Decision No. R14-0560

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0555EG

COAL CREEK VILLAGE DEVELOPMENT, INC., DOING BUSINESS AS, COAL CREEK DEVELOPMENT, INC.,

COMPLAINANT,

V.

XCEL ENERGY, INC., DOING BUSINESS AS PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE PAUL C. GOMEZ GRANTING IN PART AND DENYING IN PART THE FORMAL COMPLAINT OF COAL CREEK VILLAGE DEVELOPMENT, INC.

Mailed Date: May 27, 2014

TABLE OF CONTENTS

I. STATEMENT

A. Background

1. On May 17, 2013, Coal Creek Village Development, Inc. (Coal Creek, Complainant, or CCVD) filed a Formal Complaint against Xcel Energy, Inc., doing business as Public Service Company of Colorado (Public Service, Company, or Respondent). The Formal Complaint generally alleges that Public Service has failed to reimburse to Coal Creek, the cost allowances and certain line extension costs permitted under Public Service's gas and electric tariffs regarding construction allowances, and that Public Service has refunded construction payments on terms and conditions which deviate from their policies as set forth in the Company's filed tariffs on line extension refunds.

2. On May 23, 2013, Commission Director Mr. Doug Dean issued correspondence to Public Service that included a Notice of Hearing which established a hearing date in this matter for July 3, 2013 and an Order to Satisfy and Answer, which required Public Service to respond to the Formal Complaint to either satisfy the matters in the Complaint or to answer the Complaint in writing within 20 days from the date of service on Public Service of that Order to Satisfy. Therefore, Public Service had until June 12, 2013 to respond to the Formal Complaint.

3. Public Service failed to respond to the Formal Complaint by the date established in the Order to Satisfy and Answer.

4. On June 14, 2013, Public Service filed its Motion to File and Serve Late Answer and for Waiver of Response Time (Motion). Despite the fact that the Motion was filed subsequent to the due date of the Answer, because the Motion was unopposed, it was granted in part by Interim Decision No. R13-0728-I on June 17, 2013, which extended the time to file the Answer to June 19, 2013.

5. Public Service filed its Answer within the second imposed deadline.

6. A pre-hearing conference was scheduled for July 15, 2013 by Interim Decision No. R13-0781-I, issued June 25, 2013. No procedural schedule was adopted at the pre-hearing conference because it was determined that a procedural schedule was premature due to a pending motion to dismiss Public Service intended to file.

7. On July 17, 2013, Public Service filed its Motion to Dismiss Select Claims for Relief, Alternative Motion for Judgment on the Pleadings, and Motion for Leave to Amend and Supplement Answer.

8. Given the timing of Public Service's filing, it was construed by Interim Decision No. R13-1198-I, issued on September 25, 2013, as a motion for judgment on the pleadings

pursuant to Colorado Rule of Civil Procedure 12(c). Public Service's argument that certain claims of the Complaint were better addressed in Public Service's consolidated gas and electric service and distribution extension tariff advice letter filing was granted, and as a result, Claims Four, Five, and Six were dismissed based on the finding that they were more appropriately addressed in Proceeding Nos. 13AL-0685G and 13AL-0695E.[1] The parties were also ordered to file a proposed procedural schedule within 14 days of the effective date of Interim Decision No. R13-1198-I.

9. On October 11, 2013, Interim Decision No. R13-1286-I adopted a procedural schedule proposed by the parties which among other things, proposed a date for an evidentiary hearing of January 23, 2014, with closing statements of position due February 3, 2014.

10. On October 24, 2013, Mr. Richard A Barton filed his direct testimony and exhibits on behalf of Complainant.

11. On November 22, 2013, Mr. Ted L. Niemi filed answer testimony and exhibits on behalf of Respondent.

12. On December 23, 2013, Mr. Barton filed rebuttal testimony and exhibits.

13. On January 16, 2014, Public Service filed various corrections to Mr. Niemi's testimony.

14. On January 23, 2014, the evidentiary hearing was held. Mr. Barton testified on behalf of Complainant. Mr. Niemi testified on behalf of Respondent. Hearing Exhibit Nos. 1 through 7 were offered and admitted into evidence.

[1] Complainant was granted intervenor status in those two consolidated proceedings by Interim Decision No. R13-1068-I, issued on August 28, 2013.

15. On February 3, 2014, the parties filed their respective Closing Statements of Position.

16. In addition, due to the confusion during the hearing over the number of meters placed within the subdivision at issue here, the parties were each ordered to file a list of the gas and electric meters each party represented had been set within the subdivision. Each party filed such a list with their respective Statements of Position. Complainant also submitted its copies of the electric line and gas distribution facilities extension agreements it entered into with Public Service.

17. Respondent also submitted an affidavit by Mr. Niemi offering an explanation regarding a check box contained within its electric line and gas main distribution extension agreements which Complainant testified was checked by a Public Service employee rather than by Complainant.

18. Pursuant to § 40-6-109, C.R.S., the Administrative Law Judge transmits to the Commission the record of this proceeding, this Recommended Decision containing findings of fact and conclusions therefore, as well as a recommended order.

II. FINDINGS OF FACT

A. Complainant's Allegations and Direct Case

19. As indicated *supra*, Complainant's Claims for Relief One, Two, Three, and Seven survived Public Service's Motion to Dismiss. The remaining claims were dismissed.

20. Complainant's First Claim for Relief basically asserts that although Public Service's tariffs require it to pay to developers, at a minimum, the construction allowances as set forth in the Electric Service Tariff PUC No. 7, Sheet No. R125 which is $1,090.00 per line, and $93.00 per gas main line and $448.00 per gas lateral pursuant to Gas Service Tariff PUC No. 6,

Sheet No. R49. However, Complainant states that it has not received reimbursement of the cost allowances permitted under the tariffs, much less any additional refunds. As a result, Complainant avers that Respondent has refunded construction payments on terms and conditions that deviate from Public Service's policies as set forth in its filed tariffs on line extension refunds.

21. Complainant's Second Claim for Relief asserts that Respondent has failed to refund Complainant, at a minimum, the construction allowances set forth in Electric Service Tariff Colorado PUC No. 7 and Natural Gas Service Tariff Colorado PUC No. 6 for each new lot developed. As a result, Complainant argues that pursuant to § 40-6-119(1), C.R.S., because it has not received, at a minimum, the construction allowance for each new lot developed, Complainant is entitled to reparations in this amount, plus interest.

22. Complainant's Third Claim for Relief states that because Respondent's gas and electric service tariffs do not provide for a means of truing up the actual costs of line extensions with the estimated costs, Respondent has failed to refund to Complainant the difference between the estimated and actual costs of line extensions in an amount to be determined at trial. Pursuant to § 40-6-119(1), C.R.S., Complainant is entitled to reparations equal to a refund in the amount of the difference between the estimated and actual costs of the line extensions, plus interest.

23. As a result, Complainant seeks the following relief: a) a finding that Respondent has violated its electric and natural gas line extension refund tariffs; b) an accounting of all of Complainant's construction payments held by Respondent, including the basis for and calculation of any refunds at Respondent's expense; c) ordering Respondent to make due reparations to Complainant, which have arisen from Respondent's failure to refund at a minimum the construction allowance provided under the line extension tariffs and other such amounts as

may be shown to be due upon trial of this action; d) ordering Respondent to make reparations to Complainant, which have arisen from charges in excess of the actual costs of line extensions; e) finding that Respondent has violated Colorado law by engaging in unlawful rate discrimination to the detriment of Complainant; f) ordering Respondent to make due refunds to Complainant in the amount of 100 percent of the construction payment made or such other amount as the Commission deems owed under law, plus interest; g) ordering Respondent to undertake an accounting of all amounts paid; and, h) all other relief that the Commission deems appropriate under the circumstances.

24. In his direct testimony on behalf of Coal Creek, Mr. Barton confirms that Public Service utilizes the Gross Embedded Investment Method (GEIM) to determine the credit due a developer as a result of a developer making a construction payment to Public Service for a gas or electric line extension. He defines the Construction Allowance (CA) as the amount Public Service pays for the line extension costs, with Public Service taking the position that the CA is established by GEIM and are both the same number.

25. Mr. Barton asserts that while the CA is a fixed number in Public Service's tariffs, the GEIM is not. Mr. Barton believes that Public Service's $1,090.00 amount for an electric Construction Allowance is an error, because in his estimation the GEIM is not fixed in Public Service's tariffs, Mr. Barton requests an independent verification of the GEIM with all of Public Service's electric distribution investments regarding the GEIM available for review.

26. By Mr. Barton's calculations the GEIM per electric customer should be $2,957.00.[2] Mr. Barton alleges that Public Service's GEIM number of $1,090.00 appears to be "a play on the numbers" for Public Service's benefit. Mr. Barton maintains that Public Service is using $1,090.00 as the electric CA/GEIM without any backup information to justify the number. Mr. Barton testified at the evidentiary hearing that he believed it unfair to have a GEIM creating a CA when the GEIM number is incorrect.[3]

27. As for the gas CA, Mr. Barton asserts that the tariffs (in effect at the time of the filing of the Complaint) provide for a CA of $93.00 for the gas main line extensions, and $448.00 for the gas service laterals, which he alleges are unjust and unreasonable. It is Mr. Barton's contention that the GEIM for gas mains cannot be $93.00 per customer. He refers to Public Service witness Mr. Niemi's testimony in Consolidated Proceeding Nos. 13AL-0685G and 13AL-0695E in which Mr. Niemi stated that, "[t]he Construction Allowance calculated using the current EBITA approach is not consistent with existing policy directives."[4] Complainant asserts that the cost of the electric and gas line extensions in Coal Creek Village are $329,975.00 per electric meter, and $97,311.00 or $372.00 per gas meter for a total cost of $427,286.00 or $1,636.00 per home.

28. In his direct testimony, Mr. Barton characterizes a request for extension of Public Service's facilities to Coal Creek as a joint venture with Public Service, since Coal Creek is in essence developing new lots for new Public Service customers. As a result of that relationship,

[2] Complainant calculates Public Service's GEIM as of December 31, 2010 as its total electric plant investment of $9,853,170,000.00, with an electric distribution investment of $3,399,733,089.00 divided by 1,149,739 electric customers for a GEIM of $2,957.00 per customer. *See*, Testimony of Richard A. Barton, filed October 24, 2013, p.7, ll. 2-9.

[3] Hearing Transcript p.61: ll. 15-17.

[4] *Citing*, Direct Testimony of Mr. Ted Niemi, Consolidated Proceeding Nos. 13AL-0685G and 13AL-0695E, p. 43, ll. 10-12.

Public Service receives the benefit of new gas and electric customers on its gas and electric system in perpetuity according to Mr. Barton, while a developer, such as Coal Creek, builds the homes and sells them to Public Service's new customers. Mr. Barton notes that developers are required to put up 100 percent of the construction cost as a refundable cash security deposit, while Public Service has no speculation or risk associated with the extension of facilities. Mr. Barton asserts that there is not a clear, understandable, fairly administered process as to what triggers a refund of construction payments, how such a refund is calculated, when the refund is paid, and how much of the cash deposit remains subject to a refund at the end of each year.

29. Mr. Barton is of the opinion that the Construction Agreements with Public Service are contracts and Public Service has breached those contracts, and additionally has modified the terms and conditions of the executed Construction Agreements without providing Complainant with adequate notice regarding those modifications. Mr. Barton alleges that Public Service creates confusion between verbal representations its employees make and language contained in Construction Agreement documents, and that Public Service fails to disclose material facts and adds wording to its advantage in documents which deviates from current tariff language for the Company's benefit.

30. According to Mr. Barton, Public Service acts in an arbitrary and capricious manner in its application of its current extension policy. As evidence of that allegation, Mr. Barton compares the refund of approximately 22 percent of construction payments his company has received with another development company which he claims has received 100 percent of its construction payments as a refund from Public Service.

31. As further evidence of Public Service's arbitrary actions, Mr. Barton refers to a specific extension agreement, No. 64415, which is attached to Mr. Barton's direct testimony as

Exhibit No. RAB-9 which also includes a site plan. Associated with Exhibit No. RAB-10 is a summary of Public Service refunds for extension agreement No. 64415. Mr. Barton asserts that these exhibits demonstrate that the refunds received from Public Service, ranging from $26 to $540 per meter, were arbitrarily and capriciously refunded to Coal Creek.

32. By Mr. Barton's calculations, the amount of the cash refundable deposits from the 16 Construction Agreements he entered into with Public Service total $427,286.00. Of that amount, Public Service has refunded approximately $95,311.00 or 22 percent, with nearly 94 percent of 516 gas and electric meters installed, which Mr. Barton asserts is unjust and unreasonable. Exhibit No. RAB-1 attached to Mr. Barton's direct testimony represents that pursuant to the 16 extension agreements entered into with Public Service, there are a possible, 516 meters – 258 electric meters and 258 gas meters. However, Mr. Barton indicates that 16 units have not been built which represents 32 total meters. Consequently, Mr. Barton claims that of the total cash refundable deposits of $427,286.00, Public Service owes CCVD approximately $305,094.00 plus interest on the earned refunds from the date the refunds were due to Complainant.

33. Mr. Barton also refers to language contained in the gas and electric tariffs in effect at the time of the filing of the Complaint, and alleges that Public Service uses tariff language to its benefit and to the disadvantage of Mr. Barton. Regarding alleged inconsistencies between tariffs and the electric distribution extension agreement, Mr. Barton alleges that while the tariff language states that "the construction payment shall be refunded in part or in its entirety during a 10 year period commencing with the completion date," Paragraph 3(a) of the extension agreements with Complainant state that "said construction payment may be refunded to applicant in part or its entirety during a 10 year period commencing with the extension completion date."

Mr. Barton finds no support in the tariff language for the use of the permissive "may" in Public Service's electric distribution extension agreements.

34. Other allegations raised by Mr. Barton address the use by Public Service of certain check boxes in the extension agreements, while its tariffs make no provisions for such check boxes.[5] Mr. Barton further states that he declined to check the boxes in the Construction Agreements with Public Service; however, when Public Service provided the Construction Agreements to Mr. Barton, the box "2)" had been checked with the initials "RB" next to it. Mr. Barton represents that he did not check the boxes or affix his initials on the Construction Agreements next to the boxes. Mr. Barton attached his copies of the Construction Agreements to his direct testimony as Exhibit No. RAB-1 and Confidential Exhibit No. RAB-11.

35. Other allegations include Mr. Barton's assertion that while Public Service's electric tariff requires that the Construction Payment should be net of the CA, Mr. Barton did not receive those payments, in direct violation of Public Service's tariffs. According to Mr. Barton, Public Service acknowledged that it did not deduct the Construction Allowance from the

[5] According to Public Service's Electric Distribution Facilities Extension Agreements entered into with Complainant, Complainant must make one of two designations as follows:

3) (a) Said Construction Payment may be refundable to Applicant in part or in its entirety during a ten (10) year period commencing with the Extension Completion Date. Any possible refunds will be made in accordance with the terms and conditions of the Company's Service Connection and Distribution Line Extension Policy. This policy is on file with the Public Utilities Commission of the State of Colorado and is available for inspection. In no event will any refund exceed the Construction Payment nor will any refund be made after ten (10) years from the Extension Completion Date, as determined from the Company's records.

(b) In the alternative, the Applicant can directly pass through to purchasers of Applicant's property covered by this extension any costs associated with the extension.

(c) Applicant elects between 3(a) and 3(b) above as follows:

____1) Company shall collect participation charges caused by connections to the extension covered by this Agreement and refund those amounts to Applicant pursuant to 3(a) herein.

____2) Company shall not collect participation charges caused by connections to the extension covered by this Agreement. Applicant hereby represents that costs associated with this extension shall be collected directly by Applicant pursuant to 3(b) above.

construction costs in those agreements in Public Service's response to Complainant's Discovery Request No. CCVD 2-38.

36. At the evidentiary hearing on January 23, 2014, Mr. Barton testified that despite Public Service's previous statements that it did not owe Mr. Barton additional payments, Public Service provided to Coal Creek and its assigns on December 24, 2013 several checks identified as electric refunds for the Coal Creek Village development. The checks were dated December 19, 2013 and totaled $59,388.27. *See*, Hearing Exhibit No. 5. In addition, Hearing Exhibit No. 6 is a list of the various address locations within Coal Creek Village that coincide with the amounts of the checks. The spreadsheet contained in Hearing Exhibit No. 6 provides the addresses of the residences associated with the refunds; the date of the respective checks; the number of months Mr. Barton alleges it took Public Service to pay the refund; the amount of the CA; the amount paid by Public Service; service lateral offset; the cost of the third party contractor's work on the service lateral; what Complainant refers to as "Xcel's markup;" and the length of the service lateral and Complainant's estimate of the cost per foot of the service laterals.

37. Mr. Barton also took exception to Mr. Niemi's Hearing Exhibit No. 4, which is a corrected version of Mr. Niemi's Exhibit No. TLN-1 and cited the inconsistencies with the original Exhibit No. TLN-1 as further evidence of the problems he has encountered in getting consistent answers from Public Service. Mr. Barton testified that while the total number of gas and electric meters in Coal Creek Village identified by Mr. Niemi is 222 for each, in actuality, those numbers should reflect 258 gas and 258 electric meters in Coal Creek Village. Mr. Barton pointed out that Mr. Niemi's original TLN-1 indicated 258 electric meters and 258 gas meters. Mr. Barton notes another discrepancy in corrected TLN-1 in that there is no Filing 2 which

represents 11 homes which are unaccounted for by Public Service.[6] According to Mr. Barton, Filing 1 should include 183 homes; Filing 2 should include 11 homes; Filing 3 should include 36 homes; and Filing 4 should include 28 homes, for a total of 258 homes or a total of 516 combined gas and electric meters. However, corrected TLN-1 indicates only 222 gas and electric units for a total of 444 meters. Mr. Barton also notes that corrected TLN-1 varies from the original TLN-1 in the number of gas units. The original version of TLN-1 indicated 199 total gas units, while, as indicated above, corrected TLN-1 indicates 222 gas units.

38. Public Service also fails to follow its tariffs faithfully, picking and choosing which provisions to follow, according to Mr. Barton. He refers specifically to the Permanent and Indeterminate Service designations to support his allegations. Mr. Barton alleges that Public Service has designated 4 extension agreements as Permanent, while 12 Extension Agreements were designated as Indeterminate. Nonetheless, it is Mr. Barton's contention that Public Service treats all of the agreements as Indeterminate Service regardless of its original designation. As a result, Mr. Barton alleges that while the tariffs specifically provide that the Construction Payment should be net of the CA, Coal Creek did not receive this treatment which cost it "a lot of front side cash" in violation of the tariffs. Mr. Barton claims that Public Service admitted it failed to make the proper deduction in response to Complainant's Discovery Request CCVD2-38 (Exhibit RAB-13).

39. According to Mr. Barton, these discrepancies, along with the other issues he raised in the Complaint, including the derivation and true value of the GEIM create questions as to whether Public Service has accurately calculated the construction payment refunds due to

[6] Mr. Barton explained that the term "Filing" in Column E of corrected TLN-1 refers to the plat filings made by CCVD to the City and County of Denver. *See*, Transcript, p. 13 ll. 15-25 to p. 14, ll. 1-18.

Complainant. Mr. Barton requests as a result, that Public Service owes Complainant $331,593 as summarized in Exhibit No. RAB-18.

40. Pursuant to the First Claim for Relief contained in the Complaint, Mr. Barton alleges that Public Service has failed to comport with the language of its relevant tariffs, which resulted in Coal Creek not receiving reimbursement of the cost allowances permitted under the tariffs, much less any additional refunds. As a result, Mr. Barton alleges that Public Service has refunded construction payments on terms and conditions which deviate from the Company's policies set forth in its filed tariffs on line extension refunds, resulting in preferential treatment to certain developers. Mr. Barton further alleges that Coal Creek has been injured by Public Service's discriminatory application of its tariffs in an amount proved at trial.

