Decision No. C03-1093

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01F-071G

HOME BUILDERS ASSOCIATION OF METROPOLITAN DENVER,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

DECISION GRANTING EXCEPTIONS IN PART

Mailed Date: September 25, 2003
Adopted Date: September 24, 2003

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions to Recommended Decision No. R03-0519 filed by Home Builders Association of Metropolitan Denver (HBA) and Public Service Company of Colorado (Public Service or Company) on June 11, 2003. Both HBA and Public Service filed responses to the exceptions on June 25, 2003. In the Recommended Decision, the Administrative Law Judge (ALJ) found that HBA had standing to bring its complaint for reparations pursuant to § 40-6-119, C.R.S. The ALJ also found that Public Service had an obligation under its tariff to update its construction allowance (CA) on an annual basis or file for a waiver from the Commission but violated that obligation for several years. However, the ALJ concluded that HBA failed to satisfy its burden of proof to establish that the existing CA was excessive or discriminatory. According to the ALJ, HBA also failed to establish that its method of calculating reparations was proper. The ALJ further held that the two-year statute of limitations provided for in § 40-6-119(2), C.R.S., was applicable here and precluded HBA from seeking reparations for any period other than the two-year period

preceding the date of the filing of its complaint. Finally, the ALJ determined that an award of attorneys' fees to HBA was not proper in this matter.

2. HBA took issue with the Recommended Decision on several points. First, HBA excepted to the ALJ's finding that a determination of a correct CA would be speculative. Rather, HBA argues that the failure of Public Service to update its CA lead to payments that were excessive and discriminatory, and therefore, Public Service should not be allowed to benefit from its own failure to follow its tariff obligations.

3. HBA argues that there is an adequate record and substantial authority to support a determination that Public Service should pay reparations for its failure to update its CA. HBA further argues that it presented sufficient evidence to show that because of Public Service's tariff obligations, reparations should be awarded based on the calculation of what the CA should have been. HBA also cited several cases providing for the award of reparations under § 40-6-119, C.R.S.

4. HBA claims that it satisfied its burden of proving that its methodology for calculating reparations was proper. HBA maintains that the actual gross embedded investment per customer can be determined with certainty at a given point in time.

5. Additionally, HBA contends that the two-year statute of limitations should be equitably tolled because of Public Service's tariff violations. Finally, HBA maintains that it should be awarded attorney's fees for its participation in this docket.

6. Public Service based its exceptions solely on the issue of standing. Generally, the gist of its argument is that the express language of § 40-6-119(1), C.R.S., requires that reparations, when due, must be paid directly to the customers that did in fact pay excessive or

discriminatory rates. Since HBA itself never paid any charges to Public Service under the terms of the statute, the Commission may not award reparations to HBA. Therefore, according to Public Service, the issue that remains is whether HBA may bring a complaint for reparations under the statute on behalf of those parties that did pay Public Service for gas extensions. Public Service asserts that by virtue of the express language of § 40-6-119(1), C.R.S., HBA may not bring such an action. Public Service argues that the express terms of § 40-6-119(1), C.R.S., cannot be read to permit HBA to pursue a complaint to obtain payment of reparations to third parties.

7. Now, being duly advised in the matter, we grant HBA's exceptions in part and deny Public Service's exceptions consistent with the discussion below.

B. Background

8. HBA filed a complaint against Public Service on February 23, 2001. HBA alleged that Public Service violated its natural gas service lateral connection and distribution main extension policy tariffs - Tariff Sheet Nos. R30-R43 - by failing to update the CA. HBA specifically alleged that Public Service violated the tariff by failing to review and recalculate the CA each year since 1996 or file a request for a waiver of the filing from the Commission. HBA additionally alleged that Public Service violated its tariff by failing to file a new CA within 30 days following a final decision by the Commission after Public Service's last rate case. As a result, HBA requested reparations pursuant to § 40-6-119(1), C.R.S., for any customer who paid excessive charges for new gas extensions for the period 1996 through 2002. HBA also requested attorney's fees and costs.

9. The first hearing on this matter was heard in August and September 2001 by an ALJ. In the Recommended Decision issued from that first hearing, the ALJ found that Public

Service failed to comply with its tariffs by failing to update the CA, or ask for a waiver since 1996. However, the ALJ also found that HBA failed to establish, pursuant to § 40-6-119(1), C.R.S., that Public Service charged an excessive or discriminatory amount for natural gas extensions due to its failure to update its CA. Therefore, the ALJ found that HBA was not entitled to reparations. The ALJ also found that the Filed Rate Doctrine and the Prohibition Against Retroactive Ratemaking prohibited Public Service from retroactively recalculating and adjusting its CA.

10. HBA filed exceptions to the Recommended Decision. The Commission, in Decision No. C02-687 granted the exceptions in part and remanded the matter to the ALJ for further proceedings. The Commission upheld the ALJ's finding that Public Service had violated its tariff by failing to update its CA, or ask for a waiver from filing, beginning October 1, 1996. However, the Commission overturned the ALJ's findings that the Filed Rate Doctrine and the Prohibition Against Retroactive Ratemaking barred an award of reparations, and therefore, HBA failed to meet its burden of proof under § 40-6-119, C.R.S.

11. Public Service filed an Application for Rehearing, Reargument, or Reconsideration (RRR) or in the Alternative, Request for Clarification. In Decision No. C02-972, the Commission found the application for RRR untimely since the Commission's decision merely remanded the matter to the ALJ for additional findings, but the Commission did clarify its decision by providing further instructions to the ALJ to determine:

1. The extent of Public Service's obligation under its tariff;
2. Whether the $360 Construction Allowance rate was excessive or discriminatory under § 40-6-119(1), C.R.S. for each year from October 1, 1996 to the present;

3. Whether HBA satisfied its burden of proof that its method of calculating reparations is proper;

4. Any statute of limitations issues;

5. To determine whether to award attorney's fees and interest to HBA; and

6. Whether HBA had standing to bring the complaint.

The remand hearing was held on January 10, 2003. We summarize the most salient findings of fact and conclusions of the ALJ here.

C. ALJ's Findings and Conclusions

12. Under Public Service's natural gas service lateral connection and distribution main extension policy tariffs (Tariff Sheet Nos. R30 - R43), a customer who requests new natural gas service pays Public Service up front for all estimated costs of facilities required to serve the customer, less the prevailing CA. The CA is a credit on a customer's payment that represents that portion of necessary construction provided at Public Service's expense.

13. In essence, the gas extension tariff and CA attempt to allocate gas distribution plant costs between new customers and existing customers. The net result being that neither class of customer subsidizes the other. The CA represents the necessary distribution extension facilities equivalent in cost of the gross embedded investment per customer.

14. The relevant portion of the natural gas service lateral connection and distribution main extension policy Tariff Sheet No. 34 states:

> For gas service of a permanent character, the Company will install at its expense, necessary Distribution Extension facilities equivalent in cost of the gross embedded investment per customer as a Construction Allowance. The annual volume portion of the Construction Allowance shall be the product of the Company's estimate of the Applicant's annual volume times the derived gross embedded investment per Dth. The Construction Allowances are as shown on the Sheet entitled "Construction Allowance by Service Class for each of the various categories of service listed."

