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Thursday, March 17, 1994 / 9:26 am

(Decision No. C94-308)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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|---------------------------------|---|---------------------|
| INVESTIGATION INTO THE |) | |
| DEVELOPMENT OF RULES CONCERNING |) | DOCKET NO. 91R-642E |
| INTEGRATED RESOURCE PLANNING |) | |

COMMISSION ORDER DENYING MOTIONS
TO REOPEN DOCKET FOR AWARD OF FEES AND COSTS

Mailing Date: March 17, 1994
Adopted Date: March 10, 1994

BY THE COMMISSION:

On December 2, 1993, the Colorado Office of Energy Conservation ("OEC") filed its Motion to Reopen Docket for the Award of Fees and Costs. The Colorado Solar Energy Industries Association ("COSEIA") and the Land and Water Fund of the Rockies ("LAW Fund") filed similar motions on December 3, 1993 and December 20, 1993 respectively. The present docket is the proceeding in which the Commission investigated and eventually adopted rules concerning integrated resource planning ("IRP") for electric utilities subject to our jurisdiction. The three parties who have filed motions to reopen were active participants in that rulemaking proceeding.

The three parties, in their motions to reopen, essentially contend that the legal criteria for an award of fees and costs for their participation in this proceeding have been met. For

example, the three parties contend that their participation in this docket complied with the statutory standards relating to awards of fees and costs found in section 40-6.5-105, C.R.S. (1993). Consequently, the three parties request that the Commission reopen this docket for the purpose of making such an award. The original motions did not specify to whom the request for payment of fees and costs was directed (i.e. which party is intended to pay any award of fees and costs). In responses to the pleadings opposing the motions to reopen, the OEC and the LAW Fund clarified that the request for fees and costs is directed to Public Service Company of Colorado.

Several responses to the motions to reopen have been filed. In particular Tri-State Generation and Transmission Association, Inc. ("Tri-State"), Public Service Company of Colorado ("PSCo" or "Company"), and WestPlains Energy ("WestPlains") each filed responses to the three motions to reopen. Each of the responding parties categorically opposes the motions on various grounds, and requests that the motions to reopen be denied without hearing. Now being duly advised in the matter, we agree with the responding parties that the motions should be summarily denied.

As the first grounds for denial, we note our agreement with the arguments that an award of fees and costs in a rulemaking proceeding would be improper. The Commission addressed this

identical issued in Decision No. C81-235, issued February 3, 1981. In that decision, the Commission held:

"We agree with the contention raised in some of the objections that it would be highly inappropriate, if not unconstitutional, to condition the participation of certain utilities in a rulemaking proceeding on the possibility that it might be required to pay the attorneys' fees of another participant. Such a result would "chill", rather than (sic) encourage, participation in rulemaking proceedings which is a result which the Commission believes would harm, rather than enhance, the rule-making process...."

We agree with this prior holding.

The Commission emphasizes that this proceeding and the IRP rules which were adopted as a result of this docket applied to all electric utilities subject to our jurisdiction. This proceeding was not only applicable to PSCo. Moreover, PSCo's participation in this case was, in scope and character, the same as any other participant's. No reason exists to single out the Company for payment of other participants' fees and costs. Furthermore, we are unaware of any authority--the moving parties cited none--for the proposition that participants in a rulemaking proceeding may be compelled to pay the fees and costs of other participating parties.

In any event, we agree with the above-quoted decision that awards of fees and costs in rulemaking dockets would discourage the participation of utilities, and that such a result would harm the rulemaking process.

As a second basis for denial of the motions to reopen, we note our agreement with Tri-State and PSCo that the motions were untimely. The initial decision adopting the IRP rules was issued on December 30, 1992. The present motions to reopen were filed approximately 11 months following adoption of the rules.

A request to reopen the record for further proceedings is addressed to the discretion of the Commission, and such requests should be timely made. In this case, OEC, COSEIA, and the LAW Fund undoubtedly knew (or should have known) of their intent to request an award of fees and costs at the time the final decision was entered in this proceeding. No good reason exists for delaying the requests for 11 months following the order of adoption.

Furthermore, assuming that an award of fees and costs could be made in this case, the statutory criteria for such an award (section 40-6.5-105) involves a detailed factual inquiry. For example, reimbursements may be awarded only for expenses related to issues not substantially addressed by the Colorado Office of Consumer Counsel, the participation of the requesting party must have materially assisted the Commission in rendering its decision,

etc. The requesting parties' delay of 11 months following the conclusion of the substantive proceeding before the motions were filed makes this factual inquiry more difficult both for the Commission and opposing parties. We conclude that this prejudice to opposing parties, especially when no good reason exists for delaying the request, is sufficient cause to deny the motions to reopen.

THEREFORE THE COMMISSION ORDERS THAT:

The motions to reopen docket for the award of fees and costs by the Colorado Office of Energy Conservation, the Colorado Solar Energy Industries Association, and the Land and Water Fund of the Rockies are hereby denied.

This order is effective upon its Mailed Date.

ADOPTED IN OPEN MEETING

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith

Bruce N. Smith
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CHRISTINE E. M. ALVAREZ

VINCENT MAJKOWSKI

Commissioners

CHAIRMAN ROBERT E. TEMMER RESIGNED
EFFECTIVE MARCH 1, 1994.