

Decision No. C16-0625

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14F-0336EG

DEVELOPMENT RECOVERY COMPANY LLC ON BEHALF OF THE RYLAND GROUP,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

PROCEEDING NO. 14F-0404EG

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

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**DECISION DENYING EXCEPTIONS
AND ADOPTING RECOMMENDED DECISION**

Mailed Date: July 7, 2016
Adopted Date: June 15, 2016

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Colorado Public Utilities Commission (Commission) denies exceptions to Decision No. R16-0192 (Recommended Decision) filed on April 8, 2016, by Development Recovery Company LLC (DRC), on behalf of the Ryland Group (Ryland), and Richmond Homes of Colorado (Richmond), and adopts the Recommended Decision.

B. Background and Selected Procedural History¹

2. On April 14, 2014, DRC on behalf of Ryland, filed a Complaint against Public Service Company of Colorado (Public Service or Company). This filing commenced Proceeding

¹ For a full recitation of the procedural history of these proceedings, see Decision No. R16-0192, issued on March 7, 2016, in Proceeding Nos. 14F-0336EG and 14F-0404EG (Recommended Decision).

No. 14F-0336EG. On April 23, 2014, by Minute Order, we referred this proceeding to an Administrative Law Judge (ALJ) for a recommended decision.

3. On April 24, 2014, DRC on behalf of Richmond, filed a Complaint against Public Service. This filing commenced Proceeding No. 14F-0404EG. On May 28, 2014, by Minute Order, we referred this proceeding to an ALJ for a recommended decision.

4. On August 15, 2014, by Decision No. R14-0994-I, Proceeding Nos. 14F-0336EG and 14F-0404EG were consolidated.

5. On October 15, 2015, the ALJ held an evidentiary hearing, and on March 7, 2016, he issued the Recommended Decision.

6. On April 8, 2016, DRC filed exceptions to the Recommended Decision. On April 15, 2016, Public Service filed a response to the exceptions, which supports the Recommended Decision. On May 11, 2016, we granted DRC's motion to file a reply in support of exceptions,² and on May 24, 2016, DRC filed a reply.

C. Background and Issues Presented

7. Richmond and Ryland are housing developers. Ryland has developed 39 subdivisions in Colorado, and Richmond has developed 245 subdivisions in Colorado. Through Extension Agreements with the developers, Public Service constructed service connections and distribution line extensions (line extensions) to provide gas and electric service to Ryland's and Richmond's housing developments. This case involves the allocation of costs

² Decision No. C16-0403-I.

for these line extensions. At issue are Public Service's interpretation and application of its PUC No. 7 Electric Tariff and PUC No. 6 Gas Tariff, which set forth the portion of the costs for electric and gas line extensions to be paid by Public Service and the portion to be paid by the "applicant" or, in this case, the developer. Ryland and Richmond have assigned to DRC their contractual rights for any refunds from Public Service under these Extension Agreements.

8. The primary function of line extension tariffs is to determine how much of the costs to connect a new customer should be borne by the utility and how much should be paid by the developer. As explained in the Recommended Decision, with the exception of minor changes, Public Service's line extension tariffs have largely been in place since the early 1980s.³ The portion paid by Public Service is called the Construction Allowance. The Construction Allowance is specified in the tariff as a set amount per new meter that is connected.⁴ The portion paid by the developer is called the Construction Payment. Pursuant to an Extension Agreement, the developer pays the entire cost (Construction Payment + Construction Allowance) before construction of the line extensions begins. After the development is completed and the meters are set, Public Service pays the developer the Construction Allowance.⁵ This line extension policy ensures that the costs of new service are recovered fairly from the customers who impose the costs. This policy requires a new development to pay its own way, and not be subsidized disproportionately by the current general body of ratepayers.⁶

³ Recommended Decision, ¶ 52.

⁴ Construction Allowances for gas facilities are established separately, and are not at issue in the exceptions.

⁵ The cost of electric service laterals are deducted from the Construction Allowance payments rather than requiring the developer to pay the entire cost up front, as discussed in detail below.

⁶ Niemi Answer Testimony, p.14, ln 1 – p.15, ln 6

9. Part of the construction cost that the developer must pay is for the service laterals, which are “the secondary overhead or underground electric circuit and associated facilities located between [the] Company’s distribution line and the point of delivery to [the] customer. [A] Service Lateral provides service for [the] customer’s exclusive use.”⁷ The cost of the service laterals is not known at the time the developer signs the Extension Agreement and pays the construction costs because the cost of the service laterals depends on the exact configuration of the new homes. After the service laterals are built and the meters are set, Public Service subtracts the cost of the service laterals from the Construction Allowance, and pays the developers the remaining balance of the Construction Allowance.⁸

10. One of the issues in DRC’s exceptions is whether this practice complies with Public Service’s tariffs, with Commission Rules, and with applicable statutes; or whether Public Service should have paid the developers the entire Construction Allowance and entered into a separate agreement for payment of the cost of the service laterals.

11. The second issue related to line extension tariffs is the calculation and payment of refunds of the Construction Payment when additional customers are served from the same line extension. Public Service’s Gas and Electric Tariffs state that, for a period of ten years following the line extension completion date, Public Service will refund to the original applicant a portion of the construction payment appropriated to each additional customer.⁹ At issue is whether the homeowners who purchased the homes that Ryland and Richmond built are “additional

⁷ Hearing Exhibit 1, at 104 (Public Service’s PUC Electric Tariff No. 7, Sheet No. R112). The payment of the cost of gas service laterals is not at issue here.

⁸ Recommended Decision, ¶¶ 52-60.

⁹ See *id.* at 109-110 (Public Service’s PUC Electric Tariff No. 7, Sheet No. R117-R120); *id.* at 126-130 (Public Service’s PUC Gas Tariff No. 6, Sheet No. R39-R42).

customers” such that Public service must refund any portion of the Construction Payment to DRC.

12. Finally, DRC requests that the Commission order Public Service to provide a full accounting of its line extension contracts with Richmond and Ryland so that DRC can calculate the funds owed to it by Public Service.

D. Recommended Decision

13. As relevant to DRC’s exceptions, the ALJ found that: (1) Public Service may, under its electric tariff, deduct the cost of the service laterals from the Construction Allowance before paying the developer the remainder of the Construction Allowance;¹⁰ and (2) under the plain language of Public Service’s gas and electric tariffs, Public Service was not required to refund the entire Construction Payment to the developers after the homes were purchased.¹¹ The Recommended Decision also found that Public Service does not owe any refunds to DRC, and DRC has not met its burden to prove that the Commission should require Public service to perform a full accounting.¹²

14. Consistent with our discussion below, we deny DRC’s exceptions and affirm the Recommended Decision.

E. Burden of Proof

15. As the party bringing the Formal Complaint, DRC bears the burden of proof with respect to the relief sought; and the burden of proof is by a preponderance of the evidence. § 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Commission’s Rules of Practice

¹⁰ Recommended Decision, ¶¶ 116-123.

¹¹ *Id.*, ¶¶ 98-106.

¹² *Id.*, ¶¶ 107-115.

and Procedure, 4 *Code of Colorado Regulations* 723-1. 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.

F. Findings and Conclusions

1. Public Service May Deduct the Cost of Service Laterals from the Construction Allowance

16. DRC asserted in its Complaint, and continues to argue on exceptions, that Public Service violated its electric tariff by deducting the cost of the service laterals from the Construction Allowance that was due to Ryland and Richmond after the electric meters were set. According to DRC, Public Service did not provide notice of the cost of the service laterals to the developers, and Public Service was required to enter into an additional agreement with the developers for the cost of the service laterals.

17. Public Service’s PUC Electric Tariff No. 7, Sheet No. R114 states: “Applicant or applicants shall be required to pay to [the] Company as a Construction Payment all estimated costs for electric distribution facilities necessary to serve applicant or applicants in excess of the

Construction Allowance.”¹³ Distribution extension facilities include service laterals.¹⁴ The Recommended Decision states, “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 [Construction Payment]. Neither party disputes this interpretation of the tariff.”¹⁵

18. The Recommended Decision finds that, under the unambiguous language in PUC Electric Tariff No. 7, the developers were on notice that they would need to pay for all costs—including the service laterals—that were in excess of the Construction Allowance. The Recommended Decision finds that, because the developer must pay for the service laterals, it is logical for Public Service to deduct the cost of the service laterals from the Construction Allowance before paying the developer the remainder of the balance.¹⁶

19. In its exceptions, DRC again argues that Public Service may not, under its tariffs, offset the cost of the service laterals against the payment of the Construction Allowance. DRC argues that because the tariffs do not explicitly state that the cost of the service lateral will be deducted from the Construction Allowance, the only harmonious reading of the tariff is that customers must be provided a separate service lateral cost estimate, and the developer and Public Service must execute a second agreement before the installation of service laterals. Additionally, DRC argues that because the offset of the Construction Allowance is not specified in the tariff, the practice “effectively deprives the Commission of oversight over the line extension process, ceding its legislative authority.”¹⁷

¹³ Hearing Exhibit 1, at 106 (Public Service’s PUC Electric Tariff No. 7, Sheet No. R114).

¹⁴ *Id.*, Sheet No. R111.

¹⁵ Recommended Decision, ¶ 116.

¹⁶ Recommended Decision, ¶¶ 118-19.

¹⁷ DRC Exceptions, at 14.

20. Public Service countered that it properly applied the Construction Allowance to the service lateral costs.

21. We conclude that DRC did not meet its burden of proving by a preponderance of evidence that Public Service violated its electric tariff. The Recommended Decision thoroughly addresses how the tariffed Construction Allowance amounts are applied and funded by the utility, and how the remaining construction costs—including service lateral costs—are borne by the developer.¹⁸ The line extension process is complicated by the fact that service lateral costs are not initially known when the developer submits an application to connect a new development and by the fact that the utility does not fund its Construction Allowance portion until the meter is set.¹⁹ However, the tariff clearly states that developers must pay the cost for service laterals.²⁰ We agree with the Recommended Decision that Public Service properly applied its tariff in subtracting the cost of the service laterals from the Construction Allowance before paying the remainder to the developers.

2. Public Service Does Not Owe DRC Refunds of Construction Payments

22. DRC argued in its Complaint, and continues to argue on exceptions, that Public Service's gas and electric tariffs and Commission rules require the line extension costs to be shared by all customers using the line. According to DRC, because the homeowners are the customers—not the developers—Public Service must refund the Construction Payments to DRC after the homeowner purchases the home.

¹⁸ See Recommended Decision ¶¶ 59-60; 116-122.

¹⁹ See Recommended Decision ¶¶ 78-86. Public Service witness Niemi provides a detailed explanation of this line extension process in his Answer Testimony p 14-31.

²⁰ See Hearing Exhibit 1, at 102-06 (Public Service's PUC Electric Tariff No. 7, Sheet No. R110-R114).

23. Public Service's PUC Electric Tariff No. 7, Sheet No. R118, states:

Each customer having made a Construction Payment will receive as a refund the amount necessary to adjust [the] customer's Construction Payment to the proper level considering the additional customers served from the extension and considering the Construction Allowance in effect, if any, from a subsequent extension.²¹

24. The Recommended Decision finds that no refunds were necessary for Ryland or Richmond. The Recommended Decision explains that if DRC's Construction Payment was fully refunded once the homes were occupied, as DRC argues, then DRC would not be paying its portion of the line extension Construction Costs. Because the tariff explicitly requires the applicant—the developer—to pay for the costs in excess of the Construction Allowance, DRC's interpretation is contrary to the plain language of the tariff.²²

25. In its exceptions, DRC argues that if the Recommended Decision is correct, the tariff language and the Commission rules requiring the sharing of line extension expenses between customers would be rendered null and void.²³ According to DRC, Public Service's tariffs mandate refunds of Construction Payments, and the costs of the line extension must be shared by those customers that use the extension. DRC argues that because the homeowners use the extension, they should be considered "future customers," and the developers should be refunded the entire Construction Payment.

²¹ Public Service's No. 6 Gas Tariff contains the same provision. See Hearing Exhibit 1, Exhibit RAB-5 (PUC No. 6 Gas Tariff, Sheet No. R40).

²² Recommended Decision, ¶¶ 98-106.

²³ Rule 3210(b)(IV) of the Commission's Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations*, 723-3, states:

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).

