

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.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
DENYING MOTION REQUESTING LEAVE TO REPLY,
DENYING MOTION FOR PERMISSIVE INTERVENTION,
SCHEDULING REMOTE PREHEARING CONFERENCE,
AND REQUIRING PARTIES TO CONFER AND TO FILE A
REPORT REGARDING THE CONFERRAL BEFORE THE
REMOTE PREHEARING CONFERENCE**

Mailed Date: February 26, 2021

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I. STATEMENT

A. Background

1. On December 21, 2020, Public Service Company of Colorado (Public Service) filed a Verified Application for a Certificate of Public Convenience and Necessity to Exercise Franchise Rights in the City of Boulder, Colorado (Application). With the Application, Public Service filed the direct testimony of Hollie Velasquez Horvath in support of the Application.

2. On December 22, 2020, the Commission issued notice of the Application.

3. On January 15, 2021, Stephen Pomerance filed a Petition and Motion to Intervene (Motion to Intervene), Public Service filed an Opposition to Mr. Pomerance’s Motion to Intervene on January 22, 2021, and Mr. Pomerance filed a Motion Requesting Leave to Reply and Reply Brief in support of the Motion to Intervene (Motion for Leave to Reply) on January 28, 2021.

4. From January 19 to 27, 2021, the Office of Consumer Counsel (OCC), the City of Boulder (Boulder), and Trial Staff of the Commission (Staff) filed notices of intervention by right and entries of appearance.

5. On February 3, 2021, the Commission issued a minute order deeming the Application complete and referring this proceeding to an Administrative Law Judge (ALJ) for disposition. The proceeding was subsequently assigned to the undersigned ALJ.

B. Motions**1. Motion for Leave to Reply**

6. Under Commission Rule 1400(e), “[a] movant may not file a reply to a response unless the Commission orders otherwise.” To obtain the Commission’s permission, the movant must first file a motion for leave to file a reply brief that demonstrates: (a) a material misrepresentation of a fact; (b) accident or surprise, which ordinary prudence could not have guarded against; (c) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or (d) an incorrect statement or error of law.¹ The movant bears the burden of proving one or more of these factors by a preponderance of the evidence.²

7. Here, the Motion for Leave to Reply does not mention any of the four factors specified in Rule 1400(e) that a movant must establish to obtain leave to file a reply brief. Instead, in his Motion for Leave to Reply, Mr. Pomerance presents additional argument on three issues that he addressed in his Motion to Intervene,³ and new substantive arguments that Mr. Pomerance will present to the Commission if he is permitted to intervene.⁴ Because he has not addressed any of the four factors in Rule 1400(e), Mr. Pomerance has not carried his burden of

¹ Rule 1400(e), 4 *Colorado Code Regulations* (CCR) 723-1.

² Rule 1500, 4 CCR 723-1.

³ Motion for Leave to Reply at 1 (stating that the Motion for Leave to Reply will address three arguments: (a) Mr. Pomerance’s “interests are distinct from those represented by the OCC;” (b) the Commissions should review the Franchise, Settlement, and Partnership Agreements between PSCo and Boulder, “not just the Franchise Agreement;” and (c) the Commission should determine whether the Franchise Agreement complies with Boulder’s Charter “both in substance and in process.”), 2-13 (following the outline presented on the first page).

⁴ *Id.* at 14 (“It would be prudent for the PUC to ensure that these PSCo/Boulder agreements are clear and complete and include the necessary implementation details and costs, and that their approval processes follow the appropriate laws, so as to set a good precedent for other cities to follow. . . . Boulder will not suffer any financial harm if the City is forced to redo [the Franchise, Settlement, and Partnership Agreements between PSCo and Boulder] so that all parties’ obligations are clear and complete.”).

establishing that he should be permitted to file a reply brief. Accordingly, the Motion for Leave to Reply is denied.

2. Motion to Intervene

a. Legal Standard

8. Section 40-6-109(1), C.R.S., states in relevant part:

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.

This provision creates two classes of intervenors: those who may intervene as of right and those whom the Commission permits to intervene.⁵ Commission Rule 1401⁶ further addresses the circumstances in which, and process for, intervening in Commission proceedings. Rule 1401(b) applies to interventions as of right, and Rule 1401(c) applies to permissive interventions.

