

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19AL-0290E

IN THE MATTER OF ADVICE LETTER 1798-ELECTRIC OF PUBLIC SERVICE
COMPANY OF COLORADO TO REVISE ITS COLORADO PUC NO. 8-ELECTRIC
TARIFF TO IMPLEMENT RATE CHANGES EFFECTIVE ON THIRTY-DAYS' NOTICE.

**DECISION DENYING MOTIONS
FOR RECONSIDERATION**

Mailed Date: September 18, 2019
Adopted Date: August 28, 2019

TABLE OF CONTENTS

| | | |
|-----|--|----|
| I. | BY THE COMMISSION | 2 |
| A. | Statement | 2 |
| B. | Background..... | 2 |
| C. | NRDC and Environmental Justice Coalition Requests for Appeal | 6 |
| D. | Findings and Conclusions..... | 7 |
| II. | ORDER..... | 11 |
| A. | The Commission Orders That: | 11 |
| B. | ADOPTED IN COMMISSIONERS' WEEKLY MEETING August 28, 2019..... | 12 |

I. BY THE COMMISSION**A. Statement**

1. This Decision denies the separate motions filed on August 22, 2019, by the Natural Resource Defense Counsel (NRDC) and the Environmental Justice Coalition¹ requesting reconsideration of Decision Nos. R19-0625-I, issued July 23, 2019, and R19-0689-I, issued August 15, 2019, which was certified by the assigned Administrative Law Judge (ALJ) as immediately appealable pursuant to Rule 1502(d), of the Commission Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. We find that the ALJ did not abuse his discretion in denying the motions requesting permissive intervention filed by the NRDC and Environmental Justice Coalition and, therefore, deny the respective motions for reconsideration.

B. Background

2. On May 24, 2019, Public Service Company of Colorado (Public Service or Company) filed Advice Letter No. 1798-Electric with tariff sheets establishing a Secondary Voltage Time-of-Use Electric Vehicle Service (Schedule S-EV). Public Service states that if the Commission suspends the tariff sheets, an effective date of January 1, 2020 is requested. As described in Advice Letter No. 1798-Electric, Schedule S-EV is an optional service that would be available to non-residential customers for charging their own electric vehicles (EVs) or providing charging services to third parties for a fee. The Company states that the creation of Schedule S-EV will not directly affect any other service or customer class.

¹ The Environmental Justice Coalition collectively refers to the following entities that jointly filed a request for permissive intervention on July 15, 2019: Vote Solar; Colorado Latino Forum; Elyria and Swansea Neighborhood Association Globeville; Elyria-Swansea Coalition; and Unite North Metro Denver. On August 27, 2019, Unite North Metro Denver submitted a notice of name change to EGS & Partners.

3. Pursuant to § 40-6-111(1), C.R.S., through Decision No. C19-0491, issued June 13, 2019, the Commission set the matter for hearing and suspended the tariff's effective date. The Commission also referred the matter to an ALJ and instructed that, in light of Executive Order B 2019 002 and the enactment of Senate Bill (SB) 19-077, the ALJ and parties were encouraged to work expeditiously to allow for the implementation of a new rate pursuant to § 40-2-116(2), C.R.S., "including, if feasible, earlier than the effective date of January 1, 2020 requested by Public Service."²

4. The decision established an intervention period for 30 days following the mail date of Decision No. C19-0491.

5. ALJ Robert Garvey was assigned to the matter and addressed intervention pleadings, in addition to pending procedural matters, through Decision No. R19-0625-I, issued July 23, 2019 (July Decision). The July Decision recognizes Staff of the Colorado Public Utilities Commission (Staff), the Office of Consumer Counsel (OCC), and the Colorado Energy Office (CEO) as intervenors by right in this proceeding.³ In addition, the decision discusses and grants permissive intervention requests filed by Charge Point, Inc.; the City and County of Denver; Tesla Inc.; the City of Boulder; the Regional Transportation District; Electrify America; and the Colorado Energy Consumers.⁴

6. In addition, in the July Decision the assigned ALJ denies three requests for permissive intervention that he found stated insufficient pecuniary or tangible interests substantially affected by the instant matter: (1) a joint motion filed July 11, 2019, by NRDC and

² Decision No. C19-0491 at ¶ 15.

