

Decision No. C06-0850

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06S-234EG

RE: THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY PUBLIC SERVICE COMPANY OF COLORADO FOR ADVICE LETTER NO. 1454 - ELECTRIC AND ADVICE LETTER NO. 671-GAS.

**ORDER GRANTING MOTION FOR
PROOF OF REPRESENTATION AND
GRANTING APPLICATIONS FOR REHEARING,
REARGUMENT, AND RECONSIDERATION**

Mailed Date: July 21, 2006
Adopted Date: July 12, 2006

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of several pleadings: a Notice of Filing Membership Representation and Motion for Leave to Provide Proof of Representation filed by Ratepayers United on June 15, 2006; an Application for Rehearing, Reargument and Reconsideration (RRR) filed by the Commercial Group on June 21, 2006 of Decision No. C06-0731; and a request for RRR of Commission Decision No. C06-0656 filed by Mr. Dan Friedlander on June 23, 2006.

2. Ratepayers United's motion seeks to: (1) provide notice of the filing and serve on each party a spreadsheet listing names and addresses of 140 ratepayer members that have provided signed consent forms for representation in this proceeding (a blank consent form is attached to the motion); (2) file with the Commission the 140 original signed consent forms supporting the spreadsheet; and (3) file with the Commission one copy of the approximately 570 consent forms (email responses with the same representation language as the signed consent

forms) from other ratepayer members of Ratepayers United. Ratepayers United believes the spreadsheet filed and served on all individuals addressed in (1) above should fulfill the Commission's membership requirement in Decision No. C06-0656. It also requests that it be exempted from the requirement to update its membership list ten days prior to the first day of hearing.¹ Ratepayers United states that it should be treated similarly to Western Resource Advocates, which was not required to submit proof of representation, since it too is not representing its members in their individual capacities.

3. The Commercial Group states in its Application for RRR of Decision No. C06-0731, which denied its motion for late intervention, that good cause exists for intervening late because: its participation in the proceeding is in the public interest; no party has opposed or will be prejudiced by its participation, especially given that it agrees to accept the case as it is (the procedural orders and schedule); each of the individual companies would be allowed to intervene as of right; its interests are distinct from other parties; it will bring a unique perspective to the matter; its failure to file on time was not caused by carelessness or lack of diligence, but rather due to the logistics of coordinating efforts of multiple international companies into one group so as to minimize the burden on the Commission; and it is the Commission's normal procedure to grant petitions to intervene out-of-time in the vast majority of cases in which good cause is established.

4. Mr. Friedlander states in his RRR that he should be granted intervenor status because: he timely submitted his request for intervention; § 40-6-109(1), C.R.S., gives him the right to participate in the hearing since he will be affected by an order of the Commission in this case; his areas of interest and that of Tussey and Associates are merely those contained in Public

¹ See ordering paragraph 2 of Decision No. C06-0656

Service Company of Colorado's (Public Service Company) April 14, 2006 Application; and he reiterates that he will ensure that his involvement is coordinated with other intervenors and will not offer unduly redundant testimony or broaden the issues being considered.

B. Findings

5. We find that Ratepayers United's motion should be granted. We acknowledge that providing 140 copies of the signed consent form to each of the 15 parties in this case would be costly. The spreadsheet provides a condensed version of the necessary information regarding Ratepayer United's membership for the parties' review. We also find that Ratepayers United can be exempted from the requirement to update its membership listing 10 days prior to the first day of hearing based on the filing of the 140 signed consent forms and its status as a limited liability corporation.

6. We also grant the Commercial Group's Application for RRR. The Commercial Group is an ad-hoc association of big-box stores. It asserts that each individual company would be allowed to intervene as of right. We disagree. Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1401 clearly states that the Commission may allow a party to intervene late for good cause. Late interventions are permitted at the discretion of the Commission. Thus the Commercial Group's assertion that each represented big box store has a right to participate individually is not correct.

7. We agree that the Commercial Group's participation will harm no other party given it must take the case as it is, and the relatively early date, and perhaps it would bring a unique perspective to the case. However, we are skeptical that the Commercial Group has demonstrated good cause for its lateness. It reiterates on RRR that the reason it was late is that it was attempting to organize the group to participate in this matter, thus reducing the burden on the

Commission. To us it appears as if the Commercial Group failed to get organized in a timely fashion. It apparently knew about the deadline but just presumed that it would be acceptable to organize and file late, rather than filing before the deadline and then adding members to its group. We find that the Commercial Group's filing speaks more to the reasons why its participation would be good for the proceeding rather than to the good cause for its lateness.

8. The Commercial Group sets forth a number of cases in which the Commission has granted petitions for late intervention.² We note that most are recommended decisions by administrative law judges who have significant discretion regarding interventions. Some of the cases are not applicable to the situation in this matter. Nonetheless, we agree that, in the past, we have been overly generous with respect to late-filed interventions, and believe that the Commercial Group should be able to participate in this matter.

9. The Commission stated in Decision No. C06-0731 that we have come to believe that our historic willingness to allow late interventions has not served the Commission well, and we continue to believe that. While this is not the case in which to tighten our interpretation of the intervention rules, the Commission may not be so lenient in the future.

10. On a related matter, we note that Mr. Alan R. Jenkins, Esq. is listed as co-counsel on the Commercial Group's Application for RRR. Mr. Jenkins, to the best of our knowledge, is not admitted to practice law in Colorado. We refer the Commercial Group and Mr. Jenkins to Commission Rule 4 CCR 723-1-1201(a), which in turn refers to Rule 221.1, Colorado Rules of Civil Procedure, which governs *pro hac vice* admission to practice before state agencies. This requires, among other things, the payment of a \$250 fee to the Supreme Court of Colorado.

² It appears the Commercial Group simply copied the listing of cases from Kroger's RRR application.

Before Mr. Jenkins further participates in this matter, and within ten days of the mail date of this order at the latest, he shall file with the Commission the necessary documentation regarding his authority to practice law in Colorado.

11. The Commercial Group does not have a distinct legal status that we are aware of. As a result, it is required to update its membership list consistent with ordering paragraph 2 of Decision No. C06-0656.

12. We also grant Mr. Friedlander's Application for RRR of Commission Decision No. C06-0656, which denied his petition for intervention, and allows him to intervene in this matter. Mr. Friedlander argues that under § 40-6-109, C.R.S., he has the absolute right to participate in this matter, and selectively cites the portions of the statute that support his position. Denial of his intervention, he believes, would be a substitution of the Commission's judgment for that of the Legislature. We disagree. The complete citation of § 40-6-109(1), C.R.S., provides as follows:

(1) 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. A full and complete record of all proceedings had before the commission, any commissioner, or an administrative law judge in any formal hearing had, and all testimony, shall be taken down by any reporter appointed by the commission, and all parties in interest shall be entitled to be heard in person or by attorney. (*Emphasis added.*)

The Commission has discretion according to the statute. In *RAM Broadcasting v. Public Util. Comm'n*, 702 P.2d 746 (Colo. 1985), the Colorado Supreme Court noted that the statute allows two types of intervention, intervention by right, and intervention by Commission permission. The statute cannot mean that any individual ratepayer can intervene by right simply because his

utility bill would be affected, because then any ratepayer, virtually any party, could intervene by right; the distinction between intervention by right and by permission set forth in the statute would be obliterated. Thus the Commission may at its discretion allow Mr. Friedlander's intervention, which we do. We find his request for intervention meets the criteria set forth in our rule governing permissive intervention, 4 CCR 723-1-1401.

13. As we noted in our discussion regarding the Commercial Group, the Commission has historically been generous in allowing intervention. While participation by many individual ratepayers would not allow for efficient hearings (there is a statutory maximum 210-day deadline for consideration of advice letters), Mr. Friedlander has committed to doing everything possible to ensure that his intervention does not cause the proceedings to become unmanageable, and he is the only individual ratepayer seeking intervention. We note that the interests listed by Mr. Friedlander relate principally to decisions about infrastructure and the implications of those decisions for the future. Mr. Friedlander states that he understands that the Commission has an interest in running an efficient proceeding, and has committed to ensuring that his involvement is coordinated with other intervenors. Along those lines, we cannot emphasize enough to all parties that this is a ratemaking proceeding. It does not reexamine or infrastructure selection in any way. Parties are instructed to keep their efforts focused on relevant ratemaking issues.

C. Conclusion

14. We grant Ratepayers United's motion because providing 140 copies of the signed consent form to each of the 15 parties in this matter would be costly. We also exempt Ratepayers United from the requirement to update its membership listing ten days prior to the first day of hearing. We grant the Commercial Group's and Mr. Friedlander's Applications for RRR. This matter involves setting rates for Public Service Company, not determining what generation or

transmission resources are appropriate for the future. Parties must keep this in mind during the course of this proceeding.

II. ORDER

A. The Commission Orders That:

1. The Motion for Leave to Provide Proof of Representation filed by Ratepayers United is granted.

2. The request for rehearing, reargument, and reconsideration of Commission Decision No. C06-0731 filed by the Commercial Group is granted. The Commercial Group is permitted intervenor status in this matter.

3. The Commercial Group shall file within ten days of the Mailed Date of this Order the necessary documentation regarding Mr. Alan Jenkins' authority to practice law before the Commission.

4. The Commercial Group is required to update its membership list consistent with ordering paragraph 2 of Decision No. C06-0656.

5. The request for rehearing, reargument, and reconsideration of Commission Decision No. C06-0656 filed by Mr. Dan Friedlander is granted. He is permitted intervenor status in this matter.

6. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 12, 2006.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners