Decision No. R23-0774-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0330E

IN THE MATTER OF APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF A NON-STANDARD EDR CONTRACT, AND FOR DETERMINATION NO CPCN IS NEEDED FOR CUSTOMER-FUNDED TRANSMISSION FACILITIES.

INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
GRANTING MOTION TO STRIKE, IN PART

Mailed Date: November 22, 2023

I. STATEMENT

1. On June 23, 2023, Public Service Company of Colorado (Public Service or Company) filed its Application for Approval of a Non-Standard Economic Development Rate (EDR) Contract, and for Determination No Certificate of Public Convenience and Necessity (CPCN) is Needed for Customer-Funded Transmission Facilities (Application).

2. By Decision No. C23-0472-I, the Commission referred the matter to an Administrative Law Judge (ALJ) for issuance of a Recommended Decision.

3. By Decision No. R23-0479-I, it was established that Public Service, QTS Aurora Infrastructure, LLC (QTS), Colorado Energy Consumers[1] (CEC), Climax Molybdenum Company's (Climax), the Office of the Utility Consumer Advocate (UCA) and Trial Staff of the Commission (Staff) are the parties to this proceeding.

[1] For purposes of this proceeding, its membership is comprised of, AirGas, USA, LLC, All Recycling, Inc., Google, Lockheed Martin Corporation, Occidental Energy Ventures, Suncor Energy (U.S.A.) Inc., and Western Midstream.

4. By Decision No. R23-0524-I and R23-0674-I, a procedural schedule was established to govern this proceeding.

5. Answer testimony has been filed by UCA and Staff. Public Service filed Rebuttal Testimony.

6. On October 31, 2023, Public Service Company of Colorado's Motion to Strike Portions of the Answer Testimonies of Staff Witnesses Ms. Sigalla and Mr. Dalton and UCA Witnesses Mr. Fernandez and Mr. Neil and Request for Shortened Response Time was filed. Public Service contends that portions of the answer testimonies of Ms. Sigalla, Mr. Dalton, Mr. Fernandez, and Mr. Neil should be stricken because they "go well beyond the bounds of what is allowed by the Rules of Evidence and misconstrue the scope of what the Commission must decide in this proceeding under the EDR Statute….is not linked to any decision point properly before the Commission in this proceeding, … [and] is irrelevant."

7. On November 7, 2023, the Office of the Utility Consumer Advocate's Response to Public Service Company of Colorado's Motion to Strike Portions of the Answer Testimonies of UCA Witnesses Mr. Fernandez and Mr. Neil was filed by the UCA.

8. On November 7, 2023, the Trial Staff's Response to Public Service Company of Colorado's Motion to Strike Portions of the Answer Testimonies of Staff Witnesses Ms. Sigalla and Mr. Dalton and UCA Witnesses Mr. Fernandez and Mr. Neil was filed by Staff.

9. On November 9, 2023, the Response in Support of Motion to Strike was filed by QTS.

10. On November 16, 2023, the hearing scheduled to commence in this matter was convened. This written decision memorializes the oral ruling announced as a preliminary matter at the hearing.

B. Economic Development Rate

11. Public Service seeks approval of a Non-Standard EDR Contract pursuant to § 40-3-104.3(6) through (8), C.R.S. (the "EDR Statute").

12. The Supreme Court laid out the principles of statutory interpretation that the Commission must follow:

> As with any statute, we endeavor to interpret the provisions of section 16-5-205.5 in strict accordance with the General Assembly's purpose and intent in enacting them. Empire Lodge Homeowners Ass'n v. Moyer, 39 P.3d 1139, 1152 (Colo. 2001). To discern that intent, we look first to the statute's plain language. Bd. of County Comm'rs v. Costilla County, 88 P.3d 1188, 1193 (Colo. 2004). Where the language of the statute is plain and clear, we must apply the statute as written. Univex Int'l, Inc. v. Orix Credit Alliance, Inc., 914 P.2d 1355, 1358 (Colo. 1996). Only where the wording in the statute is unclear and ambiguous will we resort to other modes of construction, such as relying on legislative history. Colo. Dep't of Labor & Employment v. Esser, 30 P.3d 189, 195 (Colo. 2001). [**9]
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> Generally, an ambiguity exists in a statute only where at least one of its terms is susceptible to multiple meanings. See Mountain City Meat Co. v. Oqueda, 919 P.2d 246, 252-53 (Colo. 1996) (superseded by statute on different grounds as stated in United Airlines, Inc. v. Indus. Claim Appeals Office, 993 P.2d 1152, 1158 (Colo. 2000)). Where a statute is silent on a certain matter and that silence prevents a reasonable application of the statute, we must endeavor to interpret and apply the statute despite that silence all the while striving "to effectuate the General Assembly's intent and the beneficial purpose of the legislative measure." In re Estate of Royal, 826 P.2d 1236, 1238 (Colo. 1992). If, however, a statute can be construed and applied as written, the legislature's silence on collateral matters is not this court's concern, see PDM Molding, Inc. v. Stanberg, 898 P.2d 542, 545 (Colo. 1995) (superseded by statute on different grounds as stated in Colo. Springs Disposal v. Indus. Claim Appeals

> Office, 58 P.3d 1061 (Colo. App. 2002)), for we will not strain to construe a statute unless necessary [**10] to avoid an absurd result, City of Westminster v. Dogan Constr. Co., 930 P.2d 585, 590 (Colo. 1997).
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> In re 2000-2001 Dist. Grand Jury, 97 P.3d 921, 924 (Colo. 2004).

13. The Commission has applied the EDR statute in Decision Nos. C19-0446, C19-0656, and C21-0333; issued May 28, 2019, August 1, 2019, and June 7, 2021, respectively. Notably, in Decision No. C21-0333, parties conditionally reserved the right to withdraw from the partial settlement at issue. Parties to the settlement did not concede the validity or correctness of any regulatory principle or methodology directly or indirectly incorporated and did not agree that any principle or methodology contained within or used to reach the Settlement Agreement may be applied to any situation other than Proceeding No. 20A-0345E, except as expressly set forth in the settlement. Appendix A to Decision No. C21-0333 at 19. Approval of the settlement by the Commission does not have a precedential effect upon other Commission matters. *See* Colorado Ute Elec. Ass'n, Inc. v. PUC, 602 P.2d 861, 865 (Colo. 1979); and B & M Serv., Inc. v. PUC, 429 P.2d 293, 296 (Colo. 1967).

14. The Commission's authority in this proceeding is not strictly confined to the provisions of the EDR Statute. In Decision No. C19-0656, the Commission affirmed applicability of its broad constitutional and statutory authority to regulate public utilities and that nothing in the EDR Act specifically limits that authority or precludes it from exercising that authority when considering an EDR tariff or service agreement. Decision No. C19-0656, issued August 1, 2019, in Proceeding No. 18A-0791E, at 9.

15. The Commission has considered factors outside of the scope argued by Public Service and QTS to be controlling here: "[i]n considering whether to approve the Service Agreement we are cognizant of the need for economic development in Pueblo and the

intervenors' and public support for this proposal to bring in new jobs and monies to this area." Decision No. C19-0446 at 30. The Commission also acknowledged need to reconcile a service agreement between the various state policies. Decision No. C19-0446, at 34. It is noteworthy that other statutes potentially have applicability even though not expressed in the EDR Statute. Illustratively, the Commission will promulgate rules pursuant to § 40-2-108(3)(b), C.R.S., requiring consideration of how best to provide equity, minimize impacts, and prioritize benefits to disproportionately impacted communities and address historical inequalities.

16. The Commission also weighed several issues beyond the minimum statutory criteria scope argued by Public Service and QTS to be controlling in approving the settlement in Proceeding No. 20A-0345E. Decision C21-0333, issued June 7, 2021. For example, the Commission considered differing discount rates for differing contract terms as a key program design feature; intended to dissuade an EDR customer from benefitting from early termination; and considered (but did not decide) what policy would be most appropriate and effective for this Commission to adopt as to geographically-differentiated EDR discounts.

C. Admissibility of Evidence

17. Rule 1501(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1 provides:

> The Commission shall not be bound by the technical rules of evidence. Nonetheless, to the extent practical, the Commission shall conform to the Colorado Rules of Evidence applicable in civil nonjury cases in the district courts. …. Informality in any proceeding or in the manner of taking testimony shall not invalidate any Commission order, decision, rule, or regulation. The Commission may receive and consider evidence not admissible under the rules of evidence, if the evidence possesses reliable probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.

18. The Supreme Court addressed admissibility in the context of the rules of evidence:

> We begin by noting CRE 402's general directive that "[a]ll relevant evidence is admissible," unless the United States Constitution, the Colorado Constitution, a state statute, the evidence rules, or the Supreme Court prohibits that evidence. Relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." CRE 403. In weighing those dangers and considerations, the proffered evidence "should be given its maximal probative weight and its minimal prejudicial effect." People v. Dist. Ct. of El Paso Cty., 869 P.2d 1281, 1285 (Colo. 1994). Thus, the evidentiary rules strongly favor the admission of relevant, material evidence. Palizzi v. City of Brighton, 228 P.3d 957, 962 (Colo. 2010).
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> *Murray v. Just In Case Bus. Lighthouse, Ltd. Liab. Co.*, 2016 CO 47, ¶ 19, 374 P.3d 443, 451

19. Relevant evidence "[h]aving any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[2]

20. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. C.R.E. 702.

21. Testimony of an expert witness may include lay testimony outside where the basis could be expected to be based on an ordinary person's experiences or knowledge:

> First, we hold that in determining whether testimony is lay testimony under Colorado Rule of Evidence ("CRE") 701 or expert testimony under CRE 702, the trial court must look to the basis for the opinion. If the witness provides testimony that could be expected to be based on an ordinary person's experiences or knowledge, then the witness is offering lay testimony. If, on the other hand, the witness provides testimony that

[2] Colo R. Evid. 401.

> could not be offered without specialized experiences, knowledge, or training, then the witness is offering expert testimony.
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> *Venalonzo v. People*, 2017 CO 9, ¶ 2, 388 P.3d 868, 870-71.

D. Subject Testimony

22. QTS initially points to the statutory elements in the EDR Statute and argues that the Commission is not required to consider factors addressed in the testimony requested to be stricken to evaluate a prospective EDR contract. It is argued that the Commission should limit the scope to the EDR Statute and not consider QTS differently from any other new customer.

23. To Mr. Fernandez' testimony, Public Service and QTS argue that he inappropriately opines on whether the legislature's intent in enacting the EDR Statute is without foundation.

24. In response, the UCA points to the Legislative Declaration in House Bill 18-1271, which amended § 40-3-104.3, C.R.S. The General Assembly specifically found and determined that: "The health, safety, and welfare of the people of our state are dependent upon the continued development and expansion of opportunities for employment in Colorado." Thus, UCA argues testimony regarding the Legislative Declaration is relevant to the Commission's consideration of the EDR Customer Service Agreement (ESA) and should be accorded the weight determined by the ALJ.

25. Public Service contends that Ms. Sigalla is opining that the Legislature intended the Commission consider the sufficiency of economic development benefits that warrant an EDR. Public Service contends she is advocating criteria outside of the EDR statute.

26. Public Service also argues Mr. Dalton's and Ms. Sigalla's testimony should be stricken that addresses the potential impact upon incremental greenhouse gas emissions and argues that the only requirements for an EDR application with respect to greenhouse gas

emissions are contained in the Settlement Agreement in Proceeding No. 20A-0345E (the EDR Settlement Agreement).

27. In its response, Staff primarily argues Public Service's criticism of the subject testimony goes to the weight of the evidence, not its admissibility. It is argued that the disputed testimony is admissible to address the Legislative declaration that "[t]he health, safety, and welfare of the people of our state are dependent upon the continued development and expansion of opportunities for employment in Colorado." Section 1 subpart (1)(a). Further, it is argued that the Commission's decision in Proceeding No. 20A-0345E recognized the relevancy of issues raised. Decision No. C21-0333 at ¶ 85, issued June 7, 2021.

28. Staff argues that the admission of Mr. Wright in rebuttal that QTS will build the facility even if it does not get the EDR calls into question whether the standards in § 40-3-104.3(7)(a), C.R.S. have been met.

29. Staff also argues that economic benefits have been considered in the context of the EDR Statute in Decision No. C19-0446 at paragraph 87:

> In considering whether to approve the Service Agreement we are cognizant of the need for economic development in Pueblo and the intervenors' and public support for this proposal to bring in new jobs and monies to this area." In that same proceeding, Paragraph 4 of Decision No. C19-0656 similarly discusses "job, salary, investment, and other direct economic benefits.

30. Staff contends that Ms. Sigalla's testimony is relevant as to the extent to which, if at all, that the QTS project has minimal economic development results. Thus, it is argued that this extent of benefit goes to weight, not admissibility. Further, Staff argues that Ms. Sigalla is an "an expert on the economy and the economic impact of various things on the economy." Response at 7. Staff argues that the testimony within the area of Ms. Sigalla's expertise tends to prove or disprove facts in issue and is thus relevant.

31. As to Mr. Dalton's subject testimony, it is argued that impact upon greenhouse gas emissions sheds light on the project and should be admissible and given appropriate weight.

E. Duplicate Testimony

32. Public Service contends that the duplicate identical attachments included by UCA witnesses Neill and Fernandez as part of their answer testimonies should be stricken as irrelevant, overbroad, and outside the scope of the proceeding. See Hearing Exhibit 200, Attachment RAF-2; Hearing Exhibit 201, Attachment CN-3. QTS supports striking the hearsay evidence, argues that portions might have appropriately been stated in testimony, and argues that Mr. Neil's testimony from the other proceeding is not relevant in light of the Commission's subsequent decision therein.

33. UCA argues that Mr. Neil's opinion criticizing the Company's poor forecasting is relevant to the proceeding and appropriately responsive to Public Service's direct testimony. The entire document was included to avoid any objection as to the admission of a portion of the document. It is also argued that striking the testimony will avoid unnecessary clutter in the record. UCA contends the testimony should be admitted and then appropriate weight may be given to Mr. Fernandez's testimony.

34. Mr. Fernandez identifies Attachment RAF-2 to Hearing Exhibit 201 as "Answer Testimony of Mr. Chris Neil in Proceeding 22AL-0530E."

35. Attachment RAF-2 attached to Hearing Exhibit 201 in the Commission's file is 49 pages of testimony and includes a caption of Proceeding 22AL-0530E; however, it is also labelled as "Hearing Exhibit 302, Answer Testimony of Chris Neil, Rev. 1, Proceeding 21AL-0530E."

36. At page 22, lines 9-10 of Hearing Exhibit 200, Mr. Fernandez testifies "[i]n the current PSCo Electric rate case, UCA witness Mr. Neil identified about $200 million in cost overruns for eight PSCo projects due to PSCo's poor forecasting," *citing* Attachment RAF-2, Answer Testimony of Mr. Chris Neil. in Proceeding 22AL-0530E.

37. Mr. Neil identifies Attachment CN-3 to Hearing Exhibit 201 as "Proceeding No. 22AL-0530E, Hearing Exhibit 302, Answer Testimony of Chris Neil, Rev. 2, at page 10, Table CN-1."

38. Attachment CN-3 attached to Hearing Exhibit 201 in the Commission's file is identical to Attachment RAF-2 to Hearing Exhibit 201 in the Commission's file.

39. At page 10, lines 5-6 of Hearing Exhibit 201, Mr. Neil testifies that "UCA notes that PSCo's transmission costs have substantially exceeded its estimated costs in several recent cases," citing "Attachment CN-3. Hearing Exhibit 302, in Proceeding No. 22AL-0530E, the Answer Testimony of Chris Neil, Rev. 2, at page 10, Table CN-1." There is no other reference to Attachment CN-3 in Mr. Neil's testimony.

40. A review of Commission files indicates there is no Proceeding No. 21AL-0530E and there is no Rev. 2 of Hearing Exhibit 302 in Proceeding No. 22AL-0530E.

41. In the procedural order governing this proceeding, the undersigned stated:

> Parties should not duplicate hearing exhibits or attachments previously filed by another party. A hearing exhibit or attachment filed by one party which duplicates a hearing exhibit or attachment previously filed by another party may be rejected or stricken from the record. At the hearing, any party may sponsor an exhibit that was pre-filed by another party.
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> Attachment B to R23-0524-I at 4.

42. As to this proceeding, there is substantial confusion in the record. Two duplicate attachments are cumulative and unnecessary, and there are duplicate references to identical information. The disputed attachments are both Mr. Neil's testimony in another proceeding;

however, he references only Table CN-1, which identifies eight Public Service projects where he opines those costs exceeded initial estimates. Mr. Neil is obviously available and testifying in this proceeding and Mr. Fernandez' offered testimony is pure hearsay wholly supported by Mr. Neil's testimony. Further, it's not precisely clear what Mr. Fernandez' general reference to a voluminous purely-hearsay document covering a variety of topics is intending to reference.

43. The general statements in Messrs. Neil and Fernandez are reasonably related to issues the Commission may consider in this proceeding. However, the offered attachment is hearsay as to Mr. Fernandez, included in Mr. Neil's offered testimony, and is overly broad and largely irrelevant to the testimony offered. The subject attachment being Mr. Neil's testimony, Attachment RAF-2 to Hearing Exhibit 200 will be stricken in its entirety and all except Page 8 of Attachment CN-3 to Hearing Exhibit 201 referenced by Mr. Neil will be stricken.

F. Conclusion

44. Except as to striking Attachment RAF-2 to Hearing Exhibit 200 and Attachment CN-3 to Hearing Exhibit 201, it is found that Public Service failed to meet its burden of proof to strike the subject testimony as not being relevant to any consideration the Commission could weigh in deciding whether to conditionally or unconditionally approve the EDR ESA. This conclusion is underscored in the manner the Commission previously applied the EDR Statute and the fact that this is the first impression litigating a Non-Standard EDR rate for Public Service. While this is not to say Public Service argument is without merit, appropriate weight can be given to the disputed testimony with minimal or no risk of prejudice and the testimony offered will not cause substantial delay or waste of resources.

II. ORDER

A. It Is Ordered That:

1. Public Service Company of Colorado's Motion to Strike Portions of the Answer Testimonies of Staff Witnesses Ms. Sigalla and Mr. Dalton and UCA Witnesses Mr. Fernandez and Mr. Neil, filed on October 31, 2023, is granted in part consistent with the discussion above.

2. Attachment RAF-2 to Hearing Exhibit 200 is stricken. All pages of Attachment CN-3 to Hearing Exhibit 201 except page 8 are stricken (i.e. Attachment CN-3 will be one page).

3. This Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

Rebecca E. White,
Director