Decision No. R21-0014-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20AL-0432E

IN THE MATTER OF ADVICE LETTER NO. 1835 – ELECTRIC FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE ITS COLORADO P.U.C. NO. 8 - ELECTRIC TARIFF TO ELIMINATE THE CURRENTLY EFFECTIVE GENERAL RATE SCHEDULE ADJUSTMENTS ("GRSA") AND GENERAL RATE SCHEDULE ADJUSTMENT - ENERGY ("GRSA-E"), AND PLACE INTO EFFECT REVISED BASE RATES AND OTHER AFFECTED CHARGES FOR ALL ELECTRIC RATE SCHEDULES IN THE COMPANY'S ELECTRIC TARIFF, INCLUDING UPDATED ELECTRIC AFFORDABILITY PROGRAM ("EAP"), LOAD METER, AND PRODUCTION METER CHARGES TO BECOME EFFECTIVE NOVEMBER 19, 2020.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE STEVEN H. DENMAN GRANTING PERMISSIVE INTERVENTIONS AND DENYING MOTION FOR LEAVE TO FILE REPLY

Mailed Date: January 11, 2021

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I. STATEMENT

1. On October 19, 2020, Public Service Company of Colorado (Public Service) filed Advice Letter No. 1835-Electric along with tariff sheets. Through Advice Letter No. 1835-

Electric, Public Service proposes to allocate its approved $1,835,585,415 revenue requirement[1] across customer classes, based on a Class Cost of Service Study (CCOSS) using the 2019 Test Year approved by the Commission in Proceeding No. 19AL-0268E. Public Service states that this filing does not affect its annual revenue. This Proceeding is a Phase II Electric Rate Case.

2. The effective date of the tariff sheets filed with Advice Letter No. 1835-Electric have been suspended for a total of 250 days until July 27, 2021, pursuant to § 40-6-111(1)(b), C.R.S. (2019).[2]

3. The procedural history of this Proceeding is set forth in previously issued Decisions and is repeated here only as necessary to put this Decision into context.

4. On December 9, 2020, the Cities of Arvada, Aurora, Centennial, and Thornton, the Towns of Erie and Windsor, and the Colorado Communications and Utility Alliance[3] (collectively, Local Governments), filed a Motion to Intervene, requesting permissive intervention. The listed cities and towns each have franchise agreements with Public Service and each purchases utility and related services from Public Service, including street lighting service. The Local Governments claim that Public Service's Phase II filing includes proposed changes to the Energy Only Street Lighting Tariff (Sheets 97B, 97C, and 97D), including

[1] The amount of $1,828,985,415 was approved in Proceeding No. 20AL-0268E and $6,600,000 for the Electric Affordability Program was allowed in Proceeding No. 20AL-0090E.

[2] *See* Decision No. C20-0793 (issued on November 10, 2020) and Decision No. R20-0887-I (issued on December 11, 2020).

[3] According to the Motion to Intervene, the members of the Colorado Communications and Utility Alliance are: Adams County, Adams 12 Five Star Schools, Arapahoe County, Arvada, Aspen, Aurora, Bennett, Boulder, Breckenridge, Brighton, Broomfield, Burlington, Castle Pines, Castle Rock, CDOT ITS Branch, Centennial, Central City, Cherry Hills Village, Colorado Springs, Columbine Valley, Commerce City, Dacono, Denver, Douglas County, Durango, Eagle County, Eagle, Edgewater, Englewood, Erie, Estes Park, Federal Heights, Firestone, Fort Collins, Frederick, Glendale, Golden, Grand Junction, Greeley, Greenwood Village, Idaho Springs, Jefferson County Public Schools, Lafayette, Lakewood, Littleton, Lone Tree, Longmont, Louisville, Loveland, Montrose, Northglenn, Paonia, Parker, Pitkin County, Region 10 LEAP Inc., Salida, Sheridan, Southwest Colorado Council of Governments, Thornton, Westminster, Wheat Ridge, Windsor, and Wray.

proposed increases to street lighting rates. The Local Governments argue that these impacts will substantially affect their pecuniary or tangible interests and that no other party in this proceeding will adequately represent their interests. The Local Governments claimed that their intervention will not unduly broaden the issues or cause delay in this proceeding.[4]

5. On December 15, 2020, Public Service filed a response to the Local Governments' Motion to Intervene. Contrary to arguments by the Local Governments, Public Service asserted that it only proposed to change street lighting rates in Tariff Sheet No. 97B, and proposed no changes to Street Lighting Tariff Sheets Nos. 97A and R139, which are existing, effective tariffs. Public Service stated it does not object to the Local Governments' intervention, as long as their intervention is limited to street lighting rates.[5]

6. In the late afternoon of Friday, December 18, 2020, the Local Governments filed a Motion for Leave to File a Reply in Support of the Motion to Intervene (Motion for Leave to File Reply), along with a 9-page reply brief.

7. At the December 22, 2020 Prehearing Conference the ALJ took under advisement the Local Governments' Motion to Intervene, Public Service's response to the Motion to Intervene, and the Local Governments' Motion for Leave to File Reply. This Decision rules on those pleadings.

8. On December 28, 2020, the Kroger Co., on behalf of its King Soopers and City Market Divisions (Kroger), filed a Motion to Permissively Intervene Out-of-Time. Kroger has approximately 90 grocery stores and other facilities that purchase their electric supply from Public

[4] Local Governments' Motion to Intervene, at pages 1-3 and 5.

[5] Public Service's Response to the Motion to Intervene of the City of Arvada et al., at pages 1-4. *See* Attachment SWW-1 to the Direct Testimony of Mr. Wishart, at page 53.

Service. Kroger asserts that other parties would not adequately represent its interests. Kroger stated that it does not intend to broaden the issues unreasonably, burden the record, or delay this proceeding, and Kroger will accept the existing procedural schedule.[6]

9. On December 29, 2020, Public Service file a response to Kroger's Motion to Permissively Intervene Out-of-Time. Public Service takes no position on Kroger's permissive intervention, due to Kroger's stated claims of substantial pecuniary or tangible interests in the outcome of this proceeding.[7]

II. FINDINGS AND CONCLUSIONS

10. Rule 1401(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (2020), 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.* … Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. …

(Emphasis added.)

11. Through statute, rule, and sound judicial discretion, the Commission entrusts its ALJs to manage cases independently. Under Rule 1401, an ALJ addresses requests for permissive intervention in his or her sound discretion. The Commission may reverse an ALJ's decision on

[6] Kroger Motion to Permissively Intervene Out-of-Time, at pages 2 and 3.

[7] Public Service Company of Colorado's Response to the Motion of Kroger Co. to Permissively Intervene Out-of-Time, at pages 1 and 2.

requests for permissive intervention, when the decision is certified as appealable under Rule 1502(d), 4 CCR 723-1, and if the decision is proven to be an abuse of discretion; that is, when the ALJ's decision has been shown to be manifestly arbitrary, unreasonable, or unfair.[8]

A. Kroger's Motion to Permissively Intervene Out-of-Time.

12. As reasons for its late motion to intervene, Kroger asserted it was not aware of the filing of this Phase II rate case until December 23, 2020, when Kroger's counsel learned of the case from a participant in the rate case. Kroger, which did not participate in the Phase I Electric Rate Case (Proceeding No. 19AL-0268E), claims that its counsel received no electronic notification of the Phase II filing, even though it concedes that other forms of notice were provided to the public (*e.g.,* bill inserts, newspaper publication, etc.). According to Kroger, these notices escaped the attention of Kroger and its counsel, whose headquarters and offices are located in Cincinnati, Ohio. Kroger does not explain whether its 90 grocery stores and other facilities in Colorado received the public notice of this rate case filing given by Public Service or, if they did, why notice of this filing never reached Kroger and its counsel in Cincinnati. Nevertheless, the ALJ recently adopted the procedural schedule for this proceeding on December 29, 2020,[9] and neither Public Service nor other parties will be prejudiced by the acceptance of Kroger's out-of-time motion to intervene.

13. As for its request for intervention, the ALJ finds that Kroger has stated the specific grounds relied upon for its permissive intervention, including sufficient information, required by Rule 1401(c) of the Rules of Practice and Procedure, which demonstrates that this proceeding may

[8] *See* Decision No. R19-0943-I (issued on November 20, 2019), ¶ 57 at pages 24 and 25.

[9] *See* Decision No. R20-0922-I (issued December 29, 2020).

substantially affect its pecuniary or tangible interests and that Kroger's interests would not otherwise be adequately represented.

14. Kroger's request for permissive intervention will be granted, and Kroger is now a party to this proceeding. Kroger must take this proceeding, including the adopted procedural schedule, as it finds it as of the mailed date of this Decision.

B. Local Governments' Intervention and Motion for Leave to File Reply.

15. If allowed to intervene, the Local Governments asserted that among the street lighting issues they intend to address would be rates for street lighting and rules and regulations for street lighting, including street light acquisitions.[10]

16. Since Public Service proposed no changes to existing Street Lighting Tariff Sheets Nos. 97A and R139, Public Service argued that the new issues the Local Governments plan to address, including rules and regulations for street lighting and street lighting acquisitions, were not raised in Public Service's tariff filing or supporting Direct Testimony and are not at issue here. Public Service argued that the Local Governments' plan to expand the issues beyond those proposed in the tariff filing belies their claim that their intervention will not unduly broaden the issues.[11] Public Service requested that "any order granting intervention state a limited basis (rates) for allowing intervention, and provide guidance that issues relating to street lighting rules and regulations, including street lighting acquisitions, are beyond the scope of this proceeding." Public Service argued that its request was "consistent with the Administrative Law Judge's authority to control the scope of issues and the presentation of evidence by Public

[10] Local Governments' Motion to Intervene, at pages 2-4.

[11] Public Service's Response to the Motion to Intervene of the City of Arvada et al., at pages 1-4. *See* Attachment SWW-1 to the Direct Testimony of Mr. Wishart, at page 53.

Service and the intervenors, in order to conduct this proceeding, as required by § 40-6-101(1), C.R.S., 'in such manner as will best conduce the proper dispatch of business and the ends of justice.'"[12]

17. Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1, provides that:

> (e) A movant may not file a reply to a response unless the Commission orders otherwise. Any motion for leave to file a reply must demonstrate:
>
> (I) a material misrepresentation of a fact;
>
> (II) accident or surprise, which ordinary prudence could not have guarded against;
>
> (III) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or
>
> (IV) an incorrect statement or error of law.

18. In their Motion for Leave to File Reply,[13] the Local Governments' sole argument for filing a reply rests on their claim that Public Service has made "an incorrect statement of law." Specifically, the Local Governments argue that Public Service's citation to the first sentence of § 40-6-101(1), C.R.S., is an incorrect statement of law by omission, "because a) the recitation of the law is incomplete in material ways and b) the citation is used to incorrectly suggest issues not directly raised in the direct testimony and exhibits of Public Service are necessarily outside the scope of a rate case proceeding."[14] The Local Governments contend that Public Service's omission of the second sentence of § 40-6-101(1), C.R.S., "is important because the State

[12] Public Service's Response to the Motion to Intervene of the City of Arvada et al., at page 2.

[13] The Motion for Leave to File Reply stated that counsel for Boulder, COSSA, and SEIA supported the motion, while counsel for the other parties either "did not oppose or did not take a position on the motion." Motion for Leave to File Reply, at page 2. The Local Governments asserted that their motion is "unopposed." At the prehearing conference, the ALJ surveyed counsel for the parties in attendance and learned that no party intended to file a response to the motion. A movant's statement that a motion is unopposed informs the ALJ of the results of the movant's conferral required by Rule 1400(a), 4 CCR 723-1, but it does not remove the requirement that the motion must satisfy legal requirements before it can be granted.

[14] Motion for Leave to File Reply, at page 3.

Administrative Procedure Act requires that fundamental fairness and due process be applied in administrative proceedings, including the proceedings of the Commission."[15]

19. The complete text of the first two sentences of § 40-6-101(1), C.R.S., state that:

> The commission shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice. All 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.*

(Emphasis added.)

