Decision No. R12-1466

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12R-500ALL

IN THE MATTER OF THE PROPOSED RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE G. HARRIS ADAMS AMENDING RULES

Mailed Date: December 21, 2012

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I. STATEMENT

1. On May 15, 2012, the Public Utilities Commission issued the Notice of Proposed Rulemaking that commenced this docket. See Decision No. C12-0511. The Commission referred the instant rulemaking proceeding to an administrative law judge (ALJ) and scheduled the first hearing for August 6, 2012 and August 7, 2012. The purpose of this proceeding is to update procedural efficiency; serve the public interest; and make the rules more effective and elegant. The amended rules should provide for clarity, necessity and conciseness and those rules found to be duplicative, inconsistent or unnecessarily burdensome should be repealed.

2. Throughout the proceeding, written comments were filed with the Commission by Atmos Energy Corp; Black Hills/Colorado Electric Utility Company, L.P., and Black Hills Colorado Gas Utility Company, L.P., doing business as Black Hills Energy (Black Hills); BNSF Railway Company; the City and County of Denver; the City of Boulder; the City of Westminster; Colorado Natural Gas, Inc.; Climax Molybdenum Company; the Colorado Office of Consumer Counsel (OCC); the Colorado Solar Energy Industries Association; the Colorado Telecommunications Association, Inc.; Encana Oil & Gas (USA) Inc.; Public Service Company of Colorado (Public Service); Qwest Corporation d.b.a. CenturyLink QC; the Regional Transportation District; Rocky Mountain Natural Gas LLC; Source Gas Distribution, LLC; the Tri-State Generation & Transmission Association, Inc.; and the Union Pacific Railroad Company.

3. Oral and written comments were provided during the scheduled hearings. The ALJ also announced continued hearings to further consider the proposed rules. An additional hearing date of August 29, 2012 was announced during the hearing held on August 6, 2012 and on August 7, 2012, as memorialized in Decision No. R12-0915-I.

4. Oral comments were provided during the next scheduled hearing. The ALJ prepared and distributed redlined modifications to the rules attached to the NOPR (Hearing Exhibit 3) and solicited comment on additional issues. Written comments were requested to be filed by September 17, 2012 and a continued hearing was announced for September 25, 2012, as memorialized in Decision No. R12-1023-I.

5. Oral comments were provided during the next scheduled hearing and a continued hearing was announced for October 26, 2012, as memorialized in Decision No. R12-1212-I. The ALJ also referenced and made available additional redlined modifications to Hearing Exhibit 3 (Hearing Exhibit 4) and solicited additional comment.

6. Being fully advised in this matter and consistent with the discussion below, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

II. FINDING, DISCUSSION, AND CONCLUSION

7. In Decision No. C12-0511, the Commission described the nature and purpose of proposed modifications. This Recommended Decision will generally focus upon comments and other matters that arose during the course of the proceeding.

8. Not all modifications to the proposed rules are specifically addressed herein. Any changes incorporated into the redline version of the rules appended hereto are recommended

for adoption. Any specific recommendations made by interested parties that are not discussed below or otherwise incorporated into the redlined rules attached are not adopted.

9. The undersigned ALJ has reviewed the record in this proceeding to date, including written and oral comments.

10. The proposed rules attached to Decision No. C12-0511 in legislative (i.e., strikeout/underline) format and in final format, were made available through the Commission's Electronic Filings (E-Filings) system. Additionally, comments were solicited through the course of the proceeding regarding other proposed considerations in legislative (i.e., strikeout/underline) format (Hearing Exhibits 3 and 4).

A. Notice

11. Notice of the scope of this proceeding, particularly as it may affect rule 1401, has been challenged. Notice of a proposed rule-making must "provide a description of the subjects and issues involved." § 24-4-103(3)(a), C.R.S.

12. By Decision No. C12-0511, the Commission provided notice of the extraordinary scope of this proceeding to consider modifications to all aspects of the Commission Rules of Practice and Procedure. The notice clearly informed the public that amendments were proposed throughout the existing rules. Interested persons were invited to suggest other changes that will make the subject rules more efficient, effective, and elegant.

13. Several orders have issued in this proceeding and matters have been addressed throughout the public hearings noticed in this proceeding. Additional comment has been sought and addressed regarding alternate versions of proposals.

14. It is found that notice provided in this proceeding meets the requirements of the State Administrative Procedures Act.

B. Discussion of Comments

1. Rule 1001

15. Comment suggests changing all references from "proceeding" to "docket" throughout the rules for consistency. In the development of the Commission's E-Filings System the use of the more generic term, proceeding, was adopted (particularly to encompass advice letter filings). While the undersigned appreciates the commenter's intent to make the references consistent, the term "docket" will be abandoned and the term "proceeding" will be adopted throughout the rules. The chosen term is also consistent with use of proceeding in the State Administrative Procedures Act, defined in §24-4-102(13).

2. Rule 1002

16. Comment suggesting that a general reference to Commission decisions of all types is reasonable and will be adopted. Commission orders are issued in decisions and all decisions are referenced by their decision number. This terminology will be adopted throughout the rules for consistency and clarity.

3. Rule 1003

17. Comment suggests clarifications regarding the time period referenced for effectiveness of a waiver or variance. First, the proposal will be modified to clarify that the 40 day period begins from filing of the request for waiver or variance and ends with the proposed effective date of the wavier or variance. Further, the proposal to require petitioner to address notice periods in rule 1206(a) will be adopted. This requirement ties and clarifies cause required to justify expedited treatment of the petition. Somewhat of a "lesser included offense," the proposal establishes that a petition requiring such expedited treatment must necessarily also provide sufficient cause to modify notice and intervention periods. While failure to comply with

the notice requirement may not result in denial of the request, the rule will make clear that the notice period in rule 1206(a) will otherwise apply to the request.

4. Rule 1004

18. Several commenters advocate defining all types of Commission proceedings. The proposal is reasonable and will be adopted. However, the undersigned is concerned that this is easier said than done. As recognized by the Supreme Court,

> While these APA provisions suggest that agency rule-making functions are clearly distinct from agency adjudicative functions, the experience of agency process has proved to be to the contrary. Agency proceedings often require application of both rule-making and adjudicatory authority because of the nature of the subject matter, the issues to be resolved, or the interests of parties or intervenors. In general, agency proceedings that primarily seek to or in effect determine policies or standards of general applicability are deemed rule-making proceedings. Agency proceedings which affect a specific party and resolve particular issues of disputed fact by applying previously determined rules or policies to the circumstances of the case are deemed adjudicatory proceedings. The determination of whether a particular proceeding constitutes rule-making requires careful analysis of the actual conduct and effect of the proceedings as well as a determination of the purposes for which it was formally instituted.
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> Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co., 816 P.2d 278, 284 (Colo. 1991)(citations omitted).

19. The breadth of Commission jurisdiction creates a challenge to precisely categorize all Commission proceedings. Thus, the adopted definition for each type of proceeding will be modified to accommodate Commission designation as to the type(s) of proceeding, as needed. Notably, the adopted rule does not prohibit the Commission from designating a proceeding to be in the nature of multiple types of proceedings based upon facts and circumstances. The effect thereof can best be addressed by decision on a case by case basis.

5. Rule 1004(e)

20. Several comments address the definition and application of the term Commission advisor. The rule adopted will be addressed here as well as in the discussion of rule 1007 – in the context of other comments. Generally, it should be understood that all Commission staff is available to advise the Commission in every proceeding, unless disqualified (e.g., prior prohibited ex-parte communications). This is the first of many instances addressed herein where proposals must be carefully considered in light of the applicability of these rules across the Commission's jurisdiction. More specific comments regarding Commission staff designation will be address in the discussion of Rules 1007 and 1302.

21. Comment recognizes that rule 1007 introduces the designation of trial staff, rather than rule 1004. Trial staff is juxtaposed against advisory staff, which is defined in rule 1004. A definition of trial staff and advisory staff will be incorporated in rule 1004 for consistency.

22. The term Commission advisory staff will be modified to advisory staff, as applied in rule 1007. The only other reference to the defined term Commission advisor will be modified accordingly. The definition will also be modified to make clear that rule 1007 applies only to Commission staff in adjudicatory proceedings.

6. Rule 1004(l) - formerly

23. Commenters suggest retaining definition of a "docketed proceeding," in part, to identify a universal point in time identifying the commencement of a Commission proceeding. Reference to docket has been abandoned in favor of the general term proceeding. Retention is of a definition of proceeding is not necessary in light of the common meaning of the term and each type of proceeding now being defined.

7. Rule 1004(n) - formerly

24. Some comment concerns elimination of the definition of ex parte communication in rule 1004. This modification is not substantive. The content is integrated in rule 1105.

8. Rule 1004(t)

25. Comment proposed modifying the proposed rule in recognition that the Denver Post is currently the only newspaper in Colorado having a paid Colorado circulation of at least 100,000. Without regard to accuracy of the comment, the proposal will not be adopted to avoid the potential for rulemaking in the event the paper might change its name or other unforeseen circumstances occur.

9. Rule 1004(x)

26. Extensive comment addressed customer data under the Commission's electric rules with personal information defined in rule 1004(x) and applied in rule 1104. Those comments will be discussed and addressed in the context of rule 1104.

10. Rule 1004(y) - formerly

27. The definition of Public Records Law will be deleted because it is unnecessary. Rather than defining Public Records Law as the Colorado Open Records Act (CORA), the act will be referred to directly in context.

11. Rule 1004(ee)

28. Comment was submitted regarding the newly proposed definition of regulated intrastate carrier. Consistent with comments filed, the new definition was not intended to include those exempted from regulation under § 40-10.1-105, C.R.S. The proposed modification will be adopted.

12. Rule 1004(hh)

29. A definition of "signed" will be adopted to clarify and memorialize that, in addition to original signatures, the Commission has agreed to accept electronic filings through the E-Filings System that are electronically signed through the electronic filing process incorporated into that system.

13. Rule 1007

30. Comment proposes specifying that Commission staff designated as trial staff in one proceeding cannot subsequently be designated as advisory staff in a proceeding later consolidated with the original proceeding. The requested modification is unnecessary. Two proceedings, once consolidated, become one proceeding. As to the consolidated proceeding, the rule will operate as intended. If trial staff is a party to one proceeding that is consolidated with a second proceeding, staff remains a party to the consolidated proceeding and designated trial staff would then be designated as trial staff for the consolidated proceeding. The proposal to address proceedings opened "concurrently" will not be adopted because it is overly broad with potential for unanticipated consequences.

31. Extensive comments supporting rule 1007(c) are appreciated. Proposed modifications to the rule are largely intended for clarification and to memorialize current practices. It is noteworthy that there is potential for individual members of the Commission's staff not to be eligible to participate as advisory staff where prohibited communications have occurred as described in rule 1106. In practice and as intended, supervisors within the Commission manage staff members with these limitations in mind. However, under the scope of defined terms, it is permissible for different members of

Commission staff to participate as advisory and trial staff, respectively. The "China wall" is maintained between individual staff members to protect the integrity of differing roles.

32. Significant comment regarding rule 1007 suggests effectively expanding the scope of prohibited communications, particularly in instances of lengthy railroad projects as well as energy proceedings that are serial in nature. Comment points to very few instances that occurred to support concern, as opposed to possible or theoretical concerns.

33. Regarding railroad proceedings, comments address the limited number of Commission staff and the roles required to be performed. Diagnostic teams are utilized to "evaluate the crossing as to its deficiencies and develop judgmental consensus as to the recommended improvements." Hearing Exhibit 1 at 2, *citing* the Railroad-Highway Grade Crossing Handbook issued by the Federal Highway Administration. The diagnostic team is comprised of knowledgeable representatives of the parties in interest in a railroad-highway crossing. The Commission is an interested party representing the public interest in such matters. Best practices include a Commission staff representative playing an active role recommending appropriate safety measures to be implemented at a given crossing.

34. The undersigned, from experience, judged proceedings where all Commission staff members having railroad expertise were designated as trail staff. The Commission could not benefit from the expertise of advisory staff in understanding and analyzing the highly technical and complex evidence presented.

35. In other subject areas, concerns were raised where proceedings are serial in nature. In one proceeding, an individual staff member could theoretically serve as trial staff, appropriately participating in aspects such as discovery and settlement negotiations.

In a subsequent proceeding, concerns were raised with the same individuals serving in an advisory role.

36. Commission rules must be applied in the context of these considerations. To date, the limited number of Commission staff having railroad expertise has resulted in one person participating in the diagnostic process, then leaving the parties to develop positions that are presented substantially later in an application before the Commission. A diagnostic team might meet years in advance of an application being filed with the Commission. Therefore, the same staff member may serve as advisory staff in the eventual Commission proceeding. Also, issues raised as to an individual crossing may have broad applicability to other crossings. Comments demonstrate reasonable concern that the different functions served by Commission staff at different times have chilled Commission participation in the diagnostic process. As a result, commenters suggest that the scope and extent of litigation increases.

37. The Supreme Court applied the State Administrative Act to Commission proceedings in Colorado Energy Advocacy Office v. Public Service Co.: "an agency may not base its decision on ex parte information of which the parties are not given notice and an opportunity to cross-examine or rebut. Decisions in adjudicatory proceedings must be made on a public record to assure that a reviewing court will be able to determine whether there was sufficient evidence to support the agency decision." Colorado Energy Advocacy Office v. Public Service Co., 704 P.2d 298, 303 (Colo. 1985)(citations omitted).

38. Ex parte limitations apply to decision makers for the protection and benefit of these participating in Commission hearings. If an advisor is privy to factual information outside of the record upon which a decision is based concern is limited to appearance so long as prohibited ex parte communications do not occur.

39. While it might be preferable to assure litigants that no Commission staff member would ever advise on matters related to subjects addressed when designated as trial staff, it simply is not practical with limited numbers of staff and in light of the narrow scope of Commission proceedings.

40. Understandable concerns have been raised. Despite solicitation of alternative proposals, the undersigned found no practical solution sufficient to overcome comment concern as well as the Commission's necessary assurance of available Commission advisors. Were advocated positions adopted, the Commission would likely soon be left without eligible advisors in subject matters where an absolute structural separation cannot be maintained.

41. In managing day to day affairs, the Commission takes great care to create a comprehensive record upon which decisions are made as well as to protect against the appearance of impropriety. It will continue to do so. The substantive status quo shall remain.

14. Standards of Conduct , Rules 1100 - 1199

42. Comment proposes moving the first paragraph of rule 1100 to clarify applicability of the statement to a scope broader than rule 1100. The proposal will be adopted.

43. Rule 1100(a) currently introduces available limitations upon use of information; however, the issue was more thoroughly addressed in rule 1100(k). Further, exceptions provided in rule 1100(k) contradicted the general statement in rule 1100(a). Thus, for clarification and consistency, the statement regarding limited use in subsection (a)(I) (e.g., general references) will be stricken. This modification of subsection (a)(I) does not affect the permissible use of information made available pursuant to this rule.

44. Modifications to the Standards of Conduct will be adopted for consistent application in all contexts. Comments addressing applicability of provisions affecting

information in and out of proceedings highlight need for modifications. Due to the current breadth of defined Commission proceedings, it is difficult, but not impossible, to provide examples of confidential information provided outside of a proceeding.

45. The rules will be reorganized such that rule 1100 will address provisions applicable to all information subject to claims of confidentiality. Rule 1101 will be modified to address unique provisions applicable in proceeding. Rule 1102 will address those provisions applicable outside of a proceeding.

46. The rules also establish presumptions regarding information publicly available for inspection based upon application of CORA to Commission proceedings. The unilateral confidentiality claim of a filer (e.g., without Commission determination) is found inadequate to overcome the statutory presumption that information is publicly available. Thus, the rules will no longer permit presumptively public information to be filed subject to a claim of confidentiality. If a person providing information contends the Standards of Conduct otherwise provide inadequate protection, the appropriate relief will be to demonstrate highly confidential protections are necessary to overcome the statutory presumption.

47. Some comment speculated that new provisions regarding treatment of information presumed to be publicly available related to the prior rule 1100(e). That is not the case. Rather, the new rule is intended to decrease the number of improper claims of confidentiality and fulfill statutory responsibilities under CORA. The undersigned agrees that a bare claim of confidentiality is the antithesis presumption of public information. It is illogical that information not be publicly available, despite a presumption that it should be, without a Commission determination.

48. The Commission has a responsibility to the public to ensure transparency of process to the extent feasible and to comply with CORA. Information filed in proceedings subject to confidentiality claims without full compliance with required procedures undermines this effort. Too often overly broad confidentiality claims result from the failure to disclose public portions of documents containing confidential information. In order to provide appropriate protection, while ensuring that appropriate information is open for public inspection, filing procedures will be modified to permit administrative rejection of filings including information provided subject to a claim of confidentiality where a publicly-available filing is not made (e.g., excluding the information claimed to be confidential or highly confidential). See rule 1101(a)(I).

49. Comment suggests that a filer should be able to file a motion requesting confidential protection of information otherwise presumed to be publicly available. However, this is inconsistent with the structure of the rules. No motion is necessary to protect confidential information under Commission rules. Once claimed confidential, the treatment prevails until challenged. If never challenged, information will not be publicly available.

50. Where sufficient grounds can be shown to overcome the statutory presumption of availability, highly confidential protections may be ordered to accommodate extraordinary circumstances. The effect of the adopted rule is to require a Commission determination, upon motion, before information presumed to be available will not in fact be available to the public.

51. Comment questions treatment of confidential information in response to a CORA request that follows the conclusion of a proceeding. Rule 1100(f)(III) provides that a Commission determination of confidentiality will prevail in absence of new information or a change in circumstances. No further modification will be adopted.

15. Rule 1100

52. Comment suggests retention of protections specifically referencing trade secret. The Commission rule governs the use and protection of information submitted subject to the Standards of Conduct. While the definition of trade secret, as provided in the Uniform Trade Secrets Act, may be relevant in determining confidential protections, trade secrets are just one type of information that may be claimed to be confidential. If information is filed subject to a claim that it is a confidential trade secret, and the filer believes the protection afforded confidential information is inadequate to protect such information, then a process is available to request extraordinary protections.

53. Rule 1100(m)(VI) specifies that time periods set forth in CORA are not applicable to requests pursuant to Commission rule. The OCC properly points out that the Commission rule cannot modify statute; however, that is not what the rule does. A request submitted pursuant to CORA would be governed pursuant thereto. Rule 1101(c) effectuates a process for the OCC to obtain information pursuant to Sec. 40-6.5-106 C.R.S. The OCC has not shown that CORA requests must be handled through the identical process. The proposed rule will be adopted.

54. Proposed rule 1100(d) clarifies that the Commission may *sua sponte* initiate an inquiry as to the confidentiality of information provided subject to claim of confidentiality. Comment concerns whether the proposed reference to Commission action is intended to modify procedures to party challenges on a case-by-case basis. It does not. Further, all remaining subparts would not directly apply to a Commission inquiry (i.e., conferral among parties). To address the concern, and clarify the proposal, the Commission-initiated procedural has been moved to its own paragraph, as will those portions applicable to confidentiality determinations by either process.

55. Comments request further clarification of the purpose for *sua sponte* inquiry into the confidentiality claims. Briefly, there is a presumption that Commission records are open to the public. Where the Commission questions confidentiality of information provided subject to a confidentiality claim, but no party challenges the claim, the adopted modification establishes a procedure in rule to appropriately address the claim. Also, the Commission incurs administrative burdens in the management and use of confidential and highly information. Where there is no longer a need to maintain confidentiality of information, such burdens might be lessened or avoided.

56. Comment that the process to challenge a claim of confidentiality should apply to claims regarding highly confidential treatment will not be adopted. Unlike a claim of confidentiality, highly confidential treatment is granted by the Commission upon motion. Thus, a party challenging such treatment should respond to the motion, or seek modification of the decision granting highly confidential protections. In any event, the process in rule 1101(f) is not applicable to highly confidential information.

57. Several comments were received regarding continued use of colored paper for filing of confidential information. The proposed modification was intended to improve quality of imaging of information claimed to be confidential. There is broad support for the use of a lighter color, but still requiring use of a color. Comments convincingly contend that use of colored paper lessens likelihood of inadvertent disclosure. Continuation of a light color strikes a reasonable balance and will improve imaging quality.

16. Rule 1100(g)

58. The OCC proposes that service of an executed nondisclosure agreement upon a party that has filed information subject to a claim of confidentiality should satisfy written notice

requirements of rule 1100(g). This proposal is unchallenged, reasonable, and will be adopted. The very purpose of filing a nondisclosure agreement in a proceeding to which the OCC is a party is to access such information.

17. Rule 1101

59. Significant comment was submitted regarding the proposed requirement of rule 1101(b) to file information for which highly confidential protections are sought. Commenters address the impracticality or impossibility of always complying with the proposed requirement. The Commission has not required filing of the specific information in the past. Information may not be filed in any event (i.e., disclosed in discovery), may not yet exist at the time in interest, or may not yet be available. So long as the subject information sought to be protected can be adequately represented and described, current requirements adequately balance affected interests. Based thereupon the current ability to seek protection based upon a description of information sought to be protected will be maintained, upon the required showing.

60. Comment suggests that verification of factual information supporting a request for highly confidential treatment should be required. Reply comments contend such a requirement has not been shown to be necessary and that the lack of requirement has never caused a problem. The undersigned agrees with the reply comments and the proposal will not be adopted. It is noted that the modification is proposed to the affidavit requirement regarding access to information; however, there is no reason to believe that the custodian of records executing such an affidavit would necessarily have knowledge of the basis upon which confidentiality is determined. Thus, the proposal may well require preparation of a separate affidavit, further increasing burdens without demonstrable benefits. It is also noted that rule 1202(d) applies to the request for relief, minimizing concerns leading to the request for further modification.

61. Another comment suggests limiting the affidavit requirement in rule 1101(b)(VI) regarding access to subject information to only third parties. This comment is rejected as the manner in which information has been protected within an organization may be a relevant consideration in determining appropriate protections.

62. Some comment proposes modification of processes regarding document retention to permit destruction of confidential information, at the **filer's** discretion, rather than requiring retrieval in all circumstances. This proposal is reasonable and will be adopted.

63. Comment suggests that efficiency improves by requiring destruction of confidential information at the conclusion of a proceeding, rather than affording an option to require return of the information in rule 1101(a) and (l). Comments were mixed on the topic. In deference to those controlling information, the filer's preference will prevail. Proposals to the contrary will not be adopted. Confidential information is made available subject to protections. Should a party find the obligation to return the information too burdensome, they need not file a non-disclosure agreement to access the information.

64. Comment also addressed the possibility of confidential documents containing privileged work product (i.e., notes) at the time information is due for return. In response, comment suggested that counsel making notes must make those notes elsewhere. Because the preference of the one providing confidential information is known before the information is made available to anyone else, it is reasonable that appropriate processes be implemented to preserve the confidential information for return.

65. Commenters object to the striking of language requiring internal procedures protecting confidential information. Striking this language was not proposed as a substantive change affecting current processes. It is reasonable to retain the provision. See rule 1101(l)(IV).

18. Rule 1103

66. Comment suggests expanding rule 1103 to address requests for public inspection of highly confidential information. In the past, references to "confidential" have had different meanings based upon context (i.e., in some instances it is a general reference to confidential treatment while in others it references rule 1100 protections without extraordinary protections). For consistency and clarity, the proposed modifications will be adopted. If the Director determines, in response to a request, that new information or a change in circumstance requires disclosure under CORA, the modification will ensure that notice and an opportunity to comment or take action is provided to the original filer.

19. Rule 1104(b)

67. Comments suggest a qualification upon notice regarding availability of personal information required by rule 1104(b). If a company does not retain personal information, there is no benefit to notifying customers of the opportunity to request a copy of the non-existent data. Without making any determination as to the feasibility of providing service without collecting personal information, the proposed qualification will be adopted.

20. Rule 1105

68. Commission rules currently prohibit disclosure of personal information by a utility without prior authorization of the customer, except as specifically permitted otherwise.

69. The Commission must be careful in analogizing essential utility service to other business arrangements generally subject to the Colorado Consumer Protection Act. When a customer generally selects a business with whom to deal among competitive alternatives, the customer chooses to entrust the business with their personal information. Illustratively, a customer might compare the protections of personal information (e.g., privacy policies)

among competitors or choose not to purchase goods or services. Particularly as to utility service, such considerations are not always permitted. Often, the only alternative to providing information is to not have utility service. This is a particularly unacceptable alternative for essential public utility service. Thus, the information provided to obtain service warrants heightened consumer protections when compared to information voluntarily provided to a business chosen by the customer. Only within this foundational context can one compare personal information in public utility hands.

70. Public Service reports social engineering attempts to use email addresses or telephone numbers to reach customers for improper purposes. Analogous to social engineering, are the concepts of predictive analytics and big data. Utilizing multiple sources of information, additional data or information can be derived. A recent example of the application of predictive analytics was reported where a large retailer collected vast amounts of data on customers from multiple internal and external sources. According to the report, a retailer was able to determine that a given customer was pregnant.

71. In the August 2012 issue of PCWorld magazine, an article by Mark Sullivan analyzes "the booming market for your online identity." The article includes quotations of different interests in that marketplace. Among others, Sara Downey, an attorney for online privacy products firm Abine is quoted: "The widespread and largely unregulated collection, sharing, sale, and storage of massive amounts of consumer data are a threat to all of us." On the other hand, Kaliya Hamlin, of Personal Data Ecosystem Consortium is quoted: "We're saying there's a tremendous opportunity for businesses to tap into all that data by doing it in a way that involves and empowers the consumer." A balance must be struck as to use and

protection of customer information. The Commission continues to foster customer use of available information based upon their informed consent.

72. While referenced practices are far beyond the Commission's jurisdiction, the availability of personal information provided to obtain and use service should be protected from disclosure where not otherwise required by law or by the customer's informed consent. The Commission has balanced customer privacy interests with customer interest in permitting sharing of utility information.

(1) Proposed Modifications

73. Substantial comment was submitted regarding the proposal to modify the definition of personal information. Public Service proposes to limit the scope of the definition of personal information by incorporating the definition in the Colorado Consumer Protection Act, unless otherwise required by Commission rule or Colorado law. To accomplish this, they also propose to define account data, a newly established category of information.

74. Public Service maintains that the customer should be the sole source of personal information within the scope of the Colorado Consumer Protection Act because the risk of improper disclosure of such information is greatest. Incorporating the definition of personal information from the Act is argued for consistency because the Act applies to the operation of a public utility. Public Service expresses general concern regarding the cost and burden of responding to demands of legal process requesting personal information and contends that the associated risks justify making the customer the most appropriate source for information, rather than the utility. It is notable that the examples offered have no relation to Commission proceedings.

75. At heart, Public Service proposes a discrete three tier system of information based upon the risk from unintended disclosure: personal information, account data and customer data. However, the protections for account data are separate but very similar to those for customer data defined in the electric rules. Informed customer consent would control, like for customer data. Public Service contends this approach permits interested customers to share information with third parties providing energy efficiency programs or products.

76. Other comments question the adequacy of only defining personal information as the current definition in the Colorado Consumer Protection Act. Illustratively, the definition does not protect customers that are nonresidents of Colorado.

77. The undersigned has several concerns with the proposed modifications. The purpose of the definition appearing in both places differs. The provision was drafted to address security breaches of those entrusted with defined information, as opposed to authorized disclosure of information. The emphasis of comments applying the statutory definition in §6-1-716(d), C.R.S. address the effect of improper disclosure without consent. That is not the complete focus of Commission rules regarding personal information in the hands of a utility.

78. The Commission has acted to permit customers to make use of information regarding usage of public utilities while maintaining appropriate consumer protections. Mere incorporation may lead to unintended consequences because the definition was not drafted in the context of Public Utility Law. Also, §6-1-716 C.R.S. only addresses unauthorized acquisition of limited protected information. Simply put, if a utility posts a customer's social security number on a billboard at that customer's request, §6-1-716(d), C.R.S. has no applicability. It is also notable that only a combination of specified elements in §6-1-716(d) C.R.S. is protected. Where individual elements may be obtained from independent sources,

the intent of the law may be thwarted. While it is undoubtedly true that many states afford similar protections, the undersigned has not been shown uniform applicability to present circumstances. The Commission has broad discretion and authority pursuant to the Colorado Constitution and Public Utility Law. Short of incorporation, a similar provision might be crafted to the extent appropriate. It is preferable to consider the terms in the context of the Commission's jurisdiction.

79. Public Service attempts to differentiate customer personal information that a third party should obtain from the customer directly and that which should appropriately be obtained from the utility. This foundational principle is appealing and protections of personal information will continue.

80. The need to establish a new category of account data has not been shown. While some of the concerns raised are clearly reasonable, insufficient showing has been made to so dramatically change the structure of the Commission's regulation. Adoption of the new category would also require a new redundant process to permit customers to authorize release of the new category of information upon informed consent. It is unlikely that the benefits of establishing a new category would exceed the burdens and potential customer confusion. Conceptually, the undersigned prefers customer release of information upon informed consent to be managed as customer data.

81. The issue regarding personal information is what level of protection should be imposed upon the release of that information in absence of the customer's authorization and consent. At what level should the Commission state that a public utility cannot provide or utilize information about a customer, without consent.

82. Rather than create a new category of information, it was initially intended to clarify the rules by eliminating any potential overlap between personal data and the concept of customer data. In Hearing Exhibit 4, an additive definition of customer data was intended to apply across the Commission's jurisdiction. The approach also narrowed the definition of personal information with a corresponding increase in customer data.

83. Testing hypotheticals against Hearing Exhibit 4 convinces the undersigned that resolving the potential for overlap is unnecessary and likely cannot be eliminated with certainty. Illustratively, the current rules prohibit utilities from making marketing lists of customer names and mailing addresses or customer names and e-mail addresses available for solicitation. Applying the approach in Hearing Exhibit 4, one is left with the impractical result that the name and address of the utility customer on their bill may, or may not, be personal information depending upon whether the customer's name is listed in the telephone directory or is otherwise easily available to the public. Another potential for unavoidable overlap would be a utility using the customer Social Security number as an account number (assuming otherwise permissible). In that scenario, the social security number would be customer data (as an account number) and personal information (as a Social Security number).

84. Further comment made clear that the attempt failed to achieve the desired goal. Based upon the readily available hypothetical overlaps in customer data and personal information in the adopted rule, the stated effort will be abandoned. The definition and protection of personal information will largely remain unaffected. The definition of customer data will not be adopted in the Rules of Practice and Procedure. Rather, the concept will be

developed in subject matter rules based upon unique facts and circumstances applicable.[1] The adopted rules will be modified to reflect that customer data is not defined in the Rules of Practice and Procedure.

85. For information with the scope of the definitions of both personal information and customer data, the customer will be will be able to authorize use of the information as customer data, while the utility must otherwise protect the information as personal information. Customer consent trumps the utility's obligation to the extent authorized. This is also consistent with the definition and consent process for customer data where the public utility has no responsibility for the use of the information after it is disclosed in accordance with the customer's authorization. Implementation of the recommended approach will require modification of the current definition of customer data in the electric rules. Rule 1105(a) will acknowledge that information within the scope of the definition of personal information may ultimately be released in accordance with other Commission rules (e.g., as customer data).

86. Comment proposes expanding Commission-provided forms referenced in rule 1104(c) to encompass the disclosure of personal information upon customer consent. As addressed more thoroughly in the context of the definition of personal information and customer data as well as the discussion of the proposed account data definition, the proposal will not be incorporated. While customers may consent to the disclosure of customer data to others, the utility is no longer the best source as to personal information. The consent process will not be expanded to encompass personal information.

[1] Illustratively, customer data of an electric customer includes information collected from an electric meter. This would have no applicability to customer data of a gas customer.

(2) Real Estate Exception

87. Several commenters address the current "real estate exception" permitting disclosure of historical energy usage information about a requested service address. Reasonable concerns are raised regarding the ability to benchmark buildings and the burden of, and ability to, verify the eligibility of those requesting information (e.g., interest in purchasing a property). Proposals are made to limit the scope of access based upon need. However, other comments address the impractical or burdensome situation utilities would be placed to verify proposed limitations. Public Service generally contends that the release of third party information should be only upon informed consent of the customer. However, this has been a long-standing exception available to those involved in real estate transactions, lease or purchase and no comments have addressed any problems as a result.

88. The Commission recently adopted Rule 3031(b) recognizing a balancing of interest where third parties seek aggregate data regarding electric customers without consent: "The rule requires the disclosure of aggregated data unless the disclosure would compromise the individual customer's privacy or the security of the utility's system." Decision No. C11-1144. The issue was fully reviewed, resulting in the 15/15 threshold of rule 3031(b).

89. Currently, for electric customers, information about customer usage might be disclosed without customer consent when it is personal information or in the form of aggregated data. The real estate exception is more appropriately addressed and coordinated in the context of disclosure of customer data. Because the scope of information is dependent upon the service at issue, permitted disclosure is better addressed in subject matter rules. Further, as addressed above, implementation of the approach addressed above will make clear that information

defined as personal information will not be precluded from disclosure if it also within the definition of customer data.

(3) Exceptions – Permitted disclosure

90. Several commenters seek to address difficulties in administering programs intended to benefit low income customers. Agencies need to access more detailed information regarding the account history. Clarity is sought to permit sharing of this information. The existing provision allowing disclosure to governmental agencies will be expanded to accommodate concerns regarding administration of energy assistance programs.

(4) Contracted Agent

91. Comment proposes incorporating the defined term contracted agent from the electric rules as the concept applies across industries. The proposal is reasonable and will be adopted. The definition will be added to rule 1004(l) and rule 1105 will be modified accordingly. This will also provide consistency in the use of the term across the Commission's jurisdiction without referencing third-party contracts.

92. Some concern is raised as to the need for regulated operating company to share information with parent or service company in the provision of regulated service. The concern is not unique to one company, but reasonable assurance of the protection of customer information by the operating company is paramount. The undersigned agrees with comment that completely exempting a parent or service company undermines the purpose of protections incorporated in the Commission rules.

21. Rule 1200

93. The proposed rules include modifications to the traditional amicus curiae role in Commission proceedings. Because there is a body of law regarding amicus status,

the undersigned is concerned that unnecessary confusion will result from attempting to modify meaning as it applies to Commission proceedings. See e.g., Denver United States Nat'l Bank v. People, 29 Colo. App. 93, 98 (Colo. Ct. App. 1970) citing Eggert v. Pacific States Savings & Loan Co. 57 Cal.App.2d 239, 136 P.2d 822.

94. Comment also addresses the provision explicitly providing that the Commission may permit individual residential, agricultural, or small business customers of a utility to participate as amicus curiae in a proceeding that may impact the customer's rates or service. Discretion remains without regard to the modification and the proposal does not affect the status quo. Rather, the additional provision is more illustrative. Comment raises reasonable concern and the undersigned is inclined away from encouraging individual customers to attempt to obtain amicus status. The proposed addition will not be adopted.

95. The proposal was intended to provide a meaningful opportunity to inform Commission proceedings without becoming party. Additionally, one might participate without requiring representation of counsel. Combined with a more managed approach to permissive intervention, a unique opportunity is presented to improve hearing processes without restricting public input into the development of Commission policy.

96. Rule 1200(c) provides for requesting amicus curiae status. The Commission has applied Colorado Appellate Rule 29, in addition to Commission rules, in considering requests regarding amicus curiae status. "Given the requirements of C.A.R. 29, we find that any party seeking amicus status must file a brief only by leave of the Commission and within the same time constraints as the party it seeks to support." Decision No. C03-0547, issued May 21, 2003, at 3.

97. Amicus curiae status remains permissive and will be decided upon motion. Typically, counsel will be required for a qualified amicus and counsel will be necessary to file the motion requesting that status.

98. Proposals in comment to require filing of amicus briefs when testimony is filed will also not be adopted. As addressed in comment, it is most appropriate that amicus have a full opportunity to consider the evidentiary record before presenting legal argument. However, in briefing, an amicus curiae must file their brief within the same time constraints as the party it seeks to support.

99. The Proposed rules attempted to expand the role of amicus curiae to address issues of academic or policy interest. This broader scope of comment is not traditionally limited to the practice of law and is more in the nature of public comment in Commission proceedings. Rather than modifying traditional amicus practice, the undersigned recommends providing a more integral and structural role for comments.

100. The undersigned considered the role of comment in Commission proceedings in Decision No. R09-0536-I, issued May 18, 2009. The "Commission may accept comments from the public concerning any proceeding, which shall be included in the record." Rule 1504 of the Rules of Practice and Procedure, 4 Code of Colorado Regulations (CCR) 723-1. Public commenters are not parties to the proceeding. Comments are not evidence. Public comments are submitted for the Commission's general information and to encourage the Commission to exercise discretion in the matter at hand.

101. Upon this foundation, rule 1509 will be adopted to expressly provide for new categories of comment to inform the Commission's discretion regarding policy and

academic issues. Traditional amicus status will be retained to present legal argument. The proposal to conform rules regarding amicus status to Commission practice will be adopted.

22. Rule 1201

102. Rule 1201 includes the first reference in the rules to a facsimile number. The proposed rules abandon facsimile filing in favor of the utilization of email for service and the Commission's E-Filing System for filing. The Commission's E-Filing System is similarly available to all, is available anytime, and avoids the administrative burdens of manually tracking and verifying timely submission of original documents. Requirements for facsimile numbers will be abandoned throughout the rules and the Commission will no longer accept filings via facsimile.

103. Comments address proposed rule 1201(b)(II) imposing procedural requirements upon an individual representing the interests of a closely held entity before the Commission. As a general rule all parties and amicus curiae appearing before the Commission are required to be represented by an attorney at law in good standing. Rule 1201(a). Section 13-1-127(2) permits a closely held entity to be represented by an officer under specified circumstances. Rule 1201(b) implements this statutory provision in Commission proceedings. The provision must also be applied in the context of a substantial body of case law and prior Commission practices and decisions.

104. The Commission has long emphasized mandatory representation requirements. It is often found that a filing by a party not meeting the criteria of this rule, or a filing made by non-attorneys on behalf of that party, is void and of no legal effect. See, e.g., Decisions No. C05-1018, Docket No. 04A-524W issued August 30, 2005;

No. C04-1119, Docket No. 04G-101CP issued September 28, 2004; and No. C04-0884, Docket No. 04G-101CP issued August 2, 2004.

105. As a practical application, and to avoid undue burden or expense upon other parties or the Commission, the proposed rule requires an individual representing a closely held entity to demonstrate eligibility at the time their representation begins – at the first appearance.

106. Comments suggest further restriction upon the ability of individuals to represent closely held entities before the Commission in adjudicatory proceedings. However, there has been no showing that such modifications would not be contrary to law. Upon further consideration, the proposed rule also includes documentation not required by §13-1-127 C.R.S., in part. The proposed rule will be further modified to eliminate that requirement.

107. Rule 1201(b)(V) is revised to implement the expanded role of comment and recognizes that representation by counsel is not required to provide such comment.

23. Rule 1202

108. Comment addresses specificity for the calculation of testimony length requiring inclusion of a table of contents. Insufficient need has been shown to support the modification and availability of a table of contents is useful for the Commission and other parties. Thus, the proposal will not be adopted.

24. Rule 1204

109. Comments address the proposed addition to rule 1204(a)(I) requiring electronic filings of executable text-searchable formatted filings. The Commission has a strong incentive to further electronic filings for the benefit of the Commission and those participating in proceedings. However, because executable filings may not be possible in several circumstances, the requirement for executable filings will not be adopted.

110. It is notable that the native document electronically filed is not accessible by anyone other than Commission staff. Others only access a version of the document converted to the Adobe Acrobat format through the electronic filing process. While executable versions are not necessary, they contribute to a foundation and promote efficiency in Commission utilization of the filing. The undersigned is not convinced that the efficiency to be gained or adoption of the alternative proposals will overcome concerns raised. The undersigned also notes that despite adopting the comment, no finding is made whatsoever as to any privilege claims addressed in comment.

111. Further comment suggests eliminating the alternative requirement to file text-searchable formats when possible. A hypothetical scenario is suggested where significant effort could be required to obtain a text-searchable form of a document provided by a third party. Critically, the filing requirement does not require text be created from the native application creating the document. In order to be e-filed, the filer must create or access an electronic version of the document. While filing of pleadings is encouraged in native format, popular word processors are capable of producing pdf-formatted documents and free or low cost software is available to convert documents to pdf format. If text is not available, optical character recognition can be completed prior to filing. Should the filer believe the requirement to be burdensome in a particular circumstance, a waiver of the rule may be sought. While the requirement for an executable version has been deleted, text search ability will be retained.

25. Rule 1205

112. Commenters suggest distinguishing and clarifying service obligations in relation to the Commission's E-Filing System. Participation in the Commission's E-Filings System is voluntary. A required condition of that voluntary participation, memorialized in the attestation

for registration, is the agreement to accept service of process through that system. Service through the Commission's E-Filing System is effective by and through that agreement and would not be effective under current rule but for that agreement. With that foundation, rule 1205(a) establishes the service obligation and memorializes the existence of the agreement for other filers.

113. Comment also suggests excepting e-filings from the requirement to demonstrate proof of service. Because proof of service remains the obligation of the one filing a pleading or other document, the proposed exception will not be adopted. As part of the electronic filing process, a certificate of service is created for every filing. That certificate is electronically attached to the filing and is available for review and verification. The filing party remains responsible for reviewing, verifying, and fulfilling service. Thus, the presumption will remain that a party did not receive service of a filing if they are not included on a certificate of service. The rule will be clarified to integrate certificates of service generated by the Commission's E-Filing System.

114. Rule 1205(f) will retain reference to facsimile as the context refers to the agreement of parties, rather than Commission requirement. Additionally, the requirement for written waiver will be eliminated to conform to current practices among commentors. The form of agreement, for better or worse, will be left to the discretion of parties. The burden to demonstrate service will not be modified or affected.

115. Several comments support service of process via email. The undersigned has reservations with the proposal because of the limited means perceived to demonstrate effectiveness of service when challenged. In light of the strong support and comments regarding practices of the bar, service by email will be permitted for information not subject to protection

under rule 1100 or Commission decision. The default forms of service will include service through the Commission's E-Filing System, traditional means, and via e-mail. However, a process will be made available for opting out of service by e-mail on a proceeding-by-proceeding basis. Any party to a proceeding may file a notice in such proceeding notifying the Commission and all parties that they will not accept service under the Commission rules through e-mail alone.[2]

116. Comment was solicited as to the limitation upon the number of counsel permitted to represent a party in a proceeding. In light of the prevalence of the Commission's e-filing system and the ease of electronic service, the potential for burden to be imposed is minimal. Service requirements will also be streamlined in instances where multiple attorneys represent a party. In light of these considerations, the current limitation of counsel will be omitted.

117. Service requirements will be streamlined where one or more attorneys representing a party are not registered in the Commission's E-Filings System to minimize burdens of service. Finally, where a party is represented by more than one counsel, and at least one of such counsel is registered in the Commission's e-filing system, service will be complete upon the party upon service through the e-filing system. Service by U.S. Mail will not be required for more than one attorney representing a party. Illustratively, the last alternative will avoid a circumstance seen where second-chair counsel do not participate in e-filings, requiring paper service, in addition to first-chair counsel served through the e-filing system.

118. Modifications are also adopted to clarify that service of discovery cannot be complete through the Commission's e-filing system.

[2] Notably, this filing is as to service by e-mail only. Although the Commission's E-Filing System generates an email notification of service, service is completed through the system without regard to the email. Thus, the opt-out provision does not permit opt-out of service through the E-Filing System.

119. One comment sought clarification whether the proposed rules require only use of the certificate of service from the e-filing process. This is specifically not the case. Service is the obligation of the filer. The proposed rule makes clear that the obligation may be met in one or more filed certificates of service (including the E-Filings certificate electronically attached to e-filings).

26. Rule 1206

120. Comment proposes eliminating rule 1206(c)(III) and requiring notice of petitions for declaratory order or rulemaking. While there could be circumstances where the Commission may choose to provide notice of such proceedings, it will not be made a requirement in rule. It has not been shown that notice is required for every petition and the undersigned believes the issue better left to modification on a case-by-case basis. Where the Commission believes it would benefit from providing notice of such actions or that notice is required, the proposed rule does not prohibit if from doing so.

27. Rule 1207

121. Proposed rule 1207 was intended to provide an alternative notice process, by rule, consistent with past approaches approved by the Commission. Statutory notice may always be utilized. It was intended that alternative means could also be identified by rule, while still leaving open the possibility to file an application requesting any other means.

122. Upon further consideration, it is concluded that the attempt to provide a form of alternative notice by rule is contrary to statute and cannot be adopted. Section 40-3-104(2) C.R.S., provides that the "commission, for good cause shown, may allow changes with less notice than is required by subsection (1) of this section by an order specifying the changes so to

be made and the time when they shall take effect and the manner in which they shall be filed and published."

123. The Supreme Court has recognized that "Subsection (2) of section 40-3-104 permits the Commission to expedite the effective date of a proposed tariff 'for good cause shown.'" Colorado Office of Consumer Counsel v. Public Utilities Com., 752 P.2d 1049, 1054 (Colo. 1988). Findings must be supported by competent evidence to support them. Colorado Mun. League v. Public Util. Comm'n., 687 P.2d 416, 419 (Colo. 1984).

124. Despite Commission adoption of "standard" alternative notice (i.e., remedy) to that otherwise required by statute, the Commission cannot determine whether good cause to depart from statutory notice will be shown in the future upon competent evidence. The Legislature maintains a clear preference for statutory notice. A showing upon competent evidence is required to depart from that notice. Based thereupon, proposed modifications to means of alternative notice will not be adopted.

125. In reviewing the proposed notifications, the undersigned found an additional concern with proposed rule 1207(g). The Commission has broad authority to allow changes with less notice than is required by § 40-3-104(1) C.R.S. by an order specifying the changes to be made, the time when they shall take effect, and the manner in which they shall be filed and published. § 40-3-104 C.R.S. While that discretion may be exercised to permit a tariff to go into effect, the undersigned is concerned that redefining the plain meaning of the phrase "one business day's notice" may be misleading as to the deadline to act in regard to compliance filings. Striking the alternative definition is not intended to interfere with when the Commission can permit the tariff to be effective. Rather, if the Commission intends an effective date on a number of hours of notice (e.g., less than a day) it should be so stated.

126. Another practical concern arises with the provision of not less than one day's notice. In the event there are concerns regarding a compliance filing, the Commission must have a minimal opportunity to act to suspend the effective date prior to it going into effect. Thus, the provision will be modified to two days, rather than one.

127. Comment proposes simplification of the rule in making statutory notice references. However, the current proposed rule is intended to emphasize the options available under the statute. No further need for modification is shown.

28. Rule 1210(a)(VI)

128. Comment addresses the calculation of notice time periods under § 40-3-104, C.R.S. It is suggested that the statement requiring expiration of the entire notice period prior to the effective date of the tariff be stricken. The comments provided are inconsistent with the long standing understanding of the undersigned ALJ. Where a period of notice is required, the requirement is not satisfied until the entire period has passed. This is consistent with the provision of the rule that is proposed to be eliminated and § 40-3-104 C.R.S. If a notice period of 30 days is required, anything less than 30 days would not meet the requirement. The operative statutory phrase is "no change shall be made by any public utility in any rate…except **after** thirty days' notice to the commission and the public." § 40-3-104 C.R.S. (emphasis added). Thus, if the tariff cannot become effective until after a notice period of 30 days, the 31st day is the soonest that it may become effective.

29. Rule 1211(a)

129. Comment was solicited of interested persons regarding the scope of permissible changes to be made administratively by Commission staff in the E-Filings System. Specifically, comment was requested as to whether Commission staff should administratively

change pleading title information input during the e-filing process to reflect the content of the title included in the image electronically associated with the filing.

130. Limited comment was received in direct opposition. In soliciting comment, the potential to be misled (intentionally or unintentionally) from differences between the title conveyed in the email notice of service through the E-Filing System (e.g., input in the filing process) and the title stated in the image filed was highlighted. Some comment recommended that Commission staff be permitted to make the modification so long as the filer is notified of the change. On the other hand, concern was raised that the title of a pleading input by a filer taking great care inputting that title should not be changed without notice and consultation.

131. The undersigned opines that Commission staff's modifications are for the purpose of clarification and search ability benefitting all concerned. Having the title in the e-filings system match that intended by the filer, as represented in the image filed, improves search ability of Commission records and avoids unusual references in decisions addressing the filing. Because the current rule states that the title of the pleading in the e-filing system controls over the filed image, the decision referencing the pleading should reflect the e-filing system title. The undersigned has observed several unusual titles that apparently were not intended be the filer (e.g., the name of the file as saved on the filer's computer). The undersigned finds that the benefit of Staff making corrections outweighs the potential harm from staff modifying a title actually intended by the filer. Were the unlikely latter event to occur, a party could contact Commission staff to make further correction or make an appropriate filing (e.g., an amendment).

132. The modification addresses a practical concern. While Commission staff clearly is capable of mistake, as is anyone else, under the proposed modification Commission staff can also correct any mistake brought to their attention. Commission staff has no interest in rewriting

titles other than to reconcile conflicting statements made by the filer in the e-filing process and the image filed by the same person. Administratively modifying the title in the e-filing system is reasonable.

133. The Commission's e-filing system has the capability to email those registered in the e-filing system that are associated with a proceeding. Because correcting the disparate input in the e-filing process mostly changes information input by a registered filer, it is reasonable to notify those registered of the modification to the title. In this way, the filer is informed and the potential for prejudice to others is mitigated because they will be informed of the title change as well. While comment requesting courtesy notification to the filer is reasonable, prior consultation will not be required. Additionally, effectiveness of the changed title will not be conditioned upon the filer receiving notification.

30. Rule 1302 Show Cause

134. Several commenters support clarification of the proposed show cause proceedings in subparagraph h. Some proposals are reasonable and will be adopted to add specificity to the show cause order. Extensive comment was received regarding the burden of proof in show cause proceedings. The adopted rule permits that issue to be addressed in the context of individual proceedings based upon the facts and circumstances on a case-by-case basis.

135. Comments broadly support striking violation of an agreement to support issuance of a show cause order. The historical scope of agreement could encompass a prior agreement with the Commission. Different from an agreement entered by trial staff, a utility can undertake obligations by agreement with the Commission (e.g., burden of proof). In other areas, situations have arisen where the Commission implements federal schemes without a specific determination of Commission jurisdiction. Illustratively, the Commission administers funds under the

Colorado Performance Assurance Plan. While there was no specific determination of Commission jurisdiction in this regard, the plan was implemented pursuant to agreement. Thus, agreements will remain referenced, but will be further qualified as addressed below.

136. Comment characterizes a show cause proceeding solely to be confined within the scope of §40-6-108(1)(a) C.R.S. Because an agreement is not enumerated in the section, it is argued that an agreement with the Commission should be omitted. See §40-6-108(1)(a) C.R.S.

137. Comment also seeks clarification of the role of Commission staff in show cause proceedings.

138. Clearly the Commission's rules cannot expand its jurisdiction. However, there are some agreements within the Commission's jurisdiction. Illustratively, the Commission's rules have long permitted a party to agree to undertake the burden of proof in a proceeding within the scope of the Commission's jurisdiction, the terms and scope of that agreement could be determined by the Commission without necessity of pursing a breach of contract suit in a judicial proceeding.

139. Without determining that an agreement could not be included in rule 1302, a reasonable accommodation in rule for extensive comment regarding the inclusion in the show cause process is to limit the scope to those agreements memorialized, accepted, or approved by the Commission in a decision. Should future circumstances require a jurisdictional determination in the case of an agreement apart from a Commission decision, it can be considered on a case by case basis at the time outside the scope of a show cause proceeding or through waiver or variance.

140. Modifications will also be adopted to identify trial staff and advisory staff in show cause proceedings as early as practicable. If the Commission makes a determination to disclose

a proposed show cause order to a potential respondent, Commission staff designation will be disclosed. Thus, illustratively, it will be clear with whom a potential respondent should deal with once afforded an opportunity to cure. This also more closely aligns the rule with current practices.

141. Concerns are raised regarding rule 1302(h)(I)(a)(iii). It is argued the provision establishes the possibility of a summary proceeding where the respondent has no opportunity to present a defense and that granting relief pursuant thereto conflicts with rule 1302(h)(I)(C)II(C). Comment misconstrues the provision. The provision merely puts all parties on notice that relief may be granted effective at such time.

142. Comment generally requests clarification as to the burden of going forward, referenced in rule 1302(h)(II)(D). This standard has been thoroughly addressed by the Commission and is further addressed in rule 1500 below. No further need for clarification has been shown. The rule does not affect the ultimate burden of proof required. The undersigned reviewed the cases cited (without any explanation of their applicability herein) and finds them unpersuasive.

143. Comment fails to show further modifications to the rule are required.

31. Rule 1303

144. The process of deeming complete for purposes of §40-6-109.5 C.R.S. drew comment seeking more certainty of process for those filing applications with the Commission. First, it is worthy of note and reconsideration that only applications are deemed complete by the Commission.

145. The undersigned sees completeness as an integral part of efficient processing of Commission proceedings. Too quickly deeming an application complete shifts the burden of

determining and understanding the basis and relief requested to the discovery process. The proposed rule conceptually adopts an appropriate balance of party interests and proposals to modify will not be adopted.

146. Applications are deemed complete in accordance with §40-6-109.5 C.R.S., which provides:

> the commission shall issue its decision on such application no later than one hundred twenty days after the application is deemed complete as prescribed by rules promulgated by the commission.
>
> § 40-6-109.5(1) C.R.S.

The rule will be modified to prescribe all conditions for determination of completeness sufficient to commence the applicable statutory period.

147. Comment warns of considered expansion of litigation around this preliminary determination made by the Commission and supports continuation of the Commission staff's role in reviewing and presenting applications. The opportunity for parties to litigate completeness will not be adopted, consistent with comment received. Parties can pursue dismissal on the merits. A necessary consequence of continuing the current process can result in ultimate dismissal on the merits at the end of the proceeding where the shortcoming might have been overcome by early supplementation. The deeming process only determines completeness sufficient to commence the applicable statutory period. The determination is made without prejudice as to the merits of the proceeding, including whether the application, in fact, satisfies any required scope of the proceeding.

148. In response to comment, only modest changes will be made to current processes. However, the requirement will be made clear and explicit that all applications filed must state the

relief requested, identify all applicable requirements of Commission rule and decision, and address each of those respective requirements.

32. Rules 1308 and 1506

149. The circumstances in which some responses are permitted will be clarified and standards heighten above the general "good cause" standard.

150. The undersigned finds it appealing to prohibit filing or a response or reply prior to a Commission decision granting leave to make such filing (where required). Although appealing, comments seeking to prohibit the current practice of simultaneously filing a reply to a motion or request for RRR along with a motion requesting leave to file the reply will not be adopted due to practical concerns with implementation.

151. In light of the short time the Commission has to act on a request for RRR, the undersigned expressed practical timing concern of delaying submission of a response until after leave is granted to make the filing. Additionally, there is no practical way to limit the content of the request for leave to exclude the substance of the response sought to be filed. Finally, it might be that some responsive content may be necessary to meet the burden to obtain leave to file the reply. Comment supports the concerns raised and considers an alternative procedure likely to be unworkable.

33. Rule 1309

152. Comment addresses proposed modifications and requests further clarification that an application or petition may only be amended or withdrawn upon motion within 45 days prior to the commencement of hearing. Further, that an application may not be withdrawn following commencement of hearing. Other comment argues business decisions in the exercise of management discretion may reasonably occur after conclusion of a proceeding and that the

Commission, in most circumstances, cannot force a company to pursue a course of action it no longer wishes to pursue.

153. While there is no express prohibition of dismissal post hearing, the proposed rule adopts an appropriate balance of concerns. The required motion provides an opportunity to address potential for abuse while also permitting reasonable action. As amended, withdrawal or amendment at any time after 45 days prior to the commencement of hearing will be by Commission decision.

34. Rule 1400

154. Several parties commented regarding the conferral requirement suggesting that it should be deleted, clarified, or narrowed.

155. The rules continue to provide for a 14 day response time to motions. Where a movant can ascertain that a motion is unopposed, there is no need to wait 14 days for response time to expire in order to determine a request is unopposed. Thus, conferral has the potential to expedite considerations of unopposed motions.

156. On the other hand, particularly in a proceeding with numerous parties, the obligation to confer can itself become burdensome. Comments illustrate the difficulty that may result from adoption of the proposed rule.

157. Under current rules, counsel sometimes confer and address positions in motions. The undersigned believes that current practices are adequate. A movant is able to determine the cost and benefit on a motion by motion basis. The proposed rule will be made permissive, but will include language to encourage less familiar practitioners to that efficiency may be improved.

35. Rule 1401

158. The heart of Commission proceedings is furtherance of the public interest. The Commission is charged with protecting the interest of the general public from excessive, burdensome rates Public Utilities Com. v. District Court of Denver, 186 Colo. 278, 282 (Colo. 1974). Comment suggests that the Commission needs to reasonably control the increasingly large numbers of permissive intervenors in Commission proceedings and proposes modifications for this purpose. The undersigned agrees with the stated concerns.

159. The Commission thoroughly analyzed current permissive intervention standards in Docket No. 11A-510E. Decision No. C11-1163, issued October 31, 2011. It was concluded that an individual pro se petitioner was not permitted intervention because she failed to show that "(1) her interest in this docket is substantial; and/or (2) this interest would not otherwise be adequately represented by any other party" Decision No. C11-1163, at 2. It was found that the interest as a residential ratepayer was adequately represented by the OCC.

160. The Commission addressed the applicable statutory standard in Decision No. C11-0987 at 4-5, issued September 14, 2011. Further, rule 1401 was analyzed:

> In adopting Rule 1401, the Commission itself noted that the language "alerts parties that they have to do more than demonstrate an academic interest when seeking to intervene. The language makes clear that the burden is upon the party to show that a pecuniary or tangible interest will be substantially affected, while simultaneously ensuring that parties whose interests are not adequately represented can seek to protect those interests in Commission proceedings." Decision No. R11-0848-I at 4, *citing* Decision No. C07-0337 in Docket No. 06R-488ALL (April 27, 2007) at 10. These standards "are consistent with the statute, and the authority of the Commission to 'conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice. '" Decision No. C11-0987 at 6, *quoting* Sec. 40-6-101(1), C.R.S.

The Commission has stated: "We believe a stricter approach to interventions will result in more streamlined and efficient Commission proceedings, which will lead to 'the proper dispatch of

business and the ends of justice.'" Decision No. C11-0987 at 8. Prior attempts have been undertaken to limit permissive intervention based on a general or subjective interest. However, the intent has particularly failed in practice where objections are lacking. Commonly, requests for intervention are supported by the request of a customer or group relying upon utility service that will be affected by a proceeding. Based upon these interests, no opinion is expressed as to the nature or quantity of evidence that will be presented. When uncontested in an adversarial process, intervention is typically permitted. While unopposed interests have not forced determinations on merit, the consequences ultimately fall to ratepayers paying costs of multi-party litigation and Commission operations. In order to improve efficient utilization of resources and mitigate burdens of litigation, the standards for permissive intervention will be revisited.

161. In establishing permissive intervention standards, the Commission must be mindful of the resulting impact from increasing the number of parties upon the efficient administration of proceedings utilizing limited resources, the nature of proceedings, and the likelihood that expanding the number of parties will materially assist the Commission in reaching a just and reasonable result. Illustratively, too low of entry threshold can result in unnecessarily burdensome multi-party litigation. Litigation costs for all parties as well as the Commission may be materially impacted by expanding the discovery process and lengthening hearings. Particularly where duplicate interests advocate redundant or irrelevant positions, Commission proceedings are not furthered and resources are wasted.

162. While identification of a substantial interest is required, the rule will be clarified to require a specific expression of a substantial unique interest within the scope of a proceeding and Commission jurisdiction. Further, it must be shown how that specified interest may be

affected by a proceeding. Finally, it must be shown how that unique interest is not adequately represented by a statutory authority or other party to the proceeding.

163. Section 40-6.5-104 C.R.S. does not limit the right of anyone to petition, make complaint, or otherwise intervene in Commission proceedings. § 40-6.5-104(2) C.R.S. However, "[t]he fact that the statute does not limit the right of any person to petition to intervene in dockets before the Commission does not mean the Commission has no discretion in whether such a petition should be granted." Decision No. C11-1163 at 2-3.

164. The consumer counsel represents the public interest. § 40-6.5-104 C.R.S. Only to the extent consistent with the public interest, the OCC appears before the Commission to represent the specific interests of residential consumers, agricultural consumers, and small business consumers. § 40-6.5-104 C.R.S. The Legislature contemplated potential conflicts among the groups represented by the consumer counsel. The consumer counsel is explicitly authorized to represent inconsistent interests among the various classes of the consumers in a particular matter, represent one of the interests or to represent no interest. § 40-6.5-104(2) C.R.S.

165. Rule 1401(c) will be modified to strengthen requirements of the current rule by providing that, in particular, residential, agricultural or small business consumers must demonstrate that the OCC will not adequately represent the unique interests of the movant. Notably, the modification only affects permissive intervention.

166. Comment expresses concern regarding the required elements of a request for permissive intervention because it may be difficult to determine the evidence that will be offered in support of a claim. It is notable that Staff of the Commission has long been able to express specific concerns in its notice of intervention. It is reasonable to require the same of permissive intervenors. While the undersigned understands it may require a more substantial undertaking to

demonstrate that permissive intervention should be granted, the adopted rule appropriately balances the interests of prospective intervernors with the interests of the other parties and the Commission's management of the proceeding.

167. When a prospective intervenor is concerned that they will be impacted by a proceeding, but they cannot say how they will be impacted, what they have to say about it, or why they should be permitted to pursue a claim, intervention is not appropriate. Permitting intervention without the required showing, results in no bar at all.

168. By narrowing the perspective scope of intervenors, the potential for need to request late intervention could expand. Where an interested person cannot satisfy this standard within the intervention period, the appropriate course is that they not be granted intervention. However, if information satisfying requirements is later discovered, that could not reasonably have been discovered within the intervention period, a request for late intervention is the appropriate procedure to request permissive intervention.

169. Comment raises appropriate concern that requiring specificity in requesting intervention might be used against a party as to the scope of their interest in the proceeding after intervention. While a reasonable concern that is not the intent of requiring specificity in requesting intervention. The issues are apples and oranges. Permissive intervention is solely about whether the Commission should permit the one requesting to be a party to the proceeding. The scope of an intervenor's interests do not determine scope of the proceeding. The request for intervention presents no artificial limitation upon participation as a party.

170. In order to assist the Commission in weighing parties' interests and the representation of those interests, the rule will clarify that requests for permissive intervention will not be decided prior to expiration of the notice period.

171. Although the Commission is acting to streamline litigation process by limiting permissive intervention, the proposed rules notably also expand the opportunity to provide public comment regarding a proceeding, including academic and policy comment. See discussion regarding rules 1200 and 1509.

36. Rule 1405

172. There is a theme in comment of those typically initiating proceedings at the Commission versus those that do not. The former generally seems to support earlier deeming applications complete, shorter notice periods, more limited discovery, and status quo disclosure obligations. The latter has an interest largely in the status quo, particularly regarding discovery in Commission proceedings. Discovery process is subject to abuse on both sides. The balances struck in the current rule largely provide the best opportunity to avoid abuse and facilitate the fact-finding process. The presiding officer in any proceeding is in the best position to exercise discretion and weigh affected discovery interests.

173. The goal of this proceeding must be to establish the appropriate "default" procedures. Where those provisions are adequate, prehearing conferences can more likely be delayed or avoided. Where prehearing conferences are necessary, deadlines may be modified on a case-by-case basis as has occurred in the past. Promotion of efficiency in the discovery process benefits all parties concerned in the exchange of information. However, the undersigned is convinced that increasing the potential for additional process regarding discovery disputes interferes with maximizing the Commission's opportunity and ability to meet the letter and spirit of applicable statutory periods.

174. In many proceedings, the applicable statutory period may be waived. Where waived, a more global view of improving overall efficiency prevails.

175. Arguments were presented based upon comparisons made to civil litigation in courts. However, there are noteworthy distinctions not addressed. Substantial disclosure obligations, not applicable in Commission proceedings, are integral to the discovery process in civil actions. See e.g., Rule 26(a)(1). In Commission proceedings, one must discover the scope of relevant information to the proceeding. Also, civil litigation tends to resolve issues arising between those have some nexus or common experience in fact. In many Commission proceedings, discovery of facts tends to weigh more on the regulated entity because facts related to operating information and experience is within the utility's possession and control.

176. Reference was also made to the Civil Access Pilot Project applied in Douglas and Jefferson Counties. Notably, this project also requires substantial disclosure broader in scope, and more specific and complete, than otherwise required under Rule 26 before a response is due. See Pilot Project Rule 3. None of such aspects apply in Commission proceedings. Disclosure obligations go hand in hand with discovery obligations. Due to the scope and complexity of many Commission proceedings, the undersigned is not inclined to dramatically change the scope of required disclosure in order to attempt further improvement in the discovery process. As suggested in comment, picking and choosing some provisions without others would likely lead to unintended consequences.

177. Comment also addresses modifications to discovery response times. In general terms, subsequent rounds of testimony should generally narrow the scope of the proceeding. Thus, the scope of information subject to discovery should narrow from direct testimony to answer testimony to rebuttal testimony. In proceedings subject to an applicable statutory period, a slight shortening of response times for discovery in establishing a procedural schedule can provide additional time for other phases of the proceeding. After consideration,

seven day response time will be adopted for discovery regarding rebuttal or cross-answer testimony. However, where the applicable where the applicable statutory period is waived, the current 10 day period will be maintained. Where a party contends alterations should be made based upon circumstances in a proceeding, such matters can be addressed on a case-by-case basis.

178. Comment requested narrowing the scope of discovery by limiting the number of permitted interrogatories. The undersigned is concerned that artificially limiting the number of interrogatories will result in incentives to broaden the scope of questions. Rather than imposing limits upon the number of permitted discovery requests, the undersigned recommends adopting presumptions that certain types of interrogatories are overly broad or not reasonably calculated to lead to the discovery of admissible evidence. An appropriate balance is sought by requiring more thoughtful design without imposing artificial limits upon number.

179. Several comments oppose the request to require filing of discovery. Insufficient cause has been shown to dramatically alter the Commission's discovery process. The request to require filing will not be adopted.

180. There was some comment encouraging service requirements for all discovery in proceedings in light of minimal costs of electronic service. While it is not uncommon for parties to request such responses, comment regarding other costs and complications (e.g., volume and confidentiality) convince the undersigned that general service requirements for discovery should not be expanded by rule.

37. Rule 1406

181. Comment proposes to require the filing of a motion requesting issuance of a subpoena. Concern is raised with current ex parte processes where the subpoena issues without

the opposing party having an opportunity to examine whether statutory prerequisites have been met. Comment also contends that a showing should be made that information sought through deposition may not be otherwise obtained before issuance.

182. Statute does not require or contemplate notice of a request for issuance of a subpoena to be provided. The undersigned believes that the current ex parte process best serves the public interest across the Commission's jurisdiction. Particularly because the rules require personal service of a subpoena, there is substantial potential for abuse during the issuance process as well as in the evasion of service. Rule 45(c) C.R.C.P. As provided in statute, a subpoena is issued upon affidavit. Once served, the recipient of the subpoena can challenge the showing by requesting that the subpoena be quashed.

183. Secondly, the request to condition issuance of a subpoena upon a showing inadequacy of other discovery means will not be adopted. Primarily, the statute does not impose such requirement. Additionally, the undersigned views this as an inappropriate intrusion into a litigant's trial advocacy. The proposal restricts appropriate uses of deposition testimony. Illustratively, a party may wish to preserve testimony, evaluate the credibility of the witness, or pursue matters where a witness has provided evasive responses to written discovery.

184. Comments suggesting modification of subpoena processes will not be adopted.

38. Rule 1408

185. Comments request modifications regarding Commission consideration of settlements. It is requested that a deadline for filing settlements (or notice) be established at least seven days prior to hearing. While the intent to encourage efficient resolution of matters and to provide adequate opportunity for review is appreciated, the undersigned finds the proposal impractical as a rule. The possibilities are too broad to impose a seven day deadline.

Administrative efficiency would not permit a comprehensive uncontested settlement agreement to be disregarded because it was reached five days prior to hearing. The undersigned opines that existing procedures are adequate and that reasonable accommodation can be undertaken based upon surrounding facts and circumstance (e.g., delaying or rescheduling the start of hearing).

186. Rule 1408 will be amended to clarify that consideration of settlements upon motion.

187. Comment also addresses the proposed language encouraging disclosure of comprehensive reasoning regarding settlement terms. Comment raises concern if the intent is to obtain evidence regarding a party's rationale for agreement, citing Rule 408 of the Colorado Rules of Evidence. The Commission clearly and definitively encourages parties to resolve their differences. However, the Commission has long made clear its obligation to protect the public interest:

> We reject the notion that the Commission should abstain from modifying settlement agreements for fear of upsetting the balance achieved by the parties. This would be an abdication of our responsibility. The Commission must protect ratepayers, and ensure that rates are just and reasonable. We also seek to ensure that rates are cost based. Were the Commission to accept settlements as unchangeable agreements it would essentially eliminate the public decision making process. Rather than deciding the issues in public, before the Commission, the decision making process would occur behind closed doors in settlement negotiations….
>
> 7. We are cognizant that parties work hard to reach an agreement, but this Commission has and will continue to review each issue in settlement agreements. As part of the terms contained in virtually all settlements filed with the Commission, parties recognize that the Commission has the authority to modify the terms of a settlement, and include provisions for individual parties to withdraw from settlement agreements if they do not like Commission changes. While parties typically request that the Commission approve settlements without modification, the Commission often modifies settled terms as the public interest requires….

> 10. We believe that this Commission has an obligation to review all the terms contained in a settlement agreement to ensure that they comply to the greatest extent possible with applicable regulatory principles, and are just and reasonable. We recognize that any changes may lead to the withdrawal of a party from the settlement. Because the Commission has an obligation to protect ratepayers, and to ensure that rates are just and reasonable it must be free to modify settlement agreements. This does not mean that settlement agreements are in any way discouraged. To the contrary, this Commission adopted virtually all provisions of the settlement submitted by the parties, and commended the parties in settling their divergent positions. Commission initiated changes are an inherent part of the settlement process. Parties are free to withdraw from settlements if Commission modifications are too heavy handed.
>
> 2006 Colo. PUC LEXIS 198, 3-8 (Colo. PUC 2006)

188. While it is understood that various factors affect precise terms of settlement, and that the Commission would not wish to chill efforts to reach settlement, it will be noted that the Commission is not bound by the technical rules of evidence in the conduct of hearings and investigations. Section 40-6-101 C.R.S. Thus, the rules of evidence do not conclusively determine the matter. Those requesting approval of settlement are obliged to demonstrate that the terms are just, reasonable, and warrant Commission approval. The proposed rule makes clear that parties supporting approval of a settlement should be prepared to demonstrate that all terms warrant approval.

189. Comments urge the Commission not to adopt rule 1408(b) as vague, problematic, and unnecessary. With slight modification, proposed rule 1408(b) is relocated from current rule 1407. Because the provision addresses settlement, the undersigned found it more appropriate to be relocated. Based upon comments received, the provision will not be adopted -- effectively removing it from current rule 1407. Consistent with points made in comment, the provision is unnecessary (e.g., encouraging settlement of contested proceedings already includes show cause proceedings).

