

Coalition of Ratepayers Case Study

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What banker dares to speak out against the Fed, or trader against the SEC? What hospital or health insurer dares to speak out against HHS or Obamacare? What business needing environmental approval for a project dares to speak out against the EPA? What drug company dares to challenge the FDA? Our problems are not just national. What real estate developer needing zoning approval dares to speak out against the local zoning board?¹

- John H. Cochrane

Introduction

Schoolhouse Rock! taught us about how a bill becomes a law, the three co-equal branches of government – executive, legislative, and judicial – and how all three are supposed to check and balance one another. Theoretically, no one branch of government is supposed to have more power than another. In practice however, that is not true. The balance of power has tipped in favor of the executive branch and the extensive regulatory state under its authority, as John Cochrane explains:

*The United States' regulatory bureaucracy has vast power. Regulators can ruin your life, and your business, very quickly, and you have very little recourse. That this power is damaging the economy is a commonplace complaint. Less recognized, but perhaps even more important, the burgeoning regulatory state poses a new threat to our political freedom.*²

With today's hyper-partisan political environment, the Independence Institute has found that not only may bad policy be stopped at the Colorado General Assembly, but substantive change can also occur inside the regulatory space. Regulators are routinely called upon to make substantive policy decisions and have extensive authority to enact those decisions independent of legislative oversight. As these decisions occur outside of the legislative spotlight, regulatory insiders have considerable influence and often determine the outcomes. For regulatory outsiders, it can be difficult and expensive to effect change, as the regulatory process itself is a barrier to entry. For these reasons, few outside the process ever get involved, and that is a status quo that insiders like. But in Colorado, the Independence Institute has broken the code to the exclusive regulatory club with plans to disrupt business as usual. This paper is our case in point

and a case study of how organizations in other states can replicate what we did: open a way into highly regulated electric utility proceedings before Colorado's Public Utilities Commission (PUC) and give Colorado captive ratepayers a meaningful voice in the fight against unjust monopoly enrichment by investor-owned electric utilities. With a regulated electric monopoly, it is the industry that

captures the process while ratepayers foot the bill. By staking out a seat at the table, ratepayers are given a choice and a voice.

Our ultimate goal is to open up this monopoly system to more competition for the benefit of all.

Executive Summary

The PUC is charged by the General Assembly with regulatory oversight to evaluate Xcel's requests to add resources to the grid, set reasonable rates, and otherwise ensure that the monopoly's costs are equitable to ratepayers.

*"The regulatory space at the Colorado Public Utilities Commission (PUC) is the playground of corporate lawyers, unelected bureaucrats, and well-funded special interest groups. They have 'stakeholder' meetings that include only themselves. Then they issue press statements slapping each other on the back for their hard work securing a 'settlement' that forces Colorado working families and small businesses to pay more while a monopoly utility lines its pockets and special interest groups claim victory."*³

- Amy Cooke, Director of the Energy and Environmental Policy Center, Independence Institute

*The dirty little secret with many public utilities is that the more they invest, the more profit they make. That is true whether or not that investment is needed or in the public's interest."*⁴

- Steve Pociask, CEO of the American Consumer Institute

Xcel Energy Inc. is a multi-billion-dollar public utility that services over 3.3 million electric and 1.8 million natural gas customers in eight states: Minnesota, Michigan, Wisconsin, North Dakota, South Dakota, Colorado, Texas, and New Mexico through its subsidiaries: Northern States Power-Minnesota, Northern States Power-Wisconsin, Public Service Company of Colorado (PSCo), and Southwestern

Public Service Company. In 2017, Xcel's total revenue was \$11.4 billion,⁵ and its asset base was valued at \$43.03 billion.⁶ As one of America's largest investor-owned utility (IOU) conglomerates, the monopoly utility plays a major role in the energy sector. Instead of focusing on Xcel Energy Inc.'s entire operation, this report will specifically look at the dealings of the Public Service Company of Colorado that will be referred to as Xcel or Xcel Energy.

In Colorado, Xcel serves approximately 1.4 million electricity ratepayers around the Denver Metro Area, Greeley and Northern Colorado, and the Western Slope. Because Colorado is a regulated electricity market, consumers have no choice in service provider and are forced to pay for the generation, transmission, and distribution of power. The PUC is charged by the General Assembly with regulatory oversight to evaluate Xcel's requests to add resources to the grid, set reasonable rates, and otherwise ensure that the monopoly's costs are equitable to ratepayers. Historically, this arrangement has served ratepayers fairly well, and Colorado has enjoyed some of the most affordable electric rates in that nation.⁷ Unfortunately, the state embarked on a path to politicize electricity production beginning in 2006 with former Governor Bill Ritter's New Energy Economy (NEE), and since then, the financial scales have tipped in Xcel's favor.

The legislature has consistently passed measures that have both directly and indirectly driven up electricity rates. It has also further expanded the PUC's authority, which has allowed the agency to change its mission statement from least cost principle to a value-based one and recently required Xcel to include a social cost of carbon in its financial modeling, even though the federal policy has since been tossed.

As a result, Colorado's electric rates have skyrocketed 62 percent over 15 years.⁸ Out of frustration with rising costs and no ability to voice their concerns, the Coalition of Ratepayers formed to fight back in the area where all the decisions were being made—the regulatory space at the Colorado Public Utilities Commission.

The Coalition of Ratepayers' beginning in summer 2016 was humble. It started as an informally organized group of business and individual ratepayers. A number of small businesses and the Independence Institute formed the Coalition to advocate for lower electric rates, better grid reliability, and lower costs. The Coalition sought standing to intervene before the PUC in Xcel's proposed Rush Creek Wind Farm, a \$1.1 billion industrial wind project spanning 90,000 acres in eastern Colorado. With more than enough capacity to meet demand,⁹ the Coalition didn't agree that the project was in the best interest of consumers, who would be burdened with the cost while Xcel stockholders reaped the profits.

The Coalition petitioned for and was granted standing to intervene. It ultimately presenting testimony against the project, and while it lost in the end, by intervening, the Coalition established credibility before the Commission that helped set it up to participate in the larger, far more impactful proceeding in late summer 2017 involving the Colorado Energy Plan (CEP), which is part of Xcel Energy's 2016 Electric Resource Plan (ERP).

In an ERP proceeding, a regulated utility sets forth its future resource plan. The current electric grid capacity is evaluated and future needs are determined based upon estimated electricity demand. Xcel presents its projections to the PUC, which then determines whether additional capacity is necessary. Based upon the determination of how many new megawatts (MW) of capacity is required, Xcel presents various "portfolios" of future energy resources that fulfill the future demand. An Independent Evaluator is brought in to oversee the various bids that go into each portfolio (including those from Xcel), and then they are presented to the Commission for a final selection. Once the PUC selects a portfolio, it essentially acts as the blueprint for adding new resources to the grid over the foreseeable planning period.

In the 2016 ERP case, Xcel initially presented modelling options that simply looked to fulfill future growth needs without taking any resources off the grid prematurely. At the end of Phase I of the 2016 ERP proceeding, the PUC ordered Xcel to present portfolios reflecting two scenarios: a 0 MW need case (with minimal new resource acquisition, based in part on a large reserve margin of appx. 1,000 MW), and a scenario based on Xcel's updated demand forecast, which was later determined to be 450 MW.¹⁰

However, after Phase I ended, Xcel returned to the PUC with the Colorado Energy Plan, a new proposal that propositioned the early retirement of two of Xcel's coal plants: Comanche 1 and 2. Xcel made the bold claim that it could shut down two efficient and environmentally superior coal power plants,¹¹ spend \$2.5 billion replacing them with industrial wind along with some utility scale solar, utility scale battery storage, and natural gas capacity, *and* save ratepayers money. In presenting the

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CEP, Xcel stacked the deck in its favor by first meeting with the various groups that were already involved and getting them to stipulate that the CEP should be presented in the ERP proceeding (“the Stipulation”). Environmental groups jumped on board with the promise of replacing hydrocarbons with renewables. Independent Power Producers (IPPs) jumped on board because of the promise that part of the new capacity would be owned by utilities other than Xcel. And groups that would otherwise be skeptical of such bold claims such as the Office of Consumer Counsel and the PUC Staff were lured on board with Xcel’s promise that the CEP would be cheaper for ratepayers than the alternative portfolios.

The PUC accepted the Stipulation, but reopened the proceeding to additional interventions and discovery given the late entry of the CEP into the ERP proceeding. Skeptical of the monopoly’s “too good to be true” plan, the Coalition formally organized as a Colorado non-profit, went back to the PUC, petitioned and was granted intervener status in the

ERP proceeding. In a real-life David versus Goliath battle, the Coalition took on the monopoly and the 14 parties that signed onto the Stipulation.

This report is a history of the Coalition of Ratepayers and its battle to force transparency and honesty in Xcel’s accounting on behalf of its customers. It’s a case study for other groups that may want to follow this model and includes recommendations for necessary reforms in the regulatory space and how to recover costs. Make no mistake, intervening is expensive, which is why so few do it. We provide a road map and best practices for others who may want to try it in their states.

There are many challenges ahead for the Coalition, but it’s not business as usual anymore.

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Background and History

The Implementation of Regulated Utilities

When the power sector was still in its infancy, electric companies operated untouched in an open market. Multiple providers competed in one city, and they would enlarge their market base by consistently lowering their prices to undercut competition. Over time, competing firms lowered their prices too far and could no longer afford the infrastructure necessary to produce and distribute power. As a result, power providers consolidated and formed unchecked monopolies able to charge overly high rates.¹²

Unfortunately, this occurred in a period when the American people were suspicious of large corporations and trusted the government more than the open market.¹³ In an effort to eliminate the power provider’s unchecked monopolization and protect consumers, reformers employed the government to control the sector’s business dealings. Tellingly, the providers did not object to these changes. Instead, they embraced regulation because it created legal entry barriers for competition, which legalized their monopoly status. It was an exchange, their autonomy in determining rates for the exclusive rights to provide service in a region.¹⁴

Theoretically, regulation seemed a perfect solution and actually worked for a time. Guaranteeing profit and a reasonable return on investments both incentivized power companies to provide reliable service at reasonable prices and invest into and upkeep the necessary infrastructure to deliver electricity.¹⁵ However, innovative technology and market manipulation revealed this regulatory model's shortcomings. The rise of natural gas capacity altered the way in which utilities produced power, reducing the need for large coal-fired power plants and thereby eliminating the need for vertically integrated utilities, or regulated monopolies. In essence, the dramatically smaller natural gas generators allowed for more competition and revealed that the economy of scale business model was not the only method to produce affordable and reliable electricity.¹⁶ The regulated model was also susceptible to market manipulation because it encouraged—and for some states still encourages—unnecessary capital expenditures as a way to increase profit margins.¹⁷

In response to these issues, deregulation of the power sector began in the 1990s. However, Colorado remains a no choice energy state where vertically integrated monopolies increase their earnings by increasing the value of their asset base.¹⁸ Despite technological advancement within the industry and a push for deregulation, Colorado's energy market continues to operate under an esoteric regulatory model that theoretically "protects" ratepayers through PUC oversight of electric monopoly utilities.

State Regulation: Colorado's Electric Providers and its Public Utilities Commission

Colorado consists of two investor-owned utilities (IOUs), 29 municipal utilities

(munis), and 22 rural electric cooperatives (co-ops).¹⁹ It is a regulated electricity state. Ratepayers cannot choose their provider, and the PUC is charged with ensuring they receive reliable power at a reasonable rate. The PUC fully regulates both monopolies and partially regulates the munis and the co-ops.²⁰

The state's largest electricity providers are Xcel Energy and Black Hills Energy. Xcel services the Denver Metro Area, Northern Colorado, and the Western Slope. Black Hills services Pueblo and its surrounding area. Both are vertically integrated, regulated monopolies that own the entire supply chain of electricity (generation, transmission, and distribution). They are tasked with delivering reliable electricity to their ratepayers, but as publicly traded corporations, they must also produce returns for their investors and stay relevant in the market. Both Xcel Energy and Black Hills Energy fall under the category of investor-owned utilities.

Municipal utilities and rural electric cooperatives are not-for-profit organizations that provide electrical service for small and local communities. There are 22 co-ops and 28 munis in the state, and these power providers' primary concern is to service their community. Typically, they distribute dividends back to their customers through community contributions and reduced rates.²¹

The PUC consists of three commissioners—no two can be from the same political party—and they must be appointed by the Governor and confirmed by the State Senate. Its mission is to "service the public interest by effectively regulating utilities and facilities so that the people of Colorado receive safe, reliable, and reasonably-priced services consistent with the economic, environmental, and social values of our state."²²

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It is important to note that in Colorado, the PUC has broad jurisdictional authority in energy and water, telecommunications,

transportation (i.e. taxis, uber, etc.), gas pipelines, and transit. The workload of the Commission is heavy and its resources slim.

A Changed Mindset in the State of Colorado

The Public Utilities Commission

As early as 2001, the General Assembly signaled it wanted the PUC to shift away from a least cost principle mission with the passage of SB01-144, “Concerning the Promotion of Energy Efficiency.” Through its adoption, Colorado’s Legislature mandated the PUC also consider implementing clean energy generation capacity to protect the environment, and the adopted language instructed the Commission to accept investing into renewable generation as an appropriate use of ratepayers’ money.²³

Three years later in 2004, Colorado voters approved Amendment 37 as an initiated constitutional amendment. It was Colorado’s first Renewable Energy Standard, and it mandated that 10 percent of an IOU’s electric generation come from sources considered “renewable,” primarily industrial wind and solar. It also created net metering and interconnection standards for Colorado’s IOUs as well as a “carve out” for solar power generation.²⁴ Because the people of Colorado passed Amendment 37, utilities were forced to meet renewable energy standards by certain dates, and the PUC had no choice but to green-light their activities to ensure they were compliant with the measure.

Following Amendment 37 was Governor Ritter’s New Energy Economy (NEE), a legislative packet of about 57 bills that the environmental left heavily influenced, and that the state legislature passed and Governor Ritter signed. The NEE moved

Colorado away from coal-fired power in favor of natural gas and industrial wind. It included fuel-switching, demand side management programs, and tripled the renewable mandate with the goal of shutting down all coal plants.²⁵

The NEE is partly to blame for the increase in electricity rates of 62.1 percent between 2001 and 2016 for all residential, commercial, and industrial customers,²⁶ since it forced the utilities to invest in renewable sources even though current generators were functioning properly. A 2012 report highlighted \$484 million in costs associated with the NEE, or more than 18 percent of Xcel’s total electricity sales.²⁷ Based on the 1.4 million ratepayers that Xcel serves, the plan cost each ratepayer \$345. Worse yet, Xcel built 2100 megawatts of wind energy but only considered 264 megawatts dependable, indicating the increase in rates could have been avoided.

SB01-144, Amendment 37, and the NEE all played a part in encouraging and empowering the PUC to become a politically charged regulatory commission. As a result, what used to be a body concerned about protecting all ratepayers from excessive costs now pushes political and environmental initiatives.

Investor Owned Utilities’ Evolving Relationship with Renewables

In 2004, Xcel opposed Amendment 37 and its mandated renewable energy standards.²⁸ Recently, however, it realized

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how to use environmental mandates for profit. The political agenda established by the NEE encouraged utilities to profit from prematurely closing a functioning, coal-fired power plant and invest millions into renewable generation—all financed by its ratepayers. Between 2006 and 2016, Xcel’s annual profits increased from \$454.8 million to \$889.6 million because of their investments to comply with Colorado’s environmental laws.²⁹

The utility is not finished either. In the past two years, Xcel has proposed two renewable generation initiatives—The Rush Creek Wind Farm (approved in 2016 and finished in October 2018) and the recently approved Colorado Energy Plan.

Rush Creek Industrial Wind Farm

Xcel finished the Rush Creek Wind Farm in the fall of 2018. It consist of 300 industrial wind turbines spanning almost 100,000 acres in five counties and is the largest wind farm in Colorado.³⁰

Typically, a project this large has a year-long vetting process and requires extensive analysis. Xcel proposed a seven-month schedule. Five months were set for consideration, and the PUC had only two months to make its final decision. There was very little time to consider the intervenors’ concerns and questions, and the PUC was given insufficient time to understand the plan’s potential financial and environmental impacts on the state.³¹

Moreover, the state of Colorado has a surplus of generation capacity and has already met Colorado’s 30% Renewable Portfolio Standard.³² Xcel is on board with the state’s regulations and is operating with excess capacity.

In short, Xcel has no reason to be investing in new renewable projects like

Rush Creek—especially because it does not save Coloradans money.

Colorado Energy Plan

Xcel’s recently approved “Colorado Energy Plan” represents \$2.5 billion in new energy resource investments, with roughly \$1 billion of investments owned by Xcel. The CEP is a fuel switching scheme that prematurely closes Comanche Units 1 and 2—two award-winning coal generation facilities—and replaces them with various sources, predominantly industrial wind. This plan originally stems from President Obama’s controversial and costly Clean Power Plan, which attempted to push more green energy initiatives across the country. According to Xcel’s 10-Q Quarterly Report Filed 208-04-27, the Colorado Energy Plan’s major components include:

- Early retirement of 660 MWs of coal-fired generation at Comanche Units I (2022) and II (2025);
- Accelerated depreciation for the early retirement of the two Comanche Units and establishment of a regulatory asset to collect the incremental depreciation expense and related costs;
- A request to build up to 1,000 MW of wind, 700 MW of solar and 700 MW of predominately storage facilities;
- Utility ownership of 50 percent of the renewable generation resources and 75 percent of natural gas-fired, storage, or renewable with storage generation resources; and
- An accounting gimmick—reduce the RESA from two to one percent and the Colorado Energy Plan Adjustment (CEPA) Rider effective 2021 or 2022.³³

Energy Standards and environmental mandates also created an unlikely relationship between investor-owned utilities and environmental activists, which quickly turned into an alliance that now petitions the PUC for higher rates and additional renewable initiatives.

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With multiple green energy groups supporting the utility, Xcel now claims that investing in renewable energy sources will save its customers money. Findings indicate otherwise. According to the Institute for Energy Research, new wind generation costs around three times that of existing coal fired capacity and double that of existing combined gas cycle plants. The authors of the report concluded: “Most existing coal, natural gas, nuclear, and hydroelectric generation resources could continue producing electricity for decades at a far lower cost than could potential new generation resources.”³⁴

The economics quickly become murky, though, as subsidies for wind and solar—particularly in the form of Federal PTC

and ITC credits—distort the real costs of these resources. By using subsidies to offset their costs, renewables appear less costly than they actually are.

With a change in mindset for both the PUC and Colorado’s investor-owned utilities, plans to build and own more renewable energy generation capacity will continue. Business and residential ratepayers should expect an increase in their electricity bills, unless ratepayers band together and fully participate in PUC proceedings.

The PUC does not put out the welcome mat for new players. In fact, the barriers to entry in a regulatory proceeding are quite high including: an antiquated filing system, lack of affordable local counsel, and the need for highly skilled and usually very expensive expert witnesses.

The Independence Institute and Formation of the Coalition of Ratepayers

The PUC does not put out the welcome mat for new players. In fact, the barriers to entry in a regulatory proceeding are quite high including: an antiquated filing system, lack of affordable local counsel, and the need for highly skilled and usually very expensive expert witnesses. Even if a party is fully prepared to enter into a proceeding, intervention is largely discretionary. Only by first persuading the PUC that intervention should be permitted is a party granted an audience and a voice in the process.

As wealthy environmental groups dominate the regulatory space and encourage utilities to saddle the state’s ratepayers with costs associated with switching from baseload hydrocarbons to renewable or “clean energy sources,” utilities with fiduciary responsibilities to shareholders happily “invest” in new generation, which increases their asset bases and, thus, their profits. This overlap

has created a unique and convenient alliance between the utilities and the environmentalists. Xcel may have resisted renewable energy mandates 15 years ago, but now, it and the other utilities see investing in them as a lucrative investment option to increase their profits while operating in a regulated market. It happened when Xcel introduced, and the PUC approved the Rush Creek Wind Farm, and it is happening now with the Colorado Energy Plan.

It is the PUC’s job to monitor investor-owned utilities’ investments—as the ratepayers bear the costs associated with new projects—but unfortunately the PUC’s mission has changed. Instead of working from a least cost principle, it now has the authority to approve projects based on Colorado’s “environmental and social values.”

With millions of ratepayers' dollars controlled by a Commission charged with considering social and environmental costs, the Independence Institute helped create and joined the Coalition of Ratepayers—a organized group of small business and residential ratepayers concerned with issues impacting the rising cost of energy. The Coalition fights for affordable rates and transparency, and it has intervened in cases at the Public Utilities Commission concerning the Rush Creek Wind Farm and the Colorado Energy Plan.³⁵

Fighting for honest projections and transparency during the Rush Creek Wind Farm proceeding, the Coalition wanted three things from the PUC and Xcel before the plan was approved: an audit from an independent group to analyze Xcel's cost and production numbers, cost overruns to be borne by shareholders of Xcel rather than its ratepayers, and finally, an unbiased study of the long-term impacts wind farms have on eco-systems.³⁶ Xcel successfully rushed the regulatory process, and the PUC approved its plan to build the Rush Creek Wind Farm.³⁷ However, by getting involved, the Coalition received intervenor status which set it up for its most ambitious project to date, intervening in Xcel's next proposal, the Colorado Energy Plan.

The CEP prematurely closes Comanche Units 1 and 2, two very clean and environmentally superior coal plants,³⁸ and replaces them with renewable and natural gas capacity.³⁹ The Coalition disagrees with this proposal and would like to see both units remain in operation until their useful lives end. Xcel claims the CEP will save Colorado consumers \$213 million on a net present value basis, but the Coalition believes Xcel is not representing the proposal's true costs. The Coalition's expert witness delved into the economic models used for Xcel's cost projections and discovered a number of errors and biased

assumptions that tipped the scales in favor of the CEP.

In the ERP proceeding, Xcel offered a number of portfolios to the Commission for consideration. Each one represented a scenario that fulfilled Colorado's future electricity demand. When comparing the "Business as Usual" (BAU) case (also referred to as the Preferred ERP Portfolio) with no early coal plant retirements to the proposed CEP, Xcel used a number of tricks to try and show that the CEP portfolio would cost less than the BAU portfolio. Xcel added a number of costs to the BAU case that were not added to the CEP case, such as high transmission interconnection costs, high operations and maintenance costs, and much costlier "filler units" in the post-Resource Acquisition Period of the models.

The comparison also made the critical omission of \$171 million in stranded costs associated with the coal plants. When Xcel's model was challenged for omitting the stranded costs (i.e. accelerated depreciation), Xcel responded by explaining how omitting the costs was appropriate because the parties in the stipulation agreed to it. In other words, there was no legitimate accounting rationale for excluding these costs to ratepayers—Xcel simply ignored them because that is what they proposed to do.

After the Coalition presented this evidence and other problems with the electric resource planning models to the PUC, the Commission wanted revised models that showed the true costs associated with the accelerated depreciation of Comanche Units 1 and 2. It gave Xcel another chance to display honest numbers.

Xcel went back to its models and continued to doctor the numbers. In its 120-Day Report, Xcel presented revised models for various energy resource

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portfolios. The Preferred CEP portfolio put forth by Xcel was compared to the BAU case. According to Xcel's accounting, the CEP would save ratepayers \$213 million over a 38-year planning period. However, a close look at Xcel's own numbers revealed that the purported savings wouldn't occur until *after* the original retirement dates of Comanche 1 and 2. As the Coalition showed, the savings would not matriculate until 2046.

By loading up the two models with different assumptions, Xcel was able to find "savings" between the two portfolios. Basically, in its simulated model of future resource planning, Xcel included more expensive resources in the BAU case and put cheaper resources in its CEP portfolio. The simulated model allowed Xcel to insert speculative electric resources into its modeling that were unnecessary and would not enter into the grid for roughly 30 years. Xcel simply used imaginary future resources to get the results out of the models that it wanted to see. Its purported \$213 million in savings had nothing to do with an apples-to-apples comparison of a system that continues to operate Comanche 1 and 2 and one that does not. Instead, it manufactured savings by comparing two sets of proposed replacement resources in a wholly speculative future after the original expected lifespans of the coal plants.

Not only does this create a patently unfair comparison, it also relies on highly speculative savings that often don't materialize. No one is held accountable for the conditions agreed upon, so consumers pay now and over the next two decades and never see their promised savings.⁴⁰

The Coalition also discovered additional modeling errors and problems within Xcel's projections. Among other things,

the models biased the results in favor of the CEP by saddling the BAU case with unrealistically high transmission connection costs, applying capital, fuel and tax savings to the CEP but not applying these same cost-savings to the BAU case, and failing to properly account for accelerated depreciation (i.e. the sunk costs of Comanche 1 and 2) between the portfolios. When all of these costs were properly accounted for, it was revealed that the CEP would actually *cost* ratepayers between \$284 million and \$343 million. These costs are far from the \$213 million in savings that Xcel is promising.

The Coalition of Ratepayers requested that the PUC thoroughly explore all the costs associated with the CEP, including but not limited to: the stranded costs from Comanche Unit 1 and 2's early retirement and the costs associated with the infrastructure (i.e. generation, transmission, and distribution). By introducing detailed, knowledgeable, and critical testimony about the real cost impacts of the CEP, the Coalition caused the PUC to acknowledge that the "too good to be true" picture offered by Xcel doesn't represent a cost savings to ratepayers and that the policy decisions of the Commission will show up in ratepayer bills. The Coalition also hopes to educate ratepayers about the importance of energy transparency, and it will continue to push for full disclosure of the CEP's real cost.

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Reforming the Public Utilities Commission

As amended in 1954, the Colorado Constitution grants the Colorado General Assembly authority over the PUC. This means that the regulatory structure can be modernized by the General Assembly regardless of its current practices.⁴¹

Barriers to Participation

When administrative agencies became popular, its champions touted them as systems where ordinary citizens could participate without lawyers and experts—a marked distinction between them and the traditional courts. On the positive side, this idea remains partially true today; PUC proceedings are fairly transparent in that they are public, anyone can submit public comments, and all documents (excluding confidential documents subject to protective orders) are even available online. The process is straightforward and the live streamed proceedings makes observation very easy. Those wanting to can observe, access documents, submit comments, or even offer up public testimony at a weekly meeting if they desire.

The problem? Getting the Commission to actually listen. To do so, one must intervene as a PUC recognized party to a proceeding and not simply be one of the numerous public commenters.

However, intervening as a party is no easy task. You have to contend with the Commission's stringent intervention standards, which were adopted by rule.⁴² As a result, if one is representing a consumer/ratepayer group, it is only permissive intervention—there is no right to intervene as a party. The Commission also has a large amount of discretion as to whether or not a party may intervene. At the outset, you must lay out an argument that explains what you are expecting to contribute to the proceeding that

distinguishes your group from the Office of Consumer Counsel (OCC). The rule currently states:

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 is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. 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 or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene. Motions to intervene by permission will not be decided prior to expiration of the notice period. Rule 1401(c).

The criteria are both onerous and subjective. Even a well-argued and presented petition for intervention may be rejected because the Commission can decide what weight to give an intervenor's arguments and may, in its discretion, simply deny the request.

Even a well-argued and presented petition for intervention may be rejected because the Commission can decide what weight to give an intervenor's arguments and may, in its discretion, simply deny the request.

The next hurdle is legal expertise. Utility law is an uncommon specialized area of practice, and the attorneys who do have this specialty are—for the most part—already fully employed by utilities, special interest groups, or state agencies. To be effective, though, one’s legal team must be capable of navigating the universe of public utilities and have significant legal experience in the sector (i.e. knowing and understanding the rules, the different types of arguments to focus on and disregard, and what types of issues are expected to arise).

Therefore, assuming you can intervene and find competent and affordable legal counsel, just being a party to the proceeding presents hurdles and problems.

Similarly, any specific case type requires certain knowledge, experience, and expertise in order to handle it successfully. A specialized area such as public utilities law is pretty close to the extreme end of specialization. It’s not enough to know that a monopoly utility’s interests are opposed to ratepayer interests. You have to understand how utility markets work, how different cases proceed (e.g. CPCN proceedings, rate cases, ERP cases, etc.), how the economics of utilities work, how the state and federal laws intersect and overlap, the current (and historical) state of the utilities, and how to present effective and informed arguments. The legal specialization hurdle is incredibly high. In addition, for many types of utility proceedings, expert testimony is often called for. When dealing with power plant economics, environmental impacts, tax and accounting calculations, or similarly complex topics, a qualified expert is needed to provide persuasive testimony.

The expense of participation goes hand-in-hand with the legal specialization and expertise, causing extensive barriers to entry. It is simply supply and demand. There is a very small supply of utility attorneys and utility experts, and the hourly rates of those attorneys and experts reflect that scarcity. It is often the case that intervenors must seek out of state counsel as well as out of state witnesses.⁴³

Therefore, assuming you can intervene and find competent and affordable legal counsel, just being a party to the proceeding presents hurdles and problems. There are benefits but there are also burdens. These include: hiring an expert, participating in and being subject to discovery, participating in hearings, submitting testimony, examining witnesses, filing briefings, filing motions, opposing motions, and filing appeals. In other words you are a fully active litigant. With this, the more active you are, the more costly it will become.

From monitoring the proceeding to making formal appearances, having an effective legal team is cost prohibitive and part and parcel of an adversarial legal process with multiple hurdles to contend with.

Reforms and Improvements for the Regulation of Electric Utilities

Colorado has a unique system for legislative review of regulatory programs. Enacted in 1976, Colorado’s Sunset Law was the first of its kind in the nation. Basically, Sunset Provisions inserted in most regulatory programs repeal all or part of a statutory regulatory program after a specific date unless the legislature affirmatively acts to extend the program by bill. The Colorado Office of Policy, Research and Regulatory Reform within the Department of Regulatory Agencies conducts an evaluation of such programs in accordance with statutory standards and solicits diverse input from consumers, interest groups, regulated industries, government agencies, and professional associations.

The Coalition participated in the 2018 Sunset Review of the PUC and made several recommendations to reduce barriers to entry for intervenors and

increase the Commission's transparency. The Coalition intends to be actively involved with implementing legislation to secure these goals and also to encourage the PUC to make the necessary rule-making changes. Only by participating in the CEP proceedings could the Coalition identify the recommended changes

and participate in the Sunset Review in a meaningful way. A ten thousand foot review would not have garnered the practical on the ground perspective needed.

Intervening Without Going Broke

Participating in public utility proceedings is not for the faint of heart. As the previous section explained, there are a host of hurdles that make intervention in a regulatory proceeding exceptionally difficult.

Those considering becoming active participants in regulatory hearings should make sure their state's laws or rules permit intervening parties to collect attorney and expert witness fees—even if you are not on the winning side.

The Coalition of Ratepayers was fortunate in that its legal fees and witness costs were reasonable for the above captioned proceedings. The Coalition's legal team provided exceptional services and routinely reduced their invoices, and its expert witness also worked at a reduced rate. The Coalition saved over \$100,000 because of its legal team's and witness' generosity.

Nevertheless, due to the complexity and length of these proceedings, the expenses incurred by the Coalition of Ratepayers has been substantial. It presented testimony in both proceedings, issued detailed discovery requests, cross-examined witnesses, and became the lead adversary in not only the ERP proceeding but also the corollary Accelerated Depreciation and RESA Reduction proceeding challenging the Colorado Energy Plan. In other words, the Coalition fully participated as an active party in two different dockets just to be able to contest the CEP.

Its work did not go in vain. The Coalition brought to light numerous problems with Xcel's modeling and cost claims in both proceedings, identified \$87 million in errors that Xcel was forced to acknowledge, and debunked the myth that the CEP represented costs savings for consumers.⁴⁴ Its efforts throughout the proceedings were expressly recognized by members of the Commission:

- "I agree with the recommendation. I think the Coalition raised a good point and its good to see when costs turn to savings on an annual basis." - Commissioner Moser, Deliberations Meeting, 3/14/18, 9:38:30.
- "So I just want to reiterate. I think the Coalition of Ratepayers did an excellent job in our hearing. And I think we appreciated their thoughts and their due diligence as well as all the parties in the case. It helped us with our decision that asked for additional modeling runs." - Commissioner Moser, Weekly Public Meeting, 4/25/18, 9:30:40
- "I agree with Commissioner Moser. I think that the Coalition has been helpful in teeing up these arguments and helping me understand them." - Commissioner Koncilja, Weekly Public Meeting, 4/25/18, 9:31:01.

Participating in public utility proceedings is not for the faint of heart.

By participating in two proceedings and bringing to light discoveries that otherwise would not have been provided, the Coalition of Ratepayers materially assisted the Commission and even identified \$87 million worth of modeling errors within Xcel's portfolios.

- “I believe that the Ratepayer Coalition is correct, that the savings may not be as high as projected by PSCO and in fact there may no savings until after 2034, but that is not dispositive of the economic analysis that I have done.” - Commissioner Koncilja, Commission Deliberation Meeting, 8/27/18, 1:33.
- “I agree with Climax and the Coalition that the RESA should not automatically revert to 2%” - Commissioner Koncilja, Commission Deliberation Meeting, 8/27/18, 1:34.
- “I agree with the recommendation [to give no weight to the tail analysis]. And I must say thank you to the Coalition of Ratepayers and to Staff for how they worked through this issue. I was not happy to see the deviation from the modelling that was ordered by the Commission, but I do think the Coalition and Staff's testimony got us to a point where we can rely on the results giving no weight to the tails. So, thank you.” - Commissioner Moser, Commission Deliberation Meeting, 8/27/18, 2:21:30.
- “...I also particularly appreciated the depth of testimony on this point as Commissioner Moser spoke out to.” - Commissioner Ackermann, Commission Deliberation Meeting, 8/27/18, 2:23.
- “...Thank you for the testimony about cost-savings, and also the testimony that said there's not going to be any cost savings.Xcel is not going to pay for this. The customers of Xcel Energy will pay for the retirement of these plants and will pay for the accelerated depreciation and it will show up in rates in terms of the full costs of what we do with these plants. So don't think this is free and its going to be borne by somebody else.” -

Commissioner Moser, Commission Deliberation Meeting, 8/27/18, 2:48.

The Coalition's efforts also substantially impacted the Commission's decisions. In its Interim Decision, the Commission ordered numerous modeling revisions, addressed and disregarded Xcel's preferred annuity accounting method, ordered Xcel to present the costs of the portfolios on an annual basis to show when any cost savings would actually occur, and required an accounting of the accelerated depreciation costs across the various portfolios.⁴⁵

In the final decisions of both dockets, the Commission ultimately concluded that the back-end of the planning period should be ignored entirely for purposes of comparing the portfolios. Xcel's blatant attempt to bias the decision in favor of the CEP by creating an unfair comparison of imaginary resources far off into the future was recognized for what it was—a meaningless accounting deception.⁴⁶

By participating in two proceedings and bringing to light discoveries that otherwise would not have been provided, the Coalition of Ratepayers materially assisted the Commission and even identified \$87 million worth of modeling errors within Xcel's portfolios. But while the Coalition's work was significant, participation came at a price.

In the future, there may be opportunities to coordinate and share resources, strategies, attorneys and experts with similar groups in other states. This will help lessen the overall costs and accomplish more with the same resources. The Coalition of Ratepayers is also exploring options for recovery of attorney fees and costs which would make continued work in this area more feasible.

Conclusion

First established in the early twentieth century, regulated energy markets guaranteed market share for power providers in exchange for guaranteed energy delivery. While this exchange once promised reliable power at a reasonable cost, the actual result is less reliable and more costly energy at the expense of a captive ratepayer base. Not surprisingly, regulated electricity providers have learned to increase their profits by encouraging new capital projects, even when no new energy resources are needed. By prematurely closing functioning power plants, initiating new (and often unnecessary) building projects, and encouraging the replacement of hydrocarbon based assets with subsidized renewables, IOUs reap profits at their ratepayers' expense.

For some states, these issues proved big enough to dissolve the regulated market and enter into deregulated markets. Colorado has not. It remains a regulated electric state in which the Public Utilities Commission still oversees Colorado's electric utilities.

After years of battling Xcel through opinion editorial pieces and lengthy reports, the Independence Institute decided enough was enough and entered the fray by helping to create and join the Coalition of Ratepayers, which has intervened as an opposing party to the Rush Creek Wind Farm proceeding and the Colorado Energy Plan proceedings. The PUC approved the Rush Creek Wind Farm, but the Coalition gained credibility as a litigant because of its involvement in the case. This opened the door for it become an active party in the Colorado Energy Plan proceedings. Despite over 30 parties being involved, the Coalition was ultimately Xcel's chief adversary. It was the only party to present a serious

challenge to Xcel's outrageous claim that the CEP was a money-saving plan, and it challenged roughly half a billion in alleged cost savings that no other party seriously addressed. The Coalition's testimony and detailed discovery requests were critical to challenging the claims of Xcel. By testament of the Commissioners themselves, the Coalition of Ratepayers contributed much and was a key player.

The Commission issued the final ruling September 4, 2018. Two of the parties that the Coalition worked closely with have elected to further the challenge to the decision. The International Brotherhood of Electrical Workers, Local # 111 have filed an application for a rehearing, reargument, or reconsideration based on the Commission's failure to consider negative job impacts flowing from the premature closing Comanche Units 1 and 2. The Coalition has also joined with the International Rural Electric Association to challenge the Commission's decision to disregard the accelerated depreciation costs flowing from the early retirement of the two plants. The PUC has indicated it will deny these requests.

Hence, we conclude with a word of warning and advice for those interested in participating as a party in a utility proceeding. Organizations that are cost conscious or have limited budgets have to be willing to conduct preliminary research. We advise you to learn about your state's Public Utilities Commission. Organizations should know how Commissioners gain their seats (eg. are they elected or appointed) and find the Office of Consumer Counsel or the equivalent. If there is one, build working relationships with the staff because as an entrant, you will want allies. Last but not least, discover what issues the PUC is involved with that concerns your state's citizens. It sounds

By prematurely closing functioning power plants, initiating new (and often unnecessary) building projects, and encouraging the replacement of hydrocarbon based assets with subsidized renewables, IOUs reap profits at their ratepayers' expense.

Regulated utilities are green plating in order to line their shareholders' pockets at the expense of ratepayers.

obvious but owning the narrative and being successful depends on being in tune with small businesses, organizations, and individuals. Know what bothers them. Coalitions (and effective coalitions at that) form on both small and large issues. Being an active participant requires the intellectual appetite to learn about the issue citizens care about.

The regulated energy market is ripe for change. Regulated utilities are green plating in order to line their shareholders'

pockets at the expense of ratepayers. The adversaries are the utilities, but the avenue to stop them often leads directly to the Public Utilities Commission.

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⁴³ The use of out of state counsel requires special permission known as pro hac vice, which leads to additional costs for intervenors.

⁴⁴ See, e.g., Testimony of Gene Camp during Phase I hearing on February 9, 2017, Docket 16A-0939E, Tr. 141:15-22 (“...based on our testimony and the Company’s, the Coalition of Ratepayers, there is a modeling question before the Commission, too. I mean, that’s -- I think we spent a lot of time in this hearing talking about it already. I think the Commission is going to have to resolve how you model these. It’s not just -- the settlement doesn’t get down into the details of the model.”).

⁴⁵ Decision No. C18-0191, Docket No. 16A-0396E, Decision Allowing for Presentation of the Clean Energy Plan Portfolio in Phase II, Requiring Presentation of Additional Resource Portfolios, Specifying Additional Modeling Requirements and Establishing Other Requirements, March 22, 2018, pp. 18-37.

⁴⁶ Decision No. C18-0761, Sept. 10, 2018, ¶100 (“We agree with the Ratepayer Coalition and Staff regarding the flaws in the portfolio modeling in the later years of the Resource Planning Period. We

therefore focus primarily on the period before 2034, prior to the years relied upon to derive the \$213 million estimate of customer savings from the CEP Portfolio.”).

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