BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE RULES OF PRACTICE AND PROCEDURE OF THE COLORADO PUBLIC UTILITIES COMMISSION, FOUND AT 4 CODE OF COLORADO REGULATIONS 723-1, PROPOSED MODIFICATION OF RULE 9; AND NEW PROPOSED RULES 10 AND 11 OF THE COMMISSION'S PRACTICE AND PROCEDURE RULES.	)	DOCKET NO. 91R-272

COMMISSION STATEMENT OF ADOPTION OF MODIFIED RULE 9, NEW RULES 10 AND 11, TO THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE

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Mailing date: July 22, 1991
Adopted date: July 17, 1991
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BY THE COMMISSION:

I. Introduction.

On April 17, 1991, the Commission gave notice of proposed rulemaking under the applicable provision of the State Administrative Procedure Act, Colorado Revised Statutes § 24-4-103 (1988 Repl. Vol.10A). See Decision No. C91-433 (released April 17, 1991). In the Notice of Rulemaking Order, the Commission attached copies of the proposed Modified Rule 9, and new proposed Rules 10 and 11, to its Rules of Practice and Procedure, 4 Code of Colorado Regulation 723-1. Seventeen parties intervened in this rulemaking docket. Nine parties filed written comments. The Commission held Public Hearings on June 6, 1991; and allowed the parties to file additional written comments by June 26, 1991. On July 1, 1991, the Commission, sitting en banc, held

an open Working Session to finalize the Rules. The Commission is now prepared to issue a final version of the Rules, attached as an Appendix to this Statement of Adoption. The Rules will be sent to the Colorado Attorney General today, for an opinion as to their constitutionality. The Rules will be sent to the Secretary of State for publication in the next issue of the Colorado Register on August 10, 1991; and will become effective on August 30, 1991. This Statement of Adoption is intended as a courtesy to the parties, and to provide a form of "legislative history" to serve as a future guide to the interpretation of the rules. This Statement is not a Commission Order. Thus, it is not subject to an application with the Commission for rehearing, reargument, or reconsideration pursuant to Colorado Revised Statutes § 40-6-114(1) (1990 Cum.Supp. Vol.17).

II. Modified Rule 9.

The Commission adopted the present version of Rule 9, entitled "Off-the-Record Communications", in January 1991. Rule 9 became effective on March 3, 1991. Even though the Rule was recently adopted, the Commission decided to re-open rulemaking, in part because of a promise made by the Chairman of the Commission to the Legislature this year to revisit the off-the-record communications rule, as well as to consider the adoption of a Code of Ethics (new Rule 10).

One of the principal proposed changes to Rule 9 was to expand the prohibition against off-the-record communications to include all proceedings likely to be filed within a certain period. U S West Communications, Inc. ("U S West") and the Public Service Company of Colorado ("Public Service") both stated that they preferred the Rule as written, but they could support a compromise, if the too-vague "likely to be filed" language were changed. The Commission decided to modify the Rule, to satisfy the concerns of John J. Conway, Esq.; Gorsuch, Kirgis, Campbell, Walker, and

Grover; the MCI Telecommunications Corporation; the Office of Consumer Counsel; and others, that no off-the-record communications should be allowed before a case starts. The Commission, however, used alternative language suggested by Public Service, to make the prohibition more precise. No off-the-record communications are allowed while a proceeding is pending, or if the communication is "directed at an on-the-record proceeding filed within 30 days of the communication." See Rule 9(b)(2)(A)(i).

The other proposed changes to Rule 9 were less controversial, and adopted much as proposed in the April 1991 Notice of Rulemaking. Rule 9 has been changed to make more explicit the procedure for moving to disqualify a Commissioner or administrative law judge when the legal standard -- actual bias -- has been met. See Rule 9(g) (allowing Commissioner or ALJ to make initial ruling on the motion to disqualify, providing for appeal to entire Commission of ruling, and allowing all three Commissioners to vote on any appeal). Rule 9 has also been changed to allow Commissioners to attend open, scheduled, noticed public meetings -- such as conferences of the National Association of Regulatory Utility Commissioners -- without violating the prohibition against off-the-record communications. See Rule 9(b)(2)(B)(5). Also, the Rule allows the Commissioners to communicate with the Legislature without violating the prohibition against off-the-record communications. See Rule 9(a) and Rule 9(b)(3). These changes were part of a section of H.B. 91-1283, which the Legislature considered, but did not enact, this year.