³ Decision No. R19-0625-I, issued July 23, 2019, at ¶ 30.

⁴ *Id.*, at ¶¶ 31-41, 54-56, and 57.

the Southwest Energy Efficiency Project (SWEET);⁵ (2) Western Resource Advocates, filed July 11, 2019;⁶ and (3) the joint motion filed July 15, 2019, by the Environmental Justice Coalition.⁷

7. In his decision, the ALJ discusses the Commission's intervention standard, which includes intervenors as of right and permissive intervention considerations, codified in Rule 1401, 4 CCR 723-1.⁸ The ALJ includes that the requirement in Rule 1401(c) regarding permissive intervention must represent that their interests "would not otherwise be adequately represented," similar to Colorado Rule of Civil Procedure (C.R.C.P.) 24(a).⁹ Further still, he notes that Rule 1401(c) requires that a movant who is a "residential customer, agricultural customer, or small business customer" must discuss in the motion whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC.¹⁰

8. The ALJ states his surprise that a total of 18 entities seek intervention given the relatively narrow scope of this particular proceeding on an optional commercial tariff. His decision explains that he did not find it just or reasonable to allow permissive intervenors that did not state a substantial interest tied to the specific issues before him, particularly when hearing, discovery, and legal costs are ultimately recoverable by Public Service's ratepayers.¹¹

⁵ *Id.*, at ¶¶ 42-48.

⁶ *Id.*, at ¶¶ 49-53.

⁷ *Id.*, at ¶¶ 57-66.

⁸ *Id.*, at ¶¶ 26-29.

⁹ *Id.*, at ¶ 28 (citing *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n*, 214 P. 3d 451, 457 (Colo. App. 2008); *Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, 374 P. 2d 494, 495-96 (Colo. 1962)).

¹⁰ *Id.*, at ¶ 29.

¹¹ *Id.*, at ¶¶ 33-35.

9. Further still, and consistent with the Commission's decision referring this matter to the ALJ, the ALJ's July 23, 2019 decision adopted an expedited timeline. Hearings were scheduled for September, with statements of position due from parties in October. As currently scheduled, the timeline allows for a Commission decision on the optional tariff before the end of the year.¹²

10. Collectively, on July 29, 2019, the three groups denied intervention filed an unopposed motion seeking modification of Decision No. R19-0625-I, or in the alternative, request that the ALJ make the decision¹³ immediately appealable. Through Decision No. R19-0689-I, issued August 15, 2019 (August Decision), the ALJ denied the organizations' request for modification and granted the request to make the decision immediately appealable.

11. In the August Decision denying the organizations' request for reconsideration, the ALJ concludes that the initial pleadings each failed to show that it has a tangible or pecuniary interest, and each fails to explain why their concerns are not addressed by the OCC. He opines that these organizations should not be permitted to make new arguments through a motion for "modification" when the pleading is, in essence, a new request for intervention that goes beyond the initial pleadings. The ALJ also explains that a "joint" motion is procedurally inappropriate and unclear, particularly when the filing does not indicate which group is part of the collective arguments before him, and each potential party must demonstrate its own interests in the matter at issue. Despite these flaws, the ALJ also states that he nevertheless will address the additional

¹² *Id.*, at ¶¶ 68-70.

¹³ The motion appears to be inadvertently titled as, in the alternative, contesting "Decision No. R13-1140-I." Decision No. R13-1140-I, issued September 13, 2013, in Proceeding No. 13A-0836E, similarly denied Western Resource Advocates, Solar Energy Industries Association, and other intervention requests for failure to demonstrate a substantial pecuniary or tangible interest in that proceeding, but the 2013 decision is not at issue in this matter.

arguments, and that “the arguments as a group shall be viewed as equally applying to all without any evidence to support that proposition.”¹⁴

12. In response to the collective claims that environmental interests have been accepted in a number of prior proceedings, the ALJ takes pains in his August Decision to explain that none of these proceedings had addressed commercial tariff rates similar to the issues before him. He further makes abundantly clear that past intervention does not entitle any entity to intervenor status in a subsequent case.¹⁵ The ALJ addresses each argument raised in the joint motion finding, again, that the movants do not demonstrate that their concerns and interests may be substantially affected by the adjudication on just and reasonable rates pertaining to an optional commercial service schedule.

13. The ALJ certified the August Decision as immediately appealable to the Commission *en banc* pursuant to Rule 1502(d), 4 CCR 723-1.

C. NRDC and Environmental Justice Coalition Requests for Appeal

14. In response to the August Decision, NRDC and the Environmental Justice Coalition timely file separate motions before this Commission *en banc* seeking appeal of the ALJ’s determinations. SWEEP and Western Resource Advocates, which were also denied intervention in this proceeding, did not file or join the motions appealing the ALJ’s determinations. No party filed a response to either motion and the motions represent that they are unopposed.

15. NRDC continues to refute the ALJ’s assertions and expands on its prior pleadings. The organization includes its interests in SB 19-077 and that this first adjudicatory proceeding on

¹⁴ Decision No. R19-0689-I, issued August 15, 2019, at ¶¶ 28-29.

¹⁵ *Id.*, at ¶¶ 30-66.

related EV issues is critical in supporting the future of the EV market. In its almost 30-page pleading, NRDC states that its interests are far from abstract and rebuffs the ALJ's assertion that it needed to differentiate its interests from the OCC's in representing residential, agricultural, or small business customers.

16. For its part, the Environmental Justice Coalition also provides a separate 30-page appeal to this Commission, explaining its interest in representing communities located near interstate highways that are disproportionately burdened by air pollution and gasoline-powered vehicles. The Environmental Justice Coalition includes that the Air Quality Control Commission recently recognized a number of its members within the Zero Emission Vehicle rulemaking, which was also directed by 2019 legislative changes. The Environmental Justice Coalition encourages this Commission to be similarly inclusive in granting party status in this adjudication.

17. Both requests seek expedited treatment of their respective motion. NRDC requests that, if its intervention is granted, this Commission should extend answer testimony timelines by two weeks, which would require subsequent extensions of the schedule. NRDC states that it will work with Public Service and other parties to determine new dates for the hearings and other deadlines.¹⁶

D. Findings and Conclusions

18. The Commission has the authority to determine how to conduct a proceeding. As accurately noted by the ALJ,¹⁷ pursuant to § 40-6-101(1), C.R.S., the Commission “shall conduct

¹⁶ Answer testimony in this proceeding was scheduled to be filed Tuesday, August 27, 2019. Through Decision No. R19-0710-I, issued August 26, 2019, the ALJ granted Staff's request to stay the filing of answer testimony through August 30, 2019, such that the Commission may have time to consider the intervention requests of NRDC and the Environmental Justice Coalition, *en banc*, at the August 28, 2019, Commissioners' Weekly Meeting.

¹⁷ Proceeding No. R19-0689-I, issued August 15, 2019, at ¶ 18.

its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice.” The Commission may look to the Colorado Administrative Procedure Act (§ 24-4-101 *et seq.*, C.R.S.) for guidance. Section 24-4-105, C.R.S., “grants substantial discretion” to agencies such as the Commission “to control the scope and presentation of evidence” in a proceeding. *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989). The Colorado Administrative Procedure Act provides among other things, that a hearing officer (in this case the ALJ) shall “regulate the course of the hearing,” “issue appropriate orders which shall control the subsequent course,” and “dispose of motions to intervene.”

19. Through statute, rule, and sound judicial discretion, the Commission entrusts its ALJs to manage cases independently. The Commission, *en banc*, itself has discretion to overturn the ALJs’ rulings when the matters are certified as appealable. Rule 1502(d), 4 CCR 723-1. However, particularly when a case is ongoing before an ALJ, the Commission’s review is treated much like an appeal to a higher court. Consistent with C.R.C.P. 24, under Commission Rule 1401, requests for permissive intervention are addressed by the hearing officer in his or her sound discretion; in court, the decision upon the request is reversible only for an abuse of that discretion. *Grijalva v. Elkins*, 132 Colo. 315, 287 P.2d 970 (1955). It can seldom, if ever, be shown that such discretion was abused in denying the permissive right to intervene. *Allen Calculators, Inc., v. National Cash Register Co.*, 322 U.S. 137, 64 S.Ct. 905, 88 L.Ed. 1188. To show an abuse of discretion, the decision must be shown to be manifestly arbitrary, unreasonable, or unfair. *See, e.g., King v. People*, 785 P.2d 596, 603 (Colo. 1990).

20. We find that the ALJ did not abuse his discretion in finding that the intervention pleadings from both NRDC and the Environmental Justice Coalition did not adequately connect

those organizations' interests to the optional commercial service tariff rate at issue in this particular case.

21. Consistent with the ALJ's findings, we agree that the supplemental requests for modification of his July Decision go well beyond the initial intervention pleadings. In fact, NRDC admits that "[i]t is true that NRDC did not specifically state in its Petition to Intervene that the expansion of EV charging opportunities in Colorado will, in turn, have environmental impacts."¹⁸ Rather, it now relies on appending statements from Public Service's application, as well as SB19-077, to support its contention. NRDC admits that it "simply did not believe that it was necessary to belabor the self-evident proposition...."¹⁹ These statements further affirm that the ALJ's findings in Decision No. R19-0625-I, denying SWEEP and NRDC's joint motion to intervene did not abuse his discretion in finding the initial pleading insufficient. It is the movant, not the ALJ or this Commission, who must support their pleading. *See* Rule 1500, 4 CCR 723-1. His determination to deny the intervention that was not adequately supported is not manifestly arbitrary, unreasonable, or unfair.

22. Similarly, we find that the ALJ did not abuse his discretion in denying the Environmental Justice Coalition's pleading in this case. Particularly where litigation costs are ultimately born by the ratepayers, general statements regarding EV interests without further connection to the issues raised in this, specific commercial tariff, may be found insufficient to grant party status.

23. Through its pleading, the Environmental Justice Coalition compares its participation in this adjudication to a rulemaking before the Air Quality Control Commission,

¹⁸ NRDC's Motion at p. 21.

¹⁹ *Id.*

and both potential intervenors allude to broader proceedings anticipated to comply with SB19-077. This adjudication is not a rulemaking proceeding,²⁰ nor is it a broad implementation of SB19-077, which the ALJ discussed at length.

24. In the event a prospective party includes that its members are residential customers of a utility within its intervention filing, as the movants did here, it is reasonable for the Commission – and by extension its ALJs – to expect the movant “to discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC” as required by Rule 1401. The ALJ’s concern that this was not addressed is not arbitrary, unreasonable, or unfair. We remind interested participants to review Rule 1401(c), generally, as well. This includes its requirement that “[t]he motion must demonstrate that ... the movant’s interests would not otherwise be adequately represented.” Understanding that a potential party’s efforts are not duplicative, including without limitation of CEO, OCC, or Staff’s respective interests, is appropriate. This is particularly true when litigation costs are ultimately recoverable from ratepayers; a point aptly pointed out by the ALJ.²¹

25. This Commission continues to encourage organizations to participate in its proceedings. Participants are reminded, however, that their respective positions must be supported in initial pleadings, including motions for intervention, if any are required.

²⁰ Rulemaking and other administrative proceedings, as opposed to adjudications, before this Commission do not require intervention pleadings, nor do they require party status for interested persons to participate. *See, e.g.*, Rules 1200(d), 1307, 4 CCR 723-1. Persons and organizations that aim to participate in Commission proceedings are encouraged to review the Commission’s Rules of Practice and Procedure, 4 CCR 723-1, and the Colorado Administrative Procedure Act § 24-4-101 *et seq.*, C.R.S.

²¹ Decision No. R19-0625-I

26. The ALJ did not abuse his discretion. His July and August Decisions denying the Environmental Justice Coalition and NRDC requests for intervention were well reasoned, particularly given both NRDC and the Environmental Justice Coalition's sparsely supported initial pleadings that failed to connect the organizations' substantial interest to the case at hand.

27. The motions seeking reconsideration of the ALJ decisions regarding these interventions are denied.

II. ORDER

A. The Commission Orders That:

1. The Environmental Justice Coalition's Unopposed Motion Contesting Interim Decision Nos. R19-0625-I, and Request for Emergency Addendum Item for the August 28, 2019, Weekly Meeting filed August 22, 2019, is denied, consistent with the discussion above.

2. The Natural Resources Defense Council's Unopposed Motion Contesting Interim Decision Nos. R19-0689-I and R19-0625-I, and Request for Emergency Addendum Item for the August 28, 2019, Weekly Meeting filed August 22, 2019, is denied, consistent with the discussion above.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 28, 2019.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners