

Decision No. C24-0470

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22F-0263EG

OLSONS GREENHOUSES OF COLORADO, LLC,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**COMMISSION DECISION DENYING EXCEPTIONS TO
RECOMMENDED DECISION**

Issued Date: July 1, 2024

Adopted Date: June 5, 2024

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I. BY THE COMMISSION**A. Statement**

1. Through this Decision, the Commission denies the exceptions to Recommended Decision No. R24-0144 (“Recommended Decision” or “Decision”) filed on April 15, 2024, by Olson’s Greenhouses of Colorado, LLC (“Olson’s”).

B. Background**1. Procedural History**

2. Olson’s initiated this proceeding by filing a Complaint against Public Service Company of Colorado (“Public Service” or “the Company”) on June 10, 2022. The Commission, on June 15, 2022, referred the proceeding to Administrative Law Judge (“ALJ”) Conor F. Farley.

3. On January 9, 2023, Olson’s filed the direct testimony of Brandon Olson and David E. Dismuke, Ph.D. On February 14, 2023, Public Service filed the answer testimony of Ghassan S. Saroor and Steven W. Wishart. Olson’s filed the rebuttal testimony of Dr. Dismukes on March 10, 2023. On April 14, 2023, Olson’s filed a Notice of Waiver of the Statutory Deadline, Request to Reschedule Hearing, and Notice of Withdrawal of Motion to Compel. On April 21, 2023, through Decision No. R23-0255-I, the ALJ granted Olson’s request and the statutory deadline was waived.

4. On June 8, 2023, a hybrid hearing took place. Mr. Olson and Dr. Dismukes testified on behalf of Olson’s and Mr. Saroor and Mr. Wishart testified on behalf of Public Service. Exhibit Nos. 103, 104, 104C, 105, 106, 106C, 109, 110, 111, 202, 204, 205, 209–218, 222, 223, and 300 (and the exhibits listed on Hearing Exhibit 300) were admitted into the evidentiary record.

5. Olson's Complaint contained four claims against Public Service. The first two allegations were that the Company's interruptible service violated §§ 40-3-101(2)¹ and 40-4-101(1),² C.R.S., respectively. Third, Olson's alleged that the Company's gas service violated § 40-3-106(1).³ Olson's fourth claim sought a declaratory order from the Commission that an upgrade to the Company's NF-19 system to alleviate Olson's interruptions would be a system improvement, rather than a line extension. On March 11, 2024, the ALJ issued the Recommended Decision, in which all four of Olson's claims were denied.

2. Recommended Decision

6. The ALJ established that Olson's operates a greenhouse facility located at 11610 County Road 14 ½ in Fort Lupton, Colorado. This facility receives interruptible natural gas service from Public Service. Public service provides this service through a pipeline that connects upstream to the Company's NF-19 distribution system.⁴

7. Based on the applicable provisions contained in the Service Agreement between Olson's and Public Service,⁵ which is part of Public Service's Interruptible Gas Transportation Tariff, and the Company's COLO. PUC No. 6 Gas Tariff ("Gas Tariff"),⁶ the parties agreed service

¹ § 40-3-101(2), C.R.S., states: "Every public utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just, and reasonable."

² § 40-4-101(1), C.R.S., states: "Whenever the commission, after a hearing upon its own motion or upon complaint, finds that the rules, regulations, practices, equipment, facilities, or service of any public utility or the methods of manufacture, distribution, transmission, storage, or supply employed by it are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient rules, regulations, practices, equipment, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed and shall fix the same by its order, rule, or regulation."

³ § 40-3-106(1)(a), C.R.S., states: "[A] a public utility, as to rates, charges, service, or facilities, or in any other respect, shall not make or grant any preference or advantage to a corporation or person or subject a corporation or person to any prejudice or disadvantage. A public utility shall not establish or maintain any unreasonable difference as to rates, charges, service, facilities, or between localities or class of service. The commission may determine any question of fact arising under this section."

⁴ Recommended Decision at ¶ 31.

⁵ Hr. Ex. 202, Interruptible Gas Transportation Service Agreement, p. 1.