> *The above allowances are subject to review and appropriate revision by filing of new Construction Allowances with the Commission within 30 days following a final decision in a Company rate proceeding, based on the appropriate gross distribution investment amounts included in that proceeding. A review and recalculation of Construction Allowances will be made at least once a year, unless Company receives authorization for a waiver of recalculation.*
>
> Applicant or Applicants shall be required to pay to Company as a Construction Payment all estimated costs for gas distribution facilities necessary to serve Applicant or Applicants in excess of the Construction Allowance. Said Construction Payment shall be refundable in part or in its entirety during a ten-year period commencing with the Extension Completion Date. At the end of said ten-year period, any remaining Construction Payment becomes non-refundable. (Emphasis added)

15. The record indicates that Public Service last updated the CA in 1995. The amount set and approved by the Commission at that time was $360. However, the record further indicates that it is undisputed that Public Service failed to update the CA for each year from October 1, 1996 to the time of the filing of this complaint, or request a waiver of that filing requirement.

16. According to HBA's witness, had Public Service followed the requirements of its tariff, the CA would be higher than the $360 set in 1995. As a result, HBA contends that Public Service's customers therefore paid excessive amounts for gas extensions during the relevant period.

17. HBA's witness presented updated calculations from the first hearing in this matter regarding what he believed the CA should have been at various times from October 1, 1996 to June 1, 2002, had Public Service updated its CA in compliance with its tariff obligations. HBA's witness calculated what he considered to be the appropriate CA for each year in question by adding the investment in the gas mains, and regulator stations, land and rights, structures and improvements, and service laterals. That sum was then divided by the number of customers on the system, which yielded the average investment, according to HBA.

18. Based on HBA's calculations, it asserted that Public Service's customers paid excessive amounts for installation of gas extensions. According to HBA's calculations Public Service's gas extension customers, for the period October 1, 1996 to May 31, 2002, overpaid Public Service $9,789,360. Adding the statutory interest rate to that sum results in $10,866,002 in reparations due to residential gas customers, according to HBA. As for business gas extension customers, HBA estimates that reparations are due in the amount of $2,721,085 for the period, including interest. As such, HBA claims total reparations of $13, 587,087.

19. Public Service's witness found HBA's method of determining reparations by utilizing gross embedded investment per customer flawed. According to Public Service's witness, this methodology creates a mismatch between the cost adjustment and the embedded cost of facilities reflected in base rates. Rather, the witness testified that the embedded cost methodology in the tariffs should be adjusted to account for Public Service's pre-built system. In another docket (01S-404G), the witness testified that the average embedded cost reflected in the Public Service rate case in Docket No. 99S-609G should be reduced by 22 percent. According to the witness, this reduction factor would be used to adjust the CA to recognize Public Service's pre-built plant associated with extensions for which Public Service does not receive compensation.

20. Public Service's witness further testified that the Company interprets the review and recalculation language of its Tariff Sheet No. 34 to require a review of the Commission's orders handed down throughout the year to determine if a general rate schedule or general rate proceeding has occurred in order to determine whether an adjustment to the CA is needed. According to the witness, the tariff sheet provides for a waiver that can be filed by Public Service if it believes an adjustment is unnecessary.

21. Public Service's second witness testified as to the accuracy of HBA's calculations. According to the witness, although the amount of the CA is generally equivalent to the number of meter sets, the amount of the CA is not exactly equal to the number of meter sets because a lateral can serve multiple meters for each service lateral. As a result, Public Service believes HBA's estimate for reparations is flawed and led HBA to overestimate the amount of reparations that could possibly be due by 35 to 40 percent.

22. In response to our remand order, the ALJ made six findings in this matter. First, the ALJ found that HBA had standing to bring this complaint before the Commission. According to the ALJ, a reading of § 40-6-119(1), C.R.S., should not be read as narrowly as Public Service urges, particularly in view of other Public Utilities Law provisions. For example, the ALJ cited § 40-6-108(1)(a), C.R.S., that grants standing to file complaints to entities other than those directly affected. Further, the ALJ cited § 40-3-102, C.R.S., that grants to the Commission broad power to regulate and correct abuses of jurisdictional public utilities. Reading the three statutes together and considering *Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission*, 698 P.2d 255 (Colo. 1985), the ALJ concluded that the plain wording of these statutes finds that HBA has standing to maintain the complaint.

23. The ALJ also found that Public Service's tariff clearly states that the CA is subject to review by the Commission and requires Public Service to file a new CA within 30 days after a final Commission decision in a Public Service rate case. The ALJ found it equally clear that Public Service is obligated to review and recalculate the CA at least once a year, unless it applies for and receives a waiver from the Commission. Based on that plain tariff language, the ALJ determined that Public Service was required under the provisions of its tariff to file a new CA with the Commission within 30 days of a final decision in its last rate case. The ALJ also found

that Public Service was required to yearly review and recalculate its CA unless it applied for, and received a waiver of that requirement from the Commission.

24. Despite finding that Public Service was indeed required to file a new CA within 30 days of a final decision in its last rate case, and update the CA annually, unless it applied for and received a waiver from the Commission, the ALJ concluded that HBA failed to establish that the $360 CA for each year from October 1, 1996 to June 1, 2002 was excessive or discriminatory under the provisions of § 40-6-119(1), C.R.S. According to the ALJ, there is no evidence that Public Service provided a CA not approved by the Commission or discriminated in any way. Because it is unknown what the Commission would have approved for an updated CA had Public Service filed yearly updates or a waiver, the ALJ found it speculative to make a determination now as to the proper CA for each year.

25. The ALJ determined that HBA failed to satisfy its burden of proof to establish its method of calculating reparations was proper. HBA's method of moving the test period forward 12 months when the applicable period in question is advanced by a similar amount, while appearing reasonable and conservative to the ALJ, is nonetheless based on an assumption that had Public Service complied with its tariff by filing adjustments, the Commission would have in turn approved the adjusted CA. Because the ALJ found this speculative, he found that HBA failed to meet its burden of proof pursuant to § 40-6-119(1), C.R.S., that Public Service charged an excessive or discriminatory amount.

26. HBA sought reparations from October 1, 1996 to June 1. 2002. However, § 40-6-119(2), C.R.S., provides for a two-year statute of limitations for complaints regarding excessive or discriminatory charges from the date the cause of action accrued. HBA contended that

because Public Service violated its own tariff obligation, the statue of limitations is equitably tolled. However, the ALJ found that HBA's argument was without merit. Citing *Dean Witter Reynolds, Inc. et al. v. Hartman*, 911 P.2d 1094 (Colo. 1996), the ALJ found that in order to equitably toll the statute of limitations, HBA was required to show that Public Service wrongly impeded HBA's ability to bring the claim, or truly extraordinary circumstances prevented HBA from filing its claim despite diligent efforts. Finding neither of these circumstances present here, the ALJ concluded that any reparations should be limited to charges accrued after February 23, 1999, or two years prior to the filing of the complaint.

27. Although the Commission has the power to award attorney's fees and costs pursuant to Article XXV of the Colorado Constitution, the ALJ determined that HBA was not entitled to such fees and costs. Rather, the ALJ found that pursuant to *Mountain States Telephone and Telegraph Company v. Public Utilities Commission*, 576 P.2d 544 (Colo. 1978), the Commission has developed guidelines for the award of attorney's fees as follows:

> 1.) The representation of the [requesting party] and the expenses incurred relate to general consumer interests and not to a specific rate or preferential treatment of a particular class of ratepayer.
>
> 2.) The testimony, evidence, and exhibits introduced in this proceeding by the [requesting party] have or will materially assist the Commission in fulfilling its statutory duty to determine the just and reasonable rates…
>
> 3.) The fees and costs incurred … for which reimbursement is sought are reasonable charges for the services rendered on behalf of general consumer interests.
>
> *Mountain States Telephone and Telegraph Company v. Public Utilities Commission et al.*, 576 P.2d 544, 548 (Colo. 1978); *Durango West Metropolitan District No. 1 v. Lake Durango Water Company, Inc.* (November 14, 2000) Commission Decision No. C00-1265 at 35.

28. Given these requirements, the ALJ held that HBA's request for attorney's fees fails under the first standard of the Commission guidelines, since the representation of HBA and

expenses incurred did not relate to the general consumer's interest but rather to a specific rate and class of customers, the gas extension customers that consist mainly of HBA's member home builders.

D. HBA's Exceptions

29. HBA takes issue with the Recommended Decision on several points. First, HBA takes exception with the ALJ's finding that a determination of a correct CA would be speculative. HBA points out that the speculation issue was not within the scope of the remand. HBA argues that the specificity and attention to detail exhibited by the Commission in defining the scope of remand leaves no room for a speculation argument. According to HBA, the failure of Public Service to update its CA led to construction payments that are excessive and/or discriminatory, and therefore, Public Service should not be allowed to benefit from its own failure to follow its tariff.

30. Public Service, not its customers should bear the risk for noncompliance according to HBA's exceptions. Although the ALJ accepted Public Service's argument that it is speculative that the Commission would have allowed a new CA to go into affect if Public Service had complied with its tariff obligations, HBA maintains that it is equally speculative to assume the opposite. HBA argues that the risk of non-compliance with the tariff should rest with Public Service, and not with its line extension customers.

31. According to HBA, despite the ALJ's findings, there is an adequate record and abundant authority to support a determination that Public Service should pay reparations for its failure to update its CA. HBA maintains that the only fact of record the Commission needs to award reparations on is the calculation of what the CA should have been, based on the

unequivocal tariff obligation to provide gas extension customers a CA equivalent in cost of the gross embedded investment per customer, as provided in Tariff Sheet No. R34.

32. HBA points to several cases for the proposition that the authority cited therein calls for the Commission to award reparations in this matter. In *Archibold v. Public Utilities Comm'n*, 58 P.3d 1031 (Colo. 2002) the supreme court upheld a Commission award of reparations pursuant to § 40-6-110(1), C.R.S. That award of reparations was for Qwest Corporation's failure to provide service at a level required by our service quality rules. The court held that we may impose reparations under § 40-6-119(1), C.R.S., if we find that a public utility has charged an excessive or discriminatory amount for a product or service, after a complaint by a customer and an investigation by the Commission. *Id* at 1036.

33. HBA also cites *Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Comm'n*, 698 P.2d 255 (Colo. 1985) and *Bonfils v. Public Utilities Comm'n*, 189 P. 775 (Colo. 1920) to support its contention that reparations are appropriate for excessive or discriminatory charges, and the Commission has authority to award reparations for complaints filed pursuant to § 40-6-119, C.R.S. HBA also cites *Bonfils supra*, for the proposition that the Commission may order reparations to customers equal to amounts over-collected, even if the over-collections resulted from collecting funds from customers using tariffs on file with the Commission.

34. The two-year statute of limitations provided for in § 40-6-119(2), C.R.S., should be equitably tolled according to HBA. It argues that the ALJ did not directly address HBA's point that equitable tolling is also appropriate when a party does not comply with a statutory filing obligation such as Public Service's tariff obligations here.

35. HBA maintains that Public Service's tariff obligations had the force and effect of a statute. *Citing, Dyke Water Company v. California Public Utilities Commission*, 363 P.2d 326, 337 (Cal.), *cert. denied*, 368 U.S. 939 (1961). As such, a failure to comply with a statutory duty to disclose information equitably tolls the running of a statue of limitations in Colorado. *See, Garrett v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 854 (Colo. 1992).

36. Where a party by its acts or omissions contributes to the running of a statute of limitations, the doctrine of equitable estoppel will prevent the party from raising that defense according to HBA. *Citing, Strader v. Beneficial Finance Co. of Aurora*, 551 P.2d 720, 724 (Colo. 1976). In *Shell Western E&P v. Dolores County Board of Commissioners*, 948 P.2d 1002, 1007 (Colo. 1997), HBA finds language it argues is relevant to this matter that states that an equitable exception to a statute of limitations is where a duty to furnish information is imposed by statute. HBA concludes that under these two cases, Public Service's failure to follow its tariff obligations equitably tolled the running of the two-year statute of limitations in § 40-6-119(2), C.R.S. Therefore, Public Service's gas extension customers are entitled to reparations from October 1, 1996.

37. Finally, HBA urges that it should be awarded attorney's fees because an award of reparations would benefit many gas extension customers who are not HBA members.

E. Public Service's Exceptions

38. Public Service bases its exceptions solely on the issue of standing. Generally, its argument centers on the express language of § 40-6-119(1), C.R.S., requires that reparations, when due, must be paid directly to the customers that did in fact pay excessive or discriminatory rates. Since HBA itself never paid any charges to Public Service, under the terms of § 40-6-119(1), C.R.S., the Commission may not award reparations to HBA. Therefore, the issue that

remains, according to Public Service, is whether HBA may bring a complaint for reparations under the statute on behalf of those parties that did pay Public Service for gas extensions. According to Public Service, by virtue of the language of § 40-6-119(1), C.R.S., HBA may not bring such an action on behalf of Public Service customers.

39. Public Service argues that when interpreting a statute, it must be presumed "… that the legislature inserted every part of a statute for a purpose and intended every part to be given effect." *Citing*, Justice Bender's dissent in *State v. Swain*, 959 P.2d 426, 432 (Colo. 1998). Therefore, according to Public Service, the express terms of § 40-6-119(1), C.R.S., cannot be read to permit HBA to pursue a complaint to obtain payment of reparations to third parties.

40. The specific language of § 40-6-119(1), C.R.S., Public Service refers to is: "… the commission may order that the public utility make due reparation to the complainant therefore." *Id*. According to Public Service, the legislative intent is to require identity between the person that paid excessive or discriminatory charges, the person that prosecutes the complaint for reparations, and the person that is to be paid reparations.

41. Public Service takes issue with the ALJ's citation of § 40-6-108, C.R.S., and § 40-3-102, C.R.S., in conjunction with § 40-6-119(1), C.R.S., to find that HBA does have standing here. According to Public Service, the phrase *to the complainant therefore*, nullifies the language of the other statutes regarding the scope of authority of the Commission here. Section 40-3-102, C.R.S., which provides that the Commission may do all things "necessary and convenient" to ensure compliance with Public Utilities Law, does not trump the express language of § 40-6-119, C.R.S., according to Public Service. Rather, Public Service interprets § 40-3-102, C.R.S., to grant to the Commission to do all things "in addition thereto" that are necessary and convenient

to the exercise of the Commission's power. Public Service concludes that § 40-3-102, C.R.S., thus merely augments § 40-6-119(1), C.R.S., and as such, must be exercised consistent with that statute.

42. Public Service also finds error with the ALJ's finding that HBA may have associational standing to bring this complaint. According to Public Service, the Colorado Supreme Court has held that only a statute may confer standing before the Commission. *Citing, Peoples Natural Gas, supra*. Public Service argues that the ALJ's reference to this case is misguided. It points out that in *Peoples Natural Gas*, the Commission had brought the matter itself pursuant to a show cause, rather than an individual party as here. *Peoples Natural Gas* did not involve a proceeding initiated by a complainant pursuant to § 40-6-108, C.R.S., seeking an award of reparations pursuant to § 40-6-119(1), C.R.S., as here. Further, the fact that the Commission may have the power on its own motion to grant ratepayer reparations under § 40-3-102, C.R.S., does not confer standing on HBA pursuant to § 40-6-119(1), C.R.S. Therefore, Public Service concludes that the language of § 40-6-119(1), C.R.S., defeats any claim to representational standing since that statute requires the participation of the actual customers claiming to be overcharged.

43. In its response to Public Service's exceptions, HBA argues that there is abundant authority to support the Commission's broad exercise of authority to award reparations in this matter. HBA asserts that Public Service's reading of § 40-6-119(1), C.R.S., is too narrow. HBA cites *Mountain States Telephone & Telegraph Co. v. Public Utilities Comm'n*, 763 P.2d 1020, 1030 (Colo. 1988) where the court held that the Commission could, pursuant to § 40-3-102, C.R.S., provide a remedy to correct a violation of § 40-5-105, C.R.S. The court also stated that it gave great deference to the Commission in its selection of an appropriate remedy. HBA cites

Peoples Natural Gas, *supra* and reiterates the ALJ's finding that the HBA had standing to bring this action pursuant to § 40-6-119(1), C.R.S.

44. HBA finds that Public Service's statutory construction would lead to absurd results. According to HBA, there is nothing in § 40-6-119(1), C.R.S. to suggest that the statute limits the types of persons or entities who can seek reparations. HBA argues that the identity of proper complainants is broad and established by § 40-6-108(1)(a), C.R.S. HBA further contends that Public Service's argument, carried to its logical conclusion will always mean that any violation by a utility affecting a large group of utility customers can never be wholly remedied unless each affected customer files a complaint. In order to provide a complete remedy, the Commission would have to initiate its own show cause. HBA asserts that this argument is inconsistent with the provisions of § 40-6-108(1)(d), C.R.S., which states that the Commission "is not required to dismiss any complaint because of the absence of direct damage to the complainant." HBA thus urges the Commission to reject this argument.

45. In its response to HBA's exceptions, Public Service argues that the Recommended Decision properly held that HBA had failed to sustain its burden of proof to show that the CA was excessive or discriminatory. Public Service further argues that HBA's claims in its exceptions that the Commission has decided the speculation issue in HBA's favor is wrong.

46. Public Service also takes issue with HBA's exceptions and argues that HBA mischaracterizes Public Service's tariff as mandating an annual update to the CA. According to Public Service, the tariff does not require it to update the CA and does not vest new applicants for gas extensions with a substantive entitlement to a CA that automatically tracks annual changes in the plant investment on Public Service's books.

47. Public Service supports the ALJ's findings that HBA's claim that a new CA based on gross embedded investment would have become effective within 30 days after the decision in Docket No. 99S-609G was speculative.

48. Public Service also argues that HBA's suggestions that the Commission should award reparations to punish Public Service and to ensure that Public Service does not enjoy a windfall for tariff violations are misplaced. According to Public Service, to award reparations would only result in punishment insofar as it would force Public Service to make an unplanned investment in natural gas mains and laterals installed during the applicable reparations period.

49. Public Service supports the ALJ's rejection of HBA's claim that the statute of limitations should be equitably tolled as it is supported by precedent and the record. Finally, Public Service also supports affirming the ALJ's finding that no attorney's fees should be awarded to HBA.

II. ANALYSIS

A. Threshold Issues

50. In order to address the merits of this complaint case, we must address two threshold legal issues. First, whether HBA has standing to bring this complaint action against Public Service and seek reparations for its members. Second, whether a two-year statute of limitations on such actions should be equitably tolled to allow reparations from October 1, 1996.

III. STANDING ISSUE

51. In his Recommended Decision, the ALJ considered three statutes, §§ 40-6-108(1)(a)(d), 40-6-119, and 40-3-102, C.R.S., to determine that HBA had standing to seek

reparations for Public Service's tariff violations. In relevant part, § 40-6-108(1)(a), C.R.S., states:

> Complaint may be made … by any … person … or by any commercial, mercantile … association … by petition or complaint in writing, setting forth any act or thing … omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, or any provision of law or of any order or rule of the commission.

"Person" includes "any individual, firm, partnership, corporation, company, association, joint stock association, and other legal entity. § 40-1-102(5), C.R.S. Additionally, § 40-6-119(1), C.R.S., provides:

> When complaint has been made to the commission concerning any … charge for any … service performed by any public utility and the commission has found, after investigation, that the public utility has charged an excessive … amount for such … service, the commission may order that the public utility make due reparations to the complainant therefore, with interest from the date of collection, provided no discrimination will result from such reparation.

Section 40-3-102, C.R.S., gives the Commission "the authority … to correct abuses … and to do all things whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power …" Based on those statutes, the ALJ found that HBA had standing to bring this complaint action.

52. Public Service argues that the phrase "…to the complainant therefor…" in § 40-6-119(1), C.R.S., is an express limitation on the ability of the Commission to award reparations. As such, only persons that actually paid excessive or discriminatory rates are entitled to pursue a complaint for reparations under that statute, which therefore would preclude HBA from bringing this complaint action. Public Service also relies on the argument of statutory interpretation, asserting that the Commission should adopt an interpretation of that phrase that gives consistent, harmonious, and sensible effect to all of the statute's provisions.

53. We find that Public Service's interpretation of § 40-6-119(1), C.R.S., is too narrow and fails to consider the entire language of the complaint statute and those other statutes that provide the Commission authority to hear such a complaint action. We agree with HBA that § 40-6-108(1)(d), C.R.S., helps clarify the language of § 40-6-119(1), C.R.S., by providing that "the commission is not required to dismiss any complaint because of the absence of direct damage to the complainant." Furthermore, § 40-3-102, C.R.S., gives the Commission "the authority … to correct abuses … and to do all things whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power …" Therefore, we find that these three statutes must be read together to give meaning to their substance. A reading of the plain meaning of those statutes provides that HBA has statutory standing to bring this action.

54. Relevant case authority also suggests that HBA has associational standing. The U.S. Supreme Court, in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 342 (1977) devised a three-prong test addressing associational standing. Under this test, where an organization may sue to redress its members' injuries, without a showing of injury to the organization itself, the organization generally has standing to bring a claim on behalf of its members where: 1.) its members would otherwise have standing to sue in their own right; 2.) the interests the organization seeks to protect are germane to the organization's purpose; and 3.) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id*.

55. The issue of association standing was again analyzed by the U.S. Supreme Court in *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544 (1996). There, Petitioner union filed a suit alleging that respondent company began to lay off

workers in connection with the closing of one of its plants before giving the union proper closing notices required by the Worker Adjustment and Retraining Notification Act. Petitioner union also sought back pay for each of its affected members. The Court found that the union satisfied the three-prong *Hunt* test for association standing. According to the Court, the union members would have standing on their own and the interests the union sought to protect were germane to its own interests. However, the Court found the third prong of the test (that the claim asserted or the relief requested did not require the participation of individual members in the suit) of little importance. Rather, the Court found the third prong of the *Hunt* test an "impediment that Congress may abrogate" because it focused mostly on "matters of administrative convenience and efficiency, not on elements of a case or controversy." *Id*. at 544. The Court held that once an association has satisfied the first two prongs, there is very little constitutional necessity for anything more. *Id*.

56. The notion that an organization may have standing to assert its members' damages was also explored in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). The Court found there that the NAACP and its members were in every sense identical. As such, the Court allowed the NAACP to bring a claim on behalf of its members to bar the State of Alabama from compelling disclosure of the association's membership lists. *Id*. at 459. In *Automobile Workers v. Brock*, 477 U.S. 274 (1986) the Court held that a union had standing to challenge an agency's construction of a statute providing benefits to workers who lost their jobs because of competition from imports. Standing was permitted even though the union did not allege any injury to itself or that the members' associational rights were affected. *Id*.

57. The Tenth Circuit Court of Appeals closely follows the U.S. Supreme Court directive to apply the *Hunt* test in determining associational standing to redress member injuries.

See Utahns for Better Transp. v. United States DOT, 295 F.3d 1111, 1115 (10thCir. 2002) (Circuit Court found that the association had standing to assert the rights of its members by satisfying the test outlined in *Hunt*); *John Roe #2 v. Ogden*, 253 P.3d 1225, 1230 (10thCir. 2001) (Circuit Court found that the Ralph Timothy Potter Chapter of the American Civil Liberties Union at the University of Denver College of Law had associational standing to bring a suit on behalf of its student members).

58. Clearly, associational standing is granted provided the *Hunt* test is satisfied. Based on this analysis we find that HBA has satisfied the elements of the *Hunt* test. It is evident the home contractors and developers that are members of HBA would have standing to bring this complaint action before the Commission on their own. The economic interests that HBA seeks to protect here, namely, that the CA was not a just, fair, or reasonable rate to its members are certainly germane to the HBA's purpose. Based on this precedent, although HBA does not allege any damage to itself, standing is nonetheless conferred. The weight of authority favors allowing HBA to bring this complaint action on behalf of its members over Public Service's narrow interpretation of a single phrase within one provision of a statute. Applying the *Hunt* test in conjunction with a consistent and sensible interpretation of the above cited statutes leads to the conclusion that HBA certainly has standing here.

59. However, we point out that our determination here is that HBA only has standing to bring this complaint on behalf of its members who were associational members during the relevant time period as discussed below. We find that HBA does not have standing to bring this action on behalf of all Colorado customers to whom Public Service may have applied the $360 CA during the relevant time period. Therefore, we limit the ALJ's finding that HBA has standing to its relevant members to whom Public Service applied the $360 residential CA only.

IV. STATUTE OF LIMITATIONS ISSUE

60. Section 40-6-119(2), C.R.S., provides in relevant part that "[a]ll complaints concerning excessive or discriminatory charges shall be filed with the commission within two years from the time the cause of action accrues …" HBA filed its complaint on February 23, 2001. According to HBA, its claims are not barred by the statute of limitations, but rather, the statute should be equitably tolled because Public Service failed to update its CA or ask for a waiver. HBA also argues that the tariff in question has the force and effect of a statute (*Citing Dyke Water Co. supra* holding that a tariff filed with a state utility commission that once published and filed, had the force and effect of a statute, and any deviations therefrom were unlawful unless authorized by the commission). Based on this case law, HBA contends that Public Service's failure to comply with a statutory duty to disclose information equitably tolls the statute of limitations, therefore allowing HBA to pursue reparations dating to October 1996.

61. Statutes of limitation are enacted to promote justice, discourage unnecessary delay, and forestall prosecution of stale claims. *Rosane v. Senger*, 149 P.2d 372, 375 (Colo. 1944). However, certain circumstances may justify tolling the statute of limitations. *Garrett supra* at 853. The doctrine of equitable tolling has been applied where the defendant's wrongful conduct prevented the plaintiff from bringing a claim within the statutory period. In *Garrett*, the court concluded that a plaintiff may not compel the equitable tolling doctrine by a simple showing that the defendant violated a legal obligation to disclose information. Rather, the plaintiff must show extraordinary circumstances justifying a tolling of the statute of limitations. The tolling was permitted in *Garrett* because the defendant employer failed to provide the plaintiff employee with a medical report required to file a petition for worker's compensation. Because the plaintiff lacked the means to obtain the information until the employer submitted the

medical report, the Court found that equity required removal of the bar of the statute of limitations.

62. The ALJ in his Recommended Decision cited *Dean Witter, supra* to hold that equitable tolling did not apply in this matter. In *Dean Witter*, the court determined that the equitable tolling doctrine was limited to "situations in which either the defendant has wrongfully impeded the plaintiff's ability to bring the claim, or truly extraordinary circumstances prevented the plaintiff from filing his or her claim despite diligent efforts." *Id*. We find that HBA has presented nothing on the record to indicate that such is the circumstance here. As the ALJ held:

> The evidence of record demonstrates that HBA is an organization that devotes considerable resources to tracking governmental and regulatory matters that affect its members. The record shows that HBA had a considerable interest in the construction allowance of Public Service. Members of HBA regularly met with Public Service to discuss matters of mutual concern. The construction allowance tariff was published and accessible to the public at the Commission. With reasonable diligence, HBA could have determined that Public Service had an obligation to review and recalculate its construction allowance and/or file for a waiver, and that the $360 allowance remained constant for a considerable period of time.

There is nothing on the record to indicate that Public Service purposefully refused to disclose information to prevent HBA from diligently filing a claim as required in *Garrett*. Further, as the ALJ stated, HBA and its members had the means to monitor Public Service's tariff compliance, and nothing in the record reveals any extraordinary circumstances that precluded HBA from inquiring into Public Service's tariff obligations. It would appear rather, that HBA could have determined Public Service's failure on its own but failed to do so through no fault of Public Service and as such, now lacks a good faith effort to bring its equitable tolling claim. *Dean Witter* at 1098.

63. Relevant case law has long applied the equitable tolling doctrine only when the defendant wrongly impeded the plaintiff's ability to bring the claim, or extraordinary circumstances prevented the plaintiff from filing his claim. *See, e.g., Hanger v. Abbott*, 73 U.S. (6 Wall) (1867), where the Court determined that the closure of courts in the South during the Civil War constituted extraordinary circumstances justifying the equitable tolling doctrine; *Seattle Audubon Society v. Robertson*, 931 F.2d 590 (9th Cir. 1991) where the Court applied equitable tolling where the district court's erroneous enforcement of an unconstitutional statute barred plaintiff from filing claims in a timely manner. These cases clearly delineate the requirements necessary to equitably toll the statute of limitations.

64. As the above analysis indicates, in order to equitably toll a statute of limitations, as HBA requests, something more than a mere fairness issue must be shown to justify a departure from a strict application of a statute of limitations. HBA has presented no evidence here to equitably toll the statute of limitations requirements found in § 40-6-119(2), C.R.S. Therefore, we agree with the ALJ that any reparations awarded should be limited to charges accrued after February 23, 1999.

V. REPARATIONS

A. Reparations Method Proposed by the Homebuilders Association of America[1]

65. As we pointed out *supra*, over the time period addressed in this complaint case, Public Service was obligated under its tariff either to file to amend its CA at least once a year, or to file for a waiver from doing so. In addition, it was required to make a similar filing within 30 days after completion of a rate case. Between 1995 and 2002 Public Service did none of the

[1] The language in this section generally parallels the description found on pages 13 through 16 in the ALJ's Decision No. R03-0519 issued in this Docket on May 15, 2003.

above. HBA filed this complaint case, alleging that Public Service was in violation of its tariff by offering a constant residential CA of $360 over that period of time. A similar statement can be made concerning the CA for small commercial and industrial customers although the CA consists of a fixed dollar amount for the service lateral portion and a dollar per Dekatherm (dth) amount for the distribution main portion. HBA argues that the constant value of $360 understates what the CA should have been between 1995 and 2002 and provides its own methodology for computing what it contends is a more reasonable series of CAs. HBA requests that the Commission find that Public Service should pay reparations in an amount which reflects the differences between the CAs Public Service actually provided between 1995 and 2002, and the amounts Public Service, according to HBA, should have provided.

66. To develop the methodology for computing what it argues are reasonable CAs, HBA uses, as its point of departure, the $360 CA, which is based upon the results of the Phase II rate case, Docket No. 95I-394G. Most specifically, HBA bases its proposed CAs on the cost allocation study from this Phase II rate case. The test year used in this case was the 12 months ending September 30, 1992. HBA proposes that the $360 CA be applied to the period October 1, 1995, through September 30, 1996. Consequently, it is requesting no reparations during that period.

67. Beginning October 1, 1996, however, HBA believes that the CA should no longer remain at $360. Since Public Service was obligated either to file annually for amending its CA or to ask for a waiver from doing so, HBA argues that Public Service should have initiated this process no later than October 1, 1996. HBA calculates that the new CA should be $370 and

should be in effect from October 1, 1996 through September 30, 1997. To arrive at this number, HBA employs the following methodology:

1) Since HBA is attempting to develop a CA to be applied to the time period October 1, 1996, through September 30, 1997, rather than the previous 12 months during which the $360 CA was in effect, and since the $360 CA was based upon a test year ending September 30, 1992, HBA also moves the test year forward 12 months so that it ends on September 30, 1993.

2) It applies the same allocators as were determined in Docket No. 95I-394G Phase II rate case because no new cost allocation study exists.

3) It uses end-of-test-year plant accounts and customer counts. For each customer class, it adds all relevant plant accounts (see Item No. 4 below) to arrive at gross embedded investment and then divides by the customer count to arrive at the CA for that class. For the residential class, this calculation provides a straightforward estimate of the CA. For the small commercial and industrial class, on the other hand, this calculation simply results in an estimate of the average CA since different customers in this class would receive different CAs depending upon their usage.

4) It includes 100 percent of the relevant main and service lateral plant accounts but only 71.56 percent of the regulator stations plant account and 81.33 percent of the land and rights and structures and improvements plant accounts to take into consideration the fact that some percentage of these latter accounts are allocated to transportation customers. In this docket HBA only provides CAs for the residential and the small commercial and industrial distribution customers, though it recommends that Public Service provide refunds to all customers based on its proposed method of calculating CAs.

68. HBA relies upon the same methodology to generate the next three values for the CA, moving the test year forward 12 months every time it moves forward to calculate the CA for

the next 12-month period. The results for the entire period from October 1, 1995 through August 20, 2000,[2] appear in the table below:

Applicable Period	Test Year (12 months ending)	Residential CA ($)	Small Commercial and Industrial CA ($)[3]
10/1/95-9/30/96	9/30/92	360	1631
10/1/96-9/30/97	9/30/93	370	1695
10/1/97-9/30/98	9/30/94	381	1767
10/1/98-9/30/99	9/30/95	394	1838
10/1/99-8/20/00	9/30/96	397	1849

69. In 1999, Public Service filed a Phase II rate case, Docket No. 99S-609G, in which it used a test year ending June 30, 1998. As a result of this rate case, the Commission adopted a new cost allocation methodology and set new rates. HBA applies the new cost allocation methodology to its computation of the remaining CA numbers to get the following:

Applicable Period	Test Year (12 months ending)	Residential CA($)	Small Commercial and Industrial CA($)[4]
8/21/00-8/20/01	6/30/98	467	1740
8/21/01-5/31/02[5]	6/30/99	485	1789

70. As indicated in the above table, HBA continues its approach of moving the test period forward 12 months when the applicable period in question is advanced by a similar amount. The change in cost allocation methodology results in a shift in cost assignment from the small commercial and industrial to the residential class, thereby causing HBA's proposed residential CA to increase substantially from $397 to $467 at the conclusion of the rate case,

[2] The last applicable period is shortened to October 1, 1999, through August 20, 2000, because, as a result of a second Phase II rate case, Docket No. 99S-609G, HBA adjusts its CA methodology as described below, and implements the results beginning August 21, 2000.

[3] As noted above, these dollar amounts represent average CAs.

[4] These numbers again simply reflect average CAs.

[5] This applicable period ends prematurely on May 31, 2002, because, on June 1, 2002, new CAs were implemented by Public Service as a result of Decision No. C02-417 in Docket Nos. 01S-365G and 01S-404G. From that point forward, Public Service was again granting CAs specifically endorsed by the Commission.

while its small commercial and industrial average CA declines from $1,849 to $1,740 at the same time.

71. Given these series of CA computations, HBA recommends that Public Service be required, for each customer class, to use both the differences between HBA's series of CAs and the constant CA value used by Public Service from October 1, 1995 through May 31, 2002 and the actual number of customers to whom CAs were applied in each time period since October 1, 1995 to determine reparations.[6] Further, HBA argues that Public Service should pay interest as a part of the reparations. These interest payments should be based upon Public Service's customer deposit interest rate in effect at the time the CA was applied, as shown on the Customer Request for Electric or Gas Service Forms and should be applied as specified in 4 *Code of Colorado Regulations* 723-1-58(c)(3).

B. Various Approaches to Reparations

72. We find there are four possible approaches to the question of reparations payments, and we will analyze each in turn.

C. Adopt HBA's Recommendations for Annual Adjustments.

73. We agree with HBA to the extent that, had Public Service's tariff required it to change the CA annually, HBA's methodology for doing so would be a reasonable approach. HBA's approach probably generates, if anything, somewhat conservative estimates because: (1) it initially employs a test year which lags a full three years behind the beginning of the applicable period for a given CA and, after August 20, 2000, a test year over two years behind;

[6] HBA argues that only Public Service is in the position of having accurate records concerning exactly how many customers in a given class a CA was applied to within a given time period. Consequently, the actual implementation of the HBA methodology must be conducted by Public Service.

and (2) it assumes that Public Service does not change the CA until an entire year after the previous change. Moreover, the HBA approach, in general, represents a straightforward application of the gross embedded investment per customer methodology.

74. Regarding annual adjustments, Public Service's Tariff Sheet No. 34 that was in effect during the period at issue states that "a review and recalculation of Construction Allowances will be made at least once a year, unless the Company receives authorization for a waiver of recalculation." Public Service argues that this language did not obligate it to make annual filings. In the September 21, 2001 transcript, pages 94 and 95 Witness Niemi states:

> …I think the language requires the company to review and recalculate. I don't think it requires the company to make a filing. I think it requires the company to review and consider a filing.

And on pages 130 and 131, witness Niemi states:

> A review and recalculation is a review of orders by the commission, or any changes thereof, that would result in any necessary recalculations of construction allowances.

75. We disagree with this interpretation of the tariff language. We find that the plain language of the tariff required Public Service to either file a revised CA rate with the Commission, or request a waiver.

76. We do not, however, agree with HBA that Public Service was obligated to adjust its CA on an annual basis. Public Service could have fully satisfied its tariff requirement by simply filing each year for a waiver from any recalculation. While Public Service did not do so during the time period in question, based on a historical review of our past Decisions regarding the tariff at issue, it is likely the Commission would have granted waivers for most of the years at issue, had Public Service requested them. The language of our previous Decisions indicates that

waivers would likely have been granted, unless unusual circumstances warranted otherwise. We base this belief on the historical fact that, when Public Service did apply for waivers annually during the period 1988 to 1995, they were routinely granted by the Commission. We find nothing on the record to indicate Public Service was required to adjust its CA annually.

