

Decision No. R24-0144

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22F-0263EG

OLSON’S GREENHOUSES OF COLORADO, LLC,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY DENYING CLAIMS IN COMPLAINT
AND CLOSING PROCEEDING**

Mailed Date: March 6, 2024

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I. PROCEDURAL BACKGROUND

1. On June 10, 2022, Olson’s Greenhouses of Colorado, LLC (Olson’s) filed a Formal Complaint (Complaint) against Public Service Company of Colorado (Public Service).

2. On June 13, 2022, the Commission scheduled the Complaint for an evidentiary hearing to be held on August 29, 2022. On the same date, the Commission filed and served an Order Setting Hearing and Notice of Hearing and other documents on Public Service.

3. Also on June 13, 2022, the Commission served on Public Service the Complaint, the Order Setting Hearing and Notice of Hearing, and an Order to Satisfy or Answer.

4. On June 15, 2022, the Commission referred this proceeding by minute entry to an Administrative Law Judge (ALJ). The proceeding was subsequently assigned to the undersigned ALJ.

5. On July 5, 2022, Public Service filed a Motion to Dismiss with Prejudice for Failure to State a Claim or, in the Alternative, Motion for Summary Judgment (Motion).

6. On July 18, 2022, Olson's filed a Response to the Motion (Response).

7. On July 29, 2022, the ALJ issued Decision No. R22-0444-I that denied the Motion, scheduled a remote prehearing conference for August 11, 2022, directed the parties to confer regarding a schedule for this proceeding, and for Olson's to file a Report of Conferral (Report) by August 9, 2022.

8. On August 9, 2022, Olson's filed the Report in which the parties agreed to: (a) a deadline for Olson's to file its direct case; (b) "adherence to the Commission's rules governing discovery;" and (c) a two-day hearing.¹ However, the parties were waiting for "final client approval," but anticipated "obtaining approval prior to the prehearing conference scheduled for August 11, 2022."²

9. On August 10, 2022, counsel for Olson's sent an email to the ALJ and copied counsel for Public Service informing the ALJ that the parties had agreed to the entire schedule for the proceeding, and inquiring about the ALJ's availability on certain proposed hearing dates. A series of emails ensued that led to the conclusion that the hearing would be held February 29 through March 1, 2023.

¹ Report at 1.

² *Id.*

10. On August 11, 2022, Olson’s filed a Notice of Consensus Procedural Schedule (Notice) stating that the parties agreed to the following schedule for this proceeding:

| <u>Event</u> | <u>Deadline</u> |
|---------------------------------|-----------------------------------|
| Direct Testimony | December 9, 2022 |
| Answer Testimony | January 13, 2023 |
| Rebuttal Testimony | February 10, 2023 |
| Prehearing Motions | February 17, 2023 |
| Settlement Agreements | February 21, 2023 |
| Responses to Prehearing Motions | February 24, 2023 |
| Hearing | February 28 through March 1, 2023 |
| Statements of Position | March 24, 2023 |
| Statutory Deadline | July 7, 2023 |

The parties also agreed to “adhere to the Commission’s rules for discovery as well as any other procedural matters that arise.”³

11. After reviewing the schedule proposed by the parties, the ALJ stated in an email to counsel for the parties that the schedule stated above was reasonable and would be adopted. Based on that decision, the ALJ informed counsel for the parties that the remote prehearing conference would be vacated and an interim decision stating as much would issue as soon as reasonably possible.

12. On August 17, 2022, the ALJ issued Decision No. R22-0489-I that adopted the procedural schedule, vacated the remote prehearing conference, and scheduled the hearing.

13. On December 8, 2022, Olson’s filed an Unopposed Motion to Reset Procedural Schedule (Unopposed Motion). The new proposed schedule was as follows:

³ Notice at 2.

| <u>Event</u> | <u>Deadline</u> |
|---------------------------------|-----------------------|
| Direct Testimony | January 9, 2022 |
| Answer Testimony | February 14, 2023 |
| Rebuttal Testimony | March 10, 2023 |
| Prehearing Motions | March 17, 2023 |
| Settlement Agreements | March 21, 2023 |
| Responses to Prehearing Motions | March 24, 2023 |
| Hearing | April 17 and 18, 2023 |
| Statements of Position | May 15, 2023 |
| Statutory Deadline | August 7, 2023 |

As justification, Olson’s stated that its outside expert mis-calendared the direct testimony deadline in January 2023, not December 9, 2022.

14. On December 16, 2022, the ALJ issued Decision No. R22-0810-I that granted the Unopposed Motion.

15. On January 9, 2023, Olson’s filed the direct testimony of Brandon Olson and David E. Dismukes, Ph.D.

16. On February 14, 2023, Public Service filed the answer testimony of Ghassan S. Saroor and Stevem W. Wishart.

17. On March 10, 2023, Olson’s filed the rebuttal testimony of Dr. Dismukes.

18. On March 17, 2023, Public Service filed a Motion in Limine to exclude certain testimony of Dr. Dismukes.

19. On March 24, 2023, Olson’s filed an Unopposed Motion for Extension to Respond to the Motion in Limine (Unopposed Motion for Extension).

20. On March 31, 2023, the ALJ issued Decision No. R23-0212-I that granted the Unopposed Motion for Extension.

21. After Olson's filed its response on April 7, 2023, the ALJ issued Decision No. R23-0245-I denying Public Service's Motion in Limine on April 11, 2023.

22. Also on April 11, 2023, Olson's filed a Motion to Compel or, Alternatively, Motion in Limine and Motion to Shorten Response Time (Motion to Compel). The Motion addressed the alleged failure of Public Service to respond to Olson's fourth set of discovery allegedly served on March 3, 2023.

23. On April 12, 2023, Public Service filed its Response to the Motion to Compel.

24. On April 13, 2023, the parties emailed the ALJ stating that they had resolved the Motion to Compel and requested the ALJ to vacate and reschedule the hearing to a later date. The parties and the ALJ corresponded further by email to find future dates for the rescheduled hearing.

25. On April 14, 2023, Olson's filed a Notice of Waiver of Statutory Deadline, Request to Reschedule Hearing, and Notice of Withdrawal of Motion to Compel (Request). In the Request, Olson's stated that it waived the statutory deadline and requested the ALJ to vacate and reschedule the hearing to June 8 and 9, 2023. Olson's also stated that, while the parties disagreed about the method by which the hearing should be conducted (Olson's preferred an in-person hearing and Public Service preferred a remote hearing), they would "defer to the preference of" the ALJ.⁴

26. On April 21, 2023, the ALJ issued Decision No. R23-0255-I that granted the Request and rescheduled the hearing to June 8 and 9, 2023 as a hybrid hearing.

27. On June 8, 2023, the hybrid hearing took place. Mr. Olson and Dr. Dismukes testified on behalf of Olson's and Messrs. Saroor and Wishart testified on behalf of Public

⁴ Request at 2.

