

Decision No. R19-0751-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0315E

ANNE PACE, ET AL.,

COMPLAINANTS,

V.

SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.,

RESPONDENT.

PROCEEDING NO. 19F-0351E

TOWN OF CRESTONE,

COMPLAINANT,

V.

SAN LUIS VALLEY RURAL ELECTRIC COOPERATIVE, INC.,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
GRANTING MOTION TO ACCEPT
LATE-FILED AMENDED COMPLAINT AND
EXTENDING DISPOSITIVE MOTION DEADLINE**

Mailed Date: September 12, 2019

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I. STATEMENT

A. Summary.

1. This Decision grants the alternative relief requested by the Motion to Accept Amended Formal Complaint *Nunc Pro Tunc*, or In the Alternative, to Accept Late-Filed Amended Formal Complaint (Motion or Motion to Accept Late Amended Complaint), and extends the deadline to file dispositive motions.

II. BACKGROUND, FINDINGS, AND CONCLUSIONS

A. Background and Arguments.

2. During the August 27, 2019 prehearing conference Complainants¹ made a verbal request for consent to amend their Formal Complaint. *See* Decision No. R19-0722-I. The Administrative Law Judge (ALJ) granted the request during the prehearing conference; at the same time, the ALJ established August 30, 2019 as the deadline for Complainants to file an amended complaint. *Id.* This was later memorialized by Decision No. R19-0722-I.

¹ References to Complainants are to Complainants in Proceeding No. 19F-0315E (consolidated with Proceeding No. 19F-0351E).

3. The Commission's E-Filing System for this proceeding reflects an Entry of Appearance on Behalf of Complainants and Amended Formal Complaint (Amended Complaint) as being filed on September 3, 2019 at 8:00 a.m. on behalf of Complainants. On September 4, 2019, Complainants filed the Motion asking for the Amended Complaint to be accepted retroactive to August 30, 2019, or, alternatively, for the Amended Complaint to be accepted despite being late-filed. The Motion states that the Town of Crestone does not oppose the Motion.

4. On September 5, 2019, San Luis Valley Rural Electric Cooperative, Inc. (San Luis Valley) filed a Response to the Motion, objecting to the requested relief.

5. On September 6, 2019 at 12:37 a.m., due to the time constraints involved in this proceeding, the ALJ informally notified the parties by email that she is granting the Motion, and she will issue a written decision. The email is included in the record for this proceeding.

6. The Motion states that counsel prepared the Amended Complaint as quickly as possible after being retained by Complainants on the same day the pleading was due, but that due to an extraordinarily tight turnaround, counsel was unable to commence filing the Amended Complaint until close to 5:00 p.m. on August 30, 2019. Motion at ¶¶ 3 and 5. The Motion asserts that counsel faced technical difficulties with electronically filing the Amended Complaint, and that by the time the pleading was uploaded and accepted for e-filing, it was 5:02 p.m. *Id.* at ¶ 6. The Motion also states that counsel received a time stamp indicating the filing was made at 5:02 p.m.

7. The Motion acknowledges Commission Rule 1204(b), requiring all filings to be made by 5:00 p.m. on the relevant deadline, but argues the rule should be waived (as permitted by Rule 1003). Motion at ¶¶ 2 and 9; *see* Rules of Practice and Procedure, Rules 1204(b) and Rule 1003, 4 *Code of Colorado Regulations* (CCR) 723-1.

8. The Motion argues that accepting the Amended Complaint will not prejudice the parties given that the discovery cut-off is not until September 27, 2019 and the hearing is scheduled in November 2019. Motion at ¶ 8. The Motion also asserts that accepting the Amended Complaint serves judicial economy and the public policy to allow ratepayers to effectively participate in Commission proceedings because it better defines the Complainants' claims and requests for relief. *Id.* at ¶ 9.

9. In its Response, San Luis Valley argues that the Amended Complaint should not be accepted because Complainants again disregarded Commission Rules and the ALJ's directives. Response at ¶ 1.

10. The Response states that although the Motion's Certificate of Service indicates that the Amended Complaint was emailed to San Luis Valley and its counsel on August 30, 2019, but that neither of them received it on that. *Id.* at fn. 1. The Response does not indicate whether San Luis Valley or its counsel received the Amended Complaint by email on another date.

11. San Luis Valley asserts that accepting the Amended Complaint prejudices it because there is a very narrow window to conduct discovery before substantive motions are due on October 11, 2019. *Id.* at ¶ 4. San Luis Valley argues that if the Amended Complaint was timely filed on August 30, 2019, it could have received notice that day, and could have prepared discovery requests tailored to the Amended Complaint, to be issued during the first week of September. *Id.* at ¶ 5. San Luis Valley asserts that it was unable to appropriately tailor and issue its discovery requests during the first week of September as planned because it did not know which complaint was at issue. *Id.*

12. The Response also argues that Complainants were supposed to seek leave to amend their Complaint per Rule 1309(a), 4 CCR 723-1. *Id.* at ¶ 7. The Response argues that

Rule 1309(a) contemplates that parties will have an opportunity to respond to a request for leave to amend a complaint before such a request is granted, and that they were denied this opportunity because no motion was filed. *Id.* at ¶¶ 9-10.

13. In addition, the Response asserts that counsel for Complainants had ample time to review Commission Rules and ensure that the Amended Complaint was filed by 5:00 p.m. on the deadline.

B. Findings, Analysis, and Conclusions.

14. Complainants' counsel was unable to file the Amended Complaint until 5:02 p.m. on August 30, 2019. Because Rule 1204(b) requires that filings made after 5:00 p.m. will be deemed filed at 8:00 a.m. on the next business day, this two-minute delay caused the Amended Complaint to be deemed filed on September 4, 2019 (the next business day). 4 CCR 723-1. As a result, the Amended Complaint was filed after the August 30, 2019 deadline established by Decision No. R19-0722-I.

