DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	
WILDEARTH GUARDIANS, Plaintiff, v. **COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT**; **COLORADO AIR QUALITY CONTROL COMMISSION, COLORADO AIR POLLUTION CONTROL DIVISION**, Defendants. And **ENVIRONMENTAL DEFENSE FUND**, Plaintiff v. **COLORADO AIR QUALITY CONTROL COMMISSION AND COLORADO AIR POLLUTION CONTROL DIVISION**, Defendants	**▲ COURT USE ONLY ▲**
For Plaintiff WILDEARTH GUARDIANS Samantha Ruscavage-Barz (NM Bar No. 23276) WildEarth Guardians 301 N. Guadalupe St., Ste. 201 Santa Fe, NM 87501 Phone: (505) 401-4180 sruscavagebarz@wildearthguardians.org Katherine Merlin, CO Atty. Reg. No. 45672 3100 Arapahoe Ave., Ste. 410 Boulder, CO 80303 kate@katemerlinlaw.com ***For Plaintiff ENVIRONMENTAL DEFENSE FUND*** Reed Zars, CO Atty. Reg. No. 17627 910 Kearney Street Laramie, WY 82070 307-760-6268 reed@zarslaw.com	Case No.: 2020CV032320 with consolidated case 2020CV32688 Division: 280
PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO PSCO's MOTION FOR INTERVENTION	

Plaintiffs WildEarth Guardians and Environmental Defense Fund, through their undersigned attorneys, hereby file their Joint Response in Opposition to Public Service Company of Colorado's ("PSCo's") Motion for Intervention ("Mot."). As grounds, Plaintiffs state as follows:

PSCo's Motion for Intervention, based on false assertions of fact[1] and incorrect conclusions of law, should be denied. PSCo fails the test for Rule 24(a) intervention as a matter of right because it has no direct, substantial, legally protectable interest at stake in this action. Plaintiffs' suit seeks to enforce Defendants' mandatory duty to publish greenhouse gas ("GHG") emission regulations by July 1, 2020. § 25-7-140(2)(a)(III), C.R.S. This duty is Defendants' alone to satisfy and PSCo's alleged interest in preventing "rushed" agency rulemaking is speculative at best. Mot. at 4. To the extent PSCo's interest in slowing Defendants' rulemaking duty is legally cognizable, it is more than adequately represented by the Defendants.

PSCo's alternative request to intervene permissively pursuant to Rule 24(b) should also be denied for the same reasons, and because PSCo's participation as an intervenor threatens to prejudice and delay Plaintiffs' action with redundant and irrelevant arguments.

[1] PSCo's assertions that Plaintiffs complaints ask the court to require the promulgation of GHG regulations by "an unreasonable and unintended deadline," Mot. at 3, "in a rushed and non-cost-effective manner," Mot. at 4, and "on an unnecessarily expedited timeline," Mot. at 8., are neither expressed nor implied in Plaintiffs' complaints.

LEGAL STANDARD

Under C.R.C.P. Rule 24, a non-party may intervene in a civil action (a) as a matter of right, or (b) through permissive intervention. A non-party may intervene as a matter of right under Rule 24(a) only if (1) a statute confers an unconditional right to intervene or (2) it claims an interest in the subject matter of the litigation, the disposition of the case may impede or impair the applicant's ability to protect that interest, and that interest is not adequately represented by existing parties. C.R.C.P. 24(a)(1); *People v. Ham*, 734 P.2d 623, 625 (Colo. 1987); *The Dillon Cos., Inc. v. City of Boulder*, 515 P.2d 627, 628–29 (Colo. 1973). In the absence of a statutory right, as is the case here, all three elements of Rule 24(a)(2) must be present before a motion to intervene as a matter of right may be granted. *Dillon Companies, Inc. v. Boulder*, 183 Colo. 117, 515 P.2d 627 (1973). In the alternative, permissive intervention under C.R.C.P. Rule 24(b) may be allowed if there is a statute conferring a conditional right to intervene or if "an applicant's claim or defense and the main action have a question of law or fact in common," so long as the intervention "will not delay or prejudice the rights of the original parties." C.R.C.P. Rule 24(b).

C.R.C.P. Rule 24 is effectively identical to Rule 24 of the Federal Rules of Civil Procedure. *Roosevelt v. Beau Monde Co*., 152 Colo. 567, 384 P.2d 96 (1963). Further, as PSCo acknowledges, "authority interpreting a corresponding federal rule [on intervention is] instructive because Colorado Rules of Civil Procedure were modeled on the federal rules." Mot. at 12 (quoting *Concerning Application for Underground Water Rights*, 304 P.3d 1167, 1171 n.1 (Colo. 2013)).

ARGUMENT

PSCo fails to meet the standard for intervention by right under Rule 24(a) and should be denied permissive intervention under Rule 24(b) because intervention is likely to result in additional undue delay and cloud the single simple question that is at issue in this case: whether the Defendants in this matter failed to satisfy a mandatory duty by a statutory deadline.

I. PSCo Is Not Entitled to Intervene as a Matter of Right Under C.R.C.P. Rule 24(a).

PSCo does not qualify for intervention as a matter of right pursuant to Rule 24(a). Intervention as a matter of right arises when a non-party to an action demonstrates it either has an unconditional statutory right to intervene or that it has "an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." C.R.C.P. Rule 24(a).

First, PSCo has no statutory right to intervene. Second, PSCo has no legally protectable interest in the subject matter of this case, *i.e.*, Defendants' unfulfilled duty to have published notice(s) of proposed rulemaking to allow the state to meet its GHG emission reduction goals by July 1, 2020. PSCo's alleged interest in this case is speculative, indirect, and not legally cognizable. While Plaintiffs do not dispute that PSCo has an interest in the "generation, transmission and distribution of electricity and gas to its customers," Mot. at 10, the Defendants' single mandatory duty that is the subject of this case is to "by July 1, 2020, publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet it greenhouse gas emission reduction goals." § 25-7-140(2)(a)(III), C.R.S. How those regulations will or should be written is not at issue in this case. This case is solely

about the Defendants' duty to publish a notice or notices of proposed rulemaking by July 1, 2020 to initiate the administrative process to meet the GHG goals. Even if PSCo has a legally protectable interest in advocating for an avoidance or delay of any GHG rulemaking duty of the Defendants as required by § 25-7-140(2)(a)(III), C.R.S., this interest is well represented by the Defendants themselves. Furthermore, PSCo is very capable of pursuing "the well-considered and appropriate development of any rules regulating GHG emissions." Mot. at 11, by participating in any agency rulemaking to achieve its goals. § 24-4-103(6), C.R.S.

The Tenth Circuit Court of Appeals, like Colorado, "follows a somewhat liberal line of cases in allowing intervention of right," *Utah Association of Counties v. Clinton*, 255 F.3d 1246, 1249 (10th Cir. 2001). Nevertheless, any applicant for intervention as a matter of right must demonstrate, at an irreducible minimum, a "direct, substantial, and legally protectable" interest securing this right. *Coalition of Ariz./N.M. Counties for Stable Economic Growth v. Dep't of Interior*, 100 F.3d 837, 840, 842 (10th Cir. 1996). Moreover, a legally protectable interest must be "particularized," and may not "raise interests or issues that fall outside of the issues raised" by the parties. *Am. Ass'n of People with Disabilities*, 257 F.R.D. 236, 246 (D.N.M. 2008).

PSCo has no direct, substantial, and legally protectable interest in Plaintiffs' action to enforce compliance with an express, non-discretionary deadline. Numerous decisions have come to this same conclusion. For example, in *Sierra Club v. McCarthy*, 2015 WL 5006069 (E.D. Ark. August 24, 2015), Sierra Club sued the Environmental Protection Agency ("EPA") for failing to promulgate regulations within two years of the statutory deadline. Industrial interests moved to intervene under Rule 24 (a) and (b). The court denied the motions to intervene under both subsections (a) and (b) of Rule 24, holding that the industry intervenors' interests in "low-cost,

reliable energy" and an "adequate time to complete the rule-making process" – exactly on point here with the alleged interest of the proposed intervenor PSCo – did not rise to the level of a legally protectable interest. *Id.* at *3–4. This is because the only issue before that court was a missed deadline to issue regulations, not the substance or enforcement of inchoate regulations that could impact intervenors in the future.

Similarly, in *Sierra Club v. EPA*, 2013 WL 5568253 (N.D. Cal., October 9, 2013), Sierra Club sued EPA for failing to comply with a mandatory duty to revise its ambient air quality standard for ozone every five years. Industry dischargers of ozone precursors moved to intervene. The court found that the proposed intervenors' economic interests, while valid in the abstract, were nevertheless irrelevant in the context of Sierra Club's action that was focused solely on EPA's alleged failure to meet a statutory duty by date certain. According to the court,

> Proposed Intervenors' 'economic interests' do not rise above the speculative in relation to the issues in this litigation. The instant lawsuit does not seek an order adopting particular ozone air quality standards, but only one that EPA's review of the ozone air quality standards be completed by a fixed date. As in other similar actions where regulated entities attempted to intervene in litigation to compel EPA to comply with its statutory obligations, the economic interests expressed by the Proposed Intervenors here are too remote and contingent on other events to be the basis for intervention.