77. Public Service argues that the CA should only change as the result of a rate case. The Commission orders granting Public Service waivers generally stated that annual review and recalculation is not necessary outside of the context of a rate case. Decision No. C88-535, dated May 4, 1988, which appears as part of both Exhibits 17 and 58 in this docket and which grants one of Public Service's previous waivers from annual review and recalculation, states in paragraph 6:

> The primary purpose of reviewing and recalculating the construction allowances is to track changes that occur as a result of general rate proceedings and the associated changes arising from the cost allocation studies used in said rate proceeding…

78. We agree with Public Service that the CA and rates should correspond over time, so, when rates change, as they do at the end of a rate case, the CA should be revised as well. For the same reason, we reject annual recalculation of the CA, absent a rate case. We agree with HBA that variables may change which could impact the CA (and rates), however, when rates remain fixed, the CA should also remain fixed. Since we reject the idea of requiring Public Service to make annual adjustments to its CA except under certain circumstances, we decline to accept the HBA reparations method for annual adjustments in its entirety.

D. Adopt a Single Adjustment After Docket No. 99S-609G

79. While we reject the annual adjustment portion of the HBA reparations method, we are still left with the possibility of adopting the remaining portion of HBA's method, namely, a

CA adjustment following the completion of the Public Service Phase II rate case, Docket No. 99S-609G. The CAs proposed by HBA which were established immediately following a rate case are consistent with the principal that CA changes should correspond with rate changes.

80. In this docket only two rate cases were discussed by HBA, namely, Docket Nos. 95I-394G and 99S-609G. Subsequent to the first of these rate cases, the residential CA was set at $360. After Docket No. 99S-609G, HBA estimates that the same CA, applying the new Commission-approved cost allocation methodology, would have been $467. Consequently, if this method were adopted, the residential CA would be $360 for the period October 1, 1995, through August 20, 2000, and $467 thereafter.

81. In its exceptions to Decision No. R03-0519, HBA proposes this very possibility. Although not its preferred position, HBA argues that a CA adjustment 30 days after the completion of Docket No. 99S-609G was never disputed and so should be implemented even if the Commission chooses not to award reparations based upon Public Service's failure to either annually update the CA or obtain a waiver from doing so. Despite HBA's contention to the contrary, however, Public Service does later dispute this adjustment in its response to HBA's exceptions. Public Service argues that, four days prior to the issuance of the final decision in Docket No. 99S-609G, it filed Advice Letter No. 566-Gas, initiating a gas rate case in which it proposed to revise both the level of the CA and the underlying methodology for calculating it, based upon the new rates that were about to go into effect. While Public Service acknowledges that this filing did not embrace the gross embedded investment approach to the calculation of the CA, it believes that the filing does satisfy its tariff obligations and that, consequently, HBA's request for reparations based on a CA adjustment after the conclusion of Docket No. 99S-609G should be rejected.

82. We agree with Public Service. This advice letter filing was done in a timely fashion and met Public Service's tariff obligations. It was the first of three separate filings to revise the CA, all of which were suspended and set for hearing. This extended process recently resulted in the issuance of an initial Commission decision in Docket No. 02S-574G, revising the CA methodology and setting new CA levels, based upon the results of the most recent Phase I rate case, Docket No. 02S-315EG. Therefore, because of Public Service's relevant and timely filing of Advice Letter No. 566-Gas, we believe that it would be inappropriate now to find that Public Service did not follow tariff requirements and apply the gross embedded investment methodology to the results of Docket No. 99S-609G as a basis for calculating CAs and resulting reparations.

83. For this reason, we reject HBA's proposal to base reparations upon an adjustment of the CA following the conclusion of Docket No. 99S-609G.

E. Adopt the ALJ's Recommended Decision.

84. The ALJ recommended that no reparations be granted, based upon the argument that to do so would require the Commission to rely upon speculation. In particular, in paragraph 45 of Decision No. R03-0519, the ALJ states the following:

> It cannot be known with reasonable certainty that the construction allowance calculations of Mr. Binz would have been the proper construction allowance for the years 1996 to 2002. The method used by HBA to calculate construction allowances and reparations was unconvincing after the original hearing on the merits and remains unconvincing after the remand hearing. Nothing new was added that would compel a different result from the original recommended decision rejecting reparations. The method rests on the assumption that the Commission would have approved a Public Service filing to change the construction allowance. Reparations should not be based upon speculation. Rather it should be based on concrete dollar amounts that can be ascertained with a reasonable degree of certainty. HBA failed to meet its burden of proof pursuant to § 40-6-119(1), C.R.S., that Public Service charged an excessive or discriminatory amount.

85. We do not find the speculation argument to be a strong basis upon which to reject all reparations. The weakness of this argument is that any award of reparations must, by definition, be speculative because any CAs upon which reparations would be based would, in fact, not actually have been in effect. In other words, we cannot avoid speculation if we choose to grant reparations, no matter what methodology is used and what dollar amounts are derived from it, so relying upon the speculation argument would imply that reparations could never be granted.[7]

86. Even if we reject the ALJ's speculation argument, we must still determine whether we wish to adopt the ALJ's conclusion, namely, that no reparations should be granted, albeit for some other reason. To make this determination, we believe that we should consider each year in the 1996 through 2002 time period separately and, in each case, ask whether there is any compelling reason for granting reparations and, if so, what the dollar amounts should be. This determination is discussed in detail in the next section.

F. Additional Factual Considerations

87. In reviewing the facts and circumstances associated with each year of the period addressed by HBA, we have identified an area where the record in this docket does not fully represent facts that are relevant to the CA in the period at issue. As we have discussed *supra*, HBA challenged Public Service's actions in two categories: 1) HBA argues that Public Service's actions after the 1999 Phase II rate case did not meet tariff requirements. 2) HBA claims that Public Service should have filed for an annual adjustment in all other years. HBA, Public

[7] Moreover, accepting Public Service's position that no reparations should be ordered relies upon speculation as well, namely, the speculation that the residential CA of $360 would not have been raised during the period 1996 through 2002 even if Public Service had faithfully abided by its CA tariff.

Service, and the ALJ addressed the 1999 Phase II rate case under the tariff requiring it to review and appropriately revise CA rates within 30 days of a rate case. They also address all other years in the context of annual review and recalculation without considering any impacts of other rate cases in this period.

88. Public Service filed for, and the Commission adopted, a general rate increase in 1996 through 1997, within the time period that HBA advocates an annual review and recalculation. This was a Phase I rate case, Docket No. 96S-290G, with a final order C97-478 effective May 9, 1997.[8] In that case the Commission initially ordered Public Service to file a Phase II rate case. In its application for RRR Public Service argued that Gas Load Research and Service Lateral studies[9] were in progress and would not be completed in time to be incorporated into a Phase II case. Since the previous Phase II rate case in 1994 had recently been completed, and a subsequent Phase II case without the updated study information would not likely result in changes that would warrant the expense of another Phase II case, the Commission granted Public Service's request to base the rates on the 1994 Phase II allocations, with Public Service's commitment to file a complete Phase I and II rate case after the studies were complete.[10] The Commission rescinded its earlier requirement to file a Phase II after the 96S-290G Phase I rate case.

89. As previously discussed, we agree with Public Service that increases in the CA should not be made without a corresponding increase in rates. Based on this same principle, the CA amount should be addressed when the underlying rates change in a general rate case. In this

[8] Though not mentioned in the docket record for the case at hand, we take administrative notice of this order in Docket No. 96S-290G which implemented a general rate increase.

[9] These studies were required by the Commission as a part of a previous rate case order.

[10] Public Service later filed Docket Nos. 98S-518G and 99S-609G to meet these requirements.

matter, the 1997 rate case increased rates without a corresponding recalculation of the CA. Public Service's practice was to wait until after the completion of a Phase II case before implementing a change in the CA.[11] Since the Phase I rates were implemented based on the 1994 Phase II allocations without a requirement for a subsequent Phase II, the 96S-290G Phase I rate case was a "complete" rate case (*i.e.,* Docket No. 96S-290G implemented final rates without an expectation for further Phase II cost allocations of the rate increase between customer classes). Therefore, the year 1997 contained a significant departure from the normal year-to-year considerations of the annual review and recalculation discussed above, which triggers the requirement for a re-calculation of the CA. Though Public Service appeared to follow its practice of recalculating the CA only after a Phase II rate case, the issue should have been considered in the annual review and recalculation. We find that the case presented a divergence from the normal annual review considerations and should have resulted in a change to the CA in 1997.[12]

90. HBA did not specifically address the 96S-290G rate case, and did not propose a CA amount for 1997 that was based on the test year plant that was used in the 96S-290G rate case. HBA's recommended CA, which would apply to the 12-month period beginning October 1, 1997, uses test year data ending September 30, 1994, which is 15 months before the test year ending December 31, 1995 used in the 96S-290G rate case.

91. Because plant increased every year in the period at issue, HBA's recommended CA appears to be a conservative representation of the 96S-290G rate case application of the

[11] We note that Public Service's tariff required it to update the CA within 30 days after a rate case, but did not specify whether the CA should be updated after the Phase I portion of a rate case.

[12] Alternately, the Commission could consider the 1996 through 1997 rate case as applicable under the tariff provision requiring Public Service to revise its CA within 30 days after a rate case.

gross embedded plant CA method specified in Public Service's tariffs. HBA states that it did not advocate the maximum CA amount for each year, but instead acknowledges that its method of advancing the test period one year from the 1994 Phase II case for each year in consideration results in a conservative CA increase. We therefore find that HBA's proposed residential CA of $381 for the 12-month period beginning October 1, 1997 to be a just and reasonable representation of the CA that would result from the proper application of the tariff requirements.

92. As we stated earlier, a historical review of past Commission Decisions indicates that we do not find annual adjustments to be proper unless warranted by specific circumstances. The 96S-290G rate case represents such a circumstance, and an annual adjustment of the residential CA is justified for 1997 to $381. However, for all other annual adjustments proposed by HBA we find no significant departure from the normal year-to-year considerations discussed above, and we deny any further reparations.

93. Therefore, this residential CA rate of $381 would remain in place until updated to the $415 amount that was implemented in June 1, 2002. The two-year statute of limitations then applies, limiting reparations to the period of February 24, 1999 through May 31, 2002.

G. Recommended Treatment of Reparations

94. In order to properly asses reparations to the correct parties, we direct HBA to provide Public Service a list of its members, along with a description of applicable service extension locations for each member, for the period for which reparations are granted. We then require Public Service to file a refund plan which shows how it will: 1) Use the residential CA amount proposed by HBA for the period beginning October 1, 1997, and treat it as if it was in effect through May 31, 2002; 2) limit refunds to the period beginning February 24, 1999 due to the statute of limitations; and 3) calculate refunds individually for each HBA member.

95. Further, we direct Public Service to calculate the total amount of reparations that it will pay to HBA members. Because Public Service represents that the refund calculations will require a large amount of work, we also direct Public Service to include in its plan any options that it could implement to reduce its burden without substantially compromising the amount of refunds that would be made to individual customers or developers. For example, the work required in determining whether each connection would have received the full $381 extension amount may result in higher overall costs than would result if Public Service simply refunded the full $21 amount to all applicable connections.

H. Future Recovery of Refund Amounts

96. Public Service asserted that it is neutral to CA amounts, as it would recover any difference in CA levels from customers through rates. Though this would have been the case if Public Service had properly followed its tariffs, we disagree that the reparations ordered in this Docket should be subject to future recovery. Since Public Service's last rate case resulted in a net reduction in rates, we find that the Company was over-earning in the period during which the CA rates should have been higher. Any future recovery of reparations that are ordered in this Docket would then amount to double-recovery of these costs. Therefore, we order that Public Service shall not obtain recovery of the amounts it is to pay in reparations from its rate payers.

I. Interest

97. We require Public Service to include interest for each year at the Commission's customer deposit rate, as specified in Hearing Exhibit 67 of January 10, 2001.

J. Attorney Fees

98. We agree with the ALJ that HBA's representation here does not warrant an award of attorney's fees and costs. Under Article XXV of the Colorado Constitution, we possess the

power to award attorney's fees. However, the Colorado Supreme Court in *Mountain States Telephone and Telegraph Company v. Public Utilities Commission*, 576 P.2d 544 (Colo. 1978) determined that the criteria developed by the Commission was required before we could award fees. The criteria includes the following:

> 1.) The representation of the [requesting party] and the expenses incurred relate to general consumer interests and not to a specific rate or preferential treatment of a particular class of ratepayer.
>
> 2.) The testimony, evidence, and exhibits introduced in this proceeding by the [requesting party] have or will materially assist the Commission in fulfilling its statutory duty to determine just and reasonable rates …
>
> 3.) The fees and costs incurred … for which reimbursement is sought are reasonable charges for the services rendered on behalf of general consumer interests.

Id. at 548.

99. We agree with the ALJ that HBA's request for attorney's fees fails under the first standard cited above. HBA's representation and expenses do not relate to the general consumer's interest, but rather to a specific rate and class of customers, the gas extension customers that consist of HBA's member home builders. Further, given our holding above that HBA has standing only to bring this action on behalf of its member home builders, we are further persuaded that it fails to meet our guidelines to award attorney's fees and costs. Therefore, HBA shall not be awarded attorney's fees and costs in this matter.

VI. ORDER

A. The Commission Orders That:

1. The exceptions of Home Builders Association of Metropolitan Denver are granted in part consistent with the discussion above.

2. The exceptions of Public Service Company of Colorado are denied consistent with the discussion above.

3. Home Builders Association of Metropolitan Denver has standing pursuant to § 40-6-119(1), C.R.S., to bring this complaint action.

4. The two-year statute of limitations provided in § 40-6-119(2), C.R.S., is applicable to this matter. Therefore, reparations awarded will be limited to charges accrued from February 24, 1999 through May 31, 2002.

5. Public Service Company of Colorado shall pay reparations to the members of Home Builders Association of Metropolitan Denver who were affected pursuant to the complaint, and who were members during the period from February 24, 1999 through May 31, 2002.

6. Home Builders Association of Metropolitan Denver shall provide this Commission and Public Service Company of Colorado with an affidavit attesting to its list of affected members as described in Ordering Paragraph No. 5 along with a description of applicable service extension locations for each member for the period in which reparations were granted within 30 days of the effective date of this Order.

7. Public Service Company of Colorado shall file with the Commission, its plan for providing reparations to the affected members, which shall include any options to reduce the burden of calculating such reparations, without unduly compromising the amount of refunds that would be made to individual customers or developers. Public Service Company of Colorado shall file for Commission approval of this plan within 30 days of receipt of the list of affected

members from Home Builders Association of Metropolitan Denver as described in Ordering Paragraph No. 6.

8. We direct Public Service Company of Colorado to estimate the total amount of reparations that it will be required to pay to the affected members of Home Builders Association of Metropolitan Denver and provide that information to the Commission as a part of its reparations plan as described in Ordering Paragraph No. 7.

9. We direct Public Service Company of Colorado to include interest for each year of reparations at the Commission's customer deposit interest rate for gas utility customers as specified in Hearing Exhibit No. 67.

10. We order that Public Service Company of Colorado shall not obtain recovery of the reparations ordered here, including interest from its rate payers through rates.

11. We order that Home Builders Association of Metropolitan Denver shall not be awarded attorney's fees or costs in this matter.

12. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Mailed Date of this Commission Order.

13. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 24, 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.

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