

Pro Se Intervenor Workshop Tips for Non-lawyers

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Colorado Public Utilities Commission
1560 Broadway, Ste. 250
Denver, CO 80202

Agenda

- I. Introduction
- II. Scope
- III. Elements of a PUC Proceeding
- IV. General Rules of the Road
- V. Hearing Procedures
- VI. Q&A

I. Introduction

- Deborah Collette, Spokesperson
- Ken Kirkpatrick, Chief Administrative Law Judge
- Becky Quintana, Rules Administrator

II. Scope

- This workshop assumes you are an individual person representing yourself.
- If you are not representing yourself, you must be an attorney (subject to some limited exceptions for closely held entities).
- Required by the Colorado Supreme Court in *Denver Bar Association v. PUC*, 154 Colo. 273 (1964).

Rule 1201, Attorneys

III. Elements of a PUC Proceeding

- Application filed (or tariffs suspended)
- Notice of the Application (suspension) is given
- Intervention by interested persons
- Prehearing conference for parties
- Discovery
- File testimony or witness/exhibit list
- Hearing
- Posthearing briefs
- Recommended decision or Commission decision
- Exceptions or Rehearing, Reargument, or Reconsideration
- Judicial Review

Application Filed (or tariff suspended)

- Utility files a formal request with the PUC asking for the PUC's authorization or approval to do something. A typical example would be an application for a certificate of public convenience and necessity (CPCN) for some major construction, like a new power plant.

Rule 1303, Applications. Note the cross-reference to the substantive rules.

- Utility files new tariffs that the Commission suspends and sets for hearing.

Rule 1305, Rejection or Suspension of Proposed Tariffs, Price Lists, or Time Schedules.

Notice.

The PUC or the applicant (or both) will give notice of the application. It may be in a newspaper, on the PUC's website, a direct mailing, or some other type of notice. The notice will contain important information, such as the deadline for filing an intervention.

Rule 1206, Notice-Generally; Rule 1207, Transportation

Intervention

The standard for permissive intervention is found in Rule 1401(c).

“A motion to permissively intervene shall state the grounds relied upon for intervention, the claim or defense for which intervention is sought, including the specific interest that justifies intervention, and the nature and quantity of evidence, then known, that will be presented if intervention is granted. For purposes of this rule, **the motion must demonstrate that the subject docket 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 in the docket; subjective interest in a docket is not a sufficient basis to intervene.**” (Emphasis added.)

Intervention cont.

Your motion to intervene is like any other motion (more on that later). The applicant (utility) may respond to it and oppose it. The PUC will issue an order granting or denying your motion for intervention.

Intervention cont.

- If you successfully intervene, you will have all of the rights and obligations of a party. The rights include the right to conduct discovery, put on evidence, examine witnesses, make argument, and appeal an adverse decision. The obligations include following PUC rules, responding to discovery, and acting in good faith.
- If you don't state opposition to the application and request a hearing, the application may be granted without a hearing.

Rule 1200, Parties, Amicus Curiae, Non-Parties; Rule 1403, Uncontested Proceedings

Intervention cont.

- *Amicus Curiae*—an alternative to intervention

An *amicus* can present legal argument and will be served with all documents. An *amicus* is not subject to discovery, may not offer evidence, cross examine witnesses, or conduct discovery. It may be appropriate for someone who wants to persuade the PUC by argument rather than by evidence, or someone who does not meet the standard for intervention.

Rule 1200, Parties, *Amicus Curiae*, Non-Parties

Prehearing Conference.

- In larger cases, the PUC will usually, but not always, conduct a prehearing conference very early, typically right after the close of the notice period.
- The PUC will want to establish a procedural schedule to meet deadlines for making a decision; define/refine issues; and resolve pending disputes and motions. No evidence is taken at these proceedings.
- The PUC may, and most likely will, change the default provisions in the Rules of Practice and Procedure, such as by requiring electronic service (email) of documents or changing deadlines for the filing of testimony. As a party, you have a right to be heard at the prehearing conference. You will be bound by the prehearing order, whether you attend the prehearing conference or not.

Rule 1409, Prehearing Conferences

Discovery

- PUC uses the Colorado Rules of Civil Procedure for discovery with some modifications.
- Most discovery is written, but some depositions may be taken.

Rule 1405, Discovery and Disclosure of Prefiled Testimony

Discovery cont.