III. New Rule 10.

New Rule 10 establishes a Code of Ethics for the Commission. As proposed, it incorporated the Colorado Code of Ethics for Public Employees, found at Colorado Revised Statutes § 24-18-101 through 24-18-205 (1988 Repl. Vol. 10A); the Governor

of Colorado's Executive Order dated February 10, 1987, entitled "Integrity in Government for Colorado State Executive Branch Employees"; and, the statute for qualifications for Commissioners, found at Colorado Revised Statutes § 40-2-102 (1984 Rep. Vol.17).

During the hearing and comment period, the major change was that the Commission decided to adopt the "appearance of impropriety standard" in its Code of Ethics. See Rule 10 (Introduction). The "appearance of impropriety", often a confused and standardless "standard", was explicitly defined as the matters listed in the rest of the Rule. See Rule 10(a)-(i) (defining the appearance of impropriety). The Commission adopted the "appearance of impropriety" ethical standard upon the strong recommendation of Centel Electric-Colorado; John J. Conway, Esq.; Gorsuch, Kirgis, Campbell, Walker, and Grover; the MCI Telecommunications Corporation; and the Office of Consumer Counsel. U S West and the Public Service Company preferred Rule 10 as written. In final written comments, U S West -- for a broad coalition including Centel Electric-Colorado; the Public Service Company; Gorsuch, Kirgis, Campbell, Walker, and Grover; and Thomas F. Dixon, Esq. -- proposed a compromise version, which the Commission adopts. See Rule 10 (Introduction). The remainder of Rule 10 was adopted as largely as originally proposed, except that the Commission adopted the changes suggested by John J. Conway, Esq. to Rule 10's Introduction (adding "Executive Order" to the first clause of the second sentence), and Mr. Conway's suggestion that we adopt the modern definition of "fiduciary" used in Colorado Probate Court. See Rule 10(g)(7)(1).

IV. New Rule 11.

As originally proposed, Rule 11 contained a section entitled "Statements During Pending Proceedings" in proposed Rule 11(a)-(c), modeled after the American Bar

Association's Model Rules of Professional Conduct, Rule 3.6 (1983). Virtually all intervenors, led by the American Civil Liberties Union, opposed proposed Rule 11(a)-(c) as an unconstitutional limit on an attorney's First Amendment freedom of speech. The day after the final comment period, the United States Supreme Court settled doubts concerning the constitutionality of ABA Model Rule of Professional Conduct 3.6 in Gentile v. State Bar of Nevada, ___ U.S. ___, 1991 WestLaw 111145 (June 27, 1991). In Gentile, the United States Supreme Court unanimously held that the "substantial likelihood of material prejudice" standard in ABA Rule 3.6 satisfied the First Amendment. Although it is now clear that proposed Rule 11(a)-(c) comports with the First Amendment, the Commission has nonetheless decided not to adopt Rule 11(a)-(c). The Commission does not want to chill Free Speech, and we believe that all the parties practicing before the Commission are aware of their obligation, to the public and to the administrative process, to avoid comments which have a substantial likelihood of materially prejudicing a Commission proceeding. Additionally, the Commission recognizes the political character of many of the important issues with which it deals, and we also recognize the importance of free and open public discussion of such issues. Therefore, we will not adopt Rule 11(a)-(c).

The Commission will adopt Rule 11(d) as proposed, now renumbered simply as Rule 11. Rule 11 is modeled after Rule 11 of the Federal Rules of Civil Procedure. It establishes the now-familiar Rule 11 standard for the signing of pleadings, motions, and other papers at the Commission, which currently applies in the procedural rules of the courts. Rule 11 contains two prongs: (1) a "frivolousness clause" against the signing of pleadings, motions, and other papers which are not well-grounded in fact and not warranted by law, after the signer has made a "reasonable inquiry; and (2) an "improper purpose clause", against the signing of pleadings, motions, and other papers which are filed for an "improper purpose" -- such as to harass, or to cause unnecessary

delay, or to cause needless increase in the cost of litigation. See Zaldivar v. City of Los Angeles, 780 F.2d 823, 830 (9th Cir. 1986) (discussing the two prongs), abrogated in part on other grounds, Cooter & Gell v. Hartmarx Corporation, ___ U.S. ___, 110 S.Ct. 2447 (1990) (requiring deferential standard of appellate review to all aspects of district court's imposition of Rule 11 sanctions).

