



**APPROVED**

Movant shall serve copies of this ORDER on any pro se parties, pursuant to CRCP 5, and file a certificate of service with the Court within 10 days.

**Dated: Jan 13, 2011**

**Michael A. Martinez**

**District Court Judge**

**CO DISTRICT COURT DISTRICT CLERK**

**Filing Date: Jan 13 2011 5:32PM MST**

**Filing ID: 35373133**

**Review Clerk: Linda Denton**

<p>DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80202 (720) 865-8301</p> <hr/> <p>INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION, a Colorado nonprofit corporation,  Plaintiff,  v.  RONALD J. BINZ, in his capacity as Chairman of the Colorado Public Utilities Commission,  Defendant.</p>	<p><b>▲ COURT USE ONLY ▲</b></p>
	<p>Case No.: 2010 CV 9121  Division: 1 Courtroom:</p>
<p align="center"><b>ORDER DENYING PRELIMINARY INJUNCTION</b></p>	

This matter came before the Court for a hearing on the Motion for Preliminary Injunction filed by Plaintiff, Intermountain Rural Electric Association. Prior to the hearing, the Court received and reviewed a Stipulation entered into by Plaintiff and Defendant Ronald J. Binz, Chairman of the Colorado Public Utilities Commission (“Chairman Binz”), setting forth some basic facts and an agreement concerning the authenticity of a number of documents, including the emails that form the basis of Plaintiff’s requested

relief. In addition, several parties moved to intervene, which neither Plaintiff nor Chairman Binz opposed, and the Court granted the interventions. The Court reviewed written responses opposing the entry of a preliminary injunction filed by Chairman Binz, intervenors Encana Oil & Gas (USA), Chesapeake Energy Corporation and Noble Gas, Inc. (collectively, “Gas Intervenors”) and intervenor Public Service Company of Colorado (“Public Service”). The Court also reviewed Plaintiff’s reply.

The parties appeared at the hearing before the Court on December 13, 2010, and ably argued their positions. Arguments were presented by the above parties and another intervenor, Western Resource Advocates. Due to the parties’ request that this matter proceed through argument rather than an evidentiary hearing, the Court considered all of the documents appended to the various legal pleadings as well as the stipulation, giving each its appropriate weight.

## **BACKGROUND**

Plaintiffs challenge the propriety of the conduct of Chairman Binz with respect to his involvement in the development of legislation that was enacted in 2010 as the Clean Air Clean Jobs Act, § 40-3.2-201, C.R.S. *et seq.* (the “Act”) and subsequent involvement in Public Utilities Commission (“PUC”) Docket No. 10M-245E, which docket was opened to address Public Service’s emission reduction plan filed pursuant to the Act. As its basis for alleging impropriety,

Plaintiff relies on emails sent or received by Chairman Binz in the February to April 2010 time frame that evidence his back and forth discussion with others involved in the crafting of the Act. Plaintiff also asks the Court to consider the propriety of Chairman Binz's participation as a speaker on June 10, 2010 at an event sponsored by Bentek Energy, LLC, an energy markets analytics company. The evidence of alleged inappropriate conduct of Chairman Binz presented to the Court took place no later than June 10, 2010. This lawsuit was commenced on November 22, 2010, and the motion for preliminary injunction was filed on December 1, 2010.

Plaintiff seeks to enjoin Chairman Binz's further participation in PUC Docket No. 10M-245E. The PUC has already undertaken evidentiary hearings in PUC Docket No. 10M-245E, which hearings concluded November 20, 2010. The PUC further undertook public deliberations on December 6, 8, and 9, 2010. At the time a hearing was conducted on the Motion for Preliminary Injunction, the PUC was in the process of memorializing those deliberations in a written order. Pursuant to § 40-3.2-205(2), C.R.S., the PUC's written order must issue no later than December 15, 2010.

### **JURISDICTION**

Jurisdiction in this Court is proper. The Court rejects Public Service's suggestion that § 40-6-115(4), C.R.S., precludes the exercise of this Court's jurisdiction over the Motion for Preliminary Injunction.



## STANDARD OF REVIEW

Motions for preliminary injunction made pursuant to C.R.C.P. 65 are reviewed according to the criteria set forth in *Rathke v. Macfarlane*, 648 P.2d 648 (Colo. 1982). The party seeking a preliminary injunction must show: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief; (3) that there exists no plain, speedy and adequate remedy available at law; (4) that granting the preliminary injunction will not disserve the public interest; (5) that the balance of equities favors the injunction; and (6) an injunction will preserve the *status quo* pending a trial on the merits. *Rathke*, 648 P.2d at 653-54. The burden is on the moving party to establish *all* six criteria. “If each criterion cannot be met, injunctive relief is not available.” *Id.* at 654. Failure to establish any one of the six *Rathke* criteria warrants denial of a motion for preliminary injunction. *Keller Corp v. Kelley*, 187 P.3d 1133, 1137 (Colo. App. 2008).

Because injunctive relief “constitutes a form of judicial interference with continuing activities, the courts have generally been reluctant to grant such relief where ‘the actions complained of are those of departments of the executive and legislative branches of government, in exercise of their authority.’” *Rathke*, 648 P.2d at 651 (quoting *Plaquemines Parish Comm’n v. Perez*, 379 So.2d 1373 (La. 1980)). Such injunctive relief should be granted

sparingly and with full conviction on the part of the trial court of its urgent necessity. *Bd. of County Comm'rs, County of Eagle v. Fixed Base Operators, Inc.*, 939 P.2d 464, 466-67 (Colo. App. 1997) (citing *Rathke*, 648 P.2d at 651)).

### **FINDINGS OF LAW**

In applying the six *Rathke* factors, the Court recognizes that the PUC is a unique agency with unique statutory and constitutional authorities and unique responsibilities, requiring its commissioners to perform quasi-executive, quasi-legislative and quasi-judicial activities. The PUC's responsibilities to the public are far reaching and include promulgating rules, setting retail utility rates, and assessing penalties. *See e.g.*, Colo. Const. art. XXV; § 40-3-102, C.R.S. Also, the Public Utilities Law contains specific language addressing the ability of commissioners to engage in discussions on pending legislative proposals, the standards of conduct applicable to them, and the standards for disqualification. *See* § 40-6-122, -123, -124, C.R.S.

Plaintiff has not demonstrated a reasonable probability of success on the merits. A movant seeking to disqualify a PUC commissioner must overcome the rebuttable presumption that actions of administrative bodies are regular and valid absent a personal, financial or official stake in the outcome.

*Mountain States Tel. & Tel. Co. v. Public Utilities Comm'n*, 763 P.2d 1020, 1028 (Colo. 1988) (“[T]here is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities.”); *Venard v. Dep't of Corr.*, 72

P.3d 446, 449 (Colo. App. 2003) (“Absent a personal, financial or official stake in the outcome evidencing a conflict of interest on the part of the decisionmaker, an adjudicatory hearing is presumed to be impartial.”). The emails presented to the Court were written in furtherance of Chairman Binz’s essential duties on behalf of the PUC. The public should expect the PUC chairman and his fellow commissioners to exercise their quasi-legislative responsibility by participating in the legislative process on the public’s behalf and assisting with drafting of proposed legislation. Commissioner participation in the legislative process is inherent in the PUC’s duty. Engaging PUC commissioners in the legislative process should be encouraged, because their participation will likely offer technical expertise and a perspective that will enhance the final legislation. Indeed, it is unreasonable to expect the PUC’s commissioners to idly wait to weigh in on proposed legislation until the legislative language has been drafted by another, less experienced party. Furthermore, this Court’s understanding of the operation of state government does not indicate that to be appropriate. In contrast, granting Plaintiff’s Motion for Preliminary Injunction would chill this valuable activity that advances the public interest. The Court finds the emails at issue here evince proper legislative communication by Chairman Binz and are within his quasi-legislative responsibilities; therefore, Plaintiff is unlikely to succeed in the merits by proving a violation of § 40-6-124, C.R.S.

Plaintiff has not demonstrated the existence of real, immediate, and irreparable injury in the event the Motion for Preliminary Injunction is denied. The PUC has already conducted its evidentiary hearing and public deliberations in PUC Docket No. 10M-245E. Plaintiff's election to bring this action after these events and only shortly before the written decision is issued is itself grounds to find the absence of real, immediate, and irreparable injury.

Plaintiff has not demonstrated that there exists no plain, speedy and adequate remedy available at law. Judicial review of final PUC decisions is permitted as set forth at § 40-6-115, C.R.S. Plaintiff may avail itself of this process to challenge the decision of Chairman Binz and the Commission on the disqualification issue presented in PUC Docket No. 10M-245E.

Plaintiff's relief would result in a disservice to the public interest. The PUC is a three-member body. Recusal of a commissioner significantly hinders the PUC in carrying out its constitutional and statutory duties and is not warranted based on the argument presented to this Court. The Court does not find a quorum of two commissioners would be sufficient under these circumstances, as Plaintiff suggests. Moreover, Chairman Binz has already expressed his views on all decision points raised by the parties in PUC Docket 10M-245E. Further, granting Plaintiff's Motion for Preliminary Injunction would needlessly chill commissioner participation in the legislative process, to the detriment of the public.

For similar reasons, the Court finds the balance of the equities does not favor granting the Motion for Preliminary Injunction. Further, Chairman Binz has already presided over the 13 days of evidentiary hearings and participated in the public deliberations at which all issues in PUC Docket No. 10M-245E were decided.

Finally, Plaintiff has not demonstrated that the immediate disqualification of Chairman Binz will preserve the *status quo*. The *status quo* in PUC Docket No. 10M-245E is a commission consisting of three commissioners. Removing Chairman Binz from further participating in PUC Docket No. 10M-245E would significantly alter the *status quo*.

In addition, Plaintiff has alleged a violation of Amendment 41 (Colo. Const art. XXIX) in its Motion for Preliminary Injunction. Chairman Binz's travel to Houston, Texas to speak at a conference sponsored by Bentek Energy, LLC, forms the basis for this claim. However, relief under Colo. Const. art XXIX is beyond the

scope of the Complaint in this matter. Therefore, the Court cannot consider this allegation at this time.

Plaintiff has not met its burden as to any of the *Rathke* criteria. Plaintiff's Motion for Preliminary Injunction is therefore DENIED.

Done this \_\_\_\_\_ day of December, 2010.

BY THE COURT:

\_\_\_\_\_  
MICHAEL A. MARTINEZ  
District Court Judge

This document constitutes a ruling of the court and should be treated as such.

**Court:** CO Denver County District Court 2nd JD

**Judge:** Michael Anthony Martinez

**File & Serve  
Transaction ID:** 35023192

**Current Date:** Jan 13, 2011

**Case Number:** 2010CV9121

**Case Name:** INTERMOUNTAIN RURAL ELEC ASSOC vs. BINZ, RONALD J

**Court Authorizer**

**Comments:**

Plaintiff's objections are noted and overruled. The language objected to is consistent with the stated remarks and intent of the Court in issuance of the findings and Order in this matter.

**/s/ Judge Michael Anthony Martinez**