BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14AL-0660E

RE: IN THE MATTER OF ADVICE LETTER NO. 1672-ELECTRIC FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE ITS COLORADO PUC NO. 7-ELECTRIC TARIFF TO IMPLEMENT A GENERAL RATE SCHEDULE ADJUSTMENT AND OTHER RATE CHANGES EFFECTIVE JULY 18, 2014.

PROCEEDING NO. 14A-0680E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS ARAPAHOE DECOMMISSIONING AND DISMANTLING PLAN.

APPLICATION FOR REHEARING, REARGUMENT OR RECONSIDERATION

OF COMMISSION DECISION C14-1043

OF LESLIE GLUSTROM

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I. INTRODUCTION

Leslie Glustrom, an Xcel electric customer, submits this Application for Rehearing, Reargument or Reconsideration ("RRR") of Decision C14-1043 in accordance with Rule 1506, 4 Code of Colorado Regulations ("CCR") 723-1 at the Colorado Public Utilities Commission ("PUC" or Commission) in the above captioned docket related to the June 17, 2014 application of Public Service Company of Colorado ("PSCo" or "Xcel-Colorado" or "the Company") to increase net annual revenue by $137.7 million and to institute other riders and rate adjustment mechanisms.

As described further below, Ms. Glustrom has a constitutional right to due process and Decision C14-1043 deprives Ms. Glustrom of that right. In addition, Colorado Statutes make it clear that parties of interest have every right to appear *pro se* and that the presence of the Office of Consumer Counsel cannot be used to limit the right of other parties to intervene in Commission proceedings. C14-1043

The Commission has significant discretion when it comes to technical matters, but it does not have the authority to deprive interested parties of their constitutional due process rights or substitute its preferences for the clear direction provided by Colorado Law.

II. BACKGROUND ON DECISION C14-1043

On July 18, 2014 Ms. Glustrom submitted a detailed Motion to Intervene in this proceeding. By Commission Decision C14-0807, Order ¶3, Motions to Intervene were due by August 11, 2014, so Ms. Glustrom's Motion to Intervene was filed well ahead of

the deadline—and indeed was one of the first Motions to Intervene filed in the 14AL-0660E docket.

On August 1, PSCo submitted a Response in Opposition to the Motion to Intervene of Ms. Glustrom.[1] On August 28, 2014 the Commission issued Decision C14-1043 denying Ms. Glustrom's Motion to Intervene without recognizing the clear direction of Colorado Law under C.R.S. §40-6-109 (1) and 40-6.5-104(2) as discussed in detail below.[2]

In accordance with Commission Rule 1506, 4 CCR 723-1 Applications for Rehearing, Reargument or Reconsideration are due 20 days after the effective date of the decision, so this Application for RRR is timely filed.

III. DECISION C14-1043 VIOLATES CONSTITUTIONAL DUE PROCESS REQUIREMENTS

One of the fundamental precepts of American law is that citizens shall be protected from the taking of life, liberty or property without due process of law.

[1] On August 15, 2014, PSCo also filed a Response in Opposition to the Interventions of The Alliance for Solar Choice (TASC) and Clean Energy Action. (CEA) By Decision C14-1043, those groups were later allowed to intervene in Docket 14AL-0660E, though on a limited basis.

[2] The Commission's denial of Ms. Glustrom's Motion to Intervene as found in ¶49 of Decision C14-1043 reads as follows:

> 49. Ms. Glustrom fails to demonstrate pecuniary or tangible interests not shared by other residential ratepayers. We agree with Public Service that she has not shown that other parties in this proceeding cannot represent her interests in this matter. While Ms. Glustrom indicates past divergence from positions taken by the OCC, these examples fail to demonstrate how her interests would differ from other similarly situated residential customers in this proceeding. In addition, she does not allege bad faith, collusion, or negligence on the part of the OCC. With respect to the base rate matters and the proposed CACJA rider, Ms. Glustrom's interests are represented adequately by other parties, including Boulder, Staff, the OCC, and EOC. Likewise, with respect to her areas of experience and her concerns about climate change, we find many of these issues are beyond the scope of this proceeding, and other parties in this proceeding will represent her stated interests to the extent those matters are relevant. Further, we do not find her arguments compelling in showing why the OCC's representation is not adequate for purposes of this proceeding. (¶49, Colorado PUC Decision C14-1043)

The Fourteenth Amendment to the U.S. Constitution says in relevant part

> …nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Amendment 14, U.S. Constitution)

The right to due process is also protected by the Colorado Constitution, Article II, Section 25

> *Due process of law*. No person shall be deprived of life, liberty or property, without due process of law. (Colorado Constitution, Article II, Section 25)

It is well established that the principles of due process apply in administrative hearings and that the fundamental components of due process include a notification requirement, the right to be heard and the right to seek judicial review as stated below by the Colorado Supreme Court.

> The essential principles of due process apply to administrative hearings. *Mountain States Tel. & Tel. Co. v. Department of Labor & Employment*, 184 Colo. 334, 520 P.2d 586 (1974). However, no particular or specific procedure is mandated by due process considerations so long as the basic elements of opportunity for a hearing and judicial review are present. *Lamm v. Barber*, 565 P.2d 538, 546 (1977). (*EPRI v City and County of Denver* 737 P.2d 822, 828 (1987)

Importantly, only parties to PUC dockets may seek judicial review under C.R.S. 40-6-115(1)[3] so in denying Ms. Glustrom's Motion to Intervene, the Commission has denied Ms. Glustrom of the opportunity to seek judicial review—a fundamental component of due process.

The reasons for protecting the due process rights of individuals have been explained many times by the U.S. Supreme Court with just one example below:

[3] C.R.S. §40-6-115(1) says in pertinent part, "(1) Within thirty days after a final decision by the commission in any proceeding, any party to the proceeding before the commission may apply to the district court for a writ of certiorari or review for the purpose of having the lawfulness of the final decision inquired into and determined…."

> For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. (Fuentes v Shevin 407 U.S. 67, 81 (1972))

Due process takes time, money and effort and it is natural for government officials to look for more efficient ways of conducting the state's business—but the Constitution protects due process—even when it is inconvenient.

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. (*Stanley v. Illinois,* 405 U. S. 645,656 (1972)

By denying Ms. Glustrom's right to participate in Docket14AL-0660E, Decision C14-1043 unfairly denies Ms. Glustrom of her due process rights to be heard, to examine and to cross-examine witnesses and to seek judicial review.

The opportunity to provide written comments emphatically does <u>not</u> provide an adequate substitute for the exercise of Ms. Glustrom's full due process rights, including the right to judicial review. Unless Ms. Glustrom is allowed to become a party to a proceeding with full rights to serve discovery, examine and cross-examine witnesses and to seek judicial review, her due process rights have been violated.

IV. DECISION C14-1043 VIOLATES COLORADO STATUTES

Decision C14-1043 attempts to assert discretion by the PUC that is in opposition to the plain meaning of the Colorado Revised Statutes, as explained below.

A. Decision C14-1043 violates C.R.S. § 40-6-109(1)

The right of persons who are "interested in or will be affected by" a Commission decision to participate in PUC proceedings is provided for by C.R.S. § 40-6-109 (1) which is reproduced below with the key phrase rendered in italics:

> At the time fixed for any hearing before the commission, any commissioner, or an administrative law judge, or, at the time to which the same may have been continued, the applicant, petitioner, complainant, the person, firm, or corporation complained of, and such persons, firms, or corporations as the commission may allow to intervene ***and*** *such persons, firms, or corporations as will be interested in or affected by any order that may be made by the commission in such proceeding and who shall have become parties to the proceeding shall be entitled to be heard, examine and cross-examine witnesses, and introduce evidence….All parties in interest shall be entitled to be heard in person or by attorney.*
> [C.R.S. 40-6-109 (1) Italics and underlining added]

Colorado law as expressed in C.R.S. §40-6-109 (1) clearly allows for persons that are "interested in or affected by" Commission decisions to participate fully in Commission dockets.[4] While this Commission has chosen to cite the "as the Commission may allow to intervene" language, this language appears before the ***and*** that is underlined in the C.R.S. § 40-6-109(1) language above. For the best part of the last decade, the Commission has recognized Ms. Glustrom's right to intervene as outlined in detail in Ms. Glustrom's Motion to Intervene and for the last decade, the Colorado PUC has recognized that the language after the ***and*** provides persons that are "interested in or will be affected by any order" with the right to become parties and to "be heard, examine, corss-examine witnesses and introduce evidence." Moreover, C.R.S. §40-6-109(1) makes it clear that:

> *All parties in interest shall be entitled to be heard in person or by attorney.*(C.R.S. §40-6-109 (1). Italics and emphasis added)

[4] A similar provision for participation in administrative hearings is provided for in the Colorado Administrative Procedures Act at C.R.S. § 24-4-105.

While Decision C14-1043 calls out (in ¶45) the fact that Ms. Glustrom intends to appear *pro se,* C.R.S. §40-6-109(1) makes it very clear that parties in interest to a Commission decision have every right to appear *pro se* (i.e. in person and without an attorney) and this cannot be used as a criteria for denying intervention.

The clear provisions of C.R.S. § 40-6-109(1) have been recognized by the Colorado Public Utilities Commission for the best part of a decade and Ms. Glustrom has been granted intervention in many dockets in recent years as detailed in her Motion to Intervene.[5]

Decision C14-1043, however, attempts to set the arbitrary choices of the Commission above the clear language of Colorado law. As discussed in detail below, this would lead to "Rule by Man" instead of "Rule by Law" and such an outcome is rejected in court decision after court decision.

[5] Ms. Glustrom has been granted intervention in the following dockets at the Colorado PUC
05A-072E Xcel Comanche-Daniels Park Transmission
07A-107E/07A-196E Xcel 2013 Contingency Plan/Tri-State Gas Contracts
07A-421E Xcel Pawnee Smoky Hill Transmission
07A-521E Xcel Interruptible Service Option Credit
07A-447E Xcel 2007 Resource Plan
07A-469E Xcel Fort St. Vrain Turbines
08S-520E Xcel 2009 Rate Increase
09AL-299E Xcel 2010 Rate Increase
09A-772E Xcel 2010 Renewable Energy Compliance Plan and Windsource
10A-124E Xcel Smart Grid CPCN
10A-377E Xcel Amendment to 2007 Resource Plan
10M-245E Xcel Clean Air Clean Jobs Plan
11A-135E Xcel Solar Rebate Program Restart
11A-325E Xcel Pawnee Emissions Control CPCN
11A-418E Xcel 2012 Renewable Energy Standard Compliance Plan
11A-869E Xcel 2011 Resource Plan
11A-917E Xcel Hayden Emissions Control CPCN
11A-1001E Xcel Smart Grid City Cost Recovery
11A-869E Xcel 2011 Resource Plan

At the federal level, the concept that administrative agencies should not substitute their judgment or preferences for those of the legislative branch is often referred to as the first part of the "Chevron Test."

> "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." 467 U.S. 837, 842–843 (1984).

In Colorado, the Supreme Court has reminded agencies time and again, that, "the agency's interpretation will be overturned on appeal if it is clearly erroneous, arbitrary, or otherwise not in accordance with the law." (See for example *Sigala v Atencio's Market* 184 P.3d 40 (2008))

B. Decision C14-1043 Violates C.R.S. § 40-6.5-104 (2)

C.R.S. §40-6.5-104 (2) is included in the statutory provisions related to the Office of Consumer Counsel and clearly states:

> **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.** (C.R.S. §40-6.5-104 (2))

Again, Colorado Statutes, as provided for in C.R.S. §40-6.5-104 (2), make it clear that the presence of the OCC must **not** be used to limit the right of any person to intervene in proceedings before the Commission. Nonetheless, this Colorado Commission has attempted in Decision C14-1043 to place its preferences above the clear provisions of Colorado Law. Again interpretations that are not in accordance with law will not be upheld.

V. DECISION C14-1043 ERRONEOUSLY ASSUMES THE OFFICE OF CONSUMER COUNSEL (OR OTHER PARTIES) CAN PROVIDE ADEQUATE REPRESENTATION TO MS. GLUSTROM

Despite the clear language of C.R.S. § 40-6.5-104(2) stating that the presence of the Office of Consumer Counsel ("OCC") should not be interpreted to limit the right of other persons to intervene, the Commission has claimed that Ms. Glustrom's interests can be adequately represented by the OCC and other parties. Anyone familiar with Ms. Glustrom's record at the Commission knows this is patently false since over the last decade, Ms. Glustrom has submitted extensively detailed testimonies and Statements of Position on topics that no other party (and certainly not the OCC) has even considered.

In particular, a key component of this 14AL-0660E docket is the cost recovery for large investments in old coal plants included in over $1 billion of capital expenditures planned for 2014 and 2015 as outlined in PSCo witness Mark Fox's Direct Testimony. The key recommendation of Mr. Fox is below.

From 14AL-0660E Direct Testimony of PSCo Witness Mark Fox, Page 5, lines 5-13.
(Yellow highlighting added.)

> **Q. WHAT RECOMMENDATIONS ARE YOU MAKING IN YOUR TESTIMONY?**
>
> A. I recommend that the Commission approve the $401.7 million in 2014 generation capital additions and $728.6 million in 2015 generation capital additions presented in my testimony as reasonable and necessary to support Public Service's generation operations; that the Commission approve the 2013 O&M expense of $176.1 million, as adjusted, as reasonable and necessary to support Public Service's generation operations; and that the Commission find that both levels of costs are a reasonable basis to set rates in the Test Year cost of service.

The details of these capital expenditures that total over $1 billion are detailed in Attachment MRF-1 to Mr. Fox's Direst Testimony in this 14AL-0660E docket and include:

- $296 million for the Pawnee SCR[6] and Scrubber
- $57.9 million on Hayden SCR

In addition, there are tens of millions of dollars of expenditures on PSCo's aging coal fleet also detailed in Mr. Fox's attachment MRF-1. If approved, these expenditures will be added to Xcel-Colorado's rate base and customers will be responsible for paying for them—as well as the approved rate of return which is typically about 8%. **That is, the more Xcel-Colorado spends on their aging coal plants, the more money they will earn in rates and the larger their profits.**

The Office of Consumer Counsel staff (while nice enough folks)[7] are completely incapable of representing Ms. Glustrom on the issues of whether these expenditures on old coal plants should be approved and deemed prudent. While the Pawnee and Hayden expenditures carry a presumption of prudence, a presumption is not a guarantee[8] and Ms. Glustrom is prepared to challenge the prudence of these expenditures (based on what she learns in discovery) and no other party is even thinking of doing this.

[6] SCR stands for Selective Catalytic Reduction, a way to control emissions of nitrogen oxides.
[7] The OCC has gone through a major staff changes in the last couple of years and to Ms. Glustrom's knowledge there are no OCC technical staff that were part of any of the dockets (e.g. 10M-245E, 11A-325E or 11A-917E) that form the foundation for many of the expenditures that PSCo now wants to move into rate base and gain cost recovery on. These were all complicated dockets and in Ms. Glustrom's conversations with OCC staff, there is no indication that the OCC Staff have any significant familiarity with the issues discussed in those dockets and their relationship to this docket. Importantly,they have also made no effort to understand Ms. Glustrom's point of view or the reasons that underlie her position on these investments.
[8] For the presumption of prudence on the Pawnee expenditures, see C12-0345, ¶ 11, page 3. For the presumption of prudence on the Hayden expenditures, see R12-0593, ¶ 86, page 26.

The key concept is that ratepayers should not be paying for large investments in old coal plants if there is not an adequately priced supply of coal.

As noted in Attachment 11, the Wall Street Journal noticed (in a front page article from June 2009) that the concept that the United States has a "200 year" supply of coal is based on faulty reporting of coal reserves by the Energy Information Administration. This concept is detailed further in several other attachments to this Application for RRR.

While Ms. Glustrom certainly understands that PSCo does not want to have the prudency of expenditures in old coal plants challenged, the Commission should not be deciding, by denying Ms. Glustrom the right to introduce evidence and examine and cross examine witnesses, the question of prudency before the hearing has even begun.

Prudency is based on the question of whether expenditures made by Xcel (or other regulated entity) were reasonable in light of the information known, or which should have been known, at the time of the action (or lack of action).[9]

The kinds of evidence that Ms. Glustrom would intend to introduce are found in the Attachments to this Application for RRR. The reader will find highly referenced analyses of coal cost and supply issues—issues that neither the OCC and nor any other party (to the best of Ms. Glustrom's knowledge) have ever raised at the Colorado PUC what's less raised with the depth of analysis that Ms. Glustrom has done time and time again.

Again, Ms. Glustrom can understand why PSCo does not want Ms. Glustrom to raise these arguments when PSCo is planning to make over $1 billion of

[9] For a discussion of prudence, see Decision R14-0496 in Docket 13A-0869E.

capital expenditures in the next two years (much of it on old coal plants) and then look to gain "Return Of" that investment as well as *"Return On"* that investment. The *Return On* the investments at play in this docket will likely be something in the neighborhood of 8% on a billion dollars or something well in excess of $50 million dollars of profits made on these investments.

Just imagine if every time you paid a repair bill on your old cars, you could pass those costs on to someone else to pay **and** you could earn 8% on investments on those repairs (and then pass the fuel and operating costs on to your neighbors to boot….) Well, you'd want to make lots of those risk-free, high-yield investments just as PSCo is proposing to do with its old coal plants as outlined in the Direct Testimony of PSCo witness Mark Fox—and of course you would not want anyone like Ms. Glustrom challenging those "investments."

Attachments 4 and 5 indicate additional problems with the PUC directing that the OCC should represent Ms. Glustrom. After many weeks of waiting and making follow-up calls and contacts, Ms. Glustrom will finally receive part of the discovery in this docket as a response to a request she filed in August, but she will likely need to pay significant amounts to receive any further discovery. Moreover, she has no way of serving discovery herself and, as is obvious from the detailed arguments presented in the attachments to this RRR, there is no other party that is positioned to make the arguments she has made in the dockets that preceded this 14AL-0660E rate case and that she is prepared to make in this docket.

Again, while it is obvious why PSCo does not want Ms. Glustrom to make these arguments, the PUC should not reject the arguments before they have even seen them.

There is very close to a zero chance that the OCC will have an "identity of interests" with Ms. Glustrom and make the arguments that she would. Moreover, C.R.S. § 40-6.5-104(2) makes it very clear that the presence of the OCC is not to "**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.**"

VI. CONCLUSION

In attempting to substitute the preference of the Commission to keep Ms. Glustrom out of this docket for the clear language of Colorado law which grants her the right to intervene—a right that has been recognized for close to a decade—the Commission is attempting to deny Ms. Glustrom of her constitutional and statutory rights. Those rights include the right to become a full party in this docket including the right to seek judicial review. Moreover, the Commission is rejecting Ms. Glustrom's arguments before they have even heard the arguments. Perhaps most importantly, the Commission is setting the stage to charge Xcel-Colorado customers for "investments" that are not prudent and not in compliance with the fundamental duties of the Commission to ensure that all charges are "just and reasonable" and all abuses of rates are corrected. (C.R.S. § 40-3-101 and § 40-3-102).

WHEREFORE, for all the reasons stated above, Ms. Glustrom respectfully requests that her Application for RRR of Decision C14-1043 be accepted and her Motion to Intervene in Docket 14A-0660E be granted.

Respectfully submitted this 17th day of September 2014,

/s/Leslie Glustrom

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of September 2014, a copy of the foregoing **APPLICATION FOR REHEARING, REARGUMENT OR RECONSIDERATION OF COMMISSION DECISION C14-1403 OF LESLIE GLUSTROM** was filed through the Colorado Public Utilities Commission e-filing system and a courtesy copy was served by e-mail on the parties in the proceeding.

Leslie Glustrom
/s/ Leslie Glustrom