

Decision No. C04-0195

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 03I-134E

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IN THE MATTER OF THE EARNINGS TEST FOR PUBLIC SERVICE COMPANY OF  
COLORADO FOR CALENDAR YEAR 2002.

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**PROCEDURAL ORDER**

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Mailed Date: February 25, 2004  
Adopted Date: February 25, 2004

**I. BY THE COMMISSION**

**A. Statement**

1. By Decision No. C03-1066-E, the Commission set a prehearing conference for November 6, 2003. At the prehearing conference, Public Service Company of Colorado (Public Service or Company), the Colorado Office of Consumer Counsel (OCC), and Staff of the Colorado Public Utilities Commission (Staff) entered their appearances. Prior to commencement of the prehearing conference, the parties were able to agree upon filing dates for testimony, hearings, and the filing date for Statements of Position. In accordance with that agreement, we now adopt the procedural schedule set forth here. Testimony will be filed as follows: Direct on May 3, 2004, Answer on June 15, 2004, and Rebuttal on July 30, 2004. Hearings will be conducted on September 9 and 10, 2004,<sup>1</sup> and Statements of Position filed on September 29, 2004.

2. The parties could not agree upon response times for audit and discovery questions, nor upon the allocation of the burden of proof in this case, including the burden of

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<sup>1</sup> The parties agreed that the hearing should be held August 26 and 27, 2004. However, the Commission now has a conflict with the August dates, requiring resetting the hearing.

going forward. The Commission resolves these disputes here. First, the parties shall respond to audit and discovery requests relating to Direct and Answer testimony within ten calendar days of service of such questions. Objections to audit and discovery questions relating to Direct and Answer testimony shall be served within five days of receipt of those questions. As for Rebuttal testimony, the parties shall respond to audit and discovery requests within seven calendar days; objections to such audit and discovery questions shall be served within three business days of receipt of those questions. The cut-off date for audit and discovery questions relating to Direct testimony is June 15, 2004, the filing date for Answer testimony. The associated cut-off date for audit and discovery questions relating to Answer testimony is July 30, 2004, the filing date for Rebuttal testimony. The associated cut-off date for audit and discovery questions relating to Rebuttal testimony is August 12, 2004.

3. Dispositive motions shall be filed on or before August 6, 2004. Responses to dispositive motions shall be filed on or before August 13, 2004.

4. At the prehearing conference, Public Service noted that the parties disagree regarding the proper allocation of the burden of proof in this case. The issue in dispute concerns the cost of debt the Company used in calculating potential sharing in the 2002 Earnings Test. Public Service used a weighted average cost of debt of 7.5 percent, the Company's weighted *actual* cost of debt for 2002. For purposes of this Earnings Test, Staff and OCC contend that Public Service should use an *imputed* cost of debt to account for the financial difficulties experienced by NRG, a corporate affiliate of the Company. The parties concede that it is unlikely that a recalculation and restatement of Public Service's average cost of debt in 2002 will result in the Company having any earnings subject to sharing with ratepayers. The Commission allowed the parties until November 21, 2003, to file briefs on the issue of assignment of the burden of

proof, including the burden of going forward. Public Service, Staff, and OCC jointly filed briefs on this matter.

5. The Company believes that Staff and OCC bear the burden of proof and the burden of going forward. Public Service argues that it is a long-established regulatory principle that the Company use its actual weighted average cost of debt for purposes of calculating earnings. The Company used this principle in its 2002 Earnings Test filing. In developing the average cost of debt, the Company removed specific debt issuances which are not used in connection with its regulated utility business. Public Service argues that its calculations are consistent with previous Commission orders approving Earnings Tests. According to Public Service, the Stipulation which established the annual Earnings Test filings specifies that any party proposing a change in regulatory treatment for an item in an annual filing shall bear the burden of proof. Staff's and OCC's proposal to use a cost of debt other than the Company's *actual* cost constitutes a change in the accepted regulatory treatment for this item. In addition, the Company contends that pursuant to § 24-4-105(7), C.R.S. (proponent of order has burden of proof), Staff and OCC bear the burden of proof and the burden of going forward when they suggest that the Earnings Test calculation use something other than the actual weighted average cost of debt.