Rule 11 was supported by most of the intervenors in this docket, except for the Office of Consumer Counsel, which felt that the Rule was "attorney discipline" under the exclusive jurisdiction of the Colorado Supreme Court. The Commission rejected this argument, because the "discipline" of a sanction under Rule 11 for signing a frivolous or improper paper is simply not the type of "discipline" of attorneys -- reprimand, or disbarment -- meted out by the Colorado Supreme Court. Proposed Rule 11, and the exclusive jurisdiction of the Supreme Court to disbar attorneys, are not in conflict. The Rule, and the discipline of the Supreme Court, can coexist, as they presently do with both the federal and state Rule 11, neither of which have been overturned as somehow violative of the Colorado Supreme Court's jurisdiction to discipline attorneys.

While supporting Rule 11, the law firm of Gorsuch, Kirgis, Campbell, Walker, and Grover suggested that we adopt the state version of Rule 11, Colo.R.Civ.P. 11, rather than the federal version of Rule 11, Fed.R.Civ.P. 11. In 1983, the Federal Rules of Civil Procedure were amended to include the modern, strengthened Rule 11. The Colorado Rules of Civil Procedure were amended in 1987, to follow federal rule 11. Thus, the state and federal version of Rule 11 are quite similar. The Commission, however, has decided to adopt the federal rule because it is stronger and clearer, than the state rule.

The federal version of Rule 11 is stronger because it covers all "signers" of matters and imposes the duty of "reasonable inquiry" against frivolous and improper filings, upon all signers, not just attorneys. See Business Guides, Inc. v. Chromatic Communications Enterprises, ___ U.S. ___, 111 S.Ct. 922, 930 (1991) ("The essence of Rule 11 is that signing is no longer a meaningless act; it denotes merit. A signature sends a message to the district court that this document is to be taken seriously.") See also generally C. Wright & A. Miller, 5A Federal Practice and Procedure § 1331 at 21-22 & n.54 (discussing reasons the scope of federal rule 11 was expanded in 1983 to cover all signers, not just attorneys). The state rule merely covers an "attorney" who signs a paper. Compare Fed.R.Civ.P. 11 (fifth sentence starting with "The signature of an attorney or party") with Colo.R.Civ.P. 11 (fifth sentence starting with "The signature of an attorney"). The Commission has many pro se litigants. Thus, the federal rule is better than the state rule for the Commission's purposes because the federal rule includes, within its ambit, parties who appear without an attorney. With the benefit of appearing pro se, Fed.R.Civ.P. 11 imposes the corresponding obligation on parties who appear without an attorney to conduct a "reasonable inquiry" before signing a pleading or other paper, and prohibits parties who appear without an attorney from making frivolous and improper filings.[1]

The federal rule is stronger than the state rule because it covers every "pleading, motion, and other paper." The state rule covers only a "pleading". Compare Fed.R.Civ.P. 11 (first sentence starting with "Every pleading, motion, and other paper") with Colo.R.Civ.P. 11 (first sentence starting with "Every pleading"). The Commission finds the federal rule better suited to its practice because it does not want

[1]. Pro se litigants are not held to the same Rule 11 standards as attorneys; the standard is that of what a reasonable person in the pro se litigant's position would have done. See Shrock v. Altru Nurses Registry, 810 F.2d 658, 661-662 (7th Cir. 1987) (Posner, J.) (remanding to determine whether district court should have imposed Rule 11 sanctions on pro se plaintiff).

to enter into a debate about which matters filed before it are technically "pleadings", and because it realizes that motion practice -- particularly discovery motions -- led to many of the abuses Rule 11 was intended to resolve. Therefore, it is clearer and more efficacious to include all matters signed -- not just pleadings -- under Rule 11. Lastly on this point, the federal rule is clearer than the state rule because Fed.R.Civ.P. 11 has been authoritatively construed by the United States Supreme Court on many occasions since 1983. Thus, most questions about the scope and interpretation of federal rule 11 have been resolved. In contrast, the new 1987 version of state rule 11 has not yet been construed in a single reported decision by the Colorado Supreme Court.

When the Commission properly notices rulemaking, it is free to adopt a federal rule or any other state's rule as its model, so long as the model does not violate Colorado law or the Colorado Constitution. Proposed Rule 11 has been properly noticed. It does not violate Colorado law or the Colorado Constitution. For an example of a suggested borrowing of law from other jurisdictions, the MCI Telecommunications Corporation proposed that the Commission incorporate a Minnesota statute, Section 7845.0400 entitled "Conflict of Interest; Impropriety", in new Rule 10. The Commission could have adopted this Minnesota statute in its rules of procedure, but chose to adopt the version of Rule 10 previously discussed.

At the Hearing, one of the Intervenors mentioned the cite to the "the procedure in the [state] district court" in Colorado Revised Statutes § 24-4-105(4) (1988 Repl. Vol.10A). Apparently, the argument was that the State Administrative Procedure Act required the Commission to adopt the state rules of procedure. Section 24-4-105(4), however, is inapposite, because it is the section of the State Administrative Procedure Act dealing with hearings, Colorado Revised Statutes § 24-4-105, where agencies shall follow the state rules of procedure as to evidence and other matters at hearings to the extent practicable. Today, the Commission is conducting rulemaking, under Colorado

Revised Statutes § 24-4-103, not holding a hearing. Again, if properly noticed, as this rulemaking has been, the Commission can take the Federal Rule of Procedure as its model in rulemaking, and is not required to model its rule of procedure after the state rules of procedure.

As discussed, the Commission will model its Rule 11 after the federal rule, because it feels that the federal rule is stronger, and easier to interpret, than the state rule. The Commission has modified Fed.R.Civ.P. 11, deleting and changing certain language to meet its needs. We have not adopted Fed.R.Civ.P. 11 in toto. In the future, the Commission will accept cases, from the United States Supreme Court and the United States Court of Appeals for the Tenth Circuit construing Fed.R.Civ.P. 11, as persuasive (not binding) authority when it interprets new Rule 11 of the Commission's Rules of Practice and Procedure. See White v. General Motors Corporation, 908 F.2d 675 (10th Cir. 1990) (leading Tenth Circuit case construing Rule 11).

Commissioner Alvarez joined in adopting Rule 11 modeled after Fed.R.Civ.P. 11, but would have deleted the last clause of the last sentence. The last sentence reads: "If a pleading, motion, or other paper is signed in violation of this rule, the Commission, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee." Commissioner Alvarez would have deleted everything after the word "sanction". She realized that the deletion would take much of the teeth out of the rule, but was concerned that the Commission might overstep its jurisdictional authority by imposing in new Rule 11 what could be viewed as a "fine". See Haney v.

PUC, 574 P.2d 863, 864-865 (Colo. 1978) (Commission not authorized to impose fines for violation of its laws).

Chairman Cook and Commissioner Nakarado voted to adopt Rule 11 in its entirety, as originally proposed, because they believe that Rule 11 is not a "fine" for violation of Commission laws under Haney, supra, and its progeny. Haney dealt with the permissible scope of a Commission remedy, after a violation of Commission law was found, and held that the Commission had only civil sanctions available as administratively-imposed remedies. Fines and imprisonment are sanctions which can only be awarded by a court, as judicially-imposed remedies. See, Haney v. PUC, 574 P.2d 863, 865 (Colo. 1978).

Rule 11 sanctions allow the award of attorney's fees, which is a legislative power. Article XXV of the Colorado Constitution of 1954 granted the Commission broad legislative powers. As the Colorado Supreme Court has recently noted, "Article XXV delegates to the Commission legislative authority to regulate public utilities previously vested in the General Assembly." Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph, ___ P.2d ___, ___, No. 89SA400, Slip. Op. at 14 (July 15, 1991). This broad Constitutional grant of power to the Commission means that the Commission may do anything that the Legislature may do regarding the regulation of public utilities, unless the Commission's authority is specifically restricted by statute. See Colorado Energy Advocacy Office v. Public Service Co. of Colorado, 704 P.2d 298, 306 (Colo. 1985) ("The Colorado PUC is given power by the Colorado Constitution, and its power is equivalent to the legislature except as limited by statute.").

