

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 19A-0409E

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IN THE MATTER OF APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY FOR THE ACQUISITION OF, AND APPROVAL OF COST RECOVERY FOR, THE MANCHIEF GENERATION FACILITY AND VALMONT 7 & 8.

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**INTERIM DECISION OF  
ADMINISTRATIVE LAW JUDGE  
STEVEN H. DENMAN  
ON INTERVENTIONS, SCHEDULING A PREHEARING  
CONFERENCE, AND GIVING ADVISEMENTS**

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Mailed Date: September 27, 2019

**TABLE OF CONTENTS**

I. STATEMENT.....	2
A. Procedural History.....	2
B. Further Extension of the Decision Deadline. ....	4
C. Interventions. ....	5
1. Interventions as of Right. ....	5
2. Permissive Intervention Standards.....	6
3. Unopposed Motions for Permissive Intervention.....	8
4. Ms. Glustrom’s Request for Permissive Intervention. ....	9
D. Prehearing Conference. ....	16
E. Other Advisements. ....	19
II. ORDER.....	20
A. It Is Ordered That: .....	20

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**I. STATEMENT****A. Procedural History.**

1. On July 23, 2019, Public Service Company of Colorado (Public Service or the Company) filed with the Colorado Public Utilities Commission (Commission or PUC) a Verified Application (Application) for Certificates of Public Convenience and Necessity (CPCNs) for the acquisition of: (1) the 301 MW Manchief generation facility (Manchief Facility); and (2) the 82 MW Valmont generation facility (Valmont 7 & 8). In the Application, Public Service also sought approval of the Company's cost recovery proposal relating to these two facilities. Public Service also filed the supporting testimony and attachments of three witnesses. This filing commenced the above-styled proceeding.

2. In the Application, Public Service reminds us that in Phase II of its 2016 Electric Resource Plan (ERP), the Commission approved the Company's Preferred Colorado Energy Plan Portfolio (Preferred CEPP), which was developed in collaboration with a diverse array of interested participants. In addition to the 660 MW of coal-fired generation that will be voluntarily retired to allow for implementation of the Preferred CEPP, Public Service states it will acquire approximately 1,100 MW of new wind resources (500 MW of which will be Company-owned), approximately 700 MW of new solar resources, 275 MW of new battery storage, and 383 MW of existing gas assets. The 383 MW of existing gas assets are the subject of this Application.<sup>1</sup>

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<sup>1</sup> Application at pages 1-2. See Decision No. C18-0761 (mailed September 10, 2018). ¶¶ 103 – 108 and 119 – 121 at pages 31 – 33 and 36, in Proceeding No. 16A-0396E (Phase II ERP Decision). The Commission required Public Service to file a CPCN application to acquire the natural gas-fired resources and to address cost recovery requests for those resources in the required CPCN application filing. *Id.*, ¶¶ 119 – 121 at page 36 and Ordering Paragraph No. 4 at page 42.

3. In the Application, Public Service requests the following approvals:
  - a) Approval of a CPCN to acquire, own, and operate the existing 301 MW Manchief Facility;
  - b) Approval of a CPCN to acquire, own and operate the existing 82 MW Valmont 7 & 8;
  - c) Approval to exercise an Early Purchase Option afforded by the terms of its Purchase and Sale Agreement (PSA) with the owner of Valmont 7 & 8 to bring that resource on-line in 2020, approximately two years earlier than the 2022 acquisition and in- service date of the facility contemplated in the approval of the CEPP (early acquisition is the Company's preferred alternative in this proceeding); and
  - d) Approval of the Company's cost recovery proposal for both the Manchief Facility and Valmont 7 & 8, which is described in the Application and includes acquisition adjustments for accounting purposes for both the Manchief Facility and Valmont 7 & 8 acquisitions.
4. On July 23, 2019, Public Service also filed a Motion for Extraordinary Protection of Highly Confidential Information. The merits of this motion will be addressed in a future Interim Decision.
5. On July 25, 2019, the Commission issued a Notice of Application Filed (Notice) establishing deadlines for the filing of intervention pleadings. Interested persons were to file motions to intervene within 30 days, or no later than August 26, 2019.<sup>2</sup> Commission Staff had seven additional days to file a notice of intervention of right. The Notice observed that Public Service had filed testimony with the Application and was seeking a Commission decision within 120 days.
6. During the Commission's weekly meeting held on September 4, 2019, the Application was deemed complete for purposes of § 40-6-109.5, C.R.S., and was referred to an

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<sup>2</sup> Since the 30-day deadline for interventions, pursuant to the Notice, as well as Rule 1401 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, fell on Saturday, August 24, 2019, the deadline was extended by operation of law until the next business day, or until Monday, August 26, 2019. Section 40-6-121, C.R.S.

Administrative Law Judge (ALJ) for disposition. This Proceeding was subsequently assigned to the undersigned ALJ.

**B. Further Extension of the Decision Deadline.**

7. As noted above, Public Service filed supporting direct testimony and attachments with its Application. Pursuant to § 40-6-109.5(1), C.R.S., when supporting testimony is filed with an application, the Commission's initial decision is due within 120 days after the application is deemed complete, or in this proceeding no later than January 2, 2020. Moreover, a recent amendment to § 40-6-109.5(1), C.R.S. (2019),<sup>3</sup> provides further that: "If the commission finds that additional time is required, it may, by separate order, extend the time for decision by an additional period not to exceed *one hundred thirty days*." (Emphasis added.)

8. A procedural schedule has not yet been proposed or adopted in this Proceeding. Based upon his review of the Application, the supporting direct testimony, and the intervention pleadings (to be discussed *infra*) filed in this proceeding, the ALJ has determined that issuing a decision on the Application within 120 days will not be possible. Therefore, pursuant to § 40-6-109.5(1), C.R.S. (2019), the ALJ will exercise his sound discretion to extend the decision deadline by this separate order for an additional 130 days, that is for a maximum period of 250 days or until May 11, 2020.

9. In the Application, Public Service requests, if the Commission approves the Early Purchase Option for Valmont 7 & 8 (with an in-service date of the summer of 2020), that the Commission issue its "final order" no later than the first quarter of 2020, or by March 31, 2020.

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<sup>3</sup> Section 40-6-109(1), C.R.S., was amended, effective on May 30, 2019, to give the Commission the discretion to extend the 120-day decision deadline on applications by an additional 130 days, for a total of 250 days. *See* Senate Bill 19-235, Section 16, at page 31; signed into law by Governor Jared S. Polis and effective on May 30, 2019.

Since the Early Purchase Option issue will be litigated in this Proceeding and that issue will not be resolved initially until the ALJ's Recommended Decision, the undersigned ALJ believes that truncating the decision deadline at this time is premature. The decision deadline will be extended to and including May 11, 2020.<sup>4</sup>

**C. Interventions.**

**1. Interventions as of Right.**

10. Rule 1401(b) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, governs interventions as of right and states in pertinent part: "A notice of intervention as of right, unless filed by Commission staff, shall state the basis for the claimed legally protected right that may be affected by the proceeding."

11. On August 20, 2019, the Colorado Office of Consumer Counsel (OCC) filed a Notice of Intervention of Right, Entry of Appearance and Request for Hearing (OCC's Intervention). OCC says it intervenes to determine if Public Service's proposed CPCNs and the cost recovery proposal "are just and reasonable and in the public interest."<sup>5</sup> OCC's Intervention is of right and identifies six issues it may address regarding the Application.

12. OCC's Intervention as of right is acknowledged. OCC became a Party to this Proceeding on August 20, 2019.

13. On August 29, 2019, Trial Staff of the Colorado Public Utilities Commission (Staff) filed a Notice of Intervention as of Right by Staff, Entry of Appearance, Notice Pursuant

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<sup>4</sup> By "final order," it is unclear whether Public Service means the Commission's decision on exceptions or its decision on rehearing, reargument, or reconsideration. Nevertheless, the ALJ concludes that to set a decision deadline to March 30, 2020, in order to accommodate Public Service's request for a "final order" by that date, would appear to prejudice the ALJ's decision on Public Service's request on the Early Purchase Option for Valmont 7 & 8. Therefore, the ALJ declines to set the decision deadline any earlier than the additional 130 days now permitted by § 40-6-109.5(1), C.R.S. (2019).

<sup>5</sup> OCC's Intervention, ¶ 5 at page 3.

to Rule 1007(a) and Rule 1401, and Request for Hearing (Staff's Intervention). Staff's Intervention is of right and identifies four specific issues it will raise and address in this Proceeding.<sup>6</sup>

14. Staff's intervention as of right is acknowledged. Staff became a Party to this Proceeding on August 29, 2019.

15. Both OCC and Staff request an evidentiary hearing on the Application.

## 2. Permissive Intervention Standards.

16. Rule 1401(c) of the Rules of Practice and Procedure, 4 CCR 723-1, states the minimum standards for permissive intervention in Commission proceedings and requires that:

*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. ... The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Motions to intervene by permission will not be decided prior to expiration of the notice period.*

(Emphasis added.)

17. Rule 1401(c) 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.<sup>7</sup> This principle is true

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<sup>6</sup> On September 9, 2019, Staff filed a corrected Intervention. The only correction from the original Staff Intervention was to change the name of its counsel listed in Paragraph 6 on page 3.

<sup>7</sup> *Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n.*, 214 P.3d 451, 457 (Colo. App. 2008).

even if the party seeking intervention will be bound by the case's judgment.<sup>8</sup> 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.<sup>9</sup>

18. In addition, Rule 1401(c), 4 CCR 723-1, requires additional discussion for certain motions purporting to represent ratepayer interests:

If a motion to permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss 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.

Pursuant to § 40-6.5-104(1), C.R.S., the OCC has a statutory mandate to represent the interests of residential, agricultural, or small business ratepayers. “[I]f there is a party charged by law with representing [the individual’s] interest, then a compelling showing should be required to demonstrate why this representation is not adequate.”<sup>10</sup>

19. Pursuant to Rule 1500, 4 CCR 723-1, the person seeking leave to intervene by permission bears the burden of proof with respect to the relief sought.

20. Pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, “the responding party shall have 14 days after service of [a] motion, or such lesser or greater time as the Commission may allow, in which to file a response.” No response times for any of

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<sup>8</sup> *Denver Chapter of the Colo. Motel Ass’n v. City & County of Denver*, 374 P.2d 494, 495-496 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city).

<sup>9</sup> *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

<sup>10</sup> *Feign v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

the motions for permissive intervention were shortened. Hence, Public Service had 14 days after service of each motion for permissive intervention in which to file its response.

### 3. Unopposed Motions for Permissive Intervention.

21. On August 26, 2019, Southwest Generation Operating Company, LLC (SW Generation), through its counsel, filed a Motion to Intervene and Entry of Appearance (SW Generation Intervention). SW Generation is an independent power producer, serving Colorado and other western states, with its corporate headquarters in Denver, Colorado. SW Generation owns three gas-fired generating facilities in Colorado, including the Valmont facility, which it acquired in 2008 and has owned, operated, and maintained since then. SW Generation signed the PSA with Public Service to sell Valmont 7 & 8, and supports the Application. SW Generation states that it has a specific and substantial pecuniary interest, as well as a tangible interest, in this Proceeding. Because it has specific facts underlying the PSA, SW Generation asserts that no other party can represent its interests.<sup>11</sup>

22. On August 26, 2019, Western Resource Advocates (WRA), through its counsel, filed a Petition for Leave to Intervene (WRA Intervention). WRA is a non-profit conservation organization based in Boulder, Colorado. Some of WRA's supporters are customers of Public Service, and their financial contributions help WRA to advocate to reduce the environmental impacts of the electric industry. WRA asserts that this proceeding will directly impact WRA's substantial, tangible interest in reducing the environmental impact – and carbon dioxide

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<sup>11</sup> SW Generation Intervention at pages 1 through 5. SW Generation was granted permissive intervention in both Phase I and Phase II of Proceeding No. 16A-0396E, Public Service's 2016 ERP. See Decision No. C16-0663-I, ¶ 43 and Ordering Paragraph No. 11 at pages 11 and 18 (mailed July 15, 2016) and Decision No. C17-0796-I, ¶ 32 at pages 11 and 12 (mailed September 28, 2017).

emissions – of electricity generation. WRA claims no other party will adequately represent its interests. WRA states it was an intervenor and active participant in Proceeding No. 16A-0396E.<sup>12</sup>

23. Public Service did not file responses opposing either SW Generation’s Intervention or WRA’s Intervention.<sup>13</sup>

24. SW Generation and WRA, which do not represent residential consumers, agricultural consumers, or small business consumers, have demonstrated that this Proceeding may substantially affect each of their pecuniary or tangible interests pursuant to Rule 1401(c). Each also has demonstrated that its interests would not otherwise be adequately represented by other parties. The ALJ finds that SW Generation’s Intervention and WRA’s Intervention each satisfies the standards for permissive intervention of Rule 1401(c), 4 CCR 723-1, and their interventions will be granted. SW Generation and WRA are Parties in this Proceeding.

#### **4. Ms. Glustrom’s Request for Permissive Intervention.**

25. On August 23, 2019, Leslie Glustrom filed a Petition to Intervene (Glustrom Petition), seeking permissive intervention as an “Xcel ratepayer and shareholder.” Ms. Glustrom contests the Application, and argues that she may intervene pursuant to § 40-6-109(1), C.R.S., because she is “interested in and will be affected by” the outcome of this Proceeding. She also asserts that she has a substantial pecuniary interest in this proceeding under Rule 1401, since she is an Xcel Energy “ratepayer and a significant stockholder.”<sup>14</sup> Ms. Glustrom claims that her interests cannot be adequately represented by any other party, including the OCC, because no

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<sup>12</sup> WRA Intervention at pages 1 and 2, 5 and 6. See Decision No. C16-0663-I, ¶ 43 and Ordering Paragraph No.16 at pages 11 and 18, and Decision No. C17-0796-I, ¶ 32 at pages 11 and 12.

<sup>13</sup> Rule 1400(d) of the Rules of Practice and Procedure, 4 CCR 723-1, states that, “The Commission may deem a failure to file a response as a confession of the motion.”

<sup>14</sup> Glustrom Petition, at pages 1, 2, and 3.

other party has taken positions that have been significantly aligned with her positions on fossil fuel expenditures in Colorado.<sup>15</sup>

26. On August 30, 2019, Public Service filed its Response and Objection to the Petition to Intervene and Request for Hearing filed by Leslie Glustrom (Response).

27. Public Service objects to Ms. Glustrom's intervention. In its Response to the Glustrom Petition, Public Service claims that Ms. Glustrom does not have a statutory right to intervene, per § 40-6-109(1), C.R.S., and that she fails to show a pecuniary or tangible interest that is not adequately represented by other parties, including the OCC. Public Service advises the Commission that the instant Application is intertwined with two past proceedings – Proceeding No. 16A-0396E, the 2016 Public Service ERP in which the Commission approved the acquisition of existing gas-fired generation, and Proceeding No. 17A-0797E, the Accelerated Depreciation/Renewable Energy Standard Adjustment Reduction Application. In both Phase I and Phase II of the 2016 ERP Proceeding, the Commission denied Ms. Glustrom's requests to intervene in both Phase I and Phase II. The Commission also denied her intervention in Proceeding No. 17A-0797E.<sup>16</sup>

28. Public Service asserts that Ms. Glustrom's Petition does not satisfy the requirements of Rule 1401(c) and that her argument that the OCC cannot represent her interests fails, because her dispute with the OCC appears to be a disagreement over litigation strategy in past proceedings, or alternatively an impermissible attempt to re-litigate past Commission

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<sup>15</sup> *Id.*, at page 2.

<sup>16</sup> Public Service Response, at page 3 *See* Decision No. C16-0663-I, ¶ 49 and Ordering Paragraph No. 10 at pages 13 and 17; Decision No. C17-0796-I, ¶ 31 and Ordering Paragraph No. 11 at pages 11 and 21; and Decision No. C18-0117-I in Proceeding No. 17A-0797E (mailed February 15, 2018), ¶ 19 and Ordering Paragraph No. 3 at page 8. While Commissioner Francis Koncilja joined in the denial of Ms. Glustrom's permissive intervention in Phase I of the 2016 ERP, she would have granted it in Phase II and in the Depreciation case. *See* Decision No. C17-0796-I, Fn. 10 at page 11; and Decision No. C18-0117-I, Fn. 5 at page 8.

decisions.<sup>17</sup> Public Service concludes that Ms. Glustrom has failed to demonstrate how her interests as a customer cannot be represented by the OCC and her interests as a shareholder cannot be represented by Public Service.<sup>18</sup>

29. On September 3, 2019, Ms. Glustrom filed a Motion Requesting Leave to Reply (Motion for Leave) and Reply to Public Service's Response. In seeking leave, Ms. Glustrom asserts Public Service's Response contains incomplete and incorrect statements of law governing interventions at the Commission. Ms. Glustrom argues that, by failing to cite to Decision No. C19-0621-I (mailed on July 23, 2019) in Proceeding No. 19AL-026E and to §§ 40-6-109(1), 40-3-101, 40-3-102, and 40-2-123(1)(a), C.R.S., Public Service has presented an incomplete and inaccurate view of Colorado law and fails to paint a full picture of laws "designed to protect Xcel's Colorado customers from the Xcel's monopoly power" and to ensure that the PUC has given the fullest possible consideration to clean energy technologies.<sup>19</sup> Ms. Glustrom also asserts that, under § 40-6-109(1), C.R.S., she has previously been granted intervention in numerous Commission proceedings.<sup>20</sup>

30. Rule 1400(e)(IV) of the Rules of Practice and Procedure, 4 CCR 723-1, upon which Ms. Glustrom relies, requires that a motion for leave to file a reply to a response to a motion must demonstrate "an incorrect statement or error of law." Ms. Glustrom admits that the Commission has the discretion to grant or to deny permissive interventions.<sup>21</sup> Pursuant to Rule 1400(c), that discretion is based upon the ALJ's (or Commission's) determination of

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<sup>17</sup> Public Service Response, at pages 5 through 7.

<sup>18</sup> *Id.*, at page 7.

<sup>19</sup> Glustrom Motion for Leave, at pages 2 through 4.

<sup>20</sup> Motion for Leave, at page 3.

<sup>21</sup> *See Id.*, at page 3. *Public Service Co. v. Trigen-Nations Energy Co., L.L.P.*, 982 p.2d 316, 327 (Colo. 1999).

whether the person seeking permissive intervention has satisfied the requirements of Rule 1401(c).

31. The ALJ notes that several of the statutes, which Ms. Glustrom alleges that Public Service failed to cite, do not concern intervention in Commission proceedings. For example, § 40-3-101, C.R.S., requires that utility rates must be just and reasonable; § 40-3-102, C.R.S., recognizes the Commission's power to regulate utility rates, to correct utility abuses, and to prevent unjust discriminations and extortions in rates and tariffs; and § 40-2-123(1)(a), C.R.S., addresses Commission consideration of cost-effective implementation of new clean energy technologies in electric generation acquisitions. The ALJ finds that, in a dispute over whether the requirements for a permissive intervention have been met, these statutes do not govern whether a motion for permissive intervention should be granted or denied. There would have been no reason for Public Service to cite or to discuss these statutes in its Response. The ALJ concludes that Public Service's lack of citations to the foregoing statutes does *not* constitute "an incorrect statement or error of law" under Rule 1401(c). Ms. Glustrom's Motion for Leave fails on this ground.

32. Public Service's Response did discuss § 40-6-109(1), C.R.S., which Ms. Glustrom cites in passing as support for her intervention.<sup>22</sup> However, Ms. Glustrom is correct that Public Service did not cite or discuss Decision No. C19-0621-I in Proceeding No. 19AL-0268E (a pending Public Service electric rate case), in which Ms. Glustrom was granted permissive intervention.

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<sup>22</sup> See Public Service Response, at page 4; Motion for Leave, at pages 2 and 3.

33. The Colorado Supreme Court has consistently held that the Commission's prior decisions cannot be applied as binding precedent in future proceedings, even those involving the same utility. In other words, the doctrine of *stare decisis* does not apply to Commission decisions. The Commission's decision in each new proceeding must be based upon new, substantial evidence in the record of the new case.<sup>23</sup> Therefore, Decision No. C19-0621-I is not binding precedent and whether Ms. Glustrom's request to intervene in another case was granted does not compel the same result in the instant proceeding. Motions for permissive intervention in each case stand or fail on their own individual merits.

34. The ALJ finds that Public Service's failure to cite or to discuss Decision No. C19-0621-I in its Response does *not* constitute "an incorrect statement or error of law," within the meaning of Rule 1401(c). However, Public Service's analysis of that decision would have been helpful to the ALJ. Arguments in the Motion for Leave are intermingled with the Reply, which was confusing and required the ALJ to read the entire pleading. The ALJ will grant the Motion for Leave, and he will consider Ms. Glustrom's Reply.<sup>24</sup>

35. We now turn to the substantive arguments in Ms. Glustrom's Petition and Reply. First, the ALJ has reviewed Decision No. C19-0621-I and finds that its grant of Ms. Glustrom's permissible intervention in another case is conclusionary and thus not persuasive. Most of the decision about Ms. Glustrom's permissive intervention concerns a pejorative remark she made

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<sup>23</sup> See *Colorado Office of Consumer Counsel v. Public Service Company*, 877 P.2d 867, 876 (Colo. 1994); *Colorado-Ute Electric Ass'n. v. Public Util. Comm'n.*, *supra*, 602 P.2d at 865 (Colo. 1979); *B&M Services, Inc. v. Public Util. Comm'n.*, 429 P.2d 293, 295 (Colo. 1967).

<sup>24</sup> The ALJ recognizes that Ms. Glustrom is not a trained attorney, and may not be skilled in legal argument and pleading practice. For example, the proper procedure, and pleading practice, is to file a motion for leave to reply, citing the authorities and arguments for allowing a reply, and then to attach the reply with substantive arguments addressing arguments in the response. This best practice avoids making the judge read the reply before ruling on the motion for leave to reply. Commingling a motion for leave to reply with the substantive reply arguments risks denial of the motion, but could be construed as an intentional tactic. In the future, if Ms. Glustrom wishes to seek leave to reply to a response, she should use the proper pleading practice outlined in this footnote.

about the OCC (allegedly refusing to collaborate with her) and the OCC's defense and clarification of the facts.<sup>25</sup> After discussing Ms. Glustrom's arguments for and Public Service's arguments against her intervention, as well as the claims and defenses regarding the OCC, the decision recites case law and Rule 1401(c). Then the Decision merely states that:

Despite the objections of Public Service to Ms. Glustrom's request to intervene, we find that she also states good cause to allow her to intervene. Ms. Glustrom is on notice that she will be held to the same duties and responsibilities as an attorney in this matter.<sup>26</sup>

The decision sets forth no analysis or evaluation of the arguments for or against Ms. Glustrom's intervention or about whether or not she satisfied the several requirements of Rule 1401(c).

