

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24D-0046EG

IN THE MATTER OF TRIAL STAFF OF THE COLORADO PUBLIC UTILITIES
COMMISSION'S PETITION FOR DECLARATORY ORDER REGARDING
APPLICABILITY OF C.R.S. § 40-3-114(2).

**COMMISSION DECISION NOT ACCEPTING PETITION
FOR DECLARATORY ORDER**

Mailed Date: February 22, 2024

Adopted Date: February 14, 2024

I. BY THE COMMISSION

A. Statement

1. By this Decision the Commission declines to accept the Petition for Declaratory Order (Petition) filed by Staff of the Colorado Public Utilities Commission (Staff) on January 23, 2024. While taking no position on the statutory language, Staff claims there could be a potential controversy regarding how legislative changes effective August 7, 2023, codified in § 40-3-114(2), C.R.S. (Section 2), apply in prohibiting electric and gas utilities from recovering certain costs from ratepayers through rates, riders, or other charges approved prior to the effective date of Senate Bill (SB) 23-291.

2. For the reasons discussed below, we find that there is no legal or factual controversy presented in Staff's pleading that underscores plain language of the statute that is consistent with longstanding prospective legislative and ratemaking directives. While Staff points out that the Commission, historically, did not approve the costs listed in Section 2, we

continue to encourage parties, including Staff, to raise testimony and evidence in rate case and other adjudicated proceedings brought by regulated utilities to address future rate implications arising from SB 23-291 directives. Further, in addition to adjudication applicable to specific utilities, rulemaking remains an appropriate forum to implement the prospective application of generally applicable rules regarding SB 23-291.

3. In our discretion under Rule 1304, 4 *Code of Colorado Regulations* (CCR) 723-1, we therefore find it appropriate not to accept Staff's Petition, as discussed below.

B. Background

4. Senate Bill 23-291, effective August 7, 2023, revised significant portions of Title 40. Through temporary rules enacted just after the bill became effective in August 2023, the Commission began implementation of SB 23-291 on a prospective basis, including through updated compliance reporting. The Commission further indicated that it would bring forward a rulemaking to fully implement the bill. In addition, adjudications and advice letter filings are underway to enable case-specific implementation as the bill applies to individual utilities.

5. Updates provided in § 40-3-114(2), C.R.S., include prohibitions on utilities from recovering certain costs - such as lobbying, political, and advertising expenses - from ratepayers "whether through proposed base rates, riders, or other charges."

6. While "taking no position," on January 23, 2024, Staff filed a request for declaratory order claiming that there could be two interpretations of the statute.

7. Staff's pleading requests that the Commission take up whether the statute should be read for all utilities as either of the following: (1) prohibiting costs listed in Section 2 proposed on or after August 7, 2023, based on the plain language of the statute, prospective nature of the statute, and concerns about unconstitutional retrospective legislation (Future

Prohibition); or (2) prohibiting recovery of costs listed in Section 2 on and after August 7, 2023, regardless of when the cost recovery was proposed (Immediate Prohibition).

8. Staff does not take a position on “the correct interpretation of the law,” nor does it cite support for its claimed controversy by including what entities might support Future or Immediate Prohibition.

9. Despite recognizing that legislation is prospective in nature, and that statutory interpretation only reaches the intent of the legislature if the plain language is ambiguous, Staff presents these two options and asks that the Commission notice the proceeding to resolve the claimed issue. Staff states that if the Commission agrees with the Immediate Prohibition interpretation, it could address the matter “efficiently in a couple of different ways.” Staff claims these could include opening a proceeding to require utilities to establish deferred accounts to track prohibited cost recovery for purposes of a refund, or opening an investigation proceeding.

10. Staff does not include what costs or other amounts might be at issue for each affected utility if the Commission moves forward in a Declaratory Order process.

C. Findings and Conclusions

11. The Commission may entertain a petition for declaratory order to terminate a controversy or remove an uncertainty regarding any tariff, statute, or Commission rule, regulation, or order. Rule 4 CCR 723-1-1304(i)(II). If a petition meets those requirements, the Commission then exercises its discretion to accept or dismiss the petition. We find that Staff’s Petition does not raise a controversy or uncertainty best resolved through a Declaratory Order.

12. Article II, Section 11, of the Colorado Constitution generally prohibits retroactive application of law.¹ When interpreting statutes, the Commission looks “to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts” and applies “words and phrases in accordance with their plain and ordinary meaning” without adding or subtracting words.² Only where statutory language is ambiguous does the Commission review the canons of construction, including legislative history, legislative intent, and other interpretive means.³

13. Similar to prospective legislation, utility regulation has long-standing precedent that prohibits retroactive ratemaking. Ratemaking is a legislative function that the General Assembly has delegated to the PUC—accordingly, it is subject to the prohibition against retrospective legislation set forth in the Article 2, Section 11 of the Colorado Constitution. The Commission is expressly prohibited from engaging in retroactive ratemaking, and absent plain and explicit statutory authority, it would be extraordinary for the Commission to do so here.⁴

14. As Staff points out, in other areas of SB 23-291 where the legislature sought to remove certain costs from existing rates, the General Assembly saw fit to include explicit language. Staff’s Petition aptly points out that – not only does the plain language of Section 2 include the explicit word “proposed” base rates that underscores the plain reading that the statute

¹ “No ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation . . . shall be passed by the general assembly.” Colo. Const. art. II, § 11.

² Staff Petition at 6 (citing *Nieto v. Clark’s Mkt, Inc.*, 488 P.3d 1140, 1143 (Colo. 2021)).

³ *Id.* (citing § 2-4-203, C.R.S.)

⁴ *Colo. Office of Consumer Counsel v. Public Service Co. of Colorado*, 877 P.2d 867, 870 (Colo. 1994) (“In the context of utility regulation, a charge by a utility is retrospective and constitutionally prohibited if it is connected to the past performance of the utility”) (citing *Peoples Natural Gas v. Public Utils. Comm’n*, 590 P.2d 960 (Colo. 1979)).

is prospective – but also Section 2 does not include any language requiring immediate tariff filings to exclude previously approved cost recovery. SB 23-291 is presumed to be prospective,⁵ and expressly states that the bill “applies to conduct occurring on or after the applicable effective date....”⁶ As Staff states, where plain language is clear, there is no further analysis on the supposed intent or policy objectives being addressed. Where the plain language, prospective application, and ratemaking precedent is clear, the Commission should not consider presumed intentions under the canons of statutory construction.

15. Especially in reading the plain language, particularly without Staff taking a position or identifying where controversy arises, it is unclear that there is a true legal controversy appropriately resolved in a Declaratory Order.

16. It is also noteworthy that prior to SB 23-291, the Commission *already* excluded from rates many of the listed items added explicitly to be disallowed in the newly codified statute. It is uncertain that any substantive amounts would impact customer bills based on Staff’s pleading that presents no factual amounts potentially at issue, and where the Commission historically did not include as recoverable the costs listed in Section 2.

17. Indeed, factual discussion and presentation of evidence and argument for each utility is most appropriate in an adjudicatory context. If changes going forward are needed to specific utility recovery amounts, these can be appropriately raised with supporting testimony and arguments in rate case adjudications filed by regulated utilities. In addition, the Commission has already indicated that it will move forward with a rulemaking this year to fully implement SB 23-291. Particularly given the plain language of the statute and Staff’s pleading here, we find

⁵ § 2-4-202, C.R.S.

⁶ Petition at 8-9 (citing SB 23-291§8).

that these ongoing and future adjudications, in addition to rule processes, appropriately address the necessary implementation of SB 23-291.

II. ORDER

A. The Commission Orders That:

1. The Petition for Declaratory Order (Petition) filed January 23, 2024, is not accepted, consistent with the discussion above.
2. The 20-day time period provided pursuant to § 40-6-116, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.
3. This Decision is effective upon its Mailed Date.

B. **ADOPTED IN COMMISSIONERS' WEEKLY MEETING February 14, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners