

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14R-0419ALL

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

**COMMISSION DECISION DENYING EXCEPTIONS, IN
PART, AND ADOPTING RULES**

Mailed Date: December 9, 2014
Adopted Date: November 20, 2014

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I. BY THE COMMISSION

A. Statement

1. This Decision addresses exceptions filed by Public Service Company of Colorado (PSCo) to Recommended Decision No. R14-1190 (Recommended Decision). As explained in more detail below, we grant in part, and deny in part, the exceptions.

B. Factual and Procedural Background

1. Notice of Proposed Rulemaking

2. The Colorado Public Utilities Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) on May 8, 2014, by Decision No. C14-0479, regarding Proposed Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. The Commission attached to the NOPR a copy of the rules with the proposed changes shown in underlining and strikethrough.

3. The proposed rule amendments continue the current process of updating the Commission’s rules started in Proceeding No. 12R-500ALL. Specifically, the proposed rules draw a distinction between attachments included in pre-filed testimony and exhibits in a hearing, clarify captions to a proceeding and titles to a pleading, clarify procedures for immediate review of interim decisions and for the timing of certain filings in proceedings where no statutory period for decision exists, eliminate an inconsistency in the timing of motions to dismiss, eliminate redundant language, require conferral before filing a motion, and make certain formatting, non-substantive changes.

4. Of particular relevance to this decision, the relevant proposed changes to Rules 1308 and 1400, as shown in Attachment A to the NOPR, were as follows:

1308. Responses: Generally – Complaints.

. . . .

(e) A motion to dismiss may be made on any of the following grounds: lack of jurisdiction over the subject matter; lack of jurisdiction over~~of~~ the person; insufficiency of process; insufficiency of~~of~~ service of process; ~~lack of standing~~; insufficiency of signatures; or failure to state a claim upon which relief can be granted; or failure to join a party.

. . . .

1400. Motions.

(a) Except for oral motions made during hearing, or where the Commission orders otherwise, any motion involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion. Moving counsel ~~is encouraged~~shall ~~to~~ confer with all parties about the motion and~~to~~ report when the requested relief is unopposed.

5. The NOPR invited written comments from interested parties and scheduled an initial public comment hearing on the proposed rules for July 10, 2014. The Commission referred the rulemaking to Administrative Law Judge Paul C. Gomez.

6. PSCo, Western Resource Advocates (WRA), Black Hills/Colorado Gas Utility Company, LP (Black Hills), the Regional Transportation District (RTD), and SourceGas Distribution, LLC and Rocky Mountain Natural Gas, LLC (collectively, the Gas Companies) filed written comments regarding the proposed rules.

7. On July 10, 2014, ALJ Gomez held the rulemaking public hearing. PSCo, Black Hills, WRA, the Gas Companies, the Colorado Telecommunications Association (CTA), the Colorado Office of Consumer Counsel (OCC), and Tri-State Generation and Transmission Association (Tri-State) provided comments at the hearing.

8. As to the proposed changes to Rule 1308(e) governing motions to dismiss, PSCo objected to deleting “lack of standing” as an expressly identified ground for filing a motion to dismiss. PSCo argued that removal of that language would not permit a utility to file a motion to dismiss a complaint challenging a public utility’s rates based on a party’s failure to satisfy § 40-6-108(b), C.R.S., which specifies the persons or groups of persons eligible to initiate a rate case. Tri-State shared PSCo’s concern on this point, but agreed to the proposed change and requested the ALJ to clarify that the new rule does not prohibit challenges based on standing.

9. PSCo also argued that the proposed changes to Rule 1400(a), which requires pre-filing conferral among counsel, are burdensome and unworkable, particularly in large proceedings containing many parties. CTA and OCC agreed that it is sometimes impractical to confer with every party regarding a motion. On the other hand, Black Hills stated that conferring with other parties is not onerous prior to filing a motion. According to Black Hills, a moving party should be required to confer only with those parties affected by a motion.

10. Black Hills proposed changes to make Rule 1400(a) consistent with C.R.C.P. 121 § 1-15(8) and the analogous local rule of the U.S. District Court for the District of Colorado,¹ to provide exceptions to the duty to confer, to require a movant to entitle unopposed motions “Unopposed Motion for _____,” and to require a response to a request to confer within three days.

11. Tri-State agreed with Black Hills, but disagreed with the proposal for a three-day mandatory response requirement, because it believed that under such a rule parties would wait the full three days before responding, instead of responding in a timelier manner. Tri-State also proposed additional language specifying that a moving party is required to make only a reasonable effort to confer. Tri-State further proposed to require the moving party to state in its motion whether the motion is opposed/unopposed and to describe its efforts to confer.

12. Finally, the Gas Companies proposed to substitute “communicate” for “confer” in the proposed rule.

13. At the conclusion of the rulemaking hearing, the ALJ took the matter under advisement.

¹ D.C.Colo.LCiv.R 7.1.

2. Recommended Decision

14. ALJ Gomez issued his Recommended Decision on October 1, 2014.

15. As to the language governing motions to dismiss under Rule 1308(e), ALJ Gomez adopted the language proposed in the NOPR without modification. In so doing, the ALJ rejected PSCo's objection and reiterated that the purpose of deleting "lack of standing" is to make the relevant portion of Rule 1308(e) consistent with the analogous portion of C.R.C.P. 12. ALJ Gomez further stated that "[t]he issue of standing is subsumed within the defense of 'lack of jurisdiction'" and thus "the proposed amendments to Rule 1308(e) should in no way be read to mean that it was the Commission's intent to take away any party's ability to make challenges based on standing."²

16. As to the duty of counsel to confer under Rule 1400(a), ALJ Gomez rejected the arguments of PSCo and CTA concerning the burdensomeness of the proposed requirement. The ALJ concluded that conferral on procedural motions, which is already required, is not unreasonably burdensome.³ Further, ALJ Gomez held that application of the duty to virtually all motions in federal and state courts "has not caused the havoc envisioned by the parties here opposing the amendments to Rule 1400(a)."⁴ The proposed rule clarified the conferral requirement by imposing it only upon parties that would be affected by a motion. Conferral with unaffected parties is not required.⁵ Thus, the ALJ declined to make any changes based on the burdensomeness argument advanced by PSCo and CTA.

² Recommended Decision at ¶ 23.

³ *Id.* at ¶ 33.

⁴ *Id.* at ¶ 34.

⁵ *Id.* at ¶ 33.

17. ALJ Gomez did find, however, “that additional language is necessary in order to provide more procedural certainty.”⁶ The ALJ recommended the following additional changes to Rule 1400(a), as shown in underlining and strikethrough:

1400. Motions.

(a) Except for oral motions made during hearing, or where the Commission orders otherwise, any motion involving a contested issue of law shall be supported by a recitation of legal authority incorporated into the motion. Before filing a motion, Moving counsel shall make a reasonable good faith effort to confer with all parties about the motion and~~to~~ report when the requested relief is unopposed. If no conference has occurred, the reason why shall be stated.

(I) Conferral is not required for motions made in accordance with rule 56 of the Colorado Rules of Civil Procedure, motions made in accordance with Commission rule 1308(e), or motions for an attorney to withdraw from a proceeding.

(II) If a motion is unopposed, it shall be entitled “Unopposed Motion for _____.”

18. The changes to subparagraph (a) render the duty to confer mandatory, but require only a “reasonable good faith effort to confer” and, to the extent a conference has not taken place, further require the moving party to provide an explanation. As ALJ Gomez stated, “if opposing counsel fails to respond to moving counsel in a timely fashion or fails to respond at all, moving counsel will so state in the motion. The presiding ALJ, Hearing Commissioner, or Commission *en banc* will take such reasons for the failure to confer under advisement and take appropriate action when necessary.”⁷

⁶ *Id.* at ¶ 33.

⁷ *Id.* at ¶ 36.

19. ALJ Gomez added new subparagraph (a)(I) based on his recognition that the duty to confer is unnecessary and inefficient with respect to summary judgment motions, motions made pursuant to Rule 1308(e), and motions to withdraw.⁸ Such motions are either always opposed (summary judgment and Rule 1308(e) motions) or unopposed (motions to withdraw). Requiring moving parties to confer with opposing counsel regarding such motions could thus cause unnecessary delay.

20. Finally, ALJ Gomez added subparagraph (a)(II) so that the caption “will immediately cue the ALJ or Commission that it is not necessary to wait 14-days for a response to the motion.”⁹

3. Exceptions

21. PSCo filed exceptions to ALJ Gomez’s Recommended Decision on October 21, 2014.

22. PSCo reiterates its argument presented to ALJ Gomez that “lack of standing” should not be deleted from Rule 1308(e) as one of the grounds for filing a motion to dismiss. If a complainant does not satisfy the requirements identified in C.R.S. § 40-6-108(b) for filing a complaint challenging the reasonableness of a utility’s rates, PSCo asserts that the best way to describe the defect is that the plaintiff lacks standing, not that the Commission lacks subject matter jurisdiction over the dispute.

23. PSCo also takes exception with ALJ Gomez’s revisions to Rule 1400(a) and requests the Commission to retain the language that is currently effective, which encourages counsel to confer, but does not mandate it. While acknowledging that the local rules of

⁸ *Id.* at ¶ 37.

⁹ *Id.* at ¶ 38.

Colorado's state and federal courts impose a duty to confer concerning motions, PSCo argues that differences between court and commission proceedings render impractical the application of the conferral requirement to Commission proceedings. PSCo says the differences include the Commission's faster pace compared to court proceedings, the relatively high number of parties, and many motions filed with the Commission are procedural, or both procedural and substantive. PSCo also states that mandating conferral is unnecessary because counsel already have an incentive to confer and gather support for their motions. PSCo thus asks the Commission to reject the changes to Rule 1400(a). Alternatively, if the Commission adopts the language mandating conferral, PSCo requests that motions to strike be included in the exceptions to the requirement.

24. By this Decision, we grant in part, and deny in part PSCo's exceptions.

C. Discussion

1. Rulemaking Authority

25. Sections 40-2-108 and 40-6-101(1) of the Colorado Revised Statutes provide the Commission with the authority to promulgate and amend rules of practice and procedure for proceedings before the Commission. Accordingly, we issue this decision pursuant to the authority provided by these statutory provisions.

2. Rule 1308(e)

26. We reject PSCo's argument that "lack of standing" should not be deleted from Rule 1308(e) as one of the grounds for filing a motion to dismiss. It is black-letter law that "[s]tanding is a component of subject matter jurisdiction."¹⁰ If a complainant lacks standing,

¹⁰ *Maralex Res., Inc. v. Chamberlain*, 320 P.3d 399, 402 (Colo. App. 2014).

then the complaint must be dismissed for lack of subject matter jurisdiction.¹¹ ALJ Gomez was thus correct when he stated that “the proposed amendments to Rule 1308(e) should in no way be read to mean that it was the Commission’s intent to take away any party’s ability to make challenges based on standing.”¹² Parties will still be able to challenge standing, but the motion will be brought under the broader doctrine of subject matter jurisdiction.¹³

27. In addition, there is a benefit to making the relevant portion of Rule 1308(e) identical to C.R.C.P. 12. There is a well-developed body of case law interpreting C.R.C.P. 12. Making the relevant portion of Rule 1308(e) addressing motions to dismiss identical to the relevant portion of C.R.C.P. 12 makes clear that the case law interpreting Rule 12 is applicable to Rule 1308(e).

28. Accordingly, for the foregoing reasons, we reject PSCo’s exception to ALJ Gomez’s recommendation that “lack of standing” be deleted from Rule 1308(e).

3. Rule 1400(a)

29. With one exception, we also reject PSCo’s exception to ALJ Gomez’s recommendation regarding Rule 1400(a).

30. We agree with the ALJ that mandating conferral is not unduly burdensome. State and federal courts have imposed a duty to confer, and, as ALJ Gomez stated, there is no evidence that the duty has “caused the havoc envisioned by the parties here opposing the amendments to Rule 1400(a).”¹⁴ In any event, any burden imposed by the duty is

¹¹ *Lobato v. People*, 218 P.3d 358, 368 (Colo. 2009) (“Standing represents a challenge to the court’s subject matter jurisdiction”).

¹² Recommended Decision at ¶ 23.

¹³ *See, e.g., Lobato*, 218 P.3d at 368; *Maralex Res., Inc.*, 320 P.3d at 402.

¹⁴ Recommended Decision at ¶ 34.

substantially outweighed by the significant benefits it provides in the form of increased transparency and efficiency.

31. Differences between Commission proceedings and court cases do not support exempting Commission proceedings from a conferral requirement. The alleged differences identified by PSCo – that Commission proceedings are faster, have a higher number of parties, and have more motions that are procedural, or both procedural and substantive, than the typical court case – do not overcome the benefits of a conferral requirement. Even assuming that these alleged differences exist between the average Commission and court proceedings, there are numerous court cases that have the same or similar duration, number of parties, and number of procedural motions as the average Commission proceeding. There is no evidence that the imposition of the duty to confer has had any negative impact on these court cases. As a result, the evidence does not support PSCo's contention that the alleged differences between Commission and court proceedings dictate that the conferral requirement imposed by courts should not be used in Commission proceedings.

32. We agree with PSCo that motions to strike should be added to the list of motions in Rule 1400(a)(I) that are exempt from the conferral requirement. Such motions are always opposed. As a result, requiring a movant to confer with opposing counsel concerning a motion to strike is a waste of the parties' resources and is inefficient.

II. ORDER

A. The Commission Orders That

1. The Exceptions filed on October 21, 2014 by Public Service Company of Colorado, to Recommended Decision No. R14-1190, are granted in part and denied in part, as described above.

2. The Commission adopts permanent rules attached to this Decision as Attachment A, consistent with the above discussion and 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=14R-0419ALL

3. Subject to a filing of an application for rehearing, reargument, or reconsideration, the opinion of the Attorney General of the State of Colorado shall be obtained regarding constitutionality and legality of the rules as finally adopted. A copy of the final, adopted rules shall be filed with the Office of the Secretary of State. The rules shall be effective 20 days after publication in the Colorado Register by the Office of the Secretary of State.

4. 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 Decision.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 20, 2014.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners