

Decision No. R24-0651-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24F-0204E

HOWARD KIYOTA,

COMPLAINANT,

V.

UNITED POWER, INC.,

RESPONDENT,

**INTERIM DECISION
DENYING MOTION TO DISMISS; REQUIRING ANSWER
TO BE FILED AND SETTING PREHEARING
CONFERENCE**

Issued Date: September 17, 2024

I. STATEMENT

1. On May 7, 2024, Howard Kiyota filed a Complaint against United Power Inc., (“Respondent” or “United Power”). That filing commenced this proceeding.

2. On May 8, 2024, Public Utilities Commission Staff (“Staff”), served a copy of the Complaint together with an order requiring the defendant to satisfy or answer said complaint within 20 days, in accordance with § 40-6-108, C.R.S. An evidentiary hearing was scheduled for July 22, 2024.

3. On May 15, 2024, the above captioned proceeding was referred by minute entry to an Administrative Law Judge (“ALJ”).

4. On May 23, 2024, United Power filed its Motion to Dismiss.

5. On June 21, 2024, by Decision No. R24-0441-I, the evidentiary hearing was vacated.

6. On June 24, 2024, Mr. Kiyota filed his Response to Interim Decision of Administrative Law Judge Robert I. Garvey Vacating Evidentiary Hearing (“June 24 filing”).

7. On June 27, 2024, Mr. Kiyota filed a document titled Extension August 1 2024 to reply to UP’s motion to dismiss (“June 27 filing”).

8. On July 29, 2024, Mr. Kiyota filed Attachments for Howard Kiyota Formal Complaint (July 29 filing)

9. On August 1, 2024, Mr. Kiyota filed an amendment to his Response to United Power’s Motion to Dismiss (“August 1 filing”)

II. COMPLAINANT’S FILINGS

10. In the June 24 filing, Mr. Kiyota stated that he was unaware he needed to respond to United Power’s Motion to Dismiss within two weeks and requested additional time to respond and seek counsel¹.

11. The June 27 filing was titled, in the Commission’s e-filing system, as “Extension: August 1, 2024, to reply to UP’s Motion to Dismiss.” The filing itself was not titled, but rather in the form of a letter to the undersigned ALJ. Nowhere in the body of the letter is there a request for an extension of time until August 1, 2024, to file a response. The body of the filing consisted of a

¹ Mr. Kiyota did not specify an amount of time.

reiteration of the alleged facts and a request that the Motion to Dismiss be denied. There is also no reference to the Complainant obtaining or seeking counsel.

12. The undersigned ALJ was unsure if the June 27 filing was a response to the Motion to Dismiss or if Complainant intended to file a response by August 1, 2024. In addition, the undersigned ALJ allowed time for United Power to respond to the filings. United Power did not respond to any of the filings

13. On August 1, 2024, Mr. Kiyota filed an amendment to his Response and requested it replace his June 27 filing. United Power did not file a response.

III. MOTION TO DISMISS

A. Complaint fails to allege a violation under § 40-9.5-106, C.R.S.

14. United Power argues that the Commission is without jurisdiction to hear the Complaint.

15. United Power avers that the General Assembly has given the Commission the power to hear complaints under Article 6 of Title 40 but exempt electric cooperatives from most complaint cases.

16. United Power states that § 40-9.5-106, C.R.S. limits the Commission jurisdiction in complaints involving electric cooperatives to have made or granted “any preference or advantage to any corporation or person or subject[ed] any corporation or person to any prejudice or disadvantage,” or to have established or maintained “any unreasonable difference as to rates, charges, service, or facilities or as to any other matter, either between localities or between any class of service.”²

² Motion to Dismiss, p. 6

17. United Power states that Mr. Kiyota's complaint alleges that the replacement of his service lateral has caused certain disruptions to his electric service and to various devices. United Power argues that Mr. Kiyota has not alleged the type of violations required under § 40-9.5-106 C.R.S for Commission jurisdiction and therefore the Motion to Dismiss should be granted.

18. In addition, United Power states, under § 40-9.5-109, C.R.S. each electric cooperative is required to create a procedure to address complaints from members and consumers which they claim is the proper forum for this complaint.

B. Failure to Exhaust

19. In the alternative, United Power argues that Mr. Kiyota has not pursued the complaint process available to him under the United Power Rules and Regulations, and thus has failed to exhaust administrative remedies. This failure to exhaust remedies renders the Commission without jurisdiction.

20. United Power relies upon the finding of the Colorado Supreme Court in *State of Colorado v. Golden's Concrete Co.*, 962 P2d 919 ("Colo. 1998") for this argument.

IV. RESPONSE

21. In his Response, the Complainant details the numerous times he has contacted United Power with issues concerning the power quality delivered to his property.

22. Mr. Kiyota also states that he was not made aware of the internal complaint procedures contained in United Power's Rules and Regulations.

23. Mr. Kiyota also alleges that the other customers do not have the same service lateral that United Power used to deliver power to his property.

24. Mr. Kiyota also presents other arguments not directly related to the jurisdiction issue.

V. ISSUE

25. Does the Commission have jurisdiction to hear Mr. Kiyota's complaint?

VI. APPLICABLE LAW

26. The Colorado Legislature has defined a Public Utility in of C.R.S. § 40-1-103 as follows:

40-1-103. Public utility defined

(a) (I) The term "public utility", when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title.

27. Generally, electric cooperatives are not subject to Commission jurisdiction:

Except as otherwise provided in this part 1, the provisions of the "Public Utilities Law," articles 1 to 7 of this title, shall not apply to cooperative electric associations which have, by an affirmative vote of the members and consumers pursuant to section 40-9.5-104, voted to exempt themselves from such provisions and to be subject to the provisions of this part 1. The period of exemption shall begin on the date the election results are filed with the public utilities commission. § 40-9.5-103, C.R.S.

28. Although the legislature has provided for Commission jurisdiction in some electric cooperative complaint cases.

No cooperative electric association, as to rates, charges, service, or facilities or as to any other matter, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage. No cooperative electric association shall establish or maintain any unreasonable difference as to rates, charges, service, or facilities or as to any other matter, either between localities or between any class of service. Notwithstanding section 40-6-108(1)(b), any complaint arising out of this subsection (2) signed by one or more customers of such association shall be resolved by the public utilities commission in accordance with the hearing and enforcement procedures established in articles 6 and 7 of this title. § 40-9.5-106, C.R.S.

29. The legislature has also required that every electric cooperative create a procedure for members and consumers to register complaints.

The board of directors of each cooperative electric association shall adopt regulations which specify a procedure for members and consumers to register complaints about and be given an opportunity to be heard by the board on the rates charged by such association, the manner in which the electric service is provided, and proposed changes in the rates or regulations. Such regulations may be amended whenever deemed appropriate by the board. § 40-9.5-109, C.R.S.

30. To the extent the Motion asserts that the Commission lacks subject matter jurisdiction, it is a Colo.R.Civ.P. 12(b)(1) motion. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (“Colo. 1993”).

31. "Subject matter jurisdiction concerns the authority of the [Commission] to decide a particular matter." *In re Marriage of Haddad*, 93 P.3d 617, 619 (“Colo. App. 2004”). In ruling on the Motion, the ALJ relies on Colorado court decisions interpreting and implementing Colo.R.Civ.P. 12(b)(1).

32. When considering a motion to dismiss based on lack of subject matter jurisdiction, the following principles apply: Once subject matter jurisdiction is raised, the complainant bears the burden of proving the existence of the Commission's jurisdiction to decide the case or claim. *Medina v. Colorado*, 35 P.3d 443, 452 (“Colo. 2001”) (“Medina”). A complainant may meet this burden by a *prima facie* showing of threshold jurisdiction. *Pioneer Astro Industries, Inc. v. District Court*, 566 P.2d 1067, 1068 (“Colo. 1977”). The complaint's "allegations have no presumptive truthfulness[.]" *Medina*, 35 P.3d at 452 (“internal quotation marks and citation omitted”).

33. If a complainant fails to establish that the Commission has subject matter jurisdiction, the Commission must dismiss the complaint or claim. *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (“Colo. App. 1999”). Because the Commission has no subject matter jurisdiction to consider the matter, a dismissal pursuant to Colo.R.Civ.P. 12(b)(1) is not a determination on the merits of the Complaint.

VII. DISCUSSION

A. **Jurisdiction Over Service Issues**

34. The United Power frames its initial argument as the Commission lacking jurisdiction over complaints regarding service issues.³ United Power correctly points out that the Commission has limited jurisdiction in matters concerning electric cooperatives but acknowledges Commission jurisdiction of cooperatives in some complainant cases.

35. United Power correctly identifies the conditions necessary for Commission jurisdiction in complaints against cooperatives as “any preference or advantage to any corporation or person or subject[ed] any corporation or person to any prejudice or disadvantage,” or to have established or maintained “any unreasonable difference as to rates, charges, service, or facilities or as to any other matter, either between localities or between any class of service”⁴.

36. United Power used this statute itself in Commission Proceeding 19F-0620E to assert Commission jurisdiction in a complaint matter against Tri-State Generation and Transmission Association Inc.

37. United Power argues that Complainant has failed to allege a violation which falls into the exceptions that grant the Commission jurisdiction in a complaint proceeding. United Power describes Mr. Kiyota’s complaint only as alleging “that United Power’s replacement of his service lateral has caused certain disruptions to his electric service and to various devices.”⁵

38. Mr. Kiyota states in his Complaint that due to the construction of a house on his property, the service lateral to his property was changed. Mr. Kiyota alleges that the change of the service lateral has caused numerous electronic devices to fail.

³ Motion to Dismiss, p. 5.

⁴ Id. at 6.

⁵ Motion to Dismiss, p. 6.

39. In his initial complaint Mr. Kiyota alleged the following:

40) If this was Mr. Mark Gabriel, President & CEO of United Power's new house, would United Power Engineering place a 50 kv pad mounted transformer outside the front door and put primary to the transformer and secondary to the house under a 37" concrete driveway? Would any United Power Executive or Board Management want a new home under these conditions? Would United Power Engineering connect Mr. Gabriel's new home with a 220.9' hybrid OH and UG service? **Preferential treatment for United Power Executives and Board members isn't right, all customers should be treated equally** (*"emphasis added"*).⁶

40. In his filing of August 1, 2024, Mr. Kiyota responds to the Motion to dismiss by stating the following:

I'm praying the State of Colorado's Public Utilities Commission will review the preferential treatment between UP's customers who have service laterals that meet UP's Standards for Electric Installation and Use versus the "unique" 220.9' hybrid service lateral engineered and installed by United Power at my home.⁷

41. In each of these filings Mr. Kiyota alleges that other customers are being given preferential treatment. Under § 40-9.5-106, C.R.S. the Commission has jurisdiction to ensure “no cooperative electric association, as to rates, charges, **service** (*"emphasis added"*), or facilities or as to any other matter, shall make or grant any preference or advantage to any corporation or person or subject any corporation or person to any prejudice or disadvantage.” If another customer is being given preferential treatment over Mr. Kiyota in the service lateral to their property, that preferential treatment would meet the requirements of § 40-9.5-106, C.R.S.

42. Again, the standard at this early stage it is not necessary to conclusively prove that there is actual preferential treatment, only that the allegations are of preferential or discriminatory actions by the cooperative.

43. While United Power is correct that Mr. Kiyota’s complaint alleges “disruptions to his electric service and to various devices,” these are his alleged damages, not his cause of action.

⁶ Complaint p.

⁷ Response filed on August 1, 2024.

The Complaint pleads a cause of action of preferential treatment that United Power fails to address or acknowledge in its Motion to Dismiss.

44. Contrary to the argument of United Power, any allegations of preference in service by a cooperative fall under § 40-9.5-106 (2), C.R.S. and provides the Commission jurisdiction in the matter. Therefore, United Power's Motion to Dismiss based on Mr. Kiyota's failure to allege a violation under § 40-9.5-106 (2), C.R.S. fails.

B. Failure to Exhaust

45. In the alternative, United Power argues if the Commission could hear this type of case, Mr. Kiyota is required to pursue the complaint under United Power's Rules and Regulations prior to commencing the above captioned action with the Commission.

46. The only evidence United Power provides to support this proposition is citing to *State v. Golden's Contract Co.* 962 P2d 919 and stating the following:

The doctrine of exhaustion of administrative remedies "serves as a threshold to judicial review that requires parties in a civil action to pursue available statutory administrative remedies before filing suit in district court."⁸

United Power continues and makes the unsupported leap to conclude the following:

"or, as is the case here, before filing a complaint proceeding at the Commission."⁹

47. The case cited by United Power only speaks to the necessity to exhaust remedies before moving a civil action from an administrative court to district or state court. United Power does not provide any authority to show Mr. Kiyota is required to avail himself to United Power's internal administrative process before seeking relief from the Commission's administrative court.