Id. at *3. The district court also held that proposed intervenors' claimed interest in preventing a "premature deadline" for the issuance of such regulations was not well-taken because "they have no protectable procedural right to extend a rulemaking process beyond statutory deadlines in order to allow more time for comment." *Id.* at *4. Finally, the court also denied permissive intervention, finding industry's interest in raising issues related to the nature of EPA's duty and

an appropriate remedy "would only serve to confuse the matters at issue in the complaint and to delay the proceedings unnecessarily." *Id.* at *5.[2]

As in the cases above, PSCo does not have a direct, substantial, and legally protectable interest in the issue in this case. This is because the issue in this case is strictly procedural: did the Defendants fail to meet a mandatory deadline of July 1, 2020 to "publish a notice of proposed rule-making that proposes rules to implement measures that would cost-effectively allow the state to meet its greenhouse gas emission reduction goals." EDF complaint, ¶¶ 37–48; Guardians complaint, ¶¶ 40–43; C.R.S. § 25-7-140(2)(a)(III). PSCo has no legally protectable interest in delaying the July 1, 2020 deadline established by the Colorado General Assembly. Therefore, PSCo's Rule 24(a) motion to intervene as a matter of right should be denied.

PSCo's interests in energy generation and transmission are relevant to this matter only if: Plaintiffs show that the Defendants violated a statutory duty to issue notices of rulemaking by July 1, 2020; the court orders the Defendants to publish notices of proposed rulemaking; the not-yet-written notices propose rules that might affect the electrical generation and transmission sector rather than other potential regulatory targets such as the oil and gas industry, agriculture or

[2] *See also, Center for Biological Diversity v. EPA*, 2012 WL 909831 (N.D. Cal. March 16, 2012) (Rule 24(a) and (b) intervention denied because proposed industry intervenors have no protectable interest applicable to plaintiff's action to enforce deadline to revise certain pollution standards); *Earth Island Institute v. Wheeler*, 464 F. Supp. 3d 1138, 1146 (N.D. Cal. 2020) (Rule 24(a) and (b) intervention denied in suit to enforce EPA's deadline to update the Clean Water Act National Contingency Plan, because proposed intervenor petroleum company only had interests "that would remain the same regardless of the outcome of the litigation."); *Ohio Valley Environmental Coalition v. McCarthy*, 313 F.R.D. 10 (S.D.W.V. 2015) (Rule 24(a) and (b) intervention denied where proposed industry intervenor, in action to enforce EPA's mandatory duty to set maximum stream pollutant loads, had no protectable interest and no new arguments to assert).

land use, transportation, or manufacturing. Plainly at this early stage PSCo's interest is premature, indirect, remote in time, and speculative on many levels.

It is not disputed that the Defendants have a statutory duty to propose rules to achieve defined climate goals. The question before this court is the extent and timing of Defendants' duty to propose such rules. When Defendants issue notices for proposed rulemaking – as they will, all questions of timing aside – PSCo will have ample opportunity to participate in rulemaking procedures to protect its interests. However, the substance of those rulemakings is not at issue here, and PSCo's intervention at this stage only threatens to delay this case and frustrate Plaintiffs' interest in enforcing Defendants' compliance with their statutory duty.

The lack of a direct, substantial, and legally protected interest is, standing alone, sufficient reason to deny intervention. But even if the Court finds that PSCo has a legally protected interest, PSCo also bears the burden of showing that its interest is not already adequately represented by the existing parties. *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969). Regarding adequate representation Colorado courts look to the alignment of interests between the intervenor and the existing parties. "The most important inquiry in determining the adequacy of representation does not involve an analysis of the courtroom strategy of the representative but rather is concerned with how the interest of the absentee compares with the interest of the representative." *In re Estate of Scott*, 577 P.2d 311, 313 (Colo. App. 1978) (citations omitted). PSCo claims its "ultimate objective was and is to ensure the well-considered and appropriate development of Colorado law—and eventual implementing regulations—addressing the reduction of GHG emissions from the utility sector and the broader economy." Mot. at 7–8.

Ensuring the well-considered and appropriate development of Colorado law is undoubtedly the primary objective of the state Defendants as well.

This analysis would look different if Plaintiffs' suit challenged adopted rules affecting PSCo or its members. In that type of case, the Defendants' interest would be to defend the final rule, while PSCo's interest might be in challenging other elements of the rules. Here there are no currently proposed regulations at issue, only a statutory deadline applicable to the Defendants to propose rules. Because the procedural issue in this case is one in which the interests of the Defendants and PSCo are aligned, and because the current Defendants are certainly capable of representing those interests, PSCo's suggestion that its interests will not be adequately represented by the Defendants should be rejected.

II. PSCo Should not be Allowed Permissive Intervention Under C.R.C.P. Rule 24(b)

A court may grant permissive intervention "when an applicant's claim or defense and the main action have a question of law or fact in common," so long as the intervention "will not delay or prejudice the rights of the original parties." C.R.C.P. 24(b). In addition to the reasons above for denying intervention of right (lack of cognizable interest, adequate representation by Defendants) the actual and pragmatic considerations of judicial efficiency and Plaintiffs' rights to a just and speedy determination are appropriate, and weigh against intervention. *See* Response *supra* at 5–7 (discussing relevant caselaw where intervention was denied under both Rule 24(a) and (b) in similar cases). PSCo's admitted objective for seeking intervention is to achieve greater delay for the required publication of notices for rulemaking. Regardless of its unsubstantiated opinion that additional delay will result in better rules, intervention may be denied solely on the grounds that it would delay resolution of the Plaintiffs' claims and "additional factors" need not

be considered. Rule 24(b); *see also City of Stillwell v. Ozarks Rural Elec. Co-op Corp.*, 79 F.3d 1038, 1043 (10th Cir. 1996) (upholding lower court's denial of permissive intervention where primary issue was adequately represented and undue delay and prejudice to existing parties would be caused by "attempts to interject additional issues in [intervenor's] proposed answer"). PSCo's Answer includes claims regarding "legislative history, executive authority, the Colorado Constitution, and interpretative legal authority," Proposed Answers to Guardians at 9, to EDF at 10. PSCo also cited to the following proposed exhibits (E–K): an 88-page exhibit of a 2010 Public Utilities Commission Order regarding the Clean Air Clean Jobs Act; a 94-page exhibit of an internal 2016 PSCo Electric Resource Plan; a 44-page exhibit of a 2018 Public Utilities Commission Order entitled "Phase II Decision Approving Retirement of Comanche Units 1 and 2; Approving Resource Selection in Colorado Energy Plan Portfolio; Setting Requirements for Applications for Certificates of Public Convenience and Necessity; and Setting Requirements for the Next Electric Resource Plan Filing"; an in-house publication from Xcel Energy regarding its aim for zero-carbon electricity by 2050; PSCo's Prehearing Statements In the Matters of Proposed Regulations No. 22 and No. 7 to the Air Quality Control Commission; and an October 2020 letter to the Air Quality Control Commission asking for certain regulatory choices regarding GHG inventory accounting. PSCo's request for permissive intervention should be denied based on its interest in delay as well as its patent attempt to distract this court with extraneous and irrelevant evidence to obscure the simple question of whether a deadline means a time by which an action must occur.

CONCLUSION

The rules of civil procedure are to be "liberally construed to secure the just, speedy, and inexpensive determination of every action." C.R.C.P. 1(a). It is not just, speedy, or inexpensive to grant intervention to a party who has no liability as a defendant under § 25-7-140(2)(a)(III), C.R.S., and who has shown an intent to introduce redundant and irrelevant arguments that will only delay the resolution of Plaintiffs' claim. Plaintiffs therefore oppose PSCo's intervention because granting intervention will add confusion to what should be a simple case concerning the meaning of § 25-7-140(2)(a)(III), C.R.S., and will only create further delay. Plaintiffs therefore request that the Court deny PSCo's Motion for Intervention and allow the current parties to this lawsuit to go forward with their claims and defenses as set forth in their Revised Proposed Case Management Order.

Respectfully submitted this 30th day of November, 2020.

/s Samantha Ruscavage-Barz
Samantha Ruscavage-Barz (NM Bar No. 23276)
WildEarth Guardians
301 N. Guadalupe St., Ste. 201
Santa Fe, NM 87501
Phone: (505) 401-4180
sruscavagebarz@wildearthguardians.org

Katherine Merlin, CO Atty. Reg. No. 45672
3100 Arapahoe Ave., Ste. 410
Boulder, CO 80303
kate@katemerlinlaw.com

Counsel for Plaintiffs WILDEARTH GUARDIANS

/s Reed Zars
Reed Zars, CO Atty. Reg. No. 17627
Attorney at Law
910 Kearney Street
Laramie, WY 82070
307-760-6268
reed@zarslaw.com

Counsel for Plaintiff
ENVIRONMENTAL DEFENSE FUND

CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2020, a copy of this **PLAINTIFFS' JOINT RESPONSE IN OPPOSITION TO MOTION FOR INTERVENTION** was filed and served upon all registered counsel of record electronically via the Colorado Courts E-Filing System:

/s Katherine Merlin
Katherine Merlin