190. Proposed requirements to admit jurisdiction and waive further proceedings unnecessarily imposes conditions that may discourage partial settlements where otherwise appropriate, contrary to the Commission's express policy. Illustratively, the parties might agree to a partial resolution of differences while preserving procedural steps as to unresolved issues. In such event, the public interest may be served by the parties' partial resolution. Such provisions could be negotiated as part of an agreement or imposed as a condition of approval, where appropriate. They will not be required by rule.

39. Rule 1409

191. Comment requests leave to demonstrate good cause for failing to appear at a scheduled prehearing conference. The proposed modification will not be adopted. The Commission schedules prehearing conferences by decision. All parties are served and are expected to appear and fully participate. It is of practical necessity for the efficient management of proceedings that deadlines be established to govern a proceeding. Thus, conferences are convened to efficiently establish procedures and certainty for all concerned. There is no reason to amend the rule to clarify that the results of the conference (like any other hearing) will not be affected by a party's failure to appear.

40. Rule 1500

192. Historically, show cause proceedings were a creature of the decision creating them. Proposed rule 1500 attempts clarification as to the applicable burden of proof in show cause proceedings. The Commission has long utilized a show cause concept in the furtherance of its duties. See e.g., Decision No. C00-0846, issued August 4, 2000. The Commission initiates a proceeding after determining "sufficient cause exists to hold a hearing to determine the facts, to hear material arguments, to receive evidence and testimony from the Commission staff and

others, and to determine what order or requirement, if any, shall be imposed by the Commission." Decision No. C00-0846 at 2. The Commission then orders the respondent entity subject to its jurisdiction "to show cause why the Commission should not take appropriate action and enter an order or penalty" Decision No. C00-0846 at 3.

193. The Commission's long historical use of the process is more easily found in the context of subsequent judicial proceedings. See e.g., Archibold v. PUC, 933 P.2d 1323, 1325 (Colo. 1997); Public Utilities Com. v. Tucker, 167 Colo. 130, 132 (Colo. 1968); and Westway Motor Freight, Inc. v. Public Utilities Com., 156 Colo. 508 (Colo. 1965). While burden of proof is not expressly addressed as an issue in these judicial proceedings, the historical process is consistent with comments arguing that Staff of the Commission has the ultimate burden of proof.

194. Case No. 5248 arose from the Order to Shown Cause and Notice of Hearing, Decision No. 61199, issued August 15, 1963. In Decision No. 61450, issued September 25, 1963, one cannot determine the presentation of evidence with certainty, but it appears likely that Commission staff first presented evidence.

195. Case No. 5270 arose from the Order to Shown Cause and Notice of Hearing, Decision No. 62278, issued February 7, 1964. It is clear in Decision No. 63185, issued June 29, 1964, that Commission staff first presented its case because a recess was taken prior to the presentation of Respondent's case. Decision No. 63185 at 3.

196. In Decision No. C94-1475, issued November 16, 1994, Commission staff was ordered to disclose witnesses for evidentiary hearing in advance of respondent. The decision also recognized that Commission staff may seek to amend allegations based upon the ongoing nature of the investigation.

197. Because the undersigned anticipates that modifications are proposed to restore processes utilized prior to the recodification in 2003, the jurisdiction of the Commission to assign the burden of proof to a respondent in a show cause proceeding will not be determined herein that might relate to a show cause proceeding. Rather, the rule will be modified to provide an opportunity to streamline procedures based upon the burden of going forward.

198. The burden of proof has been summarized in other Complaint proceedings by analogy to civil cases:

> "In civil cases, the burden of proof is on the plaintiff to prove the elements of the case by a preponderance of the evidence. This burden of proof does not shift during the proceeding, although it may be aided by a presumption or a shift of the burden of going forward with the evidence once the plaintiff has established a prima facie case. "

Decision No. R11-0467 at 20.

199. It is also noteworthy that §40-6-108 C.R.S. is not the sole source of Commission authority. The Commission also has broad authority from other sources, including §§ 40-3-102, 40-3-110, 40-6-106, 40-6-107, and 40-15-107, C.R.S. Based upon facts and circumstances involved, the Commission might also exercise the latter authority in conjunction with a show cause proceeding.

200. Rule 1501(c) addresses the Commission taking administrative notice of matters. A Commission decision initiating a show cause proceeding may take administrative notice of information. If such evidence is sufficient to establish a prima facie case, the burden of going forward may be shifted by order. Implementing this procedure would particularly permit the Commission to improve efficiency of proceedings fundamentally based upon Commission records (i.e., whether an annual report is filed). Notwithstanding such a determination, if made, any respondent would have a full opportunity to contest or refute noticed evidence.

In this manner, uncontested proceedings can be resolved more efficiently while preserving respondents' full opportunity to offer evidence to contest or refute noticed facts prior to Commission adjudication.

41. Rule 1501

201. Without citing any authority, comment contends that due process only permits that administrative notice to be taken upon the request of a party. The undersigned disagrees. The proposed modification will not be accepted.

202. While due process concerns do not require cross examination of the information, there is a right to controvert or dispute the evidence by additional evidence. Thus, the admission of evidence by administrative notice upon request in closing argument cannot be admitted over objection.

203. Several comments address largely logistical concerns regarding the taking of administrative notice under the proposed rule. What if a copy of a document of which notice is taken is not available? If a copy of the source is not provided, what becomes the record on appeal?

204. Comment requests further modifications regarding the procedures affecting administrative notice of evidence. The undersigned appreciates the potential challenge for a party requesting administrative notice of a fact at the last minute. However, parties must anticipate evidence intended to be presented. Where unopposed, accommodations are often made for submission of a late-filed exhibit to address logistical concerns and efficiency. Where opposed, a continuance may be requested or one might request that the specific fact to be noticed be permitted to be specified in advance of providing a complete copy. In any event, administrative notice admits evidence. While the evidentiary ruling must be made by the

presiding officer based upon all surrounding facts and circumstances, the rule will be modified to be less procedurally prescriptive.

205. Comment suggesting a right to late-file a document from which evidence is noticed will not be adopted. No authority has been shown that late filing in all instances would not violate due process protections. Rather than establish such standard in rule, such determinations will be made upon request after consideration of surrounding facts and circumstances. Similarly, the undersigned in concerned that argument for admissibility of a late filed document is not practical in all instances. Illustratively, one might not be able to complete a hearing and discern what would be stricken if not admitted. Finally, it may not be appropriate to require a party to refute facts at hearing that are not in evidence. This non-exhaustive list of concerns leads the undersigned not to adopted further proposed modifications.

206. In any event, the adopted rule must remain consistent with the procedural aspects of taking administrative notice addressed by the Supreme Court. See Geer v. Stathopulos, 135 Colo. 146, 154-156 (Colo. 1957).

42. Rule 1502

207. Comment requests consideration of Colorado Appellate rule 4.2 in modifying rule 1502 in order to limit the scope of interim appeals. The scope of interim relief is indeed an extraordinary remedy and is not proposed to be modified. As has been recognized:

> 7. Interim orders are generally not subject to exceptions. Rule 1502, 4 Code of Colorado Regulations (CCR) 723-1. However, 1502(b) provides that "[a] presiding officer may certify an interim order as immediately appealable via exceptions." Rule 1502(b), 4 CCR 723-1.
>
> 8. In recommending adoption of rule 1502, Judge Ken F. Kirkpatrick summarized:

> It is the current practice of the Commission to entertain appeals of interim [*3] orders on a discretionary basis. The new rule should not encourage the appeal of interim orders, which would unnecessarily involve the Commission in ongoing proceedings that have been referred to ALJs. In addition, appeals of interim orders almost always unavoidably delay a proceeding. Nonetheless, there are certain circumstances where a significant ruling regulating the future course of the proceeding is made and a review would be appropriate. The rules currently have no mechanism for a presiding officer to certify an interim order as immediately appealable. Putting the presiding officer as the gatekeeper for interim order appeals seems to be a reasonable approach for allowing for some necessary interlocutory appeals but not encouraging practices that will result in unnecessary delay.

Decision No. R05-0461 at 18.

208. Denying exceptions to Judge Kirkpatrick's Recommended Decision, the Commission reiterated that it is left to the "discretion of ALJs and the Commission as to when interim orders may be appealed." Decision No. R09-1068-I, issued September 22, 2009, quoting. Decision No. C05-1093 at 36.

209. These considerations remain true. The current rule has proven adequate. Sufficient cause has not been shown to modify the rule.

43. Rule 1509

210. Comment requests that the rule permit parties in a proceeding to respond to all comments filed. The proposal will not be adopted in part and the rule will be clarified as to reliance upon comments filed after the last opportunity to respond. The ability of the public to provide comment to the Commission is more in the nature of the quasi-legislative function the Commission serves in the development, adoption, and implementation of public policy.

211. Comment in this proceeding requests that deadlines be established for filing of academic or policy comments. Clearly, comments are most informative when they are timely for consideration and response, as appropriate. The Commission would strongly encourage the filing of such comments to align with party positions they support.

212. Public comment will continue to be available, as in the past, for individual customers to submit comment. This type of comment will generally be submitted through the Commission's website, systems designed to accept public comment, submission of correspondence, or orally at hearings established for that purpose.

213. Academic and Policy comments will be requested in a newly broadened scope of comment intended to provide opportunity for those seeking to influence Commission consideration in the exercise of discretion.

214. In Colorado Energy Advocacy Office v. Public Service Co., the Supreme Court applied the Commission's authority in the context of an adjudicatory proceeding and the State Administrative Procedures Act. By including comments in the record and providing the opportunity for parties to address them, they will be available for consideration by the Commission in reaching a decision. The interests of parties will also be protected. See Colorado Energy Advocacy Office v. Public Service Co., 704 P.2d 298, 303-304 (Colo. 1985).

215. Any comment thereafter filed in an adjudicatory proceeding is practically too late to have impact and there will be no opportunity for parties to respond. Therefore, the rule will make clear that the Commission will not rely upon comment in adjudicatory proceedings submitted after the latter of the close of the evidentiary record or the latest due date for filing statements of position (e.g., closing briefs).

44. Other Procedural Proposals Affecting Timeliness of Commission Consideration.

216. Several comments suggest proposed modifications affecting timing of issuing a Commission decision.

217. Comment also addressed notification of the Commission action deeming an application complete. The Commission addresses completeness of applications during the Commissioners' weekly meeting. Minute entry is reflected in the Commission's E-Filing System promptly following determination. Where a decision will issue, the matter is addressed during the meeting and the decision issues shortly thereafter. Although some further delay can occur where the Commission will deem complete by decision, one can clearly anticipate such determination based upon publicly available weekly meetings as well as minutes thereof. The notice provided will not be modified further in rule.

218. Comment suggests shortening notice periods for the filing of intervention by right or permissive intervention to 14 days and to shorten the time for Commission staff to intervene the same, or for an additional seven days.

219. Typical notice in Commission proceedings is 30 days. The intervention period will not be shortened less than a typical notice period by rule. However, the amount of additional time available for Commission staff intervention is solely a creature of rule. Thus, the additional time can, and will, be shortened to seven days. See rule 1401(d).

220. A rule will be adopted to establish a shortened response time to exceptions filed in rule 1505(a). As an integral part of ensuring compliance with applicable statutory periods, it is found that the rules should provide more limited response time to filed exceptions in favor of maximizing time available to litigate a proceeding. In administrative proceedings and application proceedings where applicable statutory periods have been waived, the current response period will be retained.

221. Suggestions to eliminate some prefiled testimony may be reasonable. Because there is no deadline for filing specific types of prefiled testimony in rule, these matters can best be addressed on a case by case basis.

222. It is suggested that procedural timelines be affected to lessen timing pressure during the proceeding. Some frankly seem out of the context of these rules and are more appropriately addressed on a case by case basis in specific proceedings. Illustratively, it is suggested that the Commission issue more initial Commission decisions to circumvent the exception process. The scope and manner of referral are clearly matters within the Commission discretion and will not be addressed further in rule.

223. Some comment requests modification or time periods specified in statute. Such proposals will not, and cannot, be adopted.

A. Conclusion

224. Attachment A of this Recommended Decision represents the rule amendments adopted by this decision with modifications to the prior rules being indicated in redline and strikeout format (including modifications in accordance with this Recommended Decision).

225. It is found and concluded that the proposed rules as modified by this Recommended Decision are reasonable and should be adopted.

226. Pursuant to the provisions of § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

II. ORDER

A. The Commission Orders That:

1. The Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1, contained in redline and strikeout format attached to this Recommended Decision as Attachment A are adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director

Decision No. C13-0442

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12R-500ALL

IN THE MATTER OF THE PROPOSED RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1.

DECISION ON EXCEPTIONS

Mailed Date: April 16, 2013
Adopted Date: March 13, 2013

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R12-1466 (Recommended Decision) filed on January 24, 2013, by Atmos Energy Corporation and Colorado Natural Gas, Inc.(Atmos and CNG);

SourceGas Distribution, LLC and Rocky Mountain Natural Gas, LLC (SourceGas); Ms. Leslie Glustrom, Colorado Office of Consumer Counsel (OCC), Black Hills/Colorado Electric Utility Company, LP (Black Hills); Noble Energy, Inc. and EnCana Oil and Gas (USA), Inc. (collectively, Gas Producers), and Public Service Company of Colorado (Public Service). Public Service and the City of Boulder (Boulder) filed responses to the exceptions filed by other interested participants on February 7, 2013. Being fully advised in the matter, we address the exceptions below.

B. Procedural History

2. The Commission issued the Notice of Proposed Rulemaking (NOPR) on May 15, 2012, in Decision No. C12-0511. The purpose of this rulemaking is to make the rules of practice and procedure more effective, efficient and to serve the public interest. *Id.*, at ¶ 1.

3. The Commission referred this rulemaking to an Administrative Law Judge (ALJ), who solicited written comments from interested participants and held a series of public hearings, the latest being on October 26, 2012. The ALJ issued the Recommended Decision, which contained proposed rule amendments, on December 21, 2012. Several of the interested participants timely filed exceptions on January 24, 2013.[1]

C. Personal Information

4. Rather than discussing each party's exceptions to the personal information rules separately, we address the exceptions by topic. First, we address general clarification and revision of these rules raised on the Commission's own motion. Then we discuss the definition

[1] By Decision No. C13-0058, mailed January 10, 2013, the Commission granted a motion for extension of time to file exceptions filed by Public Service on January 8, 2013. The Commission extended the deadline for filing exceptions to the Recommended Decision to January 24, 2013, and the deadline for filing Responses to exceptions to February 7, 2013.

of personal information in Rule 1004(x); collection of personal information pursuant to Rule 1104; and distribution of personal information pursuant to Rule 1105.

1. General Clarification and Revision

5. On our own motion, we revise rule language related to personal information in rules 1004(x), 1104, and 1105, for consistency and clarity as attached in Attachments A and B hereto. Specifically, we find that it is in the public interest for these rules to be generally applicable to all regulated entities. Therefore, where appropriate, we revise the use of "utility" to "regulated entity" and "utility service" to "regulated service." Additionally, we remove reference to "account data" in Rule 1105(c). This term was discussed throughout these proceedings, yet not adopted or defined and therefore should be deleted to avoid potential confusion.

6. Further, we find that personal information pursuant to Rule 1105(a) should not be disclosed unless permitted pursuant to Commission rule[2] or as required by state or federal law. While such disclosure must be "in compliance" with state or federal law, we note that it is only when such disclosure is compelled as required by law that disclosure by a regulated entity is permitted. As discussed in the Recommended Decision, heightened protection of personal information is necessary, in part, due to the fact that customers often do not have readily viable alternatives to regulated services and therefore *must* disclose certain information or go without services, including fundamental utility services.[3]

2. Definition of "Personal Information" – Rule 1004(x)

7. The public interest to protect personal information is significant and is given due consideration in the Recommended Decision, including in the revision of the definition.

[2] As discussed below, "Commission rule" indicates both these Rules of Practice and Procedure and the Commission's industry-specific, subject matter rules.

[3] Recommended Decision, at 69-72.

8. In exceptions, Black Hills requests that the Commission reject the changes to Rule 1004(x) defining "personal information." Instead, Black Hills recommends that the currently effective rule stay in place, with the addition of a sentence that indicates there are other definitions within the rest of the Commission rules that may modify, change, or add to the definition.

9. In its response to exceptions, Public Service objects to the request of Black Hills to reject the updated rules. However, Public Service requests that clear separation between the definition of "personal information" and "customer data" be included in the Commission's Rules of Practice and Procedure. It asks that the Commission decide that statements in the Recommended Decision referencing any overlap of personal information and customer data shall have no force or effect.[4] Additionally, Public Service requests that personal information should not include "information proprietary to the utility" such as tracking numbers uniquely assigned to the utility's equipment (*i.e.,* meter number).[5] Public Service further argues that the rules should be revised to clarify that personal information must *always* include a customer's name and at least one of the enumerated items in Rule 1004(x)(II)-(VI).[6]

10. Boulder agrees with Public Service that "customer data" should be differentiated from "personal information." However, it rejects Public Service's contention that "information proprietary to the utility" should be excluded from the definition arguing that, if information created by the utility is assigned to a specific customer, it would seem *more* protective of a customer's privacy for that information to be considered confidential.[7] Further, Boulder rejects

[4] Public Service exceptions, at 5.
[5] *Id.*, at 3.
[6] *Id*.
[7] Boulder response to exceptions, at 4.

Public Service's assertion that the enumerated items in 1004(x)(II)-(VI) must be accompanied by a customer's name to be protected as personal information.[8] Both Boulder and Public Service suggest changes to subparagraph (VI) regarding the definition of "individually identifiable information," specifically noting confusion with the ALJ's "*i.e.*" statement included within that subpart.[9] Boulder also suggests that the Commission revisit the Data Privacy Rules, 4 CCR 723-3-3026 through 3031 in the near future.

11. We agree with the ALJ that there will be circumstances when information falls under both definitions, and attempting to develop definitions, for the Rules of Practice and Procedure, that are at all times distinct is impossible. We agree with the ALJ's general framework that allows information that meets both the definition of personal information and the definition of customer data to be disclosed only pursuant to informed customer consent as required in the industry-specific rules. This framework will provide broad protection of data defined as "personal information," yet allow for narrow disclosure procedures upon informed customer consent that are specific to an industry's needs. Finally, we also agree with the ALJ and participants that industry-specific rules, including specifically the Data Privacy Rules, will need to be revisited in the near future to address this updated framework.

12. We deny Black Hills' request to reject entirely the new definition of personal information. We also reject Public Service and Boulder's requests to separate personal information from customer data; however, we note that we will revisit the Data Privacy Rules in the near future. Further, we reject Public Service's objection to language relating to the overlap of personal information and customer data in the Recommended Decision.

[8] *Id.*, at 3.

[9] Subparagraph (VI) of Rule 1004(x) and the "i.e." statement include the following as protected personal information: "other individually identifiable information in the utility's possession or control (i.e., the identity of the subject is or may readily be ascertained by the investigator or associated with the information)."

13. We reject Public Service's suggestion to clarify that personal information must always include a customer's name. We agree with Boulder that the enumerated data described in subparagraphs 1004(x)(II) through (VI), when provided alone or in combination, is personal information; *e.g.*, a customer's social security number is personal information regardless of whether the customer's name is combined with that social security number.

14. We find that revision of subparagraph 1004(x)(VI) is appropriate not only to address issues raised through exceptions, but also to make clarifications raised on the Commission's own motion. Specifically, we strike the ALJ's "*i.e.*" statement that attempts to clarify "individually identifiable information." We find that this statement only reiterates and potentially confuses the meaning of "individually identifiable." Additionally, we address the following:

a. We reject Public Service's request in its exceptions to strike the phrase "possession or control." We agree that this language broadly identifies information classified as personal information; however, this information should be protected pursuant to Commission rules to the extent a regulated entity possesses or has control over this personal information.

b. We reject Public Service's request in its exceptions to exclude all "information proprietary to the utility" from the definition of personal information (*e.g.*, meter number). We agree with Boulder that information that identifies the individual is properly subject to the provisions regarding personal information if it is within the entity's possession or control, regardless of where such information originates from, even if developed by the regulated entity.

c. We clarify that "information" in subparagraph 1004(x)(VI) could be provided alone or in combination to be individually identifiable. For example, an individual *date* may not be individually identifiable; however, if that date is combined with a surname and town, such information could identify an individual by its correlation to a specific customer's birth date, mother's maiden name, and place of birth.

d. We find that language relating to the public and lawful availability of data should not apply to subparagraphs 1004(x)(I) through (V). For example, even if a customer's social security number, credit card information, account numbers, or other information identified in subparagraphs 1004(x)(I) through (V), become widely available, that information is no less personal to the customer.

> Regulated entities must not disclose this information, despite the availability of the information elsewhere. We therefore revise the rule to allow disclosure of information that is "public and lawfully available for only "other individually identifiable information" set forth in subparagraph 1004(x)(VI).

15. Consistent with the above discussion we revise the definition of personal information as attached.

3. Collection of Personal Information – Rule 1104

16. Participants, including SourceGas and Boulder, argue that not all information regarding creditworthiness is always personal information and suggest updates to clarify that information regarding creditworthiness might not be included within the meaning of personal information. In its response to exceptions, Public Service disagrees with these suggested revisions, arguing that it believes information regarding creditworthiness *is* personal information.[10] It argues that, like social security numbers, information regarding creditworthiness is highly sensitive information that is specific to individuals and can be used to perpetrate identity theft.

17. We agree with Public Service that, as listed in the revised Rule 1104, information regarding creditworthiness is individually identifiable information and should be afforded treatment consistent with the rules applicable to personal information. We therefore find that revision of the rule is not necessary and deny exceptions to this point.

4. Customer Request of Personal Information – Rule 1104

18. Pursuant to Commission Rule 1104(c), a customer may request his or her personal information that is held by a regulated entity. In its exceptions, Public Service suggests limiting customer requests of personal information to that information designated in

[10] Public Service response to exceptions, at 11.

subparagraphs 1004(x)(I) through (IV).[11] It argues that not limiting this language would be burdensome and would require the utility to identify all possible information associated with the customer. It further notes that such information may be maintained in multiple systems and in aggregated formats. In response to exceptions, Boulder disagrees with any change to the proposed rule. In addition to arguing that the Commission should not make it more difficult for customers to have their own information released, Boulder also notes that Public Service does not explain why customers should not be able to correct personal information held by the company that falls within the category of individually identifiable information.

19. We agree with Boulder that a customer should have access to his or her personal information held by a regulated entity. The potential burdens on the regulated entity described by Public Service are speculative and outweighed by the interest of the customer to access his or her personal information and make corrections pursuant to Rule 1104(c) if necessary. We therefore deny Public Service's request to limit the request for personal information upon customer request in Rule 1104(b).

5. Form of Request for Personal Information – Rule 1105

20. Public Service argues that requests for personal information pursuant to Rule 1105(c) should be limited to those in writing. It contends that written requests would promote the utility's and the Commission's ability to track disclosure and determine if disclosure was appropriate in a particular instance. In response to exceptions, Boulder asks that the Commission affirm Rule 1105 as it appears in Attachment A to the Recommended Decision and not make it more difficult for customers to have their own information released.

[11] Public Service exceptions, at 6.

21. Although we agree with Public Service, on the one hand, that written requests would document the disclosure process and promote compliance with our rules, customers should have reasonable access to their own information. In order to meet both concerns, we revise language to require that all requests for a customer's personal information be in writing, unless the request is from the customer regarding his or her own personal information, or from an entity facilitating energy assistance to that customer pursuant to Rule 1105(c). In the event the request is from an individual customer or an entity facilitating energy assistance and the request is not in writing, the regulated entity shall verify the requestor's identity as required by the rule.

6. Information Requested to Facilitate Energy Assistance – Rule 1105

22. Rule 1105(c) lists information that utilities are authorized to provide to agencies that provide energy assistance to consumers. Public Service and other commenters claim that these agencies request more information than what is listed currently in the revised rules and thus suggest that the rule be expanded to include all information requested by the agencies.

23. We agree that the rule language should be updated to encompass requests by agencies to facilitate energy assistance. We further note that, within Rule 1105, the Commission requires that a utility notify customers that their information may be disclosed to help facilitate energy assistance. On our own motion, we clarify in the rule that the utility shall notify the customer of the personal information that is or may be requested in accordance with Rule 1105(c) to facilitate in the energy assistance process.

7. Revisions Related to "Contracted Agent" – Rule 1105

24. Public Service requests clarification in relation to the use of "contracted agent" in Rules 1004 and 1105(d). It notes that a "contracted agent" is defined to be a "third-party";

however, a "third party" is defined to be a person who is not a contracted agent. Similarly, in Rule 1105(d), Public Service recommends consistent use of "contracted agent" and "third party contract," as opposed to "contracted third party" or "third party contract" in reference to contracted agents.

25. Atmos Energy and Colorado Natural Gas recommend updates to Rule 1105(d) to make explicit that treatment of personal information by contracted agents applies only after the effective date of the new Rules of Practice and Procedure. In its response to exceptions, Public Service agrees that the revisions to Rule 1105 should apply to contracts only after the rules are effective; however, it suggests a clarifying statement by order, as opposed to a rule change.

26. We agree with Public Service that revisions to the rules are necessary to clarify the inconsistent use of "contracted agent" and "third party." Additionally, we confirm that the rules are prospective, including with respect to rules related to the use of a contracted agent in Rule 1105, and will not be effective until the rules' effective date. However, we agree with Public Service that no rule change is necessary, and therefore deny Atmos Energy and Colorado Natural Gas' request for explicit revision.

27. In addition to revisions and clarifications related to a contracted agent raised by participants in exceptions, on the Commission's own motion we revise language in Rule 1105. Specifically, we make revisions to the rules related to the following:

a. Rule 1105(d)(II) states that "[t]he use of personal information for a secondary commercial purpose not related to the purpose of the contract *without first obtaining the customer's consent* is prohibited." (Emphasis added.) We add clarifying language in the rule to make explicit that the regulated entity must obtain approval if, for any reason, the purpose of the contract is altered.

We further note that any change in a contracted agent's use of personal information must be for purposes permitted by Commission rule.[12]

b. We add subparagraph 1105(d)(V) to indicate that any misuse of personal information by the contracted agent that would violate these rules or otherwise be impermissible by law shall be treated as a violation of these rules by the regulated entity.

D. Amicus Curiae and Attorney Representation

28. The Gas Producers take exception to proposed Rule 1200(c), which would require an amicus curiae to file its brief within the time allowed the party whose position the amicus brief will support. The Gas Producers argue that an amicus curiae should not be required to support any position and is entitled to advocate its own viewpoints, which may or may not be identical or similar to that of a litigating party.

29. The ALJ mirrored proposed Rule 1200(c) on Rule 29 of the Colorado Appellate Rules (C.A.R.). Recommended Decision, at ¶ 96. C.A.R. 29 requires an amicus curiae to file its brief "within the time allowed the party whose position as to affirmance or reversal the amicus brief will support unless the court for cause shown shall grant leave for later filing, in which event it shall specify within what period an opposing party pay answer." In addition, C.A.R. 29 contemplates that an appellate court will consider only those questions properly raised by the parties and that any additional questions presented in a brief filed by an amicus curiae will not be considered. *Denver United States Nat'l Bank v. People ex Rel. Dunbar*, 29 Colo. App. 93, 480 P.2d 849 (1970).

[12] For example, consider a situation where the contracted agent initially uses personal information that is also customer data for the sole purpose of assisting the utility in providing service. Subsequently, the same contracted agent proposes to use the information for other purposes as permitted by the Data Privacy Rules. Prior to using the data for an alternate purpose, the regulated entity must first obtain customer consent in compliance with Commission rules.

30. We agree with the Gas Producers that amici curiae in a Commission proceeding may raise legal issues without regard to whether the same issues have been raised by a litigating party. The Commission often decides multi-faceted matters that affect a diversity of interests, in contrast to more narrow issues of affirmance or reversal presented before appellate courts. We therefore grant the exceptions filed by the Gas Producers on this ground and delete the reference to "the party whose position the amicus brief will support" from the rule. Further, in regards to the filing deadlines for amicus briefs, we will add language stating that the deadlines will correspond to the deadlines applicable to the parties' opening statements of positions, legal briefs, or responses to motions. We therefore adopt the following language to Rule 1200(c):

1200. Parties, Amicus Curiae, Non-Parties.

(c) A non-party who desires to present legal argument to assist the Commission in arriving at a just and reasonable determination of a proceeding may move to participate as an amicus curiae. The motion shall identify why the non-party has an interest in the proceeding, shall identify the issues that the non-party will address through argument, and shall explain why the legal argument may be useful to the Commission. An amicus curiae is not a party, and may present a legal argument only as permitted by the Commission. The arguments of amicus curiae shall not be considered as evidence in the proceeding and shall not become part of the evidentiary record. All requests for amicus curiae may be accepted or declined at the Commission discretion. Unless ordered otherwise, ~~any amicus curiae shall file its brief within the time allowed the party whose position the amicus brief will support~~ the filing deadlines governing amicus curiae shall correspond to the deadlines applicable to the parties' opening statements of position, legal briefs, or responses to motions.

31. The Gas Producers also take exception to proposed Rule 1201(b)(V), which states that an individual may represent a partnership, corporation, association or any other entity, solely to provide public, academic or policy comments. That proposed rule also clarifies that non-attorney representatives may not take actions that constitute the practice of law. The Gas Producers argue that broadening the ability of non-parties to provide academic or policy comments will incent inappropriate expert advocacy and analysis, without the ability of parties to confront and cross-examine. They contend that the rules, as proposed, would violate the Sixth Amendment and would invite any advocacy or interest group to interpose itself and its opinions into Commission proceedings without the accountability of party status.

32. The Sixth Amendment of the U.S. Constitution is explicitly confined to criminal prosecutions. *Sparks v. Foster*, 241 Fed. Appx. 467, 471 (10th Cir. 2007) (finding that the Sixth Amendment did not apply to an administrative decision made by the Department of Corrections which was not part of a criminal prosecution). Therefore, the Sixth Amendment does not apply to Commission proceedings. In addition, while academic and policy comments are part of an administrative record in a proceeding, they are not considered evidence, much like other types of public comments. We grant the exceptions filed by the Gas Producers, in part, and insert a reference to Rule 1509 into Rule 1201(b)(V) as follows:

Rule 1201(b)(V) Attorney representation

(b) Notwithstanding paragraph (a) of this rule, an individual may represent:

(V) a partnership, corporation, association or any other entity, solely to provide public, academic or policy comments, pursuant to rule 1509. However, in no event shall a non-attorney representative take actions that constitute the practice of law.

E. Interventions

1. Glustrom

a. Procedural Arguments

33. In her exceptions, Ms. Glustrom focuses on proposed Rule 1401(c), in particular the language that would require residential, agricultural, or small business consumers petitioning to intervene by permission in a natural gas, electric or telephone proceeding to demonstrate that the OCC does not adequately represent their unique interests. Proposed Rule 1401(c) also states that subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Ms. Glustrom contends that the above-mentioned amendments to Rule 1401(c) have not been noticed and thus due process has not been provided. She states that the NOPR did not mention Rule 1401 and only briefly mentioned interventions in the context of another rule. Ms. Glustrom argues that, without proper notice, interested parties could not have known that changes to Rule 1401 would be made in this docket.

34. The Colorado Administrative Procedure Act (APA), § 24-4-101 et seq., C.R.S., requires agencies initiating a rulemaking to provide a notice of proposed rulemaking stating "either the terms or the substance of the proposed rule or a description of the subjects and issues involved." Section 24-4-103(3)(a), C.R.S. The APA also requires the rules, as finally adopted, to be consistent with the subject matter as set forth in the notice of proposed rulemaking. Section 24-4-103(4)(c), C.R.S. However, the notice does not need to provide the interested parties with *precise* notice of each aspect of regulations eventually adopted. *See, e.g., Forester v. Consumer Product Safety Comm'n*, 559 F.2d 774, 787 (D.C.Cir. 1977) (emphasis added).

35. In this case, it is true that the body of the NOPR itself did not mention proposed amendments to Rule 1401(c). However, the caption of this docket clearly referred to the Rules of Practice and Procedure, and the NOPR advised the parties of a comprehensive rulemaking pertaining to these rules. Rule 1401(c) is part of the Rules of Practice and Procedure. Further, the attachments to the NOPR listed proposed amendments to Rule 1401(c), although these were not the amendments ultimately adopted by the ALJ.

36. We find that the references to Rule 1401(c) in the attachments to the NOPR were sufficient and that a reference in the body of the NOPR itself was not required to comply with the APA. The federal APA, at 5 U.S.C. § 553(b)(3) contains the language *identical* to the one in the Colorado APA. In *Illinois Commerce Comm'n v. Interstate Commerce Comm'n*, 776 F.2d 355, 361 (D.C. Cir. 1985), the court considered an argument that an agency's failure to include proposed rule amendments in the body of the notice of the proposed rulemaking (the proposals were included in an appendix to the notice) did not provide sufficient notice and a reasonable opportunity to interested parties to participate in the rulemaking. The court rejected this claim and found that petitioners had a full opportunity to address the proposed rule amendments. The *Illinois Commerce Comm'n* holding applies with equal force here.

37. Further, it is irrelevant that the NOPR contained proposed amendments to Rule 1401(c) different from the ones later adopted by the ALJ. The Commission is not limited only to adopting or rejecting proposed changes listed in the NOPR and can adopt the proposals of the interested parties even if they were not initially included in the NOPR. Indeed, this is typical of the Commission's consideration of comments and proposed revisions from participants in the rulemaking process.

38. Finally, we note that Ms. Glustrom herself evidently received sufficient notice of the amendments to Rule 1401(c), as she filed written comments and addressed this issue at the October 26, 2012 hearing. For these reasons, we deny the exceptions filed by Ms. Glustrom on this ground.

b. Substantive Arguments

39. Ms. Glustrom argues that the existing law is clear that intervention by the OCC in a particular Commission proceeding cannot be used to limit other parties from intervening in the same proceeding. Ms. Glustrom cites to § 40-6.5-104(2), C.R.S., which states:

> (2) In exercising his discretion whether or not to appear in a proceeding, the consumer counsel shall consider the importance and the extent of the public interest involved. In evaluating the public interest, the consumer counsel shall give due consideration to the short- and long-term impact of the proceedings upon various classes of consumers, so as not to jeopardize the interest of one class in an action by another. If the consumer counsel determines that there may be inconsistent interests among the various classes of the consumers he represents in a particular matter, he may choose to represent one of the interests or to represent no interest. 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.

40. Ms. Glustrom further argues that Rule 1401(c), as proposed by the ALJ, is not good public policy. She states that many residential, agricultural, and small business consumers can have a host of varying interests in Commission proceedings. The OCC, on the other hand, has a very limited budget and cannot possibly represent all of these interests fully. This is why the legislature included the above-mentioned language in § 40-6.5-104(2), C.R.S., according to Ms. Glustrom.

41. In its response to exceptions, Boulder generally agrees with Ms. Glustrom, while Public Service urges the Commission to deny her exceptions.

42. As an initial matter, § 40-6-109(1), C.R.S., creates two classes of intervenors that may participate in the Commission proceedings: intervenors as a matter of right and permissive intervenors. *See, e.g., RAM Broad. of Colo. v. Public Utils. Comm'n*, 702 P.2d 746, 749 (Colo. 1985). Ms. Glustrom challenges the rule addressing only permissive interventions; she does not object to the rules authorizing intervention as a matter of right.

43. There are several requirements for permissive intervention. First, the Colorado Supreme Court interpreted the "will be interested in or affected by" language of § 40-6-109(1), C.R.S., to mean that a "substantial interest in the subject matter of the proceeding" is required. *Id.*, at 749. Accordingly, not every person, firm, or corporation that has any type of an interest in a Commission proceeding or will be affected in any way by a Commission order has a right to intervene. Second, even if the person or entity seeking intervention has an otherwise sufficient interest in a matter, courts and administrative agencies have discretion to deny intervention if that interest is represented adequately. This is the case even where the person or entity seeking intervention will be bound by the judgment of the case. *Denver Chapter of the Colo. Motel Ass'n v. City and County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming a trial court's denial of an intervention by certain taxpayers, under C.R.C.P. 24(a), in a lawsuit filed by the City and County of Denver against its auditor—because the interests of these taxpayers were represented by the city).[13] The test of adequate representation is whether or not there is an identity of interests, not discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by evidence of bad faith, collusion, or negligence on the part of the representative. *Id.*, *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

[13] The Commission is not strictly bound by the C.R.C.P., but they are useful for purposes of analysis. Rule 1001 provides the Commission may seek guidance from the C.R.C.P.

44. Reading §§ 40-6.5-104(2) and 40-6-109(1), C.R.S., together leads to a conclusion that presence of the OCC in a Commission proceeding, in and of itself, does not limit the right of persons, firms, or corporations to intervene in that proceeding, but it does not relieve them from meeting the requirements found in other statutes. These include a showing that the interest will not be represented adequately in a Commission docket and that the interest must be substantial. This interpretation harmonizes the two statutes.[14]

45. We find that the Commission is well within its authority to adopt a rule requiring residential, agricultural, and small business consumers to show that the OCC does not represent their interests adequately. The OCC's status as a governmental entity that is required under § 40-6.5-104(1), C.R.S., to represent these interests (as opposed to a private party) is another factor that supports the presumption of adequate representation. Indeed, the courts have relied on this factor in both *Denver Chapter* and *Feigin v. Alexa Group, Ltd.*, 19 P.2d 23, 31-32 (Colo. 2001).

46. Finally, we disagree with Ms. Glustrom that proposed Rule 1401(c) is not good public policy. To the contrary, a more disciplined approach to interventions results in more streamlined and efficient Commission proceedings. Further, the Commission is able to address the issues common to all consumers represented by the OCC. It is important to note that residential, agricultural, and small business consumers can participate without becoming parties by filing public comments, including academic and policy comments, and by providing public input to the OCC.

[14] If possible, the courts and administrative agencies must interpret statutes in a manner that harmonizes the statutory scheme as opposed to a manner that would leave statutory provisions antagonistic to each other. *See, e.g., Wolford v. Pinnacol Assurance*, 107 P.3d 947, 951 (Colo. 2005).

47. Even though we deny the exceptions filed by Ms. Glustrom, we find good cause to make a few modifications to proposed Rule 1401(c) on our own motion. First, we replace the word "unique" with the word "distinct." The term "unique" connotes that no other consumer in Colorado shares that interest, which is a much higher burden than showing that the interest is not represented adequately by the OCC. We find that Rule 1401(c) should require consumers to demonstrate only that their interest is distinct from the OCC and that the OCC does not represent that interest adequately. Second, we replace the word "individuals" with the word "consumers," because "individuals" may not describe commercial or corporate customers. Third, we insert the language that parallels § 40-6.5-104(2), C.R.S. That statute recognizes that "there may be inconsistent interests among the various classes of the consumers [that the OCC] represents in a particular matter, [and the OCC] may choose to represent one of the interests or to represent no interest." Finally, we clarify that the Commission retains its discretion to grant a motion for permissive intervention, even if there is adequate representation by the OCC. In sum, we amend Rule 1401(c) as follows:

1401. Intervention.

(c) * * *

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, electric or telephone proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must ~~demonstrate that the unique~~ discuss whether the distinct interest of the ~~individual~~ consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. The Commission will consider these factors in determining whether permissive intervention should be granted. Motions to intervene by permission will not be decided prior to expiration of the notice period.

2. Gas Producers

48. The Gas Producers object to proposed Rule 1401(c), in particular the language that would require an entity seeking to intervene permissively to explain why it is in the "best position" to represent a relevant interest. They contend that parties should not be required to let unaffiliated entities to assert their position and that no two entities have exactly the same position. The Gas Producers add that it is not possible for a potential intervenor to detail its evidence before intervening or to determine which party is in the best position to represent an interest. In its response to exceptions, Boulder supports the Gas Producers on this issue.

49. We agree with the Gas Producers and therefore grant their exceptions. Hence, rather than requiring a potential intervenor to demonstrate why it is "in the best position" to represent a particular interest, we will require an entity to demonstrate only that it is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. In addition, we will delete the requirement that a potential intervenor set forth the nature and the quality of evidence it anticipates presenting in the docket. We agree with the Gas Producers that it is difficult to know the nature and quality of the evidence to be presented at the outset of the proceeding. Further, a party is not required to present any evidence and may represent its interests through cross-examination of evidence presented by others or through legal briefing and argument. In sum, we amend Rule 1401(c) as follows:

1401. Intervention.

(c) 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 ~~contends they are in the best position to represent that interest~~ is positioned to represent that interest in a manner that will advance the just resolution of the proceeding~~, and the nature and quantity of evidence anticipated to be presented if intervention is granted~~.

* * *

F. Show Cause Proceedings

1. Notice to Regulated Entity

50. The proposed rules revise the process by which the Commission conducts show cause proceedings against a regulated entity for violations of statutes, rules, tariffs, and other regulatory obligations under the Commission's jurisdiction. Rule 1302(h)(I)(A) addresses the Commission Staff's preparation of a proposed decision ordering a regulated entity to show cause. Rule 1302(h)(I)(B), which is the subject of exceptions, delineates how the Commission considers the Staff's proposed decision and provides notice of the proposed order to the regulated entity. At issue is the highlighted language in proposed Rule 1302(h)(II)(B):

> Commission staff shall submit the proposed decision ordering a regulated entity to show cause to the Commission at its regular weekly meeting for approval to advise the regulated entity of the proposed proceeding. ***The Commission shall decide whether to give the regulated entity notice of the content of the proposed decision based on the supporting information presented. If the Commission decides to give notice, then the proposed decision presented by Commission staff shall be served on the regulated entity and shall be attached to a notice of proposed order to show cause over the Director's signature.*** The regulated entity shall have 20 days to cure or satisfy the allegations set forth in the notice of proposed show cause.

51. Black Hills opposes this language asserting that it gives the Commission discretion over whether to give a regulated entity advance notice of the order to show cause. Black Hills believes that advance notice should be mandatory, because, if a utility is not given advance notice, then it may be impossible to cure any problems in the show cause order within the deadlines set forth in other parts of Rule 1302.[15]

[15] Black Hills exceptions, at 4.

52. Section 24-4-104(3), C.R.S., requires an agency instituting proceedings to revoke, suspend, annul, limit, or modify a license to give the licensee notice in writing and afford the licensee the opportunity to respond with data, views, and arguments and, absent a deliberate or willful violation or a substantial danger to public health and safety, the opportunity to comply with the regulatory requirement. As quoted above, Rule 1302(h)(II)(B) also grants the regulated entity an opportunity to cure the alleged violation before the commencement of show cause proceedings.

53. We believe the ALJ's proposed language was intended to address the Commission's decision to institute the show cause procedure upon review of the Staff's proposed decision, not to deprive regulated entities of notice and the opportunity to respond and cure. Thus, the issue raised by Black Hills is one of adopting language that best communicates these procedures.

54. We grant Black Hills's exceptions to the extent that the language in Rule 1302(h)(II)(B) should be clarified, and we amend this rule as follows:

> Commission staff shall submit the proposed decision ordering a regulated entity to show cause to the Commission at its regular weekly meeting for approval to advise the regulated entity of the proposed proceeding. ~~The Commission shall decide whether to give the regulated entity notice of the content of the proposed decision based on the supporting information presented. If the Commission decides to give notice~~ If the Commission approves the advisement, then the proposed decision presented by Commission staff shall be served on the regulated entity and shall be attached to a notice of proposed order to show cause over the Director's signature. The regulated entity shall have 20 days to submit written data, views, and arguments with respect to the facts or conduct and to cure or satisfy the allegations set forth in the notice of proposed show cause. If the Commission decides not to approve the advisement, then the matter shall be deemed closed.

2. Taking Administrative Notice of Evidence

55. Black Hills, Public Service, Atmos and CNG, and SourceGas take exception to proposed Rule 1302(h)(II)(C), which addresses the taking of administrative notice, the potential for establishing a prima facie case, and the burden of proof. The exceptions generally combine their discussion of these issues, arguing that the proposed rules allow the taking of administrative notice of evidence in the proposed decision, which in turn could result in the establishment of a prima facie case and an improper shifting of burdens to the regulated entity.[16] The Commission considers the issue of administrative notice to be separate from the issues of the establishment of a prima facie case and the burden of proof, and thus for clarity we will analyze them individually.

56. Proposed Rule 1302(h)(II)(C) states:

> ***The Commission may take administrative notice of evidence in a decision ordering a regulated entity to show cause in accordance with rule 1501(c)***. Based thereupon, the decision may include a finding that a prima facie case has been shown and shift the burden of going forward as to how any statute, rule, tariff, price list, time schedule, decision, or agreement accepted or approved by Commission decision is alleged to have been violated.

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[16] *See, for example*, Public Service Company of Colorado's Exceptions to Recommended Decision No. R12-1466, at 7-8:

> Recommended Rule 1302(h)(II)(C) and (F) would improperly place the burden of proof on the utility in a show cause proceeding. Public Service believes that the proposed Rule places the cart before the horse. That is, Rule 1302 improperly suggests that the Commission could make a finding that the Staff has already established a *prima facie* case before a formal case against the utility has been filed, such that the burden of proof and of going forward would be shifted to the utility respondent. This is clearly improper. Moreover, the proposed rule suggests that a finding of the establishment of a *prima facie* case against a utility can be made on the basis of administrative notice (again before the case is filed). That is fundamentally unfair, violates the provisions of the state Administrative Procedure Act (which states that the burden of proof is on the proponent of an order), and directly violates the provisions related to administrative notice set forth in Recommended Rule 1501(c), which both limits the evidence that can be admitted on the basis of administrative notice and affords a party the opportunity to controvert evidence admitted by administrative notice.
>
> It is fundamentally unfair and contrary to fundamental principles of due process of law to require the entity against whom essentially a "complaint" is filed to bear the burden of proving *from the very outset of a proceeding* that he or she is innocent. Yet that is what the Recommended Rule would do.

See also, Black Hills at 4-5; Atmos and CNG, at 3-4; SourceGas and Rocky Mountain, at 1-3.

Public Service contends that this language violates Rule 1501(c), which limits the taking of administrative notice and grants a party the opportunity to controvert such evidence.[17] SourceGas argues, as to the administrative notice issue only, that there is no need for Rule 1302(h)(II)(C) to repeat the authority to take administrative notice granted already in Rule 1501(c), and that Rule 1501(c) allows a party to controvert the fact to be noticed.[18]

57. To the extent the exceptions challenge the first sentence to Rule 1302(h)(II)(C) relating to the taking of administrative notice in show cause proceedings, they are denied. This rule says that the taking of administrative notice is in accordance with Rule 1501(c), which necessarily includes its evidentiary and procedural protections. Per Rule 1501(c), the facts admitted through administrative notice in a show cause proceeding under Rule 1302(h)(II)(C) are only of an undisputed nature and whose accuracy reasonably cannot be questioned.[19] The incorporation of Rule 1501(c) also grants show cause respondents the opportunity to controvert evidence admitted by administrative notice. The reference to Rule 1501(c) and its protections in Rule 1302(h)(II)(C) fulfill the procedural and evidentiary requisites raised by the exceptions.

58. We also disagree with SourceGas that a rule permitting administrative notice in show cause proceedings is needlessly repetitive; rather, we find that expressly empowering the Commission to take administrative notice at this stage of show cause proceedings provides clarity and efficiency to the process.

[17] Public Service exceptions, at 8.
[18] SourceGas exceptions, at 2.
[19] Rule 1501(c) states:

> The Commission may take administrative notice of general or undisputed technical or scientific facts; of state and federal constitutions, statutes, rules, and regulations; of tariffs, price lists, time schedules, rate schedules, and annual reports; of documents in its files; of matters of common knowledge, matters within the expertise of the Commission; and facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned….Every party shall have the opportunity on the record and by evidence, to controvert evidence admitted by administrative notice.

3. Burden of Proof

59. In their exceptions to Rule 1302(h)(II)(C), Black Hills, Public Service, Atmos and CNG, and SourceGas focus primarily upon the following highlighted language:

> The commission may take administrative notice of evidence in a decision ordering a regulated entity to show cause in accordance with rule 1501(c). Based thereupon, ***the decision may include a finding that a prima facie case has been shown and shift the burden of going forward as to how any statute, rule, tariff, price list, time schedule, decision, or agreement accepted or approved by Commission decision is alleged to have been violated.***

These participants object to a shifting of the burden of proof to the regulated entity if a prima facie case has been established. They do not challenge the language allowing the Commission to find that the Staff has made a prima facie showing of a violation. In fact, Public Service advocates that a prima facie showing should be a threshold condition to the issuance of an order to show cause.[20]

60. Participants filing exceptions cite § 24-4-105(7), C.R.S., as controlling the issue of which party shoulders the burden of proof in Commission show cause proceedings, and it states:

> Except as otherwise provided by statute, the proponent of an order shall have the burden of proof, and every party to the proceeding shall have the right to present his case or defense by oral and documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

They argue that, because the Staff is the proponent of an order finding the regulated entity to be in violation, the shifting of the burden of proof away from Staff and on to the regulated entity conflicts with the first clause in §24-4-105(7), C.R.S.[21]

[20] Public Service exceptions, at 10.

[21] Public Service exceptions, at 7-8; Black Hills exceptions, at 4-5; Atmos and CNG exceptions, at 3-4; SourceGas exceptions, at 1-3.

61. The participants are confusing the burden of going forward concept with the burden of proof concept. Contrary to the assertions made by the participants, the burden of proof does not shift during a show cause proceeding. It remains with the proponent of the relief requested. This is in contrast to the "burden of going forward" as that term is used in Rule 1302(h)(II)(C). When the Commission's records and other sources evidence a violation of a statute, rule, tariff, price list, approved agreement, or other obligation, the Commission may require the regulated entity to appear. By rule, the regulated entity may present its evidence, cross-examination, argument or position to cure the allegation. As the respondent in the show cause proceeding, the regulated entity may decide not to present any evidence. The respondent retains the ability to present argument as to why the Commission should not find the regulated entity has committed a violation.

62. We therefore deny the exceptions to remove or revise the language addressing the burden of going forward in proposed Rule 1302(h)(II)(C). Rule 1500 is amended to be consistent with the discussion above.

G. Miscellaneous Rule Changes

1. Separation of Commission Staff from Advisory Staff – Rule 1004(e)

63. Through its exceptions, Black Hills requests revision to Rule 1004(e) to ensure that an absolute separation exists between trial and advisory staff. Black Hills contends that allowing staff to serve as advisory staff in one matter and trial staff in another matter raises issues such as the risk that utilities inadvertently will engage in prohibited *ex parte* communications. Further, the impartial role of advisory staff may be blurred if staff members participate as both advisory and trial staff.

64. We find that § 40-6-123, C.R.S., provides the necessary protections advocated by Black Hills. Specifically, among other directives, this statute requires that members and staff of the Commission conduct themselves in a manner that prevents the appearance of impropriety or of conflict of interest. Therefore, we find that no rule change is necessary and Black Hills's exceptions on this matter are denied. Commission staff will continue to engage in advisory and trial advocacy roles consistent with statutory directives and Commission rule.

2. 2011 Edition of C.R.S. and CRCP – Rules 1004(g) and 1406

65. Rule 1004(g) incorporates by reference the 2011 edition of the Colorado Rules of Civil Procedure (CRCP). Public Service contends that the rule either should refer to the most current edition of the CRCP or incorporate the 2012 edition. The Gas Producers argue that referencing a version of CRCP that is two years old will lead to divergent practices between the courts and the Commission. Additionally, Boulder similarly suggests that, rather than referencing the 2012 edition of CRCP, Rule 1004(g) should remove the reference to any particular year from the definition of CRCP.

66. Pursuant to the Colorado Administrative Procedure Act (APA), § 24-4-103(12.5)(a)(II), C.R.S., permits agencies to incorporate "codes, standards, guidelines, or rules" adopted by other federal or state government entities; but, the incorporated code, standard, guideline, or rule must be identified by "citation and date." The APA does not permit later amendments or editions of the incorporated code, standard, guideline, or rule.

67. We find that the Commission may incorporate the 2012 edition of the CRCP into Rule 1004(g) pursuant to § 24-4-103(12.5)(a)(II), C.R.S., but it may not incorporate any future editions by these rules. Therefore, we grant the exceptions filed by Public Service and Gas Producers, in part, and change the reference in Rule 1004(g) from the 2011 edition of the CRCP to the 2012 edition.

3. Annual Reports – Rule 1100(n)(I)

68. Rule 1100(n)(I) states that, in accordance with the Colorado Open Records Act, annual reports required by Commission rules are presumed to be available for public inspection. Public Service agrees that this provision is generally acceptable, but argues that it should protect from disclosure information that the Commission already has deemed confidential.

69. We find that Public Service's proposed language that information is "already deemed confidential" is too broad to implement practically. If an entity believes that information in an annual report should be protected, the rule allows for the filing of a motion for extraordinary protection. We therefore deny the exception.

4. Highly Confidential Information – Rule 1101(e)

70. In exceptions, Black Hills argues that exhibits offered into evidence, admitted into evidence, and then withdrawn from evidence should not be filed as part of the administrative record. According to Black Hills, a party has the "right" to withdraw an exhibit, and thus should not have to include a withdrawn exhibit in the record. Thus, Black Hills contends that subparagraph (IV) of Rule 1101(e) should be modified to require the filing of highly confidential exhibits only if those exhibits are: a) admitted at hearing; or b) offered and rejected at hearing.

71. The current language, which requires that, "unless the Commission orders otherwise, a complete version of the document that contains the information which is subject to highly confidential protection shall be filed with the Commission … *if offered* as an exhibit at hearing," (emphasis added) covers the proper scope of documents to be made part of the administrative record. While the Commission may grant a party's motion to withdraw an exhibit, a party does not have the *right* to withdraw an exhibit already admitted into evidence; Black Hills cites no authority for its contention. Further, the record should reflect the situation in which an exhibit is offered, admitted into evidence, and then withdrawn. We therefore find the rule language appropriate and deny the exception.

5. Confidential and Highly Confidential Information – Rule 1101(l)(I)

72. Rule 1101(l)(I) requires that all documents and information subject to the rules related to confidential and highly confidential information shall be retrieved by the producing party or person, unless the filer indicates that such documents shall be destroyed. The Gas Producers assert that Rule 1101(l)(I) creates a difficult standard for disposition of confidential or highly confidential material that it receives from other parties. Specifically, the Gas Producers are concerned that these documents may be manipulated; therefore, the documents would contain work product that would be disclosed if the documents are returned to the filing party. The Gas Producers argued that they should be allowed to destroy confidential or highly confidential information rather than granting the producing party the ability to retrieve documents containing information that may be proprietary to the receiving party.

73. We find that, if a receiving party is handling confidential information subject to return, then the receiving party should handle the information accordingly. If analysis of confidential information necessarily results in an integration of the two parties' work product,

then the receiving party may petition the Commission for appropriate relief or work with the filer on another agreement. We therefore deny the exception.

6. Prohibited Communications – Rule 1106

74. Current Rule 1106 disallows communications less than 30 days prior to the commencement of a proceeding. The Gas Producers argue that this restriction creates an impossible standard, because persons other than the party commencing the case may not know when the thirty day clock begins to run. The Gas Producers believe that the clause setting forth this restriction should be stricken entirely or qualified by limiting the 30-day restriction to an "announced or disclosed filing."

75. We deny the Gas Producers' request to strike the 30-day provision, because it furthers the public interest by providing a definitive safe harbor for communications. We agree with Gas Producers that the 30-day timeline is not always known, grant the exception, in part, and revise Rule 1106 to clarify that prohibited communications are those in which the participants know, or should know, about the filing of the adjudication. We also clarify that the disputed issues subject to the prohibition are tied to a pending, adjudicatory proceeding. Further, on our own motion, we amend Rule 1106(b) such that the prohibition includes communications by amicus curiae or members of the public submitting comments per Rule 1509(a).

7. Prohibited Communications ("legislation") – Rule 1110(a)(IV)

76. The Gas Producers believe that "legislation" as used in Rule 1110(a)(IV) is undefined, too narrow, and uncertain of application. They assert that legislation be defined in Rule 1004 to include "analysis, input or advocacy related to interpretation or enactment of proposed or adopted legislation."

77. We note that § 40-6-122, C.R.S., requires that adjudicatory proceedings do not include discussions on "pending legislative proposals." We therefore grant the Gas Producers' exception, in part, to include this clarifying legislative language and revise the rule accordingly.

8. Rulemaking Participants – Rule 1200(d)

78. On our own motion, we find it necessary to clarify in Rule 1200(d) that a participant in a rulemaking proceeding is *not* subject to the rules addressing prohibited *ex parte* communications, which apply only to adjudications. We therefore make corresponding revisions to Rule 1200 to clarify that participants in non-adjudicatory proceedings (e.g., rulemaking proceedings and administrative proceedings) are subject to the rules governing confidentiality, but not subject to the Commission's rules related to prohibited communications.

9. Uploading to E-Filings System – Rule 1204

79. Black Hills asserts that Rule 1204 should be modified to require parties to file documents in a text-searchable format when the document is "readily available" in such format. As currently drafted, the rule requires documents to be text-searchable. Black Hills disagrees that a waiver should be required when text-searchable documents are not possible.

80. We agree that certain documents cannot be text-searchable, including, for example, some contracts and maps. We therefore grant Black Hills' exception, in part. We find that qualifying language "when possible" will require filers to format documents that are text-searchable, but will permit filing of documents that cannot formatted without the need for a waiver. Black Hills' suggested language, "when readily available," is unclear and could indicate that the filer need not reformat the document to be text searchable, even if such formatting is possible.

10. Discovery – Rules 1205 and 1405

81. The Gas Producers recommend that all discovery responses be served on all parties to a docket, not simply the party making the request. The Gas Producers argue that this revision will mirror the process used in judicial actions, increase the efficiency of proceedings, and reduce the expected volume of discovery requests. In addition, they argue the rule should require that a party opt-out of receiving discovery responses if the party does not wish to receive the responses.

82. Unlike many judicial actions, Commission proceedings often have a vast array of participants; furthermore, these participants may have limited interests in specific issues. In the event that a party is interested in receiving all discovery responses, a request from the party for these responses can be made early in the proceeding and is not burdensome. We therefore find that no rule change is necessary and deny the Gas Producers' exception.

11. Notice Period for Compliance Filings – Rule 1207(g)

83. As revised, Rule 1207(g) requires that tariffs complying with a Commission decision may be made "on not less than two business days' notice." SourceGas argues that, with the clarification in Rule 1203(c) requiring that the entire notice period must expire prior to the effective date of a tariff, the change in Rule 1207(g) to two business days' notice (from one business day) is not necessary.

84. Public Service also disagrees that the time required for notice of compliance tariffs should be changed to two business days. Public Service states that the complexity and procedural delays often make it difficult for the Commission to conclude proceedings within mandated statutory time frames, which, in turn, should permit short time frames for

Public Service to make compliance filings. Public Service believes that the one business days' notice period has worked well.

85. We note that the rule revision accommodates Administrative and Commission staff that often incur difficulties processing and reviewing compliance tariffs in one business day. For example, if the relevant filings raise issues, convening the Commission to address an issue on that same day is often impossible or impractical. Two business days' notice is a more reasonable timeframe for processing and review. In response to Public Service's concerns, when circumstances exist indicating that two business days' notice is not reasonable under the circumstances, the Commission may indicate a shorter allowance by order; however, no rule change is necessary. We therefore deny exceptions on this issue.

12. Deeming Applications Complete – Rule 1303

86. The OCC states a general concern about the compression of time during the Commission's adjudicated proceedings and recommends that the Commission adopt the civil court's "rule of 7" time calculation – in which multiples of 7 are stated in various CRCP and Colorado Appellate Rules (CAR) rule provisions for deadlines and other procedural issues. Specifically, the OCC contends that changes to Rule 1303 would provide better notice to parties regarding the deemed complete date so that interventions, discovery, and other procedures may begin sooner. The OCC suggests the rule require that, within seven days after an application has been deemed complete, the Commission issue an order identifying the deemed date.

87. We note that many of the Commission's timelines are dictated by statute, including the time for filing exceptions and rehearing, reargument, or reconsideration (RRR); the notice period for tariff proceedings; and the decision deadline for applications and suspended tariffs. Although the Commission does have control over certain timelines, because of the

lack of discretion on statutorily prescribed timeframes, the OCC's proposed adoption of the "rule of 7" is impractical. We therefore deny the OCC's suggested revisions.

13. Substantive Response Filings – Rules 1308, 1400(e), and 1506

88. The Gas Producers believe that, where the rules require Commission approval for the filing of a response or other document, the party should obtain Commission permission to file the response *before* the substantive response is actually filed. In addition, the Gas Producers state that movants should be held to a requirement to confer with other parties regarding requests to shorten response time.

89. Due to timing restrictions, we find that it is not practical in all circumstances for parties to file the request for approval before filing the substantive response (*e.g.*, requests for response to applications for RRR). We therefore deny the request.

14. Grounds for Responses – Rules 1308(b), 1400(e), and 1506(b)

90. Public Service states that the causes justifying a responsive pleading are unduly limiting and could curtail unnecessarily the Commission's discretion to allow response and replies that could assist the decision-making process. Public Service recommends additional language to allow for responses when new arguments are raised in a filing that the other parties had no opportunity to address.

91. By revisions to Rule 1308(b), a filing party must show, through its motion for leave to file a response, a material misrepresentation of a fact, an incorrect statement or error of law, or accident or surprise which ordinary prudence could not have guarded against. Further, Rule 1400(e) permits a response if the movant can demonstrate "newly discovered facts or issues" in its motion for leave to file a reply. We find that this rule language authorizes the

Commission to allow responses in the circumstances discussed by Public Service. We therefore find that no rule revision is necessary and deny exceptions on this matter.

15. Intervention Timelines – Rule 1401(a) and (d)

92. The OCC asserts that notices of intervention by right and motions for permissive interventions should be reduced to 14 days. Further, it argues that Staff's deadline for intervention by right likewise should be reduced to either 14 or 21 days.

93. Although there may be circumstances when a 14-day intervention period is appropriate, we do not agree that this timeframe should be the generally applicable rule. An applicant may request shortened notice and intervention periods if warranted. Therefore, we deny exceptions on this matter.

16. Documentation of Administrative Notice in the Record – Rule 1501(c)

94. SourceGas takes exceptions to proposed Rule 1501(c), which as revised requires any person requesting administrative notice of a certain fact to provide a *complete* copy of the document containing that fact as an exhibit to the proceeding. The current rule provides an exception where the subject documents are voluminous. The utilities argue that the exception makes sense, because having to provide a complete copy of voluminous documents at a hearing wastes resources and can be unwieldy.

95. We agree with the merits of the exceptions that, upon leave of the Commission, a party may file only the relevant portion of an unreasonably voluminous document. In the event a party fails to include all relevant documentation, the Commission may order supplementation of the record. We therefore grant the exceptions and revise the rule accordingly.

96. Further, on our own motion, we note that the sentence in Rule 1501(c) that begins "[i]f during hearing…" duplicates the previous sentence and is therefore unnecessary. We strike this sentence in the revised rules.

17. Filing Timelines – Rule 1503 and new rule suggestions

97. The OCC suggests that, if the Commission requests briefs or statements of position, the parties may request, or the Commission on its own motion may determine, that it is necessary to use the "extraordinary conditions" provisions of § 40-6-109.5, C.R.S., to extend the date for decision another 90 days. Further, the OCC proposes four additional ways to relieve the time compression issue:

a. More frequent use of Commission Initial Decisions;

b. More frequent use of "extraordinary conditions" pursuant to § 40-6-109.5, C.R.S.;

c. Elimination of pre-filed written rebuttal and cross-answer testimony; and

d. Modification of time frames for filing exceptions and a maximum timeframe for issuing a decision.

98. Additionally, the OCC proposes a new rule on deadlines for filing dispositive motions. The OCC suggests that these motions should be due not later than 49 days before the hearing date, with a response time of 14 days, and order deadline of 14 days after responses.

99. Because these issues were not addressed fully in this rulemaking and are likely to raise issues specific to a parties' role in a proceeding, we find it appropriate to consider these proposals in a future rulemaking that specifically addresses timing issues in adjudicated proceedings. We deny the OCC's suggested changes at this time.

18. Public Comments – Rule 1509(c)

100. Black Hills takes issue with proposed Rule 1509(c), which states that entities providing academic or policy comments in adjudicatory proceedings must do so before the close

of the evidentiary record or the latest due date for filing statements of position. Black Hills argues that this rule could leave parties with little or no time to respond to these comments. Therefore, Black Hills requests that the proposed rule be modified to require any academic or policy comments be filed when direct or answer testimony is due to give all parties the chance to respond.

101. The Gas Producers argue that broadening the ability of non-parties to provide academic or policy comments will incent inappropriate expert advocacy and analysis, without the ability of the parties to confront and cross-examine. The Gas Producers argue that the proposed rules would violate the Sixth Amendment and invite any advocacy or interest group to interpose itself and its opinions into dockets without the accountability of party status.

102. The Sixth Amendment to the U.S. Constitution is inapplicable here, because it is confined to criminal prosecutions. *Sparks v. Foster*, 241 Fed. Appx. 467, 471 (10th Cir. 2007) (finding that the Sixth Amendment did not apply to an administrative decision made by the Department of Corrections, which was not part of a criminal prosecution).

103. Though public comments are part of an administrative record in a proceeding, they are not considered evidence. The same is true for academic or policy comments by the public (as opposed to testimony made by a party expert). We note that the current rules do not list a deadline by which members of the public must submit comment.

104. We further note that the Commission may permit briefing in response to certain public, academic, or policy comments that raise new issues. In establishing rules, however, it is difficult to differentiate among all the types of comments that may be submitted. We believe that the ALJ picked a reasonable deadline for submission of academic or policy comments that would

allow potential party discussion or briefing, if appropriate, including by Commission motion. We therefore deny the exceptions on this matter.

19. Other Clarification and Non-Substantive Corrections

105. By the Commission's own motion, we make additional clarifications of the rules and revise certain rules accordingly; and make non-substantive revisions, including correcting typographic errors and unnecessary repetition throughout the rules. Specifically, we revise the following rules as reflected in the attached rules adopted by this decision:

a) Addition of Rule 1103(e), authorizing the Commission to retain as confidential personal information inadvertently filed, including but not limited to, driver's license numbers, addresses, and medical information.

b) Revision of the Standards of Conduct to make clear that all information is public unless otherwise ordered.

c) Clarification in Rule 1201(c) requiring attorneys of record to update changes of address, telephone number or e-mail address if such change occurs during a proceeding.

d) Clarification in Rule 1211(c) to clarify the first sentence.

e) Clarification of the last sentence in Rule 1505(a) regarding the timing of the filing of responses to exceptions allowed "in all other proceedings."

f) Clarification of the first sentence in Rule 1509(b).

g) Other typographical corrections.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R12-1466 (Recommended Decision) filed on January 24, 2013 by Atmos Energy Corporation and Colorado Natural Gas, Inc., are granted, in part, and denied, in part consistent with the above discussion.

2. The exceptions to the Recommended Decision filed by SourceGas Distribution, LLC, and Rocky Mountain Natural Gas, LLC are granted, in part, and denied, in part consistent with the above discussion.

3. The exceptions to the Recommended Decision filed on January 24, 2013 by Ms. Leslie Glustrom are denied.

4. The exceptions to the Recommended Decision filed on January 24, 2013 by the Colorado Office of Consumer Counsel are denied.

5. The exceptions to the Recommended Decision filed on January 24, 2013 by Black Hills/Colorado Electric Utility Company, LP, are granted, in part, and denied, in part consistent with the above discussion.

6. The exceptions to the Recommended Decision filed on January 24, 2013 by Noble Energy, Inc., and EnCana Oil and Gas (USA), Inc., are granted, in part, and denied, in part consistent with the above discussion.

7. The exceptions to the Recommended Decision filed on January 24, 2013 by Public Service Company of Colorado are granted, in part, and denied, in part consistent with the above discussion.

8. The adopted rules in legislative (*i.e.*, strikeout/underline) format (Attachment A) and in final format (Attachment B) are available through the Commission's Electronic Filings (E-Filings) system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=12R-500ALL.

9. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Order.

10. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 13, 2013.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners

Decision No. C13-0576

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 12R-500ALL

IN THE MATTER OF THE PROPOSED RULES OF PRACTICE AND PROCEDURE, 4 CODE OF COLORADO REGULATIONS 723-1.

DECISION CORRECTING TYPOGRAPHICAL AND CITATION ERRORS

Mailed Date: May 17, 2013
Adopted Date: May 15, 2013

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Request for a Corrected Cross-Reference filed by Public Service Company of Colorado on May 3, 2013. In this filing, the Company correctly notes that page 24 of Attachment A and page 17 of Attachment B to Decision No. C13-0442 contain citation errors that should be corrected. Rule 1105(b) makes an incorrect reference to rule 1004(b). This reference should instead be to rule 1104(b). We agree with this change and will correct the rules before publication.

2. In conducting the final review of the rules before publication, we also found several other errors as listed below. We make these corrections to rules on our own motion.

Rule 1101(g) fourth line should read paragraphs (h) and (i) instead of (h and i)

Rule 1101(i) seventh line should reference rules 1100 – 1103 instead of 1102

Rule 1105(b) third line should reference paragraph 1105(c) instead of 1105(d)

Rule 1105(c) first line the *an* should be "and"

Rule 1105(d)(II) first line delete comma between *information* and *only*

Rule 1302(e) should reference 1205(c) instead of 1205(b)

Rule 1303(c)(IV) first line should read paragraph (c) instead of paragraph (b)

Rule 1305(c) second line there should be an "of" after *propriety*

Rule 1401(c) fifth line there should be a period after *proceeding*

3. Further and also on our own motion, we make minor corrections to the language in Decision No. C13-0442 (Decision). The heading for section I(C)(2) should reference Rule 1004(x) instead of 1104(x). Also, the first sentence of paragraph 18 of the Decision should reference Rule 1104(c) instead of Rule 1004(b); the following sentence referencing Rule 1004(x) is correct. Similarly, the second sentence of paragraph 19 of the Decision should reference Rule 1104(c) instead of rule 1004(c).

4. Additionally, we note that, with the subsequent deletion of what was previously Rule 1105(c),[1] references in the Decision to Rules 1105(d) and (e) are intended to reference what are currently Rules 1105(c) and (d), respectively, as adopted by the Decision and as attached hereto as Attachment C.

II. ORDER

A. The Commission Orders That:

1. The Commission makes the typographical and citation corrections to the Rules of Practice and Procedure consistent with the above discussion.

2. The adopted rules in legislative (*i.e.*, strikeout/underline) format (Attachment A) and in final format (Attachment B) are available through the Commission's Electronic Filings (E-Filings) system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=12R-500ALL.

[1] By Decision No. R12-1466, Rule 1105(c) was revised as "[Reserved]"; this language was subsequently deleted in the rules attached to the Decision.

3. The Commission adopts the rules attached to this Decision which shall be effective 20 days after publication in the Colorado Register by the Office of the Secretary of State.

4. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

5. A copy of the rules adopted by the Decision shall be filed with the Office of the Secretary of State for publication in the Colorado Register. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if it is in session at the time this Decision becomes effective, or for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

6. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 15, 2013.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

JAMES K. TARPEY

PAMELA J. PATTON

Commissioners