Service. Exhibit Nos. 103, 104, 104C, 105, 106, 106C, 109, 110, 111, 202, 204, 205, 209-218, 222, 223 and 300 (and the exhibits listed on Hearing Exhibit 300) were admitted into the evidentiary record. At the conclusion of the hearing, the ALJ closed the evidentiary record and took the matter under advisement.

II. ANALYTICAL APPROACH

28. In rendering this Decision, the ALJ has carefully reviewed and considered all the evidence introduced by the Parties during the hearing, including the testimony and hearing exhibits, even if this Decision does not specifically address all of the evidence presented, or every nuance of each party's position in each issue. Moreover, the ALJ has considered all the legal arguments set forth in the SOPs, even if the Decision does not explicitly address every legal argument. In rendering this Decision, the ALJ has weighed the evidence and evaluated the credibility of all the witnesses and hearing exhibits.⁵

III. BURDEN OF PROOF

29. Olson's bears the burden of proving its case by a preponderance of the evidence. Conversely, Public Service bears the burden of proving any affirmative defense by a preponderance of the evidence. In both cases, the evidence must be "substantial evidence," which is defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." A party has satisfied its burden under this standard when the evidence, on the whole, tips in favor of that party.

⁵ See *Durango Transportation, Inc. v. Colorado Public Utilities Comm'n.*, 122 P.3d 244, 252 (Colo. 2005); *RAM Broadcasting of Colo., Inc. v. Public Utilities Comm'n.*, 702 P.2d 746, 750 (Colo. 1985).

IV. FINDINGS OF FACT

30. The material facts in this proceeding are largely undisputed.

A. Olson's Operations

31. Olson's operates two greenhouse facilities in the Fort Lupton area, one at 11610 County Road 14 ½ Road (14 ½ Road Facility) and another at 3211 14th Street (14th Street Facility). Olson's has used the 14 ½ Road Facility since 2014.⁶ Olson's grows plants for outdoor gardens and indoor use from seed and cuttings for distribution throughout Colorado and elsewhere. Olson's has about 15 acres in greenhouses at the 14 ½ Road Facility. Many areas of those greenhouses are temperature controlled, so that plants will have the appropriate temperatures for germination and growth.⁷ As a result, Olson's has a "sophisticated heating system that allows for fairly precise control of temperatures."⁸ Olson's uses large quantities of gas to keep the plants warm primarily during winter and shoulder seasons.⁹

32. Olson's first leased the 14 ½ Road Facility from the then-owner of the property, and then purchased the property at some point during 2019-2021.¹⁰ At all relevant times, Olson's has taken natural gas service at both facilities as an interruptible transportation customer of Public Service.¹¹ Prior to its purchase of the 14 ½ Road Facility, Public Service provided interruptible gas transportation service to the facility pursuant to a contract it entered into with the then-owner of the facility. After Olson's purchase of the 14 ½ Road Facility, Olson's entered

⁶ Hearing Exhibit 101 at 5:3-4 (Direct Testimony of Mr. Olson).

⁷ *Id.* at 4:5-13.

⁸ *Id.* at 4:16-17.

⁹ *Id.* at 17-18.

¹⁰ Transcript of June 8, 2023 Hearing at 17:23-20:23.

¹¹ Hearing Exhibit 101 at 4:19-20, 5:16-19 (Direct Testimony of Mr. Olson); Transcript of June 8, 2023 Hearing at 19:21-20:20.

into a new Service Agreement with Public Service in December 2021 to continue the interruptible gas transportation service to the facility (Service Agreement).¹²

B. Olson’s-Public Service Gas Service Agreement and Public Service’s Gas Tariff

33. The Service Agreement states in relevant part:

The Parties agree that Transporter will receive and transport Shipper’s Gas from the Receipt Point(s) to the Delivery Point(s), as specified in writing between the Parties, on an interruptible basis as long as System capacity is available for transportation of such gas.

....

Shipper acknowledges and agrees that Interruptible Gas Transportation Service provided hereunder . . . is subject to the rates, charges, terms, and conditions of Transporter’s applicable Gas Tariff on file and in effect with the Public Utilities Commission of the State of Colorado (“Commission”), and such rates, charges, terms, and conditions are incorporated herein as part of this Service Agreement.¹³

34. Public Service’s applicable tariff – COLO. PUC No. 6 Gas (Gas Tariff) – states in relevant parts:

CHOICE OF RATES

The Schedule of Rates is on file at the offices of the Company and available to applicant for service. Applicant shall elect under which rate schedule service shall be supplied subject to the terms and conditions of the individual rate schedule. When there are two or more rate schedules applicable to any class of service Company will, upon request of applicant, explain the conditions, character of installation or use of service governing the several rate schedules and assist in the selection of the rate schedule most suitable for applicant's requirements. Applicant, however, shall be responsible for the final selection of said rate schedule and Company assumes no liability therefore.¹⁴

....

¹² Transcript of June 8, 2023 Hearing at 19:21-20:20; Hearing Exhibit 202.

¹³ Hearing Exhibit 202 at 1.

¹⁴ Hearing Exhibit 103 at Sheet No. R7A.

PRIORITY OF SERVICE

....

In general, it shall be the policy of the Company to allocate its natural gas supplies in a manner consistent with a priority system granting preference to residential use.¹⁵

....

INTERRUPTIBLE TRANSPORTATION SERVICE

....

Transportation service hereunder is subject to availability of System capacity in Company's System. Should Company, in its sole judgment, determine that adequate System capacity is unavailable or that emergency circumstances otherwise warrant, then Shipper is subject to immediate Capacity Interruption of transportation service.¹⁶

....

TRANSPORTATION SERVICE OPTIONS¹⁷

....

Interruptible Transportation Service

....

Interruptible Transportation Service is subject to availability of System capacity in Transporter's System. Should Transporter, in its sole judgment, determine that adequate System capacity is unavailable or that emergency circumstances otherwise warrant, then Shipper and Receiving Party are subject to immediate Interruption of Transportation Service.¹⁸

....

Upon determination by Transporter that the necessity for Interruption has ceased, Gas Transportation Service shall be resumed.¹⁹

....

¹⁵ *Id.* at Sheet No. R13.

¹⁶ *Id.* at Sheet No. 31C.

¹⁷ *Id.* at Sheet No. T14.

¹⁸ *Id.* at Sheet No. T15.

¹⁹ *Id.* at Sheet No. T15A.

Capacity Interruption and Priority of Service

Transporter shall have the right to interrupt or to decline to schedule the transportation of Gas for Shipper, when necessary, in Transporter's sole discretion, due to lack of capacity, or to test, alter, modify, enlarge, or repair any facility or property comprising a part of its System, otherwise related to the operation thereof, or as emergency circumstances may warrant. Unless conditions otherwise warrant, Firm Gas Transportation Service shall have priority over Interruptible Gas Transportation Service.²⁰

....

The Capacity Interruption or capacity restriction of gas deliveries in whole or in part under this tariff shall not be the basis for claims for damages sustained by Shipper or Receiving Party and Transporter shall have no liability for any losses or damages whatsoever occasioned by Shipper as a result thereof.