20. The Commission has the authority to determine how to conduct its proceedings. Pursuant to § 40-6-101(1), C.R.S., the Commission "shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice." Apparently, there is no dispute between Public Service and the Local Governments that the first sentence includes this text. In its response, however, Public Service cites the first sentence in the introduction to support the proposition that the ALJ has the "authority to control the scope of issues and the presentation of evidence by Public Service and the intervenors…."[16] Public Service then argues why the ALJ should limit the issues in this proceeding to street lighting rates, exclude street lighting regulations, and exclude the acquisition of street lights.[17]

21. The Commission and its ALJs have cited the first sentence of § 40-6-101(1), C.R.S., in recognition of their authority to control Commission proceedings, including denial of permissive interventions, making procedural rulings, and managing the scope of proceedings.[18]

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[15] Motion for Leave to File Reply, at page 4.

[16] Public Service's Response to the Motion to Intervene of the City of Arvada et al., at page 2.

[17] *Id.*, at pages 2-4.

[18] *See e.g.,* Decision No. C20-0840, ¶¶ 37-50 at pages 14-18, in Proceeding No. 20F-0077G; Decision No. R19-0976-I, ¶¶ 11 and 12 at pages 4 and 5, in Proceeding No. 19A-0530E; Decision No. R19-0943-I, ¶ 56 at page 24, and Decision No. C19-1024, ¶ 19 at page 8, in Proceeding No. 19A-0409E; Decision No. R18-0177-I, ¶¶ 12-15 at pages 4 and 5, in Proceeding No. 18F-0067E et al.; Decision No. R18-0961-I, ¶¶ 19 and 20 at page 5, in Proceeding

22. The Commission has construed the second sentence of § 40-6-101(1), C.R.S., to mean that it may look to the State 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.[19] The State Administrative Procedure Act also provides, among other things, that a hearing officer (or an ALJ) shall "regulate the course of the hearing" and "issue appropriate orders which shall control the subsequent course" of a proceeding. Hence, Public Service's argument that the ALJ has the authority to control the scope of issues and the presentation of evidence in this proceeding is not an incorrect statement of the law in § 40-6-101(1), C.R.S.

23. Moreover, the second sentence of § 40-6-101(1), C.R.S., primarily means that when there is a specific statutory provision in Title 40 (i.e., the Colorado Public Utilities Law) applying to the Commission, that specific statutory provision shall control the Commission's proceeding. For example, when the Colorado Public Utilities Law recognizes authority of the Commission and its ALJs to issue subpoenas, to compel testimony, to conduct hearings, and to issue written decisions, statutes in the Colorado Public Utilities Law apply.[20]

24. However, the Local Governments construe the second sentence to mean that the State Administrative Procedure Act requires that fundamental fairness and due process be applied in the Commission's administrative proceedings. As can be seen in the quoted text of § 40-6-101(1), C.R.S., the second sentence does not actually say that. Moreover, Public Service's

No. 18A-0524E. *See also, Mountain States Tel. & Tel. Co., v. Public Utilities Comm'n.,* 576 P.2d 544, 551-552 (Colo. 1978) (citing the first sentence of § 40-6-101(1), C.R.S., and affirming the Commission's limitation of issues in a rate case.)

[19] *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989).

[20] *See e.g.,* §§ 40-6-101(1) and (4), 40-6-102, 40-6-103, 40-6-108, 40-6-109, 40-6-109.5, and 40-6-111, C.R.S.,

response did not argue that the State Administrative Procedure Act cannot apply to Commission proceedings or that fundamental fairness and due process do not apply to Commission's administrative proceedings.

25. The ALJ disagrees with the Local Governments that, by citing the first sentence of § 40-6-101(1) and omitting the second sentence, Public Service made an incorrect statement of law. It is clear from the Motion for Leave to File Reply that the Local Governments disagree with Public Service's argument that the ALJ should limit the scope of this proceeding on street lighting issues. However, mere disagreement with an opponent's legal argument does not mean that the opponent made "an incorrect statement or error of law" within the meaning of Rule 1401(e). The Local governments have used their disagreement with Public Service's argument to bootstrap their argument that they satisfy the test in Rule 1401(e) for permission to file a reply to the response.

