Decision No. C20-0375

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19R-0483ALL

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE COMMISSION'S RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1, TO AMEND, STREAMLINE AND CLARIFY RULES ON THE COMMISSION'S OWN INITIATIVE AND PURSUANT TO THE PROVISIONS OF SENATE BILL 19-236.

DECISION ON APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: May 19, 2020
Adopted Date: May 13, 2020

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I. BY THE COMMISSION

A. Background

1. On September 13, 2019, by Decision No. C19-0747, the Colorado Public Utilities Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) to amend the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1

(P&P Rules). The proposed amendments were issued by the Commission on its own initiative, and pursuant to changes to certain business practices of the Commission as set forth in Senate Bill (SB) 19-236 enacted by the Colorado General Assembly in the 2019 legislative session.

The purpose of the Commission's P&P Rules is to advise the public, regulated entities, attorneys, and any other person of our Rules of Practice and Procedure in order to properly administer and enforce the provisions of Title 40 of the Colorado Revised Statutes and to regulate proceedings before the Commission. The purpose of the NOPR was for the Commission to solicit comments on possible changes to the P&P Rules as described in this Decision and its attachments, and to schedule a rulemaking hearing. We provided interested persons the opportunity to submit written comments on the proposed rules and to provide oral comments at the scheduled hearing. The Commission referred the rulemaking proceeding to an Administrative Law Judge (ALJ) and scheduled a hearing for October 29, 2019.

2. At the scheduled date and time, the ALJ convened a public comment hearing and received comments from interested parties. After taking comments at the hearing and considering written comments submitted by various parties, the ALJ issued Recommended Decision No. R19-1022 on December 23, 2019 adopting rules as amended.

3. Subsequently, exceptions to the Recommended Decision were filed on January 13, 2020 by the Colorado Energy Office (CEO) and Western Resource Advocates (WRA), as well as the Colorado Office of Consumer Counsel. After reviewing the exceptions, we issued Decision No. C20-0177 on March 30, 2020 adopting the rules consistent with our findings on the exceptions.

4. On April 20, 2020, CEO filed an application for Rehearing, Reargument, or Reconsideration (RRR). On that same date, WRA filed its RRR. Each RRR is addressed in turn below.

B. CEO RRR

5. CEO affirms it agrees with Decision No. C20-0177 at ¶ 92 in which we indicated that "[w]e agree with the ALJ's findings, especially his reference to the basic, settled legal principle that when the interests of an absentee party are identical to one of the parties to a proceeding, or if a party to the proceeding is charged by law with representing the absentee party's interest, a 'compelling showing should be required to demonstrate why this representation is not adequate.'"

6. Nonetheless, while CEO agrees that a potential new party should distinguish its interests from those of existing parties, CEO requests that the Commission clarify that CEO does not and cannot represent the interests of any other group or person because of its statutory duty to represent the interests of the Governor of the State of Colorado. CEO also requests clarification that it does not and cannot represent environmental groups, therefore environmental organizations should not be denied intervention in a proceeding simply because CEO has intervened as of right in that proceeding. CEO also requests that the Commission clarify that CEO's absence from a proceeding does not mean that no environmental interests exist in that proceeding.

1. Findings on CEO RRR

7. The process for ruling on RRR is contained in § 40-6-114, C.R.S. Subsection (3) provides in relevant part: "If after rehearing, reargument, or reconsideration of a decision of the

commission it appears that the original decision is any respect unjust or unwarranted, the commission may reverse, change, or modify the same accordingly." *Id*.

8. CEO, in its RRR directs its concerns about its role in proceedings to the ALJ's Recommended Decision in this proceeding, asserting that ¶ 113 of that Decision can be read to imply that CEO represents the interests of other groups. According to CEO, it may only represent the interests of the Governor, and as such, uses this as the basis for its requests for clarification.

9. CEO goes on to argue that in Proceeding No. 19A-0660E, we held that "[s]pecific 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.'" *See*, Decision No. C20-0248-I, issued April 15, 2020, Proceeding No. 19A-0660E, at ¶ 27. It is CEO's position that this statement should apply in all proceedings.

