

Decision No. R02-176

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 § 29-20-108, C.R.S.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
WILLIAM J. FRITZEL
ADOPTING RULES**

Mailed Date: February 21, 2002

I. STATEMENT

A. By Decision No. C01-1079, mailed on October 26, 2001, the Commission issued notice of proposed rulemaking concerning new rules pertaining to an appeal process under 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 Public Utilities Commission under certain circumstances. Pursuant to the statute, a public utility may appeal a local government land use decision if the local government decision will impair the ability of the public utility to provide safe, reliable, or economical service to the public and if the utility meets certain requirements as stated in § 29-20-108, C.R.S.

B. In its Decision, the Commission referred the matter to an Administrative Law Judge for hearing scheduled for December 17, 2001.

C. Written comments were filed by 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").

D. A hearing was held on the proposed rules on the scheduled date.

E. Appearances were entered on behalf of Public Service, UtiliCorp, Tri-State, CREA, Intermountain Rural Electric Association ("IREA"), and Staff of the Commission ("Staff"). Oral comments were presented. At the conclusion of the hearing, the matter was taken under advisement.

F. Pursuant to § 40-6-109, C.R.S., the record of the proceeding and a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Public Service supports the adoption of the proposed rules. Public Service believes that the rules are necessary to implement the new statute. Public Service does not believe that

the existing rules of the Commission are adequate to cover the appeals process.

B. Public Service recommends that minor modifications should be made to the proposed rules.

C. Public Service comments that the definition of "local land use decision" contained in Proposed Rule 4 *Code of Colorado Regulations* ("CCR") 723-XX-2.4 is more restrictive in scope than contained in the statute. Public Service believes that the definition should be changed to be consistent with the statute. Public Service recommends that a portion of proposed Rule 4 CCR 723-XX-2.4 be deleted so that the definition of local land use decision would read as follows:

The term "local land use decision" as used in these rules shall be construed to mean the decision of a local government within its jurisdiction to plan for and regulate the use of land.

Tri-State, CREA, and Staff agree with the recommendation. The recommendation for modification of Proposed Rule 4 CCR 723-XX-2.4 will be adopted.

D. Public Service next comments that Proposed Rule 4 CCR 723-XX-3.1 should be modified to clarify the Commission's intent with respect to the term "applications". Public Service proposes that the rule be modified by adding the underlined language as follows:

723-XX-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 information supporting each of the following requirements:

The recommendation of Public Service will be adopted. The recommended language clarifies the rule.

E. UtiliCorp generally supports the need for the proposed rules. UtiliCorp believes that the Commission's existing rules such as Rule 4 CCR 723-1-70 are not adequate to provide the necessary procedural guidelines necessary to govern facilities siting appeals. UtiliCorp recommends that certain modifications be made to the rules.

F. UtiliCorp believes that the proposed rules lack some necessary definitions. UtiliCorp believes that a definition of "local government action" is necessary since the term is used throughout the rules. UtiliCorp therefore recommends that the Commission add the following definition of "local government action" as follows:

723-XX-2.X Local Government Action. The term "local government action" as used in these rules shall be construed to mean 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 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.

Staff agrees with this recommendation. The recommendation of UtiliCorp will be adopted.

G. UtiliCorp proposes that another definition be added to the proposed rules. Utilicorp recommends that a definition of "major electrical or natural gas facility" should be included in the Rules. UtiliCorp proposes that the following definition be added:

723-XX-2.X 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 § 29-20-108, C.R.S., as amended, or by any other applicable statute.

Staff agrees with the addition of the definition. The recommendation will be adopted.

H. UtiliCorp next recommends that an addition be made to the definition of "public utility" found in proposed Rule 4 CCR 723-XX-2.7 Utilicorp proposes that the definition of "public utility" be modified as follows:

723-XX-2.7 Public Utility. The term "Public Utility" as used in these rules shall be construed to mean either an electrical utility or natural gas utility as defined within this section, or as defined by § 40-1-103, C.R.S., as amended.

Staff agrees with the modification. The recommendation of UtiliCorp will be adopted.

I. UtiliCorp suggests that the first sentence of proposed Rule 4 CCR 723-XX-5.7, concerning notice, be modified to read as follows:

The utility will be required to give notice of the date, time, and place of the open hearing to all the individuals and groups in a manner specified by the Commission.

The recommendation will not be adopted. The rule as currently proposed is adequate.

