COURT OF APPEALS STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Appeal from District Court, City and County of Denver County Honorable Catherine Lemon, Judge Case No. 2015CV34584	
Appellant, DEVELOPMENT RECOVERY COMPANY, LLC, v. **Appellee**, PUBLIC SERVICE COMPANY OF COLORADO d/b/a Xcel Energy Co.	▲ **COURT USE ONLY** ▲ Case No. 2016CA940
Attorneys for Colorado Public Utilities Commission: CYNTHIA H. COFFMAN, Attorney General JESSICA L. LOWREY, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: 720-508-6167 E-Mail: jessica.lowrey@coag.gov Registration Number: 45158 *Counsel of Record	

AMICUS ANSWER BRIEF OF THE COLORADO PUBLIC UTILITIES COMMISSION IN SUPPORT OF APPELLEE

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28, C.A.R. 29and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

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I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, C.A.R. 29, and C.A.R. 32.

/s/ Jessica L. Lowrey
Jessica L. Lowrey
Attorney for Colorado Public Utilities Commission

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Pursuant to C.A.R. 29, the Colorado Public Utilities Commission ("Commission"), through counsel, the Office of the Colorado Attorney General, respectfully submits this brief as *amicus curiae* in support of Appellee, Public Service Company of Colorado.

As identified by Appellant, Development Recovery Company ("DRC"), in the notice filed pursuant to C.A.R. 44.1, this appeal raises jurisdictional issues that question the interpretation and application of the Public Utilities Laws of Colorado. DRC's arguments seek to circumvent Commission jurisdiction under those laws. Thus, the Commission files this brief as *amicus curiae* to clarify its jurisdiction over the rates and policies of public utilities, including complaints against public utilities by their customers. The Commission agrees with the district court that DRC's complaint should be dismissed because the court lacks subject matter jurisdiction over DRC's claims until after the Commission adjudicates them. Only then will the district court have jurisdiction to review the Commission's decision under C.R.S. § 40-6-115.

Notably, the Commission recently adjudicated a complaint by DRC against Public Service based on the same factual allegations as those raised by DRC in this proceeding. *Development Recovery Co., LLC v. Pub. Serv. Co.*, Proceeding Nos. 14F-0336EG & 14F-0404EG, 2016 Colo. PUC LEXIS 685 (Colo. P.U.C. June 15, 2016) ("Commission Decision").[1] However, here, DRC characterizes its claims as contract claims in an effort to circumvent Commission jurisdiction. DRC's claims pertain to the enforcement of Public Service's line extension tariffs, which were previously approved by the Commission through a valid exercise of its jurisdiction. As the district court correctly opined, any relief to which DRC might be entitled rests upon Public Service's line extension tariffs, which are squarely within the Commission's jurisdiction. In fact, DRC appealed the Commission Decision regarding these same facts pursuant to C.R.S. § 40-6-115, which is now pending in

[1] The district court referenced the Commission proceeding in its order dismissing DRC's complaint. (R. CF p. 293) Because the final Commission Decision was issued after the district court order, it has not been made part of the record. The final Commission Decision is attached to this Answer Brief as Exhibit 1 for the Court's convenience.

Denver District Court.[2] The district court's decision to dismiss this case should be upheld.

STATEMENT OF THE CASE

This appeal is based on the same facts as the complaint DRC brought against Public Service before the Commission (consolidated Proceeding Nos. 14F-0336EG & 14F-0404EG). In both cases, DRC has assumed the rights of several housing developers in Public Service's certificated service area. (Opening Br., p. 10; Commission Decision, ¶ 9) The Commission dismissed the complaint because DRC failed to prove that Public Service violated its tariffs or that Public Service should have provided refunds of any construction payments to the developers. (Commission Decision, ¶¶ 21, 27)

Both cases undeniably implicate Public Service's tariffs filed with the Commission. Pursuant to these tariffs, the cost to construct new utility infrastructure for new homes must be divided between Public Service and the housing developer. (R. CF pp. 50-65 (electric tariff); R.

[2] *Development Recovery Co., LLC v. Pub. Utils. Comm'n.,* Denver District Court, Case No. 2016CV32817.

CF pp. 66-85 (gas tariff)) Both this case and the case before the Commission involve cost allocations for the new utility infrastructure, called "line extensions."

Line extensions are either gas pipelines or electric wires that connect a new housing development to the main gas or electric line that already exists. (R. CF p. 4 (Compl.); *see also* R. CF p. 50 (electric tariff); R. CF p. 66 (gas tariff)) Public Service's electric and gas tariffs set forth the portion of the costs for electric and gas line extensions to be paid by Public Service and the portion to be paid by the "applicant" (in this case, the developer). (R. CF pp. 50-57 (electric tariff); R. CF pp. 66-74 (gas tariff); s*ee also* R. CF p. 7-8 (Compl.); Commission Decision, ¶ 7) The portion paid by Public Service is called the "construction allowance." (R.CF p. 51 (electric tariff); R. CF p. 67 (gas tariff)) The construction allowance is an amount per new meter that is set in Public Service's tariffs. (R.CF p. 65 (electric tariff); R. CF p. 85 (gas tariff)) The portion paid by the developer is called the "construction payment." (R.CF p. 61 (electric tariff); R. CF p. 68 (gas tariff))

However, before construction of the line extension begins, Public Service estimates the total cost. Pursuant to an extension agreement with Public Service, the developer pays the entire cost (estimated construction payment and construction allowance) to Public Service, up front and prior to construction. (R. CF pp. 4-6 (Compl.); Commission Decision, ¶ 8)

The developer must also pay for the "service laterals," which are the electric wires or gas pipelines that bring the electricity or gas directly into each home. (R.CF p. 52 (electric tariff); R. CF p. 70 (gas tariff)) Public Service does not include the cost of the electric service laterals in the estimated total construction cost because the cost of the service laterals depends on the exact configuration of new homes, which is unknown at the time the developer signs the extension agreement. (Commission Decision, ¶ 9) After construction is complete and the meters are set in individual homes, Public Service subtracts the cost of the service laterals from the construction allowance that it owes to the developer, and then pays the developer the remaining balance of the

construction allowance. (R.CF pp. 53-56 (electric tariff); R. CF pp. 71-74 (gas tariff); *see also* Commission Decision, ¶¶ 8-9)

Public Service's electric and gas tariffs also contemplate refunding part of the construction payment to the developer if new customers are served from the same line extension. The electric and gas tariffs state that, for a period of ten years following the line extension completion date, Public Service will refund to the original applicant a portion of the construction payment appropriated to each additional customer. (R. CF pp. 57-60 (electric tariff); R. CF pp. 75-78 (gas tariff); R. CF pp. 6, 9 (Compl.); Commission Decision, ¶ 11)

This procedure is established in Public Service's "Service Connection and Distribution Line Extension Policy" set forth in its electric tariff (R. CF pp. 50-65) and the "Service Lateral Extension and Distribution Main Extension Policy" set forth in its gas tariff (R. CF pp. 66-85) Public Service applies the terms of its tariffs by entering into an extension agreement with new developers. (*See also* Open Br., pp. 10-13; R. CF pp. 48-49 (electric and gas extension agreements))

Here, DRC alleges that Public Service violated the *extension agreements* by failing to issue refunds and for subtracting the cost of the service laterals from the construction allowance. (Opening Br., pp. 9-10; 12-13) In the complaint proceeding before the Commission, DRC alleged that Public Service violated its *tariffs* by not refunding portions of the construction payment and by subtracting the cost of the service laterals from the construction allowance owed to DRC. (Commission Decision, ¶¶ 10-12) The district court dismissed DRC's complaint because the substance of the claims is tariff enforcement, which is within the jurisdiction of the Commission. (R. CF p. 292)

SUMMARY OF THE ARGUMENT

The Commission files this amicus brief to clarify its authority over the rates and policies governing a public utility. This clarification comports with the district court's ruling that DRC's complaint should be dismissed because the court lacks subject matter jurisdiction over DRC's claims until they have been adjudicated by the Commission.

Article XXV of the Colorado Constitution grants the Commission "all power to regulate the facilities, service, and rates" of every corporation operating as a public utility. Further, C.R.S. § 40-3-102 specifically charges the Commission with governing and regulating tariffs of all public utilities. DRC's claims here require the court to interpret Public Service's electric and gas line extension tariffs, which specify the portion to be paid by the utility and by the applicant (the developer in this instance) to construct a new service line extension. These tariffs expressly fall under Commission jurisdiction.

DRC asserted claims with the same factual allegations in a complaint proceeding before the Commission on behalf of two developers. Following a full evidentiary hearing, DRC's claims were denied by the Commission.

Here, DRC characterizes its claims as contract claims in an effort to circumvent Commission jurisdiction and raise the same issue to the district court, circumventing the Commission. DRC's claims require the court to interpret and apply Public Service's line extension tariffs, which were previously approved by the Commission. As the district

court correctly opined, any relief to which DRC might be entitled rests upon these line extension tariffs.

Fundamentally, this case centers on the Commission's jurisdiction over Public Service's tariffs. DRC's arguments seek to undermine the Commission's explicit Constitutional and legislative authority in a proceeding to which the Commission is not a party. The Commission supports the district court's ruling as a proper interpretation of Commission jurisdiction. Reversal of the district court's ruling would lead to immense uncertainty in public utility regulation in Colorado. This Court should therefore affirm the decision of the district court.

ARGUMENT

I. The Commission has authority over the rates and policies governing the relationship between a public utility and its customers.

The Commission's authority over public utilities is established by Article XXV of the Colorado Constitution, which grants the Commission "all power to regulate the facilities, service, and rates" of every corporation operating as a public utility. A public utility is any a business or enterprise that is "impressed with a public interest" and

that "hold[s] itself out as serving or ready to serve all members of the public, who may require it, to the extent of [its] capacity." *Pub. Utils. Comm'n. v. Colo. Interstate Gas Co.*, 351 P.2d 241, 248 (Colo. 1960); C.R.S. § 40-1-103(1)(a)(I). A public electric or gas utility has the right and obligation to provide service to all current and future customers in the utility's service area, to the exclusion of other utilities. C.R.S. § 40-5-101; *Pub. Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 322, 324 n.9 (Colo. 1999); *Pub. Serv. Co. v. Pub. Utils. Comm'n.*, 765 P.2d 1015, 1021 (Colo. 1998). In exchange for the right to provide service, the certificated utility must provide service to all customers in its service area at rates and terms specified in a tariff. C.R.S. §§ 40-3-101, -102.

The Commission has the authority and responsibility to approve just and reasonable rates. C.R.S. § 40-3-102; *Pub. Serv. Co. v. Pub. Utils. Comm'n.*, 644 P.2d 933, 935 (Colo. 1982); *see also Colo. Const. Art. XXV; City of Aspen v. Kinder Morgan, Inc.*, 143 P3d 1076, 1079 (Colo. App. 2006). "Tariffs are the means by which utilities record and publish their rates along with all policies relating to the rates." *AviComm, Inc. v. Pub. Utils. Comm'n.*, 955 P.2d 1023, 1031 (Colo. 1998). A public

utility such as Public Service must file tariffs that include the "rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected and enforced, together with all rules, regulations, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service." C.R.S. § 40-3-103. The Commission is charged with approving tariffs, and ensuring that rates are reasonable and not discriminatory. C.R.S. §§ 40-3-101 and -102; *AviComm, Inc.,* 955 P.2d at 1031; *City of Aspen*, 143 P.3d at 1079.

Tariffs also balance the rights of the public utility and its customers. Under the filed rate doctrine, a public utility cannot deviate from its tariffs in the rates it charges or the services it provides. *U.S. West Commc'ns. v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997); *Safehouse Progressive All. for Nonviolence, Inc. v. Qwest Corp.*, 174 P.3d 821, 826 (Colo. App. 2007) (citing *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222 (1998)). At the same time, "customers are also charged with notice of the terms and rates set out in that filed tariff." *Safehouse Progressive All. for Nonviolence, Inc.*, 174 P.3d at 826 (quoting *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000)).

The Commission is charged with interpreting tariffs and determining whether a public utility complied with its tariff. C.R.S. § 40-3-102; *AviComm, Inc.,* 955 P.2d at 1031. "Standard principles of statutory construction apply to the interpretation of a tariff." *Safehouse Progressive All. for Nonviolence, Inc.*, 174 P.3d at 826. When interpreting tariff language to determine whether a utility has complied, the Commission reads and considers the tariff language as a whole, and gives consistent, harmonious, and sensible effect to all its parts. *Id.*

The Commission therefore has jurisdiction over DRC's contract claims because they require interpretation and application of Public Service's line extension tariffs.

The General Assembly has established a process to allow the Commission to adjudicate complaints against public utilities before the complaint may be brought in the district court. *See* C.R.S. §§ 40-6-108 to -116. An evidentiary hearing may be held before a Commission administrative law judge (ALJ). C.R.S. § 40-6-109(1). The ALJ must then transmit the record and a recommended decision to the full

Commission. C.R.S. § 40-6-109(2). Parties then have the option of filing exceptions. *Id*.

The Commission rules on the exceptions and issues its final decision, which becomes a final agency action. C.R.S. § 40-6-109(4). A party may seek judicial review of a final Commission decision by applying to the district court for a writ of certiorari or review within thirty days of a final Commission decision.[3] C.R.S. § 40-6-115(1). A district court's review of a Commission decision is limited to determining whether the Commission has regularly pursued its authority, including whether the decision under review violates any right of the petitioner under the Colorado or United States Constitutions. C.R.S. § 40-6-115(3); *Durango Transp., Inc. v. Pub. Utils. Comm'n.*, 122 P.3d 244, 247 (Colo. 2005). The court's review also includes whether the Commission decision is just and reasonable and

[3] Parties may first file a request for rehearing, reargument or reconsideration (RRR) with the Commission within twenty days of the final Commission decision. C.R.S. § 40-6-114(1). However, a request for RRR is not required for a party to have exhausted its administrative remedies. C.R.S. § 40-6-114(4).

whether the Commission's conclusions are in accordance with the evidence. C.R.S. § 40-6-115(3); *Durango Transp., Inc.*, 122 P.3d at 247. Unless the decision is challenged on constitutional grounds, a reviewing court must uphold all findings of fact that are based on competent evidence. C.R.S. § 40-6-115(2); *Lake Durango Water Co. v. Pub. Utils. Comm'n.*, 67 P.3d 12, 21 (Colo. 2003).

II. This case implicates the Commission's jurisdiction over Public Service.

DRC cannot bring its claims that implicate the Commission's jurisdiction over Public Service's tariffs to the district court until the Commission has an opportunity to rule on them. Permitting DRC to do so would circumvent the clear jurisdiction of the Commission and undermine the due process requirements set forth above. The district court will assume subject matter jurisdiction over DRC's claims only after the Commission makes a final decision. C.R.S. § 40-6-115(5).

A. This case raises the same factual allegations as a complaint DRC brought against Public Service before the Commission.

Here, DRC alleges that Public Service violated extension agreements between Public Service and the developers by not refunding construction payments and by subtracting the cost for service laterals from the construction allowance. (Opening Br., pp. 9-10; 12-13) Similarly, in the complaint before the Commission, DRC alleged that Public Service violated its tariffs by not refunding construction payments and by subtracting the cost for service laterals from the construction allowance. (Commission Decision, ¶¶ 10-12)

According to DRC's Opening Brief, this case involves claims for the refund of construction payments made by developers under line extension agreements with Public Service. (Opening Br., p. 9) DRC alleges that Public Service has not issued proper refunds of construction payments to each of the developers; that Public Service has not properly credited construction allowances for line extensions designated as permanent; and that Public Service has improperly offset the

construction allowance owed to the developers with the cost of service laterals. (*Id.*, pp. 12-13) Similarly, DRC's allegations in the complaint case before the Commission concerned construction payments refunds, construction allowance credits, and deductions for the cost of service laterals. (Commission Decision, ¶¶ 10-12)

Although DRC characterizes its claims here as contract claims, the district court correctly found that the substance of DRC's claims is to enforce Public Service's tariffs, which are incorporated into the extension agreements. (Open Br., p. 13; *see also* R. CF pp. 48-49 (electric and gas extension agreements)) Both cases require the reviewing tribunal to interpret Public Service's tariffs and to determine whether Public Service properly carried out its Commission-approved policy requiring developers to pay for a portion of the costs of new gas or electric line extensions. Therefore, the district court correctly states, "under [DRC's] factual allegations, any relief to which [DRC] is entitled rests upon interpretation and application of the relevant electric line and gas main extension tariffs, which were approved by the [Commission]." (R. CF p. 293)

B. The Commission has already adjudicated DRC's claims against Public Service on behalf of two developers.

The Commission has already adjudicated—and denied—DRC's claims against Public Service on behalf of developers The Ryland Group and Richmond American Homes. DRC cannot now raise the same claims in a new complaint case in district court.

The Commission first found that Public Service properly applied its tariff in subtracting the cost of the service laterals from the construction allowance before paying the remainder to the developers:

> We conclude that DRC did not meet its burden of proving by a preponderance of evidence that Public Service violated its electric tariff. The Recommended Decision thoroughly addresses how the tariffed Construction Allowance amounts are applied and funded by the utility, and how the remaining construction costs—including service lateral costs—are borne by the developer. The line extension process is complicated by the fact that service lateral costs are not initially known when the developer submits an application to connect a new development and by the fact that the utility does not fund its Construction Allowance portion until the meter is set. However, the tariff clearly states that developers must pay the cost for service laterals. We agree with the Recommended Decision that Public Service properly applied its tariff in subtracting the cost of the service

> laterals from the Construction Allowance before paying the remainder to the developers.

(Commission Decision, ¶ 21 (footnotes omitted))

The Commission next found that Public Service does not owe any refunds of construction payments to DRC:

> We conclude that DRC did not meet its burden of proving by a preponderance of evidence that Public Service owes any refunds of the Construction Payment to DRC. We agree with the Recommended Decision that DRC's interpretation is contrary to the plain language of the tariff. Public Service's testimony provides a thorough explanation of the tariff provisions allowing for refunds of Construction Payments, and why they do not apply to the Ryland and Richmond developments at issue here. Public Service also explains that it does not typically provide refunds for Construction Payments associated with line extensions serving residential housing developments because such developments typically account for all potential lots or customers that could be served by the line extension. DRC did not contradict Public Service's explanation, and more importantly, DRC did not provide any evidence demonstrating that additional customers were connected that would require refunds to Ryland and Richmond.
>
> We find that the tariff provisions allowing for refunds of Construction Payments are contingent upon new customers connecting to the line extension, and these new customers must be additional to those in the development for which the line extension was initially built. Contrary to DRC's argument, the refunds are not triggered by the homeowners purchasing a house from the developer. The homeowners

> who purchased the homes built by Ryland and Richmond are not "future customers," as contemplated in Rule 3210 [4 CCR 723-3-3210], nor are they "additional customers," as contemplated by Public Service's tariffs. Because no customers—outside of the developments built by Ryland and Richmond—were connected to the line extensions Public Service constructed for those developments, Public Service is not required to refund any of the Construction Payments to DRC. Though the tariff refund provisions are not applicable to DRC here, they are not "null and void" as DRC argues, as they would apply in situations where an additional applicant or developer attaches meters to an extension that was funded by a different original applicant or developer.

(*Id.*, ¶¶ 27-28 (footnotes omitted))

Finally, the Commission found that the developers were not harmed. (*Id.*, ¶ 31)

Although DRC characterizes its claims here as contract claims stemming from an alleged breach of the extension agreements, the substance of the claims are the same as those DRC alleged in the tariff complaint before the Commission. This Court should not allow DRC to raise the same claims in different tribunals in hopes of getting a different result. Doing so would be contrary to the statutory and constitutional authority of the Commission over the rates and policies of public utilities.

III. DRC must bring its claims to the Commission before it can bring them to the district court.

The Commission agrees with the district court's finding that the Commission has jurisdiction to adjudicate DRC's claims. The claims challenge Public Service's application of its tariff provisions, which are incorporated into the extension agreements. Only after the Commission determines whether Public Service violated its tariffs can DRC bring its claims to the district court under C.R.S. § 40-6-115.

As explained above, DRC correctly brought its claims on behalf of two developers, The Ryland Group and Richmond American Homes, to the Commission to determine whether Public Service correctly applied its tariffs for new gas and electric line extensions. The district court was therefore correct in finding that it does not have jurisdiction over DRC's so-called "contract claims" because the claims require interpreting Public Service's tariffs. The Commission is the appropriate tribunal to adjudicate those claims pursuant to C.R.S. §§ 40-6-108 and -109. Only after the Commission issues a final decision will the district court have subject matter jurisdiction under C.R.S. § 40-6-115, to review of the

lawfulness of the Commission's decision. *See City of Aspen*, 143 P.3d at 1081-82; *City of Boulder v. Pub. Serv. Co. of Colo.*, 996 P.2d 198, 204-05 (Colo. App. 1999).

CONCLUSION

The Court should affirm the district court decision and dismiss DRC's claims against Public Service.

Respectfully submitted this 8th day of December 2016.

CYNTHIA H. COFFMAN
Attorney General

/s/ Jessica L. Lowrey
JESSICA L. LOWREY*
Assistant Attorney General
Public Utilities Commission Unit
State Services Section
Attorneys for the Colorado Public Utilities Commission
*Counsel of Record

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within ***AMICUS ANSWER BRIEF OF THE COLORADO PUBLIC UTILITIES COMMISSION IN SUPPORT OF APPELLEE*** upon all parties herein by Integrated Colorado Courts E-filing System (ICCES) on the 8th day of December, 2016 addressed to the following:

Mark T. Valentine Lewis Brisbois Bisgaard & Smith LLP 1700 Lincoln St. Suite 4000 Denver, CO 80203 Mark.Valentine@lewisbrisbois.com	Franz Hardy Lance J. Ream Gordon & Rees LLP 555 17th Street, Suite 3400 Denver, CO 80202 fhardy@gordonrees.com lream@gordonrees.com

/s/Xan Serocki