41. Pursuant to the Second Claim for Relief, Mr. Barton alleges that at a minimum, Public Service has failed to refund to Coal Creek, the CAs set forth in Electric Service Tariff Colo. PUC No. 7 and Natural Gas Service Tariff Colo. PUC No. 6 for each new lot developed. As a result, pursuant to § 40-6-119(1), C.R.S., Coal Creek is entitled to reparations plus interest.

42. Pursuant to the Third Claim for Relief, Mr. Barton alleges that Public Service's tariffs fail to provide for a means of truing up the actual costs of line extensions with the estimated costs which results in excessive billing to developers. Specifically, Mr. Barton alleges that Public Service has failed to refund to Coal Creek, the difference between the estimated and actual costs of line extensions in an amount to be determined at trial. Pursuant to § 40-6-119(1), C.R.S., Mr. Barton alleges that Coal Creek is entitled to reparations plus interest.

43. Pursuant to the Seventh Claim for Relief, Mr. Barton alleges that Public Service has not provided Coal Creek with a clear accounting of deposits per line extension agreement. As a result, Mr. Barton seeks an order from the Commission requiring Public Service to pay the

amounts due and owing to Coal Creek for the gas and electric meters already in place at Coal Creek Village, along with appropriate reparations. Additionally, Mr. Barton seeks an accounting of all moneys held by Public Service under Coal Creek's line extension agreements; the amount of refunds due to Coal Creek, if any; the calculations upon which such determinations are made; and, the interest collected by Public Service on those moneys, if any.

B. Public Service's Position

44. Public Service, through the answer testimony of Mr. Niemi, represents that as of November 22, 2013, the CA amounts it owes to Mr. Barton were $41,844.01 for two electric extensions and $4,152.00 for three gas extensions for a total of $45,996.01. According to Mr. Niemi's answer testimony, Public Service considers these amounts pending because it does not have certainty as to which party these amounts are due. Mr. Niemi states that these remaining CA amounts will be awarded to Coal Creek or its assignees when Public Service receives notarized confirmation as to which funds are due which party.

45. Mr. Niemi further states that after these amounts are awarded, it is Public Service's position that no remaining funds including CAs or refunds are available under any of the 16 extension agreements since these extensions are fully encompassed within the Coal Creek Development, and as a result, no other customers will be able to request electric or gas service from those extensions.

46. According to Mr. Niemi, the remaining Construction Payments become non-refundable, placed in Public Service's plant-in-service as a contribution in aid of construction and Public Service will close the extensions. Mr. Niemi maintains that the reason there are outstanding CA awards in this situation is twofold. First, several CA awards were pending an annual review by the Company of the extensions to determine when permanent

meters have been set. Second, Public Service indicated that it was unclear as to the contractual status of the assignment agreements provided to it, and which entity was due amounts pending CAs under the extension agreements.

47. Mr. Niemi claims that Public Service was confused by the assignments of the Extension Agreement made by Coal Creek since some of them had been partially assigned back to Coal Creek. According to Mr. Niemi, those reassignments were not provided to Public Service as required by its tariffs. Mr. Niemi further claims that due to the lack of clarity in the wording of the reassignments, Public Service claims it does not know how to pay the remaining CAs under the current extension agreements. This is the reason Public Service requests a notarized document from Mr. Barton with clear directions as to whom Public Service should pay the outstanding CAs.

48. Mr. Niemi provides a detailed description of the process of contracting for construction service for electric and gas extensions in his answer testimony from Public Service's perspective. According to that description, the process is as follows:

A.) Applicant requests service;

B.) Public Service estimates the cost it will incur to provide extension;

C.) Extension Agreement executed that delineates the service costs to be incurred by each party;

D.) The investment made by Public Service is the Construction Allowance;

E.) The costs the Applicant will incur are defined as the Construction Payment.

The equation that results from that process, which Public Service characterizes as the cornerstone of the electric and gas extension policies, is as follows:

Total Construction Cost – Construction Allowance = Construction Payment

49. According to Mr. Niemi, Public Service invests up to the CA, which adds to plant in service once the extension is closed. The remainder of the Construction Payment, which is the amount paid by the applicant, adds to contribution in aid of construction once the extension is closed. Mr. Niemi's Exhibit TLN-4 attached to his answer testimony describes how Public Service's line extension tariff provisions apply generally to land developers such as Coal Creek.

50. The extension process above is further described in more detail by Mr. Niemi. In Step 1, the Applicant applies for service by an application for gas and electric service. Public Service then designates the service requested as permanent, indeterminate, or temporary as defined in Public Service's tariffs.[7] Typically, for land developers such as Coal Creek, Public Service indicates that it designates their electric and gas service as Indeterminate until homes or businesses are constructed and the permanent service meters are set. Mr. Niemi explains that Public Service designates land developer extension agreements as Indeterminate because development plans can change from the time the land developer enters into an extension agreement with Public Service to extend facilities and the completion of construction.

[7] Public Service Company of Colorado, Colorado PUC No. 7 Electric, Sheet No. R110 and Colorado PUC No. 6 Gas, Sheet No. R30, Distribution Extension Plans A, B, and C, in the General Provisions sections of the Electric and Gas Extension Policies (Niemi Exhibits TLN-5 and TLN-6).

51. Step 2 in the extension process is for Public Service to estimate the cost of extending service to each extension the applicant based on the information received from the application for gas and electric service. Mr. Niemi indicates that the Extension Agreement includes the entire construction cost for the distribution extension. For almost all permanent service extensions, and for all extensions for Indeterminate Service in accordance with the Plan B provisions of the Electric and Gas Extension Policies, the extension applicant is required to pay Public Service, as a Construction Payment, the entire estimated cost for distribution line or main extension facilities. Applicant and Public Service then sign the extension agreement and the applicant pays the construction costs as a construction payment and Public Service builds the distribution line of the main extension.

52. Next, Public Service builds a service lateral and sets meters to provide permanent electric or gas service.[8] According to Mr. Niemi, the costs of service laterals are not included in the construction cost in the extension agreements because the location, distance, and timing for each service lateral is not precisely known. Also, the entity which requests and pays for the service lateral may not be the same entity that entered into the extension agreement.

53. Mr. Niemi indicates that in this step, Public Service may reclassify Indeterminate extensions to Permanent extensions. Public Service estimates the construction costs of the service lateral and, if the load is reclassified as permanent service, Public Service applies the CA towards the cost of the service lateral. Mr. Niemi states that if the service lateral construction cost is less than the CA, Public Service installs the service lateral at no cost to the customer. However, if the service lateral construction cost is more than the CA, Public Service installs the

[8] A service lateral is an electric conductor or gas service pipe installed from the electric distribution line or gas main extension to the service meter dedicated to each customer.

service lateral and collects from the customer the difference as a non-refundable contribution in aid of construction.[9]

54. In the next step, the remainder of the total CA for electric service and the distribution portion of the CA for gas service is awarded to the entity that signed the extension agreement. Pursuant to Public Service's tariffs in effect at that time, the currently effective CAs are $1,090.00 for Residential General Service, $448.00 for the Service Lateral Portion, and $93.00 for the Distribution Main Portion applicable to Residential Gas Service, Schedule RG.

55. Mr. Niemi indicates that this process is repeated each time a new customer is directly connected to the extension during the Open Extension Period currently set in tariffs at ten years.

56. Mr. Niemi also addresses the use of the term "refund" by Mr. Barton, and takes issue with Mr. Barton's use of the term. Mr. Niemi takes the position that under the Electric and Gas Extension policies, the award of the CA, as an offset to the initial Construction Payment is different from a later refund of a portion of the earlier paid Construction Payment. Mr. Niemi explains that the purpose of a refund is to have those customers who benefit from an earlier extension pay their proportionate share for the extension as a Construction Payment. Mr. Niemi explains that there are differences between a pioneer extension and a land developer extension. A pioneer extension is an extension whereby the initial entity requesting service pays for an extension built along public rights-of-way that provide access for other entities other than the pioneer customer, so that any additional new customers requesting service from the extension must participate in that extension by signing an extension agreement and

[9] Mr. Niemi provides an illustration of a service lateral installation, as well as the construction costs associated with an installation, as well as the accounting entries he represents that Public Service makes as the result of an extension agreement.

paying Public Service the customer's allocated or apportioned share of the extension as a Construction Payment. Public Service then refunds the proportionate share of the Construction Payment to the pioneer. As for a land developer, it is typically the only entity responsible for the extension because the extension is built wholly within the subdivision and no other entities are able to attach to the extension paid by the land developer so no refunds are provided.

57. Mr. Niemi emphasizes that subdivision developers typically do not receive refunds as provided in Public Service's tariffs because the extension that Public Service builds is usually completely contained within the subdivision development and is designed to serve only those lots, homes, or buildings within that development, so there is usually no opportunity for another entity to pay a Construction Payment to participate in the extension within the development. Rather, Mr. Niemi indicates that refunds are made only in the limited circumstance where a later third party or other unrelated party applicant seeks to connect to a distribution extension already paid for by an earlier applicant within the ten-year Open Extension Period provided by the tariffs. Mr. Niemi goes on to state that Public Service takes a portion of the Construction Payment that is charged to a later applicant and refunds that portion to the earlier applicant. As a result, both applicants then share proportionally in the extension serving both of them.

58. Mr. Niemi states that when a refund is made to an applicant, the source of the funds for the refund is provided by a later applicant connecting to a common distribution extension. He also emphasizes that refunds are separate and distinct from the CAs applicable and awarded to all new applicants.

59. Explaining the ten-year extension period, Mr. Niemi states that a subdivision developer has ten years from the payment of the Construction Payment to actually complete construction within the subdivision, set meters, and earn CAs for each meter. Mr. Niemi concedes that the coinciding timeframe of ten years as the Open Extension Period for both the award of CAs to subdivision developers and for the refunds for later connections to an earlier distribution line or main extension has led to confusion.

60. Mr. Niemi takes issue with Mr. Barton's characterization of the Construction Payment as a deposit for electric and gas service. Rather, Mr. Niemi counters that Construction Payments for the extension provides Public Service with the funds to purchase and install electric and gas facilities.

61. Mr. Niemi also takes issue with Mr. Barton's assertions that Public Service owes Coal Creek refunds over and above what Public Service provided as a CA. Mr. Niemi points to Commission Decision No. C81-752 dated April 21, 1980 in Application Nos. 32602 and 32845 for the permanent service policy directives it follows regarding the cost responsibilities of land developers such as Coal Creek. Mr. Niemi emphasizes that the Commission there determined that: "[a]ppropriate refunds are to be made to the customer by the utility if any additional customer or customers are served off the extension during the first five year period that the extension is in operation." In addition, with regard to subdividers and developers in the indeterminate policy, the Commission determined that subdividers and developers are to pay to the utility, all costs of the extension as a refundable construction advance, and "[a]s customers of a permanent nature take service within the subdivision or development, the subdivider or developer will receive from the utility a refund equal to the gross embedded investment per customer for the type of customer connected." In addition, Mr. Niemi notes that the

indeterminate policy required any amounts which are not refunded are to become contributions in aid of construction.

62. While Mr. Niemi recognizes that there have been some changes to the tariffs over time to adjust CAs after rate cases, and increasing the Open Extension Period from five to ten years, he disputes Mr. Barton's claims that Public Service has been seeking to make substantial and significant changes to the extension policy by transferring as much responsibility as possible for the cost of line extension from Public Service to the developers. Rather, Mr. Niemi argues that while some changes have occurred to the tariffs over time, Public Service has not filed for any change to the fundamental directives provided by the Commission in Decision No. C81-752.

63. As for Mr. Barton's claims that Public Service acts arbitrarily in the administration of its tariff provisions regarding extensions, Mr. Niemi counters that those claims most likely arise from a lack of a working understanding of the tariff provisions, and frustration due to difficulties by Public Service in administering the current tariffs. Mr. Niemi states that the reason Mr. Barton received different CA amounts for each of the meters set in Extension Agreement No. 64415 is attributable to the difference in the service lateral cost for each of the meters. Because Mr. Barton was not the entity requesting the service lateral, a different entity, either the builder or owner has received a CA for the service lateral. As a result, Mr. Niemi contends that the CAs awarded to Mr. Barton will vary from property to property. Mr. Niemi goes on to state that had Mr. Barton been the entity requesting both the extension and service lateral, he would have received a consistent CA related to the meters set under Extension Agreement 66415.

64. Mr. Barton compared Coal Creek with another development known as Pecos Place for the argument that Public Service applies its Extension Policy in an inconsistent matter.

Mr. Niemi described what he felt were the differences between the two developments that resulted in different awards of CAs.

65. Mr. Niemi also disagrees with Mr. Barton's assertion that Public Service holds $223,747,359 in cash and has collected approximately $557,000,000 from developers. Mr. Niemi asserts that the Construction Payment paid by developers, as well as all applicants for extension of service is used to purchase and install utility plant. He emphasizes that Construction Payments are not held in cash as deposits earning interest.

66. Mr. Niemi disputes Mr. Barton's claim that an Extension Agreement creates a joint venture between the applicant and Public Service. Mr. Niemi asserts that signing an Extension Agreement does not create any type of business relationship, joint venture, or partnership between Public Service and the applicant.

67. In response to Mr. Barton's claims that Public Service refuses to provide any backup information regarding Public Service's calculation of the average gross embedded cost method, Mr. Niemi points out that those calculations, as well as all of the backup information used in those calculations were provided in the consolidated Extension Policy Proceeding in Exhibit TLN-6, which Mr. Niemi provided here as Exhibit TLN-8. Further, Mr. Niemi disputes Mr. Barton's claim that the GEIM is not a fixed number in Public Service's tariffs. Mr. Niemi notes that the CAs are calculated, filed, and approved by the Commission. According to Mr. Niemi, they are fixed amounts and revised from time-to-time subsequent to a rate case in accordance with Public Service's Electric and Gas Extension Policies.

68. Notably, regarding Mr. Barton's claim that Public Service has only provided an accounting for 182 meters while 526 meters have been set in Coal Creek, Mr. Niemi responds

that Public Service is not able to confirm, nor deny, that claim until a final review it was conducting was completed.

69. Addressing Mr. Barton's allegation that Public Service uses a "may-shall trick" regarding the difference between the language in the Extension Agreement and the tariff language, Mr. Niemi maintains that there is no trick. Rather, if refunds are due under the tariff, refunds shall be given in part or entirely as stated in Public Service's tariffs. However, Mr. Niemi explains that just because an applicant signs an Extension Agreement does not necessarily mean the extension will fall under the applicable refund tariff provisions. This is why the Extension Agreement states that applicant "may" be entitled to a refund.

C. Complainant's Rebuttal Testimony

70. In response to Mr. Niemi's testimony, CCVD raises several issues. Initially, CCVD notes that subsequent to the filing of Mr. Niemi's answer testimony, Public Service filed two advice letter filings which made major amendments to the language of its gas and electric extension tariffs.

71. CCVD also refers to Commission Staff audit questions submitted to Public Service on July 20, 2012 (Exhibit RAB-2) regarding the amount of deposits Public Service held in the refundable contractor account. Public Service responded that it was holding refundable Construction Payments of $232,747,359 (Exhibit RAB-14). CCVD counters that Public Service's answer is incorrect and the correct answer is that Public Service is not holding any refundable customer payment deposits since it has used all of the cash deposits to build the line extensions, including any refundable portions of the deposits.

72. Characterizing this information as a "new fact," Mr. Barton expresses concern that Public Service holds these deposits as a unilateral, unsupervised administrator creating a

conflict of interest which should have been disclosed to Coal Creek and its lenders before the Extension Agreements with Public Service were executed. Mr. Barton believes that these deposits should be treated as that term is defined pursuant to § 40-8.5-103(2), C.R.S. Mr. Barton believes that such treatment would resolve any conflict of interest issues.

73. Mr. Barton again raises concerns regarding a full accounting from Public Service of Coal Creek's Extension Agreements. While Public Service represented that it uses an electronic tracking system for all extensions, which provides comprehensive data, Mr. Barton complains that he has still not received a full accounting from Public Service with regard to the status of his 16 Extension Agreements with the Company.

74. Mr. Barton points out that while in its Answer, Public Service denied owing any reimbursement of cost allowances to Mr. Barton, Mr. Niemi admits in his answer testimony that Public Service owes Mr. Barton $45,996.01, which at the time of the filing of rebuttal testimony was still unpaid. According to Mr. Barton, Public Service represented that it was still conducting a review and analysis before any money could be released to Mr. Barton.

75. Mr. Barton again expresses his concern with the discrepancies associated with the correct number of meters set in Coal Creek. Comparing Complainant's Exhibit RAB-18 and Public Service's Exhibit TLN-1, there is a discrepancy of 59 gas meters placed in Coal Creek. According to Mr. Barton, Public Service's failure to account for 59 gas meters is an example of the issues he has experienced in trying to resolve what amount of payments Public Service specifically owes. Mr. Barton believes that this is part of Public Service's goal to transfer the cost of line extensions from Public Service to the developers.

76. Mr. Barton also alleges that Public Service has delayed payment of refunds in violation of its tariffs. He points to Exhibit RAB-22 in which he provides the date a certificate of

occupancy was issued for a unit in Coal Creek, versus the date Public Service paid a refund for the unit. Mr. Barton contends that it has taken from two to four years for Public Service to make the required refund to Mr. Barton.

77. Regarding the designation of Permanent Service or Indeterminate Service of the Extension Agreement at issue, Mr. Barton points out Mr. Niemi's answer testimony that four of the Extension Agreements should have been designated Indeterminate rather than Permanent. In response to a discovery request (Exhibit RAB-24) Public Service stated that since those agreements were designated as permanent, it offset the CA from the total Construction Costs as provided in its tariffs. However, Mr. Barton alleges that the Answer is not correct. Rather, Mr. Barton alleges that those four Extension Agreements, which contain 96 lots, were not given the CA credit for the 96 lots, requiring Coal Creek to pay Public Service 100 percent of the construction cost of the line extension, which was a benefit to Public Service of $103,966.34. Mr. Barton includes interest at 8 percent for a total error by Public Service of $202,428.00

78. Regarding service laterals, Mr. Barton again emphasizes that Coal Creek should not have to pay for service laterals that it does not request. However, Mr. Barton contends that by holding Coal Creek's deposits and determining the refunds to Coal Creek, Public Service has in effect had Coal Creek pay for all of the service laterals in Coal Creek Village. Mr. Barton asserts that the value of the service lateral offset is approximately $83,850 which Public Service is requiring Coal Creek to pay which is not just and reasonable.

79. Mr. Barton further alleges that Public Service unreasonably marks up the cost of the service laterals to his detriment. Mr. Barton states that Public Service subcontracts service lateral work to a third party contractor. Pursuant to discovery (*see*, RAB-30), Mr. Barton shows that Public Service refunded Coal Creek $137.46 for the CA for a specific unit in Coal Creek.

But according to Public Service's discovery response, it offset the CA of $720.00 by $582.54 which resulted in a refund to Coal Creek of $137.46. Mr. Barton goes on to provide that according to Public Service's discovery responses, the total cost for the service lateral in question was $117.60. Therefore, by Mr. Barton's calculations, Public Service marked up the service lateral $464.94.

80. Regarding the GEIM, Mr. Barton notes another discovery response by Public Service in which it indicates that the GEIM is irrelevant and that GEIM information does not exist for all years since 2004 (Exhibit RAB-36). Mr. Barton counters that the GEIM is a tariff requirement that any revisions to the CA be based on the appropriate GEIM included in that proceeding. Mr. Barton takes the position that it is a violation of the tariffs if the CAs were revised in 2005, 2010, and in the latest advice letter filings without the appropriate GEIM included in the proceedings. Mr. Barton also goes into some detail as to his position that the $1,090.00 GEIM is in error.