In the event capacity use at a point(s) or at a mainline segment must be interrupted or curtailed, all requirements at that point(s) or through that segment shall be interrupted in the following order:

- 1) Imbalance Resolution Gas
- 2) Interruptible
- 3) Firm Transportation Service²¹

In the foregoing Gas Tariff and Service Agreement, Public Service is "Company" and "Transporter," and Olson's is "Shipper" and "Receiving Party."²² The Service Agreement is part of Public Service's Interruptible Gas Transportation Tariff. The Commission approved Public Service's Gas Transportation Tariff that includes the parts of the Service Agreement and Tariff excerpted above.²³

35. The parties agree that, based on the foregoing tariff provisions, service to interruptible customers can be interrupted to maintain reliable service to "firm" gas customers.²⁴ In return for less reliable service, interruptible gas customers pay "significantly reduced" gas

²⁰ *Id.* at Sheet No. T36.

²¹ *Id.* at Sheet No. T37.

²² *Id.* at Sheet No. T12, T13.

²³ See Decision No. R20-0046 issued in Proceeding No. 19AL-0309G on January 22, 2020; Decision No. C22-0642 issued in Proceeding No. 22AL-0046G on October 25, 2022; Decision No. C22-0804 issued in Proceeding No. 22AL-0046G on December 13, 2022.

²⁴ Hearing Exhibit 100 at 7:8-12 (Direct Testimony of Mr. Dismukes).

rates for their service compared to firm gas customers.²⁵ As a general matter, the rate reduction for interruptible gas customers is approximately 60 percent.²⁶ Public Service contends, and Olson's has not disputed, that Olson's has enjoyed substantial savings as an interruptible customer since 2014 compared to what it would have paid as a firm customer during the same period.²⁷

36. Olson's "understands that [Public Service's Gas Tariff] specifically sets forth the priority of service when there are capacity constraints, and believes that there is sound public policy behind the service priority in the tariff."²⁸ However, according to Olson's,

[t]he tariff language does not mean [] that Public Service has no service quality obligations to Olson's. Nor does the language in the Company's tariff providing it with sole discretion to determine when it may interrupt its customers suggest that the Company cannot abuse its discretion and fail to meet its service obligations.²⁹

Olson's contends that "[i]nterruptible customers are entitled to reasonably reliable service (obviously not firm service) and adequate facilities, but in the context of the interruptible nature of their service."³⁰

37. Public Service contends that, based on its Service Agreement and Gas Tariff, it does not owe a general duty of reliability of service or service quality to interruptible customers. In fact, Public Service states that it does not guarantee a minimum level of service to its interruptible customers.³¹ According to Public Service, if interruptible customers must be

²⁵ Hearing Exhibit 200 at 13:11-13 (Direct Testimony of Mr. Wishart).

²⁶ Transcript of June 8, 2023 Hearing at 173:13-174:2. *See also* Hearing Exhibit 200C at 9:10-10:8 (Confidential Answer Testimony of Mr. Wishart).

²⁷ Hearing Exhibit 200C at 5:21-6:1 (Confidential Answer Testimony of Mr. Wishart).

²⁸ Olson's SOP at 2-3.

²⁹ *Id.* at 3.

³⁰ *Id.* at 7.

³¹ Hearing Exhibit 200 at 13:12-16 (Direct Testimony of Mr. Wishart); Transcript of June 8, 20-23 Hearing at 173:13-174:2.

interrupted to maintain reliable service to firm customers, Public Service will do so, regardless of the temperature.³²

C. Public Service's Gas Infrastructure Serving Olson's

38. The 14 ½ Road Facility receives natural gas service directly from a 3-inch pipeline that runs along 14 ½ Road and serves only the 14 ½ Road Facility.³³ The 3-inch pipe connects upstream to Public Service's NF-19 distribution system.³⁴ The 3-inch pipe that directly serves the 14 ½ Road Facility has not been upgraded since Olson's started using the facility in 2014.

39. Public Service designs and builds its gas pipeline system to provide reliable service to its firm gas customers on a "Design Day." The temperature used for the "Design Day" for the NF-19 system is -25°F. This means that Public Service designs and build its system to provide reliable service to firm gas customers down to -25°F.³⁵ Public Service does not take service to interruptible customers like Olson's into account in designing and building its pipeline system.³⁶ As a result, interruptible customers cannot expect to be served reliably down to -25°F.³⁷ In fact, as noted above, Public Service states that it does not guarantee a minimum level of service to its interruptible customers at any temperature.³⁸

D. Interruptions of Olson's Gas Service

40. Olson's was not interrupted between 2014 and February 2021. On February 14, 2021, Public Service interrupted Olson's service for the first time. In January and February

³² Hearing Exhibit 200 at 11:8-12, 13:12-16 (Direct Testimony of Mr. Wishart).

³³ Transcript of June 8, 2023 Hearing at 106:23-108:4.

³⁴ *Id.* at 105:4-107:12.

³⁵ Hearing Exhibit 201, Rev.1 at 13:10-16 (Answer Testimony of Mr. Saroor).

³⁶ Transcript of June 8, 2023 Hearing at 120:9-23.

³⁷ Hearing Exhibit 201, Rev.1 at 7:4-12, 13:16-22 (Answer Testimony of Mr. Saroor); Public Service's SOP at 5-6.

³⁸ Hearing Exhibit 200 at 13:12-16 (Direct Testimony of Mr. Wishart); Transcript of June 8, 20-23 Hearing at 173:13-174:2.

2022, Olson's was interrupted seven times.³⁹ Olson's transportation gas service continued to be interrupted in the 2022-2023 heating season. Specifically, Olson's was interrupted once in both November and December 2022, and five or six times in January and February 2023. The 2022-2023 interruptions lasted longer than the interruptions in the 2021-2022 heating season.⁴⁰ As a result, Olson's has implemented a liquified natural gas system (LNG) using trailers holding LNG to provide an alternate supply of gas, which "is far more expensive than [] firm transportation service."⁴¹

41. Olson's gas consumption at the 14 ½ Road Facility did not materially change between 2021 and 2022.⁴² The increasing number of interruptions of Olson's service since 2021 is due to increasing load on the NF-19 pipeline system from firm gas customers.⁴³ In addition, the temperature at which the gas service of interruptible customers is interrupted has been rising. Public Service uses "gas hydraulic modeling software" "to determine at which temperature the gas distribution system can no longer support both firm and interruptible service customers."⁴⁴ Public Service uses that modeling software on an annual basis to determine the temperature at which its interruptible customers will be interrupted.⁴⁵ The following table shows the recent increase in the "curtailment" temperature, as determined by the modeling software:⁴⁶

³⁹ Hearing Exhibit 105.

⁴⁰ Transcript of June 8, 2023 Hearing at 28:3-18.

⁴¹ Hearing Exhibit 101 at 6:8-10 (Direct Testimony of Mr. Olson).

⁴² Hearing Exhibit 101 at 7:1-2 (Direct Testimony of Mr. Olson).

⁴³ Hearing Exhibit 201, Rev.1 at 19:22-20:2 (Answer Testimony of Mr. Saroor).

⁴⁴ Hearing Exhibit 111 at 2.

