

Decision No. C03-0867

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02F-381E

FREDERICK HERR AND IRMA SCHIRRMEISTER,

COMPLAINANTS,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

DECISION GRANTING EXCEPTIONS

Mailed Date: August 6, 2003
Adopted Date: February 12, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of Exceptions to Decision No. R02-1465 (Recommended Decision) by Public Service Company of Colorado (Public Service or Company). In that decision, the Administrative Law Judge (ALJ) recommended that the Complaint by Frederick Herr and Irma Schirrmeister against Public Service be granted for the most part. Specifically, the ALJ concluded that Complainant Frederick Herr was not liable for certain electric charges billed by Public Service, that Public Service was not justified in discontinuing service to the premises located at 222 Peterson Road, Bennett, Colorado, and that Public Service should be ordered to immediately restore services at the subject premises. Public Service, pursuant to the provisions of § 40-6-109(2), C.R.S., excepts to the Recommended Decision. Complainants Herr and Schirrmeister have filed

responses to the Exceptions. Now being duly advised in the matter, we grant the Exceptions consistent with the discussion below.

B. Discussion

2. The findings of fact in the Recommended Decision indicate:¹ The Complaint by Frederick Herr and Irma Schirrmeister in this case alleged that Public Service discontinued service at the subject premises without just cause, inasmuch as Frederick Herr was not responsible for certain electric charges billed by Public Service. Furthermore, the Complaint claims, Public Service improperly refuses to reconnect service at the premises. The location of the premises in question is a house at 222 Peterson Road, Bennett, Colorado. Complainant Herr commenced construction of a house at that address in 1997.

3. On July 28, 1997, Frederick Herr applied to Public Service for a temporary electric service extension to the premises. The service was requested in the name of Frederick Herr and was for the purpose of having electricity available during construction of the house. On August 8, 1997, Public Service's contractor completed installation of the requested temporary extension consisting of a transformer, a loop from the permanent pole to the temporary pole, and a loop to the meter box on the temporary pole. The contractor did not install a loop from the meter box on the temporary pole to the house, because Public Service would not run electricity to the house until the electrical inspection was completed. Therefore, on August 8, 1997, electric service from the Company was not available at the premises.

¹ As explained *infra*, Public Service did not provide the Commission with a copy of the transcript of the hearing in this case to support its Exceptions. Therefore, the Commission accepts the ALJ's basic findings of fact as complete and accurate. See § 40-6-113(4), C.R.S.

4. Frederick Herr was constructing the house for his son, Adrian Herr. Construction proceeded at an uneven pace from 1997 through 2000. On September 9, 2000, a lineman for Public Service, Mr. Jones, discovered jumpers at the meter box and the absence of a meter at the temporary pole at the premises. In addition, Mr. Jones observed wire running from the meter box on the temporary pole to the house. The identity of the person who placed the jumpers and the wire to the house is unknown. Mr. Jones observed scorch marks and some melting of the socket in the meter box on the temporary pole. Although aware that the existence of the jumpers and the wire to the house meant that unmetered power could flow to the premises, Mr. Jones did not take any measurements to determine whether electricity was, in fact, being used at the house.

5. Mr. Jones, on September 15, 2000, submitted a report to the Company's computer system indicating a possible energy diversion (*i.e.*, improper use of unmetered power) at the premises. Nevertheless, the Company did not conduct any investigation of the matter until March 13, 2001, six months after the report of the possible energy diversion. On that date, Mr. Johnson, a revenue protection investigator for Public Service, conducted an on-site examination of the premises observing the jumpers, the burned condition of the meter box, and the wire running from the temporary pole to the house. Based upon these observations, Mr. Johnson concluded that an energy diversion existed. He did not take any measurements to see whether electricity was flowing to the house, nor did he observe the interior of the house. Neither did Mr. Johnson remove the unauthorized electric connection to the premises. He did leave a notice at the house stating that Public Service would need to receive a copy of the electrical inspection before setting a meter. The notice contained no addressee or customer, but only the address of the house.

6. On March 15, 2001, Frederick Herr submitted to the Company an application for electric service at the house, together with a copy of the final electrical inspection report. Complainant Herr signed the application, but in the name of his son, Adrian Herr.

