

Decision No. C03-0087

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01F-530E

PUBLIC SERVICE COMPANY OF COLORADO,

COMPLAINANT,

V.

INTERMOUNTAIN RURAL ELECTRIC ASSOCIATION,

RESPONDENT.

DOCKET NO. 01A-531E

IN THE MATTER OF THE VERIFIED APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO TO AMEND PUBLIC SERVICE COMPANY'S CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO INCLUDE THE AREA UPON WHICH THE WILLOW TRACE SUBDIVISION IS LOCATED.

**RULING ON APPLICATION FOR REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: January 22, 2003

Adopted Date: January 8, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Application for Rehearing, Reargument or Reconsideration (RRR) filed by Public Service Company of Colorado (Public Service) to Decision No. C02-1363. In that decision, we affirmed the Recommended Decision by the Administrative Law Judge to dismiss Public Service's complaint against Intermountain Rural Electric Association (IREA), and to deny Public Service's application in this case. Generally, we concluded that Public Service had failed to prove that IREA was unwilling

or unable to provide electric service to the Willow Trace subdivision. As such, we determined that there were no grounds to remove Willow Trace from IREA's certificated territory and award the subdivision to Public Service. In Decision No. C02-1363, however, we disagreed with the Recommended Decision that Public Service should continue to provide service to Willow Trace into the indefinite future, pending resolution of IREA's District Court action against Public Service.

2. Decision No. C02-1363 also denied Public Service's alternate request that we direct IREA to purchase Public Service's facilities at Willow Trace at net book cost. Notably, the Decision (at page 20), in discussing the parties' legal rights and obligations in light of the decision denying the complaint and application, stated that IREA "may unilaterally choose to construct its own facilities to serve Willow Trace" (as opposed to purchasing Public Service's facilities). The Application for RRR reiterates the request that IREA be directed to purchase Public Service's facilities, and, in particular, objects to the statement that IREA may unilaterally choose to construct its own facilities to serve Willow Trace.

3. In its Application for RRR, Public Service contends that IREA's construction of its own facilities to serve Willow Trace will result in unnecessary duplication of facilities. Public Service further asserts that IREA's construction of duplicate facilities to Willow Trace will result in disruption of service to customers (*e.g.*, IREA would be required to dig up lawns and landscaping to place its own facilities in the subdivision). Public Service argues that the Commission has the authority under §§ 40-9.5-105(4) (Commission may prohibit duplicative construction by a public utility) and 40-9.5-107(3) (public utilities shall cooperate with each other in avoiding unnecessary construction of facilities), C.R.S., to now order IREA to purchase Public Service's facilities at net book cost. Finally, Public Service argues that construction of

entirely new facilities by IREA would lead to higher rates for customers, because it would be considerably more costly for IREA to construct those facilities at Willow Trace as compared to purchasing Public Service's existing facilities.

4. Alternatively, Public Service requests that, if we do not order IREA to purchase Public Service's existing facilities at Willow Trace, that IREA be directed to give notice of its construction plans to the residents of Willow Trace, and that the residents of Willow Trace and Public Service be given an opportunity to comment on those plans before IREA commences any construction of duplicative utility facilities.

B. Discussion

5. With one exception (discussed below), we deny the Application for RRR. Decision No. C02-1363 fully explains our reasons for denying the request that we order IREA to purchase Public Service's facilities at net book cost. We affirm our determinations that: (1) IREA has not yet done anything wrong; and (2) Public Service failed to prove in this case that it was entitled to any relief from IREA. These conclusions continue to be correct notwithstanding any argument in the Application for RRR. Public Service, as the utility that illegally invaded IREA's service territory, has no legal right to choose the remedy to be imposed on IREA as a result of Public Service's unlawful conduct. This denial of the Application for RRR also applies to Public Service's related requests that IREA give notice of its plans for serving Willow Trace to customers, and that we conduct a hearing on those plans.

6. The Application for RRR asserts that §§ 40-9.5-105(4) and 40-9.5-107(3), C.R.S., authorize the Commission to order IREA to purchase Public Service's facilities in this case. We disagree. Those statutes do not apply to the circumstances here, where one public utility has unlawfully constructed facilities within the service territory of another public utility, and then

requests that the blameless utility be required to purchase those unlawfully constructed facilities. We interpret § 40-9.5-105(4), C.R.S., as permitting the Commission, upon complaint by a public utility, to prohibit construction of new facilities by another utility, if such construction would duplicate the *lawful* service or facilities of the complaining utility. Similarly, when § 40-9.5-107(3), C.R.S., directs electric utilities to cooperate with each other in avoiding “unnecessary construction of facilities” its necessary premise is that each utility is acting lawfully (*i.e.*, that each utility has the legal right to construct particular facilities). In general, we disagree that these statutes authorize the Commission to issue any orders against IREA *upon Public Service’s complaint*.

7. Nevertheless, we do agree that Decision No. C02-1363 should be modified in one respect. When we stated that IREA may unilaterally choose to construct its own facilities to serve Willow Trace, we were attempting to describe IREA’s legal rights *at this time and based upon this complaint by Public Service*. That is, at this time IREA still retains its management discretion to decide how to serve Willow Trace. Of course, IREA could abuse that management discretion and be subject to a complaint by customers in the future under § 40-9.5-106(3), C.R.S. (*e.g.*, if it unreasonably refuses to purchase Public Service’s facilities). In any event, Decision No. C02-1363 did not mean to say that IREA’s decision to construct its own facilities to serve Willow Trace is reasonable and is now being approved by the Commission. Because this language is subject to misinterpretation, we agree with the Application for RRR that Decision No. C02-1363 should be modified. We now modify the Decision by deleting the language on page 20 which states that “...IREA may unilaterally choose to construct its own facilities to serve Willow Trace.” To this extent, we grant a portion of Public Service’s Application for RRR. Otherwise the Application is denied.

8. Decision No. C02-1363 ordered the parties to file a report within 90 days of December 5, 2002 (the effective date of the Decision) regarding their plans to transfer service in the Willow Trace subdivision to IREA, or to otherwise resolve this controversy. We clarify that the 90-day period to file the report is unaffected by the Application for RRR and this order. That is, the report is still due 90 days from the effective date of Decision No. C02-1363.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument or Reconsideration filed by Public Service Company of Colorado to Decision No. C02-1363 is granted, in part, consistent with the above discussion, and is otherwise denied.

2. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration to this Decision begins on the first day following the Mailed Date of this Decision.

3. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 8, 2003.**

(S E A L)



ATTEST: A TRUE COPY

Bruce N. Smith

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RAYMOND L. GIFFORD

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Commissioners

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