81. For example, Mr. Barton indicates that in 2005, Public Service's investment in electric distribution would have been $801,892,080 for a $720 GEIM. Public Service's investment in electric distribution in 2010 would have been $1,248,614,983 for a $1,090.00 GEIM. According to Mr. Barton, this means that Public Service had to invest $446,722,903 in electric distribution from 2005 to 2010 or an annual electric distribution investment of $89,344.581 for five consecutive years. Mr. Barton does not believe this is true. Mr. Barton believes that Public Service's GEIM numbers do not make sense.

82. At the conclusion of his rebuttal testimony, Mr. Barton, on behalf of CCVD, makes 17 specific claims for relief as follows:

1.) Require Public Service to furnish all backup calculations for the GEIM for 2005, 2010 and present, in order to allow Coal Creek experts an opportunity to review and comment on the true GEIM.

2.) Require Public Service to furnish gas GEIMs based on the appropriate gross distribution investment amounts for the gas Construction Allowances included in the current tariff proceedings.

3.) Order Public Service to refund the Construction Allowance offsets for the service laterals, in Coal Creek Village plus compound interest from the date the refunds were due to Coal Creek for all service laterals in Coal Creek Village not requested by Coal Creek.

4.) Establish that the relationship to the Construction Allowance main line and the service lateral should be delineated as 84.4 percent to the main line and 15.6 percent to the service lateral.

5.) An order from the Commission that the Construction Allowance refunds to CCVD are the Construction Allowances in the tariffs on the date of the refund.

6.) Order Public Service to provide to CCVD a full accounting of all the service lateral markups over the hard costs of the service laterals, refunding to CCVD all cash over the hard costs with a reasonable overhead plus compound interest from the date the refunds were due to CCVD.

7.) "CCVD requests an independent escrow agent be required for the existing refundable extension deposits."

8.) Order Public Service to pay CCVD 100 percent of the offsets for the service laterals, including compound interest from the date the offsets were due.

9.) CCVD proposes that the new gas Construction Allowances, if approved, apply retroactively for the years 2012 and 2013.

10.) Regarding Public Service's handling of the permanent agreements versus the indeterminate agreements, CCVD states that it should be awarded "these" funds from the date of the effort plus compound interest from the date of the Agreements.

11.) Pursuant to its RAB-18, CCVD requests refunds in the amounts stated in that exhibit (which appear to total $717,636).

12.) Require mediation to determine additional Construction Allowances available to CCVD and require Public Service to provide CCVD with cancelled checks showing Public Service's payments to CCVD to date.

13.) CCVD requests 8 percent compounded interest on all CCVD's deposits not refunded timely from the date the refund was due until paid, which CCVD proposes to be one year after the meter was set using a Certificate of Occupancy as the meter setting date.

14.) Order to pay Mr. Barton for this time which he estimates is over $100,000, which consists of two years of investigation.

15.) Hold Xcel [sic] accountable for its actions and require it to pay CCVD's expenses.

16.) Because CCVD loaned Public Service cash without CCVD's approval, Public Service saved on the cost of borrowing cash which CCVD determines to be 6.125 percent. Therefore, Public Service should be required to pay CCVD Xcel's average borrowing interest rate compounded for the use of CCVD cash.

17.) Award CCVD reparations for Public Service's actions adequate in size to make sure Public Service does not do this again.

III. ANALYSIS AND CONCLUSIONS

A. Jurisdiction

83. The Commission has jurisdiction over this Complaint pursuant to § 40-1-103(1)(a)(I), C.R.S., and § 40-3-102, C.R.S. Section 40-1-103(1)(a)(I) states as follows:

> The term "public utility," when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas

> corporation, electrical corporation, … operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title

Section 40-3-102, C.R.S., provides in relevant part that the power and authority is vested in the Commission and it is the Commission's duty to adopt rates, charges and regulations, as well as to govern and regulate all rates, charges, and tariffs of every public utility.. It is also within the Commission's power and authority to correct abuses and prevent unjust discrimination and extortions in the rates, charges, and tariffs of public utilities in Colorado.

84. Under that jurisdictional charge, the Commission must ensure that all rates are just and reasonable and non-discriminatory pursuant to § 40-3-101(1), C.R.S., which provides that:

> All charges made, demanded, or received by any public utility for any rate, fare, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded, or received for such rate, fare, product or commodity, or service is prohibited and declared unlawful.

85. As specifically related to complaints brought before the Commission, § 40-6-108(1)(a), C.R.S., provides that:

> Complaint may be made by the commission on its own motion or by any corporation, person, chamber of commerce, or board of trade, or by any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or by any body politic or municipal corporation by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

B. Burden of Proof

86. As the party bringing the Formal Complaint, Complainant bears the burden of proof with respect to the relief sought; and the burden of proof is by a preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 *Code of Colorado Regulations* 723-1-1500 of the Commission's Rules of Practice and Procedure. The evidence must be "substantial evidence," which the Colorado Supreme Court has defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)). The preponderance standard requires the finder of fact to determine whether the existence of a *contested fact* is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

C. Findings

87. The Commission, in Decision No. C81-752 in Consolidated Application Nos. 32602 and 32845, issued April 21, 1980 discussed the purpose of construction allowances related to line extensions. According to the Commission then, an extension policy by a utility is designed to set forth the maximum amount that a utility will invest in additional facilities in order to provide service before the utility requires any additional expense to be borne by the customer. The Commission substantiated that the issue to be determined by an extension policy is, the amount that reasonably can be invested in additional facilities without unduly burdening

the utility and its general body of ratepayers. The Commission explained that normally, of course, it is generally recognized that a public utility must extend its service at its own expense or investment in order to fulfill a reasonable request for service by a person otherwise entitled to demand service from the utility.

88. With regard to the reasonableness of the cost which an extension of service will entail, the Commission emphasized that it is not necessary that a particular extension of service immediately be profitable or that there be no unprofitable extensions. The criterion generally is whether the proposed extension will place an unreasonable burden upon the utility as a whole or its existing general body of ratepayers. Consequently, the Commission surmised that while a utility cannot fix the limits of a proposed extension which will yield an immediate profit, on the other hand it cannot be required to make unreasonable extensions. Thus, in between these two extremes a utility should be able to require of the proposed customer financial assistance in the necessary outlay in furnishing the service.

89. The allegations put forth by Complainant vary somewhat from the claims for relief contained in the Complaint, to Mr. Barton's direct testimony, to the rebuttal testimony. As indicated above, Mr. Barton's rebuttal testimony, in addition to offering rebuttal to Mr. Niemi's answer testimony, contained an additional 16 claims for relief in addition to presenting new testimony and evidence regarding the issues raised. While this form of testimony is typically proscribed, because Public Service chose not to seek to strike any of that testimony contained in Mr. Barton's rebuttal testimony, it will become a part of the record in this proceeding.

90. Despite the wide-ranging claims made by Mr. Barton, the relevant claims for relief can be distilled into a few substantive issues consistent with the Claims for Relief as enumerated in the Formal Complaint. Each one is discussed in turn below.

1. Alteration of Extension Agreements

a. Check Boxes

91. CCVD alleges that Public Service modified the line extension agreements entered into by Mr. Barton on behalf of CCVD without CCVD's permission. As described *supra* at Paragraph No. 34 and attendant footnote 5, Public Service's Extension Agreements contain check boxes which require an applicant to indicate, by checking the appropriate box, whether it chooses to have Public Service collect participation charges caused by connections to the extension covered by the Extension Agreement and refund those amounts to the applicant, or whether the applicant wishes that Public Service not collect participation charges and instead, applicant chooses to collect those participation charges. Mr. Barton testified that when he executed the 16 Extension Agreements, he refused to check either box.

92. Mr. Barton further testified that it later was determined that 13 of those Extension Agreements had boxes that were checked and in some instances, with Mr. Barton's initials placed alongside the checked box. This testimony was not refuted by Public Service.

93. CCVD provided copies of the Extension Agreements, including those with the boxes allegedly checked by Public Service personnel.[10] A review of the original Extension Agreements shows that the boxes on many of the agreements were checked and some contain the purported initials of Mr. Barton. Several concerns arise from that review. In at least one

[10] Because the Extension Agreements offered by CCVD were not the originals as required by the "Best Evidence Rule," Colorado Rule of Evidence (C.R.E.) 1002, which requires the original writing, the copies provided by CCVD were allowed to stand in evidence pursuant to C.R.E. 1004(3), which allows a copy of a writing to be admitted into evidence when the original is not obtainable because it is under the control of the party against whom offered. Nonetheless, Public Service was required to produce the originally executed Extension Agreements with CCVD along with its Closing Statement of Position. Public Service complied and produced the original Extension Agreements.

Agreement, the initials "BER" are placed next to the checked box; however, Mr. Barton's initials are "RAB." Further, it is apparent that the handwriting of the initials purported to be affixed by Mr. Barton do not remotely match Mr. Barton's signature on the same Extension Agreements. An expert in handwriting analysis is not necessary to make that assessment. Additionally, reviewing CCVD's copies of the original Extension Agreements shows that none of the boxes in those agreements are checked, while the checked boxes and initials appear in the original Extension Agreements provided by Public Service.

94. It can only be concluded that the boxes were checked and Mr. Barton's initials added by Public Service personnel subsequent to execution of the Extension Agreements. Mr. Barton concludes that this was performed by a Public Service employee. Notably, Mr. Niemi was not able to rebut that allegation and Public Service, while it offers an explanation,[11] concedes that it does not know the reason for the discrepancy.

95. Alteration of an agreement subsequent to its execution without notice to CCVD is an egregious act without justification. While Public Service indicates that it may contact applicants to discuss which box is appropriate to check when an applicant fails to indicate which option it chooses, this does not appear to be the case here. Public Service's improper alteration of those Extension Agreements will be taken into consideration in determining any relief granted here.

[11] According to a sworn affidavit of Mr. Niemi, on past occasions, should an extension agreement come in without a check in box 1 or box 2, a Public Service employee or agent would call the applicant and walk through the option set forth in each box and check the box on the extension agreement the applicant directed the agent to check.

b. May/Shall Issue

96. As discussed *supra*, CCVD alleges that Public Service's Extension Agreement language diverges from tariff language in that tariffs state that a "Construction Payment shall be refundable in part or in its entirety during a ten year period commencing with the extension completion date." However, Public Service's Extension Agreement provides that the "Construction Payment may be refundable to applicant in part or in its entirety during a ten year period commencing with the extension completion date." CCVD argues that the amended language in the Extension Agreement gives Public Service unilateral authority to determine CCVD's refunds which led to the filing of the Complaint, and constitutes arbitrary and capricious actions on the part of Public Service. CCVD inquires as to the controlling refund provisions that would apply to CCVD's refunds if the Extension Agreements do not fall under the applicable refund tariff provisions. CCVD takes the position that the language difference between Public Service's tariff and the Extension Agreement is a method for Public Service to avoid responsibility to comply with its tariff language.

97. Public Service attributes any confusion on the part of CCVD with the difference in definitions of a CA award and a refund as defined in Public Service's tariffs. Mr. Niemi offers that no trick in the language difference was intended as alleged by CCVD. Rather, should a refund be due under the tariff, refunds shall be given in part or in their entirety as provided by the tariff. Mr. Niemi contends that merely because an applicant signs an Extension Agreement does not mean that the extension will fall under the applicable refund tariff provisions. As a result, the language of the Extension Agreement provides that an applicant may be entitled to a refund. Nonetheless, Public Service asserts that the distinction has no financial impact on CCVD.

98. CCVD has not proven by a preponderance of the evidence that the difference in the language between the tariff and the Extension Agreements was perpetrated by Public Service to intentionally mislead applicants to Public Service's benefit. CCVD provides no evidence that the language difference provides Public Service with unilateral authority to determine CCVD's refunds or somehow constitutes an arbitrary or capricious act on the part of Public Service. At best, the claim indicates that it is reasonable to assume that some applicants may be confused by the difference in language between the tariff and the Extension Agreements. It is therefore recommended that Public Service amend the language of its Extension Agreement to provide a more understandable explanation of when a Construction Payment is refundable.

2. Amounts Owed to CCVD

99. Attached to Mr. Barton's rebuttal testimony as Exhibit RAB-18 is a list of the amounts CCVD claims it is owed by Public Service. According to that list, it is alleged that Public Service owes the following:

1.)	Amount Due Admitted by Xcel	$45,966
2.)	Additional Construction Allowances	$69,065
3.)	Difference Xcel and CCVD on Payments to Date	$38,497
4.)	Offsets – Xcel SL	$83,850
5.)	GEIM Errors – Electric	$73,485
6.)	Private Electric Service Laterals	$20,700
7.)	Total CCVD from Deposits	$331,593
8.)	Markups	$54,450

As well as any interest and reparations deemed appropriate by the Commission.

100. Public Service on the other hand argues that the numbers contained in Exhibit No. RAB-18 are based on outdated information, faulty calculations, and incorrect applications of Public Service's processes and Commission authorized tariffs. Public Service takes the position that the amounts contained in RAB-18 are not supported by a preponderance of the evidence.

c. Alleged Amounts Due Admitted by Public Service

101. Regarding CCVD's first line item – Amount due Admitted by Xcel – Public Service states that this amount was paid by Public Service in December 2013 after it received a notarized statement from CCVD and its assignees showing joint agreement as to which entity was owed CA awards and which extensions were due payments. In addition to the $45,966, Public Service represents that $13,422.23 was also awarded to CCVD's assignees based on an updated analysis conducted by Public Service, including meters set in 2013. Public Service notes that Mr. Barton testified that those amounts have been in fact paid.

102. Mr. Barton did testify that CCVD and its assigns received checks dated December 19, 2013 from Public Service for a total of $59,388.27, copies of which were provided pursuant to Hearing Exhibit No. 5. Therefore, it is found that this claim for reimbursement from Public Service has been made and settled.

d. Additional Construction Allowance

103. Regarding the second line item – Additional Construction Allowances – Public Service maintains that the data is derived by builder and filing number; however, Public Service tracks set meters by address and extension number. As a result, it could not verify the information on a line-by-line basis; however, Public Service does state that after the meeting with CCVD which was ordered to attempt to resolve the discrepancy in set meters between the

two parties, it is certain the two parties would agree that this number is inaccurate. Public Service contends that no additional CA are due except for a few meters.

104. It is found that CCVD has not met its burden of proof with regard to the Additional CA amount of $69,065 it claims Public Service owes to CCVD. Indeed, CCVD now claims that as a result of the post-hearing meeting between it and Public Service, it has revised this number downward to $59,621 in CAs which it believes Public Service owes CCVD. Public Service and CCVD agree that 254 meters either have been, or will be, set at Coal Creek Village and that Public Service has paid, or will pay CAs on 254 gas and 254 electric meters. Therefore, it is found that an accounting by Public Service is required to determine whether it now owes to CCVD any pending CA repayments. If it is found that any moneys are owed CCVD, interest will be added to that amount at a rate consistent with Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-3-3402(n)(II).

e. Alleged Differences Between Public Service and CCVD on Payments to Date

105. Regarding the third line item entitled Difference Xcel and CCVD on Payments to Date of $38,497, Public Service notes that as of the date of the filing of its Statement of Position, Public Service has paid to Coal Creek or its assigns a total of $181,027.44 which is reflected in Hearing Exhibit No. 4 – TLN-1 Corrected - at Column N. In addition, Public Service represents that it has provided to CCVD, a copy of every check issued to CCVD or its assigns on those extensions totaling this amount.

106. In his rebuttal testimony, Mr. Barton states that the refunds he believes are due CCVD are contained by line item in Exhibit RAB-18 attached to the rebuttal testimony. While his testimony generally describes his position as to why CCVD is owed those amounts, there is

no specific testimony related to and explaining each line item in any detail. At hearing, Mr. Barton did offer testimony as to those line items, but that testimony merely stated that he disagreed with Public Service regarding whether the payments made by Public Service satisfy the amounts CCVD believes is owed.

107. Again, this matter is to be included in the accounting Public Service will be ordered to provide regarding its reconciliation of all meters set by address, meters to be set, amounts paid by Public Service, and any amounts pending. To the extent any amounts pending are due, such amounts shall include interest accrued from the date such payments were required to be made pursuant to Public Service's Electric Service Tariff Colo. PUC No. 7 and Natural Gas Service Tariff Colo. PUC No. 6 pursuant to 4 CCR 723-3-3403(n)(II).

f. Electric Service Laterals Offsets

108. The fourth line item – Xcel Offsets-SL and the sixth line item – Private Electric Service Laterals, refer to what CCVD characterizes as privately installed, owned, and maintained service laterals. CCVD claims that Public Service admitted in the Consolidated Proceeding Nos. 13AL-0685G and 13AL-0695E that it imposed the obligations of paying for service laterals on the entity which requests the service lateral. CCVD contends that Public Service has continued to offset the cost of service laterals in the amount of $83,850.00 (258 units x $325) against CCVD's CA, and did not collect the cost of electric service laterals in Coal Creek Village from the entity requesting the service lateral for "administrative efficiency."

109. CCVD further claims that it is owed an additional $20,700 for private electric service laterals which were privately installed, owned, and maintained in approximately 92 units of Coal Creek Village. CCVD's position is that it should not pay for any service laterals that it did not request. Because CCVD claims that Public Service has no direct involvement with the

installation, ownership, or maintenance of these privately installed service laterals; consequently, CCVD takes the position that since service laterals are specifically excluded from all of its Extension Agreements with Public Service, and CCVD did not request any service laterals, Public Service should be required to refund those service lateral amounts of $83,850 and $20,700 offset against the CA made by CCVD at Coal Creek Village with appropriate interest.

110. Public Service counters that CCVD misconstrued its reference to "administrative efficiency" which is an inaccurate interpretation. Further, Public Service argues that pursuant to its tariff language, a permanent service customer will be allowed a free construction allowance equal to the embedded gross distribution investment per customer, and that the GEIM is to be calculated to include the service lateral from the distribution loop. Public Service further states that in Commission Decision No. C86-184, Case No. 5320 issued February 13, 1986, the rulemaking proceeding which approved the use of the GEIM, the Commission excluded from the calculation of distribution investment plant, meters and distribution substations, but it did not specifically exclude service lateral plant. Therefore, Public Service posits that the Commission meant to keep service lateral calculations in CAs. According to Public Service, this means that it was to invest, through the award of a CA, up to the gross embedded cost for the distribution and service lateral.

111. Public Service argues that to apply the CA as sought by CCVD would violate its tariffs and the Commission's directions. Public Service maintains that if it installed the service lateral at its cost for the builder and awarded the entire CA to the developer, Public Service would be investing in more than the average embedded cost, growth would not pay its own way, and the remainder of the existing customers would subsidize the extension with all other things being equal. However, if Public Service charged the builder for the service lateral and awarded

only the CA to the developer, Public Service would invest up to the CA, but the builder would have the same claim as CCVD, and the builder would receive a CA as required by Decision No. C81-752.

112. Public Service further asserts that the request by CCVD regarding the service lateral payments is unreasonable and unwarranted. Further, Public Service argues that CCVD has failed to establish that Public Service has violated any law, rule or Commission Decision, or that Public Service has failed to comply with its approved tariff. Public Service represents that it has resolved CCVD's concerns regarding service laterals on a going-forward basis by separating the CA for electric extensions in a manner similar to its gas extension in the consolidated tariff proceedings.

113. It is agreed that CCVD has not shown that Public Service has violated any law, rule or order, much less violated its tariffs regarding Public Service's award of CA on electric service laterals. While CCVD complains of the process of not separating the CA on electric extensions similar to gas extensions, it does not offer evidence of any tariff or statutory violations by Public Service regarding this issue. Therefore, this claim will be denied.

114. Further, CCVD argues that service laterals are specifically excluded from all of its extension contracts with Public Service. It is not clear if CCVD assumes that the installation of service laterals was excluded from those contracts, or if it is referring specifically to Paragraph 3(a)-(c) of those agreements. In order to resolve that ambiguity, it must be determined whether CCVD refers specifically to that portion of the extension agreement. If so, it is noted that in Mr. Barton's testimony regarding the allegation that Public Service marked the check boxes regarding participation charges caused by connections to the extension, after the agreement had been executed, Mr. Barton testified that he refused to check any of the boxes at

the time of execution. If in fact Mr. Barton refers to Paragraph 3(a)-(c) of the Extension Agreements for his allegation, he cannot claim that service laterals were excluded from the extension agreements, and represent that he refused to indicate his preference with regard to service lateral exclusions. Mr. Niemi testified that when an applicant does not check a box as required, a representative of Public Service typically contacts that applicant and discusses with them, which box the applicant chooses and then indicates that option by checking the appropriate box.

115. The ambiguity raised by CCVD's claim creates doubt that Public Service's practice of awarding CAs on electrical service laterals was not done in accordance with its tariffs. While CCVD complains of the practice, it has not shown that Public Service deviated from the terms of its electrical tariffs. Public Service's position that the Commission excluded from the calculation of distribution investment plant, meters and distribution substations, but it did not specifically exclude service lateral plant cannot be disputed; nor did CCVD dispute that claim. Consequently, it is found that CCVD has failed to meet its burden of proof with regard to its claim for $83,350.00 for service lateral offsets and $20,700 for private electric service laterals, and therefore, CCVD will not be awarded this amount.

g. Gross Embedded Investment Method

116. The fifth line item - GEIM Errors – Electric, argues that Public Service has periodically revised its gross embedded investment as a result of rate cases implemented since the initiation of the GEIM. However, because Public Service has established electric and gas gross embedded investments below the "true" gross embedded investment, Public Service benefits to the detriment to CCVD. As detailed above, CCVD alleges that it has repeatedly sought a valuation of the GEIM applied to Coal Creek Village from Public Service, but never

received it. CCVD further alleges that while Public Service calculated the gross embedded investment to be $720 in Proceeding No. 04S-164E as of December 31, 2001, it failed to revise the GEIM until August 1, 2005 in violation of Public Service's tariff language which provides that the gross embedded investment must be updated within 30 days of its adjustment pursuant to a rate case. Although CCVD requests payment of $73,485 for GEIM errors, in its Statement of Position, CCVD instead requests an accounting of the gross embedded investment value employed by Public Service with respect to the Coal Creek Village development.

117. Public Service takes issue with CCVD's allegations regarding the use of GEIM. Public Service maintains that CCVD has failed to comply with its Commission-approved tariffs and is therefore not entitled to any relief pursuant to § 40-6-108, C.R.S. Public Service also points out that at the evidentiary hearing, Mr. Barton testified that he does not disagree with gross embedded investment per customer, and in fact is of the opinion that it is a fair determination.[12]

118. Public Service further argues that while CCVD claims Public Service has refused to provide it with an explanation of the calculation of the gross embedded investment per customer, Mr. Niemi offered a narrative description of the most recent calculation of the CA in his Exhibit TLN-7 in Consolidated Proceeding Nos. 13AL-0685G and 13AL-0695E. That description and calculations were provided in this proceeding as TLN-8 to Mr. Niemi's answer testimony, Hearing Exhibit No. 3. Public Service states that similar GEIM information and calculations were also provided in a discovery response to CCVD, which showed the 2005 calculation of the CA on the electric side which was the last time it was updated before the 2010 revision.

[12] *See*, Hearing Transcript, p.37: ll.14-16.

119. Public Service also takes issue with CCVD's allegations that Public Service has not calculated the GEIM figure correctly and a third party should independently verify the calculations. Public Service asserts that Coal Creek has not established that Public Service has failed to comply with its Commission-approved tariffs and is therefore not entitled to any relief pursuant to § 40-6-108, C.R.S.

120. Public Service also addresses several other allegations made by CCVD regarding the GEIM. For instance, CCVD alleges that comparing portions of Exhibit TLN-7 in consolidated Proceeding Nos. 13AL-0685G and 13AL-0695E to Exhibit JCJ-1 from Public Service's last electric rate case shows that Public Service has somehow reduced (Mr. Barton uses the term "haircut") the GEIM.

121. According to Public Service, CCVD's allegation that it reduced its calculation of distribution investments to be used in the calculation of the CA is inaccurate.

122. Public Service argues that the numbers in Exhibit TLN-7 differ from Exhibit JCJ-1 because the TLN-7 numbers are only for distribution plant invested for residential customers, while the numbers used in Exhibit JCJ-1 are for total distribution plant investment for multiple customers. Public Service represents that contrary to CCVD's request, Public Service does not have the data or authority to update CA awards at this time.

123. In a review of CCVD's filed testimony and the testimony at hearing, it appears that the numbers Mr. Barton utilizes in his Exhibit RAB-38 (previously marked as Exhibit No. RAB-17) which he states are from Exhibit No. TLN-7 in Proceeding No. 13AL-685G to determine the gross embedded investment methodology and the CA and how those concepts are calculated are speculative and without adequate support. For example, during cross-examination, Mr. Barton admitted that his estimates of Public Service's residential

customers' monthly bills were determined by having a real estate agent that lives in Coal Creek Village conduct a survey of average monthly bills the agent and his clients have paid in Coal Creek Village.

124. Further, Mr. Barton admitted that he did not exclude the street lighting class from the residential class in his calculation of the GEIM related to the CA.[13] When asked whether he included residential demand customers in his calculation of the residential class number, Mr. Barton equivocated and answered "I don't think it does."[14] Mr. Barton was also unsure of whether the number he indicated in RAB-38 for commercial customers included Commercial Industrial Primary Customers.[15] Additionally, in reference to his Exhibit RAB-4 attached to his direct testimony, Mr. Barton explains that the line item entitled "Ron Benz's [sic] Discounted Cash Percentage" was obtained through an exhibit in a tariff hearing in 2010 where former Chairman Ron Binz used the number of 41.7, so Mr. Barton used that number for his purposes.[16]

125. As indicated above, the numbers used by Mr. Barton to calculate his version of the gross embedded investment per customer are unreliable. Pursuant to the preponderance of evidence standard, CCVD has failed to show that Public Service has somehow miscalculated the GEIM used in determining the CA. Therefore, it is found that CCVD has not met its burden of proof to establish by a preponderance of evidence that it is entitled to $73,485 for GEIM calculation errors committed by Public Service.

126. However, CCVD's allegation that while Public Service calculated the gross embedded investment to be $720 in Proceeding No. 04S-164E as of December 31, 2001, it failed

[13] Hearing Transcript, p. 3: ll.19-25.
[14] Hearing Transcript, p. 38: ll. 3-10.
[15] Hearing Transcript, p. 38: ll. 11-16.
[16] Hearing Transcript, p. 38: ll. 20-25 to p. 39: ll. 1-7.

to revise the GEIM until August 1, 2005 to reflect that amount, in violation of Public Service's tariff language, which provides that the gross embedded investment must be updated within 30 days of its adjustment pursuant to a rate case has merit. Public Service did not rebut this allegation. As a result, it appears that Public Service did not apply the correct CA to CCVD utilizing the GEIM of $720 from September 2003 through August 1, 2005.

127. Therefore, it will be ordered that Public Service provide a full accounting of the actual CA amounts based on the gross embedded investment of $720 from Proceeding No. 04S-164E which established the CA amount that should have been paid to CCVD within 30 days of the preceding rate case, going forward from September 2003 through August 1, 2005. If it is determined from that accounting that CCVD is owed any CA, that amount shall be paid to CCVD within 30 days of the effective date of a final Commission Decision in this proceeding plus interest from the date any amounts were accrued pursuant to Rule 3403(n)(II).

h. Markups

128. CCVD alleges that Public Service marked up its overhead for the installation of gas and electric laterals in Coal Creek Village approximately 200 to 300 percent of the actual costs of the materials and facilities used for service lateral installation. CCVD argues that a more reasonable amount should be 15 to 20 percent added to the hard costs of the service lateral is reasonable. CCVD claims the amount of those excessive markups is $54,450.00.

129. Public Service claims that it does not charge markups of the magnitude claimed by CCVD. Public Service states that as it provided in its discovery response to CCVD 4-10, the charge from its third party subcontractor does not include the costs of the materials supplied by Public Service, or Public Service's overhead with respect to those materials. Public Service

asserts that the costs it charges are legitimate costs associated with providing service lateral materials to its subcontractors.

130. Public Service also argues that CCVD, as stated in its Exhibit RAB-32, confuses the issue by estimating material costs which are identical to labor costs for Public Service's subcontractor, SiteWise. Public Service points out that the cost of materials has no direct correlation to labor costs.

131. The claim of unwarranted Public Service markups regarding service lateral installations is not grounded in law, regulations, or Public Service's tariffs. Rather, CCVD's assertions regarding markups is grounded in a belief by CCVD that the only reasonable markup is in the range of 15 percent to 20 percent added to the costs of service laterals, or approximately $15.00 to $20.00 for each service lateral. Mr. Barton expresses that this "seems" to be reasonable based on his experience. It is evident that this claim is not grounded in any statute or tariff violation by Public Service. It appears to be grounded solely in Mr. Barton's perception of what should be reasonable. Therefore, it is found that CCVD has failed to assert a legitimate claim regarding markups and as a result has not met its burden of proof here.

3. Reparations for Withholding of Construction Allowances

132. CCVD, referring to Hearing Exhibit No. 4, claims that for both gas and electric service, Extension Agreements with Public Service go back as far as September 2003 with corresponding distribution Construction Payment amounts made by CCVD to Public Service. Likewise, CAs that should have been paid to CCVD or its assigns during the last ten years were withheld by Public Service until recently when it began issuing checks to CCVD and its assigns, copies of which are shown in Hearing Exhibit No. 5. It is Mr. Barton's assertion that the filing of the Formal Complaint lead directly to Public Service refunding CCVD CA refunds of

$246,122.05 pursuant to § 40-6-119, C.R.S. CCVD seeks to be made whole for the untimely refunds which CCVD claims Public Service acknowledges are due and improperly withheld for extended period of time.

133. Specifically, CCVD seeks some form of reparation plus 8 percent compounded interest on all its deposits not refunded timely from the date the refund was due until paid, which CCVD proposes the due date to be one year after the meter was set using the Certificate of Occupancy as the meter setting date. Additionally, CCVD seeks "reparations for [Public Service's] action adequate in size to make sure [Public Service] does not do this again."[17]

134. CCVD claims that the Extension Agreement it entered into with Public Service creates a business relationship whereby new customers and approximately $684,216 in annual income were created for Public Service into perpetuity. CCVD goes on to claim that because rescission is not an option, CCVD should be awarded reparations for Public Service's action "adequate in size to make sure [Public Service] does not do this again.

135. Public Service argues that although CCVD seeks interest and reparations, its Exhibit RAB-18, in which CCVD purports to set out a summary of the amounts due it from Public Service does not quantify all of the various forms and amounts of interest and reparations CCVD has requested. Public Service provides that the request for reparations by CCVD are unreasonable and not supported by the evidence, nor are those requests justified by any proof put forward that Public Service has violated any law, Commission rule or regulation, or departed from its Commission-approved tariffs.

[17] Hearing Exhibit No. 2, Barton Rebuttal Testimony, p. 50, ll. 6-7.

136. CCVD's request for reparations is perplexing and vague. While CCVD states that it requests reparations for Public Service's refusal to make timely repayments to CCVD of CAs, it is unclear what that entails. In CCVD's Exhibit RAB-18, listed under the balance due to CCVD are various amounts which have been addressed above. Additionally, a line item entitled "Total Due CCVD from Deposits" lists the amount of $331,593. However, it is not clear whether this amount includes the reparations CCVD seeks. Below that entry in Exhibit RAB-18 is another entry which states "Plus Interest and Reparations." It can only be assumed that CCVD seeks some form of reparation beyond its other claims for relief. It also appears that CCVD intends that the specific amount of any reparations is to be determined by the undersigned Administrative Law Judge. To add confusion to this issue, while CCVD in one instance seems to define reparations as repayment to CCVD of the CA it contends were made in an untimely manner, in the other instance, it seems to state that reparations should be "in the form of interest on the amounts owed."[18]

137. CCVD seeks reparations pursuant to § 40-6-119, C.R.S. However, it is evident that CCVD seeks reparations as a punitive measure against Public Service for untimely repayments of CAs. A review of § 40-6-119, C.R.S., shows that its use as a punitive measure is not contemplated by the language of the statute. It has been determined that the purpose of the statute is to make reparation for an unreasonable charge to the extent of the excess. *Bonfils v. Public Utilities Commission*, 67 Colo. 563, 189 P. 775 (1920). Clearly, there is no punitive element contained in § 40-6-119, C.R.S.

[18] Post Hearing Statement of Position of Coal Creek Village Development, Inc. doing business as Coal Creek Development, Inc., p. 9.

138. Additionally, § 40-7-102(1), C.R.S., provides that should a person seek punitive damages against a utility for any acts or omissions, such an action must be brought before a court of competent jurisdiction for the award of exemplary damages. Consequently, to the extent CCVD seeks reparation in order to punish Public Service, this venue is improper for such a claim. As a result, that claim is denied.

4. Recovery of Fees and Costs

139. CCVD argues that Public Service should be required to pay CCVD's fees and costs for prosecuting the Complaint. CCVD takes the position that but for it bringing this Complaint, CCVD would not have been reimbursed the CA which it has received to date and which Public Service admits remains to be paid to CCVD for the Coal Creek Village development. Therefore, CCVD reasons, pursuant to § 40-6.5-105, C.R.S., it is entitled to recoup its expenses related to the prosecution of the Complaint, which it states is $131,745.

140. The award of attorney's fees and costs is governed by *Mountain States, Telephone & Telegraph v. Pub. Utils. Comm'n,* 576 P.2d 544 (Colo.1978). There, the Court held that pursuant to Article XXV of the Colorado Constitution and § 40-3-102, C.R.S., the Commission possesses broadly based authority to do whatever it deems necessary or convenient to accomplish the legislative functions delegated to it, including awarding attorney's fees and costs. The standards to be applied in determining whether to award attorney's fees or costs include: 1.) whether the representation of the Protestant-Intervenor and the expenses incurred relate to general consumer interest and not to a specific rate or preferential treatment of a particular class of ratepayers; 2.) the testimony, evidence, and exhibits introduced in the proceeding by the Protestant-Intervenor have, or will materially assist the Commission in fulfilling its statutory duty to determine just and reasonable rates; and, 3.) the fees and costs incurred for which

reimbursement is sought are reasonable charges for the service rendered on behalf of general consumer interest. *Id*. at 548.

141. It is found that CCVD has not met the three-prong test for an award of its costs and attorney's fees for prosecuting this Complaint. CCVD fails the first prong because the Complaint does not apply to the general body of ratepayers, but rather to CCVD's particular case. While CCVD argues that but for the Complaint it brought, Public Service would not have amended its line extension tariffs, there is no support for that claim. CCVD also fails the second prong requiring its participation to have materially assisted the Commission in its duty to determine just and reasonable rates. There is no evidence of such material assistance. Finally, CCVD fails the third prong in that it has provided no evidence that the significant fees and costs it seeks are reasonable under the circumstances. Consequently, CCVD's request for reimbursement of fees and costs is denied.

IV. CONCLUSIONS

142. While the evidence of record shows that Public Service administered its line extension tariffs poorly at times and its recordkeeping regarding CA payments and tracking when meters are lacking, CCVD has failed to show that Public Service acted intentionally in withholding CAs or manipulating its line extension process for its own gain.

143. CCVD brought numerous claims and requests for relief which varied somewhat from its direct case to its rebuttal case to its Closing Statement of Position as set out *supra*. However, as part of its Closing Statement of Position, it appears that CCVD attempted to

significantly narrow the relief it sought in this Complaint Proceeding. As stated in the Conclusion section of its Closing Statement of Position, CCVD represents as follows:

> What is left for resolution in this Proceeding is the refund of monies due to CCVD as [a] result of Public Service's mishandling of the line extension agreements entered into by CCVD for the extension of utility facilities to Coal Creek Village. CCVD has proven that Public Service has misapplied its own tariff language and improperly withheld refundable amounts from CCVD over an extended period of time. Public Service should be ordered to comply with its line extension tariffs, refund the amounts due, pay reparations for its prior actions and provide a full accounting to CCVD and [the] Commission. The appropriate resolution of this Complaint demands nothing less.

144. Harmonizing this claim for relief with the claims for relief stated in the Complaint, the above findings are summarized as follows.

145. Regarding the line items claiming amounts that are owed to CCVD, the line item Amounts Due Admitted by Public Service, it is found that Public Service made those payments to CCVD and its assigns on December 19, 2014 and therefore that issue has been resolved.

146. Regarding the line item, Additional Construction Allowances, while CCVD's claim for $69,065 is denied, its request for an accounting as to whether any outstanding CAs now exist based on 254 gas and 254 electric meters will be granted. This accounting will be based on the CA tariff language and will only assess whether any funds are owed CCVD.

147. Regarding the line item, Alleged Differences Between Public Service and CCVD on Payments to Date, this line overlaps the Additional Construction Allowances line item and will therefore be included in the accounting required by Public Service to determine with certainty whether any CA amounts are due to CCVD.

148. Regarding the Electric Service Lateral Offsets and Private Electric Service lateral line item, it is found that CCVD failed to meet its burden of proof and therefore its claims for those two items will be denied.

149. Regarding CCVD's claims in the line item GEIM Errors, it is found that CCVD failed to meet its burden of proof regarding this issue and therefore its claim for this item will be denied.

150. CCVD's claim for reimbursement for markups it claims Public Service applies to the installation of gas and service laterals under the Markup line item will also be denied.

151. Additionally, CCVD's request for reparations for the alleged withholding of CAs by Public Service is denied, as well as its request for recovery of its fees and costs in bringing this Complaint.

152. The accounting ordered in this proceeding will be provided by Public Service no later than 30 days from the effective date of this Decision. Such accounting will be provided to Complainant and to Commission Staff, which will review and verify the accounting report. The provision of the accounting by Public Service will not serve as an opportunity for CCVD to re-litigate any claims raised in this Complaint and ruled upon in this Decision. It will be Commission Staff's responsibility to ensure that the accounting report to be provided by Public Service is accurate and provides all necessary information to determine whether any further moneys are owed to CCVD pursuant to the Extension Agreements and Public Service's applicable tariffs at issue in this Complaint.

153. In accordance with § 40-6-109, C.R.S. it is recommended that the Commission enter the following order.

V. ORDER

A. It Is Ordered That:

1. The First Claim for Relief of the Complaint of Coal Creek Village Development, Inc., doing business as Coal Creek Development, Inc. is denied consistent with the discussion above.

2. The Second Claim for Relief of the Complaint of Coal Creek Village Development, Inc., doing business as Coal Creek Development, Inc. is granted in part and in part denied consistent with the discussion above.

3. The Third Claim for Relief of the Complaint of Coal Creek Village Development, Inc., doing business as Coal Creek Development, Inc. is denied consistent with the discussion above.

4. The Seventh Claim for Relief of the Complaint of Coal Creek Village Development, Inc., doing business as Coal Creek Development, Inc. is granted consistent with the discussion above.

5. Public Service Company of Colorado (Public Service) shall conduct an accounting of Coal Creek Development, Inc.'s account in order to determine whether any Construction Allowance amounts are due, consistent with the discussion above.

6. Public Service shall provide a report regarding the results of its accounting to Coal Creek Development, Inc. and to Commission Staff no later than 30 days after the effective date of this Decision.

7. Commission Staff shall, as a disinterested third party, review Public Service's accounting report to verify its accuracy regarding its line extension accounts with Coal Creek Development, Inc.

8. If it is determined after Public Service's accounting that any moneys are due and payable to Coal Creek Development, Inc., such moneys shall be payable with interest as described above, no later than 30 days after the filing of Public Service's accounting report.

9. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

10. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the Decision is stayed by the Commission upon its own motion, the Recommended Decision shall become the Decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedures stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

11. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director