

Decision No. R08-1297

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08R-459ALL

IN THE MATTER OF THE PROPOSED RULES IMPLEMENTING STATUTORY
AMENDMENTS TO EX PARTE DISCLOSURE REQUIREMENTS UNDER HOUSE
BILL 08-1227.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
ADOPTING RULES**

Mailed Date: December 19, 2008

I. STATEMENT

1. The above-captioned rulemaking proceeding was commenced on October 23, 2008, when the Colorado Public Utilities Commission (Commission) issued its Notice of Proposed Rulemaking (NOPR) in this matter. *See*, Decision No. C08-1108. A copy of the proposed rule was attached to the NOPR.

2. The NOPR was published in the November 10, 2008 edition of *The Colorado Register*.

3. The purpose of this proceeding is to amend certain Commission Rules of Practice and Procedure found at 4 *Code of Colorado Regulations* (CCR) 723-1 (Rules). In particular, the proposed amendment seeks to add a new subsection to Rule 4 CCR 723-1-1105(b).

4. The proposed amendment seeks to implement the provisions of House Bill (HB) 08-1227, which amended § 40-6-122, C.R.S. That statute, entitled *Ex parte communications – disclosure*, requires Commissioners and Administrative Law Judges (ALJs) to “file memoranda of all private communications to or from interested persons concerning matters under the

commissioners' or judges' jurisdiction." *See*, § 40-6-122(1), C.R.S. Among other things, the statute requires each memorandum filed, to include "a statement that the subject matter of the communication did not relate to any pending *adjudicatory* proceeding before the commission." *See*, § 40-6-122(3), C.R.S. (emphasis added). However, HB 08-1227 added a new subsection (5) that provides that "[a]s used in this section, an 'adjudicatory proceeding' *does not* include a rulemaking proceeding or discussions on pending legislative proposals." *See*, § 40-6-122(5), C.R.S. (2008) (emphasis added).

5. The proposed rule at subsection (b)(V) would bring Rule 4 CCR 723-1-1105 into conformance with the intent of HB 08-1227 by adding: "[c]ommunications relating to a pending non-adjudicatory proceeding" to the list of communications that are not prohibited communications with Commissioners, ALJs, Commission Advisory Staff, and Commission Trial Advocacy Staff.

6. The statutory authority for the proposed rule is found in §§ 40-2-108, 40-6-101, and 40-6.5-106(3)(b), C.R.S.

7. Written comments were filed in this proceeding by or on behalf of Qwest Corporation (Qwest); AT&T Communications of the Mountain States, Inc. and TCG Colorado (collectively, AT&T); the Colorado Telecommunications Association (CTA); and the Union Pacific Railroad Company (Union Pacific).

8. A hearing was conducted in this matter on December 2, 2008. Representatives of the following entities appeared and provided oral comments at the hearing: Staff of the Commission (Staff), Qwest, and Union Pacific.

9. During the course of the hearing, Qwest offered comments and response to the proposals put forth by CTA. Qwest offered oral comments, and subsequently filed written

comments on December 5, 2008, regarding its concerns with CTA's proposals. Staff indicated it had no further proposals or modifications to the rule as proposed in the NOPR, and recommended the undersigned ALJ adopt a permanent rule, utilizing identical language as adopted in the emergency rulemaking pursuant to Commission Decision No. C08-0622.

10. At the conclusion of the rulemaking hearing, the ALJ took the matter under advisement. Pursuant to § 40-6-109, C.R.S., the ALJ hereby transmits to the Commission the record of this proceeding, as well as a written recommended decision.

II. FINDINGS, DISCUSSION, AND CONCLUSION

A. Standards of Conduct, Rule 1105, Prohibited Communications - Generally

11. As indicated *supra*, HB 08-1227 amended §§ 40-6-122 and 40-6.5-106, C.R.S., by removing rulemaking proceedings and discussions on pending legislative proposals from the definition of "adjudicatory proceeding" as used in those specific statutes. Those statutory sections generally relate to *ex parte* communications with Commissioners and ALJs. HB 08-1227 became effective July 1, 2008.

12. Because the Commission's rules in effect on July 1, 2008, were in conflict with the changes brought about by HB 08-1227, the Commission adopted an emergency rule which added Commission Rule 4 CCR 723-1-1105(b)(V) which adds a fifth exemption from prohibited communications under Rule 1105(a) for "[c]ommunications relating to a pending non-adjudicatory proceeding."

13. The NOPR proposed making permanent, the emergency rule adopted earlier, utilizing identical language. Included in the NOPR, was language indicating that the Commission was still evaluating whether further changes to the *ex parte* rules was necessary and was gaining experience in the use of a "permit but disclose" type proceeding. Should further

improvements in the communications process be necessary, the Commission indicated it would commence a future rulemaking to propose additional rules.

14. In written and oral comments, Union Pacific expressed concern that the proposed rule would make it nearly impossible to converse with any Staff member (advisory or trial) concerning an ongoing adjudicatory matter. Union Pacific notes that because railroad matters are handled by only one Staff member, once a matter is filed, which is typically contested, communications are cut off if such communication deals with the “merits, substance, or outcome of the proceeding.” Consequently, railroads are precluded from asking legitimate design questions and from developing enough information to put together a reasonable cost estimate. Union Pacific believes this issue would be alleviated with an additional Staff member handling railroad affairs. As such, Union Pacific argues that the rules should not apply to crossing protection cases.

15. The ALJ concludes that Union Pacific’s concerns are a staffing issue that would exist with or without the proposed rule change. While Union Pacific’s comments and concerns are appreciated, resolution of those concerns is beyond the scope of this rulemaking. The ALJ notes however, that Union Pacific is only precluded from conferring with Staff, when Staff intervenes in a particular matter. Otherwise, applicants such as Union Pacific are free to confer with Staff regarding matters such as crossing designs and cost estimates.

16. In its written comments, AT&T expresses concern that Rule 1105(a) seems to impliedly allow Trial or Advisory Staff to engage in *ex parte* communications as conduits to the Commission. AT&T’s concerns lie in the current wording of the rule, specifically that portion that provides: “Commission staff members that are not specifically assigned as trial advocacy or advisory staff shall not act as conduits of communication in a manner that would violate this rule

if the communication had occurred directly.” According to AT&T, while Advisory Staff serves a unique function, it nonetheless believes that no Staff member, whether advisory or trial, should be given special access to any party in a contested case by acting as a conduit for that party.

17. While AT&T’s concern appears to be that the wording of the rule impliedly permits Trial or Advisory Staff to engage in *ex parte* communication as conduits to the Commission, the undersigned ALJ is comfortable that the intent of the Commission is otherwise. Rule 1105(a) provides that with the exclusion of several clearly articulated exceptions, *ex parte* communications “concerning any disputed substantive or procedural issue, or facts or allegations at issue, *are strictly prohibited.*” (emphasis added). The second sentence of Rule 1105(a), with which AT&T expresses concern, simply adds a second layer of fortification to that prohibition. Consequently, while it is axiomatic that *ex parte* communications are strictly prohibited, particularly among Trial Advocacy Staff and Advisory Staff assigned to a particular matter, the intent of the rule is that the *ex parte* prohibition may not be circumvented by use of Commission Staff (trial or advisory) not specifically assigned to a particular case. Consequently, the ALJ will not incorporate AT&T’s recommendation to amend the language of Rule 1105(a).

18. Next, AT&T takes issue with Rule 1105(b)(V). AT&T argues that some rulemakings, such as those related to switched access or other “hotly contested issues,” may create unique concerns where an interested party’s permissible comment under the rule, might influence a decision to adopt a particular rule that could adversely impact some carriers. AT&T recommends the Commission clarify that such a situation is prohibited by §§ 24-4-103(4)(a) and (a.5), C.R.S., which require the creation of a record from which an agency must promulgate its rules.

19. While AT&T's comments and observations are appreciated, the undersigned ALJ does not share its concerns regarding the record in rulemaking proceedings. Section 40-6-122, C.R.S., requires disclosure of *ex parte* communications in adjudicatory matters pending before the Commission. HB 08-1227 merely clarifies that adjudicatory proceedings do not include rulemaking proceedings or discussions regarding pending legislative proposals. In turn, Rule 1105(b)(V) reiterates the statutory directive allowing communications with individuals without the requirement to disclose such communications through memoranda. It is not apparent to the undersigned ALJ that Rule 1105(b)(V) in any way is intended, or has the practical effect of undermining the requirement under the Administrative Procedures Act that "[t]he rules promulgated by [an] agency shall be based on the record." *See*, § 24-4-103(4)(a), C.R.S. Such record is to consist of "proposed rules, evidence, exhibits, and other matters presented or considered, matters officially noticed, rulings on exceptions, any findings of fact and conclusions of law proposed by any party, and any written comments or briefs filed." *Id.* Because any decision which promulgates rules must be based on the record, it is improbable that a rule would be promulgated based on individual comments outside a rulemaking proceeding. As such, the ALJ finds that further clarification of the rule is not necessary at this time.

20. CTA filed written comments in which it indicates that it is an advocate for clarifications to the Commission's rules that specify the kind and nature of private communications with the Commission that are not prohibited. CTA recommends the adoption of rules that specify the circumstances in proceedings before the Commission that do not constitute an adjudicatory proceeding and which, as a consequence, present circumstances in which private communications are not prohibited.

21. Relying on case law that characterizes rulemaking and ratemaking proceedings as quasi-legislative and therefore non-adjudicatory matters,¹ CTA advocates adoption of a rule that provides that private communications with the Commission concerning policies or standards of general applicability, as well as the setting of new rates for the future, are in the nature of rule-making, and as such are exempt from the category of prohibited communications. Additionally, CTA argues that routine tariff and advice letter filings are not *per se* adjudicatory proceedings until formal suspension action is taken by the Commission. Following this line of reasoning, CTA further advocates for an additional reference in Rule 1105 that until the Commission takes suspension action, private communications by an interested person with the Commission concerning a filed tariff or advice letter does not constitute a prohibited communication.

22. Through oral comments made at hearing, as well as in follow-up written comments, Qwest expresses concerns regarding CTA's proposals. While Qwest has no qualms with the rule that permits *ex parte* communications regarding *proposed* tariffs, price lists, and time schedules, it nevertheless takes the position that *ex parte* communications, once a tariff, price list or schedule is filed with the Commission, are not permitted.

23. Upon the filing of a tariff, Commission Rule 4 CCR 723-1-1305(a) permits interested parties to file written protests with the Commission. Qwest is concerned that should CTA's proposed amendment be added to Rule 1105, *ex parte* communications will be utilized to by-pass the current written protest process, resulting in a loss by the filing carrier or utility of the ability to learn of, and respond to, the concerns raised in protest letters. Qwest argues that written protest letters provide an efficient means of providing utilities or carriers that file tariffs

¹ See generally, *Avicom, Inc. v. PUC*, 955 P.2d 1023 (Colo.1998); *Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph Co.*, 826 P.2d 278 (Colo. 1991); and *Homebuilders Association of Metropolitan Denver v. PUC*, 720 P.2d 552 (Colo. 1986).

with the ability to understand and respond to the concerns raised in the protest, and to propose amendments to the proposed tariff to resolve those concerns.

24. While CTA argues that tariff filings are non-adjudicatory until the Commission suspends and sets them for hearing, Qwest takes the position that the decision to suspend the tariff is itself a decision that has a substantial affect on the rights of the utility or carrier. Qwest points out that when a tariff is suspended, the burden immediately shifts to the utility or carrier to support and defend the tariff. Thus, the decision to suspend or not suspend arguably involves a determination of rights. Consequently, Qwest recommends that tariffs and advice letters filed with the Commission remain part of the existing written protest process, rather than become an exception to the prohibition against *ex parte* communications.

25. The undersigned ALJ agrees with Qwest's arguments and recommendations. The intent of the legislature in enacting HB08-1227 is unmistakably spelled out in the language of the amendment to § 40-6-122(5), C.R.S.: as utilized in this section, "an 'adjudicatory proceeding' does not include a rulemaking proceeding or discussions on pending legislative proposals." *Id.* To expand the reach of the section to the degree proposed by CTA, in the opinion of the ALJ, would contravene the intent of the legislature. For purposes of § 40-6-122, C.R.S., the definition of an adjudicatory matter is limited by subsection (5) to rulemaking matters or discussions of pending legislative proposals only. Nothing would indicate the legislature intended to stretch the exceptions to tariffs filed with the Commission. The rule as it is proposed in the NOPR, is consistent with the spirit and intent of HB 08-1227. Therefore, the ALJ declines to include the amendments to Rule 1105 proposed by CTA.

26. While the undersigned ALJ declines to adopt amendments to the rule as proposed in the NOPR, it is noted that the Commission expressed a willingness to revisit this rule in a

future rulemaking if it determines that the communication process can be improved by establishing default guidelines. Until that time, it is in the public interest to adopt Rule 1105(b)(V) without amendment, as proposed in the NOPR.

27. Commission Rule 4 CCR 723-1-1105(b)(V), attached to this Decision is clear and understandable, is necessary to conform with existing law, does not conflict with other provisions of law, and does not duplicate other rules. The Rule is in the public interest and therefore should be adopted.

28. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Rule 4 *Code of Colorado Regulations* 723-1-1105(b)(V), contained in Attachment A to this Order is adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 CODE OF COLORADO REGULATIONS (CCR) 723-1

PART 1

RULES OF PRACTICE AND PROCEDURE

BASIS, PURPOSE, AND STATUTORY AUTHORITY.

The basis and purpose of these rules is to advise the public, regulated entities, attorneys, and any other person of the Commission's rules of practice and procedure. These rules of practice and procedure are promulgated in order to properly administer and enforce the provisions of Title 40 of the Colorado Revised Statutes and in order to regulate proceedings before the Commission.

The statutory authority for these rules is found in §§ 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.

* * *

[indicates unaffected, omitted material]

STANDARDS OF CONDUCT

* * *

1105. Prohibited Communications – Generally.

- (a) Except as provided in paragraph (b) of this rule, ex parte communications concerning any disputed substantive or procedural issue, or facts or allegations at issue, are strictly prohibited. Commission staff members that are not specifically assigned as trial advocacy or advisory staff shall not act as conduits of communication in a manner that would violate this rule if the communication had occurred directly.
- (b) Notwithstanding the provisions of paragraph (a) of this rule, prohibited communications do not include:
 - (l) Procedural, scheduling, or status inquiries, or requests for information that have no bearing on the merits, substance, or outcome of the proceeding;

- (II) Protests or comments made by any customer of a utility, concerning any proposed tariff, price list, or time schedule;
- (III) Communications made in educational programs or conferences, or in meetings of an association of regulatory agencies, except for substantive issues involving pending matters;
- (IV) Communications relating to legislation, appropriations, budget, or oversight matters, except for substantive issues involving pending matters; or
- (V) Communications relating to a pending non-adjudicatory proceeding.

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