

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

PROCEEDING NO. 14M-0241EG

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IN THE MATTER OF COMMISSION CONSIDERATION OF MULTI-YEAR RATE PLAN  
ADVICE LETTER FILINGS AND TARIFF SHEETS.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
CONTAINING DECLARATORY RULING  
AND ADDRESSING RULEMAKING**

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Mailed Date: March 4, 2015

**TABLE OF CONTENTS**

I.	STATEMENT.....	2
II.	<u>DISCUSSION AND CONCLUSION</u> .....	5
A.	Declaratory Ruling. ....	7
1.	Colorado’s File and Suspend System of Public Utility Ratemaking. ....	8
2.	Authority of a Public Utility to File a Multi-Year Rate Plan. ....	11
3.	Commission Authority to Suspend a Multi-Year Rate Plan for Investigation and Hearing. ....	12
a.	The Parties’ Arguments.....	12
(1)	The Utilities. ....	13
(2)	The Joint Parties.....	22
b.	Discussion and Ruling. ....	29
B.	Rulemaking.....	42
1.	The Parties’ Arguments. ....	42
a.	The Utilities.....	43
b.	The Joint Parties.....	46
2.	Discussion and Ruling.....	47
III.	ORDER.....	49
A.	The Commission Orders That: .....	49

## I. STATEMENT

1. On March 24, 2014, by Decision No. C14-0302, the Commission opened this Proceeding.

2. In opening this Proceeding, the Commission explained: (a) Proceeding No. 12AL-1268G<sup>1</sup> (PSCo Gas Rate Case) is the genesis of this Proceeding; and (b) in the PSCo Gas Rate Case, Public Service Company of Colorado (Public Service, PSCo, or Company)

requested three separate rate increases in the form of a General Rate Schedule Adjustment for 2013, 2014, and 2015 ... pursuant to a Multi-Year Plan (MYP) tariff[.]

A *legal dispute* arose regarding whether the Commission may suspend the base rate increases proposed for 2014 and 2015 for a total of up 210 days after these increases otherwise would go into effect (210 days after January 1, 2014 and January 1, 2015) or whether the Commission is limited to a single suspension period for all base rate increases set forth on the MYP tariff sheet (210 days after January 12, 2013). The parties disagreed on the interpretation of § 40-6-111(1)(b), C.R.S., other statutes in Title 40, and applicable Commission Rules.

\* \* \*

We reaffirm [the conclusion reached in Proceeding No. 12AL-1268G] that a *resolution of these legal issues* will benefit the Commission, regulated utilities, ratepayers, and other stakeholders. We therefore find good cause to open a proceeding on our own motion to consider these matters.

\* \* \*

We refer this proceeding to an Administrative Law Judge (ALJ) for issuance of a recommended decision. *We direct the ALJ to address the legal disputes* addressed in the [legal briefs of which administrative notice was taken]

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<sup>1</sup> Proceeding No. 12AL-1268G is *In the Matter of Advice Letter No. 830-Gas of Public Service Company of Colorado, with Accompanying Tariff Sheets Concerning Implementing a General Rate Schedule Adjustment (GRSA), to be Effective January 12, 2013.*

*and to address whether the Commission should open a rulemaking to codify its rulings on the merits of those legal issues.*

Decision No. C14-0302 at ¶¶ 1-2, 4, and 6 (emphasis supplied).

3. In addition, in Decision No. C14-0302, the Commission: (a) took administrative notice of -- and, thus, made part of the record in this Proceeding -- the initial legal briefs on the Multi-Year Plan (MYP) issue filed in Proceeding No. 12AL-1268G on September 20, 2013 and the reply legal briefs on the MYP issue filed in Proceeding No. 12AL-1268G on October 4, 2013; and (b) designated Public Service, Climax Molybdenum Company (Climax), the Colorado Office of Consumer Counsel (OCC), and Trial Staff of the Commission (Staff) as necessary parties.<sup>2</sup> Finally, in that Decision, the Commission established an intervention period.

4. On April 23, 2014, Atmos Energy Corporation (Atmos) timely filed a Motion to Intervene. On April 30, 2014, by Decision No. R14-0445-I, the ALJ granted that motion. Atmos is a party in this Proceeding.

5. On April 23, 2014, Black Hills/Colorado Electric Utility Company, L.P. (Black Hills/Electric), timely filed a Motion to Intervene. By Decision No. R14-0445-I, the ALJ granted that motion. Black Hills/Electric is a party in this Proceeding.

6. On April 23, 2014, Black Hills/Colorado Gas Utility Company, L.P. (Black Hills/Gas),<sup>3</sup> timely filed a Motion to Intervene. By Decision No. R14-0445-I, the ALJ granted that motion. Black Hills/Gas is a party in this Proceeding.

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<sup>2</sup> These are the entities that submitted the legal briefs of which the Commission took administrative notice.

<sup>3</sup> Unless the context indicates otherwise, reference in this Decision to Black Hills is to Black Hills/Electric and Black Hills/Gas, collectively.

7. On April 23, 2014, Rocky Mountain Natural Gas LLC (RMNG) timely filed a Motion to Intervene. By Decision No. R14-0445-I, the ALJ granted that motion. RMNG is a party in this Proceeding.

8. On April 23, 2014, SourceGas Distribution LLC (SourceGas) timely filed a Motion to Intervene. By Decision No. R14-0445-I, the ALJ granted that motion. SourceGas is a party in this Proceeding.

9. On May 2, 2014, Colorado Natural Gas, Inc. (CNG), filed its Motion for Leave to Intervene Out of Time. On May 5, 2014, by Decision No. R14-0467-I, the ALJ granted that motion. CNG is a party in this Proceeding.

10. Atmos, Black Hills, CNG, Public Service, RMNG, and SourceGas, collectively, are the Utilities. Climax, OCC, and Staff, collectively, are the Joint Parties. The Joint and the Utilities, collectively, are the Parties. Each party is represented by legal counsel.

11. Pursuant to Decision No. R14-0445-I, on May 14, 2014, the ALJ held a prehearing conference in this Proceeding. The Parties were present, were represented, and participated.

12. During the prehearing conference, the ALJ made a number of rulings concerning this Proceeding. Decision No. R14-0573-I<sup>4</sup> contains those rulings, which are set out here as they pertain to this Recommended Decision:

At the prehearing conference, the Parties agreed that this *Proceeding is a declaratory order-type proceeding* because the case presents legal questions only and requires no fact-finding. The Parties also agreed that, in this Proceeding, *no party bears the burden of proof* because the issues presented are legal and, to some extent, policy-based. The ALJ concurs with the Parties.

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<sup>4</sup> Decision No. R14-0573-I was issued on May 29, 2014 in this Proceeding.

The ALJ notes that there is no statutory provision governing the time within which the Commission must issue a decision in this Proceeding. ...

During the prehearing conference, the Parties stated that the four legal briefs filed in Proceeding No. 12AL-1268G and incorporated by reference into the instant Proceeding all reference, and cite to, the Public Service Advice Letter and appended tariff sheets that were at issue in Proceeding No. 12AL-1268G but that are not at issue in this instant Proceeding. The Parties proposed, and the ALJ agrees, that the *references to the Public Service Advice Letter and appended tariff sheets should be used as examples only*.

Decision No. R14-0573-I at ¶¶ 7, 9, 10 (emphasis supplied). The ALJ and the Parties followed these rulings, which are reflected in this Decision and the Parties' legal arguments.

13. These utilities filed initial or opening legal briefs: Atmos, Black Hills, CNG, Public Service, RMNG, and SourceGas. The Joint Parties filed an opening brief.

14. Public Service filed a Reply Brief. The Joint Parties filed a Reply Brief.

15. The ALJ heard oral argument on the legal dispute and on the question of whether the Commission ought to open a rulemaking.<sup>5</sup>

16. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with a written recommended decision.

## **II. DISCUSSION AND CONCLUSION**

17. The Commission has jurisdiction over the subject matter of this Proceeding.

18. To be consistent with the Commission Decision that commenced this Proceeding and unless the context indicates otherwise, reference in this Decision to *public utility*, *utility*, *public utilities*, or *utilities* includes only electric public utilities and gas public utilities over which the Commission has rate regulation jurisdiction. Thus, the term does not include, for example, either cooperative electric associations that have elected to exempt themselves from the

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<sup>5</sup> A transcript of the oral argument is filed in this Proceeding.

Public Utilities Law pursuant to § 40-9.5-104, C.R.S., or common carriers by motor vehicle that hold a Certificate of Public Convenience and Necessity.

19. Unless the context indicates otherwise, the term *ratemaking*, as used in this Decision, means the § 40-6-111, C.R.S., process by which a public utility's rates, terms, and conditions for provision of utility services are determined. This is consistent with the definition of rate in Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1004(bb).<sup>6</sup>

20. Unless the context indicates otherwise, the term *tariff* or *tariffs*, as used in this Decision, means a public utility's § 40-3-103, C.R.S., schedules that contain "all rates, ... charges, and classifications collected or enforced, or to be collected and enforced, together with all rules, regulations, ... that in any manner affect or related to rates, ... classifications, or service." This is consistent with the definition of tariff in Rule 4 CCR 723-1-1004(ii). Rule 4 CCR 723-3-3108<sup>7</sup> establishes the content of an electric utility's tariff. Rule 4 CCR 723-4-4108<sup>8</sup> establishes the content of a gas utility's tariff.

21. Unless the context indicates otherwise, the term *proposed tariff* or *proposed tariffs*, as used in this Decision, means a public utility's proposal that is filed pursuant to § 40-6-111(1)(a), C.R.S., and that states "any new or changed individual or joint rate, ... charge, classification, ... practice, rule, or regulation" that the utility proposes to put into effect.

22. For ease of reference, Appendix A to this Decision contains the Colorado statutes and Commission Rules pertinent to discussion of the legal issues in this Proceeding.

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<sup>6</sup> This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

<sup>7</sup> This Rule is found in the Rules Regulating Electric Utilities, Part 3 of 4 *Code of Colorado Regulations* 723.

<sup>8</sup> This Rule is found in the Rules Regulating Gas Utilities and Pipeline Operators, Part 4 of 4 *Code of Colorado Regulations* 723.

