

Decision No. C04-0143

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02M-573E

IN THE MATTER OF THE 2001 EARNINGS TEST FILING OF PUBLIC SERVICE
COMPANY OF COLORADO.

**DECISION DENYING EXCEPTIONS IN PART,
AND GRANTING THEM IN PART**

Mailed Date: February 6, 2004
Adopted Date: December 17, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Exceptions to Recommended Decision No. R03-1228, filed by the Colorado Office of Consumer Counsel (OCC) and Public Service Company of Colorado (Public Service or Company). In that decision, the Administrative Law Judge (ALJ) recommended: (1) that Public Service amortize the gain from the sale of the Boulder Canyon Hydroelectric Project (Boulder Hydro) over a four-year period, including one fourth of the gain in earnings test calculations for the years 2001 through 2004; (2) that Public Service include a \$2.36 million capital investment in temporary emission control equipment at Arapahoe 2 Generation Station in the earnings test calculation for 2001; and (3) that approval be granted to the partial stipulation and settlement agreement filed by Public Service, Commission Staff (Staff), and OCC, resolving issues relating to the JDE and Walker financial results.

2. Public Service, in its Exceptions, seeks to have paragraph 31 of the Recommended Decision either struck, or clarified as to its intent. Staff filed its Response to

Exceptions. The OCC argues in its Exceptions that including the gain from the sale of Boulder Hydro in an earnings test is inappropriate because it precludes the Commission from determining whether and how that gain should be allocated between ratepayers and shareholders. Now being duly advised, we deny the Exceptions, but clarify paragraph 31 of the Recommended Decision.

B. Discussion

3. In its Exceptions, the OCC first argues that including the gain from the sale of Boulder Hydro in the 2001 earnings test precludes the Commission from determining whether the gain should be allocated between ratepayers and shareholders. The OCC contends that regulatory principles established through decisions of several regulatory commissions and reviewing courts should be applied in making this determination. We note that Staff and the OCC identified that the gain from the sale of Boulder Hydro was at issue for earnings test purposes and that they specifically requested that the Commission assign this and all other issues raised on the 2001 earnings test calculation for hearing.¹ The OCC gave no indication at that point that it felt a separate proceeding on the gain from the sale of Boulder Hydro was warranted. Had the Commission decided that it wanted to expressly set a regulatory policy on the proper treatment of a gain from the sale of a generation asset, the Commission could have, on its own, chosen to separate out the gain issue for a separate proceeding. Instead, the Commission chose to assign all issues raised with respect to the 2001 earnings test calculation, including the gain issue, to an ALJ (*see* Decision No. C02-971). As to the OCC's argument that certain regulatory principles be applied, this Commission determines the treatment of gain from sale of assets on a case-by-case basis. The regulatory principles OCC seeks to apply are not "established" in the

¹ *See* Joint Motion of Staff and the Colorado Office of Consumer Counsel for Commission Order (1) Requiring Public Service Company of Colorado to File Its 2001 Earnings Test Report in a Manner that Complies with the Stipulations Approved by the Commission, (2) Requiring Public Service to Make Corrections to Its 2001 Earnings Test Filing, and (3) Setting this Matter for Hearing.

sense that they must be applied to every case.² We find that the ALJ's determination is appropriate treatment of the gain from sale under the facts of this case.

4. The OCC next argues that the earnings test performance-based regulatory structure was not designed to include the gain from the sale of a generation asset. The OCC points out that the Commission, in establishing an earnings test for Public Service, noted that performance-based regulatory structures are explicitly designed to share the benefits stemming from improvements in utility efficiency between shareholders and ratepayers. According to the OCC, there is no evidence in the record in this docket that the sale of Boulder Hydro improved the efficiency of Public Service's Electric Department in 2001. The OCC contends that it is inappropriate to include the gain in the earnings test calculation because Public Service does not sell generation assets in the ordinary course of business. The OCC requests that the Commission reject the ALJ's findings that including the gain in the 2001 earnings test is consistent with earnings test performance-based regulatory standards and, instead, require Public Service to file an application opening a separate docket to determine the appropriate treatment of the gain.³

5. OCC's argument ignores that the ALJ's determination is a compromise between the interests of shareholders who own the Boulder Hydro Plant, and ratepayers who share in the gain when earnings reach an established level under the earnings test formula. In addition, it is not accurate to say that the sale of the plant is unrelated to efficiency. Plants may be sold because, as in this case, future operation of the plant requires upgrade or maintenance costs that

² Factors that are relevant to appropriate treatment of the gain from sale of an asset include, among others, the purposes of the earnings test (*e.g.*, efficiency incentive), the interests of ratepayers and shareholders, and the amount of gain realized on the sale. In another case with different facts, the Commission may find that these factors compel different treatment of the gain.

³ Although it reserved its right to make additional arguments with respect to the inclusion of gains in the earnings test, the OCC acknowledges in its Exceptions that the parties agreed in Docket No. 00A-351E that Public Service would explicitly propose to treat the gain as an item to be considered in the earnings test proceeding for the calendar year in which the transaction closed.

might be uneconomic. In such a case, it benefits both ratepayers and shareholders to sell the plant, and thus the gain from the sale should be treated accordingly.

6. The OCC is correct that the sale of a generation asset is not in Public Service's ordinary course of business. In fact, this is why Public Service submitted an Application for the sale of Boulder Hydro. *See* Docket No. 00A-351E. We note that the annual earnings tests for the Company are intended to measure Public Service's earnings in light of its actual operations for each year (applying established ratemaking principles.). As a general matter, the sale of the Boulder facility was part of the Company's operations for 2001. Public Service's earnings test allows a party to propose a regulatory treatment for an item for which there has been no previously accepted regulatory treatment. No previously established regulatory treatment was accepted for the sale of Boulder Hydro. Thus it is appropriate for the Commission to decide the specific regulatory treatment for the gain for earnings test purposes.

7. The OCC then argues that the ALJ's recommendation that one-fourth of the gain be accounted for in earnings test calculations for the years 2001 through 2004 places an impossible requirement on the Company and further deprives customers of an opportunity to receive any portion of the gain, since Public Service is not required to make an earnings test filing for 2003. The OCC requests that the Commission clarify that the amortization of the gain should take place over four earnings test filings, not the four years, 2001 through 2004. The ALJ's recommendation is that the gain be amortized over the four years, 2001 through 2004. This reflects Staff's proposed treatment and the treatment that Public Service later accepted. This treatment is consistent with our approval of similar transactions in other cases, specifically Public Service's most recent electric rate case (*see* Decision No. C03-0670, Docket No. 02S-315EG).

8. Finally, the OCC argues that a separate docket for determination of the appropriate treatment of the gain is not an inefficient use of the Commission's and the parties' resources and is not contrary to the Stipulation in Docket No. 00A-351E. We disagree. The Commission determined the appropriate procedural venue for this issue when it approved the Stipulation in Docket No. 00A-351E and further when it granted the joint motion requesting a hearing on 2001 earnings test issues, including the gain, before an ALJ.

9. Public Service Company seeks to have paragraph 31 of the ALJ's recommended decision deleted, or declared *dicta*. Paragraph 31 states:

Public Service should retain the inputs and assumptions used in the PROSYM model runs for independent review by Staff or other intervenors in future cases...

10. We note that paragraph 31 was not in the ordering section of the ALJ's decision, and that the ordering paragraphs contain no language requiring Public Service to maintain any records. The language of paragraph 31 is suggestive in nature, and indicates that Public Service "should" maintain the assumptions and inputs it uses to reach decisions that could come before the Commission for review. This language will not be stricken from the ALJ's recommended decision.

11. Nor will we, in this case, order Public Service to manage its records in any way. However, in rate cases, this Commission expects Public Service to be able to substantiate all decisions affecting rates. In general, Public Service has the burden of proof in such cases. Without the assumptions and inputs used to generate PROSYM results, the Commission and its staff may not be able to properly analyze whether a particular decision is prudent, especially when the PROSYM results provide the only evidence to show that a decision is prudent. Without the assumptions and inputs used to generate results, Public Service runs the risk that

either the results will lack the foundation required for admission into evidence, or, that its evidence will be given little weight.

12. In this case even without the assumptions used in the PROSYM run, the ALJ was able to determine that the decision to invest in pollution control equipment was sound. In another case, without the foundations and inputs such a determination might not be possible, and the Commission might not deem PROSYM results to weigh in favor of a particular decision's prudence.

13. Therefore, the Commission denies Public Service's Exceptions to the extent that they seek deletion of paragraph 31 from the Recommended Decision. We grant Public Service's Exceptions to the extent they seek clarification as to whether paragraph 31 in fact orders Public Service to maintain certain records.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Recommended Decision No. R03-1228 filed by the Colorado Office of Consumer Counsel are denied consistent with the above discussion.

2. The Exceptions to Recommended Decision No. R03-1228 filed by Public Service Company of Colorado are partially granted consistent with the above discussion.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 17, 2003.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners