

Decision No. R20-0081-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0225E

IN THE MATTER OF APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO
FOR APPROVAL OF ITS COMMUNITY RESILIENCY INITIATIVE PURSUANT TO
§ 40-2-203(4), C.R.S.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
ON INTERVENTIONS, SCHEDULING PREHEARING
CONFERENCE, AND GIVING ADVISEMENTS**

Mailed Date: February 6, 2020

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I. STATEMENT**A. Procedural History.**

1. On May 1, 2019, Public Service Company of Colorado (Public Service or the Company) filed with the Colorado Public Utilities Commission (Commission), a Verified Application (Application) for Approval of its Community Resiliency Initiative (Initiative). Public Service stated that the Initiative is designed to provide up to 15 megawatts of Company-owned energy storage systems to enhance the safety and security of designated community resiliency centers and select infrastructure. With the Application, Public Service filed the supporting testimony and attachments of three witnesses. Public Service also sought approval of a proposed schedule by which it would file Supplemental Direct Testimony in support of the Application. Public Service explained that the Application was filed in accordance with Colorado's Energy Storage Procurement Act (HB 18-1270). This filing commenced the above-styled proceeding.¹

2. On May 1, 2019, Public Service also filed a Motion for Leave to File the Supplemental Direct Testimony on or before December 16, 2019. Public Service stated that the Supplemental Direct Testimony would provide details on the energy storage system projects and construction partners selected through a competitive solicitation process, and regarding, to the extent practicable, information on the cost and construction details of each project proposed to be developed under the Initiative. Public Service also waived the statutory deadline in § 40-6-109.5(3), C.R.S.²

¹ Application at pages 1-7. HB 18-1270 is codified at § 40-2-203(4), C.R.S. (2019).

² Motion for Leave to File the Supplemental Direct Testimony at pages 1-3.

3. By Decision No. C19-0426-I (mailed on May 16, 2019), the Commission ordered that interested parties should file responses to the Motion for Leave to File Supplemental Direct Testimony within 14 days (or by May 30, 2019). The Commission also acknowledged Public Service's waiver of the statutory deadline pursuant to § 40-6-109.5(3), C.R.S. No responses were filed by anyone.

4. By Decision No. C19-0499-I (mailed on June 12, 2019), the Commission granted the Motion for Leave to File Supplemental Direct Testimony and ordered Public Service to submit the Supplemental Direct Testimony no later than December 16, 2019. The Commission also ordered its Administrative Staff to issue a 30-day Notice of Application Filed within ten days of the filing of the Supplemental Direct Testimony.

5. On December 16, 2019, Public Service filed the Supplemental Direct Testimony of two witnesses, Jack W. Ihle and Charles A. Gouin. Mr. Gouin's Corrected Supplemental Direct Testimony was filed by Public Service on December 19, 2019.

6. On December 18, 2019, the Commission issued the Notice of Application Filed (Notice) establishing deadlines for the filing of intervention pleadings. Interested persons were to file motions to intervene within 30 days, or no later than January 17, 2020. Commission Staff was given seven additional days to file a notice of intervention of right. The Notice also stated that: "The Commission may, without a hearing or further notice, determine any verified application ... which is uncontested or unopposed, if a hearing is not requested or required by law."³

³ Notice at page 1.

7. During the Commission's weekly meeting held on January 29, 2020, the Application was deemed complete for purposes of § 40-6-109.5, C.R.S. (2019), and was referred to an Administrative Law Judge (ALJ) for disposition. This Proceeding was subsequently assigned to the undersigned ALJ.

B. Interventions.

1. Interventions as of Right.

8. Rule 1401(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (2015),⁴ governs interventions as of right and states in pertinent part: "A notice of intervention as of right, unless filed by Commission staff, shall state the basis for the claimed legally protected right that may be affected by the proceeding."

9. On January 17, 2020, the Colorado Office of Consumer Counsel (OCC) filed a Notice of Intervention of Right, Entry of Appearance and Request for Hearing (OCC's Intervention). OCC stated it requests an evidentiary hearing to determine if Public Service's proposed Initiative is just and reasonable and in the public interest. OCC's Intervention identified 13 issues it may address regarding the Application.⁵

10. OCC's Intervention as of right is acknowledged, and OCC is a Party to this Proceeding.

11. On January 23, 2020, Trial Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention as of Right by Staff, Entry of Appearance, and Notice

⁴ The Commission is engaged in a rulemaking to update our Rules of Practice and Procedure in Proceeding No. 19R-0483ALL. On December 23, 2019, the Presiding ALJ issued Decision No. R19-1022 recommending amendments to the Rules. A Commission decision on several filed exceptions is pending, and the amended rules are not yet final or in effect. Hence, references in Decisions in this Proceeding will be to the existing Rules of Practice and Procedure, which became effective on November 14, 2015.

⁵ OCC's Intervention, ¶ 5 at pages 2 and 3.

Pursuant to Rule 1007(a) and Rule 1401 (Staff's Intervention). Staff stated that it "is generally supportive of the application" and indicated its detailed review will assess the "reasonability" of the Company's benefit determinations and whether a presumption of prudence related to the Initiative is appropriate.⁶ Staff did not request an evidentiary hearing.

12. Staff's intervention as of right is acknowledged. Staff is a Party to this Proceeding.

2. Permissive Intervention Standards.

13. Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, states the minimum standards for permissive intervention in Commission proceedings and requires that:

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. ... 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. Motions to intervene by permission will not be decided prior to expiration of the notice period.

(Emphasis added.)

14. In addition, Rule 1401(c), 4 CCR 723-1, requires additional discussion for certain motions purporting to represent ratepayer interests:

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

⁶ Staff's Intervention, ¶ 2 at pages 1 and 2.

either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC.

Pursuant to § 40-6.5-104(1), C.R.S., the OCC has a statutory mandate to represent the interests of residential, agricultural, or small business ratepayers. “[I]f there is a party charged by law with representing [the individual’s] interest [such as the OCC], then a compelling showing should be required to demonstrate why this representation is not adequate.”⁷

15. Pursuant to Rule 1500, 4 CCR 723-1, the person seeking leave to intervene by permission bears the burden of proof with respect to the relief sought.

16. Pursuant to Rule 1400(b), 4 CCR 723-1, “the responding party shall have 14 days after service of [a] motion, or such lesser or greater time as the Commission may allow, in which to file a response.” No response times for any of the motions for permissive intervention were shortened. Moreover, Rule 1400(d) provides that: “The Commission may deem a failure to file a response as a confession of the motion.”

3. Motions for Permissive Intervention.

17. On January 15, 2020, Western Resource Advocates (WRA), through its counsel, filed a Petition for Leave to Intervene (WRA Intervention). WRA is a non-profit conservation organization whose policy interest is “to reduce the environmental impacts of the electric power industry in the Interior West” by *inter alia* “advocating for acquisition of emission free renewable energy generation resources” and “for a policy framework that can reduce the environmental impacts of the electric industry.”⁸ While WRA said it is still evaluating the filing to develop its ultimate position, among the issues mentioned in WRA’s Intervention are the

⁷ *Feign v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

⁸ WRA Intervention at pages 1 and 2.

manner in which the Company will operate the proposed energy storage system acquisitions; whether the proposed projects are consistent with the goals of the Energy Storage and Procurement Act; if they maximize grid benefits; and the manner in which the Company will dispatch the battery storage projects.⁹ WRA claimed that this Proceeding will directly impact the tangible interests WRA represents in protecting the environment. WRA asserted that no other party, particularly the OCC, will adequately represent its interests.¹⁰ WRA did not request an evidentiary hearing on the Application.

18. On January 16, 2020, the Rocky Mountain Environmental Labor Coalition (RMELC) and the Colorado Building and Construction Trades Council, AFL-CIO (CBCTC) filed a Joint Motion for Leave to Intervene (RMELC/CBCTC Intervention). RMELC/CBCTC noted that the Application proposes that the energy storage systems will be constructed with contractors using a Project Labor Agreement with CBCTC members. RMELC/CBCTC asserted that they have a substantial and direct interest in this Proceeding and in the Initiative. They claimed that no other intervenor can adequately represent their interests.¹¹ RMELC/CBCTC did not request an evidentiary hearing on the Application.

19. Public Service did not file responses opposing the WRA Intervention or the RMELC/CBCTC Intervention.¹² Therefore, these two interventions are unopposed.

⁹ WRA Intervention, at pages 4 and 5.

¹⁰ WRA Intervention, at pages 7 through 10.

¹¹ RMELC/CBCTC Intervention, at pages 2 through 4.

¹² Rule 1400(d) of the Rules of Practice and Procedure, 4 CCR 723-1, states that, “The Commission may deem a failure to file a response as a confession of the motion.”

