

Decision No. R23-0245-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22F-0263EG

OLSON'S GREENHOUSES OF COLORADO, LLC,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
DENYING MOTION IN LIMINE**

Mailed Date: April 14, 2023

I. STATEMENT

A. Relevant Background

1. On March 17, 2023, Public Service Company of Colorado (Public Service) filed a Motion in Limine to exclude certain testimony of David E. Dismukes (Motion).

2. On March 24, 2023, Olson's Greenhouses of Colorado, LLC (Olson's) filed an Unopposed Motion for Extension of Time to April 7, 2023, to respond to the Motion (Unopposed Motion).

3. On March 31, 2023, the ALJ issued Decision No. R23-0212-I that granted the Unopposed Motion.

4. On April 7, 2023, Olson’s filed its Response to the Motion (Response).

B. Motion and Response

5. Public Service seeks to exclude the testimony of Mr. Dismukes concerning Decision Nos. R10-0520 and C10-1054. Both were issued in Proceeding No. 07F-037E.¹ They address issues that are similar to the issues raised in this proceeding. Public Service contends that Mr. Dismukes testimony concerning the foregoing decisions should be excluded because it is “irrelevant and prejudicial testimony presenting improper opinions and interpretations on applicable standards of law and legal conclusions.”² More specifically, Public Service argues that “experts may not usurp the role of the factfinder by attempting to resolve legal issues that courts or administrative agency triers of fact can determine themselves.”³ In addition, even though Mr. Dismukes testifies that Decision Nos. R10-0520 and C10-1054 merely provide “guidance” to the Commission regarding the dispute in this proceeding, Public Service asserts that, in reality, he is advocating for the Commission to apply those decisions as precedential authority in violation of longstanding authority holding that the Commission is not bound by its prior decisions.⁴ Public Service concludes that the information contained in Mr. Dismukes testimony would be appropriately included in Olson’s post-hearing Statement of Position, but not in Mr. Dismukes’ testimony.⁵

6. Olson’s responds that Mr. Dismukes “does not testify that [Decision Nos. R10-0520 and C10-1054 are] legally binding, or even provide a legal interpretation of [those]

¹ Decision No. R10-0520 issued on May 27, 2010, and Decision No. C10-1054 issued on September 28, 2010.

² Motion at 2.

³ *Id.* at 3. *See also id.* at 7-8.

⁴ *Id.* at 5-6, 9-10.

⁵ *Id.* at 2, 10.

decision[s].”⁶ Instead, “[h]e testifies as an expert witness on the principles that differentiate a system improvement from a line extension, and he uses [Decision Nos. R10-0520 and C10-1054] to aid in his discussion.”⁷ According to Olson’s, Mr. Dismukes believes the foregoing decisions are “the key Commission decision[s] explaining the difference.”⁸ Olson’s concludes that Mr. Dismukes’ testimony cited by Public Service in its Motion is appropriate.

C. Analysis

7. The ALJ will deny the Motion. The ALJ agrees with Public Service’s summary of the law prohibiting witnesses from usurping the role of the judge by presenting testimony interpreting the applicable legal standard and applying that standard to the facts of the proceeding. However, the ALJ finds and concludes that, as a general matter, Mr. Dismukes’ testimony stays on the right side of the line separating permissible testimony informing the ALJ of relevant authority and impermissible testimony interpreting authority and advising the judge about how to apply the authority to the facts of the proceeding. The ALJ will give the appropriate weight to all testimony, including that which falls on the wrong side of the line.

8. Based on the foregoing, Mr. Dismukes’ testimony is admissible and will be subject to cross-examination. That being said, the ALJ is fully aware that Mr. Dismukes is not a lawyer and, in any event, cannot provide testimony regarding the appropriate interpretation and/or application of legal authority. As a result, the ALJ will not need cross-examination focused on Mr. Dismukes lack of legal credentials or authority to interpret legal standards.

⁶ Response at 1.

⁷ *Id.*

⁸ *Id.*

II. ORDER

A. It Is Ordered That:

1. For the foregoing reasons, the Motion in Limine filed by Public Service Company of Colorado on March 17, 2023, is denied.
2. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in black ink, appearing to read "G. Harris Adams".

G. Harris Adams,
Interim Director