

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-276E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF
COLORADO FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY
FOR THE MIDWAY-DANIELS PARK TRANSMISSION REBUILD PROJECT.

DECISION PARTIALLY GRANTING EXCEPTIONS

Mailed Date: January 14, 2004

Adopted Date: January 7, 2004

I. BY THE COMMISSION

A. Statements

1. This matter comes before the Commission for ruling on exceptions filed to Recommended Decision No. R03-1308. In that Recommended Decision, the Administrative Law Judge (ALJ) granted, in part, the application of Public Service Company of Colorado (Public Service or Company) for a certificate of public convenience and necessity (CPCN) authorizing the construction of the Midway-Daniels Park Transmission Rebuild Project (Project). (The Project involves replacing one of two 230 kV single circuit lines with a double circuit line capable of operating at 345 kV, but that will be operated at 230 kV until a need is demonstrated to operate at 345 kV.) When that need can be demonstrated, Public Service will seek a CPCN to operate at the higher voltage. As a result of development, the utility right of way now runs through a housing development known as Castle Pines North.

2. In the CPCN application Public Service also requests that the Commission find that the electromagnetic fields (EMFs) and noise emitted by the Project would be reasonable, regardless of their levels, as long as Public Service employs certain mitigation techniques and

technologies. Specifically, Public Service's models show that EMFs are expected to be as set forth in Attachment AS-2 of Exhibit 7 and the noise levels are expected to be as set forth in Attachment AS-3 (within a range of error of plus or minus 15 percent) of Exhibit 7 (attached to this order). The ALJ granted the reasonableness requests relating to modeled and actual operational EMF levels, but did not grant the requests relating to reasonableness of modeled and actual operational noise levels.

3. The ALJ also did not grant the requests of intervenors Thomas Kellogg and Carol Padilla, Harris Adams, Kurt and Kimberly Steenhoek, and Castle Pines North Master Association, Inc. (CPN), that Public Service be required to bury the approximate two-mile portion of the transmission line adjacent to the Castle Pines North subdivision.

4. On December 11, 2003, CPN and Mr. Adams (CPN) and Public Service filed exceptions to the Recommended Decision. On December 18, 2003, CPN filed an unopposed motion for extension of time, until December 31, 2003, and request for waiver of response time to file responses to exceptions for all parties. By Decision No. C03-1444, the Commission granted the motion.

5. On December 31, 2003, CPN, Public Service, the Steenhoeks, and Staff of the Colorado Public Utilities Commission (Staff) filed responses to the exceptions.

II. DISCUSSION

A. Public Service's Exceptions

6. In its exceptions Public Service seeks to overturn two aspects of the ALJ's Recommended Decision. First, it asks the Commission to remove footnote 14 and, second, it

asks the Commission to make a reasonableness finding with respect to noise where the ALJ declined to do so. Footnote 14 of the Recommended Decision provides:

Some of the Intervenor are concerned that PSCo may be allowed to recover this incremental cost from ratepayers even if it never obtains a CPCN to operate the Project at the 345kV voltage level. However, the cost of the Project should not be included in PSCo's rate base unless it establishes in an appropriate rate case that the Project is "used and useful." This concept should limit PSCo's ability to recover the approximate \$10 million incremental cost incurred in constructing the Project for 345kV operation if, in fact, the Project cannot legally be operated at that level.

7. Public Service argues that footnote 14 does not comply with standard regulatory principles and should be deleted. The Company notes that the ALJ stated in his decision: (1) that prudent transmission planning dictates that Public Service anticipate future growth when it constructs new facilities; (2) that it is cost-effective to spend the incremental \$10 million now to save \$44 million to \$80 million in the future; (3) that conversion, if needed, could be done "quickly, inexpensively, and with minimal risk to [Front Range Path] reliability;" and (4) that the Company was following Commission policy by planning to deploy higher voltage capability in the Front Range area. The Company suggests that the ALJ has confused the concept of "used and useful" and "prudent utility investment." According to the Company's explanation, the used and useful concept speaks to when a prudent utility investment can be incorporated into rates, while the prudent investment concept speaks to whether a utility investment can be incorporated into rates.

8. Staff concurs that footnote 14 should be deleted. It states that as a matter of policy, a utility should be permitted to recover, through rates, its investment in regulated transmission facilities when such investment is required to serve load growth and the prudence of the investment has been satisfactorily demonstrated.

9. CPN believes that footnote 14 should be retained until the facility is actually operating at 345 kV and ratepayers are benefiting from that expenditure. CPN expresses doubt as to whether the facility will be permitted to operate at 345 kV because estimated noise levels could be deemed in violation of the Colorado Noise Abatement Statute (CNAS), §§ 25-12-101 *et seq.*, C.R.S. CPN argues that Public Service would be taking a certain degree of risk if it chose to expend the incremental amount, but that is just the sort of risk that businesses take everyday in the marketplace. It reemphasizes its position that burial of the line would remove the uncertainty of future operation at 345 kV because the noise issue would be moot.

