

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20F-0243E

UTILITIES BOARD OF THE CITY OF LAMAR,

COMPLAINANT,

V.

SOUTHEAST COLORADO POWER ASSOCIATION,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
SCHEDULING REMOTE EVIDENTIARY HEARING,
ESTABLISHING DEADLINE FOR STATEMENTS OF
POSITION, EXTENDING STATUTORY DEADLINE,
AND GRANTING MOTION TO
PARTICIPATE AS AMICUS CURIAE**

Mailed Date: December 14, 2020

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I. STATEMENT**A. Relevant Background**

1. On June 2, 2020, the Utilities Board of the City of Lamar (LUB) filed a formal complaint (Complaint) against Southeast Colorado Power Association (SECPA) in which LUB alleges that SECPA violated Commission Decision No. 76027 that granted LUB and SECPA Certificates of Public Convenience and Necessity (CPCN) to provide retail electric service outside the City of Lamar’s municipal boundaries in Prowers and Bent Counties in southeast Colorado.¹ Commission Decision No. 76027 also allowed LUB and SECPA to continue to serve customers in the other’s newly certificated territory that they had been serving prior to Decision No. 76027. LUB could continue doing so “until such time as there is a change of service” or the parties agreed to exchange or transfer customers.² In the Complaint, LUB alleges that SECPA violated Decision No. 76027 by “connecting and commencing electric service to [May Valley Water Association (May Valley) Well No. 7] that Decision No. 76027 granted [] LUB the right to continue to serve, as [] LUB had for several years before 1970.”³ LUB requests that the Commission order SECPA to cease and desist from providing electric service to May Valley, convert May Valley’s load service back to LUB, desist from converting any other LUB customer to SECPA, and compensate LUB for lost rate revenue during the conversion.

2. On June 24, 2020, SECPA filed its Answer and Counterclaims in which it denied many of LUB’s factual allegations, alleged that there had been a “change in service” justifying transfer to SECPA of the electric service to May Valley’s Well No. 7 under Decision No. 76027, proposed a methodology for compensating LUB for the transfer of May Valley’s service to SECPA,

¹ See Decision No. 76027 issued on October 6, 1970.

² *Id.* at 25 (Ordering ¶ 3).

³ Complaint at 2.

and requested a declaratory order stating, among other things, that the transfer and SECPA's proposed compensation methodology are appropriate.⁴

3. On July 14, 2020, LUB filed its Reply to SECPA's Counterclaims.

4. On August 13, 2020, the undersigned Administrative Law Judge (ALJ) issued Decision No. R20-0595-I that scheduled the remote hearing for November 9 and 10, 2020.

5. On November 4, 2020, the parties filed a Joint Motion to Vacate Hearing Date and for Waiver of Response Time (Joint Motion). In the Joint Motion, the parties requested that the remote hearing be vacated due to a death in the immediate family of one of the attorneys of record in this proceeding. The parties also requested that they be given until November 18, 2020 to file a request for a scheduling conference to reschedule the hearing.

6. On November 6, 2020, the ALJ granted the Joint Motion in Decision No. R20-0786-I.

7. Also on November 6, 2020, the Colorado Association of Municipal Utilities (CAMU) filed a Motion for Leave to Participate as Amicus Curiae (CAMU's Motion). SECPA filed a Response in Opposition to CAMU's Motion on November 20, 2020 (SECPA's Response).

8. On November 17, 2020, the parties filed a Joint Request for a Scheduling Conference (Joint Request).

9. On November 18, 2021, the ALJ issued Decision No. R20-0813-I that granted the Joint Request and set a scheduling conference for November 23, 2020 at 9:00 a.m.

10. On November 23, 2020, the ALJ held the scheduling conference scheduled in Decision No. R20-0547-I. This interim decision memorializes the scheduling decisions made at

⁴ See generally Answer and Counterclaim.

that hearing. The ALJ also took oral argument on CAMU's Motion at the end of which the ALJ took the motion under advisement.

