Decision No. C20-0248-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0660E

IN THE MATTER OF THE APPLICATION OF BLACK HILLS COLORADO ELECTRIC, LLC FOR APPROVAL OF AN AMENDMENT TO ITS 2016 ELECTRIC RESOURCE PLAN CONCERNING A COMPETITIVE SOLICITATION FOR UP TO 200 MW OF RENEWABLE ENERGY AND ENERGY STORAGE.

INTERIM DECISION DENYING MOTION IN PART AND GRANTING IN PART, AND GRANTING WRA'S INTERVENTION IN THIS PROCEEDING

Mailed Date: April 15, 2020
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I. BY THE COMMISSION

A. Statement

1. This Decision grants in part and denies in part the Motion Contesting Interim Decision No. R20-0094-I (Motion) filed by Western Resource Advocates (WRA) in response to

the Administrative Law Judge (ALJ) decision to deny WRA intervention in the above captioned proceeding. While we find it appropriate as a policy matter to allow WRA to intervene in this Proceeding, we find fault with the legal analysis it provides in support of its Motion.

B. Background

2. On November 22, 2019, Black Hills Colorado Electric, LLC (Black Hills or Company) filed an application for Approval of an Amendment to its 2016 Electric Resource Plan Concerning a Competitive Solicitation for up to 200 MW of Renewable Energy and Energy Storage (Application). On January 3, 2020, WRA filed its Petition for Leave to Intervene.

3. In its request to intervene, WRA stated that it had a tangible and pecuniary interest pursuant to the requirements of Rule 4 *Code of Colorado Regulations* 723-1-1401(c) of the Public Utilities Commission's (Commission or PUC) Rules of Practice and Procedure, because it had a substantial tangible interest in protecting the environment and that the Commission has "long recognized" protecting the environment as falling under the definition of Rule 1401(c). WRA provided a list of previous proceedings in which it has participated at the Commission.

4. WRA stated that it participated in the previous Black Hills Economic Development Rate (EDR) tariff proceeding,[1] and while there is no evidence in the current proceeding of an overlap between the EDR proceeding in the current Application, WRA argued that its knowledge and experience in the EDR proceedings may be relevant if Black Hills or its affiliates bid in generation resources originally acquired to serve the EDR customer contract. WRA further noted that its participation in previous Black Hills proceedings would allow WRA to efficiently participate in the current proceeding, thus reducing discovery and allow it to narrowly tailor its testimony to address relevant issues.

[1] *See* Consolidated Proceeding Nos. 18A-0791E and 19A-0055E.

5. WRA identified four specific components of the Application that directly impacted its objectives and interests:

- Reduction of emissions – specifically, "the [a]pplication, if approved, will directly impact WRA's tangible interest in reducing emissions associated with electricity generation."
- Evaluation of energy storage – specifically, "storage resources that maximize emissions reductions better align with WRA's mission to decarbonize the electricity grid … WRA has a tangible interest in ensuring this methodology maximizes the emissions reduction potential associated with storage resources."
- Contract length – "WRA has a tangible interest in ensuring that any RFP contract entered into by the Company is of sufficient duration to maximize emissions reductions benefits and ensure sufficient financial stability to ensure those projected emission reductions actually occur."
- Reduced costs from renewable energy – "[a]cquisition of cost-effective renewable energy resources affects WRA's objective to encourage decarbonization of the electricity grid in a manner that is also beneficial to ratepayers."[2]

6. WRA noted that it was "generally supportive of the Company's application, with some qualifications."[3] WRA stated that it sought to intervene as a party here "to advocate for Commission approval of renewable energy resources requested in the Company's application, provided that they will achieve the emissions reductions and ratepayer benefits stated in the Company's application."[4] WRA went on to state that it will "participate in this case to submit evidence into the administrative record and present legal argument as to the ways in which Company's [*sic*] application aligns with WRA's interests in protecting the environment, and ultimately whether the application is in the public interest."[5]

[2] *See* WRA's Petition for Leave to Intervene at pp. 8-9.

[3] *Id.* at p. 9.