6. Staff and OCC contend that Public Service bears the burden of proof and the burden of going forward in this case. Staff and OCC believe that NRG's non-regulated operations--Xcel is the parent company of both NRG and Public Service--has resulted in negative financial impacts on the Company's cost of debt. Staff noted in its Earnings Test report that, in September 2002, Public Service issued \$600 million in new debt at an interest rate which,

Staff contends, was not representative of prevailing market rates. According to Staff and the OCC, it is an accepted ratemaking principle that the effects of a non-regulated entity, such as NRG, on the Company's costs must be eliminated from consideration in the Earnings Test. Staff and OCC support their position by citing § 40-3-114, C.R.S., which prohibits the use of ratepayer funds to subsidize non-regulated operations, and the Commission's Cost Allocation Rules, 4 *Code of Colorado Regulations* 723-47. The Company, Staff and the OCC contend, was aware that NRG's financial difficulties increased the Company's cost of debt when it filed its earnings report. Under the Stipulation, Public Service was obligated to identify this occurrence and to account for it in its report. Public Service failed to do this in its calculation of the weighted average cost of debt. This failure to account for the impact of NRG's financial difficulties on cost of debt constitutes a change in a ratemaking principle which requires Public Service to carry the burden of proof in this case.

7. In support of their arguments, all parties cite the same paragraph in the Stipulation and Agreement approved in Decision No. C00-0393 (Docket No. 99A-377EG):

In the event that a material change in circumstances occurs subsequent to the Company's most recent rate case or the determination of a specific issue in an earnings test proceeding, any Party may argue that, as a result, the Commission should determine the appropriate regulatory treatment regarding the issue affected for the purposes of the earnings test. A material change in circumstances includes: (1) material changes with respect to components of the rates resulting from the Company's most recent rate case or determination of a specific issue in an earnings test proceeding; or (2) new circumstances which arise subsequent thereto. For purposes of earnings tests, any Party proposing a change in regulatory treatment from previously accepted regulatory treatment, or proposing a regulatory treatment for an item for which there has been no previously accepted regulatory treatment, shall identify the material change in circumstance and the Party's proposed new regulatory treatment in the Party's testimony in the earnings test docket and shall bear the burden of going forward and the burden of proof as to that proposed new regulatory treatment.

Stipulation, page 12.

8. We conclude that the burden of proof in this case is properly assigned to Staff and the OCC. The Stipulation creating these Earnings Test proceedings (discussion *supra*) assigns the burden of proof, including the burden of going forward, to the party "proposing a change in regulatory treatment from previously accepted regulatory treatment...." Public Service points out that the Commission, in setting the Company's rates, has traditionally used the Company's actual weighted average cost of debt. For example, this method was used in Public Service's last Phase I case. Instead of using the Company's actual cost of debt, Staff and the OCC here propose to impute a cost in reviewing the Company's 2002 earnings. This constitutes a change in an established regulatory principle for calculating Public Service' earnings for 2002. As such, the Stipulation requires that Staff and OCC bear the burden of proving all necessary elements of their proposal.

9. Notably, the basic premise of Staff's and OCC's argument, that Public Service should bear the burden of proof, is that the Company's 2002 cost of debt has been negatively affected by NRG's financial difficulties. Staff and OCC ask us to accept this point now, even before the hearings have been held. From this premise, Staff and OCC conclude that Public Service is required to explain why it made no adjustment (*e.g.*, using an imputed cost of debt) to account for the fact that NRG has adversely affected the Company's cost of debt. Of course, the "fact" that Staff and OCC now ask us to assume for purposes of assigning the burden of proof, is the very issue to be examined and decided in this proceeding *after* hearing the evidence from the parties. Staff and OCC's argument begs the question by assuming the very matter to be investigated and decided after hearing. We agree with Public Service that Staff and OCC are the proponents of an order: the Company's 2002 earnings should be calculated, in part, by using an

imputed cost of debt. Assigning the burden of proof to Staff and the OCC is consistent with the provisions of § 24-4-105(7), C.R.S., as well as the provisions of the Stipulation.

10. Staff and OCC shall file their direct testimony on May 3, 2004, and rebuttal testimony on July 30, 2004.

**II. ORDER**

**A. The Commission Orders That:**

1. Staff of the Colorado Public Utilities Commission and the Colorado Office of Consumer Counsel shall bear the burden of proof and the burden of going forward in this case.

2. Direct testimony shall be filed on May 3, 2004, Answer testimony on June 15, 2004, and Rebuttal testimony on July 30, 2004. Hearings shall be held in this matter at the following time and place:

DATES: September 9 and 10, 2004

TIME: 9:00 a.m.

PLACE: Commission Hearing Room  
1580 Logan Street, OL-2  
Denver, Colorado

3. Statements of Position shall be filed on September 29, 2004.

4. Response times to audit and discovery, and cut-off dates for discovery and audit are set forth above.

5. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
February 25, 2004.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Commissioners