7. On June 29, 2001, as part of their continuing investigation of the energy diversion at the house, Messrs. Jones and Johnson conducted an additional on-site inspection of the premises. The condition of the unauthorized electric connection was unchanged. On this visit, Mr. Jones measured the current running to the house; the ampere readings were 5.2 on one leg of the connection and 13.3 on the other. Messrs. Jones and Johnson did not attempt to enter the house during this investigation. Mr. Johnson testified that he did not enter the house because he was uncomfortable due to the relative isolation of the house and the presence of a sign warning against trespassing. Mr. Johnson, however, did remove the jumpers; installed a shut-off plate; and sealed the plate with red tape. On this inspection, Mr. Johnson also left an Energy Diversion Notice at the premises, which stated that electric service was disconnected. That notice contained no addressee or customer name.

8. Later in the day on June 29, 2001, Public Service personnel installed a meter on the temporary pole. Although the meter was installed, Public Service did not string a wire from the meter to the house. Nevertheless electrical usage at the house began to be measured on June 29, 2001.

9. At the conclusion of his investigation, Mr. Johnson prepared an estimate of the amount of electricity improperly diverted at the premises. As inputs into his estimation, Mr. Johnson used the actual metered usage at the house from June 29, 2001 to August 15, 2001. He estimated that the energy diversion had existed from August 15, 1998 to June 29, 2001.

Applying the residential rates in effect during that period of time, Mr. Johnson estimated that Frederick Herr owed the Company \$4,558 for the diverted electricity.

10. On September 20, 2001, the Company sent Adrian Herr--Adrian Herr was shown as the customer in Public Service's records--a bill for \$4,669: the current metered charges, and the estimate of the charges for diverted energy plus \$75 as the cost of the diversion investigation. The Company disconnected electric service at the premises on November 28, 2001 for non-payment of the estimated diversion charges. At the time of disconnection, all bills for metered service were current.

11. On January 7, 2002, Irma Schirrmeister applied for electric service at the premises in her name. Public Service refused service to Ms. Schirrmeister because of the unpaid balance on Adrian Herr's account for the unmetered electricity and because Frederick Herr lived at the house. At hearing, the Company reiterated its refusal to initiate electric service at the house so long as Frederick Herr resides there.²

12. On March 21, 2002, after discussions with Frederick Herr, Mr. Johnson performed a second estimate of diverted electric usage at the premises. Mr. Johnson changed one input into his calculation, using the metered electric usage from September 14, 2001 to October 14, 2001 (instead of from June 29, 2001 to August 16, 2001). All other inputs remained the same. The resulting estimate of energy diversion charges plus the \$75 investigation charge was \$2,591. Public Service continues to insist that Frederick Herr is responsible for these charges. At the

² In its Exceptions, however, Public Service changed its position and states that it is willing to provide service at the premises to Complainant Schirrmeister.

time of hearing in this matter, Frederick Herr lived at the house full-time. Electricity was not available at the premises except that provided by a generator and a battery.

C. Exceptions

13. The Recommended Decision agreed with Complainants Herr and Schirrmeister in virtually all respects. First, the ALJ ruled that the Company's tariffs are to be strictly interpreted and enforced against Public Service, "the author" of the tariffs. In part, based upon this standard the ALJ concluded that Public Service failed to strictly follow its tariffs in various ways in its dispute with the Complainants. Second, the ALJ concluded that Public Service failed to prove that Frederick Herr, instead of Adrian Herr, is the "real customer" at the subject premises. According to the ALJ, Adrian Herr is the customer of record at the house; Public Service failed to prove that anyone other than Adrian Herr should be treated as the customer for purposes of being responsible for energy charges at the premises. The ALJ further rejected Public Service's argument that Frederick Herr is still responsible for energy diversion charges, even if he is not the "real customer" at the house, under the Company's benefit-of-service tariff. Consequently, the ALJ concluded that Frederick Herr is not liable for any charges for diverted electricity at the house. The ALJ further concluded that Public Service improperly disconnected service at the premises, and improperly refused to provide service to Complainant Schirrmeister at those premises. Finally, the ALJ determined that, if Frederick Herr had been responsible for any energy diversion charges, Public Service's estimates were improper and excessive. Public Service objects to all of these recommendations by the ALJ.³

³ As noted *infra*, Public Service, in its Exceptions, does not contest the portion of the Recommended Decision relating to Ms. Schirrmeister, and has agreed to provide service at the premises to her. Therefore, the ALJ's recommendation that Public Service shall not deny service to Ms. Schirrmeister at the premises is affirmed.

14. For the reasons discussed below, we grant the Exceptions. Generally, we agree with Public Service that: (1) the ALJ applied the wrong standard for interpreting the Company's tariff in resolving this case; (2) the evidence in the record demonstrates that Frederick Herr was the real customer at 222 Peterson Road, Bennett, Colorado; therefore, Complainant Herr was responsible for energy charges at those premises; and (3) Complainant's responsibility for energy diversion charges at the house means that Public Service was justified in disconnecting electric service at the premises when he refused to pay these charges. However, based upon the record before us, a record which does not include a transcript of the hearing before the ALJ, we conclude that Public Service's proposed energy diversion charges were excessive. We determine that Complainant Herr is responsible for those charges discussed below.

D. Interpretation of Tariffs

15. Resolution of this case, in important respects, involves construction and interpretation of Public Service's tariff. That tariff contains the rates, terms, and conditions of electric service provided by the Company to end-users, and Public Service is obligated to comply with that tariff in rendering service to customers. We first address the standard for interpreting the Company's tariff used by the ALJ. Specifically, the ALJ concluded that Public Service's tariff sheets "...are to be strictly enforced against Public Service, their author." Recommended Decision, page 17. Public Service suggests that this standard is incorrect, and apparently accounts for many of the ALJ's recommendations in favor of Complainant Herr and against the Company. According to the Exceptions, tariffs are to be construed like statutes, the language to be "read and considered as whole" and construed "to give consistent, harmonious, and sensible effect to all of its parts." *See U.S. West v. Longmont*, 924 P.2d 1071, 1079 (Colo. App. 1995), *aff'd* 948 P.2d 509 (Colo. 1997).

16. We agree with the Exceptions on this point. The court in *U. S. West v. Longmont*, (at 1079) observed that:

[S]tandard principles of statutory construction apply to the interpretation of (a) tariff. Hence, we must give effect to the intent of the legislative body, *i.e.*, the PUC, by looking first at the language of the tariff. Further, its language must be read and considered as a whole, and when, possible, it should be construed to give consistent, harmonious, and sensible effect to all of its parts. In case of ambiguity, a court may also be guided by the consequences of a particular construction.

Accord: Redfern v. U.S. West Communications, Inc., 38 p.2d 566 (Colo. App. 2000) (standard principles of statutory construction apply to the interpretation of a tariff).

17. The ALJ in this case strictly interpreted the tariffs against Public Service, their purported "author",⁴ in resolving many of the disputes here. And apparently that standard of construction of the tariffs, in part, led the ALJ to conclusions which gave the Complainant the benefit of all doubts. To the extent the ALJ relied on this "strict-enforcement" (against the Company) standard in applying the tariffs at issue, we hold that this was incorrect.

E. Complainant as the "Real" Customer

18. In its Exceptions, Public Service argues that Frederick Herr should be regarded as the customer of record at the subject premises, and, therefore, is primarily responsible for the energy diversion charges. Alternatively, the Company contends that Frederick Herr is responsible for those charges under the benefit-of-service tariff. Under that tariff, Frederick Herr could be held responsible for energy charges at the house, even if Adrian Herr were the customer of record, because he resided at the premises and, therefore, benefited from the diverted energy

⁴ To characterize the utility as the "author" of its tariff is not completely accurate. For example, in cases where the Commission has conducted hearings on a tariff, the Commission has reviewed and approved as lawful the tariff sheets filed after those hearings. Indeed, in many of those hearings, the Commission orders the utility to file specific tariffs.

used there. The Recommended Decision determined that Public Service failed to meet its burden of proving that Frederick Herr is the "real" customer at the premises. In reaching that conclusion, the Recommended Decision rejected as unproven by a preponderance of the evidence the Company's assertion that Complainant fraudulently (*i.e.*, by subterfuge) obtained electric service at the house in Adrian Herr's name, because of a prior, delinquent account with the Company in his own name. Recommended Decision, paragraphs 74-76.