J. UtiliCorp comments that proposed Rule 4 CCR 723-XX-5 places obligations upon the utility to pay for various costs such as notice of the open hearing and rent for space to hold the hearing in the event the local government has no space available. UtiliCorp recommends that the Commission should add a provision in Rule 4 CCR 723-XX-5 to make it clear that regulatory costs imposed upon the utility by the Commission can be recovered from regulated ratepayers. UtiliCorp proposes the following addition to Rule 4 CCR 723-XX-5:

723-XX-5-10 The utility shall be entitled to recover the costs of compliance with these rules from its ratepayers or customers.

Staff disagrees with the proposal. The recommendation will not be adopted.

K. UtiliCorp proposes that Rule 4 CCR 723-XX-6 concerning denials of appeal by the Commission should contain an explicit requirement that the Commission issue a written order stating

the reasons and rationale for denying an appeal. UtiliCorp recommends that a subsection be added to proposed Rule 4 CCR 723-XX-6 which would read as follows:

723-XX-6.3 If the Commission denies the appeal pursuant to this rule, the Commission shall issue a written decision, in which the Commission shall state its findings of fact and conclusions thereon together with its order or requirement. The decision, under seal of the Commission, shall be served upon all the parties to the proceeding.

The recommendation of UtiliCorp will not be adopted. The provision of requiring the Commission to issue an order after a denial of a siting appeal is already addressed in § 40-6-109, C.R.S., which requires that the Commission issue a decision containing findings of fact and conclusions and an order.

L. UtiliCorp recommends that Proposed Rule 4 CCR 723-XX-7 be modified to conform with Section 29-20-108, C.R.S. UtiliCorp states that proposed Rule 4 CCR 723-XX-7 requires that facilities siting appeals be conducted according to the requirements of § 40-6-109.5, C.R.S., which sets timelines for the Commission to issue decisions in applications. UtiliCorp points out that § 29-20-108(5)(b), C.R.S., also requires that the evidentiary hearings in these appeals be conducted in accordance with the procedural requirements of § 40-6-109, C.R.S, and Section 29-20-108(5)(g) requires that the hearings be conducted in accordance with Article 6 of Title 40. Thus

UtiliCorp recommends that it is appropriate to add references to § 40-6-109, C.R.S., and to Article 6 of Title 40 to proposed Rule 4 CCR 723-XX-7. The recommendation will be adopted. UtiliCorp also is concerned that the last sentence of proposed Rule 4 CCR 723-XX-7 would appear to remove the power of the Commission to stay or suspend the effectiveness of its decision in a facilities siting appeal. UtiliCorp believes that § 29-20-108(5)(g), C.R.S., does not divest the Commission of jurisdiction to grant a stay of the effectiveness of its decision, but rather acknowledges that in the case of a party seeking judicial review of the Commission's final decision, courts can stay or suspend the Commission's decision pursuant to § 40-6-116, C.R.S. UtiliCorp recommends that the last sentence of proposed Rule 4 CCR 723-XX-7 be deleted. The recommendation of UtiliCorp will be adopted. Proposed Rule 4 CCR 723-XX-7 will be modified to read as follows:

723-XX-7 Procedural Rules. Section 29-20-108(5)(b), C.R.S., requires that any appeal brought by a public utility or power authority to the Public Utilities Commission under this section shall be conducted in accordance with the procedural requirements of § 40-6-109.5, C.R.S., and that in evidentiary hearings such appeals 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.

Finally, UtiliCorp states that House Bill 01-1195 also amended § 40-4-102(1), C.R.S., authorizing the Commission to order a public utility or power authority, that appeals a local government facilities siting decision to reimburse the Commission for reasonable expenses, attorney's fees, and expert witness fees that the Commission incurs in reviewing the appeal. UtiliCorp states that § 40-4-102(1), C.R.S., fails to establish any standards for the Commission to exercise this authority. UtiliCorp recommends that the Commission consider adopting a rule to establish fair procedures and standards for the reimbursement of fees and costs. This suggestion will not be adopted. The instant rulemaking proceeding relates to § 29-20-108, C.R.S. The amendment to § 40-4-102(1), C.R.S., by House Bill 01-1195 concerns a different statute and therefore any rules concerning the Commission's authority to award fees and costs relating to Commission expenses involving siting appeals should be considered in a separate rulemaking proceeding.

M. Tri-State and CREA comment that the proposed rules are unnecessary since the procedure concerning appeals of local government decision with respect to siting is fully described in § 29-20-108, C.R.S., and the existing Commission procedural rules are adequate to address siting appeals.

N. Tri-State and CREA agree with the recommendation of Public Service to modify the definition of "local land use

decision" contained in proposed Rule 4 CCR 723-XX-2.4 since the proposed definition is not consistent with § 29-20-108(5)(a), C.R.S. The recommendation of Public Service for modification of "local land use decision" definition will be adopted as previously stated in this Decision.

