

Decision No. R16-0192

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

PROCEEDING NO. 14F-0336EG

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DEVELOPMENT RECOVERY COMPANY LLC ON BEHALF OF THE RYLAND GROUP,  
  
COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,  
  
RESPONDENT.

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PROCEEDING NO. 14F-0404EG

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DEVELOPMENT RECOVERY COMPANY LLC ON BEHALF OF THE RICHMOND  
AMERICAN HOMES OF COLORADO, INC.,  
  
COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,  
  
RESPONDENT.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
ROBERT I. GARVEY  
DENYING FORMAL COMPLAINT**

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Mailed Date: March 7, 2016

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### I. STATEMENT

1. On April 14, 2014, Development Recovery Company LLC (DRC or Complainant) on behalf of the Ryland Group (Ryland) filed a Complaint against Public Service Company of

Colorado (Public Service, Respondent, or Company). This filing commenced Proceeding No. 14F-0336EG.

2. On April 18, 2014, the Public Utilities Commission (Commission or PUC) issued an Order to Satisfy and Answer in Proceeding No. 14F-0336EG.

3. On April 23, 2014, by Minute Order, the Commission referred Proceeding No. 14F-0336EG to an Administrative Law Judge (ALJ).

4. On April 24, 2014, DRC on behalf of Richmond American Homes of Colorado, Inc. (Richmond) filed a Complaint against Public Service. This filing commenced Proceeding No. 14F-0404EG.

5. On May 2, 2014, Public Service filed its Motion to Dismiss or in the Alternative Motion for More Definite Statement in Proceeding No. 14F-0336EG.

6. On May 14, 2014, DRC filed its Response to Public Service Company of Colorado's Motion to Dismiss oin the Alternative Motion for More Definite Statement.

7. On May 16, 2014, Public Service filed its Motion for Leave to File a Reply and Reply to Development Recovery Company's Response to Motion to Dismiss.

8. On May 22, 2014, DRC filed its Response to Public Service's Motion for Leave to File aReply and Reply to Development Recovery Company's Response to Motion to Dismiss.

9. On May 22, 2014, the PUC issued an Order to Satisfy and Answer in Proceeding No. 14F-0404EG.

10. On May 28, 2014, by Minute Order, the Commission referred Proceeding No. 14F-0404EG to an ALJ.

11. By Interim Decision No. R14-0591-I, issued June 3, 2014, the Motion to Dismiss in Proceeding No. 14F-0336EG was granted in part and denied in part and a prehearing conference was scheduled for July 14, 2014.<sup>1</sup>

12. On June 5, 2014, Public Service filed its Motion for More Definite Statement and Motion to Dismiss Fourth Claim for Relief in Proceeding No. 14F-0404EG.

13. On June 11, 2014, Public Service filed its Answer to the Formal Complaint in Proceeding No. 14F-0404EG.

14. On June 17, 2014, Public Service filed its Answer to the Formal Complaint in Proceeding No. 14F-0336EG.

15. On June 19, 2014, DRC filed its Response to Public Service's Motion in Proceeding No. 14F-0404EG.

16. By Interim Decision No. R14-0817-I, issued July 14, 2014, the procedural schedule for Proceeding No. 14F-0336EG agreed to by the parties at the prehearing conference was adopted.

17. On July 18, 2014, Public Service filed its Motion to Consolidate Formal Complaint Proceedings of Development Recovery LLC Against Public Service Company of Colorado in both Proceeding No. 14F-0336EG and Proceeding No. 14F-0404EG.

18. On July 31, 2014, DRC filed its Response to Public Service Company of Colorado Motion to Consolidate Formal Complaint Proceedings of Development Recovery Company LLC.

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<sup>1</sup> Claim No.4 was dismissed.

19. On August 15, 2014, in Decision No. R14-0994-I, the Motion to Consolidate Formal Complaint Proceedings of Development Recovery LLC Against Public Service Company of Colorado in both Proceeding No. 14F-0336EG and Proceeding No. 14F-0404EG was granted.

20. On December 8, 2014, by Decision No. R14-1450-I, a procedural schedule was adopted.

21. On January 20, 2015, DRC filed its Direct Testimony of Mr. Richard A. Barton and Mr. Lane Kollen.

22. On February 3, 2015, Public Service filed its *Motion in Limine* to Limit the Scope of Proceeding and Motion to Vacate Current Procedural Schedule.

23. On February 13, 2015, by Interim Decision No. R15-0156-I, the Motion to Vacate Current Procedural Schedule was granted.

24. On May 19, 2015, by Interim Decision No. R15-0482-I, the *Motion in Limine* to Limit the Scope of Proceeding was granted in part and denied in part.

25. On June 18, 2015, DRC filed its revised Direct Testimony of Mr. Richard A. Barton and Mr. Lane Kollen.

26. On July 15, 2015, Public Service filed its Answer Testimony of Mr. John D. Lee and Mr. Ted Niemi.

27. On August 26, 2015, DRC filed its Rebuttal Testimony of Mr. Richard A. Barton and Mr. Lane Kollen.

28. On September 25, 2015, DRC filed its Motion to Bifurcate Pursuant to C.R.C.P. 42(b) (Motion to Bifurcate).

29. On September 29, 2015, DRC filed its Motion for a Partial Summary Judgment (Motion for Summary Judgment).

30. On October 7, 2015, Public Service filed its Response to DRC's Motion to Bifurcate.

31. On October 13, 2015, Public Service filed its Response to DRC's Motion for Summary Judgment.

32. On October 15, 2015, the hearing was called to order. Testimony was received from Mr. Richard Barton and Mr. Lane Kollen for the Complainants and Mr. Ted Niemi, and Mr. John Lee on behalf of Respondent. Exhibits 1 through 6 were stipulated to by the parties and admitted into evidence at the start of the hearing. Exhibits 7 through 17 were offered and Exhibits 7 through 13 and 16 and 17 were admitted.

33. In reaching this Recommended Decision the ALJ has considered all arguments presented by the parties, including those arguments not specifically addressed in this Decision. Likewise, the ALJ has considered all evidence presented at the hearing, even if the evidence is not specifically addressed in this Decision.

34. Pursuant to § 40-6-109, C.R.S., the Administrative Law Judge hereby transmits to the Commission the record of this proceeding, a written recommended decision containing findings of fact and conclusions of law, and a recommended order.

## **II. MOTION TO BIFURCATE**

35. At the start of the evidentiary hearing a ruling was made on the Motion to Bifurcate.

36. DRC argued in the Motion to Bifurcate that the single issue as to whether Public Service violated its tariffs should be addressed in an initial hearing. If it is found that Public

Service violated its tariffs, a hearing would later be held to determine liability and the need for an accounting.

37. Public Service objected to the relief requested by DRC. In its Response to DRC's Motion to Bifurcate, Public Service argued that the Motion to Bifurcate fails to demonstrate any of the prerequisites necessary for bifurcation and that DRC failed to cite any precedent where the Commission has allowed bifurcation after all pre-filed testimony has been received.

38. The undersigned ALJ agrees with the arguments of Public Service. DRC fails to demonstrate in the Motion to Bifurcate any benefit to bifurcation or any harm if bifurcation is not granted. DRC also fails to demonstrate any precedent in which a complaint case was bifurcated to provide one hearing for a determination of any tariff violation and a later hearing to determine liability. Finally, due to the fact that testimony has been pre-filed in this proceeding the granting of the Motion to Bifurcate would require testimony to be re-filed further delaying this proceeding in addition to creating the potential of additional hearing. The Motion to Bifurcate is denied.

### **III. MOTION FOR PARTIAL SUMMARY JUDGEMENT**

39. In the Motion for Summary Judgment, DRC argues that, in his pre-filed testimony Mr. Neimi states that no refunds were made for gas and electric line extensions, therefore there was a violation of Public Service's Tariff. Due to this admission of a violation, DRC argues that summary judgment should be granted and Public Service should be ordered to provide an accounting to determine amounts owed to Ryland and Richmond.

40. Public Service argues that DRC provided no evidence that Ryland or Richmond were due refunds or that if refunds were due that they were not paid and for those reasons the Motion for Summary Judgment should be denied.

41. The undersigned ALJ agrees with Public Service. DRC somehow confuses the statement that no refunds were made to Ryland or Richmond since none were required with an admission of a failure to make refunds that were required. The Motion for Summary Judgment is denied.

#### IV. ISSUES

42. The following is a summary of the relevant claims that remain at issue in this proceeding:

- a) Has Public service failed to abide by line extension refund tariffs?
- b) Has Pubic Service violated 4 CCR 723-3-3210's and 4 CCR 723-4-4210's due diligence in reporting requirements?
- c) Should Public Service be ordered to provide additional accounting?
- d) Has Public Service inappropriately offset construction allowances for service laterals?

#### V. FINDINGS OF FACT

43. Richard Barton is the manager of DRC. Mr. Barton is also the president of Coal Creek Village Development, Inc. the developer of Coal Creek Village in Lafayette, Colorado.

44. DRC is a company that specializes in the recovery entitlement and utility cash advances for land developers.<sup>2</sup>

45. Mr. Lane Kollan is a utility rate and planning consultant with J. Kennedy and Associates in Roswell Georgia.

46. Public Service is a Colorado public utility, as defined in § 40-1-103(l)(a), C.R.S.

47. Ryland has developed 39 subdivisions in Colorado.

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<sup>2</sup> No evidence was submitted as to the actual business model, the size, or any other facts concerning Ryland or Richmond. Although Mr. Barton's testimony is that he was testifying on their behalf "for the land development portion of their business" *Revised Direct Testimony of Richard A. Barton, p. 2, l. 2.*



48. Richmond has developed 245 subdivisions in Colorado.

49. Ryland and Richmond have assigned their rights for any refunds due from line extensions to DRC.

50. DRC was given boxes which contained information regarding line extension agreements between Ryland and Public Service and Richmond and Public Service.

51. DRC has not undertaken any examination of any Ryland or Richmond documents. DRC has not even bothered to open the boxes of documents supplied by Ryland and Richmond. *Hearing Transcript p. 142, l.6-10.*

52. The Public Service line extension policies, with the exception of minor changes, have been in place for electric service since 1981 and for gas service since 1983.

53. The parties agree on certain aspects of how the tariffs related to the line extensions are to be administered. .

54. Under the terms of the Public Service tariff concerning line extensions for both electric and gas service the term Construction Allowance (CA) is defined as, “that portion of necessary Construction Costs that the Company makes at its own expense. *Hearing Exhibit RAB-4, p. 2 and Hearing Exhibit 5, p. 3*

55. Under the terms of the Public Service tariff concerning line extensions for both electric and gas service the term Construction Payment (CP) is defined as, “amount advanced by applicant to pay all construction costs in excess of Construction allowance.” *Id.*

56. The Construction Cost (CC) equals the CP + CA.

57. A service lateral under the terms of the Public Service tariff concerning electric service line extensions is defined as, “the secondary overhead or underground electric circuit and

associated facilities located between Company's distribution line and the point of delivery to customer. Service lateral provides service for customer's exclusive use."

58. A service lateral under the terms of the Public Service tariff concerning gas line extensions is defined as, "the supply pipe installed by the Company extending from the distribution main to and including the first valve or cock on the main side of the meter necessary to supply service to the Applicant."

59. At the time an Extension Agreement is signed, the Applicant advances the CP for the entire estimated CCs for the distribution line<sup>3</sup> extension excluding the cost of service laterals, as the Company generally does not pay its portion of the facilities (the CA) until the meter is set. The service line costs are typically not known at that time, so any CP advance from the Applicant for service lines would be made separately at a later date, but is typically offset against the Company-funded CA payment instead of requiring a separate service line CP, as discussed in the Service Lateral section, below.

60. The Company awards a CA after the Service Lateral is built and a meter is set, and remits payment of the CA to the Applicant, as appropriate after the Service Lateral costs have been deducted.

## **VI. APPLICABLE LAW**

61. The Commission has jurisdiction over this Complaint pursuant to § 40-1-103(1)(a)(I), C.R.S., and § 40-3-102, C.R.S. Section 40-1-103(1)(a)(I), C.R.S., states as follows:

The term "public utility," when used in articles 1 to 7 of this title, includes every common carrier, pipeline corporation, gas corporation, electrical corporation, ... operating for the purpose of supplying the public for domestic, mechanical, or

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<sup>3</sup> Or distribution main for the gas department

public uses and every corporation, or person declared by law to be affected with a public interest, and each of the preceding is hereby declared to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title

Section 40-3-102, C.R.S., provides in relevant part that the power and authority is vested in the Commission and it is the Commission's duty to adopt rates, charges and regulations, as well as to govern and regulate all rates, charges, and tariffs of every public utility. It is also within the Commission's power and authority to correct abuses and prevent unjust discrimination and extortions in the rates, charges, and tariffs of public utilities in Colorado.

62. Under that jurisdictional charge, the Commission must ensure that all rates are just, reasonable, and non-discriminatory pursuant to § 40-3-101(1), C.R.S., which provides that:

All charges made, demanded, or received by any public utility for any rate, fare, product, or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge made, demanded, or received for such rate, fare, product or commodity, or service is prohibited and declared unlawful.

63. As specifically related to complaints brought before the Commission, § 40-6-108, C.R.S., provides that:

(1)(a) Complaint may be made by the commission on its own motion or by any corporation, person, chamber of commerce, or board of trade, or by any civic, commercial, mercantile, traffic, agricultural, or manufacturing association or organization, or by any body politic or municipal corporation by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

And

(b) No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electric, water, or telephone public utility, unless the same is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the county, city and county, city, or town, if any, within

which the alleged violation occurred, or not less than twenty-five customers or prospective customers of such public utility.

64. The line extension requirements for electric service are found at *Rule* 3210 of the Commission's Rules Regulating Electric Utilities, 4 *Code of Colorado* (CCR) 723-3:

- (a) Each utility shall have tariffs which set out its line extension policies, procedures, and conditions.
- (b) Specific tariff provisions for making overhead or underground service connections, for transmission line extensions, and for distribution line extensions shall include:
  - (I) Service connections and distribution line extensions by customer class and the appropriate terms and conditions under which those connections and extensions will be made.
  - (II) Provisions requiring the utility to provide to a customer or to a potential customer, upon request, service connection information necessary to allow the customer's or potential customer's facilities to be connected to the utility's system.
  - (III) Provisions requiring the utility to exercise due diligence in providing the customer or potential customer with an estimate of the anticipated cost of a connection or extension.
  - (IV) Provisions addressing steps to ameliorate the rate and service impact upon existing customers, including equitably allowing future customers to share costs incurred by the initial or existing customers served by a connection or extension (as, for example, by including a refund of customer connection or extension payments when appropriate).
  - (V) A description of specific customer categories (such as permanent, indeterminate, and temporary) within each customer class.

65. The line extension requirements for gas service are found at *Rule* 4210 of the Commission's Rules Regulating Gas Utilities and Pipeline Operators, 4 CCR 723-4:

- (a) A utility shall have tariffs which set out its line extension policies, procedures, and conditions.
- (b) In its tariff a utility shall include the following provisions for gas main extensions and service lateral extensions from its distribution system:
  - (I) The terms and conditions, by customer class, under which an extension will be made.

- (II) Provisions requiring the utility to provide to a customer or to a potential customer, upon request, service lateral connection information necessary to allow the customer's or potential customer's facilities to be connected to the utility's system.
- (III) Provisions requiring the utility to exercise due diligence in providing the customer or potential customer with an estimate of the anticipated cost of a connection or extension.
- (IV) Provisions addressing steps to ameliorate the rate and service impact upon existing customers, including equitably allowing future customers to share costs incurred by the initial or existing customers served by a connection or extension (as, for example, by including a refund of customer connection or extension payments when appropriate).

66. As the party bringing the Formal Complaint, Complainant bears the burden of proof with respect to the relief sought; and the burden of proof is by a preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 *Code of Colorado Regulations* 723-1-1500 of the Commission's Rules of Practice and Procedure. The evidence must be "substantial evidence," which the Colorado Supreme Court has defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury." *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)). The preponderance standard requires the finder of fact to determine whether the existence of a *contested fact* is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

## **VII. ARGUMENTS OF DRC**

### **A. Line Extension Refunds**

67. DRC argues that the tariff “requires proportional sharing of line extension costs among customers that are attached to the extension.” *DRC Statement of Position*, p. 13.

68. DRC defines the amount returned to a developer from the CA as a refund.

69. DRC states that based upon the testimony of Mr. Niemi, that Public Service has not made any refunds of CPs to either Ryland or Richmond. DRC argues that refunds were due for each new customer connected to the electric or gas distribution extension. DRC defines customer as a homeowner.

70. DRC believes that the failure to provide refunds of all funds provided by Ryland and Richmond for line extensions after new customers/homeowners are permanently connected to the line extension constitutes a violation of the Public Service tariff.

### **B. Rules 4 CCR 723-3210’s and 4 CCR 723-4210’s Due Diligence in Reporting Requirement/Request for Accounting**

71. DRC argues that Public Service should provide an accounting by developer for the amounts of any refund due Richmond and Ryland since they cannot be determined by DRC without effort.

72. DRC argues that Exhibit 1, RAB-18 shows that Public Service incorrectly calculated refunds concerning Ryland’s service agreement 037242. Based upon this showing of an incorrect refund, DRC believes that Public service should be required to perform an accounting of all service agreements between Ryland and Public Service and Richmond and Public Service from 1996 through 2014.

73. DRC did not argue that a provision of 4 CCR 723-3210 or 4 CCR 723-4210 was actually violated but rather used this provision to provide justification for additional accounting.

**C. Service Laterals**

74. DRC believes that Public service has violated its tariff by deducting the cost of service laterals from the CA.

75. DRC argues that this method of deducting the cost of service laterals is without the necessary notice and requires an additional agreement between Public Service and the party requesting the service lateral.

76. DRC finally argues that the cost of the service laterals is determined without an advice letter filing violating the Commission's ability to determine if the Company's amount charged for the service laterals are just and reasonable.

77. DRC cites Exhibit RAB-20 to show that unreasonable markups are charges by Public Service for service laterals. The exhibit shows a total cost of \$856,391 for the service laterals in the contract provided by Public Service. DRC divided the \$856,391 by the number of lots and concluded that Public Service charged \$543.80 for each service lateral. According to Mr. Barton this amount includes a markup not explained by Public Service.

**VIII. ARGUMENTS OF PUBLIC SERVICE**

**A. Public Service Line Extension Process**

78. Mr. Niemi provides a detailed description of the process of contracting for construction service for electric and gas extensions in his answer testimony from Public Service's perspective. According to that description, the process is as follows:

- A.) Applicant requests service;
- B.) Public Service estimates the cost it will incur to provide extension;

- C.) Extension Agreement executed that delineates the line extension costs to be incurred by each party;
- D.) The investment made by Public Service is the Construction Allowance;
- E.) The costs the Applicant will incur are defined as the Construction Payment.

79. The equation that results from that process, which Public Service characterizes as the cornerstone of the electric and gas extension policies, is as follows:

$$\text{Total Construction Cost} - \text{Construction Allowance (CA)} = \text{Construction Payment}$$

80. According to Mr. Niemi, Public Service invests up to the CA, which adds to plant in service once the extension is closed. The remainder of the CP, which is the amount paid by the applicant, adds to contribution in aid of construction once the extension is closed.

81. The extension process above is further described in more detail by Mr. Niemi. In Step 1, the Developer requests a line extension be built by submitting an application for gas and electric service. Thus, the Developer is the Applicant in this example.

82. Step 2 in the extension process is for Public Service to estimate the cost of extending service to each extension to the applicant based on the information received in the application. . Mr. Niemi indicates that the Extension Agreement includes the entire CC for the distribution extension<sup>4</sup> (service line costs are excluded). The Developer and Public Service then sign the extension agreement and the applicant pays the CCs as a CP and Public Service builds the distribution line portion of the line extension.

83. Next, Public Service builds a service lateral and sets meters to provide permanent electric or gas service. According to Mr. Niemi, the costs of service laterals are not included in the CC in the extension agreements because the location, distance, and timing for each service

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<sup>4</sup> Or Distribution Main extension in the gas department.



lateral was not precisely known when the developer submitted the application. Also, the entity which requests and pays for the service lateral may not be the same entity that entered into the extension agreement.

84. Public Service applies the CA towards the cost of the service lateral. Mr. Niemi states that if the service lateral CC is less than the CA, Public Service installs the service lateral at no cost to the customer. However, if the service lateral construction cost is more than the CA, Public Service installs the service lateral and collects from the customer the difference as a non-refundable contribution in aid of construction.<sup>5</sup>

85. In the next step, the remainder of the total CA for electric service and the distribution portion of the CA for gas service is awarded to the entity that signed the extension agreement. Pursuant to Public Service's tariffs in effect at that time, the currently effective CAs are \$1,090.00 for Residential General Service, \$448.00 for the Service Lateral Portion, and \$93.00 for the Distribution Main Portion applicable to Residential Gas Service, Schedule RG.

86. Mr. Niemi indicates that this process is repeated each time a new customer is directly connected to the extension during the Open Extension Period currently set in tariffs at ten years.

## **B. Line Extension Refunds**

87. Mr. Niemi also addresses the use of the term "refund" by Mr. Barton, and takes issue with Mr. Barton's use of the term. Mr. Niemi takes the position that under the Electric and Gas Extension policies, the award of the CA, as an offset to the initial CP is different from a later refund of a portion of the earlier paid CP. Mr. Niemi explains that the purpose of a refund is to

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<sup>5</sup> Mr. Niemi provides an illustration of a service lateral installation, as well as the CCs associated with an installation, as well as the accounting entries he represents that Public Service makes as the result of an extension agreement.

have those customers who benefit from an earlier extension pay their proportionate share for the extension as a CP. Mr. Niemi explains that there are differences between a pioneer extension and a land developer extension. A pioneer extension is an extension whereby the initial entity requesting service pays for an electric distribution extension or gas main extension that provides access for other entities in addition to the pioneer customer, so that the additional new customers requesting service receive benefits from the pioneer extension and must participate in that extension by signing an extension agreement and paying Public Service the customer's allocated or apportioned share of the pioneer extension, in addition to the cost of additional facilities to serve the new customer, as a CP. Public Service then refunds the proportionate share of the CP to the pioneer. Public Service takes a portion of the CP that is charged to a later applicant and refunds that portion to the earlier applicant. As a result, both applicants then share proportionally in the extension serving both of them.

88. Mr. Niemi emphasizes that subdivision developers, including the developments at issue in this case, typically do not receive refunds as provided in Public Service's tariffs for pioneer provisions because the extension that Public Service builds is usually completely contained within the subdivision development and is designed to serve only those lots, homes, or buildings within that development, so there is usually no opportunity for another entity to pay a CP to participate in the extension within the development. Rather, Mr. Niemi indicates that refunds are made only in the limited circumstance where a later third party or other unrelated party applicant seeks to connect to a distribution extension already paid for by an earlier applicant within the ten-year Open Extension Period provided by the tariffs.

89. Mr. Niemi states that when a refund is made to an applicant, the source of the funds for the refund is provided by a later applicant connecting to a common distribution

extension. He also emphasizes that refunds are separate and distinct from the CAs applicable and awarded to all new applicants.

90. Public Service argues that it is not required to refund the full CP to a developer after the completion of a line extension under the applicable tariff. In addition, Public Service argues that DRC has failed to meet its burden to present evidence that Public Service failed to refund any funds to Ryland or Richmond.

91. Public Service points out that DRC failed to examine any Ryland or Richmond records to establish that Ryland or Richmond failed to receive any refunds they were due.

**C. Rules 4 CCR 723-3210's and 4 CCR 723-4210's Due Diligence in Reporting Requirement/Request for Accounting**

92. Public Service argues that DRC failed to meet its burden concerning violations of 4 CCR 723-3210's and 4 CCR 723-4210's due diligence in reporting requirement since these rules do not require an after the fact accounting.

93. Public Service states that the rules in question only require that "[e]ach utility shall have tariffs which set out its line extension policies, procedures, and conditions." *4 CCR 723-3210(a)*.

**D. Service Laterals**

94. Public Service argues that Electric Tariff Sheet R113 specifically authorizes Public service to deduct the cost of the service lateral from any remaining funds contained within the CA.

95. As to DRC's arguments that Public Service charges impermissible markups to service lateral costs, Public Service argues that the argument of DRC fails to distinguish between

different types of service laterals that may be installed, so the average cost raised by DRC is not representative of the costs for line extensions at issue in this case.

96. In addition, that DRC failed to provide any evidence that the charge for any service lateral was inflated, therefore failing to meet its burden.

## **IX. DISCUSSION**

97. For the ease of understanding, the arguments concerning electric and gas line extensions and service laterals are not separated. The tariff language is almost identical and through the course of the hearing neither DRC nor Public Service argued any major differences between gas and electric line extensions or service laterals.

### **A. Line Extension Refund Tariffs**

98. DRC rests its argument upon the definition of the word “customers” contained within the tariff language. DRC believes the term customer under Tariff Sheet R118<sup>6</sup> is the home buyer not the home builder. Hearing Transcript Vol. I, p. 72 l. 1-25. Public Service believes that the term customer under Tariff Sheet R118 refers to the builder. Hearing Transcript Vol. II, p. 17 l. 10-25, p. 18 l. 1-11.

99. In the instant cases, the developer and the home builder are the same entity. There has been no evidence presented contrary to this view.

100. DRC argues that under its interpretation of the definition of customer, the entire cost of any line extension is to be provided by Public Service. DRC believes that all funds provided to Public Service by any developer through the CP should be refunded if a development becomes fully occupied. Hearing Transcript Vol. I, p. 140 l. 6-25, p. 14, l. 1-22.

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<sup>6</sup> Exhibit RAB-4, page 9.

101. This conclusion is directly contrary to the conclusion drawn by the Colorado Supreme Court in *Aurora v. Public Utilities Com.*, 785 P.2d 1280.

102. In *Aurora*, the court held that the “donation” made by the City of Aurora was not in violation of article XI of the Colorado Constitution. *Id.* at 1288. The donation in question was funds provided for a line extension or the CP. There is no discussion of the City of Aurora ever being refunded the amount “donated” to the utility and in fact makes it clear that the “donation” is payment:

It cannot be reasonably argued that Aurora, a new utility customer, would receive no consideration in return for the **payment of some of the costs associated with service extension facilities**. Aurora, as any other new utility customer, would receive electrical utility service which is, after all, exactly what a new customer bargains for. Aurora, therefore, clearly would receive consideration in return for its **payment**.

*(emphasis added) id.*

103. If the conclusion of DRC was correct, the amount of funds provided by the City of Aurora would not be viewed as a donation or a payment. In addition, the contribution in aid of construction represents a reduction in the rate base. *Id.* at 1287.

104. Further, DRC’s interpretation is contrary to the plain language of Public Service’s line extension tariffs, which define the CA as “that portion of necessary Construction Costs that the Company makes at its own expense” and defines the CP as “amount advanced by applicant to pay all construction costs in excess of Construction allowance.” Hearing Exhibit RAB-4, p. 2 and Hearing Exhibit 5, p. 3.

105. The undersigned agrees with Public Service witness Neimi that DRC appears to confuse the reimbursement of part of the CP costs by the utility-funded CA, with the potential refunding of the developer’s costs under the “pioneer extensions” provisions.

106. The complaint as to the first claim of relief is denied.

**B. Rules 4 CCR 723-3210's and 4 CCR 723-4210's Due Diligence in Reporting Requirement**

107. DRC does not allege an actual violation of the language contained in the Rules. DRC only maintains that these rules which require an accounting provide justification for their request for further accounting. Mr. Barton could not point to any specific language during the hearing that showed a violation<sup>7</sup> and DRC fails to even mention the rules in their Statement of Position in connection with due diligence of reporting.

108. DRC argues that a full accounting is required to be performed by Public Service in order to determine the amount of the refund due Ryland and Richmond. In support of this argument DRC used Exhibit 1, RAB-18 to show that on the line extension listed on the spreadsheet, Public Service had not properly refunded Ryland on line extension contracts.

109. As discussed above, this conclusion by DRC that Ryland had not been refunded the correct amount was based upon the erroneous belief that the full amount of the CP should be refunded in every case. DRC conducted no investigation into any actual line extension contracts between Ryland and Public Service. The information gleaned from RAB-18 was in response to a discovery request and not due to any investigation conducted by DRC.

110. DRC conducted no investigation as to any contracts between Richmond and Public Service. Not a single contract was presented that even alleged that Richmond was not given a refund of CP when required to by Public Service under the tariff.

111. The testimony of Mr. Barton was clear that, although given records by both Ryland and Richmond, no investigation was done of the documents. *Hearing Transcript Vol. I, p. 136 l. 1-25.*

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<sup>7</sup> *Hearing Transcript Vol. I, pp. 47-62*

112. Compounding this failure to provide any evidence of any need for additional accounting were numerous occasions where it appeared the Complainant mistakenly viewed the evidentiary hearing as an opportunity to conduct an investigation. *Hearing Transcript Vol. I, p. 128 l. 24-25; Vol. I, p. 136 l. 22-24; Vol. I, p. 142 l.6-10; Vol. I, p. 150-151 l. 24-1.* Many times during the hearing, Mr. Barton did not appear to understand his burden.

113. DRC has the burden to show that an accounting should be ordered. DRC presented no credible evidence to meet the burden that an accounting should be ordered for line extension contracts between Public Service and Ryland.

114. DRC did not allege nor argue that Public Service violated the provisions of 4 CCR 723-3-3210 and 4 CCR 723-4-4210. Therefore the second count for relief is denied.

115. DRC failed to present any evidence of any need for an accounting of contracts between Public Service and Richmond.<sup>8</sup> Therefore the sixth claim for relief fails.

### **C. Service Laterals**

116. It is clear from the line extension agreements in evidence and the tariff, that the cost of the service lateral is not included in the initial CP. Neither party disputes this interpretation of the tariff.

117. DRC claims that the cost of the service laterals may not be offset against the CA.

118. This argument fails due to the unambiguous language contained in tariff sheet R114:

Applicant or applicants shall be required to pay to Company as a Construction Payment all estimated costs for electric distribution facilities necessary to serve applicant or applicants in excess of the Construction Allowance. Said Construction Payment shall be refundable in part or in its entirety during a

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<sup>8</sup> Exhibit RAB-18, which DRC claimed showed a need for an accounting of line extension contracts, did not include any contracts between Public Service and Richmond.

ten-year period commencing with the Extension Completion Date. At the end of the Open Extension Period any remaining Construction Payment becomes non-refundable.

119. By this language, which was later changed to make this even more clear, the applicant is required to make an additional CP if the cost of the service lateral is in excess of the CA. It only makes logical sense that these costs would be offset against the CA.

120. Under the interpretation proposed by DRC the following scenario would take place:

Request is made for 10 service laterals – estimated cost \$5,000

Public Service Construction Allowance - \$10,900 (10 x \$1,090)

DRC required to pay an additional \$5,000 to Public Service for service laterals

Public Service pays DRC \$10,900.<sup>9</sup>

121. Under the interpretation proposed by Public Service, the following scenario would take place:

Request is made for 10 service laterals – estimated cost \$5,000

Public Service Construction Allowance - \$10,900 (10 x \$1,090)

Public Service pays DRC \$5,900

122. The interpretation proposed by DRC makes no logical sense and would be to the detriment of customers, developers, and builders.

123. Additionally, DRC argues that the charges for service laterals are not just and reasonable.

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<sup>9</sup> The costs for the distribution main portion must also be accounted for, but such costs are not included in this example for simplicity.



124. Any complaint of DRC directed toward the reasonableness fails for a lack of standing:

§ 40-6-108(1)(b), C.R.S., provides that:

No complaint shall be entertained by the commission, except upon its own motion, as to the reasonableness of any rates or charges of any gas, electric, water, or telephone public utility, unless the same is signed by the mayor or the president or chairman of the board of trustees or a majority of the council, commission, or other legislative body of the county, city and county, city, or town, if any, within which the alleged violation occurred, or not less than twenty-five customers or prospective customers of such public utility

125. In addition, there was no evidence provided to even suggest that the cost of service laterals were unreasonable. The testimony of Mr. Barton characterized the issue as a request for an “investigation” Hearing Transcript Vol. I p. 128 l. 2-25, p.129 l. 1-2.

126. The request for “an investigation” is based upon the flawed use of an average as Mr. Barton himself testified. Hearing Transcript Vol. I p. 129 l. 11-19.

127. DRC is without standing to bring this claim and in the alternative failed to provide any evidence to support the claim therefore it is denied.

## **X. CONCLUSIONS**

128. The evidence is not sufficient to support the complaint that Public Service failed to abide by line extension refund tariffs therefore count 1 is denied.

129. There was no evidence to support the complaint that Public Service violated 4 CCR 723-3-3210's and 4 CCR 723-4-4210's due diligence in reporting requirement therefore count 2 of the complaint is denied.

130. The evidence is not sufficient to support the complaint that Public Service inappropriately offset CAs for service laterals therefore count 5 is denied.

131. The evidence is not sufficient to support the complaint that Public Service should be required to provide an accounting of line extension contracts by developer, therefore count 6 of the complaint is denied.

## **XI. ORDER**

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

1. The formal complaint filed by Development Recovery Company (DRC) in Proceeding No. 14F-0336EG against Respondent Public Service Company of Colorado on April 14, 2014, is denied.

2. The formal complaint filed by DRC in Proceeding No. 14F-0404EG against Respondent Public Service Company of Colorado on April 24, 2014, is denied

3. 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.

4. As provided by § 40-6-109, 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 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 basic findings 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.

5. If exceptions to this 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

ROBERT I. GARVEY

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Administrative Law Judge