10. First, we observe that applications for RRR apply to a Commission Decision in a proceeding in which the Commission has presided over the matter, or a Commission Decision addressing exceptions to a Recommended Decision. *See generally*, *Snell v. Pub. Utils. Comm'n.*, 114 P.2d 563 (1941); *Pub. Utils. Comm'n. v. Poudre Valley Rural Electric Ass'n.*, 480 P.2d 106 (1970); *Denver Clean-Up Service, Inc., v. Pub. Utils. Comm'n.*, 483 P.2d 974 (1971). CEO's clarifications (as indicated *supra*) appear to target the ALJ's Recommended Decision and a decision we issued in another proceeding, decisions we find to be beyond the scope of this particular RRR.

11. Further, CEO asks us to adopt the finding we made in Decision No. C20-0248-I and incorporate what amounts to a rule, that CEO is the party charged with environmental

protection and renewable energy and incorporate that finding into our Decision here. We decline to do so.

12. We first point to the very specific language of Decision No. C20-0248-I at ¶ 27 which states:

> *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."
> (Emphasis added)

We were very explicit that our findings regarding CEO's participation was specific to Proceeding No. 19A-0660E, in order to emphasize that nothing from that finding was binding in subsequent proceedings. We find nothing in CEO's RRR to convince us that this finding should be incorporated into this Decision or adopted as a rule.

13. Consequently, based on the discussion above, we deny CEO's RRR and decline to clarify the matters for which it requests clarifications.

C. WRA's RRR

14. WRA states that in Decision No. C20-0177 and attached redline rules, the Commission proposed changes to Rule 1502(c), which were adopted relying on changes proposed by WRA in its exceptions to the Recommended Decision. However, in making this modification, WRA states that the Commission deviated significantly from the redline rules proposed by WRA in its initial comments and exceptions. WRA objects to these changes and asks that the Commission reconsider adopting its originally proposed redline rules put forward in its initial comments and exceptions, and to reject the new language added to Rule 1502(c) in its entirety.

15. WRA comments that some ALJs issue an interim decision denying a motion for intervention as a certified decision immediately appealable to the Commission *en banc* pursuant to Rule 1502(d). Certification of the interim decision is sometimes noted by a specific ordering paragraph noting that the decision is appealable to the Commission *en banc* by a date certain. However, in other Commission Decisions, WRA states that ALJs and hearing officers do not issue interim decisions denying intervention as a certified decision. In such a situation, the prospective intervenor must follow the process laid out in Rule 1502(c) and (d) to seek full Commission review.

16. In Decision No. C20-0177, in ¶ 117, the Commission rejected WRA's full proposal to modify Rule 1502 finding "it problematic to make interim decisions denying interventions immediately appealable to the Commission due to interference by the Commission in ongoing ALJ proceedings." However, WRA points out that the redline rules attached to the Decision propose entirely new changes to Rule 1502(c), which now reads:

> Any person aggrieved by an interim decision may file a written motion with the presiding officer entering the decision to set aside, modify, or stay the interim decision. Such motion shall be filed within seven days of the mailed date of the interim decision and shall be titled "Motion Contesting Interim Decision No. [XXX-XXXX-I]." Parties shall have five days to respond to any such motion.

17. WRA argues that in effect, the Commission considered WRA's recommendation to modify the time period in which to file a motion for reconsideration of an interim decision from 1502(b) and hybridized it with new modifications to the requirements for motions contesting interim decisions under Rule 1502(c). The resulting effect is that these new redline rules propose, for the first time in this proceeding, that Motions Contesting an Interim Decision will no longer be filed with and decided on by the Commission *en banc*, but instead must be filed and ruled upon by the presiding officer that issued the Interim Decision. WRA states that the

proposed redline rule language in Rule 1502(c) shifts the authority to rule on a Motion Contesting an Interim Decision from the Commission *en banc*, to the presiding officer. WRA states that it is a major change that was not contemplated by the Commission or commenters in either initial comments or exceptions. WRA asserts it also represents a significant shift in the Commission's authority to rule on motions contesting interim decisions.

