

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0818E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR AN ORDER APPROVING EXPENSES INCURRED FOR THE
PERIOD JANUARY 2013 THROUGH DECEMBER 2013 THAT ARE RECOVERED
THROUGH THE ELECTRIC COMMODITY ADJUSTMENT CLAUSE AND
APPROVING THE CALCULATION OF 2013 SHORT TERM SALES MARGINS.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
DENYING MOTION TO RECONSIDER**

Mailed Date: October 31, 2014

TABLE OF CONTENTS

I. <u>STATEMENT</u>	1
II. MOTION TO RECONSIDER.....	2
III. DISCUSSION.....	3
A. Standard for Permissive Intervention	3
B. Due Process	4
C. § 40-6-109(1), C.R.S.	5
D. § 40-6.5-104, C.R.S.....	7
E. Recent Case Law	8
IV. ORDER.....	9
A. The Commission Orders That:	9

I. STATEMENT

1. On August 1, 2014, Public Service Company of Colorado (Public Service), filed a Verified Application that seeks Commission approval of the 2013 fuel, purchased energy, and

purchased wheeling costs that Public Service collected through the Electric Commodity Adjustment clause. That filing commenced this proceeding.

2. On August 4, 2014, the Commission issued its Notice of Application Filed (Notice). That Notice established an intervention period, which expired on September 3, 2014.

3. On September 2, 2014, Ms. Leslie Glustrom filed her Motion to Intervene.

4. On September 3, 2014 the Colorado Office of Consumer Counsel (OCC) filed its Notice of Intervention of Right, Entry of Appearance, and Request for Hearing. The OCC is an intervenor as of right and a party in this proceeding.

5. On September 10, 2014, by minute order, the Commission referred this matter to an Administrative Law Judge (ALJ).

6. On September 12, 2014, Public Service filed its Objection to Motion to Intervene of Leslie Glustrom.

7. By Decision No. R14-1139-I, issued on September 17, 2014, the intervention of Leslie Glustrom was denied and a prehearing conference was scheduled for October 2, 2014.

8. On October 7, 2014, Ms. Glustrom filed her Exceptions to Decision R14-1139-I. In her Exceptions she requests that Decision No. R14-1139-I be set aside and her Motion to Intervene be granted.

9. On October 14, 2014, Public Service filed its Response to Glustrom's Exceptions to Interim Order No. R14-1139-I.

II. MOTION TO RECONSIDER

10. Interim Decision No. R14-1139-I, issued by the undersigned ALJ on September 17, 2014, was not certified appealable to the Commission *en banc* pursuant to

4 *Code of Colorado Regulations* (CCR) 723-1-1502(d) of the Commission's Rules of Practice and Procedure.

11. Since Interim Decision No. R14-1139-I was not certified appealable the Exceptions to Decision No. R14-1139-I shall be viewed as a Motion to Reconsider.

III. DISCUSSION

A. **Standard for Permissive Intervention**

12. Commission Rule 1401(c) of the Rules of Practice and Procedure 4 CCR 723-1, requires persons seeking permissive intervention to show that their interests “would not otherwise be adequately represented.” This rule is similar to Colorado Rule of Civil Procedure 24(a), which provides that, even if a party seeking intervention has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties. *See Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n*, 214 P.3d 451, 457 (Colo. App. 2008). This is true even if the party seeking intervention will be bound by the case's judgment. *See Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, 374 P.2d 494, 495–96 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city). The test for adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

13. Further, Rule 1401(c), 4 CCR 723-1, requires that a movant who is a “residential consumer, agricultural consumer, or small business consumer” must discuss in the motion whether the distinct interest of the consumer is either not adequately represented by the OCC or

inconsistent with other classes of consumers represented by the OCC. As set forth in §§ 40-6.5-104(1) and (2), C.R.S., the OCC has a statutory mandate to represent the interests of residential ratepayers. The Colorado Supreme Court (Supreme Court or Court) stated that “if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate.” *Feigen v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

B. Due Process

14. Ms. Glustrom argues that “[o]ne of the fundamental precepts of American law is that citizens shall be protected from the taking of life, liberty or property without due process of law.”¹ Ms. Glustrom states that due process is protected by the United States Constitution and the Colorado Constitution. Further, she notes that these principles apply in administrative hearings, and that “the fundamental components of due process include a notification requirement, the right to be heard and the right to seek judicial review....”²

15. This matter which concerns the prudence of expenses incurred by Public Service from January 2013 through December 2013 does not implicate a property or other right of any individual ratepayer. In *Pub. Serv. Co. of Colo. v. Pub. Util. Comm’n of Colo.*, 653 P.2d 1117, 1120–21 (Colo. 1982), the Supreme Court held that ratepayers do not have a property right to continued utility service at the same rate. The Court concluded that to have a property interest “a person must have more than an abstract need or desire for it ... he must instead have a legitimate claim of entitlement to it.” *Id.*

¹ Glustrom RRR, at 4.

² Glustrom Exceptions, at 5 (stating that “only parties to PUC dockets may seek judicial review ...” citing § 40-6-115(1), C.R.S.).

16. Ms. Glustrom's filing does not define what claim of "life, liberty, or property" she believes could be deprived in this prudency review case. Since the Court has found that an individual ratepayer does not have a property or any other due process right in electricity rate cases, it follows that a ratepayer does not have a property right in disputing the prudency of a utility's expenditures.

C. § 40-6-109(1), C.R.S.

17. Ms. Glustrom argues that the Decision violates § 40-6-109(1), C.R.S., focusing on its language that persons "interested in or affected by any order that may be made by the commission in such proceeding and who shall have become parties to the proceeding shall be entitled to be heard..." She cites other language from this section saying "[a]ll parties in interest shall be entitled to be heard in person," thus allowing her to appear *pro se*. Ms. Glustrom also refers to other Commission proceedings in which she was granted intervention. Ms. Glustrom contends this language coupled with previous Commission interventions vests her with rights to appear and participate.³

18. Section 40-6-109(1), C.R.S., states:

At the time fixed for any hearing before the commission, any commissioner, or an administrative law judge, or, at the time to which the same may have been continued, the applicant, petitioner, complainant, the person, firm, or corporation complained of, and such persons, firms, or corporations as the commission may allow to intervene and such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceeding and who shall have become parties to the proceeding shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence.

19. This provision creates two classes of parties that may participate in Commission proceedings: those who may intervene as of right and those whom the Commission permits to

³ Glustrom Exceptions, at 4-7.

intervene. *Pub. Serv. Co. of Colo. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 327 (Colo. 1999). Within those two classes, the statute describes four categories of parties allowed to participate in Commission proceedings: (1) the applicant, petitioner, or complainant; (2) the person, firm, or corporation complained of; (3) persons, firms, or corporations the Commission *may allow to intervene*; and (4) persons, firms, or corporations *that will be interested in or affected by Commission orders* in the proceedings and who shall become parties to the proceeding. § 40-6-109(1), C.R.S. (emphasis added).

20. The Colorado Legislature gave the Commission the authority to promulgate “such rules as are necessary for the proper administration and enforcement of this title ...” § 40-2-108(1), C.R.S. Pursuant to this authority, the Commission adopted 4 CCR 723-1-1401 which implements § 40-6-109, C.R.S. Rule 1401(c) says:

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.

(Italics and Bolding supplied)

21. The Supreme Court held that, consistent with Commission rules, the party “will be interested in or affected by” the language of § 40-6-109(1), C.R.S., which requires “*a substantial interest* in the subject matter of the proceedings [whose] intervention will not unduly broaden the issues.” *Trigen-Nations Energy Co.*, 982 P.2d at 327 (emphasis added). Rule 1401(c) corresponds with this standard, allowing permissive intervention upon showings that the proceeding may substantially affect the pecuniary and tangible interests of the movant.

