Decision No. C16-0707

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14M-0241EG

IN THE MATTER OF THE COMMISSION CONSIDERATION OF MULTI-YEAR RATE PLAN ADVICE LETTER FILINGS AND TARIFF SHEETS.

DECISION ADOPTING RECOMMENDED DECISION NO. R15-0202 WITHOUT MODIFICATION AND CLOSING PROCEEDING

Mailed Date: August 2, 2016
Adopted Date: June 15, 2016

TABLE OF CONTENTS

I. BY THE COMMISSION

A. Statement

1. By Interim Decision No. C14-0302, issued March 21, 2014, the Commission opened this proceeding to address a legal dispute that initially arose in Proceeding No. 12AL-1268G regarding the suspension of future rate increases proposed by Public Service Company of Colorado (Public Service or Company) in a Multi-Year Rate Plan (MYRP), as set out in the Company's proposed MYRP tariff. The legal dispute centered around whether the Commission may suspend the base rate increases proposed for 2014 and 2015 for a total of up to 210 days after these increases would otherwise go into effect (210 days after January 1, 2014 and January 1, 2015), or whether the Commission is limited to a single suspension period for all base rate increases set out in the MYRP tariff sheet (210 days after January 12, 2013).

2. Because the parties in that rate case disagreed on the interpretation of § 40-6-111(1)(b), C.R.S., other applicable statutes and Commission Rules as they all related

specifically to a proposed MYRP, we found it necessary to refer this matter to an Administrative Law Judge (ALJ) to address those legal disputes and provide recommendations based on the principles of statutory construction. We also directed the ALJ to consider whether the Commission should open a rulemaking to codify its ruling on the merits of those legal issues.

3. By Recommended Decision No. R15-0202 (Recommended Decision), issued March 4, 2015, ALJ Mana L. Jennings-Fader addressed these legal disputes and set out two declaratory rulings based on a statutory interpretation. First, the ALJ declared that a public utility has a statutory right to file an MYRP and, in its sole discretion, to determine the rates, terms, and conditions of the proposed MYRP. Second, the ALJ held that an MYRP has a single effective date that applies to the entire filing, that requires the Commission to suspend the entire MYRP tariff filing, in the event it elects to suspend the tariff for investigation and hearing, and that the suspension period commences on the proposed effective date of the entire MYRP tariff as indicated in the filing utility's Advice Letter. The ALJ also recommended that the Commission not open a rulemaking at this time.

4. By Decision No. C15-0257-I, issued March 20, 2015, the Commission stayed the Recommended Decision on the Commission's own motion, pursuant to Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1505(a) of the Commission Rules of Practice and Procedure, in order to take sufficient time to consider the ALJ's legal interpretations and policy recommendations.

5. Now, after reviewing the Recommended Decision and being fully advised in the matter, we uphold the ALJ's declaratory orders contained in her Recommended Decision.

II. ANALYSIS AND FINDINGS

A. Background

6. In a prior gas ratemaking proceeding, Public Service requested three separate rate increases in the form of a General Rate Schedule Adjustment for 2013, 2014, and 2015 pursuant to an MYRP tariff. A legal dispute arose regarding whether the Commission may suspend the base rate increases proposed for 2014 and 2015 for a total of up 210 days after these increases otherwise would go into effect (210 days after January 1, 2014 and January 1, 2015) or whether the Commission is limited to a single suspension period for all base rate increases set forth on the MYRP tariff sheet (210 days after January 12, 2013). The parties disagreed on the interpretation of § 40-6-111(1)(b), C.R.S., other statutes in Title 40, and applicable Commission Rules.

7. As indicated above, in Proceeding No. 12AL-1268G, the Commission concluded that a resolution of these legal issues would benefit the Commission, regulated utilities, ratepayers, and other stakeholders and opened this proceeding on its own motion to consider the matters. The declaratory order proceeding was referred to an ALJ to address the legal disputes and address whether the Commission should open a rulemaking proceeding to codify its rulings on the merits of the legal issues.[1]

8. Two sets of parties filed briefs in this Proceeding. The first set of parties, the "Utilities," includes Public Service, Atmos, Black Hills, RMNG, SourceGas, and CNG. The second set of parties, the "Joint Parties," includes Staff, OCC and Climax.

[1] In Decision No. C14-0302, the Commission also took administrative notice of, and made part of the record in Proceeding No. 14M-0241EG, the initial legal briefs and reply briefs on the MYRP issued filed in Proceeding No. 12AL-1268G. Additionally, Public Service, Climax Molybdenum Company (Climax), the Colorado Office of Consumer Counsel (OCC), and Commission Trial Staff (Staff) (the parties filing the briefs in Proceeding No. 12AL-1268G) were designated as necessary parties in this proceeding. Several other parties intervened in this proceeding: Atmos Energy Corporation (Atmos); Black Hills/Colorado Electric Utility Company, L.P. (Black Hills); Rocky Mountain Natural Gas LLC (RMNG); SourceGas Distribution LLC (SourceGas); and, Colorado Natural Gas, Inc. (CNG).

B. First Declaratory Ruling Regarding the Authority of a Public Utility to File a Multi-Year Rate Plan.

9. In her first declaratory ruling, the ALJ found that there was no dispute that a public utility has the authority to file an MYRP according to the plain language of §§ 40-3-104 and 40-6-111, C.R.S., which are the provisions that govern Colorado's file and suspend ratemaking process. The ALJ determined that these provisions make it clear that the utility commences ratemaking by making a filing that proposes new tariffs, changed tariffs, or both. In its sole discretion, the utility determines the content (*i.e.*, rates, terms, and conditions) of the proposed tariffs. There is no statutory provision that circumscribes this utility prerogative to file proposed tariffs with the content that the utility seeks to implement. There is no Commission rule that limits or restricts the content of the utility's proposed tariffs. Additionally, as the utility bears the burden of proof with respect to the proposed MYRP tariffs, it is appropriate and reasonable that the utility controls the content of the proposed tariffs.[2]

10. Based on that analysis, the ALJ's first declaratory ruling is: "a public utility has a statutory right to file an MYRP and, in its sole discretion, to determine the content (that is the rates, terms, and conditions) of the proposed MYRP."[3]

C. Second Declaratory Ruling Regarding Commission Authority to Suspend a Multi-Year Rate Plan for Investigation and Hearing

11. The ALJ determined that in making a declaratory ruling on this matter, the contested issue was whether the Commission must suspend for investigation and hearing, and

[2] The ALJ made this determination based on case law, including: *Glustrom v. Colorado Public Utilities Commission*, 280 P.3d 662, 669 (Colo. 2012); *Mountain States Legal Foundation v. Public Utilities Commission*, 197 Colo. 56, 59, 590 P.2d 495, 497 (1979) (internal citations and footnote omitted); *Public Service Company v. Public Utilities Commission*, 653 P.2d 1117, 1121 (Colo. 1982), *quoted with approval in Office of Consumer Counsel v. Public Utilities Commission*, 752 P.2d 1049, 1053 (Colo. 1988); *Colorado Municipal League v. Public Utilities Commission*, 197 Colo. 106, 116, 591 P.2d 577, 584 (1979); and, *Colorado Ute Electric Association, Inc. v. Public Utilities Commission*, 198 Colo. 534, 544, 602 P.2d 861, 868 (1979).