⁴⁵ *Id.* See also Hearing Exhibit 201, Rev.1 at 8:1-14 (Answer Testimony of Mr. Saroor).

⁴⁶ Hearing Exhibit 111 at 1.

| Heating Season | Temperature Threshold (°F) |
|----------------|----------------------------|
| 2022-2023 | 2 |
| 2021-2022 | 0 |
| 2020-2021 | -1 |
| 2019-2020 | -2 |
| 2018-2019 | -2 |

Public Service has instructed Olson’s that it anticipates firm gas service load on the NF-19 system will continue to grow and, consequently, the number of interruptions of Olson’s service will increase.⁴⁷

42. The constraint that is causing the interruption of Olson’s service is not on the 3-inch line that serves only Olson’s. Instead, the constraint is likely elsewhere on Public Service’s NF-19 system.⁴⁸ Public Service does not have any plan to upgrade or reinforce the NF-19 system in the next five years because its analysis shows that no such work is necessary to continue to provide reliable service to its firm gas customers during that period.⁴⁹

43. The evidence establishes that Public Service interrupted Olson’s service in 2021-2022 to maintain safe and reliable service to Public Service’s firm gas customers.⁵⁰

E. Olson’s Inquiry About Switching to Firm Transportation Service

44. At some point, Olson’s inquired about switching from interruptible to firm transportation service. After the inquiry, Public Service conducted an informal analysis and provided to Olson’s “a high-level, informal cost estimate” of \$2 to \$3 million to make the

⁴⁷ Hearing Exhibit 101 at 7:17 (Direct Testimony of Mr. Olson); Hearing Exhibit 201, Rev.1 at 19:15-20:2 (Answer Testimony of Mr. Saroor).

⁴⁸ Transcript of June 8, 2023 Hearing at 150:25-152:7; Hearing Exhibit 201, Rev.1 at 18:22-19:12 (Answer Testimony of Mr. Saroor).

⁴⁹ Transcript of June 8, 2023 Hearing at 129:1-11.

⁵⁰ Hearing Exhibit 201, Rev. 1 at 18:21-19:14 (Answer Testimony of Mr. Saroor).

switch.⁵¹ Public Service also informed Olson’s that Public Service would conduct the work necessary to provide the “exact scope and cost for the service conversion” if Olson’s submitted a formal switch request. However, Olson’s never submitted such a formal request.⁵² As a result, Public Service never conducted the detailed analysis described above. There is no deposit or other financial obligation associated with the submission of a formal switch request, and the requester is not required to go through with the switch once Public Service’s analysis is completed.⁵³

45. Nevertheless, if such a switch were to take place, Olson’s contends that any expenditures by Public Service necessary to effectuate the switch would be “system improvements” that must be socialized over, and thus paid for by, all of Public Service’s ratepayers.⁵⁴ In contrast, Public Service contends that such work would qualify as a “line extension” for which Olson’s would be responsible for a significant portion of the cost.⁵⁵

F. Formal Complaint

46. As noted above, Olson’s filed the Complaint that initiated this proceeding on June 10, 2022. In the Complaint, Olson’s has asserted claims for “inadequate facilities” in violation of §§ 40-3-101(2), 40-4-101, C.R.S.;⁵⁶ discriminatory treatment in violation of § 40-3-106(1), C.R.S.;⁵⁷ and for a declaratory order that any changes to Public Service’s system to accommodate the switch of Olson’s service from interruptible to firm “are system

⁵¹ Hearing Exhibit 101 at 6:11-17 (Direct Testimony of Mr. Olson); Hearing Exhibit 201, Rev.1 at 16:23-17:1 (Answer Testimony of Mr. Saroor).

⁵² Hearing Exhibit 201, Rev.1 at 17:1-8 (Answer Testimony of Mr. Saroor).

⁵³ Transcript of June 8, 2023 Hearing at 155:2-156:7; Hearing Exhibit 204.

⁵⁴ Hearing Exhibit 100 at 34:1-52:20 (Direct Testimony of Dr. Dismukes).

⁵⁵ Hearing Exhibit 200 at 20:2-13 (Answer Testimony of Mr. Wishart).

⁵⁶ *Id.* at 5-6 (¶¶ 38-43).

⁵⁷ *Id.* at 6 (¶¶ 44-47).

improvements to be funded by [Public Service] as opposed to line extensions subject to the Public Service natural gas tariff.”⁵⁸

V. CONCLUSIONS OF LAW

A. Claims 1 & 2 – Violation of §§ 40-3-101(2), 40-4-101(1), C.R.S.

1. Law

47. Section 40-3-101(2), C.R.S. states: “[e]very public utility shall furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just, and reasonable.” The question of whether service is adequate is a question of fact. To prove such a claim, the complainant must establish “a general pattern of inadequate service.”⁵⁹ However, “the test of inadequacy is not perfection.”⁶⁰

48. Section 40-4-101(1), C.R.S. states:

Whenever the commission, after a hearing upon its own motion or upon complaint, finds that the . . . equipment, facilities, or service of any public utility or the methods of . . . supply employed by it are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine the just, reasonable, safe, proper, adequate, or sufficient . . . equipment, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed and shall fix the same by its order, rule, or regulation.

49. Both parties agree that the evidence and arguments regarding Claims 1 and 2 are the same.⁶¹

⁵⁸ *Id.* at 6-7 (¶¶ 48-50).

⁵⁹ *Durango Trans., Inc. v. PUC & DSC Purgatory, LLC d/b/a Mountain Transport*, 122 P.3d 244, 248 (Colo. 2005); *Ephraim Freightways, Inc. v. PUC*, 380 P.2d 228, 232 (Colo. 1963).

⁶⁰ *Ephraim Freightways*, 380 P.2d at 232.

⁶¹ Olson’s SOP at 13 (“Olson’s second claim overlaps with the first, but is pursuant to C.R.S. §40-4-101. That claims for inadequate facilities can be made under two different sections of the Public Utilities Law demonstrates the importance the General Assembly placed on the Commission’s duty to ensure that there are adequate facilities to serve customers.”); Public Service’s SOP at 18 (“Olson’s allegations in Claim 2 are redundant of the allegations in Claim 1.”); 18-19 (“Olson’s evidence and Public Service’s evidence relating to Claim 2 are essentially the same as the evidence relating to Claim 1 which also alleges inadequate facilities. . . . Public Service here incorporates its arguments already presented against Claim 1.”).

