

Decision No. R19-0976-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0530E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2016 ELECTRIC RESOURCE PLAN AMENDMENT REGARDING THE TARGETED 2019 SOLAR REQUEST FOR PROPOSALS.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING AND DENYING PERMISSIVE
INTERVENTIONS AND SETTING
PREHEARING CONFERENCE**

Mailed Date: December 6, 2019

I. STATEMENT

1. On September 30, 2019, Public Service Company of Colorado (Public Service or the Company) filed its Verified Application for approval of its 2016 Electric Resource Plan (ERP) Amendment Regarding the 2019 Solar Request for Proposals (Application). Specifically, Public Service seeks Commission approval to replace approximately 200 MW of solar resources with replacement solar bids. The Commission originally approved the initial bids as part of the Preferred Colorado Energy Plan Portfolio (CEPP) in Decision No. C18-0761 (Phase II Decision) for the reasons stated in the Application.

2. On October 31, 2019, the Colorado Office of Consumer Counsel (OCC) filed its Notice of Intervention of Right, Entry of Appearance, and Request for Hearing. The OCC is an intervenor as of right and a party in this proceeding. The OCC listed a series of issues they wish to investigate.

3. On October 31, 2019, the Colorado Independent Energy Association (CIEA) filed its Motion to Intervene. As a non-profit corporation and trade association of independent power producer (IPP) member companies, CIEA states that its members routinely participate in requests for proposals (RFPs) associated with the ERP processes of public utilities to bring their projects to market in Colorado. CIEA asserts that it has an interest in monitoring the present proceeding to ensure a fair and transparent bidding and bid evaluation process. CIEA further asserts that it and its members have a specific interest in advocating for Commission decisions and rules that safeguard competitive bidding of renewable resources and market participation by IPPs. Additionally, CIEA states that this proceeding will directly and substantially impact the tangible and pecuniary interests of its IPP members because those members currently operate, or seek to operate, electric generating resources in Colorado.

4. On October 31, 2019, Western Resource Advocates (WRA) filed its Petition for Leave to Intervene. WRA states that it is a nonprofit conservation organization dedicated to protecting the land, air and water of the West and that it was actively engaged in Proceeding No. 16A-0396E, regarding Public Service's 2016 ERP. WRA asserts that the Commission's decision in this proceeding will directly impact its tangible interest in environmental protection, and no other party will adequately represent its interests in this matter.

5. On November 4, 2019, Trial Staff of the Commission (Staff) timely filed its Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a) and Rule 1403(b), and Request for Hearing. The intervention is of right, and Staff is a party in this matter.

6. On November 6, 2019, by minute order, Proceeding No. 19A-0530E was referred to an Administrative Law Judge (ALJ).

II. INTERVENTIONS

A. Standard for Intervention

7. Two classes of parties may intervene in proceedings such as this: parties with a legally protected right that may be impacted by the proceeding (intervention of right), and parties with pecuniary or tangible interests that may be substantially impacted by the proceeding (permissive intervention). Rule 1401(b) and (c), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure; *see* § 40-6-109(1), C.R.S., *RAM Broadcasting of Colo. Inc., v. Public Utilities Comm'n*, 702 P.2d 746, 749 (Colo. 1985).

8. Commission Rule 1401(c) of the Rules of Practice and Procedure 4 CCR 723-1, requires persons seeking permissive to show the following:

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. 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. 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.

9. Rule 1401(c) requires persons or entities seeking permissive intervention in a proceeding to represent that their interests "would not otherwise be adequately represented." This requirement is similar to Colorado Rule of Civil Procedure 24(a), which provides that even if a party seeking intervention in a case has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties. *See Clubhouse at*

Fairway Pines, L.L.C. v. Fairway Pines Owners Ass'n, 214 P.3d 451, 457 (Colo. App. 2008). This is true even if the party seeking intervention will be bound by the case's judgment. *See Denver Chapter of the Colo. Motel Ass'n v. City & County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city). 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. *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

10. Further, Rule 1401(c), 4 CCR 723-1, requires that a movant who is a "residential customer, agricultural customer, or small business customer" must discuss in the motion 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. As set forth in §§ 40-6.5-104(1) and (2), C.R.S., the OCC has a statutory mandate to represent the interests of residential ratepayers. The Colorado Supreme Court expressly stated that "if there is a party charged by law with representing his interest, then a compelling showing should be required to demonstrate why this representation is not adequate." *Feigen v. Alexa Group, Ltd.*, 19 P.3d 23, 26 (Colo. 2001).

11. The Commission has the right to determine how to conduct a proceeding. Pursuant to § 40-6-101(1), C.R.S., the Commission "shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice." The Commission may look to the Colorado Administrative Procedure Act (§ 24-4-101 *et seq.*) for guidance. Section 24-4-105 "grants substantial discretion" to agencies such as the Commission

“to control the scope and presentation of evidence” in a proceeding. *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989)

12. The Colorado Administrative Procedure Act provides among other things that that an ALJ shall “regulate the course of the hearing,” “issue appropriate orders that shall control the subsequent course,” and “dispose of motions to intervene.”

B. Interventions by Right

13. Staff and the OCC are intervenors by right. They are parties in this proceeding.

C. Permissive Intervenors

14. No objection was filed to the requests for permissive intervention by CIEA and WRA.

1. CEIA

15. CEIA is a trade organization that represents IPPs that bid on contracts with Public Service. The contracts that are at issue in this proceeding are between IPP’s, the group CEIA represents and Public Service. The results of this proceeding will have a pecuniary and tangible effect on the members of CEIA.

16. CEIA is a party in this proceeding.

2. WRA

17. WRA states that it “seeks to decarbonize electricity production”¹ and seeks to intervene to advocate for Commission approval of acquisition solar bids to replace the withdrawn bids.² WRA adds that it does not know at this time if it approves of Public Service’s

¹ WRA Petition for Leave to Intervene, p. 2, ¶ 6.

² *Id.* at ¶ 7.

proposal and believes that it cannot determine that without, among other things, submission of discovery requests.

18. WRA states that it has a substantial tangible interest in protecting the environment and that the Commission has “long recognized” protecting the environment as falling under the definition of Commission Rule 1401(c).³ WRA fails to provide any citation to decision where the Commission has recognized “protecting the environment” as falling under the definition of Commission Rule 1401(c) as a tangible interest.

19. WRA in explaining how this proceeding will affect this alleged tangible interest states the following:

Increasing renewable energy generation from solar and solar-plus storage systems to replace the energy and capacity of older fossil-fueled generation plants will help decrease carbon dioxide emissions which drive climate change and other air pollutants which are detrimental to human health. A Commission decision in this proceeding that supports acquisition of renewable energy generation will directly impact the tangible interests WRA represents, specifically environmental protection through reduction of emissions from the electricity sector. *WRA Petition for Leave to Intervene*, p. 5, ¶ 8.

20. Finally, WRA states that the OCC will not represent its issues because the OCC represents residential consumers, agricultural consumers, and small business consumers. WRA states that it does not represent these groups and the interests of these groups “are distinct from the interests of an environmental conservation organization.”⁴ WRA does not, however, state any additional interests of an “environmental conservation organization.”⁵

³ *Id.* at p. 5, ¶ 8.

⁴ *Id.* at p. 6, ¶ 9.

⁵ WRA also attempts to distinguish itself from the Colorado Energy Office (CEO). The CEO did not intervene in this proceeding. It can be assumed that the CEO did not believe that the issues in the above captioned proceeding overlapped with their mission. Since CEO did not find it necessary to intervene in this proceeding, WRA’s discussion concerning the CEO is moot. It is also noted that no other environmental group believed that a substantial tangible or pecuniary interest would be affected by this proceeding.

21. The issue in this proceeding is quite narrow. The only determination is whether the replacement solar bids should be approved. This proceeding is not to determine if the replacement bids should be from renewable energy or a fossil fuel. That decision was made in Decision No. C18-0761. Any attempt to replace the initially approved solar bid with a non-solar bid would be a collateral attack on a previous Commission Decision and not allowed.

22. Among the issues listed by Staff and the OCC are if the bids are the best choice when there are less expensive bids; if the backup bids provide a just and reasonable outcome if the preferred bid cannot proceed; whether the solicitation was adequate with an apparent limitation on storage of 50 MW, and receipt of higher prices in the 2019 bids than in the 2017 ERP Solicitation.⁶ Put simply, the issues in this proceeding are financial issues. This proceeding will not consider the use of fossil-fueled generation plants, nor could it.