**A. Declaratory Ruling.**

23. The Commission opened the present Proceeding as

an *adjudicatory proceeding* to consider whether, pursuant to § 40-6-111(1)(b), C.R.S., and other law: (1) an electric or natural gas public utility may propose, as part of a tariff with a single effective date, to change its rates for service over time based on a succession of multiple stepped changes occurring on specific dates in the future (*i.e.*, pursuant to a multi-year rate plan); and (2) the Commission has the authority to order a distinct suspension period for each proposed rate increase in a multi-year rate plan.

Decision No. C14-0302 at Ordering Paragraph No. 1 (emphasis supplied).

24. Although opened as an adjudication, this Proceeding is a declaratory ruling proceeding that presents only legal questions (and, to some extent, policy questions) and that requires no fact-finding. Because the issues are legal, the ALJ makes no findings of fact. In addition, because the Commission commenced this Proceeding, no party bears the burden of proof.

25. For the reasons discussed below, the ALJ recommends that the Commission issue a declaratory order that: (a) a public utility has the right to file in one proposed tariff a Multi-Year Rate Plan (MYRP) that has a single effective date and that seeks to change the filing utility's rates, terms, and/or conditions for service over time based on stepped (or phased-in) changes that will occur on specific dates in the future; and (b) if the Commission suspends a MYRP tariff<sup>9</sup> for investigation and hearing, the Commission suspends the entire MYRP tariff filing and the suspension period commences on the proposed effective date of the entire MYRP tariff as stated in the filing utility's Advice Letter, and not from the effective date of an individual rate, term, or condition within the proposed MYRP tariff.

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<sup>9</sup> Unless the context indicates otherwise, reference in this Decision to MYRP tariff(s), proposed MYRP tariff(s), MYRP tariff filing, and MYRP filing is to a public utility's proposed tariffs containing an MYRP.

**1. Colorado's File and Suspend System of Public Utility Ratemaking.**

26. Ratemaking is a legislative function, and the Commission has broad authority in how it sets rates. *Glustrom v. Colorado Public Utilities Commission*, 280 P.3d 662, 669 (Colo. 2012)

27. “Article XXV of the Colorado Constitution gives the [Commission] full legislative authority to regulate public utilities. ... [However, the] legislative authority in public utilities matters delegated by Article XXV to the [Commission may] be restricted by statute.” *Mountain States Legal Foundation v. Public Utilities Commission*, 197 Colo. 56, 59, 590 P.2d 495, 497 (1979) (internal citations and footnote omitted). As pertinent here, the General Assembly has restricted at least a portion of the Commission's ratemaking authority by statute.

28. Colorado has a file and suspend system of public utility ratemaking. The ratemaking process is “initiated by the utility's filing of tariffs with the Commission setting forth the proposed new rate[.]” *Public Service Company v. Public Utilities Commission*, 653 P.2d 1117, 1121 (Colo. 1982), *quoted with approval in Office of Consumer Counsel v. Public Utilities Commission*, 752 P.2d 1049, 1053 (Colo. 1988). *See also Colorado Municipal League v. Public Utilities Commission*, 197 Colo. 106, 116, 591 P.2d 577, 584 (1979) (*Colorado Municipal League*) (same). Pursuant to Rules 4 CCR 723-1-1210(a)(III) and 723-1-1210(c), the utility files an Advice Letter with an accompanying proposed tariff. *See also* Rules 4 CCR 723-3-3109 and 723-3-3110 (requirements for electric utility filing proposed tariffs and Advice Letter); Rules 4 CCR 723-4-4109 and 723-4-4110 (requirements for gas utility filing proposed tariffs and Advice Letter). Pursuant to §§ 40-3-104(1)(a) and 40-6-111(2)(a)(III), C.R.S., unless the Commission shortens the time for public notice, there is a 30-day public notice period that must expire before proposed tariffs can go into effect.



29. Sections 40-3-104(1)(a) and 40-6-111(2)(a)(III), C.R.S., require public notice of proposed new or changed tariff provisions filed by the utility. This affords an opportunity for a member of the public (including ratepayers and their representatives) to determine whether the proposed new or changed tariff provisions warrant intervention in the Commission's proceeding to investigate the proposals.

30. The Commission, in its sole discretion, may suspend for investigation and hearing a utility's proposed tariffs if the Commission believes they may be improper, unreasonable, or otherwise contrary to law. In that event and following a hearing, the Commission "establish[es] the rates, ... charges, classifications, ... practices, or rules proposed, in whole or in part, or others in lieu thereof, that it finds [to be] just and reasonable." Section 40-6-111(2)(a)(I), C.R.S. Thus, the Commission may accept the utility's proposed tariff as filed; may reject the utility's proposed tariff *in toto*; or may change the utility's proposed tariff and order the utility to file the tariff provisions as changed by the Commission.

31. In determining just and reasonable rates, terms, and conditions for service, § 40-6-111(2)(a)(I), C.R.S., requires the Commission to "consider the reasonableness of the test period revenue requirements presented by the utility" and permits the Commission to consider: (a) current, future, or past test periods (or any reasonable combination of test periods); (b) any other factors that may affect the sufficiency or insufficiency of rates, terms, and conditions "during the period the same may be in effect"; and (c) "any factors that influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development."

32. Section 40-6-111(1)(b), C.R.S., establishes the length of time for which the Commission may suspend proposed tariffs. As relevant here, the suspension period cannot exceed 210 days "beyond the time when [the suspended proposed] rate, ... charge,

classification, ... practice, rule, or regulation would otherwise go into effect[.]” During this period, the Commission investigates and holds its hearing on the suspended proposed tariff.

33. If the Commission does not issue its decision establishing the just and reasonable rates, terms, and conditions by the expiration of the 210-day suspension period, the utility’s proposed tariff goes into effect by operation of law pursuant to § 40-6-111(2)(a)(III), C.R.S. *Colorado Ute Electric Association, Inc. v. Public Utilities Commission*, 198 Colo. 534, 544, 602 P.2d 861, 868 (1979) (Section 40-6-111(2), C.R.S., “clearly authorizes the [Commission] to establish revised rates after the suspension period has run if the hearing on the [proposed] rates has not been completed in that time.”) At that point, the utility may implement and begin to operate pursuant to the tariff that has gone into effect by operation of law. The rates, terms, and conditions that go into effect by operation of law at the expiration of the suspension period remain in effect until permanently suspended by the Commission. New rates, terms, or conditions established by the Commission after the expiration of the suspension period have prospective effect only.

34. When the Commission issues its administratively-final decision establishing the just and reasonable rates, terms, and conditions, irrespective of whether that decision issues within the 210-day suspension period, the Commission-determined rates, terms, and conditions are lawful and legal. To implement its final decision, the Commission typically permanently suspends the proposed tariff and orders the utility to make a compliance filing to include the Commission-determined rates, terms, and conditions in the utility’s filed tariffs.

35. The administratively-final Commission decision is subject to judicial review pursuant to § 40-6-115, C.R.S.

36. The Commission, in its sole discretion, may decide not to suspend the proposed tariffs for investigation and hearing. In that event, at the expiration of the 30-day notice period (or the Commission-shortened notice period) and by operation of law, the proposed tariffs,

on the effective date thereof, ... go into effect and [are] the [utility's] established and effective rates, ... charges, classifications, ... practices, and rules subject to the power of the commission, after a hearing on its own motion or upon complaint, as provided in [§§ 40-3-111 and 40-6-108, C.R.S.,] to alter or modify

the tariffs that have gone into effect by operation of law. Section 40-6-111(2)(a)(III), C.R.S. These are lawful rates, terms, and conditions.

## 2. Authority of a Public Utility to File a Multi-Year Rate Plan.

37. In this Proceeding, there is no dispute that a public utility has the authority to file an MYRP. This utility authority is found in the plain language of §§ 40-3-104 and 40-6-111, C.R.S., which (as discussed above) are the provisions that govern Colorado's file and suspend ratemaking process. As discussed in the Colorado Supreme Court decisions cited above, these provisions make it clear that the utility commences ratemaking by making a filing that proposes new tariffs, changed tariffs, or both. In its sole discretion, the utility determines the content (*i.e.*, rates, terms, and conditions) of the proposed tariffs. There is no statutory provision that circumscribes this utility prerogative to file proposed tariffs with the content that the utility seeks to implement. In addition, there is no Commission rule that limits or restricts the content of the utility's proposed tariffs. Finally, as the utility bears the burden of proof with respect to the proposed MYRP tariffs, it is appropriate and reasonable that the utility control the content of the proposed tariffs.

38. For these reasons, the **first declaratory ruling** is: a public utility has a statutory right to file an MYRP and, in its sole discretion, to determine the content (that is, the rates, terms, and conditions) of the proposed MYRP.

### **3. Commission Authority to Suspend a Multi-Year Rate Plan for Investigation and Hearing.**

39. As relevant here and for purposes of this discussion, an MYRP has these features: (a) it is a utility tariff filing; (b) the proposed tariff sheets that contain the MYRP have a single effective date; (c) the proposed MYRP tariffs seek to change the filing utility's rates, terms, and/or conditions for utility service; and (d) at least some of the proposed tariff changes (if approved) will take effect over time as a result of stepped or other changes that will occur on specific dates in the future. An example of an MYRP is the Public Service Gas Rate Case tariff filing that proposed to put into effect three rate increases over three years and that contained proposed changes that related to the rate increases (*e.g.*, earnings sharing mechanism, process for annual review of earnings).

40. It is undisputed that, in accordance with the authorities cited above in the discussion of Colorado's file and suspend system of public utility ratemaking, the Commission has the authority to suspend for investigation and hearing a public utility's proposed MYRP tariffs.

41. The contested issue is: must the Commission suspend for investigation and hearing and then issue one Commission decision on the entire MYRP tariff filing; or may the Commission suspend the proposed MYRP tariffs for investigation and hearing, hold hearings on any rates, terms, and conditions that have specific effective dates, and issue separate Commission decisions following those hearings.

#### **a. The Parties' Arguments.**

42. In this Proceeding the Parties filed both opening briefs that state and support the filing party's position and response briefs that address the arguments presented by other parties. For ease of reading and comprehension, the following discussion consolidates into one

presentation the positions contained in the opening and response briefs. As necessary for clarity, the discussion will differentiate the arguments presented in opening briefs from those presented in response briefs.

**(1) The Utilities.**

43. Atmos, Black Hills, RMNG, and SourceGas support the position taken by Public Service as stated in the Public Service legal briefs on the MYRP issue filed in the PSCo Gas Rate Case. They also support the position taken by Public Service as stated in the Public Service opening brief filed in this Proceeding and as stated during the oral argument held in this Proceeding. Unless the context indicates otherwise, in this Decision, reference in this Decision to the Utilities' position is to Public Service's position as adopted by the other utilities.

44. The Utilities take the position that, under the Colorado file and suspend ratemaking system: (a) an MYRP tariff filing is a single filing that contains the rates, terms, and conditions for the MYRP and is a unified whole; (b) the proposed tariff sheets that contain the MYRP have a single effective date, which is the date stated in the Advice Letter and shown on the bottom of each tariff sheet; and (c) as a result, the Commission suspends for investigation, must hold a single hearing on, and must issue a single administratively-final Commission decision on the entire MYRP tariff filing. The Utilities seek a declaratory ruling that, as a matter of law, if the Commission chooses to suspend an MYRP filing, the Commission must suspend for investigation and single hearing the entire MYRP tariff filing.

45. In support of the requested declaratory ruling, the Utilities make three arguments: (a) one based on the plain meaning of the file and suspend statutes; (b) one based on statutory

interpretation<sup>10</sup> of the file and suspend statutes; and (c) one based on public policy implications.

The following sets out these arguments.

46. With respect to the *plain language of the applicable statutes*, the Utilities assert:

47. Under the file and suspend ratemaking system, the utility's tariff filing commences the proceeding. As a result, the utility files for the new rate or proposed service -- including associated rates, terms, and conditions -- that, in its discretion, the utility seeks to implement. In its discretion, the utility also sets the proposed effective date for the entire tariff, and it does so by stating the proposed effective date in the Advice Letter and on the accompanying tariff sheets.<sup>11</sup>

48. If the Commission is of the opinion that a component or an element of the proposed tariff should be investigated, the Commission suspends the tariff as a whole by setting it for investigation and hearing. The language of § 40-6-111(1)(b), C.R.S., pursuant to which the Commission may suspend a utility's tariff filing, does not permit the Commission to deconstruct the utility's proposed tariff and to choose which proposals or proposed tariff sheets will be suspended for investigation and hearing and which will not.

49. This file and suspend ratemaking system applies to, and works equally well with, tariff filings that contain a single rate or new service proposal and those that contain an MYRP. That an MYRP may include provisions (whether rates, terms, or conditions) that go into effect at different times does not render inapplicable the basic principles of the file and suspend system,

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<sup>10</sup> Unless the context indicates otherwise, reference in this Decision to statutory interpretation includes both statutory construction and statutory interpretation.

<sup>11</sup> The Utilities acknowledge that the effective date must meet the requirements of § 40-3-104, C.R.S.

including the principle that the utility establishes the proposed effective date of the tariff by stating that date in the Advice Letter and on each tariff sheet.

50. In addition, no statutory provision or Commission rule, properly read, precludes the application of the file and suspend principles to an MYRP tariff filing. No Commission rule precludes the filing of an MYRP or contains the suggestion that an MYRP filing is to be treated any differently than any other tariff filing.

51. Further, the Public Utilities Law expressly contemplates a utility tariff filing with provisions that have future effect. Section 40-3-103, C.R.S., requires a public utility to have on file with the Commission

schedules showing all rates, ... charges, and classifications collected or enforced, or *to be collected and enforced*, together with all rules, regulations, ... that in any manner affect or relate to rates, ... classifications, or service.

(Emphasis supplied.) In addition, Rule 4 CCR 723-1-1004(ii) defines “tariff” as

a schedule that is filed with the Commission pursuant to § 40-3-103, C.R.S., showing all rates and classifications collected or enforced, or *to be collected or enforced*, and/or rules, regulations, terms, and conditions, that in any manner affect or relate to rates, classifications, or service.

(Emphasis supplied.) The explicit reference in the statute and the Rule “to rates ‘to be collected and enforced’ recognizes that a public utility’s tariffs may include [provisions] which have future, but not current, effect.” PSCo Initial Brief on Multi-Year Plan Tariff Issue filed on September 20, 2013 in the Gas Rate Case at 22.

52. Finally, an MYRP contains interrelated and inter-dependent rates, terms, and conditions that are to take effect on the same date (*i.e.*, the effective date in the Advice Letter and on each tariff sheet) in order to effectuate the utility’s proposal. If the Commission were to break apart an MYRP filing, to examine some of the MYRP’s constituent parts in separate hearings, and to issue separate decisions at the conclusion of each hearing, the utility would be deprived of

its right to present and to have the Commission consider the MYRP as a unified whole and in one hearing. The practical effect of such an approach would be a *de facto* denial of the MYRP tariff because the integrated and interrelated rates, terms, and conditions that comprise the MYRP would not have the same effective date and, thus, would not be implemented at the same time.

53. With respect to the *statutory interpretation of the applicable statutes*, the Utilities assert:<sup>12</sup>

54. When it is necessary to interpret a statute, these rules apply:

where a statute is capable of more than one interpretation, it must be construed in light of the apparent legislative intent and purpose. Among the guidelines to be considered are the ends the statute was designed to accomplish, and the consequences which would flow from an alternative construction. If separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, we should adopt that construction which results in harmony rather than that which produces inconsistency. ... Two statutes concerning the same subject matter are to be read together to the extent possible so as to give effect to legislative intent. .. Further, we will presume that the legislature intended a just and reasonable result when it enacted a statute. .. *See also* § 2-4-201(1)(b) C.R.S. (1980) (“the entire statute is intended to be effective”).

*Colorado-Ute Electric Association, Inc. v. Public Utilities Commission*, 760 P.2d 627, 685 (Colo. 1988) (*Colorado-Ute Electric Association*) (some internal citations omitted).

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<sup>12</sup> Although not clear from the filings, the Utilities appear to be of the opinion that the relevant statutes are clear and, therefore, no interpretation is necessary. They make the statutory interpretation argument in the event the Commission finds it necessary to interpret the relevant statutes.



55. Applying these statutory interpretation principles, the Utilities make several arguments.

56. *First*, to determine what the Commission may suspend for investigation and hearing, one begins with § 40-6-111(1)(a), C.R.S., which is the source of the Commission's suspend authority and which provides in relevant part:

(1)(a) Whenever there is filed with the commission any tariff ... stating any new or changed ... rate, ... charge, classification, ... practice, rule, or regulation, the commission has power, ... at once, ... but upon reasonable notice, to have a hearing concerning the propriety of such rate, ... charge, classification, ... practice, rule, or regulation if [the Commission] believes that such a hearing is required and that such rate, ... charge, classification, ... practice, rule, or regulation may be improper.

This provision uses “tariff” when describing what the utility files to commence the ratemaking process. Logically, this refers to the entire tariff filing made by the utility, whether the filing is a change in a single rate, term, or condition or an MYRP. This provision also establishes what a tariff filing contains (*i.e.*, “any new or changed” rate, term, condition) and what the Commission suspends (*i.e.*, the entire tariff as filed by the utility).

57. One must take § 40-6-111(1)(a), C.R.S., into account in order to understand the key references in § 40-6-111(1)(b), C.R.S., the provision that establishes the length of the suspension period and the consequences if the Commission does not issue a final decision within the suspension period. That statutory provision provides in relevant part:

(b) *Pending the hearing and decision thereon, ... such rate, ... charge, classification, ... practice, rule, or regulation shall not go into effect; but the period of suspension of such rate, ... charge, classification, ... practice, rule, or regulation shall not extend beyond one hundred twenty days beyond the time when such rate, ... charge, classification, ... practice, rule, or regulation would otherwise go into*

*effect* unless the commission, in its discretion, and by separate order, extends the period of suspension for a further period not exceeding ninety days.

(Emphasis supplied.)

58. When § 40-6-111(1), C.R.S., is read in its entirety, it is clear that in § 40-6-111(1)(b), C.R.S.: (a) the phrase “[p]ending the hearing and decision thereon” refers back to the tariff filed by the utility and suspended by the Commission; and (b) the word “such” refers back to the tariff filed by the utility and suspended by the Commission.

59. In addition, this reading harmonizes the notice period in § 40-3-104, C.R.S., and the § 40-6-111(1)(b), C.R.S., phrase “beyond the time when such [rate, term, or condition] would otherwise go into effect[.]” Section 40-3-104(c)(I), C.R.S., states: “Such notice shall be given by filing with the [Commission] and keeping open for public inspection new schedules stating plainly the changes to be made in the schedules then in force and the time when the changes will go into effect.” Both statutes refer to the effective date of the entire tariff as stated in the Advice Letter and on the tariff sheets filed by the utility and suspended by the Commission.

60. Further, this reading is consistent with, and is supported by, §§ 40-6-111(2)(a)(I) and 40-6-111(2)(a)(III), C.R.S.

Section 40-6-111(2)(a)(I), C.R.S., states that in making a finding based upon a hearing as to whether a public utility’s rates are just and reasonable, the Commission may consider “any other factors that may affect the sufficiency or insufficiency of such rates, fares, tolls, rentals, charges, or classifications during the period the same may be in effect....” This provision in Section 40-6-111(2)(a)(I), C.R.S., authorizes the Commission, through a single hearing on a public utility’s multi-year rate plan filing, to find that the utility’s proposed rates are just, reasonable and sufficient “during the period the same may be in effect.” Thus, in a utility’s multi-year rate plan filing, the Commission may determine that the utility’s proposed rates for the first year of the multi-year rate plan are just, reasonable and sufficient for that first year, that its proposed rates

for the second year of the multi-year rate plan are just, reasonable and sufficient for that second year, and so on and so forth.

Opening Brief of SourceGas Distribution LLC and Rocky Mountain Natural Gas LLC, filed on June 30, 2014, at ¶ 2. In addition, § 40-6-111(2)(a)(III), C.R.S., states that, if not suspended by the Commission, the rates, terms, and conditions filed in a proposed tariff,

on the effective date thereof, ... shall go into effect and be the established and effective rates, ... charges, classifications, ... practices, and rules subject to the power of the commission, after a hearing on its own motion or upon complaint, as provided in [article 6 of title 40, C.R.S.,] to alter or modify the same.

61. *Second*, the use of the singular in § 40-6-111(1), C.R.S., is not dispositive with respect to either what the Commission may suspend or the suspension period. Section 2-4-102, C.R.S., is a rule of statutory construction and provides: “The singular includes the plural, and the plural includes the singular.” Thus, although § 40-6-111(1), C.R.S., uses the singular, the statute includes the plural. As a result, when the Commission suspends the MYRP tariff filing, the same suspension period applies to all of the MYRP rates, terms, and conditions and the Commission holds one hearing on the entire filing.