10. The Steenhoeks question why it is prudent to incur the incremental 345 kV construction costs while at the same time it is not prudent to spend the money to bury the line. They contend that burial of the line would prevent future litigation over the line and ensure operation at 345 kV.

11. The Commission will grant the request to delete footnote 14. We agree with Public Service that the ALJ found many reasons to support the construction of the line to 345 kV standards and that the prudence of investment is properly determined at the time the decision is made. We acknowledge that our ruling could create a situation where ratepayers are paying for the incremental \$10 million of expenditures which may not be used to provide service to customers. However, the question with respect to the footnote is whether present construction of the line at 345 kV capacity is prudent. This Commission has encouraged the construction of more 345 kV lines, and we believe that the continued growth of the metro Denver area population will likely require increased transmission capacity in the future. Moreover, we agree with the arguments that the incremental expenditures are reasonable as compared to the much greater expenditures which could be required later if future circumstances dictated an upgrade of

the line to 345 kV, and that possibility was not considered in the Project. Because we agree with Public Service and the Recommended Decision that construction is prudent, the footnote will be struck.

12. Public Service's second exception relates to the ALJ's refusal to make a reasonableness finding relating to the modeled and actual operational noise levels of the line. The Company notes that the Commission recently granted a similar request in Docket No. 03A-329E, Decision No. C03-1055 for the Chambers 230/115 kV transmission line, and in Docket No. 03A-265E, Decision No. C03-0946 for the Denver Terminal-Dakota-Arapahoe 230 kV transmission line.

13. Public Service explains that it requests such a finding to help it avoid costly nuisance litigation. It states that it is not requesting that the Commission shield it from liability resulting from excessive noise. Rather it is only asking that the Commission find that the projected noise levels at 230 kV operation are reasonable. This statement cannot be reconciled with its desire for a Commission finding of reasonableness regardless of the noise level emitted as long as it employs noise reduction technology. Public Service respectfully requests that the Commission make this specific finding with respect to noise:

The Commission has reviewed the evidence in this docket and finds that the noise levels estimated for 230kV operation by Public Service's witness, Mr. Schaller, in his Exhibit No. AS-3 are reasonable. The Commission further finds that, given the public convenience and necessity requiring the construction of the Midway—Daniels Park Rebuild Project, the imprecision in industry-recognized noise modeling, and the numerous factors that can contribute to noise as described by Mr. Schaller, the noise levels resulting from the operation would still be reasonable even if they vary from the Company's modeling projections so long as Public Service has employed the prudent avoidance techniques described by Mr. Schaller.

14. Public Service evidently does seek a shield from liability for excessive noise. Under the proposed language, any noise, regardless of decibel level, would be reasonable as long as prudent avoidance techniques are used. Public Service argues that a transmission line cannot simultaneously be necessary for the public good and be a public nuisance.

15. The ALJ declined to make any noise reasonableness findings for several reasons: because the Commission is not required to make reasonableness findings under *Public Service Company v. Van Wyk*, 27 P.3d 377 (Colo. 2001); because the ability of the Commission to determine whether the level of noise anticipated from a particular transmission line is currently limited; the models used are inexact; and, the model used by Public Service has not been validated.

16. In this case, Public Service submits results generated by a state-of-the-art noise model (attached to this decision) to demonstrate the reasonableness of the noise levels expected to be produced by the new line. According to the model, these noise levels will be 19-20 dB(A) during fair weather and 44-45 dB(A) during periods when the transmission lines are wet, under 230 kV operation. The error range of the model is estimated to be plus or minus 15 percent (*see* Model Case C, attached to this Decision). According to the evidence, this puts the noise levels at those of a recording studio or bedroom during fair weather, and at their highest, including the margin of error, at those of a suburban living room. The Company argues that the Project is expected to reduce the noise levels from those modeled for the existing transmission facilities in this corridor.

17. In its response to Public Service's exceptions, Staff contends that the Commission, has the legal authority to make reasonableness findings pursuant to the authority granted under § 40-3-102, C.R.S., which says in part:

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...

18. Staff supports the Company's request that the Commission find the projected noise levels associated with operation at 230 kV operation would be reasonable.

19. In its response to Public Service's exceptions, CPN states that the Commission has adopted no objective noise standard against which projected noise levels could be measured and it has not been presented with reliable noise level projections or any experimental comparison data. Furthermore, CPN contends that Public Service is fundamentally wrong when it states that the Commission is the appropriate venue to decide the noise issues. CPN points out that the CNAS is unclear whether the noise limits in the CNAS apply based on the zoning area where the noise originates or the zoning area where it is heard.

20. Finally, CPN disputes Public Service's assertion that a reasonableness finding in this case will not prevent intervenors from exercising whatever rights they may have under the CNAS. CPN states that if the Commission declares noise from the line is reasonable, then they will be precluded from pursuing a lawsuit in the event that the noise emitted by the Project is unreasonable.

21. The Steenhoeks question whether the Commission has the authority to ignore the CNAS and whether interpretation of the CNAS is better left to the courts and legislative venue. They also believe Public Service is taking advantage of the process because it seeks approval of

a 345 kV line, but wants the Commission to only look at information relating to 230 kV operation. They are also concerned that Public Service is using noise models not yet validated by application to an existing power line in Colorado. They conclude their reply by stating that no one, even a public utility, should be allowed to break the law and override the rights of property owners in the course of business.

22. We agree that the *Van Wyck* case does not require that the Commission make reasonableness findings. However, that case indicated that because the Commission proceedings are the fact-finding arena, such proceedings are the appropriate place to make reasonableness findings. A standard of reasonableness need not be found in rule or statute. We believe there is enough evidence to make reasonableness findings in this case. It is uncontroverted that the model used by Public Service is state-of-the-art, and we find that the noise levels it predicts are reasonable. We will not, however, provide the blanket exemption that Public Service seeks. It would be arbitrary to conclude that any noise emitted by the power lines is reasonable even if Public Service employs proper mitigation technology. We find that the levels of noise predicted by the model, as set forth in the attachment, Model Case C plus the 15 percent margin of error are reasonable.

23. We disagree with Public Service's argument that a project cannot be both in the public interest, and at the same time a nuisance. A CPCN for a power transmission project merely indicates that the public convenience will be served by the construction of a particular project. It says nothing about the effect of that project on property rights. For example, issuance of a CPCN for the construction of a brand new right-of-way does not mean that a utility does not have to pay for any condemnation that would occur (Public Service in its consideration of alternative routes for the project at issue notes that condemnation would add costs to the project).

B. CPN and Harris Adams' Exceptions

24. CPN and Harris Adams submit two exceptions. The first exception seeks to have the Commission adopt the CNAS standards as a guide to reasonableness until the applicability of those standards is determined by the legislature or the courts. The second exception is to the ALJ's decision that Public Service need not bury the line. We decline to apply the standards in the CNAS to the transmission line in this case. Without further guidance from the legislature or the courts regarding the CNAS, we believe that in this case, reasonableness is best determined through the fact-finding that occurred during the hearing. Indeed, what is reasonable in one case may not be reasonable in another case.

25. Finally, CPN asks the Commission to reverse the ALJ's decision to allow the line to be built above ground. According to CPN, burial will provide for the future transmission needs of the public while protecting the individual rights of CPN property owners.

26. They believe that the incremental \$10 million to construct to 345 kV standards, might be wasted if the line cannot operate at 345 kV due to noise levels. Thus to spend an additional \$10 million to bury the line would help to ensure that the line could be able to operate at 345 kV in the future.

27. The final point raised by CPN is that since Company witness Johnson testified that there are no other lines in Colorado that violate the CNAS, requiring burial of this line would not set a dangerous or expensive precedent.

28. Public Service provides four reasons why it opposes burying this line: first, it is expensive (up to ten times as much); second, when forced out of service a buried line that affects tens of thousands of customers can take weeks to repair as opposed to hours for aerial lines;

third, burial causes environmental damage; and fourth it must treat all groups fairly. Equitable treatment would demand that all lines bordering residential areas be buried. Public Service asserts that CPN provided no justification for departing from its policy of constructing high voltage overhead transmission.

29. Public Service also asserts that: the operation of the Project at 230 kV is expected to be less noisy than the existing line it is replacing. In addition, the Project is located in an agricultural zone and there are no noise limits in the CNAS for agricultural zones. Whether or not the Commission places a restriction on future operation of the line at 345 kV is not sufficient justification for requiring the burial of the line now.

30. The Steenhoeks reiterate their position that burial of the line would prevent future litigation over the line and ensure operation at 345 kV.

31. The Commission denies the exceptions seeking burial of the line. The Commission finds the arguments presented by Public Service persuasive. We agree with Public Service that alleged potential future noise violations due to operation at 345 kV does not constitute a technical reason to bury the line. While we agree with CPN and the Steenhoeks that burial of the line would mitigate possible noise issues, it is only one aspect which the Commission must consider in balancing the public interest.

III. ORDER

A. The Commission Orders That:

1. Footnote 14 of Recommended Decision No. R03-1308 shall be deleted.

2. The noise levels projected by the model, as set forth in Exhibit No. AS-3, Model Case C (attached) plus the 15 percent margin of error, to be emitted by the reconstructed line operating at 230 kV are deemed reasonable.

3. All other exceptions filed by Public Service Company of Colorado and Castle Pines North Master Association, Inc., and Mr. Harris Adams are denied.

4. 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 Commission mails or serves this Order.

5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 7, 2004.**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

CHAIRMAN GREGORY E. SOPKIN
RECUSED HIMSELF IN THIS DECISION.