[4] *Id.*

[5] *Id.*

7. In addition, WRA argued that it would seek to validate the asserted emissions reductions and cost reduction benefits, and ensure the bids received in the Company's Request for Proposal (RFP) solicitation are consistent with the assumptions put forward in the Company's cost and emissions reductions modeling. WRA sought to ensure that Black Hills' evaluation of storage bids ensures that storage resources will maximize both grid benefits and emissions reductions and set a proper precedent for evaluation of storage bids in the future. WRA expressed concern that contracts for 5-year periods may not yield the same environmental benefits as standard 20-year renewable resource contracts.

8. WRA also argued that neither the Colorado Office of Consumer Council (OCC) nor the Colorado Energy Office (CEO) had interests identical to WRA. While the interests of those two entities were similar, they weren't identical. So, considering the standards of Colorado Rule of Civil Procedure 24(a), WRA urged the ALJ to find its interests were not represented adequately by any other party.

9. On February 12, 2020, the ALJ issued Interim Decision No. R20-0094-I, denying the intervention of WRA. The ALJ found that because Black Hills' Application seeks to conduct a competitive solicitation for renewable energy and storage of up to 200 MW, there was no need to determine whether the bids at issue should be from a renewable energy source or fossil fuel. The ALJ went on to find that the issues in this proceeding were primarily financial, not environmental – specifically, whether approval of any of the bids submitted in the competitive solicitation provide a just and reasonable outcome, which includes consideration of any rate impact on Black Hills' customers.

10. To the extent the proceeding touches on environmental issues, the ALJ noted that CEO, a party to the proceeding is statutorily charged with promoting the development of

renewable resources in Colorado. The ALJ further noted the similar environmental concerns of CEO and WRA and that WRA did not sufficiently demonstrate that its stated interests in environmental protection and emissions reduction would not otherwise be adequately represented by CEO.

11. The ALJ concluded that the Commission should not be a vehicle for parties who may or may not have a substantially affected pecuniary or tangible interest to conduct fishing expeditions and to allow such would merely add to the litigation costs of proceedings that are in the end, passed on to ratepayers.

12. On February 28, 2020, WRA filed its Motion seeking reversal of the ALJ's decision. WRA seeks a decision that it has demonstrated a tangible interest in the outcome of this proceeding and should be granted permission to intervene.

C. Findings and Conclusions

1. Standard of Review

13. In its Motion, WRA argues that the Commission should review the facts and law arising in a motion contesting an interim decision *de novo*. WRA further argues that the Commission should rely on the language of § 40-6-109(1), C.R.S. It then cites *Williams Nat'l Gas Co. v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989) as instructive to employing § 40-6-109(1), C.R.S. WRA cites the case for the single proposition that "[t]he right to participate in agency proceedings is governed by the agency's enabling legislation."[6] But in that case, the underlying agency action involved a matter before the Colorado Oil and Gas Conservation Commission (COGCC). The court of appeals held that a prospective party's right

[6] Motion at Footnote 15.

to participate in a COGCC hearing was mandated by that agency's statute, not the Administrative Procedures Act (APA). WRA uses this analysis to support its position that the Commission should review whether the ALJ's decision was proper *de novo*. WRA refers to other cases for the proposition that courts have typically found that questions of standing concern subject matter jurisdiction and are reviewed *de novo*. WRA then uses this conclusion for the proposition that it is inappropriate and inconsistent with Colorado law for the Commission to apply an abuse of discretion standard when reviewing an Interim Decision denying the opportunity to participate in a Commission proceeding.