⁶ Hr. Ex. 103, Public Service Gas Tariff Index, at Sheet No. 31C.

to interruptible customers can be interrupted to maintain reliable service to “firm” gas customers.⁷ In exchange for this less reliable service, interruptible customers pay significantly reduced rates for their service as compared to firm customers (a rate reduction of approximately 60 percent).⁸

8. Olson’s began interruptible service in 2014 and was interrupted for the first time on February 14, 2021. Since then, Olson’s was interrupted seven times in January and February 2022, once in both November and December 2022, and five or six times in January and February 2023.⁹

9. Olson’s first two claims against Public Service were that the Company’s interruptible service violates §§ 40-3-101(2) and 40-4-101(1), C.R.S., respectively. Olson’s argument under these first two claims focused on “[i]nterruptible customers [being] entitled to reasonably reliable . . . and adequate facilities,” but within the context of interruptible service.¹⁰ Olson’s Witness Dr. Dismukes took the position that “[w]hen compared to the reliability responsibilities owed to firm customers, it can be said that a utility owes slightly reduced reliability responsibilities to interruptible customers.”¹¹

10. Additionally, Olson’s argued Public Service’s Service Agreement and Gas Tariff fail to meet the intent of Rule 4203 of the Rules Regulating Gas Utilities, 4 *Code of Colorado Regulations* (“CCR”) 723-4,¹² because they do not establish specific terms and conditions for interruptions and curtailments of service.¹³ Olson’s contended neither the Service Agreement nor

⁷ Recommended Decision at ¶ 35.

⁸ *Id.*

⁹ *Id.* at ¶ 40.

¹⁰ *Id.* at ¶ 50.

¹¹ *Id.* (citing Hr. Ex. 100, Direct Testimony of David E. Dismukes, p. 13:1–3).

¹² Commission Rule 4203(b) states: “In its tariff a utility shall establish specific terms and conditions for interruptions and curtailments of service. The utility shall establish, and adhere to, interruption and curtailment priorities for sales service and for transportation service by customer class. These priorities shall be consistent with the requirements of this rule.”

¹³ Recommended Decision at ¶ 51.

Gas Tariff state that interruptions can be caused by typical cold weather, and do not set forth temperatures at which interruptions will occur.¹⁴ Moreover, Olson’s argued Public Service (1) is filling up the capacity of its NF-19 system with firm customers and decreasing service to Olson’s, (2) is unable to provide any system planning information, and (3) still allocates capacity costs to Olsons’s despite interruptible customers having no claim on capacity.¹⁵

11. The ALJ found Olson’s did not carry its burden of proving its first two claims that the Company’s interruptible service violates §§ 40-3-101(2) and 40-4-101(1), C.R.S. The ALJ held that Public Service’s Gas Tariff and Service Agreement make clear several relevant points, including, among other things, (1) Olson’s service (as in interruptible customer) is subject to the availability of capacity in the Company’s pipeline system, (2) interruptible service can be interrupted at any time to “test, alter, modify, enlarge, or repair any facility or property comprise a part of its System,” or due to “lack of system capacity,” or “any other emergency situation,”¹⁶ and (3) the decision to interrupt service is at the “sole discretion” of Public Service.¹⁷ The ALJ further determined the evidence in the record established that Public Service interrupted Olson’s service in 2021–2022 to maintain safe and reliable service to its firm gas customers, which is permissible under the Gas Tariff and Service Agreement.¹⁸

12. Additionally, the ALJ held there was no evidence in the record of interruptions or disruptions to Public Service’s firm gas customers who are serviced by the NF-19 pipeline system.¹⁹ If there were interruptions to the Company’s firm gas customers, the ALJ continued, this could arguably be evidence that the Company’s equipment, facilities, or service is inadequate,

¹⁴ *Id.*

¹⁵ *Id.* at ¶ 52.

¹⁶ *Id.* at ¶ 58 (citing Hr. Ex. 103 at Sheet No. R13).

¹⁷ *Id.* (citing Hr. Ex. 103 at Sheet Nos. 31C, T15, T36).

¹⁸ *Id.*

¹⁹ *Id.* at ¶ 59.

especially if they were due to capacity constraints or inadequate system planning.²⁰ However, the ALJ concluded that interruptions of Olson's service are not evidence of inadequate equipment, facilities, or service because Olson's Service Agreement does not include any warranties of service (other than that Olson's service will not be interrupted as long as there is sufficient capacity).²¹ Therefore, the ALJ found Olson's had not carried its burden of proving that Public Service had not provided it with the service to which it is entitled under the Gas Tariff and Service Agreement.²²

13. Further, the ALJ found Olson's claim that the Gas Tariff and Service Agreement violate Commission Rule 4203(b) due to lack of specificity was unsupported.²³ The ALJ found Public Service's Gas Tariff complies with the Commission Rule because it has sufficiently specific terms and conditions for interruptions of service, as well as interruption and curtailment priorities for sales and transportation service by customer class.²⁴

14. The ALJ also found Olson's had not carried its burden with respect to its remaining allegations, including the allegation the Company was intentionally filling up the system with firm customers. Similarly, the ALJ held that Olson's did not sufficiently prove its allegations that Public Service failed to provide system planning information and allocated capacity costs to interruptible customers while giving them no claim on capacity.²⁵

15. Finally, the ALJ concluded that Olson's seven years of non-interrupted service, as an interruptible customer, may have created the expectation that interruptible customers are "entitled to reasonably reliable service."²⁶ However, the ALJ asserts that to agree with this would

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at ¶ 60.