62. *Third*, the Commission’s interpretation of its suspension authority, as set out in Commission rules, is consistent with the reading of § 40-6-111(1)(b), C.R.S., as requiring suspension of the entire proposed MYRP tariff for one hearing.

63. As pertinent here, Rule 4 CCR 723-1-1210(a)(III) requires a utility that seeks to change its existing tariffs (*e.g.*, to add an MYRP) to file an Advice Letter accompanied by proposed tariff sheets. Rule 4 CCR 723-1-1210(a)(VII) permits

[a]ny person affected by a tariff change proposed under this rule [to] submit a written protest to the proposed change. Any protest must be filed sufficiently in advance of the effective date to permit Commission consideration before the tariff becomes effective, generally at least ten days before the effective date of the proposed tariff.

“Effective date,” “before the tariff becomes effective,” and “effective date of the proposed tariff” refer back to the Advice Letter and the entire set of accompanying proposed tariff changes. *See also* Rule 4 CCR 723-1-1210(a)(VIII) (“the Commission may suspend the proposed tariff’s effective date”; the “period of suspension shall not extend more that [210 days] beyond the proposed effective date of the tariff”); Rule 4 CCR 723-1-1305(c) (a decision that sets a proposed tariff for hearing “suspends the effective date of the proposed tariff”); Rule 4 CCR 723-1-1305(e) (“A suspension shall not extend more than 120 days beyond the proposed effective date of the tariff” unless extended by the Commission).

64. *Fourth*, adopting an interpretation of § 40-6-111(1)(b), C.R.S., that permits the Commission to suspend each phased-in component<sup>13</sup> of an MYRP tariff and to hold a separate hearing on each suspended phased-in component would be contrary to the principles of statutory interpretation. Such an interpretation: (a) would lead to an absurd result (*e.g.*, each phased-in component would have a separate 210-day maximum suspension period commencing on the proposed effective date of the phased-in component); (b) would be antagonistic to other statutory provisions (*e.g.*, the 210-day maximum suspension period would be rendered meaningless; the file and suspend ratemaking process would be applied to a tariff provision that had already gone into effect by operation of law on the effective date of the proposed tariff sheet); and (c) would be contrary to the legislative intent, as evidenced in § 40-6-111(1), C.R.S., to provide certainty as to when changes in rates, terms, and conditions become effective.

65. *Fifth* and finally, under the existing file and suspend system, the Commission has the flexibility to hold hearings and to issue administratively-final decisions on tariff filings after

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<sup>13</sup> For example, in a single tariff sheet with a stated proposed effective date, a utility proposes to increase rates effective on January 1 of each of three future years.

the suspension period expires.<sup>14</sup> Section 40-6-111(2)(a)(I), C.R.S. Thus, if the Commission needs additional time to hear and to decide an MYRP tariff filing, it already has that authority. As a result, the Commission does not need to adopt a new statutory interpretation of the statutes governing file and suspend ratemaking.

66. With respect to *public policy implications*, the Utilities assert:

67. In approving the Electric MYP Settlement in Proceeding No. 11AL-947E, the Commission made the following observations regarding some of the benefits of the MYP aspects of the settlement:

The fact that the Settlement Agreement results in certainty regarding Public Service's non-energy electric rates is an important aspect of the Settlement Agreement. Certainty over rates assists the residential customers in budgeting for future rate changes. Likewise, it is advantageous for the commercial and industrial customers. This allows existing businesses to plan their future utility costs with more certainty. It also provides new businesses in Public Service's Colorado territory with information regarding not only current commercial electric rates, but also where those rates will be over the next two years.

\* \* \*

The multi-year aspect of the Settlement Agreement is another commendable aspect with respect to regulatory filings. Given that inflation and interest rates are low and stable, the Settlement Agreement takes advantage of that environment. Annual filings by utilities are not as needed or as productive during such economic times. This should result in lower regulatory expenses for both Public Service and the stakeholder groups concerned about electric rates. The "stay-out" provision should also provide incentive for Public Service to strive for efficiency.

Decision No. C12-0494<sup>15</sup> at ¶¶ 75, 77.

68. The public interest is served when a public utility is encouraged to file an MYRP so that these benefits can be realized. Treating an MYRP tariff as anything other than a single

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<sup>14</sup> As discussed above, the proposed tariffs go into effect by operation of law.

<sup>15</sup> This Decision was issued on May 9, 2012, in Proceeding No. 11AL-947E, *In the Matter of Advice Letter No. 1597-Electric Filed by Public Service Company of Colorado to Revise its Colorado PUC No. 7-Electric Tariff to Implement a General Rate Schedule Adjustment and Other Changes Effective December 23, 2011*.

inseparable filing, therefore, would be unsound public policy because such treatment: (a) likely would discourage the filing of MYRPs because there would be no timely review of the MYRP *in toto*; (b) would deprive the utility and its customers of the MYRP benefits identified by the Commission in Proceeding No. 11AL-947E; and (c) would increase the time and resources expended by the Commission, the filing utility, and the intervenors because there would be multiple, and possibly duplicative, hearings.

69. In addition, keeping open the possibility that, in the future, the Commission might treat an MYRP filing as a separable filing would have the same negative effects because it would create uncertainty about how the Commission will treat MYRP filings in the future. By making a definitive ruling in this Proceeding, the Commission avoids this result and provides the utilities, intervenors, and the public with certainty about the treatment of MYRPs in the future.

70. Finally, MYRPs are complex and have many rates, terms, and conditions. This can make holding one hearing and issuing one decision in accordance with § 40-6-111, C.R.S. (including the 210-day timeframe), challenging. Nonetheless, the public policy benefits of recognizing that the utility has the right to file an MYRP and to have that plan considered as a whole outweighs the practical difficulties that may be encountered.

71. For these reasons, the Utilities ask that the Commission issue a declaratory ruling that, as a matter of law, if the Commission chooses to suspend an MYRP filing, the Commission must suspend the entire MYRP tariff filing for investigation and a single hearing.

## **(2) The Joint Parties.**

72. The Joint Parties take the position that, under the file and suspend ratemaking system: (a) an MYRP tariff filing, while a single filing in the sense that the utility submits one Advice Letter with accompanying proposed tariff sheets, is a collection of separate proposed

rates, terms, and conditions, some of which take effect years in the future; (b) § 40-6-111(1), C.R.S., does not restrict the Commission's authority to treat individual proposed rates, terms, and conditions as separate items for investigation and hearing even if the items are contained on a single tariff sheet;<sup>16</sup> (c) the Commission's suspension authority commences at the time a new rate, term, or condition "would otherwise go into effect" (§ 40-6-111(1)(b), C.R.S.), which is the stated future effective date of an individual rate, term, or condition within an MYRP tariff and is not the date the Commission orders the MYRP tariff suspended; (d) pursuant to § 40-6-111(1)(b), C.R.S., the Commission has the authority to order a distinct suspension period for each proposed rate, term, or condition that has a specified future effective date; and (e) as a result, the Commission has the discretion to suspend for investigation, to hold a separate hearing on, and to issue a separate decision on each MYRP proposed rate, term, or condition with a future effective date that is specific to the rate, term, or condition. The Joint Parties seek a declaratory ruling that, as a matter of law, the Commission has the authority to suspend for investigation and hearing an MYRP rate, term, or condition with a future effective date specific to the rate, term, or condition and, thus, is not required to treat a utility's proposed MYRP tariff as having one effective date applicable to the entire filing.

73. In support of this position, the Joint Parties advance three arguments: (a) one based on the plain meaning of the file and suspend statutes; (b) one based on interpretation of the file and suspend statutes; and (c) one based on public policy implications. The following sets out these arguments.

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<sup>16</sup> For example, in the PSCo Gas Rate Case, the Company proposed three separate rate increases; each had a different date on which it would go into effect. The three proposed rate increases were contained on one tariff sheet.

74. With respect to the *plain language of the applicable statutes*, the Joint Parties assert:

75. Under the file and suspend ratemaking system, the utility's tariff filing commences the proceeding. If the Commission is of the opinion that a component or an element of the filing should be investigated, the Commission suspends the filing by setting it for investigation and hearing.

76. Section 40-6-111(1)(b), C.R.S., states:

(b) Pending the hearing and decision thereon, in the case of a public utility other than a rail carrier, *such rate*, fare, toll, rental, *charge, classification, contract, practice, rule, or regulation* shall not go into effect; but the period of suspension of such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation shall not extend beyond one hundred twenty days *beyond the time when such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation would otherwise go into effect* unless the commission, in its discretion, and by separate order, extends the period of suspension for a further period not exceeding ninety days.

(Emphasis supplied.)

77. Given the consistent use of singular nouns (*i.e.*, “rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation”), the plain language of § 40-6-111(1)(b), C.R.S., is clear that: (a) the Commission has the authority to suspend individual rates, terms, and conditions within an MYRP tariff filing because the statute refers to a single one-time change to a utility's rates, terms, or conditions of utility service; (b) the Commission has broad discretion to determine whether to suspend the effective date of proposed rates, terms, and conditions and

[t]his discretion to determine *whether* to suspend a given rate is not limited by the suspension periods in C.R.S. § 40-6-111. Rather, it is vested solely with the Commission, which may choose to suspend rates as it deems necessary for investigative purposes. ... The fact that Public Service has submitted three rates in one advice letter here does not limit that discretion, and there is no statutory provision requiring that the Commission consider all three rates contained in



Public Service's MYP at once. The Commission may, if it so chooses, exercise its broad authority to suspend each rate individually. *See* C.R.S. § 40-3-111.

Initial Legal Brief [of the Joint Parties] on the Applicability of C.R.S. § 40-6-111(1)(b) to Public Service's Proposed Multi Year Rate Plan (filed on September 20, 2013 in the PSCo Gas Rate Case) (Joint Parties' September 2013 Legal Brief) at 11 (emphasis in original; some internal citations omitted); (c) the Commission suspension authority commences on the date a proposed individual rate, term, or condition "would otherwise go into effect," which is consistent with the relevant language of § 40-6-111(2)(a)(III), C.R.S. ("All such [rates, terms, and conditions] ... not so suspended, on the effective date thereof, ... shall go into effect[.]"); (d) if a rate, term, or condition has a unique and specific future effective date (*i.e.*, a date on which the provision becomes operative) set out in the MYRP tariff, the 210-day suspension period is measured from that unique and specific future effective date; and (e) as a result, the Commission has the authority to suspend and to set for hearing an individual rate, term, or condition before it goes into effect by operation of law on the unique and specific future effective date contained in the MYRP tariff.