36. Second, in her Petition and Reply, Ms. Glustrom suggests she satisfies the language for intervention in § 40-6-109, C.R.S., because she is both "interested in" and will be "affected by" the decision on the merits in this proceeding. The Colorado Supreme Court has held that § 40-6-109(1), C.R.S., creates two classes of intervenors that may participate in Commission proceedings: those who may intervene as of right and those whom the Commission permits to intervene.<sup>27</sup> The Court has also interpreted the language "will be interested in or affected by" in § 40-6-109(1), C.R.S., to mean "substantial interest in the subject matter of the proceeding" is required.<sup>28</sup> Rules 1401(b), interventions as of right, and 1401(c), permissive interventions, were promulgated to implement § 40-6-109, C.R.S., and Rule 1401(c) defines the meaning of "substantial interest."

37. In *Glustrom v. Colorado Public Utilities Comm'n.*, Case No. 11CV8131 (Order Dismissing Appeal, July 11, 2012), the Denver District Court affirmed Commission decisions

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<sup>25</sup> See Decision No. C19-0621-I ¶¶ 21 through 23 at pages 13 through 15.

<sup>26</sup> Decision No. C19-0621-I, ¶ 29 at page 18.

<sup>27</sup> See, e.g., *RAM Broadcasting of Colo. v. Public Utilities Comm'n.*, 702 P.2d 746 (Colo. 1985).

<sup>28</sup> *Id.*, at 749.

that denied Ms. Glustrom's permissive intervention *inter alia* based on the Commission's interpretation of § 40-6-109(1), C.R.S.<sup>29</sup>

38. Second, the ALJ finds that Ms. Glustrom has failed to demonstrate that she has a substantial pecuniary interest in this proceeding pursuant to Rule 1401(c). She argues that she satisfies the "substantial pecuniary interest" requirement by being an Xcel Energy ratepayer and a significant stockholder.<sup>30</sup>

39. Based upon the Petition, Public Service's Response, and the Reply, the ALJ finds that Ms. Glustrom has failed to satisfy the requirement in Rule 1401(c) to "discuss whether the distinct interest of the consumer is either not adequately represented by OCC or inconsistent with other classes of consumers represented by the OCC." Ms. Glustrom failed to overcome the presumption of adequate representation of residential consumers by the OCC through evidence of bad faith, collusion, or negligence on behalf of OCC.<sup>31</sup> The ALJ finds that she failed to make a compelling showing of why OCC's representation is inadequate.<sup>32</sup>

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<sup>29</sup> The District Court affirmed the Commission's rejection of the same statutory argument and its denial of Ms. Glustrom's permissive intervention in Decision No. C11-0987 (mailed September 14, 2011), denying exceptions; and in Decision No. C11-1163 (mailed October 31, 2011), denying rehearing, reargument, or reconsideration of Decision No. C11-0987, in Docket No. 11A-510E. *See also e.g.*, Decision No. C14-1247 issued October 16, 2014, in Proceeding No. 14AL-0660E (denying Ms. Glustrom's intervention, including that she does not have a right to intervene pursuant to statute); and Decision No. C18-0117-I (mailed February 15, 2018), at page 6, in Proceeding No. 17A-0797E (the same, and concluding that, "Ratepayers, including Ms. Glustrom, do not have a 'right' to intervene based on § 40-6-109, C.R.S.")

<sup>30</sup> Glustrom Petition, at page 2. Ms. Glustrom does not argue that she has a substantial tangible interest in the outcome of this proceeding, and thus that aspect of Rule 1401(c) is not discussed here. Moreover, her Reply to Public Service's response does not address further the substantial pecuniary interest requirement.

<sup>31</sup> *Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, *supra*, 374 P.2d at 496 (finding no intervention of right in the absence of such factors as fraud, collusion, and bad faith); *Estate of Scott v. Smith*, *supra*, 577 P.2d at 313-314 (finding adequate representation where no evidence of bad faith, collusion, or negligence on the part of the representative).

<sup>32</sup> *Feign v. Alexa Group, Ltd.*, *supra*, 19 P.3d at 26 (requiring a compelling showing to demonstrate why representation by the party charged by law with representing the individual's interest is not adequate).

40. The ALJ finds, moreover, that Ms. Glustrom's interests as a stockholder are represented by Public Service, which has a fiduciary responsibility to its stockholders and is expected to represent their interests.

41. For all of these reasons, the ALJ denies Ms. Glustrom's request for intervention. As a non-party, Ms. Glustrom is welcome to present her concerns through public comments filed with the Commission.

42. The Parties to this Proceeding are Public Service, Staff, OCC, SW Generation, and WRA.

**D. Prehearing Conference.**

43. Staff and OCC request a hearing on the Application.

44. In anticipation of scheduling an evidentiary hearing, the ALJ will schedule a prehearing conference, in accordance with Rule 1409(a) of the Rules of Practice and Procedure, 4 CCR 723-1. The prehearing conference will be scheduled for **October 11, 2019 at 10:00 a.m.**

45. *At the prehearing conference*, the Parties must be prepared to discuss how many days will be needed for the hearing. The Parties must be prepared to discuss: (a) the date by which each intervenor will file answer testimony and attachments; (b) the date by which Public Service will file rebuttal testimony and attachments; (c) the date by which each intervenor may file cross-answer testimony and attachments;<sup>33</sup> (d) the date by which each party will file corrected testimony and attachments;<sup>34</sup> (e) the date by which each party will file prehearing motions, other than motions relating to discovery, but including any dispositive motions, motions

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<sup>33</sup> Cross-answer testimony shall respond only to the answer testimony of another intervenor.

<sup>34</sup> Filing of corrections is limited to correcting errors (*e.g.*, mathematical errors, typographical errors) in the testimonies or attachments as filed. Without a finding of good cause and leave of the ALJ, corrections may not be used for any other purpose (*e.g.*, to make material or substantive changes to prefiled testimony or attachments).

*in limine*, or motions to strike;<sup>35</sup> (f) whether a final prehearing conference is necessary and, if it is, the date for that prehearing conference; (g) the date by which the parties will file any stipulations or a settlement agreement;<sup>36</sup> (h) the date(s) for the evidentiary hearing, including a statement of how many days the parties will need to try this case; and (i) the date by which each party will file its post-hearing statement of position (statements of position will be simultaneous and no responses will be permitted).<sup>37</sup>

46. The following page limits on statements of position will be imposed: The statement of position to be filed by Public Service may not exceed 60 pages in length, exclusive of a table of contents and appendices; the statement of position to be filed by each intervenor may not exceed 30 pages in length, exclusive of a table of contents and appendices. If any intervenors file joint statements of position, the foregoing 30-page limit will apply to all joint statements of position.

47. Absent a waiver of the decision deadline pursuant to § 40-6-109.5(3), C.R.S. (2019), or a further extension of the deadline pursuant to § 40-6-109.5(4), C.R.S. (2019), the Commission decision in this Proceeding must issue no later than **May 11, 2020**. To allow time for statements of position, the recommended decision, exceptions, responses to exceptions, and a Commission decision on exceptions, the **evidentiary hearing in this matter must be *concluded* no later than January 22, 2020**.

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<sup>35</sup> This date shall be at least 21 calendar days before the first day of the hearing.

<sup>36</sup> This date shall be at least 14 calendar days before the first day of hearing.

<sup>37</sup> Post-hearing statements of position should be filed no later than 14 calendar days from the conclusion of the evidentiary hearing.

48. *At the prehearing conference*, the Parties must be prepared to discuss any matter pertaining to discovery if the procedures and timeframes contained in Rule 1405, 4 CCR 723-1 are not sufficient.

49. *At the prehearing conference*, the Parties must be prepared to discuss any matter pertaining to the treatment of information claimed to be confidential if the procedures and timeframes contained in Rules 1100 and 1101, 4 CCR 723-1, are not adequate. This discussion will include the treatment of additional information for which extraordinary protection may be sought, assuming that there may be such additional information.

50. *At the prehearing conference*, the Parties must be prepared to discuss whether the presentation of evidence at the hearing should be done through electronic exhibits to the fullest extent possible, with the exception of exhibits to be used for impeachment or rebuttal.

51. *At the prehearing conference*, a party may raise any additional issues relevant to this Proceeding.

52. The Parties must consult prior to the prehearing conference with respect to the matters to be discussed at the prehearing conference and are encouraged to present, if possible, a consensus procedural schedule and hearing date(s) that are acceptable to all Parties. The ALJ will order Public Service to coordinate these discussions.

53. If the Parties are able to reach agreements on a consensus procedural schedule, hearing date(s), and the other procedural matters addressed in this Decision, the ALJ encourages Public Service to make a filing **no later than October 7, 2019**, stating those agreements. Alternatively, the Company may present a consensus procedural schedule, hearing date(s), and the other procedural matters at the prehearing conference.

54. **The parties are advised, and are on notice, that** the ALJ will deem a Party's failure to attend or to participate in the prehearing conference to be a waiver of that Party's objection to the rulings made, the procedural schedule established, and the hearing dates scheduled during the prehearing conference.

**E. Other Advisements.**

55. **The Parties are advised that** an order may issue requiring that the presentation of evidence at the hearing shall be done through electronic exhibits to the fullest extent possible, with the exception of exhibits to be used for impeachment or rebuttal.

56. **The Parties are advised, and are on notice, that** they must be familiar with, and abide by, the Rules of Practice and Procedure, 4 CCR 723 Part 1. These Rules are available on-line at [www.dora.colorado.gov/puc](http://www.dora.colorado.gov/puc) and in hard copy format from the Commission.

57. At this point in the Proceeding, all Parties are represented by counsel. The ALJ calls counsels' attention to the requirement of Rule 1202(d), 4 CCR 723-1, that, "[e]very *pleading* of a party represented by an attorney shall be signed by the attorney, and *shall state* the attorney's address, telephone number, e-mail address, and attorney registration number." (Emphasis supplied.) **The Parties are advised, and are on notice, that** filings must comply with this requirement and with the other requirements found in the Commission's rules pertaining to filings made with the Commission.<sup>38</sup>

58. **The Parties are advised, and are on notice, that** timely filing with the Commission means that the Commission *receives* the filing by the due date. Thus, if a document

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<sup>38</sup> During the course of this Proceeding, the ALJ may have occasion to inform counsel, on short notice, of his rulings. The ALJ will make such notifications by e-mail and will rely solely on signature blocks of pleadings for the appropriate e-mail addresses. If any counsel's email address changes during the pendency of this Proceeding, please promptly update it with the Commission.

is placed in the mail on the date on which the document is to be filed, then the document is *not* filed timely with the Commission. Pleadings and other documents are filed with the Commission either by using the E-filings System, or by filing the original of a paper document along with three copies. Emailing pleadings and other documents to the ALJ, the Commissioners, the Director of the Commission, or other employees of the Commission **does not** constitute a proper filing under Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1.

59. **Each Party is specifically advised** that all filings with the Commission must also be served upon counsel for all other Parties, in accordance with Rule 1205 of the Rules of Practice and Procedure, 4 CCR 723-1.

60. **Each Party is specifically advised** that, pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, responding Parties (*i.e.*, the Parties that did not file a motion) have the procedural right to file a written response to motions within 14 days after service of the motion, unless that time is shortened by the ALJ or the Commission.

61. **The Parties are advised, and are on notice, that** the Commission has an E-Filings System available. If a party and/or its counsel are not registered to use the E-Filings System, they are requested to register at [www.dora.colorado.gov/puc](http://www.dora.colorado.gov/puc).

62. Other advisements may be provided in subsequent Interim Decisions.

## II. **ORDER**

### A. **It Is Ordered That:**

1. Pursuant to § 40-6-109.5(1), C.R.S. (2019), the time for issuance of the Commission's decision in this Proceeding shall be extended by an additional period of 130 days, or to and including May 11, 2020.

2. A prehearing conference in this proceeding is scheduled as follows:

DATE: October 11, 2019  
TIME: 10:00 a.m.  
PLACE: Commission Hearing Room  
1560 Broadway, 2nd Floor  
Denver, Colorado

3. Consistent with the discussion and findings *supra*, the matters identified in this Interim Decision will be discussed at the prehearing conference. Those Parties and counsel attending the prehearing conference must be prepared to address those matters identified in this Decision and must have authority to agree to a procedural schedule, to the resolution of all procedural matters, and to evidentiary hearing dates.

4. Failure of a Party or its counsel to attend or to participate in the prehearing conference shall constitute a waiver of any objection to the rulings made, to the procedural schedule established, and to the hearing dates scheduled during the prehearing conference.

5. Consistent with the discussion above, counsel for Public Service Company of Colorado (Public Service) shall consult prior to the prehearing conference with counsel for the intervenors, regarding the procedural schedule, hearing date(s), and the other procedural matters addressed in this Decision.

6. If the Parties are able to reach agreements on a consensus procedural schedule, hearing date(s), and the other procedural matters addressed in this Decision, counsel for Public Service may make a filing no later than October 7, 2019, stating those agreements. Alternatively, the Parties may present at the prehearing conference a consensus procedural schedule, hearing date(s), and any agreements on the other procedural matters.

7. The Notice of Intervention of Right, filed by the Colorado Office of Consumer Counsel on August 20, 2019, is acknowledged.

8. The Notice of Intervention as of Right, filed by Trial Staff of the Colorado Public Utilities Commission on August 29, 2019, is acknowledged.

9. The Motion to Intervene, filed on August 26, 2019 by Southwest Generation Operating Company, LLC, is granted.

10. The Petition for Leave to Intervene, filed on August 26, 2019 by Western Resource Advocates, is granted.

11. The Motion Requesting Leave and Objection of Public Service Company of Colorado to the Petition for Leave to Intervene of Leslie Glustrom, filed on September 3, 2019 by Ms. Glustrom, is granted, consistent with the discussion and findings in this Decision.

12. The Petition to Intervene of Leslie Glustrom, filed on August 23, 2019 by Ms. Glustrom, is denied, consistent with the discussion and findings in this Decision.

13. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,  
Director