Regarding the specific question of the Commission's power to award attorney's fees in administrative proceedings, the Colorado Supreme Court has ruled directly on

this point, and has held that the Commission has the power to award attorney's fees without statutory authority. Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544 (Colo. 1978). See also, Colorado-Ute Electric Association, Inc. v. PUC, 602 P.2d 861, 868 (Colo. 1979) ("Under Mountain States, supra, the commission has broad constitutional and statutory discretion to determine when attorney's fees should be awarded in its own proceedings.").

In Mountain States, supra, the Colorado Supreme Court held that the Commission had the power to award attorney's fees because that was a legislative prerogative, within the delegation of legislative power to the Commission in Article XXV of the Colorado Constitution, not restricted by later statutory enactment, and in fact supported by a statute enacted by the Legislature, Colorado Revised Statutes § 40-3-102 (1984 Rep. Vol.17):

> The power to authorize the award of attorney's fees and other legal costs in cases tried before administrative bodies is generally accepted as a fundamental legislative prerogative. Under our constitution, the legislative authority in public utility matters has been delegated to the PUC and the legislature has not by any statutory enactment restricted it in the matter of awarding attorney fees and other legal costs. On the contrary, we deem the following statute to be a recognition and a more specific grant by the legislature of authority in this and other areas of rate regulation. Section 40-3-103, C.R.S. provides: [direct quotation of the statute by the Court, with the following phrase emphasized by the Court, "and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power"]
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> Mountain States Telephone and Telegraph v. PUC, 576 P.2d 544, 547 (Colo. 1978).

The Commission finds that it is "necessary and convenient" to have a rule of practice and procedure concerning the signing of pleadings, motions, and other papers at the Commission -- a rule such as Rule 11 that make a signature no longer a "meaningless act" and sends a message that the "document is to be taken seriously", as

the Supreme Court has explained the "essence" of Rule 11. Business Guides, Inc. v. Chromatic Communications Enterprises, ___ U.S. ___, 111 S.Ct. 922, 930 (1991). The sanction in Rule 11, for filing a frivolous or improper document, is not a general fee-shifting rule. The purpose of Rule 11 is to provide an incentive to reduce administrative and litigation costs to all affected parties. If no monetary award is needed to deter future conduct in violation of Rule 11, no monetary sanction will be awarded. As the Supreme Court has noted regarding Fed.R.Civ.P. 11, "It is now clear that the central purpose of Rule 11 is to deter baseless filings in the District Court and thus, consistent with the Rule Enabling Act's grant of authority, streamline the administration and procedure of the federal courts." Cooter & Gell v. Hartmarx Corporation, ___ U.S. ___, 110 S.Ct. 2447, 2454 (1990).

The Commission intends a similar purpose in its Rule 11 -- to deter baseless filings at the Commission, consistent with: (1) the Commission's legislative powers under Article XXV of the Constitution; (2) the Commission's statutory authority in Section 40-3-102 of the Colorado Revised Statutes to "do all things .. necessary and convenient in the exercise" of the Commission's legislative powers; and (3) the Commission's statutory obligation in Section 40-2-108, Colorado Revised Statutes stating that the Commission "shall promulgate such rules and regulations as are necessary for the proper administration and enforcement of articles 1 to 13 of this title." Rule 11, with the teeth of discretionary monetary sanctions, is within the Commission's constitutional and statutory authority. Further, Rule 11 will benefit everyone by deterring frivolous filings and thereby reducing administrative costs to the Commission, and litigation costs to all affected parties. As we noted in our Regulatory Analysis, "the net effect of Rule 11 will be to reduce costs to everyone by deterring frivolous filings." Regulatory Analysis at 4 (May 28, 1991). We are confident the Legislature would support Rule 11 for exactly these reasons -- it reduces administrative

waste and bureaucracy; reduces costs to the parties in the administrative process; and streamlines the administrative process. We therefore adopt Rule 11 as written, with the sanction of attorney's fees available, in order to deter frivolous and improper filings at this Commission.

V. Technical Changes to Rules 25-100.

When the Commission revised the first 24 of its Rules of Practice and Procedure effective March 3, 1991, it failed to correct cross-references in Rules 25-100 to reflect re-numbering. For example, one of the most common citation mistakes in Rules 25-100 is to Rule 5, "Rules of Construction - Definitions", which is Rule 4 in the 1991 Version of the Commission's Rules of Practice and Procedure. The Appendix contains a table which shows these technical changes, which correct cross-references only, and are not substantive.

ADOPTED IN OPEN MEETING ON July 17, 1991.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners