

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0544FEG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER GRANTING TO IT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO EXERCISE FRANCHISE RIGHTS IN THE CITY OF BOULDER, COLORADO.

**COMMISSION DECISION DENYING MOTION
CONTESTING INTERIM DECISION
NO. R21-0106-I AND DENYING INTERVENTION**

Mailed Date: May 7, 2021
Adopted Date: April 21, 2021

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I. BY THE COMMISSION

A. Statement

1. By this Decision, in a two to one vote, the majority denies Mr. Stephen Pomerance’s Motion Contesting Interim Decision R21-0106-I and Requesting that the Public Utilities Commission Allow Intervention (Motion). Chairman Eric Blank dissents from the majority decision.

B. Background

2. On December 21, 2020, Public Service Company of Colorado (Public Service or Company) filed its Application for a Certificate of Public Convenience and Necessity for a franchise in the City of Boulder (Boulder or City). The application states that in the November 2020 election the citizens of Boulder approved a Franchise Agreement between Public Service and the City. The Franchise Agreement has a term of 20 years, with opt-out provisions allowing the City to end the Franchise Agreement without cause on the 5th, 10th, or 15th anniversaries, or if Public Service fails to meet greenhouse gas emissions benchmarks included in the Franchise Agreement. The Franchise Agreement also contains provisions for the undergrounding of electrical distribution lines.

3. On January 15, 2021, Mr. Stephen Pomerance, a citizen of Boulder, filed his Motion to Intervene, citing general and specific interests that he claimed warranted intervention. The general interests he offered included that he is a Boulder citizen, voter, taxpayer and ratepayer served by Public Service, and that his financial interests will be affected by the outcome of the proceeding. In addition, Mr. Pomerance put forth three specific interests as a basis for his intervention.

4. First, he maintains the Franchise Agreement does not include all the agreements between Public Service and the City. According to Mr. Pomerance, missing are the Settlement Agreement and Partnership Agreement, which potentially allow for differential treatment to the City relative to other Public Service franchisees. Mr. Pomerance claims he has a particular interest in ensuring that all aspects of the Franchise Agreement and its companion agreements are fully considered by the Public Utilities Commission (Commission or PUC).

5. Second, Mr. Pomerance asserts the Franchise Agreement does not contain provisions that are required to be included by Boulder's Charter and the process for obtaining voter approval of the Franchise Agreement did not comply with Boulder's Charter. Mr. Pomerance claims an interest in ensuring the requirements in Boulder's Charter for franchise agreements are followed, especially since the Franchise Agreement narrowly passed by a 53 percent to 47 percent margin.

6. Thirdly, Mr. Pomerance alleges Public Service made commitments to Boulder above and beyond commitments it typically makes in franchise agreements such as promising a level of undergrounding of above-ground electrical lines not seen in other franchise agreements.

7. Mr. Pomerance takes the position that the Office of Consumer Counsel (OCC) cannot represent his interests because its duty is to represent small ratepayers in general, so the OCC has no clear obligation to represent only the ratepayers of Boulder. Mr. Pomerance states he has experience as a Boulder city council member, as a person long involved with energy issues, and as a person quite familiar with the Commission and OCC who drafted the legislation creating the OCC almost 40 years ago. As a result, he believes he has the expertise necessary to represent his own interests.

8. On January 22, 2021, Public Service filed a Response and Objection to Mr. Pomerance's Petition and Motion to Intervene. Public Service cited Commission authority holding that individual ratepayers do not have a right to intervene in Commission electric proceedings under § 40-6-109(1), C.R.S., and Rule 1401(b), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure. Public Service argued Mr. Pomerance should not be permitted to permissively intervene because he failed to satisfy his burden of establishing that the OCC cannot represent his interests. Public Service is further

concerned his claims of expertise in the subject matter are insufficient to justify intervention. Public Service is of the opinion Mr. Pomerance has not established a sufficient tangible and pecuniary interest as required by Rule 1401(c). In addition, Public Service argues the issues Mr. Pomerance identifies concerning compliance with the Boulder Charter are outside the scope of the proceeding. Finally, it is Public Service's contention Mr. Pomerance's intervention would substantially and unnecessarily broaden the scope of the proceeding.

9. At the Commissioners' Weekly Meeting of February 3, 2021, this matter was referred to an Administrative Law Judge (ALJ) for disposition.

10. On February 26, 2021, the ALJ issued Interim Decision No. R21-0106-I, in which, relevant to this matter, the ALJ denied Mr. Pomerance's request for intervention. The ALJ found Mr. Pomerance did not meet the status as an intervenor as of right since he failed to identify a legally protected right that would justify his intervention under Rule 1401(b). The ALJ determined Mr. Pomerance's identification as a Boulder citizen, voter, taxpayer, and ratepayer served by Public Service is insufficient for intervention as of right under the requirements of both § 40-6-109(1), C.R.S., and Rule 1401(b).

11. The ALJ found that in Mr. Pomerance's Motion for Permissive Intervention, he distinctly laid out his concerns with the Franchise Agreement, but nonetheless failed to satisfy the standard for permissive intervention. The ALJ laid out four distinct points for his findings.

12. First, the ALJ found Mr. Pomerance failed to cite any authority or present sufficient legal analysis as to whether the Franchise Agreement's compliance with the Boulder City Charter is within the Commission's jurisdiction.

13. Second, Mr. Pomerance failed to demonstrate why the OCC cannot adequately represent his interests in the proceeding. The OCC stated in its Notice of Intervention by Right

that it will investigate and analyze: (a) the Settlement Agreement between Public Service and Boulder; (b) any agreement or attempt to socialize Boulder-specific costs from municipalization, condemnation, or the undergrounding of overhead lines, and shift these costs on non-Boulder ratepayers; and (c) any “novel terms in the Franchise Agreement will create precedents that could be problematic or discriminatory with respect to other future franchise agreements.”¹

14. Third, given the OCC’s statements in its Intervention as of Right and Mr. Pomerance’s statements in his Motion for Permissive Intervention, the ALJ found it readily apparent Mr. Pomerance and the OCC share the same position as to potential cost subsidization by non-Boulder ratepayers.

15. Finally, the ALJ concluded that although Mr. Pomerance is a former Boulder city council member, long involved with energy issues, and familiar with the Commission and the OCC, Mr. Pomerance did not demonstrate that he can bring unique expertise to this proceeding that the OCC or other parties cannot provide.

16. On March 9, 2021, Mr. Pomerance filed a Motion Requesting Modification of Decision R21-0106-I (Motion for Modification) requesting that the ALJ modify the Interim Decision to allow him to intervene, or in the alternative, to certify the decision as immediately appealable. Mr. Pomerance states what appears to him to be a misrepresentation of facts and/or incorrect statements or errors of law in Interim Decision No. R21-0106-I. Mr. Pomerance also

¹ See, *Notice of Intervention of Right, Entry of Appearance and Request for Hearing of the Colorado Office of Consumer Counsel*, filed January 19, 2021 at pp. 2-3.

reiterates that he meets the pecuniary or tangible interests requirements of Rule 1401(c) and explains why the OCC cannot adequately represent his interests.

17. Mr. Pomerance objects to the ALJ's view of the OCC's statutory role, stating that under § 40-6.5-104(2), C.R.S., others cannot be excluded from intervening, citing the following language: "Nothing in this section shall be construed to limit the right of any person, firm, or corporation to petition or make complaint to the commission or otherwise intervene in proceedings or other matters before the commission."² Mr. Pomerance further asserts that § 40-6.5-104, C.R.S., limits the OCC's role in PUC proceedings to economic issues and specifically rates and charges. Therefore, the OCC cannot address the legal concerns he has with the Franchise Agreement and requirements of the City Charter. Mr. Pomerance states that these represent serious impingements on his fundamental rights as a citizen of Boulder.

18. Mr. Pomerance challenges the ALJ's position as to the Commission's jurisdiction over the City Charter requirements, citing § 40-5-103(1), C.R.S., citing the specific language: "...such evidence as shall be required by the commission to show that such applicant has received the required consent, franchise, permit, ordinance, vote, or other authority of the proper county, city and county, or municipal or other public authority." Mr. Pomerance interprets "as shall be required by the commission"³ to give the Commission authority to evaluate whether the City's actions in granting the franchise were in full legal compliance with its home rule city charter and further states that the Commission is not limited by the statute regarding from whom it can request evidence. Mr. Pomerance rejects Public Service's statement that the Charter issues are appropriately handled by local courts, concluding that since his interpretation of statute gives

² Motion for Modification at p. 2. (emphasis omitted)

³ *Id.* at p. 3. (emphasis omitted)

the Commission authority over these issues, the appropriate venue for his complaint is with the Commission.

19. On April 8, 2021, the ALJ issued Decision No. R21-0206-I, denying Mr. Pomerance's Motion for Modification and certifying that decision as immediately appealable. In Decision No. R21-0206-I, the ALJ finds that the Commission does not have jurisdiction to address the issues Mr. Pomerance raises regarding Boulder's City Charter, thus those issues cannot be used as a basis for permissive intervention. Additionally, the ALJ finds that Mr. Pomerance did not provide evidence that the OCC cannot adequately represent his remaining issues in this proceeding.

20. The ALJ specifically found that the Commission does not have jurisdiction to address the Boulder City Charter matters as asserted by Mr. Pomerance. The ALJ cites to Article V, § 35 of the Colorado Constitution which the Colorado Supreme Court has held precludes the Commission from regulating municipal utilities operating within their municipal boundaries. The ALJ posited it follows the Commission does not have the jurisdiction to determine whether a municipality has complied with its own laws. The ALJ referred to the language of that constitutional article which is self-evident in stating: "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever."⁴ The ALJ held that constitutional provision explicitly prohibits the Commission from asserting jurisdiction over the issues surrounding the City Charter and election matters asserted by Mr. Pomerance as the basis for his intervention in this Proceeding.

⁴ Colorado Constitution, Article V, § 35.

21. The ALJ further determined that Mr. Pomerance reads too much into § 40-5-103(1), C.R.S., in that it does not give the Commission the authority to determine whether Boulder complied with the Boulder City Charter in drafting the Franchise Agreement or in placing the agreement on the November 4, 2020 ballot. Rather, it is local, state, or federal courts that have jurisdiction over those questions. The ALJ pointed out a prior Commission decision indicating that the Commission does not possess the jurisdiction or authority of an article III court. Therefore, the ALJ concluded the Commission does not have jurisdiction to address the issues raised by Mr. Pomerance that require interpretation and application of the Boulder City Charter.

22. On April 12, 2021, Mr. Pomerance filed his Motion Contesting Interim Decision R21-0206-I and Requesting that the Public Utilities Commission Allow Intervention by Stephen Pomerance (Motion Contesting Interim Decision). In this Motion Contesting Interim Decision, Mr. Pomerance requests that the Commission reverse Decision No. R21-0206-I and allow his intervention and extend the deadline for Answer Testimony.

23. Mr. Pomerance states he seeks intervention because he finds a myriad of problems with the Settlement Agreement and the Partnership Agreement between Boulder and Public Service. These problems include: 1) failure to follow the Boulder City Charter's requirements as to what must be included in a franchise agreement; 2) failure to follow some of the Charter's process requirements for putting franchises on the ballot; 3) a significant lack of detail of many of the provisions in the Franchise Agreement such as the Opt-Outs leading to uncertainties as to how they would be implemented, thus creating possibility for lawsuits; 4) a set of detailed resolutions of prior disputes in the Settlement Agreement that have not been reviewed by the

Commission; and, 5) lack of any substance to the deliverables, timelines, costs, and who pays for the projects listed in the Partnership Agreement likely to require future PUC involvement.

24. Mr. Pomerance argues that “required consent” pursuant to § 40-5-103(1), C.R.S., was not received because the Boulder Charter requirements were not met since all relevant Charter matters were not included in the Franchise Agreement (citing Section 125 of the Boulder City Charter). Mr. Pomerance reads that statutory provision to mean that it gives the Commission the power to evaluate whatever evidence it deems necessary, including evidence that would reveal whether the actions of Boulder in the substance and process of the franchise were in full legal compliance with the Boulder home rule charter. If the charter provisions were not met, then the PUC could rule Public Service did not receive the “required consent” under § 40-5-103(1), C.R.S. According to Mr. Pomerance, it would be a relatively simple matter for the Commission to gain whatever evidence it needs to determine whether the “required consent” was properly granted, or in other words, that the Franchise Agreement meets the City Charter content requirements, that it legally was submitted to a vote, and that it legally gained voter approval.

25. Mr. Pomerance disagrees with the ALJ’s constitutional assessment that Article V § 35 precludes PUC authority since the Commission is simply looking to confirm that a home rule city followed its charter and that is not “performing a municipal function” which § 35 precludes.

26. Mr. Pomerance further states that the ALJ was wrong to find the OCC could adequately represent his interests. He argues the OCC enabling legislation may not be used to exclude others from intervening. Mr. Pomerance cites § 40-6.5-104(2), C.R.S., which provides in part, “[n]othing in this section shall be construed to limit the right of any person ... to petition or make complaint to the commission or otherwise intervene in proceedings or other matters before

the [C]ommission.”⁵ Mr. Pomerance takes the position that the OCC is statutorily focused on economic issues and not on the legal concerns he has identified, so the interests of Boulder citizens are not adequately represented by the OCC.

27. Regarding the ALJ’s statement that the City Charter issues are more appropriately handled in local courts, Mr. Pomerance after setting forth again his arguments as to deficiencies with the franchise agreement approval process reiterates, without legal support, his belief that local courts can address misdemeanors committed by City Council members, but the Commission nonetheless has jurisdiction in this matter.

28. As to the OCC’s representation, Mr. Pomerance takes the position that the OCC is confined merely to economic issues. However, Mr. Pomerance allows that he would be pleased if the OCC is permitted to take on all issues without restriction.

C. Findings and Conclusions

29. Mr. Pomerance requests we overturn the ALJ’s determination to deny his intervention based on the interests he cites to participate in this Proceeding. Therefore, we must answer whether those interests are indeed outside our jurisdiction and whether Mr. Pomerance’s remaining interests are presently addressed by the OCC.

30. Rule 1401(c) governs permissive interventions and states, in relevant part:

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

⁵ Motion Contesting Interim Decision at p. 14. (emphasis omitted)

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.

31. In his Motion to Intervene, Mr. Pomerance states that he opposes the application for two reasons: 1) the Franchise Agreement is an incomplete representation of the full set of agreements between Public Service and Boulder, and these agreements potentially allow for differential treatment of Boulder relative to other Public Service franchisees while having unspecified performance requirements for Public Service; and, 2) the ballot measure that led to the Franchise Agreement's approval by the voters of Boulder was placed on the ballot without meeting the requirements of the Boulder City Charter, and the Franchise Agreement itself does not include items mandated by the City Charter for inclusion in such a franchise.

32. In addressing what legally protected right under Rule 1401(b) is implicated, Mr. Pomerance states that he has legally protected rights as a Boulder citizen, voter, taxpayer, and ratepayer served by Public Service to not be subject to agreements between the Company and Boulder (Settlement Agreement and Partnership Agreement) that are effectively part of the Franchise Agreement but have not been reviewed by the Commission, and to not be subject to a Franchise Agreement that was placed on the ballot without meeting Charter rules and whose content does not include items that the Charter requires to be included.

33. As to the requirement under Rule 1401(c) that specific grounds for permissive intervention be stated, as well as the specific interest that justifies intervention, Mr. Pomerance again emphasizes that his intervention is to ensure the Commission reviews and approves all the relevant agreements between Public Service and Boulder and, that the Commission consider

addressing the failure of Boulder to follow its own Charter in both the franchise approval process and the franchise content.

34. In the Motion Contesting Interim Decision, Mr. Pomerance once again reiterates that he attempted to intervene because of the City's failure to follow the Boulder City Charter's extensive set of legal requirements as to what must be included in a franchise agreement; a failure to follow some of the Charter's process requirements for putting franchises on the ballot; a significant lack of detailing of many of the provisions of the Franchise Agreement such as the Opt-Outs, leading to uncertainties as to how these would be implemented creating the potential for lawsuits and further Commission involvement; a set of detailed resolutions of prior disputes in the Settlement Agreement that have not been reviewed by the Commission; and, a complete lack of any substance to the deliverables, timelines, costs, and who pays for the projects listed in the Partnership Agreement leading to further uncertainty for Boulder citizens and likely to require further Commission involvement to clarify.

35. Therefore, Mr. Pomerance's interests are explicit and well-defined. There is no mistake as to what he intends to address – his allegations regarding the Franchise Agreement, as well as the underlying Settlement Agreement between Public Service and Boulder and the Partnership Agreement. Additionally, he seeks to address the alleged failure of Boulder to follow the Charter's legal requirements as to what must be included in a franchise agreement. As part of that argument, Mr. Pomerance seeks relief regarding the method by which Boulder placed the Franchise Agreement on the ballot for a vote. The ALJ found most of these matters beyond the jurisdiction of the Commission mostly by virtue of Article V § 35 of the Colorado Constitution as outlined above. Those matters not determined to be extra jurisdictional were found to be matters which the OCC already intended to explore as part of its intervention.

36. The majority agrees with the ALJ that the Commission simply does not have authority to make determinations or correct alleged abuses associated with the franchise agreement approval process within the City of Boulder. Article V § 35 states:

[t]he general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.

It is well-established under case law that this section does not deprive the General Assembly of the power to create special commissions for any purpose and to delegate to them powers other than those mentioned in § 35. The prohibition is not upon the creation of a special commission, but upon the delegation to the special commission of enumerated powers.⁶ A “special commission” refers to a body or association of individuals separate and distinct from city government created for different purposes not connected with the general administration of municipal affairs.⁷ The PUC is a “special commission” as that term is used in this section.⁸ Most importantly, it has been held that:

“[t]he PUC is a body separate and distinct from the ‘city government’ created for an object ‘not connected with the general administration of municipal affairs.’ The framers of the constitution had in mind the possibility that the general assembly might attempt to create some special body to interfere with the management of municipal affairs, and wisely made provision to prevent such action.⁹

37. While the issues raised by Mr. Pomerance may be cause for concern, those problems may not be addressed by the Commission. The Commission was created by Article XXV of the Colorado Constitution and receives its authority from the General Assembly

⁶ *Town of Holyoke v. Smith*, 226 P. 158 (1924).

⁷ *In re Senate Bill Providing for Bd. Of Pub. Works*, 21 P. 481 (1888); *City & County of Denver v. Eggert*, 647 P.2d 216 (Colo. 1982).

⁸ *City of Lamar v. Town of Wiley*, 248 P. 1009 (1926).

⁹ *Town of Holyoke*, *supra*.

through the Public Utilities Laws pursuant to Title 40. As the ALJ noted, the Commission is not an article III court of general jurisdiction. There is a clear demarcation between those courts of law and the PUC that may not be traversed. We do not intend to cross that line now.

38. To the extent Mr. Pomerance expresses concerns with the manner in which the Franchise Agreement ballot initiative was handled, it is equally apparent that the Commission lacks authority to deal with such issues. Those matters are required to be dealt with according to the provisions of Title 31, article 10 of the Colorado Revised Statutes which generally hold that contested municipal elections must be handled by a district court judge in the district in which the municipality is located. Matters of such malfeasance must be brought to the attention of the district attorney in such district or to the attorney general for prosecution. Once again, such matters are beyond this Commission's jurisdiction.

39. To the extent Mr. Pomerance argues that as a Public Service ratepayer his concerns can be characterized as economic in nature, that places his issues squarely within the purview of the OCC under § 40-6.5-101, C.R.S. *et seq.* Mr. Pomerance provides no evidence he is uniquely qualified to intervene to address ratepayer issues or that his advocacy would not duplicate the efforts of the OCC.

40. Mr. Pomerance's stated concern is with the agreements negotiated by Public Service and Boulder and compliance with Boulder City Charter requirements. Yet he has provided no evidence or legal argument to convince the majority that the Commission has jurisdiction over issues concerning Boulder's City Charter. Furthermore, Mr. Pomerance has not demonstrated that his concerns with the Franchise Agreement and Partnership Agreement cannot be adequately addressed by the OCC. His interpretation of the OCC's mandate as limited only to economic issues is incorrect. Nothing limits the OCC's advocacy to solely economic issues.

Moreover, the OCC stated in its Notice of Intervention that it would investigate all aspects of the Franchise Agreement, including the Settlement Agreement and Partnership Agreement, satisfying Mr. Pomerance's concern.

41. Rule 1401(c) expressly states that subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Rules and statutes governing intervention are intended to ensure efficiency and effectiveness in the hearing process, as the right to issue discovery, file motions, and cross-examine witnesses increases costs and the time necessary to complete a proceeding. The Commission must consider this when granting permissive interventions, as those costs will ultimately fall to rate payers.

42. For all these reasons, the majority denies Mr. Pomerance's Motion Contesting Interim Decision and denies his intervention in this Proceeding. However, we note while we deny the relief Mr. Pomerance seeks, he is free to submit extensive comments on the issues he believes are relevant and those comments will be considered by the ALJ in rendering a decision. Should Mr. Pomerance believe he has relevant information useful to the OCC regarding the Settlement Agreement and Partnership Agreement, he may contact the OCC with his concerns.

II. ORDER

A. The Commission Orders That:

1. The Motion Contesting Interim Decision R21-0106-I and Requesting that the Public Utilities Commission Allow Intervention by Stephen Pomerance filed on April 12, 2021 is denied consistent with the discussion above.

2. The request to permissively intervene by Mr. Stephen Pomerance is denied.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
April 21, 2021.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOHN GAVAN

MEGAN M. GILMAN

Commissioners

CHAIRMAN ERIC BLANK DISSENTING.