

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION)
OF PUBLIC SERVICE COMPANY OF)
COLORADO FOR AUTHORIZATION OF THE)
REPOWERING OF FORT ST. VRAIN, FOR)
ISSUANCE OF SUCH CERTIFICATES OF)
PUBLIC CONVENIENCE AND NECESSITY)
AS MAY BE NECESSARY TO ACCOMPLISH)
THE ABOVE PURPOSE, FOR MODIFICATION)
OF SUCH COMMISSION DECISIONS AS)
MAY BE NECESSARY TO ACCOMPLISH THE)
ABOVE PURPOSES, FOR AUTHORIZATION)
OF A RATE METHODOLOGY ASSOCIATED)
WITH THE REPOWERING, FOR GRANTING)
OF THE RELIEF SOUGHT ON AN)
ACCELERATED BASIS, AND FOR SUCH)
OTHER RELIEF AS MAY BE NECESSARY)
OR APPROPRIATE TO ACCOMPLISH THE)
ABOVE PURPOSES.)

DOCKET NO. 91A-281E

COMMISSION ORDER DENYING MOTION TO DISMISS
AND SETTING PROCEDURAL SCHEDULE

Mailing date: July 12, 1991
Adopted date: July 10, 1991

BY THE COMMISSION:

This matter came on for consideration at a Prehearing Conference held on Tuesday July 2, 1991 at 9 a.m. The Commission heard argument of counsel concerning the Motion to Dismiss filed by Intervenors Belcher, Green, Starling, and the Concerned Citizens Congress of Northeast Denver; and recessed to allow the parties to confer on a proposed procedural schedule. The Commission makes the following rulings.

Regarding the motion to dismiss, the Commission adopts the standard of review for motions to dismiss filed pursuant to Rule 61(d) of the Commission's Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1, which apply to motions to dismiss filed in the court system. The United States Supreme Court's classic statement of the standard of review on a motion to dismiss is:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

In its Motion to Dismiss, Intervenors seek to dismiss the Application because the Application allegedly: (1) breaches the September 24, 1986 Fort St. Vrain Stipulation and Settlement Agreement; (2) seeks an unconstitutional impairment of the obligation of contracts; and (3) would result in rates and regulatory treatment which is neither just nor reasonable. Intervenors' allegations in its Motion to Dismiss raise disputed issues of fact. Upon review of a motion to dismiss of a Commission application, as upon review of a motion to dismiss a complaint, the facts alleged in the application, and reasonable inferences from those facts, are presumed to be true. See Hishon v. King & Spalding, 467 U. S. 69, 73 (1984) ("At this stage in the litigation, we must accept petitioner's allegations as true."). For example, we must accept as true Public Service's allegations of "changed circumstances" since the 1986 agreement, leading to "significant, widespread benefits of early dismantlement", which would mean that it would be in the "public interest" for the Commission to approve this Application. See Application at 16, ¶ 24. At this stage of the litigation, the Commission cannot state that it is clear that no relief could be granted to Public Service

under any set of facts that could be proved consistent with the allegations in the Application.

Further, the Commission agrees with Public Service's argument that the PUC has the legal power to change or modify the 1986 Fort St. Vrain settlement, if the company demonstrates facts establishing "changed circumstances" and that a modification of the 1986 Settlement would be in the public interest. "If the facts exist to indicate an adverse change in circumstances such that prior agreements offend the public welfare, the PUC must pursue its lawful mandate. After providing parties with an opportunity to be heard, it may then rescind, alter or amend its prior orders or decisions." Public Service Response to Motion to Dismiss at 5, citing, Zelinger v. Public Service Co., 435 P.2d 412, 416 (Colo. 1967) ("a general grant of power to regulate rates authorizes a commission to regulate or modify rates fixed by contract") (quoting 73 C.J.S. Public Utilities § 41 at 1085); Consolidated Freightways Corp. v. PUC, 406 P.2d 83, 87 (Colo. 1965) (PUC cannot change, alter, amend or strike an order previously in effect without a hearing when requested); Municipal Authority of Township of Blythe v. Pennsylvania PUC, 185 A.2d 628, 631 (Pa. Super. Ct. 1962) ("Public Utilities Commission has jurisdiction over the price charged for utility service regardless of whether that price has been established by a deed, a contract, ordinance, or otherwise"); Colorado Revised Statutes § 40-6-112 (1) (1984 Rep. Vol.17) ("The commission, at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, may rescind, alter, or amend any decision made by it."). While the Company may have a difficult burden in proving facts showing "changed circumstances" such that the Commission would conclude that modifying the 1986 Settlement was in the "public interest", at this stage in the litigation, the company should be allowed to proceed with this Application. Accordingly, the motion to dismiss is denied.