22. In denying Ms. Glustrom's intervention, the undersigned ALJ found that she "fails to demonstrate pecuniary or tangible interests not shared by other residential ratepayers. She has failed to show that other parties in this proceeding cannot represent her interests in this matter."⁴ While Ms. Glustrom contrasts her positions from those taken by the OCC, the undersigned ALJ determined "these examples fail to demonstrate how her interests would differ from other similarly situated residential customers ..."⁵ Ms. Glustrom did not demonstrate a pecuniary or tangible interest not shared by other ratepayers for purposes of § 40-6-109(1), C.R.S., and Rule 1401(c).

D. § 40-6.5-104, C.R.S.

23. In addition, Ms. Glustrom argues that the Decision violates § 40-6.5-104, C.R.S., the statute describing OCC's mandate to represent residential, agricultural, and small business consumers. Subsection 40-6.5-104(2), C.R.S., concludes by saying "[n]othing in this section shall be construed to limit the right of any person, firm, or corporation to ... intervene in proceedings or other matters before the commission." Ms. Glustrom claims this statute "make[s] it clear that the presence of the OCC must **not** be used to limit the right of any person to intervene in proceedings before the Commission."⁶

24. Regarding intervention, the Supreme Court expressly stated that "if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate." *Feigen v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

⁴ Decision R14-1139-I, ¶ 16.

⁵ *Id.*

⁶ Glustrom Exceptions, at 9 (emphasis in original).

25. Ms. Glustrom's reliance only on the statement "[n]othing in this section shall be construed to limit the right of any person, firm, or corporation to ... intervene in proceedings or other matters before the commission"⁷ ignores the existence of § 40-6-109(1), C.R.S. Section 40-6.5-104(2), C.R.S., does not eliminate the Commission's authority to decide whether petitions to intervene meet the requirements of § 40-6-109(1), C.R.S., and Commission Rule 1401. Statutes should be interpreted in a manner that avoids conflict between two or more statutory provisions. *Safeco Ins. Co. v. Westport Ins. Corp.*, 214 P.3d 1078, 1081 (Colo. App. 2009). The Commission and Colorado courts have interpreted §§ 40-6.5-104(2) and 40-6-109(1), C.R.S., to mean the existence of the OCC does not limit the ability of persons, firms, or corporations to intervene in Commission proceedings, *so long as* they meet the intervention standards in § 40-6-109, C.R.S., and Rule 1401, in addition to applicable case law, which requires those parties have a substantial interest in the proceeding and would not be otherwise adequately represented. *See, Trigen-Nations Energy Co.*, 982 P.2d 316.

26. Ms. Glustrom's arguments are not compelling that the OCC's representation is not adequate for purposes of this proceeding. Contrary to Ms. Glustrom's assertions, denying Ms. Glustrom's intervention complies with §§ 40-6.5-104(2) and 40-6-109, C.R.S.

E. Recent Case Law

27. Recent Colorado cases support the denial of the Motion. The District Court for the City and County of Denver (District Court) ruled that the Commission did not violate Ms. Glustrom's due process rights or Commission statutes when it denied Ms. Glustrom's motion for permissive intervention.⁸ The District Court upheld denial of permissive intervention

⁷ Glustrom Exceptions at 9 (emphasis omitted)

⁸ *Glustrom v. Public Utilities Comm'n*, 11CV8131 (Order Dismissing Appeal, July 11, 2012).

where the Commission found that Ms. Glustrom has not alleged: pecuniary or tangible interests not shared by residential ratepayers in general; that her interests would not be adequately represented by the OCC; and that there is bad faith, collusion, or negligence on behalf of the OCC.⁹

IV. **ORDER**

A. The Commission Orders That:

1. The Exceptions to Interim Decision R14-1139-I of Leslie Glustrom construed as a Motion to Reconsider are denied.

2. The Parties shall be held to the advisements in this Decision.

3. 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.

4. 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

⁹ *Glustrom v. Public Utilities Comm'n*, 11CV8131 (Order Dismissing Appeal, July 11, 2012).

administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. 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

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director