O. IREA in its oral comments agrees with Tri-State and CREA that the proposed Rules are not needed. IREA believes that if the Commission adopts the proposed rules, certain modifications should be made. IREA stated that proposed Rule 4 CCR 723-XX-3, "Completeness of Application", establishes the requirements that an application must contain with respect to the application. IREA suggests that there should be a provision in the rules stating that if one or more of the matters enumerated in Rule 4 CCR 723-XX-3.2 through 4 CCR 723-XX-3.11 do not apply to an applicant, there should be a provision in the rules so that an applicant can explain why one or more of the enumerated factors do not apply. This suggestion will not be adopted.

P. IREA comments that proposed Rule 4 CCR 723-XX-5.6 concerning the requirement that parties provide to the utility a list of individuals and groups to receive notice of the hearing should more narrowly state who should receive notice such as adjacent property owners. IREA also comments that Proposed Rule 4 CCR 723-XX-5.8 concerning meeting space for the open

hearing should be modified to state that the local government is required to provide the space for the open hearing rather than having the utility bear the cost associated with the rental of the space if the local government is unable to provide the meeting space. The recommendations will not be adopted.

Q. It is found and concluded that the proposed rules as modified by this Decision are necessary to implement the directives of the General Assembly in § 29-20-108, C.R.S., concerning appeals of local government land use decisions brought by a public utility or power authority before the Commission.

R. Pursuant to § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

III. ORDER

A. The Commission Orders That:

1. The proposed 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* 723-XX, attached to this Decision, are adopted.

2. The rules shall be effective 20 days after publication by the Secretary of State.

3. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

4. A copy of the rules adopted by this Decision shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*. The rules shall be submitted to the appropriate committee of reference of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or to the Committee on Legal Services, if the General Assembly is not in session, for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

5. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

6. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO



WILLIAM J. FRITZEL

Administrative Law Judge

ATTEST: A TRUE COPY

Bruce N. Smith
Director

**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-XX

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

723-XX-2.2 Electric Utility. The term "Electric Utility" as used in these rules shall be construed to mean any person, co-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-XX-2.3 Local government. The term "Local Government" as used in these rules shall be construed to mean a county, home rule or statutory city, town, territorial charter city, or city and county.

723-XX-2.4 Local government action. The term "Local government action" as used in these rules shall be construed to mean 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 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-XX-2.54 Local land use decision. The term "Local land use decision" as used in these rules shall be construed to mean 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-XX-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 § 29-20-108, C.R.S., as amended, or by any other applicable statute.

723-XX-2.57 Natural gas utility. The term "Natural Gas Utility" as used in these rules shall be construed to mean 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-XX-2.86 Power authority. The term "Power Authority" as used in these rules shall be construed to mean an authority created pursuant to § 29-1-204, C.R.S.

723-XX-2.97 Public utility. The term "Public Utility" as used in these rules shall be construed to mean 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-XX-3. COMPLETENESS OF APPLICATION.

723-XX-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 information supporting each of the following requirements:

723-XX-3.2 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-XX-3.3 The demonstrated need for the major electrical or natural gas facility;

723-XX-3.4 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-XX-3.5 Whether the proposed facility would exacerbate a natural hazard;

723-XX-3.6 Applicable utility engineering standards, including supply adequacy, system reliability, and public safety standards;

723-XX-3.7 The relative merit of any reasonably available and economically feasible alternatives proposed by the public utility, the power authority, or the local government;

723-XX-3.8 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-XX-3.9 The basis for the local government's decision to deny the application or impose additional conditions to the application;

723-XX-3.10 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-XX-3.11 The safety of residents within and without the boundaries of the jurisdiction of the local government.

723-XX-3.12 Any application that fails to provide all of the information required in sections 723-XX-3.2 through

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

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

Public Hearing. 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-XX-5. SCHEDULING CONFERENCE.

723-XX-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-XX-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-XX-3.

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

723-XX-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-XX-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-XX-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-XX-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-XX-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-XX-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-XX-6. DENIAL OF APPEAL.

723-XX-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-XX-6.2 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 commission to notify the public utilities commission of 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.

723-53-6.3 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-XX-7. PROCEDURAL RULES

§ 29-20-108(5)(b), C.R.S. requires that any appeal brought by a public utility or power authority to the public utilities commission under this section shall be conducted in accordance with the procedural requirements of section 40-6-109.5, C.R.S. and that in evidentiary hearings such appeals 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-XX-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.

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