78. In addition, § 40-6-111(1)(b), C.R.S., references individual rates, terms, and conditions. It does not include tariff or tariffs. The plain language of this provision contains no indication that an MYRP tariff filing must be considered as a whole and at one time.

79. Further, consistent with the purpose of § 40-6-111(1), C.R.S., the suspension period is designed to give the Commission adequate time within which to hold a "hearing concerning the propriety of such rate, fare, toll, rental, charge, classification, contract, practice, rule, or regulation" (§ 40-6-111(1)(a), C.R.S.). Thus, the Commission's authority to suspend each rate, term, and condition is discretionary. In the exercise of that discretion, the Commission may choose to set an entire MYRP tariff filing for hearing at one time or may choose to hold a

series of hearings. Even if the Commission elects to hold a series of hearings, the Commission may issue a decision on MYRP rates, terms, and conditions with future, specific effective dates sooner than the expiration of the suspension period allowed by law.

80. Moreover, that a utility elects to file an MYRP tariff with multiple components and elements and then asks the Commission to treat the MYRP filing as an integrated whole is not controlling. For the reasons discussed above, each proposed change with a specific future effective date is a separate rate, term, or condition for purposes of § 40-6-111(1)(b), C.R.S., and each has a separate effective date. As a result, the statute allows -- but does not require -- the Commission to treat the MYRP tariff's constituent parts as individual rates, terms, or conditions if the Commission deems that treatment necessary in order to perform an adequate examination. Any other reading of § 40-6-111, C.R.S., renders the Commission's ratemaking authority subservient to the utility's intent that a MYRP filing be considered as an integrated whole.

81. Further, once § 40-3-104, C.R.S., notice has been given about the utility MYRP filing, that notice is sufficient for all further Commission hearings on that filing. There is no requirement that there be separate § 40-3-104, C.R.S., notice given for each component or element of an MYRP that the Commission sets for separate hearing.

82. Finally, nothing in § 40-6-111(1), C.R.S., precludes separate hearings on the different rates, terms, and conditions that a utility proposes as stepped (or phased-in) changes in its MYRP tariff filing.

83. With respect to the *statutory interpretation of the applicable statutes*, the Joint Parties assert:<sup>17</sup>

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<sup>17</sup> Although not clear from the filings, the Joint Parties appear to be of the opinion that the relevant statutes are clear and, therefore, no interpretation is necessary. They make the statutory construction and interpretation argument in the event the Commission finds it necessary to interpret the relevant statutes.

84. *First*, the purpose of the file and suspend ratemaking process is to allow the Commission to perform an examination of the utility's proposal in order to determine whether the Commission should approve, disapprove, or modify the proposal.

The Commission has authority to suspend the ... [rates, terms, and conditions with future effective dates] 210 days after those [rates, terms, and conditions] are proposed [to] go into effect. This is because the suspension period in the statute applies to individual *rates*, and not to *rate filings* as a whole (e.g., MYPs). Indeed, for the statute to retain its purpose in the face of a MYP, it must be read to require the possibility of multiple suspension periods co-extensive with the multiple effective dates in the plan.

The suspension period in the statute is linked to the Commission's power to conduct a hearing in order to determine the propriety of a rate. *See* C.R.S. § 40-6-111(1)(a) & (b). The suspension period strikes a balance between allowing the Commission sufficient time to consider filed rates, and giving regulated entities certainty about when they may put their rates into effect. Allowing multiple rates to be shoehorned into one suspension period would upset this balance. In such a situation, the Commission could be required to consider -- in the same time it usually considers one rate -- MYPs containing a theoretically unlimited number of rates. Such a result would undermine the Commission's ability to fully investigate the utility's filing and establish reasonable rates.

Joint Parties' September 2013 Legal Brief at 8-9 (emphasis in original; footnote omitted).

85. *Second*, the better interpretation of § 40-6-111, C.R.S., is: the effective date of an MYRP rate, term, or condition is the date that the specific rate, term, or condition goes into effect or becomes operative for ratepayers, and the Commission may suspend a proposed rate, term, or condition based on its specific proposed effective date. This interpretation is consistent with the commonly-accepted definition and understanding of effective; recognizes that the elements and components of an MYRP may go into effect at different times; and is consistent with the "would otherwise go into effect" language of § 40-6-111, C.R.S. In addition, the General Assembly did not use consistent terms through § 40-6-111, C.R.S.; this use of different language is presumed to have been done for a reason; and any interpretation of the statute must take this into account. The Joint Parties' interpretation gives effect to and reconciles the legislature's use of different

terms in the statute. Finally, interpreting the statute to require the Commission to suspend as a whole an MYRP tariff filing would be contrary to the logical interpretation of § 40-6-111, C.R.S., and would artificially restrict the Commission's suspension authority.

86. *Third*, the

language [of § 40-6-111(1)(a), C.R.S.,] used to create the suspension authority evidences the General Assembly's intent to provide the Commission with suspension authority in the context of individual rates. The words used to describe what may be suspended strongly indicate a presumption of individual rates: the items listed that may be suspended are "rate, fare, toll, rental, charge, classification, contract, price, rule, or regulation." Noticeably absent from this list is "multi-year rate plan," or any similar multi-rate type of filing.

Joint Parties' September 2013 Legal Brief at 6. To assure consistent application of the file and suspend ratemaking process, the Commission interpretation of § 40-6-111(1), C.R.S., should reflect this legislative intent and should not allow a utility to circumvent the applicable suspension period by combining into one MYRP tariff filing multiple rates, terms, and conditions with individual effective dates.

87. *Fourth* and finally, the Commission's rules are consistent with the interpretation that the Commission may suspend individual rates, terms, and conditions if they have effective dates unique to them. Rule 4 CCR 723-1-1305(e) confirms that "[a] suspension shall not extend more than 120 days beyond the proposed *effective date* of the tariff ... unless" the Commission extends the period by another 90 days (emphasis supplied).

88. With respect to *public policy implications*, the Joint Parties assert:

89. It is the Commission's duty and obligation to assure that rates, term, and conditions of utility service are just, reasonable, and not unduly discriminatory. In the exercise of that duty, the Commission serves the public interest. In carrying out its ratemaking duties and responsibilities, the Commission must have the authority to apply a separate suspension period to

each proposed MYRP rate, term, or condition in order to protect ratepayers. If this were not the case, the Commission's ability fully to investigate the propriety of rates, terms, and conditions would be substantially diminished, to the detriment of the public interest.

90. The statutory interpretation advocated by the Joint Parties neither restricts the ability of a utility to file an MYRP nor dictates the content of a utility's MYRP tariff filing. The utility is able to file an MYRP as it sees fit. The statutory interpretation addresses only what the Commission may do when an MYRP is filed.

91. The Commission has the discretion to suspend individual MYRP rates, terms, and conditions for investigation and hearing. It is important to remember, however, that the Commission need not do so. On a case-by-case basis, the Commission can decide the best approach given the utility MYRP filing.

92. For these reasons, the Joint Parties ask that the Commission issue a declaratory ruling that, as a matter of law, if the Commission chooses to suspend an MYRP filing, the Commission may suspend for investigation and hearing an individual MYRP rate, term, or condition that has an effective date that is specific to it.

**b. Discussion and Ruling.**

93. To determine how to treat an MYRP filing in the context of the Colorado file and suspend ratemaking process, one must determine what the Commission may suspend for investigation and hearing and when the Commission may suspend it. This involves understanding the process established in the statutes, which in turn involves a statutory analysis.

94. The first step in a statutory analysis is examination of the plain language of the statute. If the language is clear, the language is applied as written and the analysis is at an end.

If the statutory language is ambiguous or otherwise unclear, the second step in statutory analysis is used: one interprets the statutory language and applies the statute as interpreted.

95. In applying the statutory analysis process to determine how an MYRP tariff filing fits within and is treated within the § 40-6-111, C.R.S., ratemaking process, one must examine the plain language of § 40-6-111, C.R.S., to determine whether the language is clear and unambiguous.

96. In the context of an MYRP tariff filing, § 40-6-111, C.R.S., does not lend itself to a plain meaning of the statute analysis for two principal reasons. First, the statutory language of § 40-6-111, C.R.S., is inconsistent in its use of singular and plural nouns. Section 40-6-111(1), C.R.S., refers to “rate, ... charge, classification, ... practice, rule, or regulation[.]” and § 40-6-111(2), C.R.S., refers to “rates, ... charges, classifications, ... practices, or rules[.]” Second, § 40-6-111, C.R.S., contains, but does not define, the key terms “effective date” and “the time when [a rate, term, or condition] would otherwise go into effect[.]” The statutory language is critical to determining how the statute applies in the MYRP context, contains ambiguities (or is otherwise unclear), and can be interpreted (or read) in more than one way.

97. Consequently, to determine how to treat an MYRP tariff filing pursuant to § 40-6-111, C.R.S., one must construe or interpret the statute in order to determine which of the possible readings is the one most likely intended by the General Assembly when it enacted the statute. That is, one must interpret or construe the ambiguous or unclear statutory language to effectuate the legislative intent.

98. When engaging in statutory interpretation, one applies these well-known principles: (a) “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, [are] construed accordingly” (§ 2-4-101, C.R.S.);

(b) the “singular includes the plural, and the plural includes the singular” (§ 2-4-102, C.R.S.); and (c) when it enacts a statute, the General Assembly is presumed to intend the “entire statute ... to be effective[,]” a “just and reasonable result[,]” and a “result feasible of execution” (§§ 2-4-201(1)(b), (c), (d), C.R.S.). In addition and as pertinent here, if “a statute is ambiguous, ... in determining the intention of the general assembly, [one] may consider among other matters: .. [t]he consequences of a particular construction[] [and] [t]he administrative construction of the statute[.]” Sections 2-4-203(1)(e), (1)(f), C.R.S. Finally, if “separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, [one] should adopt that construction which results in harmony rather than that which produces inconsistency.” *Colorado-Ute Electric Association*, 760 P.2d at 685.

99. The ALJ applies these principles in arriving at her declaratory ruling in this Proceeding and discusses each below. Admittedly, there is significant overlap when these principles are applied.