²⁴ *Id.*

²⁵ *Id.* at ¶ 64.

²⁶ *Id.* at ¶ 66.

fundamentally change the terms of the deal it entered into with Public Service and the terms of interruptible service in the Gas Tariff that the Commission has determined are just and reasonable.²⁷

C. Olson's Exceptions to the Recommended Decision

16. On March 28, 2024, Olson's filed an Unopposed Motion for Extension of Time to File Exceptions, requesting an extension of two weeks. Through Decision No. C24-0205, issued on April 1, 2024, the Commission granted the motion and extended the time to file exceptions to April 15, 2024. Olson's filed Exceptions to the Recommended Decision on April 15, 2024.

17. On April 25, 2024, Public Service filed an Unopposed Motion for An Extension of Time to Respond to Exceptions, requesting an extension of time through May 13, 2024. Through Decision No. C24-0291-I, issued on May 1, 2024, the Commission granted the Company's motion and extended the time to file a response to exceptions to May 13, 2024. Public Service filed its Response to Exceptions Recommended Decision No. R24-0144 ("Response") on May 13, 2024.

18. In its exceptions, Olson's argues the Recommended Decision failed to apply the correct standard because it reviewed only whether the interruptions comply with the Company's tariff, and not whether the Company's facilities and service are reasonable.²⁸ Olson's states the Recommended Decision found in Public Service's favor for one main reason: it reviewed the Company's actions for tariff compliance, not whether the service was objectively reasonable and reliable.²⁹

19. Olson's acknowledges that interruptible customers can be interrupted, but contends the question for the Commission is whether the service and facilities provided to Olson's, as an

²⁷ *Id.*

²⁸ Olson's Exceptions, at p. 6.

²⁹ *Id.*

interruptible customer, are reasonable and reliable.³⁰ Olson's argues it is unreasonable for Public Service to interrupt Olson's during ordinary cold weather, more frequently and at higher temperatures, to allow for normal growth on the system.³¹ This demonstrates, according to Olson's, that the Company's facilities are not adequate to support increasing numbers of firm customers and reasonable interruptions.³²

20. Olson's states it does not dispute that the interruptions that have occurred thus far comply with the Company's tariff. However, it contends this does not mean the Company provides adequate facilities.³³ According to Olson's, it is not proper for the current situation to continue indefinitely, with continuing interruptions at higher temperatures, and demonstrates that Public Service's facilities are inadequate to support increasing numbers of firm customers and reasonable interruptions. Olson's argues that if the Company's system has a system constraint that requires the deterioration of service faced by Olson's in normal weather due to system growth, the system is not adequate, and the Commission should order Public Service to rectify the system constraint.³⁴

21. Additionally, Olson's contends the Recommended Decision appears to state that the Company's tariffs cannot be challenged in this case, and this ignores the provisions of § 40-4-101(1), C.R.S., which, Olson's argues, specifically allows a customer to challenge the adequacy of a utility's service and facilities.³⁵ Olson's asserts that it may properly challenge the sufficiency of the rules governing interruption as set forth in the tariff, and tariff compliance is not

³⁰ *Id.* at p. 8.

³¹ *Id.* at p. 9.

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at p. 9.

a defense if the rules and service are not reasonable.³⁶ Rather, Olson's contends, the statutory requirement for adequate facilities and service is independent of the tariff contents and trumps the tariff.³⁷

22. Olson's further argues it is not just or reasonable for the Company to use interruptible customers as a planning tool to accommodate increasing numbers of firm customers through regular interruptions, particularly without notice.³⁸ Olson's contends the Company's overly broad tariff language allows it to interrupt service at any time, for any reason, which is in direct conflict with the provision in § 40-3-101(2), C.R.S., that mandates utility service be adequate and reasonable.³⁹ Olson's reiterates its argument that this broad tariff language is in violation of Commission Rule 4203(b) because, among other things, it allows for interruptions whenever the Company desires and does not notify customers specifically why there would be an interruption.⁴⁰

D. Public Service's Response to Exceptions

23. Public Service contends the ALJ correctly found that Olson's failed to prove by a preponderance of the evidence that the Company violated any statute, Commission rule, or Company tariff in its provision of interruptible gas transportation service to Olson's.⁴¹ Accordingly, Public Service asks the Commission to affirm the Recommended Decision, which denied all four claims in Olson's Complaint, and deny the exceptions.