19. Based upon the ALJ's basic findings of fact, we conclude that, as the Company contends, Frederick Herr is the "real" customer at the subject premises. The basic findings of fact in the Recommended Decision indicate:

- Frederick Herr was the person who applied to Public Service for a temporary electric service extension to the premises. The service was requested in the name of Frederick Herr and was for the purpose of having electricity at the premises during construction of the house. Recommended Decision, paragraph 18.

- Sometime in 1998, Complainant Herr obtained landline telephone service at the house in his own name. Recommended Decision, paragraph 23.

- In February 1998, Complainant Herr obtained natural gas service from Eastern Colorado Utility Company to the house in his own name. At the time of hearing in this case, gas service at the premises was still in Complainant's name. Recommended Decision, paragraph 24.

- Beginning in January 2001 at the latest, Frederick Herr himself knew that electricity used at the house was improperly diverted (*i.e.*, unmetered). There is no evidence whether Adrian Herr knew of the improper diversion. Recommended Decision, paragraph 34.

- Frederick Herr began permanent residence at the premises in February 2001. At that time he was the only resident at the house. Recommended Decision, paragraph 35.

- On March 15, 2001, after Public Service left an Energy Diversion Notice at the premises, Complainant Herr signed and submitted an application for residential electric service at the premises. The named applicant was Adrian Herr. In fact, Frederick Herr submitted the request for service signing the application as "Adrian Herr" apparently with no indication to the Company that he, the signatory, was not Adrian Herr. Recommended Decision, paragraph 40.

·Prior to July 1, 2001, Adrian Herr lived in California, making only occasional trips to Colorado. Adrian Herr moved to Colorado full-time and moved into the house only in July 2001. Recommended Decision, paragraph 49.

·As of the date of hearing, Frederick Herr lived full-time at the house.

20. The most reasonable conclusion from these findings of fact is that Frederick Herr, not Adrian Herr, was the real customer for electric service at the subject premises, and should be held liable for energy diversion charges. We first observe that Adrian Herr had little connection to the house for most of the period of time relevant to this dispute. Indeed, Adrian Herr lived out of state until July 1, 2001. According to the Recommended Decision, Frederick Herr was the person who: (1) first applied for electric service at the premises (*i.e.*, the temporary electric service extension) in 1997 in his own name; (2) obtained telephone utility service at the premises in his own name in 1998; (3) obtained natural gas utility service at the premises in 1998 in his own name, and maintained that service in his own name even at the time of hearing in this case; (4) lived full-time at the premises before other persons began residing there; and (5) eventually signed and submitted the application for permanent electric service at the premises. We emphasize that, unlike Adrian Herr, Complainant lived at the house at times when energy was being improperly diverted. The Recommended Decision points out that Public Service personnel first discovered an improper (*i.e.*, unmetered) loop from Public Service's system to the house in September 2000; Adrian Herr did not move to Colorado full-time until July 2001. Frederick Herr concedes that he knew of the improper diversion (Recommended Decision, paragraph 34). Indeed, according to the Recommended Decision, Complainant was the *only* resident at the house at certain times when electricity was being improperly diverted.

21. Apparently, the Recommended Decision concluded that Frederick Herr was not the "real" customer for electric service at the house because Public Service's records indicated

that Adrian Herr was the nominal customer, and because Public Service failed to prove that Complainant's conduct in applying for permanent service constituted subterfuge. As to the first point, we note that the Company's customer record was based upon the application for service in Adrian Herr's name, *but signed and submitted by Frederick Herr*. Given the findings of fact in the Recommended Decision (discussion above), including the fact that Complainant was the person who actually signed and submitted the application for service, Frederick Herr should be considered the real customer notwithstanding the nominal customer on the Company's records. The evidence in this case (discussed above) is much more supportive of this conclusion, rather than the conclusion that Adrian Herr was the real customer at the premises.⁵ That the Company's records listed Adrian Herr as the customer at the house does not foreclose a determination, based upon adequate evidence, that someone else (*i.e.*, Complainant) was the "real" customer and the person primarily responsible for utility charges at the premises.

22. As for the Recommended Decision's conclusion that Public Service failed to prove subterfuge by Complainant, we note that an inference of subterfuge is certainly supported by the ALJ's findings of fact. But, in any event, the lack of a showing of subterfuge would not change our conclusion that Frederick Herr is the real customer at the subject premises. The fundamental dispute here concerns who is responsible for charges for improperly diverted energy. The facts discussed above--facts which demonstrate Complainant's close connection to the premises and to the energy diversion, and which suggest little or no connection on the part of

⁵ Moreover, to hold otherwise based upon the facts of this case would subject Public Service to fraudulent applications for service by other persons. A person could submit an application for utility service in someone else's name, and avoid responsibility for utility charges even though that person was the primary, or even the sole, beneficiary of the service.

Adrian Herr--still justify our conclusion that Frederick Herr is the customer responsible for the charges in dispute here.

F. Discontinuance of Service

23. The basic findings of fact in the Recommended Decision indicate: Company personnel, as part of their investigation into the energy diversion at the subject house, removed the improper connection to Public Service's system at the premises on June 29, 2001. Recommended Decision, paragraph 45. On the same visit to the house, the investigators left an Energy Diversion Notice stating that electric service was disconnected effective that date, and that an account needed to be established with the Company. Recommended Decision, paragraph 46. Public Service personnel, on June 29, 2001, installed a meter on the temporary pole, but did not string a wire from the meter to the house. Nevertheless, electricity usage began to be measured at the meter on June 29, 2001. Recommended Decision, paragraphs 47 and 48.

24. On September 20, 2001, Public Service sent Adrian Herr a bill of \$4,669.50 for current metered charges, estimated diverted energy charges, and the \$75 cost for the diversion investigation. Recommended Decision, paragraph 54. The Company disconnected electric service at the premises on November 28, 2001 for failure to pay the estimated diverted energy charges.

25. Ms. Schirrmeister applied to have electric service at the premises in her name on or about January 7, 2002. But because there was an outstanding balance for service at the premises and because Frederick Herr continued to live there, Public Service refused service to Ms. Schirrmeister. As stated above, the Recommended Decision concluded that the Company improperly discontinued service at the premises, and improperly refused to provide service there to Complainant Schirrmeister.

26. The Exceptions make clear that the Company does not contest the portion of the Recommended Decision related to Complainant Schirrmeister. That is, the Company now agrees to provide service at the premises to Ms. Schirrmeister. Therefore, this portion of the Recommended Decision is affirmed. Public Service shall not refuse to provide service to Ms. Schirrmeister at the house for charges owed by Frederick Herr.

27. As to whether it was improper for Public Service to discontinue service to Frederick Herr, we grant the Exceptions. We note that the ALJ's conclusion, that it was improper to discontinue service to Frederick Herr for failure to pay the diverted energy charges, was based on the premise that Complainant Herr was not the "real" customer at the house. As explained above, however, we conclude that this premise is incorrect. Frederick Herr should be regarded as the real customer at the house. As such, Complainant Herr was the person primarily responsible for the energy diversion charges. His failure to pay these charges justified the discontinuance of service.

28. The findings of fact discussed above point out that Public Service did send the bill for the diverted energy charges several months prior to disconnection on November 28, 2001. Admittedly, that bill was addressed to Adrian Herr; however, the discussion above also points out that Frederick Herr himself caused that confusion by applying for service at the premises in Adrian Herr's name. There is no dispute that Frederick Herr was aware of the use of diverted energy at the premises and was even willing to pay some charges for unmetered usage (*e.g.*, Recommended Decision, paragraphs 34 and 68). Furthermore, the above discussion points out that, in fact, the Company's representatives removed the improper connection to the Company's system on June 29, 2001, and left an Energy Diversion Notice at the premises on that date stating that service was disconnected. Notwithstanding those actions, electric usage began flowing

through the meter anyway on June 29, 2001. Under these circumstances, we conclude that Public Service acted reasonably in discontinuing service in November 2001 when Complainant Herr failed to pay or to make arrangements to pay charges for diverted energy.

G. Energy Diversion Charges

29. Initially, Public Service estimated the diverted energy charges at the premises to be approximately \$4,558. This estimate was based upon actual (*i.e.*, metered) energy usage at the house from June 29, 2001 to August 15, 2001, and the assumption that the energy had been diverted from August 15, 1998 through June 29, 2001. Recommended Decision, paragraph 53. After discussions with Frederick Herr, the Company representative (Mr. Johnson) revised his estimate. Specifically, Mr. Johnson used the actual metered electric usage at the premises from September 14, 2001 to October 14, 2001, but still assumed energy diversion from August 1998 through June 2001. This revised calculation resulted in energy diversion charges of approximately \$2,591. Recommended Decision, paragraph 60. The amount at issue at hearing was this \$2,591 estimate, plus the \$75 diversion investigation charge. Recommended Decision, paragraph 66.

30. The effect of our rulings above is that Frederick Herr is the person responsible for energy diversion charges at the premises. The ALJ determined, however, that even if Complainant Herr were the responsible person, Public Service's estimate of the diverted energy charges was unacceptable. First, the Recommended Decision holds that under the applicable tariff,⁶ Company investigators were required to enter (or attempt to enter) the premises and make an actual count of all electric energy consuming devices to aid in the estimate of the diverted

⁶ Colo. PUC No. 7 Electric, Sheets R30-32.

energy. The Company investigators did not attempt to enter the house; therefore, the ALJ concludes, the Company cannot rely on an estimation of electrical usage. In addition, the Recommended Decision disagreed with the Company's estimate of the time period during which energy was diverted at the premises. The ALJ concluded that, especially since the Company's investigators did not attempt to enter the premises to confirm electrical usage, Complainant's testimony regarding the time during which energy was diverted was the most credible.

31. The Exceptions object to the ALJ's determinations. Public Service argues that the applicable tariff did not require its personnel to enter, or attempt to enter, the house to confirm electrical usage and the rate of that usage. According to the Exceptions, the Company's estimate of the duration of the energy diversion was reasonable based upon the evidence of record, and Complainant offered no credible evidence to rebut the Company's estimate. The Exceptions suggest that the energy diversion tariff accords some deference to the Company's estimate of improperly diverted energy. Because there is no way for the Company to actually measure diverted energy, a person who benefits from that diversion should not receive the benefit of any doubt in the matter. The Exceptions further suggest that the energy diversion tariff allows Public Service to estimate energy usage based on "any available information", but do not allow the customer to "defeat" that estimate by presenting testimony that usage was actually much lower.

32. The Exceptions, in large part, dispute the Recommended Decision's findings of fact, particularly concerning the duration of the energy diversion by Complainant. That is, the Company, for the most part, argues that the facts demonstrated by the record support its estimate of the charges for diverted energy in this case, including its estimate of the time period during which Complainant diverted energy at the premises. For example, the Exceptions (page 14) contend that Complainant told Mr. Johnson in March 2001 that he had been at the premises for

four to five years. And, the Exceptions point to the Complainant's natural gas records as indicating full-time residency at the house since the end of 1997. According to the Exceptions, Complainant presented little evidence disputing the Company's estimate of the duration of the energy diversion.

33. We note that the Company failed to provide the Commission a transcript of the hearing before the ALJ. As such, we presume that the ALJ's basic findings of fact are complete and accurate. *See* § 40-6-113(4), C.R.S. (if transcript not provided with exceptions, basic findings of fact in a recommended decision shall be presumed to be complete and accurate). Therefore, to the extent the Exceptions dispute the ALJ's findings of fact (as opposed to conclusions), we reject those arguments. In part, this means that the Commission cannot accept the Company's suggestion that Complainant diverted energy from August 1998 through June 2001. The ALJ found that the most credible evidence in the record, including Complainant's testimony, indicated a starting date long after August 1998. Recommended Decision, paragraph 96.

34. We also agree with the ALJ that, contrary to Public Service's arguments, the energy diversion tariff does not preclude Complainant from disputing the Company's estimate of diverted energy usage. No such provision appears in the tariff.

35. We do agree with the Exceptions in one respect: The Recommended Decision erred in concluding that the Company's investigators were required to enter, or attempt to enter, into the premises to estimate the extent of the diversion (by making an actual count of electric energy consuming devices). The energy diversion tariff states that Company investigators "shall have the right to enter customer's premises and make an actual count of all electric energy

consuming devices..." when they discover a possible diversion. The tariff then provides that, "Where the Company is unable to make such a count, the computation (of diverted energy) will be based upon any other available information...." The Recommended Decision interprets these provisions as requiring entry or attempted entry into the premises as a "precondition" to the use of an estimate in cases of energy diversion. We disagree.

36. First, a "right" is not a "mandate." The tariff does not specify that Company personnel "shall enter or attempt to enter" premises (or similar language) where energy diversion is discovered. We also note the tariff language--this is in the same sentence in which the right to entry is mentioned--that the Company may compute the amount of diverted energy "in any reasonable manner." Construing these provisions as a whole, we do not interpret the language in the tariff as *compelling* energy diversion investigators to enter, or attempt to enter, a customer's premises before using an estimate of diverted energy. Notably, the Recommended Decision's strict interpretation of the tariff against Public Service would appear to require Company representatives to enter or attempt to enter premises even without consent of the customer. And, in this case, the Company pointed out that there are instances where it may be unsafe for investigators to insist upon entry into a customer's premises in reliance upon the tariff, and, therefore, it may be necessary to make estimates of diverted energy without having entered a customer's premises.

37. We finally note that the tariff provision concerning entry into the premises to "make an actual count of all energy consuming devices" is apparently intended to allow the Company to estimate *the rate of diverted energy usage* (as opposed to the duration of the energy diversion). In this case, however, the Company's eventual computation of the rate of diverted energy usage was not an estimate, but a measurement of actual usage from September 14, 2001

to October 14, 2001. For all these reasons, we conclude that Public Service did not violate its tariff in this case by failing to enter or attempting to enter the premises in the course of its energy diversion investigation.

38. Public Service's estimate of diverted energy assumed 36.0666 kWh per day based on actual metered usage (from September 14, 2001 to October 14, 2001). Mr. Herr disagreed with Public Service's amount and time period and estimated that the cost for electricity used should be \$5 to \$10 per month. We agree with Public Service that it is reasonable to use the undisputed actual meter usage as a proxy for unmetered usage. As explained above, we cannot accept Public Service's argument that the assumed duration of the energy diversion here should be from August 1998 through June 2001. The Recommended Decision (paragraph 95) found that, based upon the evidence, the calculation of any energy diversion charges must begin from October 1, 2000. Without a transcript on Exceptions, we cannot question that finding. Assuming Complainant diverted energy at the premises at the rate of 36.0666 kWh per day from October 1, 2000 through June 28, 2001, Frederick Herr is responsible for energy diversion charges in the amount of \$744.37. This amount includes \$75.00 for the energy diversion investigation, and \$669.37 for electricity used from October 1, 2000 to June 28, 2001 (a period of 271 days at a rate of \$2.47 per day). Public Service may collect this amount from Frederick Herr as the amount due for the improper energy diversion at the premises.

H. Conclusion

39. For the foregoing reasons, we grant the Exceptions consistent with the above discussion. We conclude that Frederick Herr, as the actual customer, is responsible for the energy diversion at 222 Peterson Road, Bennett, Colorado. As such, Complainant Herr is liable to Public Service for the amount specified above.

II. ORDER**A. The Commission Orders That:**

1. The Exceptions to Decision No. R02-1465 filed by Public Service Company of Colorado are granted consistent with the above discussion, and are 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 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
February 12, 2003.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

POLLY PAGE

JIM DYER

Commissioners

CHAIRMAN GREGORY E. SOPKIN
RECUSED HIMSELF.