

Decision No. C02-559

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01R-485EG

IN THE MATTER OF PROPOSED RULES ESTABLISHING PROCEDURES GOVERNING APPEALS BROUGHT BY PUBLIC UTILITIES OR POWER AUTHORITIES TO THE PUBLIC UTILITIES COMMISSION PURSUANT TO SECTION 29-20-108, C.R.S.

ORDER LIFTING STAY AND ADOPTING RULES

Mailed Date: May 15, 2002

Adopted Date: April 17, 2002

I. BY THE COMMISSION

A. Statement

This matter comes before the Colorado Public Utilities Commission ("Commission") for consideration of Recommended Decision No. R02-176 ("Recommended Decision") issued on February 21, 2002. In that decision, the Administrative Law Judge ("ALJ") recommended that the Commission adopt the Rules Concerning Appeals of Local Government Land Use Decisions Brought by a Public Utility or Power Authority to The Public Utilities Commission, 4 Code of Colorado Regulations ("CCR") 723-XX as modified by the Recommended Decision. The rules were proposed to incorporate the provisions of House Bill No. 01-1195, codified in § 29-20-108, C.R.S., that allows a public utility to appeal local government siting and building

determinations for power plants and other facilities to the Commission under certain circumstances. The Commission, on its own motion, issued a stay of the Recommended Decision on March 6, 2002 (Decision No. C02-284) in order to review portions of the proposed rules. See § 40-6-109(2), C.R.S. Now, being duly advised in the premises, we adopt the Recommended Decision of the ALJ, with several modifications to portions of the proposed rules.

B. Discussion

1. The Commission gave notice of a proposed rulemaking regarding the adoption of new Rules Concerning Appeals of Local Government Land Use Decisions Brought by a Public Utility or Power Authority to the Public Utilities Commission under § 29-20-108, C.R.S., 4 CCR 723-XX, on October 26, 2001. Notice was given to the Secretary of State on the same day.

2. Public Service Company of Colorado ("Public Service"); UtiliCorp United, Inc. ("UtiliCorp"); Tri-State Generation and Transmission Association, Inc. ("Tri-State"); and the Colorado Rural Electric Association ("CREA") filed written comments.

3. A hearing was held on the proposed rules on December 17, 2001. Public Service, UtiliCorp, Tri-State, CREA, Intermountain Rural Electric Association ("IREA"), and Staff of

the Commission ("Staff") presented oral comments. The ALJ subsequently issued his Recommended Decision proposing to adopt the rules on February 21, 2002.

4. The Commission issued a stay of the Recommended Decision on March 11, 2002, to review some of the proposed language in the rules. Now that the Commission has had the opportunity to review the proposed rules, we adopt them with several changes, which are noted in the Attachment to this Order.

5. The changes we incorporate clarify that the utility filing an appeal will be required to provide information as to how residents' safety will be affected by the new facilities or lack of facilities. The changes will also clarify the role of local governments in the appellate proceedings. Finally, we make some minor grammatical and cosmetic changes to the rules.

6. First, to clarify the information required by the filing utility in its application, we modify the language in Rule 3.11¹ to read "Information concerning how the proposed major electrical or natural gas facilities will affect the safety of residents within and without the boundaries of the jurisdiction of the local government." We find that this language clarifies

¹ Modified to Rule 3.1.9.

the safety impact information required in the utilities' application for appeal.

7. We also clarify the language in Rule 5.3 to read that local governments are considered an indispensable party to the appellate process and as such, will be joined as a party.

8. Finally, we make minor cosmetic changes throughout the rules to correct grammatical errors, clean up language and renumber Rule 3 and Rule 6 for the rules to flow more logically. These modifications are all noted in the Attachment to this Order.

II. ORDER

A. The Commission Orders That:

1. The stay of Decision No. R02-176 is lifted.
2. The rules recommended in Decision No R02-176 are modified consistent with this Order and the Appendix.
3. The rules attached to this decision as the Appendix are adopted. This order adopting the attached rules shall become final 20 days following the mailed date of this decision in the absence of the filing of any applications for rehearing, reargument, or reconsideration. In the event any application for rehearing, reargument, or reconsideration to this decision is timely filed, this order of adoption shall

become final upon a Commission ruling on any such application, in the absence of further order of the Commission.