24. Public Service argues Olson's challenges to the Recommended Decision's findings for its first two claims are mistaken, and that the ALJ's findings were appropriate based on Olson's failure to adduce substantial evidence in the record that the Company violated

³⁶ *Id.* at p. 7.

³⁷ *Id.* at p. 5.

³⁸ *Id.* at p. 10.

³⁹ *Id.* at p. 11.

⁴⁰ *Id.* at p. 12.

⁴¹ Public Service's Response at p. 1.

§ 40-3-101(2) and § 40-4-101 C.R.S., or any of the Commission rules or tariffs, that could justify a finding that the Company was liable for the sought-after remedies of Claims 1 and 2.⁴²

25. Public Services alleges that, while the original complaint conceded that an analysis of the Company's tariffs was essential for the Commission's determination, Olson's exceptions now argue the ALJ applied an incorrect standard of law to deny Claims 1 and 2.⁴³ The new standard that Olson's urges the Commission to adopt, the Company continues, is that interruptible service must be "reasonably reliable," while completely ignoring the contractual terms of the Service Agreement (which states that service will be delivered on an interruptible basis).⁴⁴ Public Service further points out that neither statute Olson's relies upon requires that interruptible service be "reasonable reliable." The Company asserts Olson's is mistaken in adding this term to the statutory language, as the applicable statutes only require that its services to interruptible customer be "adequate" and "reasonable."⁴⁵

26. Additionally, Public Service disputes Olson's claim that the Recommended Decision focused on tariff compliance rather than addressing whether the service and facilities provided to Olson's was "reasonably reliable."⁴⁶ The Company argues the ALJ carefully analyzed and considered all of Olson's arguments claiming that its interruptible service was not reasonably reliable, which necessarily included consideration of the relevant Service agreement Gas Tariffs, and Interruptible Tariffs.⁴⁷

⁴² *Id.* at p. 10.

⁴³ *Id.* at p. 11.

⁴⁴ *Id.*

⁴⁵ *Id.* at pp. 12–13.

⁴⁶ *Id.* at p. 13.

⁴⁷ *Id.*

27. Public Service also argues Olson's assertion that §§ 40-3-101(2) and 40-4-101, C.R.S., are independent of tariff contents and trump the tariff misses the issue in this case.⁴⁸ The Company points out that both its Gas and Interruptible Tariff, which were in effect at times relevant to the Complaint, have been approved as just and reasonable by the Commission in contested and litigated rate cases.⁴⁹ Moreover, Public Service asserts Olson's misconstrues Colorado law regarding the role of tariffs, arguing instead that courts have established that tariffs have the effect of law, though they do not rise to the level of statutes.⁵⁰ As such, considering the Complaint in light of all the considerations in the case, Public Service contends the Recommended Decision properly concluded that Olson's failed to satisfy its burden of proving, by a preponderance of the evidence, that the Company violated either or both of the cited statutes.⁵¹

28. Public Service further argues the testimony of David E. Dismukes, upon which Olson's relies to prove Claims 1 and 2, failed to take into account the Service Agreement, applicable Gas Tariff, or the Interruptible Tariff.⁵² Public Service asserts Mr. Dismukes provided no credible evidence that the Company's gas distribution facilities serving Olson's are inadequate, but rather made conjectural and speculative statements regarding the adequacy of the system's capacity.⁵³ The Company points to its own witness, Mr. Wishart, who testified that the Company was able to provide reliable service to Olson's greenhouse in question 98.9 percent of the hours involved (in 2022), arguing that this fact demonstrates the sufficiency of the system's capacity to provide interruptible service.⁵⁴

⁴⁸ *Id.* at p. 14.

⁴⁹ *Id.*

⁵⁰ *Id.* (citing *Shoemaker v. Mountain State Tel. & Tel. Co.*, 559 P.2d 721, 723 (Colo. App. 1976); *US WEST Communications, Inc., v. City of Longmont*, 948, P.2d 509, 516–517 (Colo. 1997)).

⁵¹ *Id.* at pp. 15–16.

⁵² *Id.* at pp. 17–18.

⁵³ *Id.* at p. 18.

⁵⁴ *Id.*

E. Findings and Conclusions

29. Olson's first argues the Recommended Decision applied the incorrect standard because it reviewed only whether the interruptions comply with the Company's tariff, and not whether the Company's facilities and service to Olson's, as an interruptible customer, were reasonable. Olson's contends the ALJ's reasoning is flawed due to the reliance on tariff compliance, rather than on the service itself being reasonably reliable.

30. We find Olson's assertion that the Recommended Decision only reviewed the Company's practice for compliance with its tariff and did not evaluate the reasonableness of the Company's actual practices and rules to be unpersuasive. It is evident the ALJ evaluated the reasonableness of the Company's practices and rules, which necessarily includes the context provided by the applicable tariffs and agreements to which the parties are bound. While Olson's states that "[t]he statutory requirement for adequate facilities and service is independent of the tariff contents,"⁵⁵ it fails to recognize that, to properly evaluate the reasonableness of its service as an interruptible customer, the Company's Gas Tariff and Service Agreement are necessary considerations.

31. The ALJ concluded Olson's had not carried its burden of proving its claims that Public Service's interruptible service violated §§ 40-3-101(2) and 40-4-101(1), C.R.S. As part of the analysis, the ALJ referred to Public Service's Gas Tariff and Service Agreement, pointing out, among other things, it explicitly states that Olson's service is subject to the availability of capacity in the Company's pipeline system, and can be interrupted at any time to "test, alter, modify, enlarge, or repair any facility or property comprising a part of its System," or due to "lack of system

⁵⁵ Olson's Exceptions at p. 5.

capacity” or “any other emergency situation.”⁵⁶ The ALJ found Olson’s had not presented evidence disputing that Public Service had a permissible reason under the tariff for interrupting service each time an interruption occurred.⁵⁷ Moreover, these documents make clear that firm gas transportation service has priority over interruptible gas transportation service, meaning the interruptible customers’ service can be interrupted or curtailed to ensure safe and reliable service to firm transportation customers.

32. Second, Olson’s asserts the ALJ’s conclusion that the Company’s tariff is sufficiently specific pursuant to Commission Rule 4203(b) is mistaken because the tariff does not notify customers specifically why there would be an interruption and allows for interruptions whenever the Company desires.

33. We find the Recommended Decision’s analysis and conclusion on this issue was proper. Commission Rule 4203(b) states:

In its tariff a utility shall establish specific terms and conditions for interruptions and curtailments of service. The utility shall establish, and adhere to, interruption and curtailment priorities for sales service and for transportation service by customer class. These priorities shall be consistent with the requirements of this rule.

The ALJ, based on the excerpted tariff provisions outlined in the Recommended Decision, concluded the Company’s Gas Tariff complies the Commission Rule. The ALJ held it has sufficiently specific terms and conditions for interruptions of service and interruptions and curtailment priorities for service by customer class.

34. We agree with ALJ’s analysis. Among other things, the Company’s Gas Tariff states that the interruptions may occur due to “lack of capacity, or to test, alter, modify, enlarge, or repair any facility or property comprising a part of its System, otherwise related to the operation

⁵⁶ Recommended Decision at ¶ 58.

⁵⁷ *Id.*

thereof, or as emergency circumstances may warrant.⁵⁸ The Company's tariff also specifies the priority of service by customer class, stating that, "[u]nless conditions otherwise warrant, Firm Gas Transportation Service shall have priority over Interruptible Gas Transportation Service," and lists the priority of interruptions as (1) Imbalance Resolution Gas, (2) Interruptible, and (3) Firm Transportation Service.⁵⁹

35. We find the Recommended Decision applied the correct standard of review, properly considered Olson's Complaint in light of the Company's Service Agreement and Tariffs, and reasonably concluded that Olson's failed to bear its burden of proof in demonstrating that the Company's service or tariffs violated Colorado statutes or Commission rules. We therefore deny Olson's exceptions consistent with the discussion above and uphold the Recommended Decision.

36. On a final note, we expect the Company will continue to improve upon its communication processes and procedures to ensure that customers engaged in demand response programs are not surprised by interruptions in service.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Recommended Decision No. R24-0144, filed by Olson's Greenhouses of Colorado, LLC, on April 15, 2024, are denied consistent with the discussion above.

2. The 20-day time period provided by § 40-6-114, C.R.S., to file an Application for Rehearing, Reargument, or Reconsideration shall begin on the first day after the effective date of this Decision.

⁵⁸ *Id.* at ¶ 34 (citing Sheet No. T36).

⁵⁹ *Id.* (citing Hr. Ex. 103 at Sheet Nos. T36 and T37).

3. This Decision is effective upon its Issued Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 5, 2024.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads 'Rebecca E. White'.

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners

C.