2. Olson's Argument

50. Olson's makes three primary arguments supporting its conclusion that Public Service's interruptible service violates §§ 40-3-101(2), 40-4-101(1), C.R.S. First, Olson's asserts that "[i]nterruptible customers are entitled to reasonably reliable service (obviously not firm service) and adequate facilities, but in the context of the interruptible nature of their service."⁶² The last clause of that sentence apparently means that "[w]hen compared to the reliability responsibilities owed to firm customers, it can be said that a utility owes slightly reduced reliability responsibilities to interruptible customers."⁶³ Regardless, Olson's contends that "Public Service does not provide [it] with reasonably reliable service."⁶⁴

51. Second, Public Service's service agreement and tariff (of which the service agreement is part) "do not meet the intent of the Commission Rule 4203 because they do not 'establish *specific* terms and conditions for interruptions and curtailments of service' (emphasis added) as required by Rule 4203(b)."⁶⁵ According to Olson's, neither states that "typical cold weather can cause an interruption."⁶⁶ Nor do they "set forth the temperatures, known by [Public Service], at which interruptions will occur" or "set forth that increasing numbers of firm customers can cause interruptions."⁶⁷ According to Olson's, the service agreement and tariff violate "the spirit or intent of Rule 4203."⁶⁸

52. Finally, Olson's asserts that Public Service: (a) "is filling up the capacity of the NF-19 with firm customers, and decreasing service to Olson's;"⁶⁹ (b) is unable "to provide any

⁶² Olson's SOP at 7.

⁶³ Hearing Exhibit 100 at 13:1-3 (Direct Testimony of Dr. Dismukes).

⁶⁴ Olson's SOP at 7.

⁶⁵ *Id.* at 8 (emphasis in original).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 12.

system planning information (not even inputs into the model), let alone the location of the constrained facility;⁷⁰ and (c) “asserts that interruptible customers have no claim on capacity, but still allocate capacity costs to them during their rate design proceedings.”⁷¹ According to Olson’s, the situation is “unfair” and supports the conclusion that Public Service’s facilities are inadequate in violation of §§ 40-3-101(2), 40-4-101(1), C.R.S. because “[n]o customer, including interruptible customers, expects its utility to allow service to deteriorate to serve other (more lucrative) customers, and no customer would expect that trend to worsen over time.”⁷²

3. Public Service’s Argument

53. Public Service argues that Olson’s “provides no direct evidence of inadequate capacity of the distribution system.”⁷³ According to Public Service, “[t]he only true indication of inadequate system planning would be the loss of reliable natural gas service to the firm gas service customers on that distribution system.”⁷⁴ As “[t]here have been no interruptions to firm gas service customers on the NF-19 system due to capacity constraints or inadequate system planning,”⁷⁵ Olson’s cannot prove its allegation of inadequate planning of the NF-19 system.

54. Further, Olson’s argument that Public Service must provide “reasonably reliable” service to interruptible customers like Olson’s is unfounded, because it is “diametrically contrary to this Commission’s manner of regulation of interruptible service embodied in Public Service’s Gas Tariffs,” which do not guarantee reliable service to interruptible gas service customers.⁷⁶ Instead, Public Service asserts that, consistent with its gas tariff, it designs and builds its gas system “to maintain reliable service to its firm service customers under Design Day conditions.

⁷⁰ *Id.*

⁷¹ *Id.* at 13.

⁷² *Id.*

⁷³ Public Service’s SOP at 11-12.

⁷⁴ Hearing Exhibit 201, Rev. 1 at 8:18-20 (Answer Testimony of Mr. Saroor).

⁷⁵ *Id.* at 8:20-21.

⁷⁶ Public Service’s SOP at 13.

Interruptible gas service customers utilize available capacity, if it exists, on the system that firm gas service customers are not utilizing at a specific time.”⁷⁷

55. Public Service also cites the following statements by Professor Bonbright as contrary to Dr. Dismukes argument that interruptible customers are entitled to “reasonably reliable” service:

If a customer contracts for firm [service], the company makes a commitment for a specified amount of capacity . . . during some commitment or reservation period. . . . In contrast, interruptible [service] may be curtailed or interrupted if conditions arise that are burdensome to the supplier. In short, the interruptible customer is buying a lower quality service that a cost incurrence philosophy would deem appropriate for a lower rate.

. . . .

Under interruptible rates, a utility turns off service for specified periods of time during system peak, while still providing the customer with a satisfactory level of service. Interruptible customers are charged lower rates since they do not have any demand or capacity costs. The company considers the fact that interruptible rates are an increasingly important load management technique.⁷⁸

Public Service thus asserts that the only service to which Olson’s and all other interruptible customers are entitled is service when there is available capacity to serve them, but that entitlement disappears when providing such service would call into question Public Service’s ability to provide service to firm customers or some other emergent situation.⁷⁹

56. Finally, Public Service states that the evidence in the record establishes that it provided reliable service to Olson’s “98.9 percent of the hours [in 2022] involved.”⁸⁰ In addition, the Commission found the interruptible tariff, which “does not specify a maximum number of allowable interruptions and specifies that service is subject to system capacity availability,” to be

⁷⁷ *Id.*

⁷⁸ *Id.* at 14 (quoting James C. Bonbright, *Principles of Public Utility Rates*, 2d Edition 1988, at pp. 402-403).

⁷⁹ Hearing Exhibit 201, Rev. 1 at 7:1-12 (Answer Testimony of Mr. Saroor).

⁸⁰ Public Service’s SOP at 17. *See also* Hearing Exhibit 200 at 11:13-19.

just and reasonable.⁸¹ As a result, the tariff does not violate Rule 4203 and Public Service complied with the tariff.

57. Based on the foregoing, Public Service concludes that Olson's has not carried its burden of proving that Public Service's interruptible service violates §§ 40-3-101(2), 40-4-101(1), C.R.S.

4. Analysis

58. The ALJ concludes that Olson's has not carried its burden of proving Claims 1 and 2. Public Service's Gas Tariff and Service Agreement make clear that: (a) as a general matter, residential customers receive the highest priority of service;⁸² (b) as an interruptible transportation customer, Olson's service is subject to the availability of capacity in Public Service's pipeline system;⁸³ (c) interruptible service can be interrupted at any time to "test, alter, modify, enlarge, or repair any facility or property comprising a part of its System," or due to "lack of system capacity" or "any other emergency situation;"⁸⁴ (d) the decision to interrupt interruptible gas transportation customers like Olson's is up to Public Service "sole discretion" or "sole judgment;"⁸⁵ and (e) "Firm Gas Transportation Service shall have priority over Interruptible Gas Transportation Service," meaning that Public Service can interrupt Olson's interruptible gas transportation service to ensure safe and reliable service to firm transportation customers.⁸⁶

The evidence also establishes that Public Service interrupted Olson's service in 2021-2022 to maintain safe and reliable service to its firm gas customers, which is permissible under the Gas

⁸¹ Public Service's SOP at 17.

⁸² Hearing Exhibit 103 at Sheet No. R13.

⁸³ *Id.* at Sheet No. 31C.

⁸⁴ *Id.* at Sheet No. T36.

⁸⁵ *Id.* at Sheet No. 31C, T15, T36.

⁸⁶ *Id.* at Sheet No. T37.

Tariff and Service Agreement.⁸⁷ Olson's has not presented evidence disputing that Public Service had a permissible reason under the tariff for interrupting Olson's gas transportation service each time that an interruption occurred.

59. In addition, there is no evidence in the record that there have been service interruptions/disruptions to Public Service's firm gas customers who are served by the NF-19 pipeline system.⁸⁸ Such service interruptions/disruptions of firm gas customers arguably would be evidence that Public Service's equipment, facilities, or service are inadequate, particularly if they were due to "capacity constraints or inadequate system planning."⁸⁹ Interruptions of Olson's service are not evidence of inadequate equipment, facilities, or service because Public Service-Olson's Service Agreement does not include any service warranties other than that Olson's service will not be interrupted as long as there is sufficient capacity to serve both Olson's and Public Service's firm gas customers, there are no emergencies requiring interruption, and Public Service does not need to interrupt Olson's service to "test, alter, modify, enlarge, or repair any facility or property comprising a part of its System."⁹⁰ Accordingly, Olson's has not carried its burden of proving that Public Service has not provided Olson's with the service to which it is entitled under the Gas Tariff and the Service Agreement.

60. Olson's second argument – that the Gas Tariff and Service Agreement violate Commission Rule 4203(b) due to their lack of specificity in identifying the situations in which Olson's service can be interrupted – is unsupported. Rule 4203(b) states:

In its tariff a utility shall establish specific terms and conditions for interruptions and curtailments of service. The utility shall establish, and adhere to, interruption and curtailment priorities for sales service and for transportation service by

⁸⁷ See *infra* ¶ 43.

⁸⁸ Hearing Exhibit 201, Rev. 1 at 8:15-21 (Answer Testimony of Mr. Saroor).

⁸⁹ §§ 40-3-101(2), § 40-4-101(1), C.R.S.

⁹⁰ Hearing Exhibit 103 at Sheet No. 31C, T15, T15A, T36.

customer class. These priorities shall be consistent with the requirements of this rule.

Based on the specific tariff provisions excerpted in the findings and the summary more immediately above, the ALJ concludes that Public Service's Gas Tariff complies with Commission Rule 4203(b) because it has sufficiently specific terms and conditions for interruptions of service and "interruption and curtailment priorities for sales service and for transportation service by customer class."⁹¹

61. The ALJ also concludes that Olson's second argument is an impermissible collateral attack on the Commission decisions approving the Gas Tariff. Section 40-6-112(2), C.R.S. states that "final" Commission decisions "shall be conclusive" in "all collateral actions or proceedings." The purpose of § 40-6-112(2), C.R.S., is "to prevent re-litigation of matters finally decided, especially when the time period to appeal Commission decisions has expired."⁹²

62. Here, as noted, the Commission has already reviewed the Gas Tariff, including the Service Agreement, and determined that it is just and reasonable.⁹³ The period within which to challenge those Commission decisions has expired, and the decision is thus final. While it was

⁹¹ Rule 4203(b), 4 CCR 723-4.

⁹² Decision No. C06-0004 issued in Proceeding No. 05F-337E on January 5, 2006 at 9. *See also Lake Durango Water Company, Inc. v. PUC*, 67 P.3d 12, 21-22 (Colo. 2003) (appellant sought review of PUC's decision award of attorney fees in rate case proceeding on basis that impermissible *ex parte* communication led to Commission's adoption of method for setting rates that led to award of fees and costs, but did not seek review of adopted rates; Colorado Supreme Court held that because appellant did not appeal adopted rates, its appeal of the awarded fees and costs was an impermissible collateral attack on the underlying rate decision); *Mountain States Tel. & Tele. Co. v. Commission*, 527 P.2d 524 (Colo. 1974) (on appeal of a rate case decision, appellant challenged a Commission rule that required a utility to utilize a prior test year for determining rates; because the Commission decision in rulemaking proceeding was final, appellant's challenge of rule was impermissible collateral attack on Commission decision implementing rule); *PUC v. Grand Valley Rural Power Lines, Inc.*, 447 P.2d 27 (Colo. 1968) (appeal of Commission decision allowing Public Service to serve a new motel with an estimated power need of 196 kilowatts was impermissible collateral attack on 1946 Commission decision granting Public Service CPCN to serve customers in proposed motel's location whose estimated power needs exceeded 100 kilowatts); *Southeast Colorado Power Assoc. v. PUC*, 428 P.2d 939 (Colo. 1967) (on appeal of Commission's decision that the City of Lamar had the right to serve a new AT&T installation, appellant's challenge of 1943 decision granting Lamar a CPCN to serve the area in which the new AT&T installation would be located was an impermissible collateral attack on that decision).

⁹³ Decision No. R20-0046 issued in Proceeding No. 19AL-0309G on January 22, 2020; Decision No. C22-0642 issued in Proceeding No. 22AL-0046G on October 25, 2022; Decision No. C22-0804 issued in Proceeding No. 22AL-0046G on December 13, 2022.

not a party to the proceedings in which the Commission made that determination, Olson's had the opportunity to participate. Accordingly, Olson's second argument will also be denied as an impermissible collateral attack on Decision Nos. C22-0804, C22-0642, and R20-0046.

63. Olson's also has not carried its burden with respect to its remaining allegations. Olson's has not presented evidence proving that Public Service is taking action to "fill[] up the capacity of the NF-19 system with firm customers."⁹⁴ Instead, the evidence is consistent with the conclusion that decreased capacity on the NF-19 system is the result of population growth in areas served by that system over which Public Service has no control.

64. Similarly, while Public Service did not provide certain requested system planning documentation to Olson's because it is "proprietary and confidential," Public Service did invite Olson's to review in-person the system planning models for the NF-19 system, but Olson's never took Public Service up on the invitation.⁹⁵ If Olson's disagreed with Public Service's contention regarding the proprietary nature of the information or was otherwise dissatisfied with Public Service's response, it could have filed a motion to compel. As a result, Olson's has not proven its allegation that Public Service failed "to provide [] system planning information,"⁹⁶ much less that such an allegation, if proven, would justify the relief sought in the first and second claims.

65. Similarly, Olson's contention that Public Service's allocation of capacity costs to interruptible customers during their rate design proceedings but gives them "no claim on capacity" does not justify the relief it requests.⁹⁷ Olson's has not effectively countered Public Service's argument that interruptible customers should contribute to Public Service's revenue requirement given that they contribute to total system load that drives certain pipeline

⁹⁴ Olson's SOP at 12.

⁹⁵ Hearing Exhibit 201, Rev. 1 at 16:7-17 (Answer Testimony of Mr. Saroor).

⁹⁶ Olson's SOP at 12.

⁹⁷ *Id.* at 13.

investments.⁹⁸ In any event, none of these allegations and arguments, even if true, counter the fact that Public Service has fully complied with its Gas Tariff.

66. Finally, the ALJ understands and appreciates Olson’s view that “Interruptible customers are entitled to reasonably reliable service (obviously not firm service) and adequate facilities, but in the context of the interruptible nature of their service.”⁹⁹ Olson’s seven years of interruptible service without being interrupted after it first took interruptible service from Public Service in 2014 may have created the expectation that interruptible customers are “*entitled* to reasonably reliable service.”¹⁰⁰ However, to agree with Olson’s would fundamentally change the terms of the deal it entered into with Public Service and the terms of the interruptible service in the Gas Tariff that the Commission has determined are just and reasonable.

67. Based on the foregoing, Olson’s has not carried its burden of proving that Public Service violated either or both of §§ 40-3-101(2), 40-4-101(1), C.R.S.

B. Claim 3 – Violation of § 40-3-106(1)(a), C.R.S.

1. Law

68. Section 40-3-106(1)(a),C.R.S. states in relevant part:

a public utility, as to rates, charges, service or facilities, or in any other respect, shall not make or grant any preference or advantage to a corporation or person or subject a corporation or person to any prejudice or disadvantage. A public utility shall not establish or maintain any unreasonable difference as to rates, charges, service, facilities, or between localities or class of service.

2. Olson’s Argument

69. Olson’s alleges that Public Service has violated § 40-3-106(1)(a),C.R.S. in two ways. First, Public Service has decided “to provide reasonably reliable service to one class *at the*

⁹⁸ Hearing Exhibit 200 at 12:3-15 (Answer Testimony of Mr. Wishart).

⁹⁹ Olson’s SOP at 7.

¹⁰⁰ *Id.*

expense of another. The Company pits the service of two classes against each other, foregoing reasonably reliable service for one class to provide it to another.”¹⁰¹ The class receiving this “preference” is firm gas customers, and interruptible transportation customers constitute the disfavored class. According to Olson’s, “[t]he law requires Public Service to provide reasonably reliable service to all customers.”¹⁰²

70. Second, Olson’s argues that the cost of the upgrades to Public Service’s NF-19 system to allow Olson’s to switch from interruptible to firm transportation service should be borne by all ratepayers, and not imposed exclusively on Olson’s. Olson’s states that Public Service socialized the cost of the last upgrade to the NF-19 system to ensure safe and reliable service to firm gas customers. According to Olson’s, by not socializing the costs of the necessary upgrades to accommodate Olson’s request to switch to firm gas transportation service, Public Service is discriminating against Olson’s in violation of § 40-3-106(1)(a), C.R.S.¹⁰³

3. Public Service’s Argument

71. Public Service asserts that the party claiming improper discrimination in violation of § 40-3-106(1)(a), C.R.S. “must establish that the classes of customers subjected to the alleged preference, disadvantage, or discrimination are similarly situated and subjected to regulatory treatment that is unjust and discriminatory.”¹⁰⁴ Public Service argues that Olson’s has failed to do so. Specifically, Public Service claims that Olson’s did not present any evidence that “other similarly situated Public Service interruptible transportation customers in the NF-19 system, from which Olson’s is served, were given any preference or advantage or that Olson’s was

¹⁰¹ Olson’s SOP at 15 (emphasis in original).

¹⁰² *Id.*

¹⁰³ *Id.* at 15-16.

¹⁰⁴ Public Service’s SOP at 21.

subjected to unlawful discrimination.”¹⁰⁵ Instead, the evidence establishes “that interruptible gas transportation customers, like Olson’s, and firm gas transportation customers are in two different rate classes and pay different rates for service.”¹⁰⁶ Because the interruptible gas transportation and firm gas transportation classes of customers are not similarly situated and the Commission has approved the different rates and service costs for these “distinct classes as just and reasonable,” Public Service concludes that Olson’s has failed to prove its third claim.¹⁰⁷

4. Analysis

72. The ALJ concludes that Olson’s has not satisfied its burden of establishing that Public Service has violated § 40-3-106(1)(a), C.R.S. Olson’s argument that the difference in reliability of service provided by Public Service to Olson’s and firm gas customers is unreasonable is unpersuasive. As noted above, as an interruptible transportation customer Olson’s receives an approximately 60 percent discount off the rates paid by firm transportation customers. In return, the Gas Tariff and Service Agreement make clear that Public Service receives “sole discretion” and “sole judgment” to interrupt Olson’s service at any time to, among other things, maintain capacity to provide safe and reliable service to firm transportation and residential customers. The Gas Tariff, including the Service Agreement, makes both the benefit and consideration of this bargain clear. As noted, the Commission has found that the Gas Tariff is just and reasonable.

73. In addition, Olson’s has not proposed to give back any portion of the difference between the rates it would have paid if it had been a firm transportation customer and the approximately 60 percent discounted rates it actually paid as an interruptible customer. If

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 22.

¹⁰⁷ *Id.*

adopted, therefore, Olson's argument would allow it to keep the benefit of the bargain (the approximately 60 percent savings in rates), but eliminate at least a significant portion of the consideration (the "sole discretion" and "sole judgment" given to Public Service to interrupt Olson's service to maintain safe and reliable service to firm gas customers, among other reasons). Under these circumstances, the ALJ cannot conclude that Public Service's interruptible service violates § 40-3-106(1)(a), C.R.S., either generally or as it has been applied to Olson's.

74. Finally, the ALJ also cannot conclude that any potential changes to Public Service's system to accommodate Olson's switch to firm transportation service would be a system upgrade — the costs of which would be socialized across all ratepayers — rather than a line extension the costs of which would be borne largely or solely by Olson's. Olson's did not formally request to switch from interruptible to firm transportation service, despite the fact, as found above, that such a request would not have been binding on Olson's and would not have triggered a financial obligation, such as an application fee or requirement that Olson's pay for a Public Service analysis to determine the upgrades/reinforcements necessary to accommodate such a switch.¹⁰⁸ Because Olson's never made such a formal request, Public Service did not conduct a formal investigation to determine the location and cause of the constraint in its NF-19 system that has caused Public Service to interrupt Olson's service. As a result, the record does not contain any evidence of what Public Service would be required to do to accommodate such a request from Olson's, much less the cost thereof. The ALJ thus cannot conclude whether any such upgrades/reinforcements fall under the line extension provisions of Public Service's Gas Tariff.

¹⁰⁸ Transcript of June 8, 2023 Hearing at 155:2-156:7.

75. Based on the foregoing, the ALJ concludes that Olson's has not carried its burden of proving its third claim.

C. Claim 4 – Declaratory Order

1. Law

76. Rule 1304(f)(II) states:

The Commission may issue a declaratory order to terminate a controversy or to remove an uncertainty affecting a petitioner with regard to any tariff, statutory provision, or Commission rule, regulation, or order.

2. Olson's Argument

77. Olson's contends that an upgrade to the NF-19 system to alleviate, at least to some degree, Olson's interruptions would be a system improvement, and not a line extension, for four primary reasons. First, "the upgrade would not only reduce capacity constraints for at least one existing customer (i.e., Olson's) but would also likely reduce capacity constraints for future PSCo customers as well."¹⁰⁹ Second, an upgrade that replaces older with newer infrastructure and reduces capacity constraints also improves system reliability for all ratepayers.¹¹⁰ Third, "if Olson's was compelled to convert to firm transportation service, any upgrade needed to make that possible could be deemed necessary to meet the system's design criteria, as, according to the Company, the system is designed to meet the demands of firm customers."¹¹¹ Finally, Olson's contends that Decision No. R10-0520 supports its conclusion that the required upgrade to switch Olson's from interruptible to firm transportation customer is a system improvement.¹¹²

¹⁰⁹ Olson's SOP at 16.

