Decision No. C14-0280

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13AL-0816E

IN THE MATTER OF ADVICE LETTER NO. 1644 FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO ADD LANGUAGE TO THE ELECTRIC COMMODITY ADJUSTMENT ("ECA") TARIFF IN THE COMPANY'S COLORADO PUC NO. 7 TO BECOME EFFECTIVE AUGUST 15, 2013.

COMMISSION DECISION DENYING EXCEPTIONS AND CLARIFYING THE RECOMMENDED DECISION

Mailed Date: March 13, 2014
Adopted Date: March 5, 2014

TABLE OF CONTENTS

I. BY THE COMMISSION 2
A. Statement 2
B. Background 2
C. Exceptions 6
1. Applicability of Rule 3402 6
a. Party Positions 6
b. Discussion, Findings, and Conclusions 8
2. Interest Recovery 11
a. Party Positions 11
b. Discussion, Findings, and Conclusions 12
II. ORDER 13
A. The Commission Orders That: 13
B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 5, 2012 13

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Decision No. R14-0026 (Recommended Decision) filed on January 29, 2014, by the Colorado Office of Consumer Counsel (OCC), and Climax Molybdenum Company and CF&I Steel LP, doing business as Evraz Rocky Mountain Steel (collectively, Joint Filers). The Joint Filers challenge the Recommended Decision that would permit Public Service Company of Colorado (Public Service or Company) to recover $26.2 million and interest, despite certain errors made by the Company. Public Service filed a response to exceptions on February 12, 2014, requesting the Commission deny the exceptions and uphold the Recommended Decision.

2. The Joint Filers request that the Commission: (a) reverse the determination in the Recommended Decision that the six-month billing statute of limitations under Rule 3402 of the Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3 does not apply to the error made by Public Service; (b) reject the determination in the Recommended Decision permitting Public Service to recover $104,000 in interest through the Electric Commodity Adjustment (ECA); and, (c) clarify and affirm that Public Service is barred from recovering interest based on the rate applicable to the Renewable Energy Standard Adjustment (RESA) deferred account balance.

3. We deny exceptions and clarify the Recommended Decision, consistent with the discussion below.

B. Background

4. On July 15, 2013, Public Service filed Advice Letter No. 1644, and the Commission referred the matter to an Administrative Law Judge (ALJ). The Staff of the

Colorado Public Utilities Commission (Staff) and Western Resource Advocates (WRA), in addition to the Joint Filers, intervened. An evidentiary hearing was held on December 10 and 11, 2013, and parties filed their Post Hearing Statements of Position on December 23, 2013.

5. The Joint Filers do not challenge the ALJ's factual determinations. Public Service recovers the costs of the eligible energy resources acquired for compliance with the Renewable Energy Standard (RES) established in § 40-2-124, C.R.S., from customers through two cost adjustment clauses: the RESA and the ECA. The net incremental cost of the acquired eligible energy resources are recorded in Public Service's RESA account, whereas the non-incremental portion, or avoided costs, of the acquired eligible energy resources are recorded in the ECA account.

6. During an internal audit of the RESA account in March 2012, Public Service discovered it had not used the correct factors when calculating the avoided cost amount to be transferred from the RESA to the ECA. Public Service failed to update the estimated avoided cost for the years 2010 through 2012 and instead applied the amount approved for 2009.[1]

7. This error resulted in overcharging approximately $26.2 million to the RESA account. In this proceeding, the Company requests to transfer the overcharged amount, $26.2 million, from the RESA deferred account to the ECA deferred account.

8. No party disputes that the $26.2 million were prudently incurred costs, consistent with the RES established in § 40-2-124, C.R.S. Further, parties agree that there was no malice on the part of Public Service for the error; all parties agree the error was not intentional and actions were taken to correct the error as soon as it was discovered by Public Service.[2]

[1] Recommended Decision, ¶ 20 (citing *Hearing Transcript*, p. 82: 13-20.
[2] *Id.*, ¶ 28.

9. The RESA deferred account accrues interest at the Company's after-tax Weighted Average Cost of Capital, which is approximately 7.7 percent. The interest applied to any balance in the ECA account is based upon a three-month commercial paper rate, which has been approximately 0.3 percent.

10. As the ALJ correctly points out, the issues presented in this matter "are only if the $26.2 million in avoided costs placed in the RESA deferred account rather than the ECA deferred account…should be treated as a billing error [pursuant to Rule 3402 and subject to its six-month billing limitations period] and what if any interest should accrue on the amount of any avoided costs to be transferred to the ECA."[3]

11. Parties disagreed on whether the error constitutes a "billing error" as contemplated in Rule 3402. In part, Rule 3402 provides:

> (a) A utility shall adjust customer charges for electricity incorrectly metered or billed as follows…
>
> > (IV) In the event of under-billings not provided for in subparagraph (a)(I) or (III) of this rule (such as, but not limited to, an incorrect multiplier, an incorrect register, or a billing error), the utility may charge for the period during which the under-billing occurred, with such period not to exceed six months.

12. Before the ALJ, the Joint Filers argued Rule 3402 should apply to Public Service's error. OCC claimed the "accounting errors led to billing errors" since 2010 by under-billing ratepayers for the ECA adjustments and overbilling the RESA adjustments.[4] Public Service, Staff, and WRA argued that Rule 3402 did not apply and that this rule was not intended

[3] *Id.*

[4] *OCC Post Hearing Statement of Position*, p. 2.

to encompass the type of error made by Public Service in this instance. In further support of this position, Staff points out the error had not yet "passed through" the billing system.[5]

13. In his Recommended Decision, the ALJ rejected the Joint Filers' position that this error was a "billing error" pursuant to Rule 3402. He stated that "[h]ad the model been updated the avoided costs would have been transferred to the ECA. The amount to bill ratepayers due to the 'Avoided Energy Cost' had been determined; ratepayers simply had not yet been billed."[6] He therefore determined this error was not a "billing error" for purposes of Rule 3402 and Public Service is entitled to full recovery of the $26.2 million through a sub-account within the ECA, to be recovered over a 12-month period.[7]

14. Parties also disagreed as to what interest should apply to the $26.2 million. Public Service advocated for a compromise interest rate between the ECA interest rate (0.3 percent) and the RESA interest rate (7.7 percent). Staff and WRA proposed application of the ECA interest rate to leave the Company and ratepayers in the same position as if no error had been made and the $26.2 million had been transferred to the ECA deferred account.

15. The ALJ determined the interest rate proposed by Public Service has no justification other than it falls between the RESA rate and ECA rate, and that Public Service failed to show that this rate is just and reasonable. The ALJ found persuasive Staff and WRA's arguments and agreed with their proposal to apply the interest rate associated with the ECA to the amount in error. He therefore recommended the Company be allowed to collect this interest amount, which he calculated at $104,000, through the ECA deferred account.

[5] *See* Recommended Decision, ¶ 36 (citing *Staff witness Dalton, Hearing Transcript,* p. 166: 4-9).
[6] Recommended Decision, ¶ 36.
[7] *Id.*, ¶ 38.

C. Exceptions

1. Applicability of Rule 3402

a. Party Positions

16. Through exceptions, Joint Filers request the Commission apply Rule 3402 to the error made by Public Service and thus disallow Public Service to recover approximately $9 million of the $26.2 million incorrectly allocated to the RESA account. Joint Filers argue the Commission must interpret its rules according to their plain language.[8] Joint Filers take the position that, because administrative rules should be read harmoniously, when Rule 3402(a) and Rule 3402(a)(IV) are interpreted together, the "only logical outcome" is that Rule 3402 should be applied to correct the Company's error.[9]

17. Joint Filers also describe Rule 3402's procedural history to support their interpretation. They cite Proceeding No. 03R-519E, the rulemaking proceeding in which Rule 3402 was promulgated, and cite the Commission's denial of Public Service's exceptions requesting that Rule 3402 be applied equally to both the utility and customers. In that proceeding, the Commission stated, "[b]ecause this rule serves as an incentive for a utility to properly monitor and maintain its equipment, and as an incentive for a utility to address metering and billing errors expediently, we deny the exception."[10] The Joint Filers further argue it does not matter whether the error was an "accounting error" or that the costs were prudently incurred;

[8] Exceptions, at 2 (citing *Regular Route Common Carrier Conference v. Pub. Utils. Comm'n*, 761 P.2d 737, 745-46 (Colo. 1988) (*rehearing denied*); *Russo v. Birrenkott*, 770 P.2d 1335, 1337 (Colo. App. 1988); *Van Pelt v. State Bd. for Community Colleges and Occupational Educ.*, 577 P.2d 765, 770 (Colo. 1975)).

[9] Exceptions, at 3.

[10] Exceptions, at 3-4 (citing Commission Decision No. C05-1081, ¶ 97).

they ask that the Commission apply Rule 3402 regardless of the situation for "incorrectly billed electricity."

18. Joint Filers also argue that $1.2 million of the $26.2 million are due to a "failed to reconcile actual billings for [purchase power agreements (PPAs)] with its estimates…." They argue this "clerical error" does not rise to the level of an "accounting error" and that the Company should bear its share of the burden of the cost under the provisions of Rule 3402.

19. Public Service opposes the Joint Filers' arguments. The Company argues that the overstatement of incremental costs of renewable resources recorded in the RESA deferred account is an "accounting error" and should not be treated as a "billing error" pursuant to Rule 3402. Public Service notes that the ALJ carefully considered arguments for both positions and ultimately agreed with Public Service, Staff, and WRA, when he did not apply Rule 3402.[11]

20. Public Service states that the ALJ rejected the Joint Filers' position that the facts of this case fall within the "plain language" of Rule 3402. Public Service also relies on rule history, explaining that "billing error" is not defined by Commission rule; however, "the predecessor of Rule 3402 clearly applied only to adjustments of bills for meter errors."[12] The Company argues that the adoption of Rule 3402 was an attempt to streamline the language of the previous rule. Further, Public Service contends that the error at issue could not have been contemplated when Rule 3402 was promulgated, because, at that time, there was "no RES statute, no RESA mechanism nor any RESA-ECA transfer procedure."[13]

[11] *See* Response, at 7.

[12] Response, at 10 (citing Rule 4 CCR 723-3-27, Adjustments of Bills for Meter Errors, 4 CCR 723-3 (2001).

[13] Response, at 11.

21. In addition, Public Service disagrees with the Joint Filers' assertion that approximately $1.2 million of the $26.2 million is a separate "clerical error." The Company argues the $1.2 million account for adjustments calculated after close of the operating year to reflect the actual Retail Jurisdiction Allocation and are tied to the amount prudently incurred from the acquisition of eligible energy resources. Public Service states this same argument was raised before the ALJ and rejected.

22. Public Service claims that case law and Commission rules support a finding of full recovery of these prudently incurred costs for reasonable purchase power expenses and other operating expenses related to the acquisition of eligible energy resources.[14] The Company notes that the Joint Filers do not address explicitly how the Commission should treat the $9 million they wish to disallow if exceptions are granted; Joint Filers are requesting the Commission to order only a compliance filing "that will implement rates in accordance with [Rule 3402]." Public Service argues that an inability to recover the $9 million and all accrued interest would violate Commission RES Rules, which allow recovery of all costs of implementing § 40-2-124, C.R.S., and the RES.[15]

b. Discussion, Findings, and Conclusions

23. At issue is whether the type of error that occurred here is a "billing error" within the meaning of Rule 3402 and, therefore, subject to a six-month limitation period. We agree with the ALJ and supplement his analysis to show Rule 3402 does not apply in the present situation.

[14] Response, at 13 (citing *Pub. Serv. Co. of Colo. v. Pub. Utils. Comm'n*, 644 P2d 933, 941-42; and Commission Rules 3660(a), 3660(f), 3660(j), and 3661(h)(VI)).

[15] Response, at 14-15 (citing Rules 3660(a) and 3661(c)).

24. Administrative regulation and rules are interpreted using the same principles as statutory interpretation. *Schlapp v. Colo. Dep't of Health Care Policy and Financing*, 284 P.3d 177, 180 (Colo. App. 2012). If the plain meaning of a rule or regulation is clear, resorting to linguistic rules or extrinsic aids is unnecessary. *People v. Andrews*, 871 P.2d 1199, 1201 (Colo. 1994). However, where the plain meaning of the language is unclear or ambiguous, consideration of extrinsic aids, such as history of enactment or structure of the regulations, are often considered. *See People v. Sowell*, --- P.3d ----, 2011 WL 915786, at *3 (Colo. App. 2011) (interpreting a statute in a manner consistent with its structure); *Kern v. Gebhardt*, 746 P.2d 1340, 1344, n. 1 (Colo. 1987). Provisions of a regulation are read together, interpreting the regulation as a whole. *Regular Route Common Carrier Conference v. Pub. Utils. Comm'n*, 761 P.2d 737, 746 (Colo. 1988). In addition, we interpret regulation so as not to conflict with the objective of the statute it implements. *Schlapp*, 284 P.3d, at 180.

25. A "billing error" for purposes of Rule 3402 is not defined by Commission rule. Thus, consideration of extrinsic aids to interpret and determine the applicability of Rule 3402 is necessary.

26. As stated in Rule 3400, Rule 3402 applies to "residential customers, small commercial customers and agricultural customers served pursuant to a utility's rates or tariffs….The utility may elect to apply the same or different terms and conditions of service to other customers." This language suggests that errors in the placement of costs impacting all of the utility's customers on a global basis, such as Public Service's incorrect assignment of the $26.2 million of avoided costs in the RESA account, is not within the scope of billing errors under Rule 3402.

27. As shown in Public Service's presentation of the history of the rule's enactment, Rule 3402 primarily addresses billing errors occurring from meter malfunctions and incorrect multipliers affecting individual customers. Current subsections 3402(a)(I) through (III) place limitations upon the utility's ability to recover undercharges due to the malfunctioning of "*a* meter," further indicating a Commission intent to apply Rule 3402 to individual billing matters and not system-wide cost and accounting issues.

28. Parties do not challenge that the $26.2 million in costs is prudently incurred to meet RES requirements, consistent with the Company's approved 2010, 2011, and 2012 RES Compliance Plans.[16] Recovery of costs related to eligible energy resources apply to all customers, not just residential, small commercial, and agricultural customers. Rule 3402 does not contemplate the billing of rates approved by the Commission on a system-wide basis, further indicating that this rule is not intended to apply in the present circumstances.

29. In addition, the public utilities law and Commission rules reflect Colorado's strong policy to allow recovery of prudently incurred costs to acquire eligible energy resources. Section 40-2-124, C.R.S., requires the Commission to revise or clarify rules to establish policies for the recovery of costs incurred with respect to the renewable energy standards.[17] "These policies must provide incentives to qualifying retail utilities to invest in eligible energy

[16] *See* Public Service Witness Kittel, Direct Testimony, p. 2: 15-19 (referencing Exhibit RLK-2); Public Service Witness Dalton, Answer Testimony, p. 7: 14-18, p. 8: 1-2; *see, also,* OCC Post Hearing Statement of Position, at 3-4 (arguing that, despite Rule 3660 applying, Public Service should not recover these prudently incurred costs).

[17] *See* §§ 40-2-124(1)(a) and (f), C.R.S.

resources…."[18] The Commission promulgated rules in Proceeding No. 05R-112E to implement the directives set forth in this statute. For example, Rule 3660(a) states in part:

> The investor owned QRU shall be entitled to timely cost recovery through retail rate mechanisms for *all* funds prudently expended to comply with these rules….The QRU shall be entitled to recover its investment and expenses associated with these rules through appropriate adjustment clauses, including the RESA, that allow recovery of expenditures without the full resetting of electric rates.
>
> (Emphasis added)

30. To apply Rule 3402 in a manner limiting Public Service's recovery of the costs at issue would not be consistent with Rule 3660(a) or the statutory policy objectives of providing incentives to invest in eligible energy resources. Though under some circumstances prudently incurred costs could be subject to the limitations in Rule 3402, not only were Public Service's costs prudently incurred, but also they were incurred for the specific purpose of meeting the statutory eligible energy resource standards.

31. We also agree with Public Service that the $1.2 million in costs resulting from the purchased power agreements should not be split from the $26.2 million of recoverable costs. These $1.2 million in costs were prudently incurred to acquire renewable energy resources, and their recovery is supported by the policies underlying § 40-2-124, C.R.S., and our rules.

2. Interest Recovery

a. Party Positions

32. Joint Filers argue that "[a]s a matter of fairness" the Company should not earn any interest from this mistake; therefore, they request that the Commission reverse the ALJ's determination to permit $104,000 of interest to be recovered through the ECA. Further, Joint Filers ask for two clarifications affirming the Recommended Decision, to make explicit:

[18] § 40-2-124(1)(f), C.R.S.

(a) that Public Service is barred from recovering interest based on the rate applicable to the RESA balance; and (b) that Public Service shall reduce the RESA deferred balance by an amount equal to all interest earned to date on the $26.2 million that the Company failed to transfer to the ECA deferred balance.

33. In response, Public Service states that the ALJ considered what interest would be "fair" for the Company to accrue on the monies at issue. Public Service argues that, denying all interest on the $26.2 million is "not only unfair, but it is also contrary to Commission Rule 3660(a) because it would not allow Public Service full recovery of our costs of acquiring eligible energy resources."[19] The Company has no objection to the requested clarification that all interest on the $26.2 million in the RESA account, to date, should be removed from that account.

b. Discussion, Findings, and Conclusions

34. The Commission agrees with the ALJ's calculation of interest to simulate the amount of interest that would have been accrued, but for the error. This methodology places customers and the Company in the same position as if no error had occurred. The Joint Filers' request to prohibit the Company from recovering any interest on the $26.2 million is denied.

35. As requested by Joint Filers, we affirm that Public Service may not recover interest on the $26.2 million in issue based on the rate applicable to the RESA balance. In addition, we clarify that Public Service shall reduce the RESA deferred balance by the amount of interest earned to date on the $26.2 million that the Company failed to transfer to the ECA deferred account.

[19] Response, at 17.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Recommended Decision No. R14-0026 filed on January 29, 2014, by the Colorado Office of Consumer Counsel, and Climax Molybdenum Company and CF&I Steel LP, doing business as Evraz Rocky Mountain Steel, are denied, consistent with the discussion above.

2. The 20-day period provided in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

3. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 5, 2014.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director