(Decision No. C94-612)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY PUBLIC SERVICE COMPANY OF COLORADO WITH ADVICE LETTER NO. 1197-ELECTRIC.	)	DOCKET NO. 93S-151E
IN THE MATTER OF THE INVESTIGATION OF THE MAINTENANCE COSTS AND OPERATIONAL EFFICIENCY OF PAWNEE I, UTILIZATION BY PUBLIC SERVICE COMPANY OF COLORADO OF QUALIFYING FACILITIES, AND RELATED MATTERS.	)	DOCKET NO. 94I-264E

DECISION

Mailed Date: May 19, 1994
Adopted Date: May 13, 1994

BY THE COMMISSION:

This matter comes before the Colorado Public Utilities Commission ("Commission") for consideration of applications for rehearing, reargument, or reconsideration filed by Public Service Company of Colorado, Commission Staff, and the Colorado Office of Consumer Counsel regarding Decision No. C93-1500.

The Commission agrees on the denial of certain portions of Public Service Company's Application, and disagrees on other portions. Acting Chairperson Alvarez, for reasons stated in her separate opinion which will be mailed under separate cover, would grant in part and deny in part the applications of Commission Staff and the Office of Consumer Counsel. Commissioner Majkowski, for

reasons stated in his separate opinion which will be mailed under separate cover, would deny the applications of Commission Staff and the Office of Consumer Counsel.

In Decision No. C93-1500, this Commission concluded that a separate investigation proceeding should be commenced to consider Public Service Company's utilization of qualifying facilities and the operational efficiency and maintenance cost of Pawnee I. This has not yet occurred. Therefore, by this Decision the Commission orders that a new docket be opened to consider these matters.

THEREFORE THE COMMISSION ORDERS THAT:

1. The Applications for Rehearing, Reargument, or Reconsideration filed by Commission Staff, Public Service Company of Colorado, and Office of Consumer Counsel, are hereby denied by operation of law.

2. Docket No. 94I-264E is hereby opened. The Commission will conduct a **prehearing conference** to set the procedural schedule for this docket on:

DATE: June 20, 1994

TIME: 1:30 p.m.

PLACE: Commission Hearing Room A, Office Level (OL) 2
1580 Logan Street, Denver, Colorado

3. Public Service Company of Colorado shall file within ten days of the effective date of this Order its tariffs incorporating its earnings test and a review process. This tariff shall be

effective on 30 days' notice. This filing should include a proposed review schedule for the costs included in the Qualifying Facility Capacity Cost Adjustment. Upon receipt of the proposed tariffs, the Commission may suspend the tariffs and set them for hearing.

This Order is effective on its Mailed Date.

ADOPTED IN SPECIAL OPEN MEETING May 13, 1994.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CHAIRMAN ROBERT E. TEMMER RESIGNED
EFFECTIVE MARCH 1, 1994.

THE OPINIONS OF ACTING CHAIRPERSON CHRISTINE E. ALVAREZ AND COMMISSIONER VINCENT MAJKOWSKI WILL BE FILED SEPARATELY FROM THIS DECISION.

(Decision No. C94-612-MAJKOWSKI)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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THE INVESTIGATION AND SUSPENSION OF TARIFF SHEETS FILED BY PUBLIC SERVICE COMPANY OF COLORADO WITH ADVICE LETTER NO. 1197-ELECTRIC.	)	DOCKET NO. 93S-151E
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OPINION OF COMMISSIONER VINCENT MAJKOWSKI
TO DECISION NO. C94-612

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Decision Adopted Date: May 13, 1994
Decision Mailed Date: May 19, 1994
Commissioner Majkowski Opinion Mailed Date: May 25, 1994

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In Decision No. C93-1500, this Commission approved, with modifications, Public Service Company of Colorado's ("Public Service" or "PSCo") tariffs filed under Advice Letter No. 1197. These tariffs authorize Public Service to institute a Qualifying Facility Capacity Cost Adjustment rider ("QFCCA") to collect capacity costs charged by qualifying facilities ("QFs"). We ordered certain modifications be made to the tariffs to more equitably balance the interests of Public Service shareholders and ratepayers. Among other modifications, we ordered Public Service to file an advice letter and tariff to set forth a proposed

earnings test which would limit recovery of QF costs under the QFCCA.

A. Application of Public Service.

Public Service requests that we reconsider our decision to adopt an earnings test. It argues that an earnings test is inconsistent with the statutory complaint process of § 40-6-108, C.R.S., and the general provisions of § 40-3-104, C.R.S. (1993). The company further argues that the concept of an earnings test is not supported in the record. Finally, Public Service argues that the interest rate on over-collections under the rider should be the deposit rate of interest and not its current composite cost of capital.

I find that the company's legal arguments misconstrue the public utility statutory framework. The statutory complaint process simply affords a procedural remedy to ratepayers to challenge rates filed by utilities. These statutes do not define what rates this Commission may find just and reasonable. That determination is left to the broad discretion of the Commission.

In this regard, I note that this Commission has set a number of rates that are, in some fashion or another, connected to utility earnings. For example, in Docket No. 90A-665T we adopted an alternative form of regulation for U S WEST Communications, Inc., which provides for a sharing of the utility's revenues with ratepayers above a certain threshold. In Docket No. 93S-001EG, Public Service proposed a tariffed sharing mechanism for profits

and losses called the Earnings and Service Quality Incentive Plan. Public Service did not argue there that such a provision is inconsistent with the complaint process. And, as the company correctly notes in its present Application, the various cost adjustment clauses that it currently has in place are also related to earnings in the sense that they are intended to stabilize the company's earnings. Public Service distinguishes these clauses from the earnings test by arguing that they are a limited exception to the statutory framework but are justified on solid policy grounds. In effect, Public Service argues that this Commission can and has modified statutory requirements by its own policies. This Commission does not have authority to modify statutes. Rather, there are no statutes which limit these cost adjustment clauses. And, just as the statutes do not limit our authority to adopt a cost adjustment clause, the statutes do not limit our authority to adopt an earnings test in tariffs.

In a related argument, the company argues that the earnings test would change base rates without a hearing and without a formal complaint procedure. Again, I disagree for the reasons set forth above. In addition, the company is incorrect that the earnings test would change base rates. The earnings test limits recovery of QF costs that are otherwise collected under the QFCCA. The Commission has broad discretion on how a utility can recover costs. *See Public Service Company v. Public Utilities Commission*, 644 P.2d 933 (Colo. 1982). The fact that these costs are substantial and

recoverable does not then translate into a legal right to recover them through an automatic cost adjustment mechanism.

The company is also incorrect that the earnings test portion of Decision No. C93-1500 must be reversed for lack of record. Mr. Hix of the OCC raised the concept of an earnings test in his testimony. Public Service cross-examined Mr. Hix in this issue and had the opportunity to rebut this concept. We found in Decision No. C93-1500 that an earnings test provides the necessary counterbalance to the automatic flow through of QF costs by Public Service. In its exceptions and Application, Public Service had additional opportunities to argue its position. I have fully reviewed these arguments and find that they should be rejected for the reasons set forth in Decision No. C93-1500. I note in this regard that the balancing of competing interests and the adoption of an earnings test is primarily a policy decision calling upon the judgment of the Commission. Even accepting Public Service's factual claims regarding their argument here as true, I continue to believe that the appropriate balance is that struck in Decision No. C93-1500.

In addition, Public Service argued that the earnings test may impact its incentives to operate its system efficiently and reduce costs. I will consider this issue in reviewing the earnings test tariff.

The last issue raised by Public Service regarding the earnings test is its claim that there was insufficient notice for the Commission to adopt this test. This is incorrect. The

Commission's authority in reviewing rates filed by a utility is not simply either to reject or accept the tariff. The Commission can, without additional notice, make such modifications that it, in the exercise of its discretion, finds are just and reasonable. *See* § 40-6-111(2)(a), C.R.S. (1993). I conclude our decision to modify the QFCCA to include the earnings test is just such a modification and is well within the scope of the notice.

With respect to the correct interest rate to be charged to over-collections of QF costs, Public Service argues that the customer deposit rate of interest should be used and that there is no record on which to select the higher composite cost of capital selected by the administrative law judge and this Commission. The company argues that the deposit rate more closely reflects the true cost of these over-collections and, for that reason, should be adopted.

I vote not to alter our decision even accepting Public Service's factual assertions as true. This Commission selected the composite cost of capital as the interest rate because it provides Public Service an incentive to accurately estimate *pro forma* adjustments. The company in its Application does not take issue with this policy decision. Therefore, the Application as to this issue should be denied.