- Interrogatories—Questions of another party that must be answered within either 10 days (first 30) or 20 days (any over 30).
- Request for production of documents—a request to inspect and copy known documents.
- Remedy—If you don't feel the party you served discovery on has responded, file a motion to compel responses, attaching a copy of the disputed discovery (questions and answers). Only at this point will the discovery be filed with the PUC.

File Witness/Exhibit List or Testimony.

In the absence of a procedural order, the Rules of P&P will set the deadlines by which you must file and serve your witness/exhibit list or testimony.

Rule 1405(d), Discovery

Second Prehearing Conference

Sometimes the PUC will have a prehearing conference right before the hearing. This usually will deal with last minute issues, and it may involve motions to strike portions of prefiled testimony.

Rule 1409, Prehearing Conferences

Hearing Procedures

Burdens of proof and persuasion; order of presentation; order of examination; copies of exhibits; questions as opposed to testimony; briefs or closing arguments. These and other issues will be dealt with in the session on the hearing.

Rule 1500, Burden of Proof; Rule 1501, Evidence

Posthearing Briefs

- File closing briefs/statements of position, usually within 2 weeks of hearing
- Briefs may be responsive or not

Rule 1503, Briefs; Rule 1504, Record.

Recommended Decision or Commission Decision

- If Commissioners hear case, will issue a Commission Decision
- If ALJ hears case, will issue a Recommended Decision (exception: Initial Commission Decision). If no appeals or stay, the Recommended Decision becomes a Decision of the Commission after 20 days.

Rule 1505, Exceptions

Exceptions

- An appeal of a recommended decision of an ALJ to the Commission is called Exceptions.
- A transcript of the hearing must accompany the Exceptions if the appealing party wants to challenge factual findings.

Rule 1505, Exceptions

Application for Rehearing, Reargument, or Reconsideration (R,R,&R, Triple R)

- May request this of any Commission Decision.
- By filing for this, you are seeking relief just as the name implies.

Rule 1506, Rehearing, Reargument, or Reconsideration

Judicial Review

- Parties may seek judicial review in the district court.

Rule 1507, Judicial Review

IV. General Rules of the Road

- Pleadings
- Time
- Filing
- Service
- Responses
- Motions
- Subpoenas
- Settlements
- *Ex Parte* communications/prohibited communications
- Confidential matter
- Rulemakings

Pleadings

- Definition—what is a pleading?
- Paper requirements
- Caption
- Contents
- Signature block (e.g., telephone number)

Rule 1004(u), Definitions; Rule 1202, Form and Content

Time

- “Day” means calendar day.
- When computing, first day excluded, last day included.
- When day for performance falls on Saturday, Sunday, or holiday, it is continued to 5:00 p.m. on the next business day.
- Tip: Just be safe and file early!

Filing

- Number of copies
- When
- Where
- Fax filings—beware!
- A Commission Order may supersede these default provisions

Rule 1204, Filing

Service

- Anything that is filed must be served.
- Serve all other parties and any *amicus*
- Proof of service is demonstrated in the form of a certificate of service attached to the document.

Rule 1205, Service

Responses

- May be filed to respond to some, but not all, pleadings. For example, may file a response to a motion, but not to another response.
- Responses must be timely, or else demonstrate good cause for the untimeliness.

Rule 1308, Responses: Generally-Complaints

Motions

- Motion is a type of pleading, probably the most common. The movant is asking the Commission to order that something be done, such as extend a deadline.
- General response time is 14 days after service (not receipt), unless response time has been shortened.
- Like any other pleading, motions must be filed and served.

Rule 1400, Motions

Subpoenas

- May be issued to compel the attendance of a witness or the production of known documents.
- PUC will only issue upon a sworn showing of good cause. “Good cause shall consist of an affidavit stating with specificity the testimony, records, or documents sought and the relevance of such testimony, records, or documents to the proceedings.” Section 40-6-103(1), C.R.S.

Rule 1406, Subpoenas

Settlements

- The PUC encourages negotiated settlements to contested proceedings. As a party you may be involved in settlement negotiations.
- Settlements may cover all or only some issues, and may include all or some parties. Global settlements (all parties and all issues) are the goal.
- Tip: Be aware of this and be thinking about a settlement position.
- All settlements are subject to Commission approval.

Rule 1408, Settlements

Ex Parte Communications/ Prohibited Communications

- An *ex parte* communication is one between a party and a decision maker (or their advisor), before or during a proceeding, with no notice to the other parties, who have no opportunity to respond.
- *Ex parte* communications on disputed issues are prohibited. (Communications about uncontested procedural matters, scheduling questions, and status inquiries are not prohibited.) Sanctions can be imposed for violating this prohibition.