9. In his Motion to Intervene, Mr. Pomerance has asserted the right to intervene pursuant to Rule 1401(b) and requested permission to intervene pursuant to Rule 1401(c). As with his Motion for Leave to Reply, Mr. Pomerance bears the burden of satisfying the standard for intervention under Rules 1401(b) or 1401(c) by a preponderance of the evidence.⁷ The standard for each is addressed in more detail below.

⁵ *Pub. Serv. Co. of Colo. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 327 (Colo. 1999).

⁶ 4 CCR 723-1.

⁷ Commission Rule 1500, 4 CCR 723-1.

(1) Intervention as of Right

10. Rule 1401(b) provides that an individual or entity asserting an intervention as of right must “state the basis for the claimed legally protected right that may be affected by the proceeding.” Examples of individual or entities who have a “legally protected right” to intervene in proceedings include Staff,⁸ the OCC,⁹ and a common carrier in a proceeding addressing an application to issue a new authority that would compete with the existing common carrier.¹⁰ However, it is well-settled that “[r]atepayers . . . do not have a ‘right’ to intervene based on § 40-6-109, C.R.S.”¹¹

(2) Permissive Intervention

11. Rule 1401(c) requires a motion for permissive intervention to:

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.

Based on the foregoing, Mr. Pomerance bears the burden of establishing: (a) the claim or defense within the scope of the Commission’s jurisdiction that his requested intervention is based upon; (b) his pecuniary or tangible interest that may be substantially affected by the outcome of the proceeding and why he is positioned to represent that interest in a manner that will advance the

⁸ Commission Rule 1401(e), 4 CCR 723-1.

⁹ §§ 40-6.5-104, 40-6.5.106(1)(b), C.R.S.

¹⁰ See Commission Rule 1401(f), 4 CCR 723-1; *Yellow Cab Coop. Ass'n v. Public Utils. Comm'n*, 869 P.2d 545, 550 (Colo. 1994).

just resolution of the proceeding; and (c) that his identified interest would not be otherwise adequately represented. Further, because this is an electric proceeding and Mr. Pomerance is seeking intervention as a residential consumer, the Motion to Intervene must also establish that his interest is either not adequately represented by the OCC, or inconsistent with one or more other classes of consumers represented by the OCC.

12. 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.”¹² The latter – disagreement with the OCC’s litigation strategy – is insufficient.¹³ If there is an identity of interests, the movant can still establish inadequate representation by presenting evidence of bad faith, collusion, or negligence by the existing party or parties.¹⁴ However, because the OCC has a statutory mandate to represent the interest of residential ratepayers,¹⁵ a movant must make a “compelling showing” that the OCC’s representation will not be adequate to serve the movant’s interests.¹⁶

13. The decision concerning whether to grant or deny petitions for permissive intervention falls within the discretion of the Commission.¹⁷

b. Mr. Pomerance’s Argument

14. In the Motion to Intervene, Mr. Pomerance identifies general and specific interests that he claims justify his intervention. As to general interests, Mr. Pomerance states that he is a

¹¹ Decision No. C18-0117-I issued in Proceeding No. 17A-0797E on February 15, 2019, at 6 (¶ 13).

¹² Decision No. C16-0663-I issued in Proceeding No. 16A-0369E on July 15, 2016, at 10 (¶ 39); Decision No. C14-1247 issued in Proceeding No. 14AL-0660E on October 16, 2014, at 3 (¶ 4).

¹³ Decision No. C16-0663-I at 13 (¶ 50).

¹⁴ *Id.* Decision No. C14-1247 at 3-4 (¶ 4).

¹⁵ § 40-6.5-104(1), (2), C.R.S.

¹⁶ Decision No. C16-0663-I at 11 (¶ 40); Decision No. C14-1247 at 4 (¶ 5).

¹⁷ *Public Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 327 (Colo. 1999).

“Boulder citizen, voter, taxpayer and ratepayer served by Public Service.”¹⁸ He also argues that his financial interests will be affected by the outcome of this proceeding because he lives in Boulder and is a ratepayer of Public Service.¹⁹

15. Mr. Pomerance identifies three specific interests that he asserts justify his intervention. First, he states that, while Public Service has provided the Franchise Agreement between Public Service and Boulder to the Commission for approval, the overall relationship between the two parties is defined by the combination of the Franchise Agreement and two other agreements – a Settlement Agreement and a Partnership Agreement.²⁰ Mr. Pomerance claims he has “a particular interest in ensuring [] that all aspects of the Franchise Agreement and its companion agreements, the Settlement Agreement and Partnership Agreement, are fully considered by the Commission.”²¹