23. The issues in this proceeding are of an economic or financial nature. WRA states clearly it does not represent Public Service's residential ratepayers who do have a financial interest in this proceeding. WRA states it represents only itself or the "interests of an environmental conservation organization." At no point does WRA state that as an "environmental conservation organization," it has an economic or financial tangible interest in this proceeding, only that it has an interest protecting the environment.

24. WRA also states that because it has not had the opportunity to "fully review and evaluate all aspects of the Company's proposal," WRA does not know at this time if it supports or opposes the proposed bids by Public Service.⁷

⁶ See Staff and OCC intervention for a complete list of issues.

⁷ *Id.* at p. 5, ¶ 7.

25. Public Service filed its application with testimony, on September 30, 2019. WRA filed its Petition for Leave to intervene on October 31, 2019. With the limited tangible interest of protecting the environment from fossil fuels and no tangible interest in financial concerns, it is difficult to understand how with one month to read the application it would not have the “opportunity” to “fully review and evaluate all aspects of the Company’s proposal.”

26. If a substantial tangible interest is being threatened by a proposed application, it should be apparent on its face. With one month to review the application and accompanying testimony, it is inexplicable that an organization that touts its expertise with clean energy⁸ and the limited interest of protecting the environment as a reason to allow an intervention, cannot even state if it supports or opposes the application.

27. The Commission is not a vehicle for parties who may or may not have a substantially affected a pecuniary or tangible interest to conduct fishing expeditions. To allow this would give Rule 1401(c) no effect and thereby opening the door to anyone being granted an intervention and propound unlimited discovery upon a utility. Litigation costs (including discovery requests) that provide no benefit to the ratepayers or the Commission are still passed on to the ratepayers. The Commission has a duty to protect ratepayers from the expense of intervenors who add unnecessary litigation costs from parties who do not have pecuniary or tangible interest or cannot even determine if they support or oppose an application. If WRA supports the application, a public comment or participation as an *Amicus Curie* would accomplish the same goal with no expense to ratepayers.

⁸ WRA Petition for Leave to Intervene, p. 3, ¶ 4.

28. The issues in the above captioned proceeding – specifically, the replacing of failed solar bids with replacement solar bids – are financial issues. The claimed tangible interest stated by WRA, protecting the environment,⁹ is not at issue in this proceeding. Without a pecuniary or tangible interest that may be substantially impacted by the proceeding, the intervention of WRA is denied. The undersigned ALJ believes that the denial of this intervention will allow for the scope of the proceeding to be limited to relevant issues, will not unnecessarily increase the costs of litigation, and will allow for a full and clear record.

29. Applicant and Intervenors Staff, the OCC, and CIEA, collectively, are the Parties.

III. PREHEARING CONFERENCE

30. It is necessary to schedule a hearing, to establish a procedural schedule, and to discuss discovery and other matters. A prehearing conference will be held on December 19, 2019.

31. The undersigned ALJ expects the Parties to come to the prehearing conference with proposed dates for disclosures, including hearing dates, for the procedural schedule. The Parties must confer prior to the prehearing conference with respect to the listed matters and are encouraged to present, if possible, a procedural schedule and hearing dates that are acceptable to all Parties.

32. If the Parties reach agreement on a procedural schedule, they may file the proposed procedural schedule and a motion to vacate the prehearing conference.

⁹ The undersigned ALJ does not make a finding as to whether “protecting the environment” is a tangible interest. It is a moot point since “protecting the environment” as defined by WRA, increasing the use of renewable energy generation, is not at issue in the above captioned proceeding.

IV. ORDER

A. It Is Ordered That:

1. A prehearing conference in this matter is scheduled for the following date, at the following time, and in the following location:

DATE: December 19, 2019
TIME: 9:00 a.m.
PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

2. The Motion to Intervene filed by Colorado Independent Energy Association on October 31, 2019, is granted.

3. The Petition for Leave to Intervene filed by Western Resource Advocates on October 31, 2019, is denied.

4. This Decision shall be effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director