15. Complainants' counsel was retained the same day that the Amended Complaint was due, and, despite the very short turn-around, counsel drafted and finalized the 15-page Amended Complaint, and began the process of filing it electronically before the 5:00 p.m. deadline. Counsel faced technical difficulties in making the filing. Based on all of this, the ALJ finds that Complainants' counsel took reasonable and appropriate measures to file the Amended Complaint by the August 30, 2019 deadline. This is demonstrated by the fact that the Amended Complaint was submitted just two minutes past the deadline.

16. The Amended Complaint provides significantly more information about the nature of the issues and claims that Complainants seek to be addressed in this proceeding than the original Complaint. *Compare* Amended Complaint to Complaint filed on June 4, 2019. Rejecting

the Amended Complaint would prejudice Complainants, potentially severely limiting their ability to participate and seek relief in this proceeding. The ALJ finds that in the circumstances, it is not appropriate to punish the Complainants by rejecting the Amended Complaint based on their counsel's late filing.

17. The ALJ also finds merit in Complainants' argument that the Amended Complaint will promote judicial economy since it better defines their claims, and therefore will aid the ALJ and the parties in adjudicating this matter. In fact, this came up during the August 27, 2019 prehearing conference.²

18. For the reasons discussed above, the ALJ finds that Complainants have established good cause to accept the late-filed Amended Complaint.

19. The ALJ rejects San Luis Valley's argument that Complainants were required to file a motion seeking leave to amend their complaint as meritless. This argument directly contradicts San Luis Valley's admission that, "the Administrative Law Judge ordered that any amended complaint be filed by August 30, 2019" (Response at ¶ 2), and its many other statements plainly acknowledging that an amended complaint—*not* a motion to amend the complaint—was due on August 30, 2019. Response at ¶¶ 2, 4, and 5. It further contradicts San Luis Valley's assertion that it is prejudiced by the late filing because it could have issued discovery requests tailored to the Amended Complaint during the first week of September 2019 had it been filed on August 30, 2019. *Id.* at ¶ 5.

² Specifically, during the prehearing conference, before the ALJ addressed Complainants' request to amend their Complaint, counsel for San Luis Valley commented that he was struggling to identify each individual Complainants' claim, concern, or position. The ALJ agreed that it is difficult to identify each individual Complainants' claims based on the Complaint, and that since Complainants had already mentioned that they wish to amend their Complaint, that perhaps everyone could receive needed clarity through an amended complaint.

20. What is more, there should be no question that Complainants requested leave to amend their Complaint during the August 27, 2019 prehearing conference and that the ALJ granted that request during the prehearing conference. Decision No. R19-0722-I explicitly confirms that Complainants complied with Rule 1309(a) by requesting leave to amend their Complaint and that this request was granted. Specifically, the Decision states:

In addition, Complainants requested approval to amend the Complaint filed on June 4, 2019 (June 4, 2019 Complaint). The ALJ granted this request, and ordered that the amended complaint be filed by August 30, 2019. *See* Rule 1309(a), 4 CCR 723-1.

Decision No. R19-0722-I, ¶ 14. Any remaining doubt should be eliminated by the following additional language in the Decision:

Deadline to Amend Complaint. The June 4, 2019 Complaint in this consolidated proceeding may be amended. The amended complaint must be filed and served *on or by August 30, 2019*. If an amended complaint is filed, the evidentiary hearing scheduled in this matter will address the merits of the amended complaint.

Id. at Ordering ¶ 4 (emphasis in original).

21. San Luis Valley (and counsel) were present at the prehearing conference, and thus, could have objected to the ALJ's decision to grant Complainants' verbal request to amend their Complaint. But, no such objection was made. As a result, the ALJ also rejects San Luis Valley's arguments that it has been denied the opportunity to object to the Amended Complaint before it was filed.

22. Moreover, during the prehearing conference, though the ALJ plainly stated that she grants Complainant's verbal request to amend their Complaint, San Luis Valley did not object to the request being made verbally, rather than by motion. San Luis Valley did not request

that Complainants be required to file a written motion to amend³ the Complaint so that it could object in writing. The ALJ finds that San Luis Valley failed to timely object to the process employed to make and decide the request to amend the Complaint. As a result, the ALJ rejects San Luis Valley's belated attempt to do so now.

23. San Luis Valley argues that the late-filed Amended Complaint prejudices its ability to timely issue discovery requests in order to meet the October 11, 2019 deadline to file dispositive motions. The ALJ will extend that deadline to minimize possible prejudice to San Luis Valley. Moreover, on September 6, 2019, the ALJ informed San Luis Valley that the Motion would be granted, thereby also minimizing potential prejudice. In addition, San Luis Valley may file an answer specifically objecting to any aspect of the Amended Complaint, and may also present legal arguments objecting to any aspect of the Amended Complaint in a dispositive motion.

24. The ALJ finds that in the circumstances here, the prejudice to Complainants that would result from denying the Motion outweighs the potential prejudice to San Luis Valley.

25. Based on the foregoing, the ALJ grants the Motion's alternative relief, and will accept the Amended Complaint as filed on September 3, 2019.

III. ORDER

A. It Is Ordered That:

1. The Administrative Law Judge grants the alternative relief sought by the Motion to Accept Amended Formal Complaint Nunc Pro Tunc, or In the Alternative, to Accept Late-Filed Amended Formal Complaint. The Amended Complaint is accepted as filed on September 3, 2019.

³ Commission Rule 1302(a) does not require that a written motion to amend a complaint.

2. The deadline to file and serve dispositive motions in Decision No. R19-0722-I is extended from October 11, 2019 to October 18, 2019.
3. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director