¹¹⁰ *Id.* at 17.

¹¹¹ *Id.*

¹¹² *Id.*

3. Public Service's Argument

78. Public Service argues that “Olson’s evidence failed to prove that an actual uncertainty exists” requiring a declaratory order from the Commission.¹¹³ To the extent the Commission disagrees, Public Service also asserts that the relevant facts in Decision No. R10-0520 are distinguishable from the facts in this proceeding,¹¹⁴ and the evidence in this proceeding establishes that any upgrades/reinforcements necessary for Olson’s switch from interruptible to firm transportation customer qualify as a line extension under Public Service’s line extension provisions of its Gas Tariffs.¹¹⁵

4. Analysis

79. The ALJ concludes that Olson’s has not carried its burden of providing evidence supporting the declaratory order it seeks. As stated above, the record does not include evidence concerning what upgrades/reinforcements would be required to accommodate Olson’s switch from interruptible to firm transportation customer, much less a cost estimate of such changes that contain any reasonable degree of precision or certainty. Similarly, there is no evidence about what upgrades/reinforcements would be required to improve Olson’s interruptible service by decreasing the number and/or duration of interruptions, much less the cost of such work. Finally, Olson’s has not identified how much the interruptions and/or durations of interruptions would need to be reduced to provide Olson’s with service that complies with Public Service’s alleged duties owed to Olson’s. Under these circumstances, the record is insufficient to allow the ALJ to determine whether “the system improvement(s) required to improve Olson’s service is/are

¹¹³ Public Service’s SOP at 28.

¹¹⁴ *Id.* at 24-26.

¹¹⁵ *Id.* at 26-28.

system improvements to be funded by [Public Service] as opposed to line extensions subject to the Public Service natural gas tariff.”¹¹⁶

80. Decision Nos. R10-0520 and C10-1054 do not require a different conclusion, as argued by Olson’s.¹¹⁷ There, an electric cooperative (Grand Valley Rural Power Lines, Inc. (Grand Valley)) served about 200 customers in the southwestern quadrant of its service territory that included the town of Gateway.¹¹⁸ Grand Valley served the southwestern quadrant of its service territory via a single-phase radial distribution line known as the UnawEEP Canyon Line.¹¹⁹

81. At the time of the proceeding, the Complainants were building the Gateway Canyons Resort in Gateway.¹²⁰ Grand Valley told Complainants that the UnawEEP Canyon Line would need to be upgraded to a three-phase radial line to accommodate the projected load of the Gateway Canyons Resort and that Complainants would have to pay for 100 percent of the costs of the upgrade because it was a line extension. Complainants disagreed, contending that the upgrade was a system improvement, the costs of which should be paid for by Grand Valley and then recovered from Grand Valley’s ratepayers.¹²¹ After the filing of the complaint in 2007, the parties reached an interim agreement pursuant to which Grand Valley would upgrade the UnawEEP Canyon Line so as not to delay the construction of the Gateway Canyons Resort and the Resort would pay for the upgrade subject to refund, in whole or in part, depending on the

¹¹⁶ Complaint at 7 (¶ 50).

¹¹⁷ Decision No. C10-1054 issued in Proceeding No. 07F-037E on September 28, 2010; Decision No. R10-0520 issued in Proceeding No. 07F-037E on May 27, 2010.

¹¹⁸ *Id.* at 2 (¶ 2).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 2-3 (¶ 3).

outcome of the proceeding. As a result, the upgrade took place during the pendency of the proceeding.¹²²

82. The ALJ found that, since 1982, Grand Valley “ha[d] identified service reliability, voltage and line losses, and service outages and interruptions problems on the single phase UnawEEP Canyon line.”¹²³ In addition, Grand Valley had imposed a total moratorium on new commercial loads in the Gateway area in 2004 and included the upgrade of the UnawEEP Canyon Line in Long Range Plans and Construction Work Plans, which was not typical for line extensions.¹²⁴ Finally, the total incremental capacity created by the three-phase upgrade was 3,070 kVa, which far exceeded the 436 kVa projected load of the Gateway Canyons Resort.¹²⁵ As a result, at the time of the Commission’s decision, the provider had conclusively determined that it could not accommodate any future commercial load in the relevant area, the infrastructure that needed to be upgraded to accommodate additional commercial load had been identified, the cost of the upgrade of that infrastructure had been determined, and the upgrade took place during the pendency of the proceeding.

83. Based on the foregoing, the ALJ concluded that Grand Valley’s line extension policy did not apply to the upgrade of the UnawEEP Canyon Line and ordered Grand Valley and Complainants to pay 85.8 and 14.3 percent, respectively, of the cost of the upgrade.¹²⁶ The ALJ reached this determination by finding that construction of the Gateway Canyons Resort was “the immediate catalyst for the line upgrade.”¹²⁷ The ALJ determined the percentages by calculating the percentage of the incremental capacity increase taken up by the projected load of the

¹²² *Id.* at 3 (¶ 5).

¹²³ *Id.* at 4 (¶ 8).

¹²⁴ *Id.* at 4-5 (¶ 9), 5 (¶ 10).

¹²⁵ *Id.* at 6-7 (¶ 13).

¹²⁶ *Id.* at 5-7 (¶¶ 12-13).

¹²⁷ *Id.* at 6 (¶ 13).

Gateway Canyons Resort (436 kVa/3070 kVa = 14.2 percent).¹²⁸ The Commission upheld the ALJ's Recommended Decision.¹²⁹

84. Here, in contrast, the upgrades/reinforcements necessary to accommodate Olson's switch from interruptible to firm transportation customer have not even been identified and, as a result, the cost of any such upgrade/reinforcement is unknown. In addition, because the constraint on Public Service's pipeline system causing Olson's interruptions and the solution(s) therefore have not been identified, there is no evidence (beyond unspecific speculation) concerning how many other Public Service ratepayers, if any, would benefit from any such upgrades/reinforcements. Finally, Public Service does not have any upgrades/reinforcements planned within five years and has not issued any moratorium on providing service to any class of customers. Instead, Public Service's projections reveal that it can provide safe and reliable gas service to its firm gas customers over that time-period without any upgrades/reinforcements. Accordingly, Decision Nos. R10-0520 and C10-1054 do not mandate a declaratory order in this proceeding that any upgrades/reinforcements to Public Service's pipeline system to accommodate Olson's unofficial request to switch from interruptible to firm transportation service is a line extension. Instead, as noted above, the ALJ concludes that the record is insufficient to support any such declaratory order.

VI. **RECOMMENDED DECISION**

85. In accordance with § 40-6-109, C.R.S., the ALJ recommends the Commission enter the following order.

¹²⁸ *Id.*

¹²⁹ *Id.* at 12 (Ordering ¶ 1).

VII. ORDER

1. The claims asserted in the Complaint filed by Olson’s Greenhouses of Colorado, LLC on June 10, 2022 against Public Service Company of Colorado are denied.

2. Proceeding No. 22F-0263EG is closed.

3. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by §40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the Recommended Decision shall become the decision of the Commission and subject to the provisions of §40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

5. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director