

Decision No. C04-0331

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01F-071G

HOME BUILDERS ASSOCIATION OF METROPOLITAN DENVER,

COMPLAINANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

DOCKET NO. 02F-434G

MELODY HOMES, THE RYLAND GROUP INC., KB HOME COLORADO INC., VILLAGE HOMES OF COLORADO, INC., SHEA HOMES LIMITED PARTNERSHIP AND THE WRITER CORPORATION, ON BEHALF OF THEMSELVES AND ALL OTHER SIMILARLY SITUATED INDIVIDUALS AND BUSINESSES,

COMPLAINANTS,

v.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**ORDER APPROVING STIPULATION
AND SETTLEMENT AGREEMENT**

Mailed Date: March 30, 2004
Adopted Date: March 24, 2004

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of approval of a Stipulation and Agreement in Resolution of Proceedings (Settlement Agreement) entered into

between Public Service Company of Colorado (Public Service) and Home Builders Association of Metropolitan Denver (HBA) on March 12, 2004. The parties entered into this Settlement Agreement to settle and resolve all disputes arising out of HBA's complaint action against Public Service, which alleged that Public Service failed to update its Construction Allowance (CA) as required by its tariff.

2. Now, being duly advised in the matter, we approve the Settlement Agreement.

3. HBA filed this complaint action on February 23, 2001. In its complaint, HBA alleged that Public Service's construction allowance was too low because Public Service failed to update it as required by its natural gas extension tariff, sheet number R34. The matter was heard by an administrative law judge (ALJ) who subsequently issued Recommended Decision No. R02-049. In that Recommended Decision, the ALJ found that the \$360 CA was the allowance approved by the Commission, that changing the CA as requested by HBA would violate the filed rate doctrine, and that HBA had failed to establish that the CA was excessive or discriminatory. However, we overturned the ALJ's findings and remanded the matter to the ALJ to determine whether HBA had standing to bring this complaint; whether the CA was excessive or discriminatory; whether reparations were required to be paid by Public Service pursuant to § 40-6-119, C.R.S.; the amount of such reparations taking into account any statute of limitation issues; and, whether HBA was entitled to an award of attorney's fees and interest.

4. In response to the unsettled standing issue, several HBA members brought an identical complaint case against Public Service on August 20, 2002, captioned *Melody Homes v. Public Service*, Docket No. 02F-434G. However, the Commission stayed that proceeding pending the outcome of the HBA complaint action.

5. After further hearings on remand, the ALJ issued Recommended Decision No. R03-0519. In that Recommended Decision, the ALJ found the following: that HBA had standing to bring this complaint action; that Public Service was required to file a new CA within 30 days of a final decision in its last rate case; Public Service was required to annually review and recalculate the CA, unless it applied for and received a waiver from the Commission; HBA failed to meet its burden of proof that its CA methodology and calculation of reparations was proper; due to the statute of limitations, any reparations were limited to charges accrued after February 23, 1999; and, HBA was not entitled to attorney's fees.

6. The parties both filed exceptions to the Recommended Decision. In Decision No. C03-1093, we held that Public Service did not follow the terms of its tariff in failing to annually update the CA or file for a waiver. We further held that HBA was entitled to reparations as a result of this failure. We agreed with the ALJ that HBA had standing to bring this matter, and that the statute of limitations in 40-6-119(2), C.R.S. restricted reparations to two years prior to the filing of the complaint. We ordered reparations based on Public Service's rate case in Docket No. 96S-290G. We further ordered HBA to provide a list of its affected members and identify the extensions subject to reparations. We ordered that Public Service prepare and file a plan of reparations based on HBA's list. Although we initially barred Public Service from seeking recovery of any reparations ordered here in future rate cases, we subsequently reversed that decision.

7. After we denied Public Service's application for rehearing, reargument or reconsideration of our decision, it filed for judicial review in Denver District Court. Subsequently, the parties indicated that they had entered into settlement negotiations and on March 12, 2004, filed this Settlement Agreement.

8. The parties agree that the Settlement Agreement resolves all the issues in this proceeding as well as the issues in Docket No. 02F-434G. HBA further agrees that neither it nor its members will challenge the level of construction allowances for the period 1996 through 2002 in any proceeding before the Commission or any other forum.

9. In settlement of the issues, Public Service agrees to pay HBA \$682,081.00, which shall be distributed by HBA among its affected members in accordance with their respective entitlements. HBA agrees to cooperate fully with Public Service to ensure proper accounting by identifying the amount of settlement payment remitted to each HBA member for each extension, including, where practicable, the extension number. The parties also agree that Public Service will submit notification to the Commission within ten days of the date on which all of the following have occurred:

- a) the Stipulation becomes effective;
- b) the settlement payment has been made in full to HBA;
- c) HBA has notified Public Service that the full amount of the settlement payment has been distributed among its members in accordance to their entitlements; and
- d) Public Service and HBA have completed the process of identifying the specific homebuilders, extensions and extension numbers in accordance with paragraph 20 of the Settlement Agreement.

Public Service avows that it will seek to dismiss its judicial review proceedings in the Denver District Court in this matter within ten days of the date on which the notification above has been filed with the Commission.

10. We find that the terms of the Settlement Agreement are a just, reasonable and equitable resolution of the issues raised in this matter. We further find that approving the Settlement Agreement is in the public interest and we therefore approve the Settlement Agreement without modification.

11. We point out one issue raised in the language of the agreement. The Settlement Agreement provides that by approving it, “the Commission authorizes Public Service, for accounting purposes, to record the Settlement Payment, exclusive of the interest component thereof, in Account No. 252 (Customer Advances-Refundable).” We have no qualms with this method of accounting. However, we note that this authorization is not to be construed in any way as Commission approval of any attempt by Public Service at recovery of these settlement dollars in any future Public Service rate case. Approval or disapproval of recovery of those monies by Public Service shall be determined by the Commission after a full opportunity to hear arguments on that recovery in a specific future rate case.

12. We find that the Settlement Agreement provides a comprehensive procedure regarding payment by Public Service to HBA for the agreed upon amount and for disbursement of those funds by HBA to its affected members. We applaud the parties for their efforts to reach this settlement. Although the parties have agreed that Public Service will notify this Commission upon disbursement of all funds to HBA members, we find it important that HBA provide certain information to the Commission as well. Therefore, we require HBA to file an affidavit with the Commission that includes a statement as to when all monies it receives from Public Service in settlement of this matter are distributed to its members. No other conditions will be required of the parties.

13. We further note that the parties have agreed that the Settlement Agreement also settles the matters raised in the *Melody Homes v. Public Service* complaint in Docket No. 02F-434G. Therefore, we lift the stay we imposed there and close the docket.

II. ORDER

A. The Commission Orders That:

1. The Stipulation and Agreement in Resolution of Proceedings entered into between Public Service Company of Colorado and Home Builders Association of Metropolitan Denver is approved.

2. Home Builders Association of Metropolitan Denver shall file an affidavit with the Commission as detailed above.

3. The stay we imposed in Docket No. 02F-434G is lifted and the docket closed consistent with the discussion above.

4. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 24, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CHAIRMAN GREGORY E. SOPKIN
RECUSED HIMSELF.