16. Second, Mr. Pomerance alleges that: (a) the Franchise Agreement does not contain provisions that are required to be included by Boulder’s Charter;²² and (b) the process for obtaining voter approval of the Franchise Agreement did not comply with Boulder’s Charter.²³ He states that he has “a particular interest in ensuring . . . that the requirements in the Boulder City Charter for franchise agreements are followed, especially because the Franchise Agreement barely passed by a 53 [percent to] 47 [percent] margin.”²⁴

¹⁸ Motion to Intervene at 3. *See also id.* at 4 (“As a citizen of Boulder and customer of PSCo As a Boulder citizen and PSCo ratepayer . . .”).

¹⁹ *Id.* at 4.

²⁰ *Id.* at 2-5.

²¹ Motion to Intervene at 2.

²² *Id.* at 6.

²³ *Id.* at 6-7.

²⁴ *Id.* at 2.

17. Third, Mr. Pomerance alleges that Public Service has made commitments to Boulder above and beyond the commitments it typically makes in franchise agreements. For example, Mr. Pomerance states that Public Service has promised a level of undergrounding of above-ground electrical lines not seen in other franchise agreements. Mr. Pomerance estimates that the undergrounding will cost “something on the order of \$11 million” and further states that “if this investment is placed in the rate base, . . . then its costs will be borne primarily by other ratepayers, because Boulder is only a small fraction of Public Service’s total system.”²⁵ According to Mr. Pomerance, not only would this be unfair, but it could also lead to “other areas making their own requests for extra benefits or incentives.”²⁶

18. Finally, Mr. Pomerance argues that the OCC cannot represent his interests because “[t]he OCC’s job is to represent small ratepayers in general. So the OCC has no clear obligation to represent just the ratepayers of Boulder.”²⁷ However, Mr. Pomerance also states that “the OCC could and perhaps should take such issues on, given their potential future relevance to other cities, and also given the potential costs that might accrue to other ratepayers.”²⁸ Mr. Pomerance states that 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 the OCC [who] drafted the legislation that led to the creation of OCC almost 40 years ago.”²⁹ Mr. Pomerance thus concludes that he has the expertise necessary to represent his interests.

²⁵ *Id.*

²⁶ *Id.* at 5-6.

²⁷ *Id.* at 5.

²⁸ *Id.*

²⁹ *Id.* at 4.

c. Public Service's Argument

19. Public Service cites 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) in arguing that Mr. Pomerance cannot intervene as of right in this proceeding.³⁰ Public Service further argues that Mr. Pomerance should not be permitted to permissively intervene because: (a) he has not satisfied his burden of establishing that the OCC cannot represent his interests;³¹ (b) his claims of expertise in the subject matter of the proceeding are insufficient to justify intervention;³² (c) he has not established a sufficient tangible and pecuniary interest as required by Commission Rule 1401(c);³³ (d) the issues he identifies concerning compliance with the Boulder Charter are outside the scope of the proceeding;³⁴ and (e) his intervention would “substantially and unnecessarily broaden the proceeding” based on his request for the Commission to consider the Settlement and Partnership Agreements and the alleged violations of the Boulder Charter.³⁵ Public Service thus requests the Commission deny Mr. Pomerance’s Motion to Intervene.

d. Analysis**(1) Intervention as of Right.**

20. Mr. Pomerance does not have a right to intervene in this proceeding under § 40-6-109(1), C.R.S., and Rule 1401(b). Mr. Pomerance has not identified a recognized “legally-protected right” that would justify his intervention under Rule 1401(b). The fact that he is a “Boulder citizen, voter, taxpayer and ratepayer served by Public Service” is insufficient. As

³⁰ PSCo’s Response at 3 n.6.

³¹ *Id.* at 4-5 (¶ 7).

³² *Id.* at 5 (¶ 8).

³³ *Id.* (¶ 9).

³⁴ *Id.* at 6 (¶ 10).

stated above, it is well-settled that “[r]atepayers . . . do not have a ‘right’ to intervene” under § 40-6-109(1), C.R.S. and Commission Rule 1401(b).³⁶ The fact that Mr. Pomerance is also a “Boulder citizen, voter, and taxpayer” does not alter this conclusion. Accordingly, Mr. Pomerance has not satisfied his burden of establishing that he has a right to intervene in this proceeding under § 40-6-109(1), C.R.S., and Rule 1401(b).

(2) Permissive Intervention

21. Mr. Pomerance has not satisfied the standard for permissive intervention for four primary reasons. First, Mr. Pomerance has not carried his burden of establishing that one of the issues he requests the Commission to address – whether Boulder and Public Service have complied with the Boulder City Charter – is within the Commission’s jurisdiction. The Commission’s jurisdiction is limited, and it is not self-evident that this issue falls within it. In fact, Public Service contends that the Commission does not have jurisdiction over the violations of the Boulder City Charter alleged by Mr. Pomerance.³⁷ By failing to cite any authority or present any legal analysis on this question, Mr. Pomerance has not satisfied his burden of establishing that the alleged violations of the Boulder City Charter are “within the scope of the Commission’s jurisdiction.”³⁸

22. Second, Mr. Pomerance has not established that the OCC cannot adequately represent his interests in this proceeding as to the other issues identified in his Motion. In fact, Mr. Pomerance admits that the OCC “could and perhaps should take [] on” the issues that Mr.

³⁵ *Id.* (¶ 11).

³⁶ Decision No. C18-0117-I at 6 (¶ 13).

³⁷ PSCo’s Response at 6 (¶ 10).

³⁸ Rule 1401(c), 4 CCR 723-1.

Pomerance raised in his Motion to Intervene.³⁹ Further, not only *could* the OCC take on such issues, the OCC has stated that it *will* take them on. Specifically, in its Notice of Intervention of Right, the OCC states that it will investigate and analyze: (a) whether the Settlement Agreement between Public Service and Boulder is in the public interest; (b) whether any agreement or attempt to socialize Boulder-specific costs from municipalization, condemnation, or the undergrounding of overhead lines, and thereby force non-Boulder ratepayers to bear some of the those costs, is in the public interest; and (c) whether any “novel terms in the Franchise Agreement will create precedents that could be problematic or discriminatory with respect to other future franchise agreements.”⁴⁰ While the OCC does not specifically mention the Partnership Agreement identified by Mr. Pomerance, it is apparent that the OCC will address all issues that have a bearing on the question of whether the Franchise Agreement should be approved. The OCC has thus indicated that it plans to review the issues identified by Mr. Pomerance in his Motion to Intervene and thus is representing Mr. Pomerance’s interests.

23. Third, Mr. Pomerance has not argued that his interests and the interests of any other class of consumers are inconsistent such that the OCC cannot adequately represent him. Mr. Pomerance has identified one area in which there is a potential for tension between the interests of groups of consumers, namely, the potential subsidization of the costs that Public Service has allegedly agreed to incur in Boulder by Public Service’s non-Boulder ratepayers. However, Mr. Pomerance and the OCC appear to share the same position on this issue insofar as they both question whether such an outcome is in the public interest.

³⁹ Motion to Intervene at 5.

⁴⁰ OCC’s Notice of Intervention of Right at 2-3. *See also* Staff’s Notice of Intervention as of Right at 1-2 (¶ 2) (stating that it will address issues (a) and (b) above, as well as “[w]hether the costs to comply with Boulder’s greenhouse gas emission reduction goals impose additional costs on Public Service Company of Colorado’s system,

24. Specifically, Mr. Pomerance questions whether such socialization of Boulder's costs would treat ratepayers equally, and could lead ratepayers in other areas of the state to insist on both higher Public Service expenditures to address local energy issues and the socialization of those local costs to all of Public Service's ratepayers.⁴¹ Similarly, the OCC has indicated that it has questions as to whether any such cost socialization is in the public interest.⁴² As a result, Mr. Pomerance has not established that the OCC cannot represent him because it has aligned with a separate class of consumers with a conflicting interest.

25. Finally, Mr. Pomerance has not argued that the OCC or any other party has engaged in bad faith, collusion, or negligence. In addition, while the ALJ appreciates Mr. Pomerance's "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 the OCC" by virtue of his work on the legislation that created the OCC,⁴³ Mr. Pomerance has not argued that he would bring expertise to this proceeding that the OCC and the other parties cannot provide. Mr. Pomerance has thus not made any showing – much less a compelling showing – that the OCC's representation of his interests would be inadequate.⁴⁴

26. Accordingly, based on the foregoing, Mr. Pomerance has not satisfied his burden of establishing that he should be permitted to permissively intervene in this proceeding. The Motion to Intervene will be denied.

27. This does not mean that Mr. Pomerance is excluded from participating in this proceeding. As part of the Department of Regulatory Agencies' modernization plans, the

should be included in a franchise agreement, and whether any of the costs associated with attaining such goals will be appropriately allocated to Boulder ratepayers.")

⁴¹ Motion to Intervene at 5-6.

⁴² OCC's Notice of Intervention of Right at 2-3.

⁴³ Motion to Intervene at 4.

Commission is encouraging relevant input from a broad range of perspectives addressing important issues to be decided by the Commission in administrative and rulemaking proceedings. While this is an adjudicatory proceeding,⁴⁵ the disputes between Public Service and Boulder that “served as obstacles” to the Franchise Agreement for several years received substantial public attention.⁴⁶ In addition, the resolution of the issues identified by Staff and the OCC regarding the Franchise Agreement could have wider implications than just for the parties to this proceeding.

28. Thus, Mr. Pomerance and other members of the public are encouraged to file relevant public comments in this proceeding pursuant to Rule 1509.⁴⁷ If members of the public want to give the parties the opportunity to address their comments in testimony, the comments should be filed at least two weeks before the deadlines for filing answer and/or rebuttal testimony, which will be established in a forthcoming interim decision. Alternatively, any member of the public who can satisfy the requirements of Rule 1200(c) in a motion filed in this proceeding will be granted permission to “present legal argument to assist the Commission in arriving at a just and reasonable determination of [this] proceeding.”⁴⁸ In rendering its decision, the Commission will consider any comments, recommendations, and arguments submitted by Mr. Pomerance and any other member of the public via either of these avenues.

⁴⁴ Decision No. C16-0663-I at 11 (¶ 40); Decision No. C14-1247 at 4 (¶ 5).

⁴⁵ Rule 1004(c), 4 CCR 723-1 (“‘Adjudicatory proceeding’ means the following types of proceedings: applications, petitions, other than petitions for rulemaking, formal complaints, show cause proceedings, advice letter proceedings after suspension of the effective date by the Commission, or any other proceeding designated by the Commission as an adjudicatory proceeding.”).

⁴⁶ PSCo’s Response at 6 (¶ 11).

⁴⁷ 4 CCR 723-1.

⁴⁸ Rule 1200(c), 4 CCR 723-1. *See also* Rule 1509(b) (“amici curiae to a proceeding may not provide public comment in that proceeding”).

C. Remote Prehearing Conference

29. It is appropriate to hold a prehearing conference in this proceeding. The ALJ finds that holding the prehearing conference remotely is consistent with current public health advisories to prevent the spread of COVID-19. The ALJ concludes that it is in the parties' and the public interest to hold the prehearing conference remotely. Accordingly, a remote prehearing conference shall be scheduled for March 17, 2021, at 1:00 p.m. Attachment A to this Decision provides the information addressing how to use the GoToMeeting platform for participating in the remote prehearing conference.

30. Public Service and the other parties shall confer in advance of the remote prehearing conference regarding a schedule for this proceeding. Public Service shall file a report of the results of the conferral. If there is agreement on a procedural schedule, the report shall state as much and detail the stipulated procedural schedule and associated discovery procedures. If agreement is not achieved, the report shall state as much and identify the competing schedules and discovery procedures. For purposes of developing a schedule, the latest date on which the hearing must conclude is June 18, 2021, which is based on the assumption that the proceeding will be decided within the 250-day deadline provided by § 40-6-109.5(1), C.R.S. The deadline to file the report will be March 12, 2021.

31. All parties must appear at the remote prehearing conference. Failure to attend or to participate in the remote prehearing conference is a waiver of any objection to the rulings made, to the procedural schedule established, and to the hearing dates scheduled during the remote prehearing conference.

II. ORDER

A. It Is Ordered That:

1. The Motion Requesting Leave to Reply and Reply Brief in Support of the Motion to Intervene (Motion for Leave to Reply) filed by Stephen Pomerance on January 28, 2021 is denied for the reasons stated above.

2. The Petition and Motion to Intervene filed by Mr. Pomerance on January 15, 2021, is denied for the reasons stated above.

3. The parties to the proceeding are Public Service Company of Colorado, Trial Staff of the Commission, the Office of Consumer Counsel, and the City of Boulder.

4. A remote prehearing conference in this proceeding is scheduled as follows:

DATE: March 17, 2021

TIME: 1:00 p.m.

WEBCAST: Hearing Room B

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

5. PSCo shall file the report of the conferral identified above on or before March 12, 2021.

6. This Decision 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