14. We agree that the Commission is bound by the language of § 40-6-109(1), C.R.S.; however, that is where agreement with WRA ends. WRA reads that statute to require a *de novo* review of all ALJ decisions, whether they are recommended decisions or interim decisions. That is simply not the case. WRA starts with the notion that a party's right to participate in a proceeding is governed by § 40-6-109(1), C.R.S. The plain language of that section provides that parties entitled to be heard include the applicant, petitioner, complainant and the person complained of, and those persons "as the commission may allow to intervene," as well as those persons "as will be interested in or affected by any order that may be made by the commission in such proceeding *and who shall have become parties to the proceeding*" (emphasis added)[7] are entitled to be heard, as well as participate in the evidentiary hearing. As case law firmly imparts, "this section contemplates two type of intervenors, (a) those which the commission may permit to intervene, and (b) those who will be interested in or affected by any order that the Commission may make." *DeLue v. PUC*, 454 P.2d 939 *cert. denied*, 396 U.S. 956 (1969). Two classes of parties may participate: Those who may intervene as of right; and those whom the PUC permits

[7] *Id.* at p. 10.

to intervene. *RAM Broadcasting of Colo. v. PUC*, 702 P.2d 746 (Colo. 1985); *Pub. Serv. Co. of Colo. v. Trigen-Nations Energy Co.*, 982 P.2d 316 (Colo. 1999). Those findings are unequivocally captured in Rule 1401(c).

15. WRA argues that the case law it cites (*Marks v. Gessler*, 350 P.3d 883, 899 (Colo. App. 2013); and *Dunlap v. Colo. Spgs. Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992) stands for the proposition that Colorado courts have long found questions of standing concern subject matter jurisdiction and are therefore reviewed *de novo*. Those cases generally provide, in conducting a *de novo* review, courts may examine evidence outside of the existing record in support of standing.[8] WRA urges that as an agency, it is important for the Commission to utilize a *de novo* standard which provides the Commission full authority to review questions related to petitions for intervention in order to "adopt, reject, or modify" any findings of fact or conclusions of the ALJ (citing to § 40-6-109(2), C.R.S.).

16. A reading of the entire statutory provision reveals that the Commission's review of an ALJ decision during which the Commission may "adopt, reject, or modify" findings of fact or conclusions is only applicable to decisions after any hearing, investigation, or other proceeding assigned to an ALJ, and after the conclusion of such hearing. The full text of § 40-6-109(2), C.R.S., is as follows:

> **(2)** Whenever any hearing, investigation, or other proceeding is assigned to an administrative law judge or individual commissioner for hearing, the administrative law judge or individual commissioner, after the conclusion of said hearing, shall promptly transmit to the commission the record and exhibits of said proceeding together with a written recommended decision which shall contain his findings of fact and conclusions thereon, together with the recommended order or requirement. Copies thereof shall be served upon the parties, who may file exceptions thereto; but if no exceptions are filed within twenty days after service upon the parties, or within such extended period of time as the commission may

[8] WRA's legal argument conflates standing of a party to bring a complaint with permissive intervention, which we decline to adopt.

> authorize in writing (copies of any such extension to be served upon the parties), or unless such decision is stayed within such time by the commission upon its own motion, such recommended decision shall become the decision of the commission and subject to the provisions of section 40-6-115. The commission upon its own motion may and where exceptions are filed shall reconsider the matter, either upon the same record or after further hearing, and such recommended decision shall thereupon be stayed or postponed pending final determination thereof by the commission. The commission may adopt, reject, or modify the findings of fact and conclusions of such individual commissioner or administrative law judge or, after examination of the record of any such proceeding, enter its decision and order therein without regard to the findings of fact and conclusions of any individual commissioner or administrative law judge. Any commissioner to whom a proceeding may be so assigned shall not be disabled thereby from participating with the commission in the final decision.

17. It is clear, when read in its entirety, rather than taking a single phrase out of context, this statutory provision applies to proceedings in which a hearing has been held by an ALJ or Hearing Commissioner and not, as WRA urges to all ALJ decisions, whether interim decisions or final recommended decisions. Therefore, WRA's attempts to coerce this provision into its argument for *de novo* review of the ALJ's Interim Decision denying it intervention in the proceeding is without merit.

18. This finding in turn vitiates the remainder of WRA's arguments that its proposed standard of review sets the legal underpinnings for overturning the ALJ's decision. For example, WRA argues that a prospective party's interest to participate in Commission proceedings is broadly defined under both the Public Utilities Law and the Commission's Rules. WRA attempts to define the standard for intervention utilizing *Yellow Cab Coop. Ass'n. v. PUC*, 869 P.2d 545, 549 (Colo. 1994). But that case dealt with a regulated transportation carrier's standing to challenge a competitor's application to modify the latter's Commission operating restrictions under the doctrine of regulated monopoly. We find no congruence between an intervention as of right to protect one's operating authority and its significantly higher standard for intervention with the permissive intervention sought here.

19. Overall we find WRA's legal argument regarding the standard of review of an ALJ's Interim Decision lacking. WRA makes the assertion, relying on *Williams Natural Gas Company supra*, that it is the agency's statute, not the APA that is dispositive in determining the legal right of intervention. This statement is true on its face.[9] However, the basis for that statement is a statute applicable to the COGCC which mandates that the agency allow all parties to intervene in its proceedings.[10] It is well settled that the APA "serves as a gap-filler, and its provisions apply to agency actions unless they conflict with a specific provision of the agency's statute or another statutory provision preempts the provisions of the APA. (*See*, *Well Augmentation Subdistrict of the Central Colo. Water Conservancy Dist. v. City of Aurora*, 221 P.3d 399, 417 (Colo. 2009). Under § 40-6-109(1), C.R.S., the Commission determines those intervenors it wishes to allow into its proceedings. There is no congruency between COGCC statutory provisions and § 40-6-109, C.R.S. We find no cogent legal reason to find it appropriate to compare two incongruous statutes in support of an argument that we review on a *de novo* basis, an interim decision denying a petition for permissive intervention.

2. WRA's Policy Arguments

20. WRA takes the position that environmental impacts are a recognized tangible interest and it should be granted leave to intervene on the basis of this same tangible interest in environmental protection. We decline to adopt such a blanket determination. This is not a legal

[9] Section 40-6-101(1), C.R.S., states in relevant part: "[a]ll of the provisions of article 4 of title 24, C.R.S., shall apply to the work, business, proceedings, and functions of the commission, or any individual commissioner or administrative law judge; but where there is a specific statutory provision in this title applying to the commission, such specific statutory provision shall control as to the commission."

[10] Section 34-60-108(2), C.R.S. (applicable to COGCC hearings), mandates that "any interested person shall be entitled to be heard." Section 34-60-108(7), C.R.S., provides that "all persons who have filed a timely protest shall be given full opportunity to be heard" at a COGCC hearing. Additionally the Court of Appeals determined that there was nothing under the Oil and Gas Conservation Act (§ 34-60-101, *et seq*., C.R.S.) requiring that "a person seeking to participate in a COGCC proceeding must demonstrate an appropriate interest, motive, or economic connection as a prerequisite to being hear by the commission." *Id*. at 312.

position or *stare decisis* in which the Commission must follow past decisions in determining intervention. Rather, it is a policy determination to be made by the Commission based on the unique circumstances and facts of each individual case.

21. WRA argues that the ALJ's conclusions about the Application's potential impacts to the environment are incorrect and not supported by the record. However, WRA does not point to the specific provisions in the Application or other pleadings filed up to that point that substantiate that position. WRA's subsequent arguments are based on its interpretation of the environmental impacts of electric resource planning and acquisitions. WRA requests the Commission reverse the ALJ's findings regarding the Application's impact on WRA's tangible interest. However, as before, WRA provides no legal support for its contention here or its request to reverse findings made by the ALJ.[11]

22. Finally, WRA asserts its interests will not be adequately represented by CEO or OCC. This matter was discussed in-depth at previous weekly meetings adopting Practice and Procedure Rules, at which time the majority voted to not amend the language of Rule 1401(c) that addresses permissive interventions. It is not necessary to revive those discussions here.

23. While we were not persuaded by WRA's legal arguments, considering this matter from a policy perspective, we find WRA should be permitted to intervene in this particular proceeding.

24. The ALJ, at Paragraph No. 42 of the Interim Decision, offered as additional support for denying WRA's intervention the risk of it becoming a "fishing expedition" which would result in WRA being able to "…propound unlimited discovery upon a utility." While

[11] Allowing WRA as an intervenor here does not require reversal of all findings made by the ALJ. Rather, it appears WRA merely wishes to erase the ALJ's findings from the record.

there may at times be issues with discovery becoming a burden on utilities, in this case this is not a basis for denying the intervention. Rather, we determine it is too early in the proceeding to know with certainty the scope of any party's discovery. If there are concerns with discovery becoming burdensome, perhaps it should be addressed through appropriate methods such as the current practice of bringing discovery disputes to an ALJ for disposition. Should burdensome discovery be found to be an ongoing issue, then the more appropriate process would be through a rulemaking proceeding.

25. The ALJ expresses concern over the costs of litigation here by allowing permissive intervenors into the proceeding. We agree that the Commission has a responsibility to assure we are conducting business as efficiently and effectively as possible. Unnecessary litigation costs should always be avoided to the fullest extent possible. Nevertheless, placing the responsibility of limiting litigation costs on permissive intervenors results in an imbalanced allocation of responsibility. Rather, all parties, including the proponent, and all intervenors, should bear the responsibility to keep litigation costs reasonable.

26. We also have concern with the statement that WRA's intervention would "provide no benefit to ratepayers." We find it difficult to discern the extent of one party's burden on a proceeding at such an early point. In this particular circumstance, WRA's petition identifies specific experience from past PUC proceedings, and specific issues where its expertise would be applied. This assertion is given additional support by Staff's Response to WRA's Motion. Commission Staff (Staff) provides that:

> Because this is the first Commission proceeding where these [SB19-236] requirements will apply, Staff believes it is in the public interest to allow WRA to intervene in order to: (1) promote robust discussion of the application of Senate Bill 19-236; (2) analyze the carbon costs for the proposed resource plan in this proceeding; and (3) determine whether Black Hills has properly modeled those

> costs. WRA's interest and expertise will be valuable as the parties grapple with these novel issues."[12]

Staff goes on to state, "the Commission should simply welcome WRA's intervention as a matter of public interest."[13] We find this compelling support for our decision to allow WRA to participate in this proceeding.

27. A portion of the ALJ's analysis addressed the CEO and its role in proceedings at this Commission. Particularly, we refer to the comment that WRA had not sufficiently demonstrated how its interests varied from CEO's environmental protection and emissions reduction interests, and that CEO "is a party charged with environmental protection and promoting renewable energy."[14] In its reply supporting WRA's motion, CEO clarifies its understanding of its statutory charge and its limitations precluding it from being responsible for all environmental protection and renewable energy advocacy in this proceeding. Specific to this proceeding and contrary to the ALJ's finding, we determine it is not appropriate in this proceeding to conclude that CEO "…is the party charged with environmental protection and renewable energy."

28. Lastly, we address the need for intervention petitioners to be more diligent by fully articulating their tangible interests and the issues to be addressed by their participation in the proceeding. Reviewing WRA's petition with the information it provides in its Motion, had the level of detail provided in its Motion been provided in its petition to intervene, it is doubtful WRA or the Commission would have been required to take on these additional processes to address the denial of its petition to intervene. Consequently, we encourage WRA not to wait

[12] Staff' Response at p. 2.
[13] *Id.*
[14] Interim Decision at ¶ 43.

until it seeks reconsideration of a decision denying its intervention to provide the kind of detail it provides in its Motion to support its participation in a proceeding. As demonstrated here, that level of detail is highly relevant to the initial rulings on interventions.

29. Therefore, while we decline to grant WRA's Motion based on its legal arguments, we grant WRA's Motion based on the policy considerations discussed above.

II. ORDER

A. It Is Ordered That:

1. Western Resource Advocates' (WRA) Motion Contesting Interim Decision No. R20-0094-I filed on February 28, 2020 is granted in part and denied in part consistent with the discussion above.

2. WRA's Intervention in the above-captioned proceeding is granted consistent with the discussion above.

3. WRA shall take the proceeding as it finds it from the effective date of this Decision.

4. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 18, 2020.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

Commissioners

COMMISSIONER FRANCES A. KONCILJA'S TERM EXPIRED MARCH 13, 2020.