4. Within twenty days of the effective date of this decision, the adopted rules shall be filed with the Secretary of State for publication in the next issue of the Colorado Register along with the opinion of the Attorney General regarding the legality of the rules.

5. The twenty-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the Mailed Date of this decision.

6. This Order is effective immediately upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 17, 2002**

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



RAYMOND L. GIFFORD

POLLY PAGE

ATTEST: A TRUE COPY

Bruce N. Smith
Director

JIM DYER

Commissioners

**THE
PUBLIC UTILITIES COMMISSION
OF THE
STATE OF COLORADO**

**RULES CONCERNING APPEALS OF
LOCAL GOVERNMENT LAND USE DECISIONS
BROUGHT BY A PUBLIC UTILITY OR POWER AUTHORITY
TO THE PUBLIC UTILITIES COMMISSION
UNDER § 29-20-108, C.R.S.**

4 CODE OF COLORADO REGULATIONS (CCR) 723-32

BASIS, PURPOSE AND STATUTORY AUTHORITY.

The basis and purpose of these rules is to establish procedures governing appeals brought by a public utility or power authority to the Public Utilities Commission under § 29-20-108, C.R.S. It is intended that these rules will promote the balancing of determinations made by local governments that are exercising reasonable constitutional police and licensing powers with respect to local land use concerns with the broader statewide interest in the locations, construction and improvement of major electrical and natural gas facilities. These rules are issued pursuant to § 40-2-108, C.R.S.

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RULE (4 CCR) 723-32-1. APPLICABILITY.

These rules are applicable to all public utilities or power authorities. In order for a public utility or power authority to appeal a local government action to the Commission under this rule, according to § 29-20-108(5)(a), C.R.S., one or more of the following conditions must be met:

723-32-1.1 The public utility or power authority has applied for or has obtained a certificate of public convenience and necessity from the Commission pursuant to § 40-5-101, C.R.S., to construct the major electrical or natural gas facility that is the subject of the local government action;

723-32-1.2 A certificate of public convenience and necessity is not required for the public utility or power authority to construct the major electrical or natural gas facility that is the subject of the local government action; or

723-32-1.3 The Commission has previously entered an order pursuant to § 40-4-102, C.R.S., that conflicts with the local government action.

RULE (4 CCR) 723-32-2. DEFINITIONS.

The meaning of terms used in these rules shall be consistent with their general usage in the electric and natural gas industry unless specifically defined by Colorado statute or this rule. In addition to the definitions in this section, any applicable statutory definitions apply. In the event the general usage of terms in the electric and natural gas industry or the definitions in this rule conflict with the statutory definitions, the statutory definitions control. As used in these rules, unless the context indicates otherwise, the following definitions apply:

723-32-2.1 Commission. The term "Commission" as used in these rules ~~shall be construed to mean~~s the Public Utilities Commission of the State of Colorado.

723-32-2.2 Electric Utility. The term "Electric Utility" as used in these rules ~~shall be construed to mean~~s any person, ~~eo~~ partnership, cooperative electric association, non-profit electric corporation or association, firm, corporation, whether privately owned or otherwise, when subject to the jurisdiction of this Commission, their lessees, trustees or receivers appointed by any court whatsoever that may now or hereafter be engaged as a public utility in the business of furnishing electricity to domestic, commercial or industrial customers in the State of Colorado.

723-32-2.3 Local government. The term "Local Government" as used in these rules ~~shall be construed to mean~~s a county, home rule or statutory city, town, territorial charter city, or city and county.

723-32-2.4 Local government action. The term "Local government action" as used in these rules ~~shall be construed to mean means~~ any decision, in whole or in part, by a local government which has the effect or result of denying a permit or application of a public utility or power authority that relates to the location, construction, or improvement of major electrical or natural gas facilities, or if the local government imposes a decision imposing requirements or conditions upon such permit or application that will unreasonably impair the ability of the public utility or power authority to provide safe, reliable, and economical service to the public.

723-32-2.54 Local land use decision. The term "Local land use decision" as used in these rules ~~shall be construed to mean~~s the decision of a local government within its jurisdiction to plan for and regulate the use of land. ~~by those methods articulated in § 29-20-104, C.R.S.~~

723-32-2.6 Major electrical or natural gas facility. The term "Major electrical or natural gas facility" as used in these rules ~~shall be construed as defined by have that meaning set forth in § 29-20-108, C.R.S., as amended, or by in any other applicable statute.~~

723-32-2.57 Natural gas utility. The term "Natural Gas Utility" as used in these rules ~~shall be construed to mean~~s any person, partnership, cooperative association, non-profit

corporation or association, firm, corporation, whether privately owned or otherwise, when subject to the jurisdiction of this Commission, their lessees, trustees or receivers appointed by any court whatsoever that may now or hereafter be engaged as a public utility in the business of furnishing gas to domestic, commercial or industrial customers in the State of Colorado.

723-32-2.~~86~~ Power authority. The term "Power Authority" as used in these rules ~~shall be construed to mean~~s an authority created pursuant to § 29-1-204, C.R.S.

723-32-2.~~97~~ Public utility. The term "Public Utility" as used in these rules ~~shall be construed to mean~~s either an electric utility or natural gas utility as defined within this section, or as defined by § 40-1-103, C.R.S., as amended.

RULE (4 CCR) 723-32-3. COMPLETENESS OF APPLICATION.

723-32-3.1 In accordance with § 29-20-108(5)(c) and § 29-20-108(5)(d), all applications filed with the Commission pursuant to this rule shall include the following information: ~~supporting each of the following requirements:~~

723-32-3.~~21.1~~ A statement of the reasons why the local government action would unreasonably impair the ability of a public utility or power authority to provide safe, reliable, and economical service to the public;

723-32-3.~~31.2~~ The demonstrated need for the major electrical or natural gas facility;

723-32-3.~~41.3~~ The extent to which the proposed facility is inconsistent with existing applicable local or regional land use ordinances, resolutions, or master or comprehensive plans;

723-32-3.~~5~~1.4 Whether the proposed facility would exacerbate a natural hazard;

723-32-3.~~6~~1.5 Applicable utility engineering standards, including supply adequacy, system reliability, and public safety standards;

723-32-3.~~7~~1.6 The relative merit of any reasonably available and economically feasible alternatives proposed by the public utility, the power authority, or the local government;

723-32-3.~~8~~1.7 The impact that the local government action would have on the customers of the public utility or power authority who reside within and without the boundaries of the jurisdiction of the local government;

723-32-3.~~9~~1.8 The basis for the local government's decision to deny the application or impose additional conditions to the application;

723-32-3.~~10~~1.9 The impact the proposed facility would have on residents within the local government's jurisdiction including, in the case of a right of way in which facilities have been placed underground, whether those residents have already paid to place such facilities underground, and if so, shall give strong consideration to that fact; and

723-32-3.~~11~~1.10 Information concerning how the proposed major electrical or natural gas facilities will affect the safety of residents within and without the boundaries of the jurisdiction of the local government.

723-32-3.~~12~~ Any application that fails to provide all of the information required in sections 723-32-3.2 through 723-

32-3.11, shall be deemed incomplete by the Commission in accordance with (4 CCR) 723-1-70.

RULE (4 CCR) 723-32-4. PUBLIC HEARING.

~~Public Hearing.~~ In accordance with Section § 29-20-108(5)(b), C.R.S. ~~requires that~~, in addition to the formal evidentiary hearing on the appeal, the public utilities commission shall take statements from the public concerning the appealed local government action at an open hearing held at a location specified by the local government.

RULE (4 CCR) 723-32-5. SCHEDULING CONFERENCE.

723-32-5.1 ~~Scheduling Conference.~~ In order to assist the parties in scheduling the open hearing, determining the scheduling of the evidentiary hearing, and developing the list of persons to receive notice of these hearings, the Commission will require a scheduling conference.