20. WRA and RMELC/CBCTC have demonstrated adequately that they satisfy the standards of Rule 1401(c) for permissive intervention, and their interventions will be granted. WRA and RMELC/CBCTC are Parties in this Proceeding.

21. The Parties to this Proceeding are Public Service, Staff, OCC, WRA, and RMELC/CBCTC.

C. Prehearing Conference.

22. Only OCC requests a hearing on the Application.

23. In anticipation of scheduling an evidentiary hearing, the ALJ will schedule a prehearing conference, in accordance with Rule 1409(a) of the Rules of Practice and Procedure, 4 CCR 723-1. The prehearing conference will be scheduled for **February 18, 2020 at 10:00 a.m.**

24. *At the prehearing conference*, the Parties must be prepared to discuss the following: (a) the date by which each intervenor will file answer testimony and attachments; (b) the date by which Public Service will file rebuttal testimony and attachments; (c) the date by which each intervenor may file cross-answer testimony and attachments;¹³ (d) the date by which each Party will file corrected testimony and attachments;¹⁴ (e) the date by which each Party will file prehearing motions, other than motions relating to discovery, including any dispositive motions, motions *in limine*, or motions to strike;¹⁵ (f) whether a final prehearing conference is

¹³ Cross-answer testimony shall respond only to the answer testimony of another intervenor and *not* to the Direct or Supplemental Direct Testimony of Public Service.

¹⁴ Filing of corrections shall be limited to correcting errors (*e.g.*, mathematical errors, typographical errors) in the testimonies or attachments as filed. Without a finding of good cause and leave of the ALJ, corrections may *not* be used for any other purpose (*e.g.*, to make material or substantive changes to prefiled testimony or attachments).

¹⁵ This date should be at least 21 calendar days before the first day of the hearing.

necessary and, if it is, the date for that prehearing conference; (g) the date by which the Parties will file any written stipulations or settlement agreements;¹⁶ (h) the date(s) for the evidentiary hearing, including a statement of how many days the Parties will need to try this case; and (i) the date by which each Party will file its post-hearing statement of position (statements of position will be simultaneous and no responses will be permitted).¹⁷

25. The following page limits on statements of position will be imposed: The statement of position to be filed by Public Service, which has the burden of proof, may not exceed 50 pages in length, exclusive of a table of contents and appendices; the statement of position to be filed by each intervenor may not exceed 30 pages in length, exclusive of a table of contents and appendices. If any intervenors file joint statements of position, the foregoing 30-page limit will apply to all joint statements of position.

26. *At the prehearing conference*, the Parties must be prepared to discuss any matter pertaining to discovery if the procedures and timeframes contained in Rule 1405, 4 CCR 723-1, are not sufficient.

27. *At the prehearing conference*, the Parties must be prepared to discuss any matter pertaining to the treatment of information claimed to be confidential if the procedures and timeframes contained in Rules 1100 and 1101, 4 CCR 723-1, are not adequate. This discussion should include the treatment of additional information for which extraordinary protection may be sought, if that issue will arise.

¹⁶ This date should be at least 14 calendar days before the first day of hearing.

¹⁷ Post-hearing statements of position are usually filed 14 calendar days from the conclusion of the hearing, but in this Proceeding may be filed no later than 21 calendar days after the last day of the hearing.

28. *At the prehearing conference*, the Parties must be prepared to discuss whether the presentation of evidence at the hearing should be done through electronic exhibits to the fullest extent possible, with the exception of exhibits to be used for impeachment or rebuttal.

29. *At the prehearing conference*, a Party may raise any additional issues relevant to this Proceeding.

30. The Parties must consult prior to the prehearing conference with respect to the matters to be discussed at the prehearing conference and are encouraged to present, if possible, a consensus procedural schedule and hearing date(s) that are acceptable to all Parties. The ALJ will direct Public Service to coordinate these discussions.

31. If the Parties are able to reach agreements on a consensus procedural schedule, hearing date(s), and the other procedural matters addressed in this Decision, the ALJ encourages Public Service to make a filing **no later than February 13, 2020**, stating those agreements. Alternatively, the Company may present a consensus procedural schedule, hearing date(s), and the other procedural matters at the prehearing conference.

32. **The parties are advised, and are on notice, that** the ALJ will deem a Party's failure to attend or to participate in the prehearing conference to be a waiver of that Party's objection to the rulings made, the procedural schedule established, and the hearing dates scheduled during the prehearing conference.