Rule 1004(m), Definition of *ex parte* communication; Rule 1105, Prohibited Communications-Generally; Rule 1106, Prohibited Communications-Disclosure; Rule 1107, Prohibited Communications-Remedies; Rule 1108, Disqualification of Commissioner or Administrative Law Judge

Confidential Matter

- Party must sign nondisclosure agreement (NDA).
- Use of confidential information must be in strict accordance with rules or party may incur civil liability. Can't divulge contents except to others who have signed NDAs; filings must be segregated; use at hearing is limited; documents and information must be returned.
- Information claimed to be confidential must be treated that way unless the PUC determines, after challenge, that the material is not confidential.
- PUC will not provide confidential information to parties, it must be obtained from the party sponsoring it.

Rule 1100, Confidentiality

Rulemakings

- No intervention is necessary to comment on proposed rules.
- There are no parties to a rulemaking proceeding.
- PUC will sometimes request that interested persons file written comments in advance of hearing.
- Generally there is limited or no cross examination of commenters.

Rule 1306, Rulemaking

V. Hearing Procedures

- Appearances
- Preliminary matters
- Order of presentation
- Order of examination
- Exhibits
- Conducting cross examination
- Being cross examined
- Redirect examination
- Further examination
- Briefs, closing arguments, statements of position

Appearances

- Stand, state and spell your name, state your business address
- Limit yourself to identifying yourself

Preliminary matters

- Resolve any pending disputes
- Address procedural matters that have recently arisen, *e.g.*, a witness is now unavailable due to emergency and a substitute is needed, or someone will be arriving late, or a witness needs to be heard on a certain day.

Order of Presentation

- Generally the party with the burden of proof and persuasion goes first, typically the utility.
- It will put on evidence in the form of testimony (live or prefiled or both) and exhibits. Then the other parties will put on their evidence. The parties may agree or the presiding officer may assign. Generally, OCC and Commission Staff will go last.
- Applicant (utility) will have chance to rebut the answer testimony of the intervenors. Often the rebuttal testimony of the applicant will be filed in advance of the hearing, but not always.

Order of Examination

- After each witness has either adopted his/her prefiled testimony, or given it live, the witness will be tendered for cross-examination. Which party goes first, second, etc., will usually be set for the duration of the hearing. It may be set by agreement of the parties, or established by the Presiding Officer. It is usually, but not always, the same as the order of presentation.

Exhibits

- Make sure you bring your own copies, in the number required by Rule 1501(b). Generally, bring one for the record, one for each Commissioner or the ALJ, and one for each party.
- If the exhibits have already been filed and served before hearing, which will usually be the case, you need not provide additional copies to the other parties, but you still need to bring copies for the record and the Commissioners/ALJ.
- Remember, your prefiled testimony itself will be an exhibit, so bring copies of that.

Conducting Cross Examination

- This is the time for asking questions, not testifying.
- The questions are limited in scope to what the witness testified to on direct examination.
- The Commission does not allow friendly cross-examination. (If you are trying to do anything other than attack, discredit, undermine, or possibly clarify the testimony, you may have a problem.)
- Tip: Speak slowly and don't talk over the witness.

Being Cross Examined

- Try to limit your answers to the questions that are posed.
- You will have a chance after you are done being cross examined to expand on your answers and put them in fuller context, but you will not be able to offer new material that wasn't discussed on cross.

Redirect Examination

- After cross examination is complete, the party that sponsored the witness will have an opportunity to ask questions to rehabilitate the witness.
- The scope of the redirect examination is limited to the subjects of cross examination. (If you are the witness, you won't ask yourself more questions, you will just offer the additional testimony.)

Further Examination

- In rare cases, the Commission may allow re-cross examination, limited in scope to the subjects of redirect examination, with concomitant re-redirect examination, limited in scope to the subjects of re-cross examination.
- If you want to conduct such further examination you usually will have to ask permission from the Presiding Officer and justify why it is warranted.

Briefs, Closing Arguments, Statements of Position

- Usually, the Commission does not have closing arguments, but rather asks the parties to sum up their view of the case in a written brief or statement of position filed shortly after the hearing. This is where you can argue for your views and attempt to persuade the Commission to adopt your position on issues.
- This is a persuasive document that is not expected to be just sworn information. For example, you can urge the Commission to find a witness not credible.
- Tip: Be thinking of what you want to put in your statement of position while the hearing is underway.

VI. Q & A