723-32-5.2 The public utility or power authority filing an appeal under this rule shall file a motion requesting that the Commission conduct a scheduling conference within 30 days after the application is deemed complete by the Commission in accordance with (4 CCR) 723-32-3.

723-32-5.3 The local government shall be ~~enjoined~~ as an essential indispensable party by the Commission. ~~and will be compelled to attend the pre-hearing conference.~~

723-32-5.4 Ten days before the commencement of the scheduling conference, the local government shall submit to the parties and the Commission its preference for the location of the open hearing in accordance with § 29-20-108(5)(b), C.R.S.

723-32-5.5 The Commission will decide the date and time of the open hearing after receiving comments from the parties at the scheduling conference.

723-32-5.6 By the date of the scheduling conference, each party shall provide to the utility a list of individuals and groups to receive notice of the open hearing.

723-32-5.7 The utility will be required to give notice to all the individuals and groups in a manner specified by the Commission. Notice may be accomplished by newspaper publication, bill insert, first class mail, or any other manner deemed appropriate by the Commission.

723-32-5.8 If the local government is unable to provide meeting space for the open hearing, and space needs to be acquired, ~~then~~ the utility shall bear any cost associated with the rental of such space for the open hearing.

723-32-5.9 The parties are encouraged to confer prior to the scheduling conference to develop a schedule for the filing of testimony and the dates for the formal evidentiary hearing.

RULE (4 CCR) 723-32-6. DENIAL OF APPEAL.

723-32-6.1 In accordance with § 29-20-108(5)(e), C.R.S., the Commission shall deny any appeal brought under this rule unless the public utility or power authority has complied with the following notification and consultation requirements:

723-32-6.21.1 A public utility or power authority shall notify the affected local government of its plans to site a major electrical or natural gas facility within the jurisdiction of the local government prior to submitting the

preliminary or final permit application, but in no event later than filing a request for a certificate of public convenience and necessity pursuant to article 5 of title 40, C.R.S., or the filing of any annual filing with the Commission that proposes or recognizes the need for construction of a new facility or the extension of an existing facility. If a public utility or power authority is not required to obtain a certificate of public convenience and necessity pursuant to article 5 of title 40, C.R.S., or file annually with the ~~public utilities e~~Commission to notify the ~~public utilities e~~Commission of the proposed construction of a new facility or the extension of an existing facility, ~~then~~ the public utility or power authority shall notify any affected local governments of its intention to site a major electrical or natural gas facility within the jurisdiction of the local government when such utility or authority determines that it intends to proceed to permit and construct the facility. Following such notification, the public utility or power authority shall consult with the affected local governments in order to identify the specific routes or geographic locations under consideration for the site of the major electrical or natural gas facility and attempt to resolve land use issues that may arise from the contemplated permit application.

723-53-6.23 In addition to its preferred alternative within its permit application, the public utility or power authority shall consider and present reasonable siting and design alternatives to the local government or explain why no reasonable alternatives are available.

RULE (4 CCR) 723-32-7. PROCEDURAL RULES

Pursuant to § 29-20-108(5)(b), C.R.S. ~~requires that~~ any appeal brought by a public utility or power authority to the ~~public utilities~~ eCommission under this section shall be conducted in accordance with the procedural requirements of Article 6 of Title 40 of the Colorado Revised Statutes, including section § 40-6-109.5, C.R.S., ~~and that in~~ eEvidentiary hearings on any such appeals shall be conducted in accordance with § 40-6-109. ~~Additionally, § 29-20-108(5)(g) requires that such appeals be conducted in accordance with Article 6 of Title 40 of the Colorado Revised Statutes. If any Commission determination or decision in this matter is appealed to a state district court, that decision or determination will not be stayed suspended except upon a decision of the court.~~

RULE (4 CCR) 723-32-8. VARIANCE AND WAIVER.

The Commission may permit variance or waiver from these Rules, if not contrary to law, for good cause shown if it finds that compliance is impossible, impracticable or unreasonable.