26. The Local Governments' legal argument for claiming Public Service made an incorrect statement of law is itself an incorrect statement of law. Neither the second sentence of § 40-6-101(1), C.R.S., nor the State Administrative Procedure Act themselves guarantee constitutional rights to due process of law. Those are statutes that impose statutory rights and obligations on administrative agencies and the parties to administrative hearings in Colorado. Only the Constitutions of the United States and Colorado guarantee to persons the constitutional rights to due process of law.[21] However, the denial of statutory rights – for example, to present

[21] There is no doubt that, in Commission regulatory proceedings, the parties are entitled to due process of law, under Article II, Section 25, of the Colorado Constitution and the 14th Amendment of the U.S. Constitution. *See DeLue v. Public Utilities Comm'n.*, 486 P. 2d 563 1050, 1052 (Colo. 1971) and *Public Utilities Comm'n. v. Colorado Motorway*, 437 P.2d 44, 47-48 (Colo. 1968). The essence of procedural due process of law is fundamental fairness. *Mountain States Tel. & Tel. Co. v. Dept. of Labor & Employment,* 520 P.2d 586, 588-589 (Colo. 1974).

evidence and to cross-examine opposing witnesses – in certain cases could deprive a party to his/her constitutional right to due process of law.[22]

27. The Local Governments apparently have conflated procedural rights in a statute with constitutional rights to due process of law, perhaps because § 24-4-105(1), C.R.S., includes the statement that, "In order to assure that all parties to any agency adjudicatory proceeding are accorded due process of law, the provisions of this section shall be applicable." This statement is consistent with opinions of the Colorado Supreme Court's (Court) and assures that administrative adjudicatory proceedings are conducted in accordance with constitutional rights to due process of law.[23]

28. The ALJ concludes that the Local Governments' argument about the second sentence of § 40-6-101(1), C.R.S., does not support their claim that Public Service made an incorrect statement of law.

29. Finally, the cases cited by the Local Governments do not support their claim that Public Service made "an incorrect statement of law." First, the Local Governments argue that:

> C.R.S. § 40-6-101(1) does not require the Commission to restrict the scope of issues raised by intervenors to those raised by the investor-owned utility. That section of the statute must be read together with C.R.S. § 40-3-102, which broadly grants the Commission "authority to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state." The plain language of C.R.S. § 40-3-102 permits the Commission to examine existing tariffs as well as other issues not raised by the investor-owned utility as part of a Phase II Rate case."

The Local Governments cite *Mountain States Tel. and Tel. Co. v. Public Util. Comm'n.*, 576 P.2d 544, 547 (Colo. 1978) to support this argument.

[22] *Public Service Company of Colorado v. Public Utilities Comm'n.,* 653 P.2d 1117, 1120 (Colo. 1982).

[23] See the discussion in the foregoing paragraph and *Public Service Company v. Public Utilities Comm'n.,* 653 P.2d at 1120.

30. In *Mountain States Tel. and Tel. Co. v. Public Util. Comm'n*, 576 P.2d at 551-552, the Court held that the Commission, during a rate case, properly rejected Mountain Bell's late request to add an out-of-period adjustment for additional cost of imbedded debt and to change the test year. While the Court did cite § 40-3-102, C.R.S.,[24] the Court's holding rests squarely on the first sentence of § 40-6-101(1), C.R.S., that the Commission must "conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice."[25] The Court's decision in the *Mountain States Tel. and Tel. Co.* case actually affirms the Commission's authority to limit the scope of its proceedings and the issues to be litigated in a proceeding. That holding supports Public Service's legal argument that the ALJ has the authority to control the scope of issues and the presentation of evidence in this proceeding. It does not support the Local Governments' argument that Public Service's response made an incorrect statement of law.

31. Next, the Local Governments cite *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373 (Colo. 1994)[26] for the proposition that, "[T]he duty of the PUC is to adopt fair and reasonable rate structures and it is not limited to options formally presented." This statement, however, is *dictum* and not a holding in the Court's opinion. The Court made this statement in support of its finding that, "First, it is the function of the PUC to adopt rate structures that are fair and reasonable."[27] This finding was part of the Court's holding that there

[24] Among other things, § 40-3-102, C.R.S., vests in the Commission the power and authority "to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state…." See *Mountain States Tel. and Tel. Co. v. Public Util. Comm'n*, 576 P.2d at 547.

[25] The Court held that to grant Mountain Bell's request – to consider the out-of-period adjustment for additional cost of imbedded debt and to change the test year – would have been inconsistent with statutory guidelines in §§ 40-6-101(1) and 40-6-111, C.R.S. (the latter relating to the 210-day maximum suspension period). *Mountain States Tel. and Tel. Co. v. Public Util. Comm'n*, 576 P.2d at 551-552.

[26] The undersigned ALJ advises counsel for the parties that, in the case of *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373 (Colo. 1994), he represented US WEST Communications, Inc.

[27] *Integrated Network Services. Inc. v. Public Utilities Comm'n.*, 875 P.2d at 1381.

was sufficient evidence to affirm the Commission's decision to establish mandatory measured service rates for Shared Tenant Service (STS) providers. Appellant Integrated Network Services had "suggested" that the evidence was insufficient, because (1) no party formally advocated measured service rates for STS providers, and thus measured service rates were not an option available to the Commission, and (2) the Commission's decision was based entirely upon the testimony of a trial staff witness. The Court rejected both of those arguments, finding that neither of those assumption has any merit.[28] At most, dictum relied upon by the Local Governments, stands for the proposition that in establishing new rates in tariffs filed by a utility, sufficient evidence to support the just and reasonable rates adopted by the Commission can include rate options not formally presented by the utility.

32. More significantly, the *Integrated Network Services* appeal did not involve challenges to existing, effective tariffs of a utility, as in the instant proceeding, and the Court's opinion does not discuss § 40-6-101(1), C.R.S.[29] Mountain Bell had filed tariffs to adopt rates for various regulated telephone services to recover a revenue increase approved by the Commission in a Phase I rate case. This appeal was from Commission decisions in a Phase II rate case that had adopted new rates in the filed tariffs for STS providers and for Public Access Line service.[30]

33. The *Integrated Network Services* opinion did not resolve whether existing non-rate tariffs of a utility may be challenged in a rate case nor who has the burden of proof to demonstrate that a change to the existing non-rate tariffs should be adopted by the Commission. The ALJ

[28] *Id.*

[29] The Court's opinion does discuss § 40-3-102, not for the proposition argued here by the Local Governments, but rather on whether the rate structures adopted by the Commission were unlawfully discriminatory. The Court held that the rates adopted by the Commission were not unlawfully discriminatory. *Integrated Network Services. Inc. v. Public Utilities Comm'n.*, 875 P.2d at 1382-1384.

[30] *See Id.*, 875 P.2d at 1376.

concludes that the *Integrated Network Services* opinion does not support the Local Governments' argument that they should be granted leave to reply to Public Service's response.

34. The ALJ finds and concludes that Public Service's Response to the Motion to Intervene did not make "an incorrect statement or error of law." The Local Governments have failed to satisfy the requirements of Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1. Therefore, ALJ will deny the Motion for Leave to File Reply. The ALJ will not consider the Reply appended to the Motion for Leave to File Reply as Attachment A.

35. Public Service's Response to the Motion for Leave to File Reply asks the ALJ to grant to the Local Governments a limited intervention, providing guidance that issues relating to street lighting rules and regulations, including street lighting acquisitions, are beyond the scope of this proceeding.[31] Public Service is seeking an advisory opinion from the ALJ. However, the ALJ cannot realistically anticipate the details of answer testimony, if any, the Local Governments or other intervenors (*e.g.,* Boulder or Denver) may file or whether any such answer testimony is rationally related and responsive to any direct testimony. At this time, the ALJ cannot speculate about the contents of any such answer testimony and thus is unable to determine whether it would be appropriate. The ALJ will not issue such an advisory opinion.[32]

36. The Local Governments established that the decision in this proceeding would substantially affect their "pecuniary or tangible interests" as contemplated by Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1. Since Public Service has no opposition to their

[31] Public Service's Response to the Motion to Intervene of the City of Arvada et al., at pages 2 and 4.

