

Decision No. C11-0354

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09A-324E

IN THE MATTER OF THE APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., (A) FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE SAN LUIS VALLEY-CALUMET-COMANCHE TRANSMISSION PROJECT, (B) FOR SPECIFIC FINDINGS WITH RESPECT TO EMF AND NOISE, AND (C) FOR APPROVAL OF OWNERSHIP INTEREST TRANSFER AS NEEDED WHEN PROJECT IS COMPLETED.

DOCKET NO. 09A-325E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO (A) FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE SAN LUIS VALLEY TO CALUMET TO COMANCHE TRANSMISSION PROJECT, (B) FOR SPECIFIC FINDINGS WITH RESPECT TO EMF AND NOISE, AND (C) FOR APPROVAL OF OWNERSHIP INTEREST TRANSFER AS NEEDED WHEN PROJECT IS COMPLETED.

**ORDER ADDRESSING MARCH 9, 2011
CORRESPONDENCE FROM
TRINCHERA RANCH TO DOUG DEAN**

Mailed Date: April 1, 2011
Adopted Date: March 30, 2011

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of correspondence dated March 9, 2011 from Blanca Ranch Holdings, LLC and Trinchera Ranch Holdings, LLC (collectively, Trinchera Ranch), an intervenor in this docket, to Mr. Doug Dean, Commission Director and Custodian of Records. Trinchera Ranch also filed this letter in this docket.

2. In that letter, Trinchera Ranch discusses the communications between Chairman Binz and Commissioner Baker and SolarReserve, a developer of concentrating solar technology, and between Chairman Binz and Mr. Scott Wilensky, an employee of Public Service Company of Colorado (Public Service), one of the applicants in this docket. Trinchera Ranch attaches to its letter the disclosure memoranda filed by Chairman Binz and Commissioner Baker pursuant to § 40-6-122, C.R.S., with respect to each of these three meetings.

3. In the letter, Trinchera Ranch also makes the following statement “[g]iven that Chairman Binz has publicly admonished Trinchera not to make any more filings with respect to the Commissioners’ *ex parte* communications and that the Commission has rejected Trinchera’s motions on this issue, Trinchera will not repeat its arguments that these types of meetings are improper, especially given that the Commission was considering the Recommended Decision at the time of the meetings.”

4. The Commission believes that the above statement refers to the remarks made by Chairman Binz during the January 5, 2011 Commissioners Weekly Meeting (CWM), while the Commission was deliberating on the motion to strike attachments to the exceptions of Trinchera Ranch and all arguments concerning same, filed on December 21, 2010 by Public Service.

5. In that motion, Public Service argued that the Commission should strike certain attachments to the December 16, 2010 exceptions filed by Trinchera Ranch to Recommended Decision No. R10-1245 (Recommended Decision), and all arguments related to the attachments. Public Service argued these attachments are an improper attempt to introduce new evidence after the evidentiary record has been closed. Four of these attachments pertained to disclosures related to *ex parte* communications that occurred from June 23, 2010 to August 19, 2010, filed by Commissioner Baker pursuant to § 40-6-122, C.R.S.

6. The Commission memorialized its rulings with respect to the motion to strike in Decision No. C11-0021, mailed January 7, 2011. The Commission granted the motion, in part.

B. Discussion

7. To put the remarks referenced in Trinchera Ranch's March 9, 2011 letter into a proper context, it is important to note that Chairman Binz made these remarks while ruling on Public Service's motion to strike. The issue before the Commission was whether the arguments regarding the communications between the Commissioners and disclosures filed under § 40-6-122, C.R.S., were an appropriate subject of exceptions to the Recommended Decision, given that these arguments would introduce new information into the record.

8. It is also important to note that, in its exceptions, Trinchera Ranch discussed the rulings made by the Commission on its earlier motion to disqualify and dismiss,¹ not filing a new motion to disqualify and/or dismiss. Hence, in Decision No. C11-0021, at ¶ 9, the Commission questioned the relevance of communications that Commissioner Baker had from June 23, 2010 to August 19, 2010, to whether he made a correct decision on the motion in February and April of 2010.²

9. Finally, the remarks referenced by Trinchera Ranch are not contained in Decision No. C11-0021. Section 40-2-106, C.R.S., requires the Commission to make its decisions by a written order. Because these remarks are not contained in a written order, they do not have the force of a Commission decision.

¹ Trinchera Ranch filed a motion to disqualify and dismiss on January 25, 2010, a supplement to the motion on January 27, 2010, and a request for reconsideration of Decision No. C10-0125 filed on March 2, 2010.

² Decision No. C10-0124, mailed February 10, 2010, by which Commissioner Tarpey disqualified himself and Chairman Binz and Commissioner Baker did not; Decision No. C10-0125, mailed February 10, 2010, by which the Commission denied the motion to dismiss; and Decision No. C10-0368, mailed April 19, 2010, by which the Commission denied the request for reconsideration.

10. In sum, we clarify that the remarks made by Chairman Binz during the January 5, 2011 CWM should not be construed by Trinchera Ranch (or any other party in this docket) as a bar to seek any appropriate relief, in good faith, with respect to the communications made by the Commissioners and disclosed pursuant to § 40-6-122, C.R.S. The Commission will consider, in good faith, any appropriate motions. The fact that the Commission denied Trinchera Ranch's previous motion pertaining to the *ex parte* communications has no bearing on how the Commission will decide motions on this subject in the future.

11. That said, we also note that Trinchera Ranch must overcome a significant burden with respect to any such motion to disqualify and/or dismiss, for several reasons. First, § 40-6-122(3), C.R.S., states that the subject matter of *ex parte* communications may not *relate to* any pending adjudicatory proceeding before the Commission (*emphasis added*).^{3,4} The connection between the merits of this case and the meetings referenced by Trinchera Ranch in the March 9, 2011 letter appears to be attenuated.

12. Second, the Commission and its members serve multiple roles.⁵ In Decision No. C11-0021, the Commission found that meetings with solar developers are critical to the functions of its members. We reiterate that it is critical for the Commissioners to stay informed regarding the latest developments in concentrating solar and other technologies.

³ In Decision No. C10-0368, at ¶ 8, the Commission found that § 40-6-122, C.R.S., implicitly prohibits *ex parte* communications, the subject matter of which relates to a pending adjudicatory proceeding, and does not just require disclosure of communications that do not.

⁴ The term "relate to" cannot be taken to extend to the further stretch of its indeterminacy. *See, Egelhoff v. Egelhoff*, 532 U.S. 141, 146 (2001) (internal citations omitted) (discussing the term "relate to" in the context of pre-emption).

⁵ *See, Order Denying Preliminary Injunction*, dated January 13, 2011, in *Intermountain Rural Elec. Ass'n v. Binz*, Case No. 2010 CV 9121, Denver District Court, by Judge Martinez (noting the Commission and its members serve multiple roles, in the context of participation in the legislative process and adjudicating cases brought before them).

13. Third, the legislative history of § 40-6-122, C.R.S., shows the General Assembly did not intend to create *ex parte* requirements that would restrict the flow of vital information to the Commissioners or to hamstringing the Commission so that it cannot efficiently conduct its business.⁶

14. Finally, even assuming, *arguendo*, the communications referenced by Trinchera Ranch in its March 9, 2011 correspondence involve any impropriety or an appearance thereof, the Rule of Necessity would prevent the disqualification of Chairman Binz or Commissioner Baker in this case. *See*, § 24-4-105(3), C.R.S., Decision No. C10-0368, at ¶¶ 14-18 and cases cited therein.

II. ORDER

A. The Commission Orders That:

1. The correspondence dated March 9, 2011 from Blanca Ranch Holdings, LLC and Trinchera Ranch Holdings, LLC to Mr. Doug Dean should not be construed by any party in this docket as a bar to seek any appropriate relief, in good faith.

2. This Order is effective on its Mailed Date.

⁶ *See*, Report titled “1992 Sunset Review: Colorado Public Utilities Commission,” by the Office of Policy, Research, and Regulatory Reform, Department of Regulatory Agencies, dated June 1992 (Sunset Report), pp. 54-56, available at <http://www.dora.state.co.us/opr/archive/92puc.pdf>. This report preceded Senate Bill 93-18, codified at § 40-6-122, C.R.S. This report is relevant, because, if the legislative history shows intent to adopt recommendations of the expert commission, the statute should be interpreted in a manner that is consistent with the report issued prior to introduction of the bill. *L.E.L. Constr. v. Goode*, 867 P.2d 875, 878 (Colo. 1994). The General Assembly adopted the recommendations contained in the Sunset Report on the issue of *ex parte* communications via Senate Bill 93-18.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 30, 2011.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

MATT BAKER

Commissioners

COMMISSIONER JAMES K. TARPEY
NOT PARTICIPATING.