18. WRA requests the Commission reconsider Decision No. C20-0177 and adopt the rule changes to Rule 1502(b) and (d) as proposed in WRA's initial comments and cull the redline changes to Rule 1502(c) put forward in Decision No. C20-0177 in their entirety.

D. Findings on WRA's RRR

19. By way of background, we begin by reference to Decision No. C20-0177, where the Commission denied WRA's recommendations to modify Rule 1502, "find[ing] it problematic to make interim decisions denying interventions immediately appealable to the Commission due to interference by the Commission in ongoing ALJ proceedings. We agree with the ALJ that the language is not necessary. Therefore, we denied WRA's and CEO's exceptions." (*See*, Decision at ¶ 117).

20. In addressing WRA's and CEO's exceptions to the Recommended Decision adopting rules, those parties argued that the existing process creates unnecessary confusion and delay and creates the very real risk of depriving parties of their due process rights. WRA recommended amendments to the Commission's existing P&P Rules to clarify and streamline review of interim decisions, including interim decisions denying motions to intervene.

21. In Decision No. C20-0177 at pages 18 and 19, the Commission determined that the ALJ was correct in finding that the current process had not proven to be a denial of a parties' due process rights. The Commission stated that a party may seek to have the interim decision

denying intervention immediately appealed to the Commission for review. We found the language of the rule straightforward. The Decision held that to adopt the parties' recommendations would require the Commission to basically interfere with a proceeding once it's been assigned to an ALJ.

22. We agreed with the ALJ's Recommended Decision that when a party requests reconsideration of an interim decision denying intervention, the proponent of the proceeding, as well as any other party to the proceeding would most likely file responses. This would result in additional delays to the litigation, which WRA identified as a concern in the first place. However, we determined that WRA's proposal to shorten timelines had merit. We therefore adopted the language as proposed in the NOPR with the amendments suggested by the ALJ, including language in Rule 1401(c) that requires a party to respond to a motion for permissive intervention within seven days after service of the motion, or such lesser or greater time as the Commission may allow.

23. This background is presented to better understand that the amendments adopted by the Commission should have been applicable to Rule 1402(c) as follows:

> (c) A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. If a motion to permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must 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. The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Anyone desiring to respond to the motion for permissive intervention shall have

> seven days after service of the motion, or such lesser or greater time as the Commission may allow, in which to file a response. The Commission may decide Motions to intervene by permission will not be decided prior to expiration of the notice period.

This highlighted language is what we intended Decision No. C20-0117 to adopt rather than the redline language indicated in Rule 1502 attached to the Decision.

24. This transposition of language to Rule 1502(c) was inadvertent. The language appearing in redline to Rule 1502(c) was actually intended to be incorporated into Rule 1401(c) with no amendments to Rule 1502.

25. Therefore, we agree with WRA and grant its RRR to the extent it requests to remove the amendments to Rule 1502(c) that appear in the redline rules attached to Decision No. C20-0117. Additionally, we clarify that we adopt the amendments to Rule 1401(b) and (c) as adopted by Recommended Decision No. R19-1022 on December 23, 2019 and attached to this Decision.

26. The statutory authority for the rules proposed here is found at §§ 24-4-101 *et seq.*, 40-2-108, 40-6-101(1), 40-6-108(2), 40-6-109(5), 40-6-109.5, 40-6-114(1), and 40-6-122(4), C.R.S., as well as the statutory amendments contained in SB 19-236.

27. The proposed rules in legislative (*i.e.*, strikeout/underline) format (Attachment A) and final format (Attachment B) are available through the Commission's Electronic Filings System at:

> https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=19R-0483ALL.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration of Decision No. C20-0177 filed on April 20, 2020 by the Colorado Energy Office is denied consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration of Decision No. C20-0177 filed on April 20, 2020 by Western Resource Advocates is granted in part and denied and part consistent with the discussion above.

3. The 20-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 effective date of this Decision.

4. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 13, 2020.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director