B. Rescheduled Remote Evidentiary Hearing

1. Hearing Date

11. At the scheduling conference, the parties proposed to hold the rescheduled remote hearing on two of three days in the January 25, 26, and 27, 2021 window, which is the first time that all of the parties, their witnesses, and attorneys are available. The parties also agreed to February 10, 2021 as the new deadline for filing of Statements of Position (SOPs). Based on that information, the ALJ rescheduled the remote evidentiary hearing for January 25-26, 2021 and the established February 10, 2021 as the new deadline for SOPs. As with the original hearing dates, the ALJ finds that holding the hearing remotely, in which the parties, witnesses, and Commission staff participate from remote and discrete locations, is consistent with current public health advisories to prevent the spread of COVID-19. The ALJ also concludes that it is in the parties' and the public interest to hold the hearing remotely.

2. Instructions for Participating in, and Observing, the Remote Hearing

12. The parties should follow the instructions in attachment A to Decision No. R20-0595-I for how to use the GoToMeeting platform for participating in the remote hearing.

3. Electronic Exhibits

13. The parties should follow the instructions for the electronic presentation of exhibits at the hearing included in Attachment B to Decision No. R20-0595-I.

C. Extension of Statutory Deadline

14. Section 40-6-108(4), C.R.S. states in relevant part:

The commission shall hold a hearing and issue a final order in complaint cases within two hundred ten days after the filing of testimony and exhibits by the complainant. In extraordinary circumstances, the commission may extend the time

an additional ninety days following a hearing in which such extraordinary circumstances are established. The complainant may waive the time limits established in this section, in which case the time limits are not binding on the commission.

15. Here, LUB filed its testimony and exhibits on August 24, 2020. As a result, the deadline for issuance of a final order in this proceeding is March 22, 2021.

16. At the scheduling conference on November 23, 2020, the ALJ and the parties discussed the fact that rescheduling the hearing to January 25 and 26, 2021 will make it impossible for the Commission to issue a final decision by March 22, 2021. The parties then agreed that: (a) the death of the immediate family member of one of the attorneys of record in this proceeding requiring the vacation of the November 9 and 10, 2020 and the inability of the parties to reschedule the hearing before January 25 and 26, 2021 established extraordinary circumstances justifying a 90-day extension pursuant to § 40-6-108(4), C.R.S.; and (b) the scheduling conference on November 23, 2020 satisfied the hearing requirement in § 40-6-108(4), C.R.S.

17. Based on the foregoing, the ALJ finds and concludes based on the evidence and stipulations presented at the hearing on November 23, 2020 that extraordinary circumstances exist justifying a 90-day extension of the March 22, 2021 deadline imposed by § 40-6-108(4), C.R.S. Accordingly, the new deadline for a final Commission decision in this proceeding shall be June 20, 2021.

D. CAMU's Motion

18. In its Motion, CAMU states that it is “the trade associati[on] representing Colorado’s 28 community-owned electric utilities” and that it advocates for its members’ interests “in providing safe, reliable, and affordable electricity to their citizen and non-citizen electric customers.”⁵ CAMU’s members provide electric service extraterritorially with Commission

⁵ CAMU’s Motion at 1 (¶ 1).

authorization and some such service is provided within the service territories of cooperative electric distribution utilities.⁶ According to CAMU, “[t]hese extraterritorial extensions of service are expensive and are partially financed by municipal electric rates.”⁷ The background of its members would allow CAMU “to assist the commission in a just resolution of this proceeding”⁸ by providing legal argument “concerning the requirement that a utility compensate a municipal utility prior to the transfer of rights to serve a customer granted either by a CPCN or other Commission authorization.”⁹

19. SECPA opposes CAMU’s Motion for two reasons. First, SECPA argues that the issue CAMU proposes to address is beyond the scope of this proceeding. As support, SECPA states that the only compensation-related questions in this proceeding are: (a) whether Decision No. 76027 requires LUB to be compensated if May Valley Well No. 7 is transferred to SECPA; and (b) if so, the amount of such compensation.¹⁰ SECPA states that the answers to both questions are “unique to Decision No. 76027.”¹¹ SECPA asserts that, in contrast, the compensation-related issue identified by CAMU is a “broad policy question” because the answer would apply to “all transfers of customers being served under a territorial invasion arrangement in Colorado.”¹² SECPA concludes that the CAMU’s proposed legal argument is beyond the scope of the issues raised by the parties and thus would not be helpful to the Commission. For the same reason, SECPA states that CAMU does not have a legitimate interest in this proceeding.¹³

⁶ *Id.* at 1-2 (¶ 3).

⁷ *Id.* at 2 (¶ 3).

⁸ *Id.* at 2 (¶ 5).

⁹ *Id.* at 2 (¶ 7).

¹⁰ SECPA’s Response at 3.

¹¹ *Id.* at 7.

¹² *Id.* at 6.

¹³ *Id.* at 6-8.

20. Second, SECPA argues that CAMU's Motion is procedurally defective because CAMU filed the motion too late and failed to confer with SECPA, as required by Rule 1400 of the Commission's Rules of Practice and Procedure. While SECPA concedes that "Commission rules do not explicitly provide for a deadline to file a motion to participate as *amicus curiae*," SECPA cites two decisions in which the Commission denied such late-filed motions.¹⁴ SECPA also asserts that it would be prejudiced if CAMU's Motion is granted because CAMU filed the motion after the close of discovery and SECPA thus has not had the opportunity to present testimony or other evidence concerning the issue upon which CAMU seeks to offer argument.

21. Rule 1200(c) of the Commission's Rules of Practice and Procedure states in relevant part:

A non-party who desires to present legal argument to assist the Commission in arriving at a just and reasonable determination of a proceeding may move to participate as an *amicus curiae*. The motion shall identify why the non-party has an interest in the proceeding, shall identify the issues that the non-party will address through argument, and shall explain why the legal argument may be useful to the Commission. . . . Unless ordered otherwise, the filing deadlines governing *amicus curiae* shall correspond to the deadlines applicable to the parties' opening statements of position, legal briefs or responses to motions.¹⁵

22. Here, as identified in CAMU's Motion, some of CAMU's members provide service extraterritorially and one or more such members in the future may transfer a customer to the utility in whose territory the customer resides. Thus, CAMU desires to provide legal argument in this proceeding concerning the compensation to be paid by the receiving utility, if any, to the transferring utility.¹⁶ CAMU concludes that its "experience and substantive knowledge with concern to issues concerning municipal utilities, including information concerning the extraterritorial provision of electric service by municipal electric utilities, give it the background

¹⁴ *Id.* at 8.

¹⁵ 4 *Code of Colorado Regulations* (CCR) 721-1.

¹⁶ LUB's Response at 2 (¶ 7).

and knowledge necessary to assist the commission in a just resolution of this proceeding.”¹⁷ CAMU’s Motion thus identifies CAMU’s interest in this proceeding and the issue that it proposes to address through legal argument, and explains why the legal argument may be useful to the Commission. Accordingly, CAMU has satisfied the requirements of Rule 1200(c) for participating as an *amicus*.

23. SECPA’s argument that CAMU’s Motion must be denied because the compensation-related issues in this proceeding are limited to the interpretation and application of Decision No. 76027 is contradicted by SECPA’s own evidence. Specifically, a witness for SECPA has testified that SECPA “does not believe [] the Commission’s 1970 Decision requires it to compensate LUB for a customer, such as May Valley’s Well No. 7, that reverts to [SECPA].”¹⁸ Notwithstanding this testimony, SECPA has proposed a methodology for compensating LUB for the loss of May Valley’s Well No. 7. As justification, SECPA’s witness does not cite Decision No. 76027, but instead testifies that it would generally be “fair and reasonable for the certificated utility to provide some appropriate compensation upon reversion of a customer to it.”¹⁹ Like SECPA’s theory of the source of any obligation to compensate LUB, therefore, SECPA’s methodology for calculating the amount of such compensation is not found in Decision No. 76027.²⁰ Instead, it is based on general damages concepts modified to apply to a municipal utility. As CAMU’s members are all municipal utilities, it is reasonable to conclude that CAMU’s proposed argument will be

¹⁷ *Id.* at 2 (¶ 5).

¹⁸ Hearing Exhibit 303 at 14:8-10 (Answer Testimony of SECPA Witness Jack S. Johnston).

¹⁹ *Id.* at 14:5-7.

²⁰ Hearing Exhibit 303 at 12:3-9 (SECPA’s compensation methodology is based on LUB’s “net margin loss,” which is LUB’s “retail rate less power cost, operating expenses, capital expenses, and Charter Appropriation fees,” and would be paid “on a monthly kilowatt-hour production basis for a period of five years.”) (Answer Testimony of Mr. Johnston).

useful to the Commission in this proceeding. Accordingly, SECPA's own evidence submitted in this proceeding undercuts its argument in its Response and supports the grant of CAMU's Motion.

24. The Commission Decisions cited by SECPA do not require denial of CAMU's Motion. In Decision No. C11-1291, the Commission denied a Rule 1200(c) motion based, at least in part, on the finding that under the circumstances of that proceeding "allowing *amicus* comments into the record well after the due date for the filing of intervenor Answer Testimony would prejudice certain parties and may result in delays in the proceeding."²¹ In Decision No. R19-0372-I, the undersigned ALJ denied a Motion to Participate as Amicus Curiae because the motion was filed a day before the hearing and the parties had not been given the opportunity to develop the evidentiary record on the issue the movant sought to address.

25. Here, in contrast, both parties have already submitted testimony concerning whether and, if so, to what extent, SECPA must compensate LUB as a result of the transfer of rights to serve May Valley Well No. 7. Consequently, SECPA cannot argue that it will be prejudiced by the grant of CAMU's Motion because it has not had the opportunity to present evidence on the issues CAMU seeks to address. Indeed, the current evidentiary record reflects that SECPA has already been given, and taken advantage of, such an opportunity. In addition, SECPA has not asserted that granting CAMU's Motion will lead to delays in this proceeding. Accordingly, Decision Nos. C11-1201 and R19-0372-I do not require denial of CAMU's Motion.

26. Finally, SECPA is correct that CAMU's counsel failed to comply with Rule 1400(a) of the Commission's Rules of Practice and Procedure, which requires counsel for the movant to "make a reasonable good faith effort to confer with all parties about the motion and report when the requested relief is unopposed." However, given that the hearing has been delayed, the failure

²¹ Decision No. C11-1201 issued in Proceeding No. 11A-689E on November 29, 2011 at 8 (¶ 25).

of CAMU's counsel to comply with Rule 1400(a) is not as significant as it otherwise would have been. Under these circumstances, the ALJ shall not deny CAMU's Motion based on its violation of Rule 1400(a).

27. Based on the foregoing, and because "[a]ll requests for amicus curiae status may be accepted or declined at the Commission's discretion,"²² CAMU's Motion shall be granted. CAMU shall file its *amicus* brief on or before February 10, 2021, which is the deadline for SOPs.

II. **ORDER**

A. **It Is Ordered That:**

1. A remote evidentiary hearing is scheduled as follows:

DATE: January 25-26, 2021

TIME: 9:00 a.m.

FOR WEBCASTS: Hearing Room B

METHOD: Join by video conference at the link to be provided by an email from the Administrative Law Judge

2. Nobody should attend the remote evidentiary hearing in-person.

3. The parties must follow the instructions in attachment A to Decision No. R20-0595-I for how to use the GoToMeeting platform for participating in the remote hearing.

4. The parties must follow the instructions for the electronic presentation of exhibits at the hearing included in Attachment B to Decision No. R20-0595-I.

5. Statements of Position are due on February 10, 2021.

6. For the reasons stated above, the statutory deadline is extended 90 days – to and including June 20, 2021 – pursuant to § 40-6-108(4), C.R.S.

²² Rule 1201(c) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

7. For the reasons stated above, the Motion for Leave to Participate as Amicus Curiae filed by the Colorado Association of Municipal Utilities (CAMU) on November 6, 2020 is granted. As stated above, CAMU must file its *amicus* brief in this proceeding by February 10, 2021.

8. This Order is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director