26. Public Service responded arguing that the proper application of its tariffs does not require the Company to pay any refunds to DRC, and that this interpretation does not render the tariff language null and void.

27. We conclude that DRC did not meet its burden of proving by a preponderance of evidence that Public Service owes any refunds of the Construction Payment to DRC. We agree with the Recommended Decision that DRC's interpretation is contrary to the plain language of the tariff. Public Service's testimony provides a thorough explanation of the tariff provisions allowing for refunds of Construction Payments, and why they do not apply to the Ryland and Richmond developments at issue here.²⁴ Public Service also explains that it does not typically provide refunds for Construction Payments associated with line extensions serving residential housing developments because such developments typically account for all potential lots or customers that could be served by the line extension. DRC did not contradict Public Service's explanation, and more importantly, DRC did not provide any evidence demonstrating that additional customers were connected that would require refunds to Ryland and Richmond.

28. We find that the tariff provisions allowing for refunds of Construction Payments are contingent upon new customers connecting to the line extension, and these new customers must be additional to those in the development for which the line extension was initially built. Contrary to DRC's argument, the refunds are not triggered by the homeowners purchasing a house from the developer. The homeowners who purchased the homes built by Ryland and

²⁴ Niemi Answer Testimony, pp. 22-24 and 31-35.

Richmond are not “future customers,” as contemplated in Rule 3210, nor are they “additional customers,” as contemplated by Public Service’s tariffs. Because no customers—outside of the developments built by Ryland and Richmond—were connected to the line extensions Public Service constructed for those developments, Public Service is not required to refund any of the Construction Payments to DRC.²⁵ Though the tariff refund provisions are not applicable to DRC here, they are not “null and void” as DRC argues, as they would apply in situations where an additional applicant or developer attaches meters to an extension that was funded by a different original applicant or developer.

3. Accounting

29. Finally, DRC argues that Ryland and Richmond have suffered damages; therefore the Commission should require Public Service to provide an accounting of Ryland and Richmond funds so that DRC can calculate the funds owed to it. The Recommended Decision finds that DRC did not investigate the contracts between the developers and Public Service, DRC did not meet its burden to show that Public Service owes refunds to DRC, and DRC did not meet its burden to prove that an accounting should be ordered.²⁶

30. DRC continues to argue in its exceptions that the developers were harmed because Public Service did not provide a separate contract for the cost of the service laterals and

²⁵ DRC makes several arguments in its Reply to Public Service’s Response to Exceptions that are not relevant to our analysis. DRC disputes Public Service’s statement that Richmond and Ryland are the original permanent service customers, not “additional permanent service customers,” referred to in Tariff Sheet No. R117. We find that it is irrelevant whether Richmond/Ryland or the subsequent homeowner is the permanent customer. The refund provision applies only if an additional customer, other than that for which the utility awarded the original Construction Allowance, connects to the distribution extension. DRC also takes issue with Public Service’s statement that “every day developers build the costs of line extensions into their prices.” We find that this statement is not relevant to the issue at hand.

²⁶ Recommended Decision, ¶¶ 107-115. In fact, the Recommended Decision found that “DRC has not even bothered to open the boxes of documents supplied by Ryland and Richmond.” *Id.* ¶ 51.

because Public Service did not refund any construction payments. DRC asserts that the appropriate remedy is for the Commission to require an accounting by Public Service.

31. We do not find DRC's arguments persuasive, and we conclude that DRC did not meet its burden of proving by a preponderance of evidence that Ryland or Richmond were injured or that an accounting is warranted. We affirm the Recommended Decision denying DRC's request for the Commission to require Public Service to provide a full accounting.

II. ORDER

A. The Commission Orders That:

1. The Exceptions to Decision No. R16-0192 filed on April 8, 2016, by Development Recovery Company LLC, on behalf of the Ryland Group and Richmond Homes of Colorado, are denied consistent with the discussion above.

2. We adopt Recommended Decision No. R16-0192 as a Decision of the Commission without modification.

3. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

4. This Decision is effective on its mailed date.

**B. ADOPTED IN COMMISSIONER'S WEEKLY MEETING
June 15, 2016.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

FRANCES A. KONCILJA

Commissioners