[32] *See People v. Trupp*, 51 P.3d 985, 986 (Colo. 2002) ("a court has no jurisdiction to render an advisory opinion on a controversy that is not yet ripe, or to decide a case on speculative, hypothetical, or contingent set of facts"); Decision No. C15-0979, ¶ 3 at page 2, in Proceeding No. 13A-0686EG.

Motion to Intervene on these grounds, the ALJ will grant permissive intervention to the Local Governments.

37. As of the issue date this Decision, the parties to this proceeding are Public Service, the OCC, Staff, Boulder, Denver, EOC, COSS/SEIA, Molson Coors, Climax, Vote Solar, CEC, SWEEP, FEA, Walmart, Kroger, and the Local Governments.

C. Burdens of Proof and Future Motions in Limine.

38. As the party seeking Commission approval of the rates and tariffs filed in this proceeding, Public Service bears the burden of going forward and the burden of proof with respect to the relief sought; the burden of proof is by a preponderance of the evidence.[33] The Intervenors have the burden of going forward and the burden of proof with respect to each of their proposals on cost of service study methodologies, rates, tariffs and other issues by a preponderance of the evidence.[34] That is, the intervenors have the burden of going forward and the burden of proof by a preponderance of the evidence with respect to the relief they may seek in answer testimony and cross-answer testimony.

39. The preponderance standard requires that the evidence of the existence of a contested fact outweighs the evidence to the contrary. That is, as the trier of fact the ALJ must determine whether the existence of a contested fact is more probable than its non-existence.[35] A

[33] *See* Rule 1500 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1; §§ 13-25-127(1) and 24-4-205(7), C.R.S.

[34] *See Western Distributing Co. v. Diodoso*, 841 P.2d 1053, 1057-1059 (Colo. 1992); *see also Public Utilities Comm'n v. District Court*, 186 Colo. 278, 527 P.2d 233 (1974).

[35] *See Mile High Cab, Inc. v. Colorado Public Utilities Comm'n.,* 302 P.3d 241, 246 (Colo. 2013); *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985).

party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.[36]

40. When the preponderance standard applies, the evidence in the record must be substantial. Substantial evidence "is more than a scintilla [;] ... it must do more than create a suspicion of the fact to be established. It means such relevant evidence as a reasonable [person's] mind might accept as adequate to support a conclusion [;] … it must be enough to justify, if a trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."[37]

41. When answer testimony, cross-answer testimony, or rebuttal testimony has been filed in this proceeding, any party may file an appropriate motion in limine to exclude all or part of such testimony as inappropriate, improper, or unlawful. All motions in limine shall include legal arguments with supporting authorities that demonstrate a proper legal basis to exclude such testimony.

III. ORDER

A. It Is Ordered That:

1. The Motion to Permissively Intervene Out-of-Time filed by The Kroger Co. on December 28, 2020 is granted, consistent with the findings, discussion, and conclusions in this Decision.

2. The Motion for Leave to file a Reply in Support of the Motion to Intervene filed on December 18, 2020 by the Cities of Arvada, Aurora, Centennial, and Thornton, the Towns of Erie

[36] *Schocke v. Dept. of Revenue,* 719 P.2d 361, 363 (Colo. App. 1986).

[37] *City of Boulder v. Public Utilities Comm'n.*, 996 P.2d 1270, 1278 (Colo. 2000).

and Windsor, and the Colorado Communications and Utility Alliance (collectively, Local Governments) is denied, consistent with the findings, discussion, and conclusions in this Decision.

3. The Motion to Intervene filed on December 9, 2020 by the Local Governments is granted, consistent with the findings, discussion, and conclusions in this Decision.

4. Other advisements in this decision shall be in effect in this proceeding, unless amended by subsequent decision of the Administrative Law Judge or the Commission.

5. 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

Doug Dean,
Director