100. First, “[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, [are] construed accordingly.” Section 2-4-101, C.R.S.

101. As relevant here, the Commission has rules that contain the technical or particular meaning that the Commission has given to the important terms at issue: (a) Rule 4 CCR 723-1-1004(ii) defines tariff and explicitly states that a tariff contains *all* rates, terms, and conditions “collected or enforced or *to be collected or enforced*” (emphasis supplied); (b) Rule 4 CCR 723-1-1210(a)(VII) requires a protest to a proposed tariff to be “filed sufficiently in advance of the effective date to permit Commission consideration before *the tariff becomes effective*” (emphasis supplied); (c) Rule 4 CCR 723-1-1210(VIII) states that “the Commission

may suspend the *proposed tariff's effective date*" and that "[p]ending hearing and decision, the *proposed tariff* shall not go into effect" (emphasis supplied); (d) a utility must file an Advice Letter, which introduces the utility's proposal, with proposed tariff changes, and Rule 4 CCR 723-1-1210(c)(II)(H) requires an Advice Letter to include "*the tariff's or tariff page's proposed effective date*" (emphasis supplied); (e) Rule 4 CCR 723-1-1305(c) states that a Commission decision to set a hearing "suspends the *effective date of the proposed tariff*" (emphasis supplied); and (f) Rule 4 CCR 723-1-1305(e) states the period of suspension shall not exceed 210 days "*beyond the proposed effective date of the tariff*" (emphasis supplied). The Commission Rules are consistent with and implement the balance struck in the structure of the ratemaking process: the utility controls the content of its tariff filing, including the effective date; and the Commission may suspend and set for hearing only the entire tariff filing, even if it contains rates, terms, and conditions that have future effective dates.

102. Taken together, these Rules support the Utilities' interpretation that: (a) a proposed MYRP tariff may contain rates, terms, and conditions that go into effect at different times in the future; (b) the entire MYRP tariff filing has a specific effective date; (c) the filing utility establishes that effective date in its Advice Letter; (d) the Commission suspends the entire MYRP tariff filing for one hearing; and (e) the suspension period is calculated from the proposed effective date of the MYRP tariff as stated in the Advice Letter.

103. The Joint Parties' interpretation that the Commission may set for hearing an individual MYRP tariff provision based on the provision's specific effective date finds no support in the Commission Rules. The Rules are clear that the Commission suspends for investigation and hearing the entire tariff (*i.e.*, all the tariff sheets) that accompanies an Advice Letter and that "effective date" means the date as stated in the Advice Letter. In addition, the



reference in Rule 4 CCR 723-1-1210(c)(II)(H) to the effective date of a tariff page does not support the Joint Parties' interpretation that the Commission may set for separate hearing each individual rate, term, or condition because the Joint Parties' interpretation would allow the Commission to set for investigation and hearing a single rate, term, or condition found on a proposed tariff sheet that contains numerous rates, terms, or conditions.

104. On balance, this statutory interpretation factor weighs in favor of the Utilities' interpretation.

105. *Second*, the "singular includes the plural, and the plural includes the singular." Section 2-4-102, C.R.S.

106. Application of this statutory interpretation principle clarifies that the use of the singular in § 40-6-111(1)(b), C.R.S., does not mean that the Commission suspends an individual rate, term, or condition. If the statute is read substituting the plural for the listed singular nouns, it becomes clear that the suspension includes all rates, terms, and conditions contained in the MYRP tariff filing and that the Joint Parties' interpretation of § 40-6-111(1)(b), C.R.S., is too restrictive.

107. On balance, this statutory interpretation factor weighs in favor of the Utilities' interpretation.

108. *Third*, when it enacts a statute, the General Assembly is presumed to intend the "entire statute ... to be effective[.]" a "just and reasonable result[.]" and a "result feasible of execution[.]" Sections 2-4-201(1)(b), (c), (d), C.R.S.

109. The Utilities' interpretation effectuates the legislature's intent because: (a) the interpretation is consistent with and allows all provisions in the Public Utilities Law to be effective (*e.g.*, discussion *infra* regarding judicial review of a Commission decision on an

MYRP); (b) suspending the utility's proposed tariff in its entirety and for one hearing results in a ratemaking process that applies equally in all circumstances, whether the tariff filing seeks to change one provision in an existing tariff or to introduce an entire new service or program (e.g., MYRP); and (c) it gives full effect to the balance struck in § 40-6-111(1)(b), C.R.S., between the utility's interest in having enforceable tariffs in place within a reasonable period of time and the public interest in assuring that the Commission has sufficient time to investigate whether proposed tariffs are just, reasonable, and not unduly discriminatory.

110. The Joint Parties' interpretation does not effectuate the legislature's intent when it enacted the file and suspend ratemaking scheme because (for example): (a) as discussed in detail *infra*, prompt judicial review of a Commission decision on an MYRP is not available; (b) the ratemaking process hinges on whether the utility filed an MYRP tariff or some other type of tariff, and the resulting lack of certainty as to the process to be used is not in the public interest; and (c) the suspension period in § 40-6-111, C.R.S., is rendered meaningless.<sup>18</sup>

111. In this regard, the ALJ finds unpersuasive the argument that § 40-3-111(2)(a), C.R.S., permits the Commission to suspend for investigation and hearing only a portion of an MYRP tariff filing.

112. Section 40-3-111(2)(a), C.R.S., provides:

The [Commission] has the power, *after a hearing upon its own motion or upon complaint*, to investigate a single rate, ... charge, classification, rule, ... or practice, or the entire schedule of rates, ... charges, classifications, rules, ...

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<sup>18</sup> The ALJ is aware that the Joint Parties assert that, if their interpretation of § 40-6-111, C.R.S., is adopted, the Commission has the discretion not to use its authority to set individual rates, terms, and conditions for separate hearing. The assertion misses the point that it is the possibility that the Commission may set individual rates, terms, and conditions for separate hearings that is problematic.

and practices of any public utility; and to establish new rates, ... charges, classifications, rules, ... practices, or schedules, in lieu thereof.

(Emphasis supplied.) This provision is part of § 40-3-111, C.R.S., which sets out the process to be followed when either the Commission *sua sponte* or a third party initiates a complaint against a utility and that complaint involves *existing* rates, terms, and conditions, including those that have gone into effect by operation of law. In a § 40-3-111, C.R.S., case, the complainant (whether the Commission or a third party) bears the burden of proof. It is reasonable and appropriate, therefore, that the complainant selects the tariff provisions on which its complaint is based; this is the purpose of § 40-3-111(2)(a), C.R.S. For these reasons, § 40-3-111(2)(a), C.R.S., is not applicable in a § 40-6-111, C.R.S., file and suspend ratemaking proceeding and, thus, is not applicable to an MYRP tariff filing.

113. In an MYRP tariff proceeding, as discussed above, § 40-6-111, C.R.S., is the governing statute and establishes the procedures to be followed. Section 40-6-111, C.R.S., contains no language similar to § 40-3-111(2)(a), C.R.S. If it intended the Commission to be able to suspend only a portion of a utility tariff filing for investigation and hearing, the General Assembly could have included in § 40-6-111(1), C.R.S., a provision similar to § 40-3-111(2)(a), C.R.S. That the General Assembly did not do so is telling. The Commission should not read § 40-3-111(2)(a), C.R.S., into the file and suspend ratemaking process.

114. Even when one takes into consideration the Commission's plenary authority over public utility ratemaking, this is the correct result because: (a) reading § 40-3-111(2)(a), C.R.S., into § 40-6-111(1), C.R.S., would upset the balance in the § 40-6-111, C.R.S., ratemaking process in which the utility files the proposed tariff it wishes to implement and the Commission prevents the proposed tariff from going into effect by suspending it for investigation and hearing if one or more provisions of the proposed tariff may be contrary to law;

(b) § 40-3-111(2)(a), C.R.S., applies when tariffs are in effect; as a result, the exact language of the entire tariff and of each provision within the tariff is known and the effect or impact of changing one or more provisions can be assessed in the context of the entire tariff; and (c) the exact tariff language that will result from § 40-6-111, C.R.S., ratemaking is not known until the Commission issues its final decision; consequently, the effect or impact of changing one or more proposed tariff provisions cannot be assessed in the context of the entire tariff.

115. On balance, this statutory interpretation factor weighs in favor of the Utilities' interpretation.

116. *Fourth*, if “a statute is ambiguous, ... in determining the intention of the general assembly, [one] may consider among other matters: ... [t]he consequences of a particular construction[.]” Section 2-4-203(1)(e), C.R.S.

117. Adoption of the Utilities' interpretation, as pertinent here, will have no discernable effect on, and will continue, the Commission's current practices with respect to ratemaking; these practices apply in MYRP tariff cases. Thus, for example, after suspending a tariff filing for investigation and hearing: (a) following suspension, the Commission can remove from consideration one or more provisions (*i.e.*, rates, terms, and conditions) in the utility's suspended tariff filing, as the Commission removed from consideration Public Service's request for approval of decoupling in a recent rate case (Decision No. C14-1331-I<sup>19</sup>); (b) the Commission can adopt, either on its own motion or at the request of a party, appropriate procedures within an

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<sup>19</sup> Decision No. C14-1331-I was issued on November 5, 2014 in Proceeding No. 14AL-0660E, *In the Matter of Advice Letter No. 1672-Electric Public Service Company of Colorado to Revise the General Rate Schedule Adjustment (GRSA) Rider Applicable to All Electric Base Rate Schedules and Revise the Transmission Cost Adjustment (TCA) to Remove Costs That Have Been Shifted to Base Rates to Become Effective July 18, 2014*, and Proceeding No. 14A-0680E, *In the Matter of the Application of Public Service Company of Colorado for Approval of Its Arapahoe Decommissioning and Dismantling Plan*.

individual MYRP proceeding, as the Commission did in the fully-litigated PSCo Gas Rate Case; and (c) the Commission can take the time necessary to issue its administratively-final decision on an MYRP tariff filing even if the decision is issued after the expiration of the suspension period. In short, without changing its current practices, the Commission has the flexibility necessary for a thorough investigation of, and full evidentiary hearing on, an MYRP tariff filing.

118. Adoption of the Joint Parties' interpretation, as pertinent here, will result in a statutory interpretation that changes the Commission's current procedures *vis-à-vis* § 40-6-111, C.R.S., ratemaking. If adopted, the Joint Parties' interpretation will have at least these effects and consequences,<sup>20</sup> in addition to those addressed elsewhere in this Decision: (a) in the file and suspend ratemaking process, the utility bears the burden of proof with respect to its proposed tariff changes; the Commission can disassemble an MYRP tariff filing, which will leave the utility no longer in control of its own filing; and this is inconsistent with the basic premise of the file and suspend ratemaking process; (b) if one MYRP tariff page contains several rates, terms, and conditions and each of those has a distinct future effective date, neither the utility nor its ratepayers will know which (if any) of the MYRP rates, terms, and conditions will be in effect until the arrival of the future effective date because the Commission can set any of those individual rates, terms, and conditions for separate hearing; and this creates uncertainty and confusion; (c) one public notice pursuant to § 40-3-104, C.R.S., suffices for the entire MYRP ratemaking process,<sup>21</sup> no matter how long the process takes to complete; and this undercuts the

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<sup>20</sup> The ALJ is aware that the Joint Parties assert that the Commission has the discretion not to exercise its ratemaking authority as interpreted by the Joint Parties and, thus, may hold one hearing and issue one decision on an MYRP filing. The ALJ's analysis of consequences rests, as it must, on an examination of the consequences should the Commission choose to exercise its ratemaking authority as interpreted by the Joint Parties.

<sup>21</sup> This is an assertion made by the Joint Parties in support of their interpretation. To be clear, in stating this assumption, the ALJ does not make -- and does not intend to make -- any determination on the issue of whether, in fact, one notice would suffice.

purpose and dilutes the effectiveness of the public notice due to the passage of time; and (d) because a utility will not know which (if any) of the MYRP provisions with specific effective dates the Commission will set for hearing and which the utility may implement on the effective date stated in the proposed MYRP, the utility will prepare for effective date implementation of the MYRP tariff provisions and will incur the associated costs; and, if the Commission sets for hearing an MYRP rate, term, or condition after the utility incurs implementation costs associated with that provision, the costs may be recoverable from ratepayers irrespective of whether the MYRP rate, term, or condition goes into effect.<sup>22</sup>

119. On balance, this statutory interpretation factor weighs in favor of the Utilities' interpretation.

120. *Fifth*, if “a statute is ambiguous, ... in determining the intention of the general assembly, [one] may consider among other matters: ... [t]he administrative construction of the statute[.]” Section 2-4-203(1)(f), C.R.S.

121. The agency's statutory interpretation can be discerned from an agency's rules and from its processes and practices.

122. The Commission's rules and how they reflect the Commission's statutory interpretation are discussed *supra*.

123. The Commission has a long-standing and consistent practice that is indicative of the Commission's statutory interpretation: all tariff sheets appended to an Advice Letter are suspended for investigation and a single hearing, and the suspension period commences on the effective date of the proposed tariff sheets as stated in the Advice Letter. That the Commission

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<sup>22</sup> To be clear, by identifying this consequence, the ALJ does not make -- and does not intend to make -- any determination on the issue of whether cost recovery would be available.

applies this interpretation uniformly across all tariff filings, no matter how many individual proposals are contained in the filing, is particularly instructive. *See, e.g.*, Proceeding No. 14AL-0660E (in addition to a request for an increase in base rates and a reduction to the Transmission Cost Adjustment, the tariff filing requested: (a) institution of a Clear Air-Clean Jobs Act rider; (b) implementation of a revenue decoupling mechanism; (c) substantive revision of the TCA tariff; (d) institution of an Equivalent Availability Factor Performance Mechanism (EAFPM) based on the annual performance of a specified group of generating units; and (e) changes to the Energy Cost Adjustment tariff to include the terms and conditions under which the EAFPM would be applied).

124. Somewhat undercutting reliance on the Commission's past practices, however, are these points: (a) the Commission has had only one MYRP filing; and (b) the application of the Commission's rules and practices to a MYRP filing presents new and unique issues.

125. Nonetheless, on balance, this statutory interpretation factor weighs in favor of the Utilities' interpretation.

126. *Sixth* and finally, if "separate clauses in the same statutory scheme may be harmonized by one construction, but would be antagonistic under a different construction, [the Commission] should adopt that construction which results in harmony rather than that which produces inconsistency." *Colorado-Ute Electric Association*, 760 P.2d at 685.

127. The Joint Parties' interpretation that the Commission can suspend, hold separate hearings on, and issue separate decisions on individual rates, terms, or condition at different times is incompatible with, and would have a significant and adverse effect on, the ability of a party to obtain timely judicial review of a Commission's decision on the MYRP tariff filing.

128. Section 40-6-115, C.R.S., provides for judicial review of Commission decisions. In a context that is similar to the process advocated by the Joint Parties, the Colorado Supreme Court has considered the issue of whether judicial review is available in advance of an administratively-final Commission decision. In a Commission proceeding involving determining and awarding geographic service territories among several utilities, the Commission held an evidentiary hearing on each of several phases of the case and issued a substantive decision following each phase. The Commission also issued a final decision. On judicial review of its final decision in the case, the Commission argued that one of the interim substantive decisions constituted a final judgment as to one of the parties and that the party was required to appeal that decision immediately or not at all.

129. The Colorado Supreme Court disagreed. In finding against the Commission on this point and determining that § 40-6-115, C.R.S., judicial review is not available for interim (or interlocutory) Commission decisions, the Court said:

We are of the opinion, however, that [the decision at issue] is interlocutory, not final, as it was merely a part of the continuing litigation on this problem. ... Unless and until an administrative matter is reduced to a final judgment, settling all issues between the parties, [the Court] will not review it. ... The assignment of separate numbers by the Commission to its decisions dealing with different phases of the same proceeding did not create two separate proceedings.

*Public Utilities Commission of Colorado v. Poudre Valley Rural Electric Association, Inc.*, 173 Colo. 364, 369, 480 P.2d 106, 108 (1970) (internal citations omitted).

130. If the Joint Parties' interpretation were adopted, there would be no administratively-final Commission decision until the Commission issued its decision on the last of the individual rates, terms, or condition that were separately investigated and set for hearing in the MYRP proceeding. The effect would be to preclude judicial review of the entire MYRP filing until the Commission issues its last decision, an event which could be well into the later



years of an MYRP. This outcome is contrary to the public interest as it has the potential to delay, if not preclude, timely judicial review of a Commission decision on an MYRP and adversely affects the ability of a party to obtain judicial review.

131. The Joint Parties' interpretation that the Commission may suspend for investigation and hearing an individual proposed rate, term, or condition with a specific and distinct effective date not later than the specific and distinct effective date exacerbates the problem because, under this interpretation, the Commission's final decision on an MYRP filing might not issue until 210 days after the latest specific and distinct effective date of an individual rate, term, or condition.

132. Adopting the Joint Parties' interpretation would create an irreconcilable inconsistency between § 40-6-111, C.R.S., MYRP ratemaking and § 40-6-115, C.R.S., judicial review of the Commission's decision on an MYRP. These statutes cannot be harmonized under the Joint Parties' interpretation.

133. Adopting the Utilities' interpretation creates no inconsistency because the Commission would hold one proceeding on the entire MYRP tariff filing and would issue one administratively-final decision on that filing. An adversely affected party could seek timely judicial review of the final Commission decision. The statutes are harmonized under the Utilities' interpretation.

134. Given the seriousness of the adverse impact on the ability of a party to obtain judicial review of the Commission's MYRP administratively-final decision, the ALJ does not address other inconsistencies that the adoption of the Joint Parties' interpretation would produce.

135. On balance, this statutory interpretation factor weighs in favor of the Utilities' interpretation.

136. For these reasons, the **second declaratory ruling** is: (a) an MYRP has a single effective date that applies to the entire filing; (b) if the Commission elects to suspend an MYRP tariff for investigation and hearing, the Commission suspends the entire MYRP tariff filing; and (c) if the Commission elects to suspend an MYRP tariff for investigation and hearing, the suspension period commences on the proposed effective date of the entire MYRP tariff as stated in the filing utility's Advice Letter.

137. In arriving at her decision in this matter, the ALJ considered the relevant law, the arguments of counsel, and the entire record. To the extent this Decision does not address an argument, the ALJ found the argument to be unpersuasive.<sup>23</sup>

## **B. Rulemaking.**

138. In Decision No. C14-0302 at ¶ 6, the Commission directed the ALJ "to address whether the Commission should open a rulemaking to codify its rulings on the merits of [the] legal issues." For the reasons set out below, the ALJ recommends that there be no formal rulemaking at this time and also recommends that the Commission not issue a policy statement addressing either MYRPs or future test years (FTYs).

### **1. The Parties' Arguments.**

139. In this Proceeding the Parties filed both opening briefs that state and support the filing party's position and response briefs that address the arguments presented by other parties. For ease of reading and comprehension, the following discussion consolidates into one presentation the positions contained in the opening and response briefs. As necessary for clarity,

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<sup>23</sup> For example, the Parties discuss statutes and rules in other jurisdictions. This Proceeding pertains to Colorado statutes and rules. As a result, the ALJ did not find persuasive arguments based on federal statutes and interpretations of those statutes; other states' statutes; or other states' regulations.

the discussion will differentiate arguments presented in opening briefs from those presented in response briefs.

**a. The Utilities.**

140. Atmos, Black Hills, RMNG, and SourceGas generally support PSCo's position with respect to rulemaking. Unless the context indicates otherwise, in this Decision, Public Service's position is the Utilities' position.

141. Public Service recommends that the Commission commence a rulemaking to develop rules that include both MYRPs and FTYs. Specifically, Public Service recommends that the Commission consider issuing rules that: (a) specify the contents of an Advice Letter filing that includes proposed rates based on an FTY or that includes a proposed MYRP (or both); (b) specify the elements that a utility must include in an FTY or MYRP filing; (c) specify the types of information that a utility must include in an MYRP filing; (d) specify the types of information that a utility must include in an FTY (whether stand-alone or part of an MYRP) filing; and (e) address the standards the Commission will use to evaluate the utility's FTY or MYRP filing.<sup>24</sup>

142. The Company makes several arguments and assertions in support of commencing an FTY and MYRP rulemaking.

143. *First*, Public Service acknowledges the Commission's authority over ratemaking (discussed above) and the Commission's § 40-2-108, C.R.S., rulemaking authority. Public Service also acknowledges that any rule adopted by the Commission must comport with and be

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<sup>24</sup> Public Service also filed suggested rules offered purely as starting points for discussion. The ALJ does not discuss these suggested rules because the ALJ finds that the Commission should not initiate a rulemaking at this time.

consistent with applicable statutory requirements. The Company asserts that a rule that addresses the filing of FTYs and MYRPs would be an exercise of the Commission's broad ratemaking authority, not an action that limits that authority.

144. *Second*, a utility spends considerable time and effort preparing a rate case for filing. While the Commission recognizes that customers and utilities may benefit from an MYRP,<sup>25</sup> a utility may be reluctant to expend the resources necessary to file an FTY-based rate case or an MYRP-based rate case due to uncertainty surrounding what the filing should contain, the standards that the Commission will use to evaluate the proposed FTY or MYRP, or both. A rule would alleviate at least some of that uncertainty, which may encourage an interested utility to make an FTY or MYRP rate case filing.

145. *Third*, intervenors in an FTY-based rate case or an MYRP-based rate case are uncertain about what a filing should contain, whether a utility's filing is sufficient, how the Commission will evaluate the filing, or all three. As a result of that uncertainty, in recent rate cases in which a utility has sponsored an FTY or MYRP, the parties have engaged in significant debate before the Commission about the type of information that a utility should file in support of its FTY or MYRP, the sufficiency of the information the utility filed in support of its FTY or MYRP, or both. When this debate occurs, the Commission must issue a decision addressing these issues, which delays the intervenors' investigation of the rate filing and results in the expenditure of Commission and party resources. A rule would alleviate at least some of the intervenors' uncertainty, would assure that the Commission and the intervenors have the information at the commencement of the ratemaking proceeding, would promote timely review

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<sup>25</sup> The Company cites as an example Decision No. C12-0494 at ¶¶ 75, 77. These paragraphs are quoted in this Decision *supra*.

and evaluation of the utility's FTY or MYRP filing (*i.e.*, facilitate consideration of the filing within the § 40-6-111, C.R.S., 210-day timeframe), and would preserve resources.

146. *Fourth*, by providing clear standards for evaluation, a rule may encourage a utility to make an innovative FTY or MYRP filing because, at the time it makes the filing, the utility will know the standards under which the Commission will evaluate the filing.

147. *Fifth*, Public Service acknowledges that, as it does at present, the Commission may develop standards and may determine filing requirements on a case-by-case basis. The Company states that continued reliance on this approach will not address the issues identified above and will do little to encourage an interested utility to file an innovative FTY-based rate case or MYRP-based rate case.

148. *Sixth* and finally, notwithstanding the Commission's recognition that customers and utilities may benefit from an MYRP (at least), notwithstanding a utility's ability to control the content of its rate case filings, and notwithstanding that at present nothing prevents a utility from filing an innovative FTY-based rate case or MYRP-based rate case if it wishes to do so,

Public Service remains concerned that Staff, the OCC, intervening parties, and ultimately the Commission will not be receptive to FTY and MYP filings until there is some clarity around what should be included in such filings.

Public Service Reply Brief filed July 31, 2014 at 8.

149. For these reasons, the Company recommends that the Commission commence a rulemaking to address FTY filings and MYRP filings.

150. If the Commission determines that it will not commence a rulemaking at this time, Public Service makes this alternative recommendation: the Commission should issue a policy statement that provides general guidance to utilities concerning: (a) the contents of an Advice Letter filing that includes proposed rates based on an FTY or that includes a proposed MYRP

(or both); (b) the elements that a utility should include in an FTY or MYRP filing; (c) the types of information that a utility should include in an MYRP filing; (d) the types of information that a utility should include in an FTY (whether stand-alone or part of an MYRP) filing; and (e) the standards the Commission likely will use to evaluate the utility's FTY or MYRP filing. The Company states that, while not enforceable or binding, a policy statement might provide some of the benefits -- principally, it might reduce the uncertainty and hesitancy surrounding an FTY-based rate case filing or an MYRP-based rate case filing -- that a rule would provide.

**b. The Joint Parties.**

151. The Joint Parties recommend that the Commission not commence a rulemaking to develop rules that include both MYRPs and FTYs. The Joint Parties make several arguments and assertions in support of this recommendation.

152. *First*, even absent a rule on FTYs and MYRPs, the Commission has ample and undisputed authority to manage FTY and MYRP filings. In fact, as demonstrated by § 40-6-111(2)(a)(I), C.R.S., FTY ratemaking is not novel.

153. *Second*, utilities have filed FTY-based rate cases and at least one MYRP-based rate case without a rule that addresses the filing's content and the evaluation standards. Rules that dictate the form and content of FTY and MYRP filings may have the unintended consequence of encouraging a filing utility to create an FTY or MYRP to fit the rule. This could discourage creative approaches to FTYs and MYRPs.

154. *Third*, at present, utilities and other parties are free to propose innovative approaches to the rates, terms, and conditions of an MYRP. However, a "rulemaking could have the effect of limiting the definition of an [MYRP] and could lead to an overly prescriptive process that limits innovation." Joint Parties Opening Brief filed on June 30, 2014 at 8.

155. *Fourth*, no rule is necessary to facilitate the Commission's consideration and evaluation of FTY and MYRP filings. Under the file and suspend ratemaking process, the Commission has tremendous flexibility to review and grant or deny each filing on a case-by-case basis and on its own merits.

156. *Fifth* and finally, the existence of FTY and MYRP rules runs the risk of these unintended consequences: (a) constraining the flexibility and discretion that are fundamental to the ratemaking process; (b) restricting the Commission's ability to consider each FTY and MYRP rate filing on its own merits and in light of the relevant circumstances; and (c) creating the incorrect impression that meeting a set of standards assures approval of an FTY or MYRP filing.

157. For these reasons, the Joint Parties recommend that the Commission not commence a rulemaking to address FTY filings and MYRP filings.

## **2. Discussion and Ruling.**

158. The ALJ recommends that the Commission not undertake a rulemaking to address FTY and MYRP filings at this time.

159. *First*, the Commission has rules that govern the content of Advice Letters: Rules 4 CCR 723-1-1210(c), 723-3-3110, and 723-4-4110. The existing rules are broad enough to encompass FTY and MYRP filings, as evidenced by the utilities' making FTY and MYRP filings.

160. *Second*, in the ALJ's experience, the Commission typically develops rules that address the content of a particular type of filing based on the Commission's accumulated experience with that type of filing. A rulemaking is premature at this point because the Commission has extremely limited experience with either fully-litigated FTY-based filings and

proceedings or fully-litigated MYRP-based filings and proceedings.<sup>26</sup> Given this paucity of practical experience, the Commission may not be in a position at present to assess the benefits and the potential pitfalls (*e.g.*, the unintended consequences) of a particular rule requirement. Before commencing a rulemaking, the Commission should have more practical experience with FTYs, MYRPs, their operation, and their effect.

161. *Third*, the concept of an MYRP is fluid and has many possible permutations, limited only by the filing utility's perspective, needs, and creativity.<sup>27</sup> The ALJ agrees with the Joint Parties that a rulemaking at this juncture may stifle innovation by inadvertently shaping a utility's or other party's thinking and unintentionally encouraging the filing of an FTY or an MYRP that fits the rule. This could result in "cookie-cutter" MYRP proposals instead of carefully thought-through and original MYRP proposals.

162. *Fourth* and finally, it is not readily apparent that a rule will result in the benefits enumerated by the Utilities. For example, the ALJ is not persuaded that, in a given FTY or MYRP proceeding, a rule will reduce significantly the debate about the type of information or the sufficiency of the information that a utility filed in support of its FTY or MYRP. Of course, depending on the language of the rule, the focus of that debate may change.<sup>28</sup> The uncertain benefits must be weighed against the possible and significant unintended consequences.

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<sup>26</sup> Insofar as the ALJ is aware, there has been only one fully-litigated (*i.e.*, not settled) rate case involving an FTY and an MYRP.

<sup>27</sup> For example, an MYRP may or may not include annual reviews or an earnings test; may or may not be based exclusively on a forecasted test year; and may have features that have not been included in the MYRPs filed with the Commission.

<sup>28</sup> For example, a rule that directs the utility to file a specific type of information or study, "if relevant" or "if applicable" may invite the parties in a case to question whether information not filed by the utility is "relevant" or "applicable" in that particular case.



163. Given the Commission's extensive ratemaking and rulemaking authority, the ALJ perceives no legal obstacle to commencing a rulemaking. For the practical reasons discussed above, and on balance, the Commission should not commence a rulemaking on FTYs and MYRPs at this time. For the same reasons, the Commission should not issue a policy statement on FTYs and MYRPs at this time.

164. In accordance with § 40-6-109, C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

### **III. ORDER**

#### **A. The Commission Orders That:**

1. Consistent with the discussion above, electric public utilities and gas public utilities have the statutory right to file in one proposed tariff a Multi-Year Rate Plan (MYRP) that has a single effective date and that seeks to change the filing public utility's rates, terms, and/or conditions for utility service over time based on stepped (or phased-in) changes that will occur on specific dates in the future.

2. Consistent with the discussion above, if the Commission elects to suspend an MYRP tariff for investigation and hearing pursuant to § 40-6-111(1), C.R.S., by its decision the Commission suspends the entire MYRP tariff filing.

3. Consistent with the discussion above, if the Commission elects to suspend an MYRP tariff for investigation and hearing pursuant to § 40-6-111(1), C.R.S., the suspension period commences on the proposed effective date of the entire MYRP tariff as stated in the filing utility's Advice Letter.

4. Consistent with the discussion above and at this time, the Commission will not commence a formal rulemaking proceeding to codify the declaratory rulings made in this Decision.

5. Consistent with the discussion above and at this time, the Commission will not commence a formal rulemaking to consider the addition of one or more procedural rules addressing the content of an electric utility's or a gas utility's filing for an MYRP.

6. Consistent with the discussion above and at this time, the Commission will not issue a policy statement addressing the content of an electric utility's or a gas utility's filing for an MYRP.

7. Consistent with the discussion above and at this time, the Commission will not commence a formal rulemaking to consider the addition of one or more procedural rules addressing the content of an electric utility's or a gas utility's rate filing based on a future test year.

8. Consistent with the discussion above and at this time, the Commission will not issue a policy statement addressing the content of an electric utility's or a gas utility's rate filing based on a future test year.

9. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

10. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission

upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

11. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

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Administrative Law Judge