B. Application of Colorado Office of Consumer Counsel.

The OCC requests that we reconsider our decision to adopt the QFCCA because the company has not established that the QF costs are

volatile. To support this assertion, the OCC requests that we take administrative notice of certain Public Service records in Docket No. 93A-098E which allegedly establish that the implementation dates for these assets are known and, therefore, are not volatile. The OCC also argues that the QFCCA rider is contrary to the Commission's policy to engage in piecemeal regulation.

With respect to the first claim that costs are not volatile, the Commission notes that even accepting OCC's claim that these dates on which these costs will be incurred is fairly well known, these costs are still volatile in the sense that they change over time. As the Staff noted in its exceptions, these costs rise over time until August, 1996.

Moreover, Public Service recently completed a general rate case. This gives the Commission a fair measure of assurance that the company's costs and revenues are fairly matched. These QF costs are substantial and will likely disrupt the balance struck by the rate case. If we did not include these costs in a rider, we would likely force Public Service into filing another rate case in the near future. This does not strike me as a prudent use of resources. I also disagree that Public Service could have included these costs in the last rate case. These costs will continue to accrue significantly beyond any *pro forma* period that the Commission has traditionally accepted.

Even if the Commission were to conclude that these costs are not volatile in any sense, the Commission is not precluded from adopting the rider. This "volatility" argument is not statutory.

It is one of the factors that state commissions look to in deciding whether to adopt a rider. But it is not legally necessary to find volatility before a rider is approved. For the reasons set forth in Decision No. C93-1500, I conclude that this clause is just and reasonable and should be approved, as modified.

OCC argues that the QFCCA results in an excessive recovery of capacity costs. This argument was not raised at hearing and can not properly be raised for the first time in an Application for Reconsideration. For this same reason, OCC's proposed revision of the QFCCA set forth in its Application is rejected.

Finally, OCC is not correct that the earnings test to be adopted in this case is left to the discretion of Public Service. Public Service has been ordered to file a tariff incorporating an earnings test. I anticipate voting to suspend this tariff when filed and setting the matter for hearing. At that time, intervenors may file their version of an earnings test. The Commission will then establish an appropriate test after full hearing on the matter.

C. Application of Commission Staff.

Commission Staff recommended that the Commission reconsider the duration of the QFCCA and determine that is should expire at the end of calendar year 1996. I do not feel that this is necessary, since the QFCCA came on line in December, 1993, and ramps up to 1996, at which time they level off. This issue was originally addressed in Decision No. C93-1500 when I agreed to

limit the duration of the QFCCA. The QFCCA will expire when the next rate case is filed. For this reason, I reject Staff's proposal.

Staff recommends the Commission clarify what it envisions as an earnings test. As the parties will recall, I supported OCC's request for an earnings test in the original Decision. Public Service was to file by January 1, 1994, an advice letter and tariffs, to be effective on 30 days' notice, which incorporated an earnings test. Had these tariffs been filed at that time, I would have voted to suspend them and set the matter for hearing. At that hearing, a record would be developed to resolve the type of issues Staff now raises. These issues cannot be resolved prior to hearing as Staff requests, because the record is insufficient to resolve them.

By Commission Decision No. C93-1643, and Decision No. C94-282, this Commission granted extensions of time to file applications for rehearing, reargument, or reconsideration and to delay the filing of the earnings test until ten days after our decision on the applications. These delays have not allowed Staff's issues to be resolved at this time. For these reasons, I reject Staff's request.

With regard to Staff's concern of QFCCA and review process, Public Service has been ordered to file an advice letter with tariffs incorporating a proposed earnings test and review process. Again, I anticipate voting to suspend this tariff when filed and setting the matter for hearing. At that time intervenors may file

their version of an earnings test and review process. The Commission will then establish an appropriate test and review process after full hearing on the matter.

In Decision C93-1500, the Commission supported Staff concerning the use of QFs and the operations and maintenance costs of Pawnee I power plant. The discussion portion of that decision addressed this; however, the ordering portion of that decision did not direct opening of a separate docket. Thus, it is so ordered in this Decision.

With regard to Staff's concern regarding an investigation into all riders and incentives, my only comment on this is that these are a number of independent dockets currently under way. The results have not been completed. This docket should concentrate on QFCCAs. Therefore, I reject this proposal at this time.

For the reasons set forth above and in Decision No. C93-1500, I vote to deny Applications for Rehearing, Reargument, and Reconsideration filed by Commission Staff, Public Service Company of Colorado, and the Office of Consumer Counsel.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Vincent Majkowski

COMMISSIONER VINCENT MAJKOWSKI.