⁸ Motion to Dismiss, p. 8.

⁹ Id.

48. United Power fails to address if Mr. Kiyota were to avail himself to the internal administrative process if Commission jurisdiction would be *de novo* or as an appellate body. United Power also fails to explain why, if Mr. Kiyota's claim fails in the internal administrative process, he would not be estopped from re-litigating his claims before the Commission. At best there is concurrent jurisdiction in cases that fall under § 40-9.5-106 (2), C.R.S.

49. Finally, even if the doctrine of exhaustion of administrative remedies was applicable, United Power fails to state why the exceptions to the doctrine would not apply to the instant matter. The same case cited by United Power states that an exception to the doctrine of exhaustion of administrative remedies is when it is "clear beyond a reasonable doubt" that further administrative review by the agency would be futile because the agency will not provide the relief requested."¹⁰

50. In his response Mr. Kiyota states that he has exchanged over 36 emails and interacted with 14 United Power employees over a two-year period without a resolution to his issues. Mr. Kiyota also states that he was never informed of the United Power's Rules and Regulations and that United Power's website does not provide information on this process.¹¹

51. Mr. Kiyota contacted United Power two years ago about his service lateral issue. United Power not only failed to provide the requested relief but failed to even advise him of the internal process they now say he must avail himself before seeking relief from the Commission. There is no reason to believe after two years of a runaround and failure to make this process available to Mr. Kiyota that he will be provided the relief he has requested. Therefore, further review by United Power would be futile.

¹⁰ *State v. Golden's Contract Co.* 962 P2d 919, 923 (Colo. 1998).

¹¹ Response, p. 1

52. The undersigned is unconvinced that Mr. Kiyota was required to avail himself to United Power's internal dispute process and if the law could be twisted to require him to do so, this situation creates an exception to the requirement.

C. Conclusion

53. United Power's Motion to Dismiss is denied.

VIII. ANSWER

54. As of the date of this Decision, United Power has not filed an Answer to the Complaint filed by Mr. Kiyota.

55. United Power shall have until October 8, 2024, to file an Answer to the Complaint.

IX. PREHEARING CONFERENCE

56. Given the procedural posture of the case, it is appropriate to hold a prehearing conference to address several issues. The parties to this proceeding should be prepared to discuss all procedural and substantive issues, including, but not limited to, deadlines for witness lists, exhibits, and a date(s) for a hearing on the Complaint.

57. Participants will appear at the prehearing conference from remote locations by videoconference and may not appear in person for the prehearing conference. The remote prehearing conference will be held using the web-hosted service, Zoom. Attachment A hereto includes important technical information and requirements to facilitate holding the prehearing conference remotely. All those participating in the hearing must carefully review and follow all requirements in this Decision and Attachment A.

58. To minimize the potential that the videoconference hearing may be disrupted by non-participants, the link and meeting ID or access code to attend the hearing will be provided to the participants by email before the hearing, and the participants will be prohibited from

distributing that information to anyone not participating in the hearing. Parties will receive an email with information needed to join the hearing at the email addresses on file with the Commission for this Proceeding. As such, it is important that all parties ensure that the Commission has the correct email address for them.

59. The ALJ will deem any party's failure to appear at the prehearing conference to be a waiver of any objection to the rulings made during the prehearing conference.

60. If a party is unable to appear on the date scheduled for the prehearing conference, that party must file a motion to reschedule the prehearing conference with dates both parties are available.

61. A prehearing conference in this matter will be scheduled as ordered.

X. ORDER

It is Ordered That:

1. The Motion to Dismiss filed by United Power Inc. ("United Power"), on May 15, 2024, is denied.

2. United Power is ordered to file an Answer to the complaint filed by Mr. Kiyota on May 7, 2024, by October 8, 2024.

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

DATE: October 15, 2024

TIME: 10:00 a.m.

PLACE: Join by videoconference using Zoom

4. Participants in the hearing may not distribute the hearing link, access, or ID code to anyone not participating in the hearing. Participants may not appear in person at the Commission

for the above-scheduled hearing. Instead, they must participate in the hearing from remote locations, consistent with the requirements of this Decision.

5. All participants must comply with the requirements in Attachment A to this Decision, which is incorporated into this Decision.

6. The Parties shall be held to the advisements in this Decision

7. This Decision is 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

Rebecca E. White,
Director