At the prehearing conference, the parties conferred among themselves concerning a procedural schedule. In advance of the Commission regular Open Meeting on July 10, 1991, the parties conferred further, and sent correspondence to the Commission indicating a desire to delay the procedural schedule by approximately one month. The Commission will accept the schedule agreed to by the parties:

September 13, 1991	Public Service Supplemental Direct Testimony due.
November 7, 1991	Scheduling Conference before the <u>en banc</u> Commission, 9:30 a.m.
December 6, 1991	Intervenor Answer Testimony due.
December 12, 1991	Scheduling Conference before the <u>en banc</u> Commission, 9:30 a.m.
February 21, 1992	Reply Testimony by Public Service due.
March 19, 1992	Final Prehearing Conference, 9:30 a.m. before the <u>en banc</u> Commission. Colo.R.Civ.P. 16(a) Supplemental Disclosure Certificates due one week in advance, March 12, 1992.
April 6 through 9, 1992	Hearings before the <u>en banc</u> Commission on the Application.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Motion to Dismiss, filed on June 21, 1991, by Intervenor Belcher, Green, Starling, and the Concerned Citizens Congress of Northeast Denver, is hereby denied.
2. This Application shall proceed with discovery as usual, except that responses to discovery requests shall be due in 21 days, rather than the normal 30 days.

3. On or before September 13, 1991, Applicant the Public Service Company of Colorado shall file its supplemental direct testimony.

4. On November 7, 1991, the Commission, sitting en banc, will conduct a Scheduling Conference, at the following place and time:

Time: Thursday November 7, 1991, 9:30 a.m.

Place: Logan Tower
1580 Logan Street, Office Level 2
Hearing Room "A"
Denver, CO 80203.

5. On or before December 6, 1991, Intervenors shall file their Answer Testimony.

6. On December 12, 1991, the Commission, sitting en banc, will conduct a Scheduling Conference, at the following place and time:

Time: Thursday December 12, 1991, 9:30 a.m.

Place: Logan Tower
1580 Logan Street, Office Level 2
Hearing Room "A"
Denver, CO 80203.

7. On or before February 21, 1992, the Public Service Company of Colorado shall file its Reply Testimony.

8. On or before March 12, 1992, the parties shall file Supplemental Disclosure Statements, conforming to Colo.R.Civ.P. 16(a).

9. On March 19, 1992, the Commission, sitting en banc, will conduct a Final Prehearing Conference, at the following place and time:

Time: Thursday March 19, 1992, 9:30 a.m.

Place: Logan Tower
1580 Logan Street, Office Level 2
Hearing Room "A"
Denver, CO 80203.

10. During the week commencing April 6, 1992, the Commission, sitting en banc, will conduct 4 days of hearing on this Application, commencing each day at 9:30 a.m. (The Commission will reserve Friday April 10, 1992 for a possible fifth day of hearing, if necessary.) The hearing will be held at the following time and place:

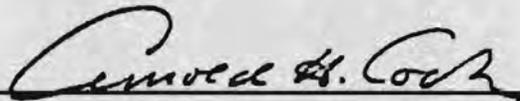
Time: Monday - Thursday, April 6 through 9, 1992, 9:30 a.m.

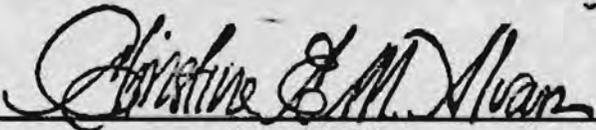
Place: Logan Tower
1580 Logan Street, Office Level 2
Hearing Room "A"
Denver, CO 80203.

11. This Order is effective on the date of its release (mailing date).

ADOPTED IN OPEN MEETING ON July 10, 1991.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO





Commissioners

COMMISSIONER GARY L. NAKARADO
ABSENT, BUT CONCURRING.