[3] Recommended Decision No. R15-0202 at ¶ 38.

then issue one Commission Decision on the entire MYRP tariff filing; or whether the Commission may suspend the proposed MYRP tariffs for investigation and hearing, hold separate hearings on any rates, terms, and conditions that have specific effective dates, and issue separate Commission Decisions following those individual hearings.

D. The Utilities' Position Regarding Commission Authority to Suspend a Multi-Year Rate Plan for Investigation and Hearing

12. The Utilities took the position that under the Colorado file and suspend ratemaking system, an MYRP tariff filing is a single filing that contains the rates, terms, and conditions for the MYRP and is a unified whole. The proposed tariff sheets that contain the MYRP have a single effective date, which is the date stated in the Advice Letter and shown on the bottom of each tariff sheet. As a result, the Commission suspends for investigation, must hold a single hearing on, and must issue a single administratively-final Commission decision on the entire MYRP tariff filing. The Utilities seek a declaratory ruling that, as a matter of law, if the Commission chooses to suspend an MYRP filing, the Commission must suspend for investigation the entire MYRP tariff filing, and hold a single hearing on the entire MYRP.

13. In order to arrive at their collective stance, the Utilities took the position that when it is necessary to interpret a statute, where a statute is capable of more than one interpretation, it must be construed in light of the apparent legislative intent and purpose. Among the guidelines to be considered are the ends the statute was designed to accomplish, and the consequences which would flow from an alternative construction. If separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, then we should adopt that construction which results in harmony rather than that which produces inconsistency. Two statutes concerning the same subject matter are to be read together to the extent possible so as to give effect to legislative intent.

Further, we are to presume that the Colorado Legislature (Legislature) intended a just and reasonable result when it enacted a statute.[4]

14. Applying those statutory principles, the Utilities made several arguments. First, the Utilities read § 40-6-111, C.R.S., sequentially to ascertain its full meaning. Beginning with subsection (1)(a), the Utilities note that this provision uses the term "tariff" when describing what the utility files to commence the ratemaking process. The Utilities argue that this must logically refer to the entire tariff filing made by the utility, whether the filing is a change in a single rate, term, or condition or an MYRP. That provision also establishes what a tariff filing contains (*i.e.*, "any new or changed" rate, term, condition) and what the Commission suspends (*i.e.*, the entire tariff as filed by the utility).

15. The Utilities maintain that § 40-6-111(1)(a), C.R.S., must be taken into account to understand the provisions of § 40-6-111(1)(b), C.R.S., which establishes the length of the suspension period and the consequences if the Commission does not issue a final decision within the suspension period as outlined. That provision provides in relevant part that pending the hearing and decision, such rate shall not go into effect during the 120-day suspension period, unless the Commission extends the suspension period for an additional period not to exceed 90 days.

16. When § 40-6-111(1), C.R.S., is read in its entirety, the Utilities argue that under subsection (1)(b), the phrase "[p]ending the hearing and decision thereon" refers back to the tariff filed by the utility and suspended by the Commission, and the word "such" refers back to the tariff filed by the utility and suspended by the Commission. In addition, this reading

[4] *Citing*, *Colorado-Ute Electric Association, Inc. v. Public Utilities Commission*, 760 P.2d 627, 685 (Colo. 1988) (*Colorado-Ute Electric Association*) (some internal citations omitted).

harmonizes the notice period in § 40-3-104, C.R.S., and the § 40-6-111(1)(b), C.R.S., phrase **"beyond the time when such [rate, term, or condition] would otherwise go into effect[.]"** Section 40-3-104(c)(I), C.R.S., states: Such notice shall be given "by filing with the [Commission] and keeping open for public inspection new schedules stating plainly the changes to be made in the schedules then in force and the time when the changes will go into effect." Both statutes refer to the effective date of the entire tariff as stated in the Advice Letter and on the tariff sheets filed by the utility and suspended by the Commission.

17. The Utilities maintain that this reading is consistent with, and is supported by §§ 40-6-111(2)(a)(I) and 40-6-111(2)(a)(III), C.R.S. Subsection 2(a)(I) provides that in making a finding based upon a hearing as to whether a public utility's rates are just and reasonable, the Commission may consider "any other factors that may affect the sufficiency or insufficiency of such rates … during the period the same may be in effect …" According to the Utilities, this provision authorizes the Commission, through a single hearing on a public utility's multi-year rate plan filing, to find that the utility's proposed rates are just, reasonable, and sufficient "during the period the same may be in effect." Thus, in a utility's multi-year rate plan filing, the Commission may determine that the utility's proposed rates for the first year of the multi-year rate plan are just, reasonable, and sufficient for that first year, that its proposed rates for the second year of the multi-year rate plan are just, reasonable, and sufficient for that second year, and so on and so forth.

18. Second, the Utilities take the position that the use of the singular in § 40-6-111(1), C.R.S., is not dispositive with respect to either what the Commission may suspend or the suspension period. Considering the principles of statutory construction, § 2-4-102, C.R.S., provides that "[t]he singular includes the plural, and the plural includes

the singular." Consequently, although § 40-6-111(1), C.R.S., uses the singular, the statute includes the plural. So, when the Commission suspends the MYRP tariff filing, the same suspension period applies to all of the MYRP rates, terms, and conditions and the Commission holds one hearing on the entire filing.

19. Third, the Utilities argue that the Commission's interpretation of its suspension authority as set out in its rules is consistent with the reading of § 40-6-111(1)(b), C.R.S., as requiring suspension of the entire proposed MYRP tariff for one hearing. The Utilities point to Rules 4 CCR 723-1-1210(a)(III) and 1210(a)(VII) as evidence that the Commission intended the references to the tariff effective date to refer back to the entire set of accompanying proposed tariff changes and to the Advice Letter filing.

20. Fourth, the Utilities contend that adopting an interpretation of § 40-6-111(1)(b), C.R.S., that permits the Commission to suspend each phased-in component of an MYRP tariff and to hold a separate hearing on each suspended phased-in component would be contrary to the principles of statutory interpretation. The Utilities argue that such an interpretation would lead to an absurd result such as each phased-in component would have a separate 210-day maximum suspension period commencing on the proposed effective date of the phased-in component. The Utilities also argue that such an interpretation would be antagonistic to other statutory provisions in that the 210-day maximum suspension period would be rendered meaningless, because the file and suspend ratemaking process would be applied to a tariff provision that had already gone into effect by operation of law on the effective date of the proposed tariff sheet. That interpretation would also be contrary to the legislative intent, as evidenced in § 40-6-111(1), C.R.S., to provide certainty as to when changes in rates, terms, and conditions become effective.

21. Fifth and finally, the Utilities state that under the existing file and suspend system, the Commission has the flexibility to hold hearings and to issue administratively-final Decisions on tariff filings after the suspension period expires under § 40-6-111(2)(a), C.R.S. So, if the Commission needs additional time to hear and to decide an MYRP tariff filing, it already has that authority. Consequently, the Commission does not need to adopt a new statutory interpretation of the statutes governing file and suspend ratemaking.

22. The Utilities address the public policy implications of their statutory interpretation by asserting that the public interest is served when a public utility is encouraged to file an MYRP so that the benefits of such a filing can be realized.[5] Treating an MYRP tariff as anything other than a single inseparable filing would be unsound public policy because such treatment would likely discourage the filing of MYRPs because there would be no timely review of the MYRP in total. Further, the Utilities posit that such treatment would deprive the utility and its customers of MYRP benefits and would increase the time and resources expended by the Commission, the filing utility, and the intervenors since there would be multiple and possibly duplicative hearings.

E. The Joint Parties' Position Regarding Commission Authority to Suspend a Multi-Year Rate Plan for Investigation and Hearing

23. The Joint Parties take the position that, under the file and suspend ratemaking system, an MYRP tariff filing, while a single filing in the sense that the utility submits one Advice Letter with accompanying proposed tariff sheets, is a collection of separate

[5] According to the Utilities, those benefits include certainty regarding Public Service's non-energy electric rates, which assists residential customers in budgeting for future rate changes. Additionally, MYRP filings allow existing businesses to plan their future utility costs with more certainty, and provides new businesses with information regarding current commercial electric rates and what those rates will be over the next two years. Further, the Utilities argue that an MYRP would result in lower regulatory expenses for both Public Service and the stakeholder groups concerned about electric rates.

proposed rates, terms, and conditions, some of which take effect years in the future. The Joint Parties also contend that § 40-6-111(1), C.R.S., does not restrict the Commission's authority to treat individual proposed rates, terms, and conditions as separate items for investigation and hearing even if the items are contained on a single tariff sheet.

24. The Joint Parties further state that the Commission's suspension authority commences at the time a new rate, term, or condition "would otherwise go into effect" pursuant to the language of § 40-6-111(1)(b), C.R.S., which is the stated future effective date of an individual rate, term, or condition within an MYRP tariff and is not the date the Commission orders the MYRP tariff suspended. According to the Joint Parties, that statute also provides the Commission with the authority to order a distinct suspension period for each proposed rate, term, or condition that has a specified future effective date, and as a result, the Commission has the discretion to suspend for investigation, to hold a separate hearing on, and to issue a separate decision on each MYRP proposed rate, term, or condition with a future effective date that is specific to the rate, term, or condition.

25. Based on those contentions, the Joint Parties seek a declaratory ruling that, as a matter of law, the Commission has the authority to suspend for investigation and hearing an MYRP rate, term, or condition with a future effective date specific to the rate, term, or condition and, thus, is not required to treat a utility's proposed MYRP tariff as having one effective date applicable to the entire filing.

26. The Joint Parties base their position on three separate arguments, two of which are based on statutory interpretation, and one argument based on public policy considerations.

27. Regarding the plain language of the statutes, the Joint Parties maintain that § 40-6-111(1)(b), C.R.S., reveals a consistent use of singular nouns such as "rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation." Because the statute refers to a single one-time change to a utility's rates, terms, or conditions of utility service, the Joint Parties believe it is clear that the Commission has the authority to suspend individual rates, terms, and conditions within an MYRP filing. Additionally, the Commission has broad discretion to determine whether to suspend the effective date of proposed rates, terms, and conditions, and such discretion is not limited by the suspension periods of § 40-6-111, C.R.S., but is vested solely with the Commission, which may choose to suspend rates as it deems necessary for investigative purposes. The Joint Parties assert that the fact that a utility submits three rates in one advice letter does not limit the Commission's discretion and there is no statutory provision that the Commission must consider all three rates contained in one MYRP at once.

28. Continuing their "plain language" argument, the Joint Parties take the position that the Commission suspension authority commences on the date a proposed individual rate, term, or condition "would otherwise go into effect," which is consistent with the relevant language of § 40-6-111(2)(a)(III), C.R.S. ("All such [rates, terms, and conditions] ... not so suspended, on the effective date thereof, ... shall go into effect[.]"). Additionally, if a rate, term, or condition has a unique and specific future effective date set out in the MYRP tariff, the 210-day suspension period is measured from that unique and specific future effective date. As a result, the Commission has the authority to suspend and to set for hearing an individual rate, term, or condition before it goes into effect by operation of law on the unique and specific future effective date contained in the MYRP tariff.

29. The Joint Parties conclude that § 40-6-111(1)(b), C.R.S., contains no language requiring the Commission to consider an MYRP tariff filing as a whole and at one time. Rather, the suspension period is designed to give the Commission adequate time within which to hold a "hearing concerning the propriety of such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation" § 40-6-111(1)(a), C.R.S. Accordingly, the Commission's authority to suspend each rate, term, and condition is discretionary. In the exercise of that discretion, the Commission may choose to set an entire MYRP tariff filing for hearing at one time or may choose to hold a series of hearings.

30. Concerning the Joint Parties' argument based on the statutory interpretation of the applicable statutes, the Joint Parties assert that the purpose of the file and suspend ratemaking process is to allow the Commission time to examine the utility's proposal in order to determine whether the Commission should approve, disapprove, or modify the proposal. The Joint Parties contend that the Commission has authority to suspend the rates, terms, and conditions with future effective dates 210 days after those rates, terms, and conditions are proposed to go into effect. This is because, according to the Joint Parties, the statutory suspension period applies to individual rates and not to rate filings as a whole, such as MYRP filings.

31. The Joint Parties believe that a better interpretation of § 40-6-111, C.R.S., is that the effective date of an MYRP rate, term, or condition is the date that the specific rate, term, or condition goes into effect or becomes operative for ratepayers, and the Commission may suspend a proposed rate, term, or condition based on its specific proposed effective date. The Joint Parties argue that this interpretation recognizes that the elements and components of an MYRP may go into effect at different times, and is consistent with the "would otherwise go into effect" language of § 40-6-111, C.R.S.

32. As a policy matter, the Joint Parties are of the opinion that it is the Commission's duty and obligation to assure that rates, terms, and conditions of utility service are just, reasonable, and not unduly discriminatory. In the exercise of that duty, the Commission serves the public interest. In carrying out its ratemaking duties and responsibilities, the Commission must have the authority to apply a separate suspension period to each proposed MYRP rate, term, or condition in order to protect ratepayers. If this were not the case, the Joint Parties contend that the Commission's ability to fully investigate the propriety of rates, terms, and conditions would be substantially diminished, to the detriment of the public interest.

33. The Joint Parties believe that their statutory interpretation neither restricts the ability of a utility to file an MYRP, nor dictates the content of a utility's MYRP tariff filing. The utility is able to file an MYRP as it sees fit. The Joint Parties point out that their statutory interpretation addresses only what the Commission may do when an MYRP is filed.

34. For these reasons, the Joint Parties ask that the Commission issue a declaratory ruling that, as a matter of law, if the Commission chooses to suspend an MYRP filing, the Commission may suspend for investigation and hearing an individual MYRP rate, term, or condition that has an effective date that is specific to it.

F. ALJ's Findings

35. The ALJ conducted her analysis utilizing the principles of statutory construction. In analyzing the plain language of the statute, she found the language of § 40-6-111, C.R.S., inconsistent in its use of singular and plural nouns. Additionally, she found that the statute contains, but fails to define, the key terms "effective date" and the time when a rate, term, or condition would otherwise go into effect. The ALJ found that in the context of an MYRP tariff filing, § 40-6-111, C.R.S., does not lend itself to a plain meaning of the statute analysis for

two principal reasons. First, the statutory language of § 40-6-111, C.R.S., is inconsistent in its use of singular and plural nouns. For example, § 40-6-111(1)(a), C.R.S., refers to "rate, ... charge, classification, ... practice, rule, or regulation," and § 40-6-111(2)(a)(I), C.R.S., refers to "rates, ... charges, classifications, ... practices, or rules[.]" Second, § 40-6-111, C.R.S., contains, but does not define, the key term "effective date" and "the time when [a rate, term, or condition] would otherwise go into effect[.]" The statutory language, according to the ALJ is critical to determining how the statute applies in the MYRP context, contains ambiguities, or is otherwise unclear, and can be interpreted or read in more than one way.

36. So, the ALJ found it appropriate to interpret § 40-6-111, C.R.S., in order to construe the ambiguous statutory language to determine which of the possible readings is the one intended by the General Assembly when it enacted the statute.[6]

1. ALJ's Use of Commission Rules to Define the Technical or Particular Meaning of Words

37. The ALJ first looked at the principle that "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, [are] construed accordingly." (See, Section 2-4-101, C.R.S.) The ALJ specifically referenced the Commission rules that contain technical or particular meaning that the Commission has given to important terms at issue. For example, Rule 4 CCR 723-1-1004(ii) defines "tariff" and explicitly states that

[6] The ALJ applied the following statutory interpretation methods: When engaging in statutory interpretation, one applies these well-known principles: (a) "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, [are] construed accordingly" (§ 2-4-101, C.R.S.); (b) the "singular includes the plural, and the plural includes the singular" (§ 2-4-102, C.R.S.); and (c) when it enacts a statute, the General Assembly is presumed to intend the "entire statute ... to be effective[,]" a "just and reasonable result[,]" and a "result feasible of execution" (§§ 2-4-201(1)(b), (c), (d), C.R.S.). In addition and as pertinent here, if "a statute is ambiguous, ... in determining the intention of the general assembly, [one] may consider among other matters: .. [t]he consequences of a particular construction[] [and] [t]he administrative construction of the statute[.]" Sections 2-4-203(1)(e), (1)(f), C.R.S. If "separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, [one] should adopt that construction which results in harmony rather than that which produces inconsistency." Decision No. R15-0202 at ¶ 54 citing *Colorado-Ute Electric Association.*

a tariff contains all rates, terms, and conditions "collected or enforced or to be collected or enforced." Rule 4 CCR 723-1-1210(a)(VII) requires a protest to a proposed tariff to be "filed sufficiently in advance of the effective date to permit Commission consideration before the tariff becomes effective" (emphasis supplied). Rule 4 CCR 723-1-1210(VIII) states that "the Commission may suspend the proposed tariff's effective date" and that "[p]ending hearing and decision, the proposed tariff shall not go into effect" (emphasis supplied). Further, a utility must file an Advice Letter, which introduces the utility's proposal, with proposed tariff changes, and Rule 4 CCR 723-1-1210(c)(II)(H) requires an Advice Letter to include "the tariff 's or tariff page's proposed effective date" (emphasis supplied). Rule 4 CCR 723-1-1305(c) states that a Commission decision to set a hearing "suspends the effective date of the proposed tariff" (emphasis supplied). Finally, Rule 4 CCR 723-1-1305(e) states the period of suspension shall not exceed 210 days "beyond the proposed effective date of the tariff" (emphasis supplied). The ALJ commented that those Commission Rules are consistent with, and implement the balance struck in the structure of the ratemaking process, which is that the utility controls the content of its tariff filing, including the effective date, and the Commission may suspend and set for hearing only the entire tariff filing, even if it contains rates, terms, and conditions that have future effective dates.

38. Taken all together, it is the ALJ's finding that these rules support the interpretation that: (a) a proposed MYRP tariff may contain rates, terms, and conditions that go into effect at different times in the future; (b) the entire MYRP tariff filing has a specific effective date; (c) the filing utility establishes that effective date in its Advice Letter; (d) the Commission suspends the entire MYRP tariff filing for one hearing; and (e) the suspension period is calculated from the proposed effective date of the MYRP tariff as stated in the Advice Letter.

2. Principle that the Singular Includes the Plural and the Plural Includes the Singular

39. The ALJ next considered the statutory interpretation principle that the "singular includes the plural, and the plural includes the singular." § 2-4-102, C.R.S. The ALJ determined that application of this statutory interpretation principle clarifies that the use of the singular in § 40-6-111(1)(b), C.R.S., does not mean that the Commission suspends an individual rate, term, or condition. If the statute is read substituting the plural for the listed singular nouns, it becomes clear that the suspension includes all rates, terms, and conditions contained in the MYRP tariff filing.

3. Entire Statute Presumed to be Effective

40. When the Legislature enacts a statute, it is presumed to intend the "entire statute … to be effective." The ALJ determined that her interpretation effectuates the Legislature's intent because the interpretation is consistent with, and allows all provisions of the Public Utilities Law to be effective. In addition, suspending the utility's proposed tariff in its entirety and for one hearing results in a ratemaking process that applies equally in all circumstances, whether the tariff filing seeks to change one provision in an existing tariff or to introduce an entire new service or program (*e.g.*, MYRP). The ALJ found that this interpretation also gives full effect to the balance struck in § 40-6-111(1)(b), C.R.S., between the utility's interest in having enforceable tariffs in place within a reasonable period of time and the public interest in assuring that the Commission has sufficient time to investigate whether proposed tariffs are just, reasonable, and not unduly discriminatory.

4. Consequences of a Particular Construction

41. One of the principles of statutory construction provides that if "a statute is ambiguous, … in determining the intention of the general assembly, [one] may consider

among other matters: … [the consequences of a particular construction[.]" § 2-4-203(1)(e), C.R.S. The ALJ determined that her interpretation will have no discernible effect on, and will continue the Commission's current practices with respect to ratemaking.[7]

5. Statutory Language Should be Harmonized

42. The principle advanced by the ALJ here is that if separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, the Commission should adopt that construction which results in harmony rather than that which produces inconsistency.

43. The ALJ found that if the Commission found that it could suspend, hold separate hearings on, and issue separate decisions on individual rates, terms, or conditions at different times is incompatible with, and would have a significant and adverse effect on, the ability of a party to obtain timely judicial review of a Commission's decision on the MYRP tariff filing. The ALJ went on to determine that under this scenario, there would be no administratively-final Commission decision until the Commission issued its decision on the last of the individual rates, terms, or conditions that were separately investigated and set for hearing in the MYRP proceeding. The effect would be to preclude judicial review of the entire MYRP filing until the Commission issues its last decision, an event which could be well into the later years of an MYRP. This outcome is contrary to the public interest as it has the potential to delay,

[7] The ALJ cites as examples: after suspending a tariff filing for investigation and hearing: (a) following suspension, the Commission can remove from consideration one or more provisions (*i.e.*, rates, terms, and conditions) in the utility's suspended tariff filing, as the Commission removed from consideration Public Service's request for approval of decoupling in a recent rate case (Decision No. C14-1331-I, Proceeding No. 14AL-0660E issued November 5, 2014); (b) the Commission can adopt, either on its own motion or at the request of a party, appropriate procedures within an individual MYRP proceeding, as the Commission did in the fully-litigated Public Service Gas Rate Case; and (c) the Commission can take the time necessary to issue its administratively-final decision on an MYRP tariff filing even if the decision is issued after the expiration of the suspension period.

if not preclude, timely judicial review of a Commission decision on an MYRP and adversely affects the ability of a party to obtain judicial review.[8]

44. The ALJ found that adopting the Joint Parties' interpretation would create an irreconcilable inconsistency between § 40-6-111, C.R.S., MYRP ratemaking and § 40-6-115, C.R.S., judicial review of the Commission's decision on an MYRP, and that those statutes cannot be harmonized under the Joint Parties' interpretation. However, adopting the Utilities' interpretation creates no inconsistency because the Commission would hold one proceeding on the entire MYRP filing and would issue one administratively final Decision on that filing. The ALJ concluded that an adversely affected party could seek timely judicial review of the final Commission Decision.

45. For those reasons, the ALJ's second declaratory ruling was that: (a) an MYRP has a single effective date that applies to the entire filing; (b) if the Commission elects to suspend an MYRP tariff for investigation and hearing, the Commission suspends the entire MYRP tariff filing; and (c) if the Commission elects to suspend an MYRP tariff for investigation and hearing, the suspension period commences on the proposed effective date of the entire MYRP tariff as stated in the filing utility's Advice Letter.

G. Findings Regarding the ALJ's Declaratory Rulings

46. The ALJ's analysis is thorough and reasonable, and thus supports a procedure in which the Commission hears an MYRP in one proceeding. The statutory interpretation utilized by the ALJ is in conformance with the proper methodology to read and understand statutes that

[8] *See*, *Public Util. Comm'n. v. Poudre Valley Rural Electric Association, Inc.*, 480 P.2d 106, 108 (1970) (finding that unless and until an administrative matter is reduced to a final judgment, settling all issues between the parties, the court will not review it. The assignment of separate numbers by the Commission to its decision dealing with different phases of the same proceeding did not create two separate proceedings).

appear ambiguous. It is noted that the ambiguity in § 40-6-111, C.R.S., does not reside in the language itself, but how that language relates to the treatment of MYRPs. At the time § 40-6-111, C.R.S., was enacted (1913) the General Assembly did not (and reasonably could not) have anticipated the filing of multi-year rate plans by utilities. The language of the statute simply does not provide for that specific treatment. It is incumbent on the Commission to interpret the statute in a manner most reasonable to the Commission and the utility, and in a manner that is in the public interest and which provides certainty to the parties and effectuates and encourages the filing of MYRPs.

47. The ALJ's interpretations provide not only a reasonable legal interpretation, but also provide the certainty required in a ratemaking proceeding. For example, if the Commission were to adopt the position that it could suspend each proposed rate year in an MYRP, there would be no certainty among the parties as to when those rates for the years subsequent to year one would be determined, who the parties would be in those subsequent proceedings, and the final outcome of those proceedings. The purpose of an MYRP is to reduce ratemaking litigation costs by considering several rate cases in one proceeding.

48. We agree with the ALJ that adopting a position that the Commission could separately suspend each year in the MYRP would render a utility unable to know which, if any of the MYRP provisions with specific effective dates the Commission would set for hearing, and which the utility may implement on the effective date stated in the proposed MYRP. The utility would be required to prepare for effective date implementation of the MYRP tariff provisions for all years of the proposed MYRP and incur the associated costs for each year. Most importantly, if the Commission requires utilities to set hearings for each proposed year in an MYRP,

the utility would incur significant costs which would then be recoverable from ratepayers, irrespective of whether the MYRP rate, term, or condition goes into effect.

49. We also agree with the ALJ that interpreting § 40-6-111, C.R.S., to allow separation of each year of an MYRP filing into separate rate cases would have an adverse effect on the process of judicial review of Commission decisions. Since the MYRP is filed under one proceeding, separating out each year would result in no administratively-final Commission decision until the Commission issued its decision on the last of the individual rates, terms, and conditions that were separately investigated and set for hearing in the MYRP proceeding. This would preclude judicial review of the entire MYRP filing until the Commission issues its last decision, which could be well into the later years of an MYRP. This creates an irreconcilable inconsistency between § 40-6-111, C.R.S., MYRP ratemaking, and § 40-6-115, C.R.S., judicial review of the Commission's decisions on an MYRP.

50. For these reasons, we agree with, and uphold the declaratory rulings made by the ALJ in her Recommended Decision.

H. ALJ's Recommendation Regarding Rulemaking

51. The ALJ recommended that the Commission not undertake a rulemaking at this time to address the use of Future Test Years (FTYs) and MYRP filings. The ALJ noted that the Commission already has rules in place that govern the content of Advice Letters at Rules 1210(c), 3110, and 4110 of the Commission's Rules Regulating Gas Utilities and Pipeline Operators, 4 CCR 723-4. The ALJ stated that these existing rules are broad enough to encompass FTYs and MYRP filings, as evidenced by the fact that utilities have already successfully filed those matters with the Commission.

52. The ALJ also noted that the Commission typically develops rules that address the content of a particular type of filing based on the Commission's accumulated experience with that type of filing. However, in this case, a rulemaking would be premature because the Commission has extremely limited experience with either fully-litigated FTY-based filings and proceedings, or fully litigated MYRP-based filings. As a result, the Commission may not be in a position at present to assess the benefits and the unintended consequences of a particular rule.

53. The concept of an MYRP is "fluid" according to the ALJ, and has many possible permutations, which are limited only by the utility's perspective, needs, and creativity. As such, a rulemaking at this time may stifle innovation by inadvertently shaping a utility's or other party's thinking and unintentionally encouraging the filing of an FTY or MYRP that fits the rule, which could lead to "cookie-cutter" proposals rather than carefully crafted and original MYRP proposals.

54. We agree with the ALJ that a rulemaking at this point in time may not provide the efficacious results the Utilities hope for. We harbor the same concerns as the ALJ that a premature rulemaking may result in unintended consequences that could be anticipated with more experience with FTY and MYRP proceedings. We therefore uphold the ALJ's recommendation that no rulemaking should be implemented at this time.

III. ORDER

A. The Commission Orders That:

1. Recommended Decision No. R15-0202 is upheld in its entirety without modification.

2. The Administrative Law Judge's (ALJ) declaratory rulings that: 1) A public utility has a statutory right to file a Multi-Year Rate Plan and, in its sole discretion, to determine the content of the proposed Multi-year Rate Plan; and 2) (a) a Multi-Year Rate Plan has a single effective date that applies to the entire filing; (b) if the Commission elects to suspend a Multi-Year Rate Plan tariff for investigation and hearing, the Commission suspends the entire Multi-Year Rate Plan tariff filing; and (c) if the Commission elects to suspend a Multi-Year Rate Plan tariff for investigation and hearing, the suspension period commences on the proposed effective date of the entire Multi-Year Rate Plan tariff as stated in the filing utility's Advice Letter, are upheld in their entirety without modification.

3. The ALJ's recommendation that no rulemaking is necessary at this time regarding the filing of Future Test Years and Multi-Year Rate Plans is upheld.

4. This Proceeding is now closed.

5. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

6. This Decision is effective upon its upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING June 15, 2016.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director

COMMISSIONER FRANCES A. KONCILJA DISSENTING IN PART AND CONCURRING IN PART.

IV. COMMISSIONER FRANCES A. KONCILJA DISSENTING IN PART AND CONCURRING IN PART

A. Introduction

1. After almost five years, at least three rate cases and this miscellaneous proceeding, the Public Utilities Commission (Commission or PUC) finally decides today—yes an electric or gas utility, subject to our jurisdiction, has the right to file a Multi-Year Rate Plan (**MYRP**). (All parties agreed there was no dispute on this issue and so, the Commission did not reach much of a decision—although it took five years and at least four proceedings to definitively resolve this legal issue.)

2. The Commissioners also decided today that if we suspend the effective date of the MYRP (for up to 210 days) in order to conduct an investigation and a hearing on those rates, the suspension period applies to the MYRP *in toto*—the suspension and a new hearing period does not occur every year before the new rates of the MYRP go into effect, because that would defeat the whole concept of an MYRP.

3. These two issues of statutory construction were fully analyzed and included in the recommended decision of the Administrative Law Judge (**ALJ), Decision No. R15-0202,** which she transmitted to the Commission on *March 4, 2015*. One wonders why it takes over 14 months to adopt, without modification, the decision of the ALJ on interpretations of two subsections of a statute.

4. After taking five years (or only 26 months, if one includes in the calculation only this miscellaneous proceeding, opened by the Commissioners on March 24, 2014) to arrive at this monumental decision of statutory construction,[9] one might have thought that the Commissioners would at least discuss the other issue that every gas and electric utility whom we regulate, requested we answer—what are the minimum elements that a utility should include in the Future Test Year (**FTY**) that the utility uses to establish revenue requirements to support the tariff it files and to explain the standards the Commission will use in evaluating the FTY. [10] Instead the other two Commissioners refuse to discuss, let alone provide minimum standards to be used in evaluating an FTY, even though Public Service Company of Colorado

[9] In summary, today we decided that § 40-6-111(1)(b), C.R.S., which states that the Commission cannot suspend "such rate" for more than 210 days while it conducts a hearing, that "such" in subparagraph (b) refers to the tariff, including rates, filed by the utility pursuant to subparagraph (a) and suspended by the Commission. Thus, there is only one suspension period of up to 210 days, and it applies to the complete tariff, because one must read the two subsections together and the singular of "rate" includes the plural of "rates."

[10] In 2010, the Colorado General Assembly added new language to § 40-6-111(2)(a)(I), C.R.S.: "The commission shall consider the reasonableness of the test period revenue requirements presented by the utility."

(Public Service or PSCO) provided a Proposed Rule (which I attach as Exhibit A) as well as statutes from two other jurisdictions that deal with the issues.

5. This non-answer from the Commissioners means that every tariff is a food fight with no clear rules, no clear principles, and every entity or person opposed to the rates is in a position to pick off and fight about every issue that is arguably related to revenue requirements. Multi choice fights or rather all choice fights mean that the scope of the discovery is broad and the time needed to handle the disputes, by this Commission and all of the parties is much higher. Referring to and relying on 100-year-old principles of ratemaking, that are buried in previous decisions, does not serve utilities or ratepayers in this 21st Century New Energy Economy. Ultimately, rate payers pay for these inefficiencies.

6. As a result, I concur with Paragraph 2 of the Decision, but dissent from Paragraph 3 of the Decision, as explained in more detail below.

B. How Should We Analyze and Grade Regulatory Competence?

7. The failure of the Commissioners to efficiently and timely decide the matters raised in this proceeding and their failure to consider and discuss the issue of using an FTY is a regulatory failure. Because this type of delay and failure to engage in robust discussion and analysis of statutes, regulations, and policy occurs on a regular basis,[11] I begin my analysis with a discussion of the criteria by which we should analyze and grade the regulatory functioning of Commissioners.[12]

[11] My criticisms in this opinion are criticisms of the other two Commissioners. They are not criticisms of Staff or advisors of the Commission, who, in my opinion, prepare excellent and timely analyses for the Commissioners.

[12] Commissioners are subject to the requirements of the Open Meetings Law, § 24-6-402, C.R.S. Therefore, Commissioners cannot discuss "public business" in private meetings—only at meetings properly noticed. Because the other two Commissioners consistently refuse to engage in discussion of matters in public at the adjudicatory hearings, the only means available to me to bring these matters to their attention is through written dissents and/or concurrences.

8. It seems obvious that Commissioners should decide matters quickly and efficiently, discuss and explain on the bench as well as in written decisions what we are considering and/or ordering or not ordering, as well as why and that we should consider innovations that might benefit the utilities and/or rate payers. However, that appears to be a novel approach at the Commission. Therefore, I decided to conduct a review of the literature on the subject of regulatory competence to see if I could locate support for my opinions. I did. (This opinion does not attempt to analyze regulatory philosophies, because one must first have proficiency in the elements of regulatory competence, before one can rationally discuss regulatory philosophies.)

9. Phil Weiser (until recently the Dean at the University of Colorado School of Law) and Jonathon Neuchterlein in their book *Digital Crossroads* (MIT Press, Second Edition 2013), discuss the five goals or values of institutional competence required for regulators in order to manage competition policy. The authors conclude that there are five basic elements needed by regulators in order to competently regulate. They are: expertise, determinacy, transparency, neutrality, and humility **(Dean Weiser's 5 Elements of Regulatory Competence**).

1. *Expertise*—a critical element and self-evident element. Regulators must "understand or can easily learn the esoteric technology of telecommunications, the structure of the industry, and the complex economic and regulatory issues…"[13] *Digital Crossroads, p. 367.*

2. *Determinacy*—legislative bodies, the agencies and courts working together "**smoothly and expeditiously enough that the industry knows as quickly as possible what the ground rules for competition rules will be and can predict with reasonable precision how those rules will be applied.** The more determinate these ground rules are, the more comfortable investors will be in placing bets on the future of this industry, and the more likely it is that innovators will obtain financing to put their ideas to work for the public good." *Ibid*, p. 367 (emphasis added).

[13] While *Digital Crossroads* is focused on the telecommunications industry, the five goals and objectives outlined are, in my opinion, applicable to the regulation of electric and gas utilities, as well as other utilities.

3. *Transparency*—"a commitment to openness in the process of decisionmaking. The concept is more complex than it may first appear. It often is used to denote full disclosure of the inputs into the decisionmaking process: if a party makes an argument to a decision-maker, it should have to tell its adversaries what it said and to whom. But **such transparency of inputs does not itself produce public knowledge about the evolving deliberations of the decisionmakers** themselves as they work through complex and often shifting sets of issues. Indeed, sometimes—as in the case of formal judicial proceedings—the inputs are completely transparent, yet **the deliberation of the decisionmaking body (such as a jury or panel of judges) are a black box**." *Ibid, p. 368*, Emphasis added.

4. *Neutrality* –Regulators should ask "**Why have we done it this way…"** *Ibid,* p. 368 (emphasis added).

5. *Humility* –"reminds policymakers that over the long term the unintended, undesired consequences of regulation can dwarf the intended, desired outcomes." *Ibid,* p. 368.

1. Determinacy

10. If Commissioners fail to issue decisions on a timely basis and instead delay resolution for months and years, we are not effective regulators and do not possess the second element of Dean Weiser's 5 Elements of Regulatory Competence, namely Determinacy. Unfortunately, the Commissioners have developed, either intentionally or inadvertently, a course of conduct of delay of months and/or years in arriving at decisions. This places the utilities, their investors, the ratepayers and other stakeholders in the position of not knowing what the rules are, which ultimately harms all of the participants. This case is an excellent example of the failure to act quickly and efficiently. The Commissioners could have and should have answered the questions of statutory construction involving the MYRP as well as the policy issues inherent in using an FTY in any one of a number of previous rate cases, including

Proceeding No. 11AL-947E, *In the Matter of Advice Letter No. 1597—Electric of Public Service Company of Colorado*; or Proceeding No. 12AL-1268G—*In the Matter of Advice Letter No. 830-Gas of Public Service Company of Colorado*—filed December 12, 2012; or 13AL-0496G—*In the Matter of Advice Letter No. 497 Gas of Atmos Energy.*

11. By failing to provide clear guidance and principles—instead concluding maybe yes, maybe no that a utility could file an MYRP and/or use an FTY, the Commissioners encourage or rather mandate a costly trial and error approach. Even after opening this "Miscellaneous" matter on March 24, 2014, the Commissioners delayed a final decision for 26 months, knowing that some of the utilities whom we regulate would likely file rate cases in the interim.

12. This type of delay in issuing final PUC decisions is, unfortunately, not atypical. Instead, it has become the normal course of events. By way of example, the PUC has delayed, for several years, the implementation of the following changes to the Colorado Statutes, enacted by the General Assembly:

1. **Best Value Employment Metrics**--Almost three years and two rulemaking proceedings to implement House Bill 13-1292, known as the Colorado Jobs Act (Act). The Act directs the PUC to establish the factors that affect employment and the long term economic viability of Colorado communities in constructing electric generation. During that period of time, numerous employment opportunities for Colorado workers were lost.[14]

[14] House Bill 13-292 amended § 40-2-129, C.R.S., and it expanded the PUC's obligations to consider Best Value Employment Metrics in issuing certificates of convenience and necessity for the construction and expansion of electric generation facilities. (This was already a requirement in electric resource planning.) The Commission opened *two* rule-makings on this topic—the first one Proceeding No. 13R-1151E, which it opened on November 12, 2013, months after the act was passed and which it closed on November 12, 2014 without adopting rules. Six months later on May 12, 2015, the Commission opened another rule-making on this issue—Proceeding No. 15R-0325E, which finally culminated in published rules on March 11, 2016. Numerous employment opportunities were likely lost by Colorado workers as a result of this delay of almost three years.

2. **Transportation Network Companies**-- Almost two years to implement Senate Bill 14-125, creating Transportation Network Companies—the Ubers and Lyfts.[15]

3. **Telecom Reform**--Over two years to even issue a Notice of Proposed Rule Making to implement telecom reform laws passed by the Colorado Legislature in May of 2014.[16]

13. It is also, not out of the ordinary for the Commissioners to fail to act on and/or to consider detailed recommendations and analyses from the ALJs. See by way of example, Proceeding No. 13M-0877T –*In the Matter of Possible Rule Revisions to the Commission's Rules Relating to the High Cost Support Mechanism*, opened on August 16, 2013. [17] It must be demoralizing to the ALJs to have their detailed recommendations pending for months, if not years.

14. Resources of the Commission, the ALJs, the industries that we regulate, and the stakeholders are limited. We should not send them off on costly and lengthy journeys

[15] Senate Bill 14-125 exempted transportation companies, such as Uber and Lyft, from the definition of common carrier and the regulations applicable to common carriers. Instead the Legislature provided limited authority to the PUC to regulate only safety, insurance, and driver qualifications as set forth in a new statute at § 40-10.1-601, C.R.S., known as the Transportation Network Companies Act, which the General Assembly made effective on June 5, 2014. On April 24, 2015, the Commission opened a rulemaking, Proceeding No. 15R-0250TR, to implement the statutory changes. These rules were finally effective on December 21, 2015.

[16] House Bills 14-1327, 1328, 1329, 1330, and 1331 were adopted by the Colorado General Assembly and signed into law by Governor Hickenlooper on May 14, 2014 (**"Telecom Reform"**). The Commissioners delayed implementing these legislative changes until, it issued the Notice of Proposed Rulemaking on June 10, 2016. This delay caused the telecom industry to file in excess of 150 applications, advice letters, and/or tariffs to comply with regulations that the Commission no longer had jurisdiction to impose. See my dissents in Proceeding No. 16AL-0072T, *In the Matter of Advice Letter Filed by CenturyTel of Eagle*, Decision No. C16-0190 issued March 4, 2016, and Proceeding No. 16A-0035T, *In the Matter of the Joint Application of Onvoy, LLC, et al*, Decision No. C16-0184 issued March 3, 2016. I requested and the other two Commissioners agreed to designate me as the Hearing Commissioner on these rules (*See* Decision No. C16-0508 in Proceeding No. 16R-0453T issued June 10, 2016). I modified the expedited schedule, at the request of the participants to take place on September 26 and 27, 2016 (*see* Decision No. R16-0590 issued June 29, 2016 in Proceeding No. 16R-0453T).

[17] *See* Decision No. R15-1113 in Proceeding No. 13M-0877T, which included a 160-page report dated October 27, 2015 in which the ALJ made detailed findings and laid out policy issues that should be decided by the Commissioners before the ALJ could prepare proposed rules. To date, the Commission has issued no new rules on the High Cost Support Mechanism and made no response to the policy issues on which the ALJ suggested Commissioner input was necessary.

with no answers, vague answers, or incomplete answers at the end. Baroque processes and Rube Goldberg machines can be used in art and cartoons, but not in the regulatory process.

2. Transparency

15. In addition to a lack of determinacy, the Commissioners consistently fail to provide transparency as to their decisions leading stakeholders to likely conclude that there is no basis for the decisions of the Commissioners and that the decision making process is a lengthy and time consuming black box of processes—more a game of chance than a rational analysis of issues. The Commissioners do not display this element of Dean Weiser's 5 Elements of Regulatory Competence, namely Transparency.

16. To leave the utilities in limbo on the issue of the minimum standards to include in an FTY, without even a cursory discussion on the record or in the decision, is a failure of regulatory competence. The choice of a test year is a key element of ratemaking because the utility sets forth, and allows those challenging the rates to understand, the relationship between and among revenues, expenses, capital investments, and the rate base as well as the interrelationships of the component parts. There are advantages and disadvantages to using a Historical Test Year or an FTY. Commissioners have an obligation to understand those advantages and disadvantages and to provide guidance to the utilities as well as the other participants in the rate case.

17. PSCO listed in their Attachment C (included here as Attachment A) cost categories, budgeting components, as well as escalators and definitions. These merited discussion by the Commissioners. The ALJ recommended that we not commence a rulemaking or implement a statement of principles because she did not believe there was enough experience to support a rulemaking. In this regard, I disagree with the ALJ and believe that the

Commissioners should have, at least, discussed the concepts, read the briefs, and discussed the positions of the utilities and the other stakeholders.

18. The electric utilities are currently in a challenging situation with usage flat or almost flat. Their legitimate issue is how do they show the growth in revenues that is required to attract investors as well as shareholders and to obtain favorable financing terms for the large capital investments that we expect them to make.[18]

19. This matter is not an isolated example of the Commissioners' failure to explain the basis for their decisions. Similarly, after months of hearings and presentation in the net metering dispute, the Commissioners issued a five-page decision maintaining the status quo. That might have been the correct decision, but Dean Weiser's 5 Elements of Regulatory Competence, requires much more of us—an explanation as opposed to a black box of hidden and secret thought processes to which the utilities and stakeholders cannot react to in the future cases.[19]

3. Neutrality

20. By refusing to consider and discuss the FTY, the Commissioners evidence an unwillingness to consider the innovative and new. There was absolutely no discussion of "Why have we done it this way…" the hallmark of one of Dean Weiser's 5 Elements of Regulatory Competence, namely Neutrality.

[18] The use of a historical test year can limit the revenues available to pay for these investments, because of the "regulatory lag"—usually two or more years until the utility can begin to recover in the rates for these investments. See Opening Brief of Atmos Energy Corporation at p. 2.

[19] On, March 18 2014, the Commissioners opened miscellaneous proceeding 14M-0235E to discuss "net metering". After conducting numerous workshops, hearings from many stakeholders (there are 412 documents in the proceeding) the Commission finally issued its five-page decision, Decision No. C15-0990, on August 26, 2015 which, without any discussion or explanation, concluding that the status quo was adequate. Even if this were the correct decision, the failure to explain the basis for the decision demonstrated a lack of transparency and guidance to the industry and to rate payers.

21. Public Service, joined by the other utilities we regulate, laid out numerous issues and considerations as to why they requested minimum standards from this Commission as follows: "Many states and the FERC allow rates to be set based on FTYs and some states allow for MYPs by statute or by rule." Opening Brief of PSCO Page 9. PSCO provided statutory and regulatory examples from Minnesota and New Mexico. PSCO provided an example of a proposed rule and also suggested that if the Commission did not want to commence a formal rulemaking, it could adopt all or some of the concepts in a statement of philosophy. Opening Brief of PSCO, p. 13.

22. As PSCO pointed out in its reply at page 2 "What will stifle utility innovation in the MYP area is if MYP filings are subject to prolonged suspension periods and if utilities cannot be assured that MYP filings will be evaluated consistent with any clear standards."

23. The PSCO Reply, at page 11 states:

> Rather than develop standards on a trial and error basis in individual rate cases, Public Service believes that it would be better for the Commission to set out clear rules through a rulemaking. Rate cases take a great deal of time and effort to prepare, and utilities are going to hesitate to submit MYPs if they believe it likely that all but the first phased request will be summarily rejected. If the Commission does not wish to conduct a rulemaking, it could provide useful guidance by providing a policy statement.

I agree with these statements with one exception—after seeing the Commissioners' track record on rulemaking which usually takes years, I suggest a rulemaking is a bad idea and that the Commission issue a policy statement.

24. Nationally, gas and electric utilities are facing flat or declining load growth and are confronting competition from unregulated entities, such as Wal-Mart, Apple, Solar City, and others. The Commission should be open to and willing to discuss new and innovative approaches to regulation so that Colorado is a leader in rational and efficient utility regulation.

4. Expertise

25. It is difficult to determine if the Commissioners possess regulatory expertise when they consistently delay decisions and then refuse to consider the issues. It could be a lack of expertise that leads to a refusal to discuss matters on the record and/or refusal to consider, in written opinions, requests.

C. Conclusion

26. So, at the end of five years, hundreds of hours of time of all of the stake holders, tens of thousands of dollars of attorney time, the other two Commissioners have kicked the can down the road to the next rate case and failed to provide regulatory guidance. I believe that the utilities we regulate deserve much more from this Commission and further the utilities and ratepayers deserve that we provide answers to important questions much more quickly. If the Commissioners had no intention of providing guidance as to the use of the FTY, the Commissioners could have and should have said no five years ago or two years ago when they opened this miscellaneous proceeding and assigned it to the ALJ. The utilities could have then decided whether or not they wanted to go the Colorado General Assembly (again) to reduce the authority and/or jurisdiction of the PUC.

27. We cannot thumb our noses at the Colorado General Assembly and delay, for years, the implementation of statutory changes. We should not refuse to consider and discuss suggestions from the entities we regulate—especially when the suggestions are, as here, joined in by every electric and gas utility we regulate. We should adopt Dean Weiser's 5 Elements of Regulatory Competence and regulate ourselves to perform our obligations competently, but

preferably with excellence so that Colorado is regarded as an innovator with regulatory processes that are timely, efficient, and rational.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA
_____
Commissioner