D. Other Advisements.

33. **The Parties are advised that** an interim decision may issue requiring that the presentation of evidence at the hearing shall be done through electronic exhibits to the fullest extent possible, with the exception of exhibits to be used for impeachment or rebuttal.

34. **The Parties are advised, and are on notice, that** they must be familiar with, and abide by, the Rules of Practice and Procedure, 4 CCR 723-1 (2015). These Rules are available on-line at www.dora.colorado.gov/puc and in hard copy format from the Commission.

35. At this point in the Proceeding, all Parties are represented by counsel. The ALJ calls counsels' attention to the requirement of Rule 1202(d) of the Rules of Practice and Procedure, 4 CCR 723-1, that, "[e]very *pleading* of a party represented by an attorney shall be signed by the attorney, and *shall state* the attorney's address, telephone number, e-mail address, and attorney registration number." (Emphasis supplied.) **The Parties are advised, and are on notice, that** filings must comply with this requirement and with the other requirements found in the Commission's rules pertaining to filings made with the Commission.¹⁸

36. **The Parties are advised, and are on notice, that** timely filing with the Commission means that the Commission *must receive* the filing by the due date. Thus, if a document is placed in the mail on the date on which the document is to be filed, then the document is *not* timely filed with the Commission. Pleadings and other documents are filed with the Commission either by using the E-filings System, or by filing the original of a paper document along with three copies. Emailing pleadings and other documents to the ALJ, the Commissioners, the Director of the Commission, or other employees of the Commission **does not** constitute a proper filing under Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1.

¹⁸ During the course of this Proceeding, the ALJ may have occasion to inform counsel, on short notice, of his rulings. The ALJ will make such notifications by e-mail and will rely solely on signature blocks of pleadings for counsels' e-mail addresses. If any counsel's email address changes during the pendency of this Proceeding, please promptly update it with the Commission.

37. **Each Party is specifically advised** that all filings with the Commission must also be served upon counsel for all other Parties, in accordance with Rule 1205 of the Rules of Practice and Procedure, 4 CCR 723-1.

38. **Each Party is specifically advised** that, pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, responding Parties (*i.e.*, the Parties that did not file a motion) have the procedural right to file a written response to motions within 14 days after service of the motion, unless that time is shortened by the ALJ.

39. Other advisements may be provided in subsequent Interim Decisions.

II. **ORDER**

A. **It Is Ordered That:**

1. A prehearing conference in this proceeding is scheduled as follows:

DATE: February 18, 2020
TIME: 10:00 a.m.
PLACE: Commission Hearing Room
1560 Broadway, 2nd Floor
Denver, Colorado

2. Consistent with the discussion and findings *supra*, the matters identified in this Interim Decision will be discussed at the prehearing conference. Those Parties and counsel attending the prehearing conference must be prepared to address all the matters identified in this Decision and must have authority to agree to a procedural schedule, to the resolution of all procedural matters, and to evidentiary hearing dates.

3. Failure of a Party or its counsel to attend or to participate in the prehearing conference shall constitute a waiver of any objection to the rulings made, to the procedural schedule established, and to the hearing dates scheduled during the prehearing conference.

4. Consistent with the discussion and findings *supra*, counsel for Public Service Company of Colorado (Public Service) shall consult prior to the prehearing conference with counsel for the intervenors, regarding the procedural schedule, hearing date(s), and other procedural matters addressed in this Decision.

5. If the Parties are able to reach agreements on a consensus procedural schedule, hearing date(s), and the other procedural matters addressed in this Decision, counsel for Public Service may make a filing no later than February 13, 2020, stating those agreements. Alternatively, the Parties may present at the prehearing conference a consensus procedural schedule, hearing date(s), and any agreements on the other procedural matters.

6. The Notice of Intervention of Right, filed by the Colorado Office of Consumer Counsel on January 17, 2020, is acknowledged.

7. The Notice of Intervention as of Right, filed by Trial Staff of the Colorado Public Utilities Commission on January 23, 2020, is acknowledged.

8. The Petition for Leave to Intervene, filed by Western Resource Advocates on January 15, 2020, is granted.

9. The Joint Motion for Leave to Intervene, filed by the Rocky Mountain Environmental Labor Coalition and the Colorado Building and Construction Trades Council, AFL-CIO on January 16, 2020, is granted.

10. The Parties shall comply with the directives and advisements set forth in this Decision.

11. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director