Decision No. C10-0286

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09AL-299E

IN THE MATTER OF ADVICE LETTER NO. 1535 BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE ITS COLORADO PUC NO. 7 ELECTRIC TARIFF TO REFLECT REVISED RATES AND RATE SCHEDULES TO BE EFFECTIVE ON JUNE 5, 2009.

ORDER ADDRESSING PHASE II

Mailed Date: March 29, 2010
Adopted Date: March 10, 2010

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I. BY THE COMMISSION

A. Procedural History

1. On May 1, 2009, Public Service Company of Colorado (Public Service or Company) filed Advice Letter No. 1535-Electric. Public Service requested that the tariff pages accompanying Advice Letter No. 1535-Electric become effective on June 5, 2009. Public Service filed direct testimony in support of the rate increases and rate design changes proposed in the advice letter.

2. The Commission issued several orders dealing with variety of procedural issues in the course of this docket, prior to the start of the scheduled hearing. It is not necessary to reiterate each of these orders here, but we below review important milestones in this docket.

3. The Commission set proposed tariff pages for a hearing pursuant to § 40-6-111(1), C.R.S., and suspended their effective date for 120 days from the proposed effective date, through October 3, 2009. *See* Decision No. C09-0512, mailed May 13, 2009. The proposed effective date was further suspended until April 1, 2010. *See* Decision No. C09-1427, mailed December 18, 2009. Memorializing that further suspension, Public Service filed an amended advice letter on August 19, 2009.

4. The Commission held a prehearing conference in this docket on June 18, 2009, as scheduled. *See* Decision No. C09-0709, mailed July 1, 2009. At the prehearing conference, the

Commission noted interventions by right and found good cause to grant petitions to intervene by permission filed by the following entities:

- Staff of the Colorado Public Utilities Commission (Staff);
- The Colorado Office of Consumer Counsel (OCC);
- Colorado Governor's Energy Office (GEO);
- The Colorado Department of Transportation (CDOT);
- Colorado Harvesting Energy Network;
- Western Resource Advocates;
- Black Hills/Colorado Electric Utility Company, L.P.;
- Interwest Energy Alliance;
- The City of Boulder;
- Boulder County Board of Commissioners;
- Energy Outreach Colorado;
- Dr. Robert A. Bardwell;
- Ms. Nancy LaPlaca;[1]
- The City of Grand Junction;
- Kroger Company (Kroger);
- Wal-Mart Stores, Inc., and Sam's West, Inc. (collectively, Wal-Mart);
- Ms. Leslie Glustrom;
- Southwestern Energy Efficiency Project (SWEEP);
- Mr. Stephen Pomerance;
- The City and County of Denver (Denver);
- Ms. Alison Burchell;
- Colorado Energy Consumers (CEC);
- NAIOP, the Commercial Real Estate Development Association, Colorado Association of Home Builders, Denver Metro Building Owners and Managers Association, Forest City Stapleton, Inc., and Fitzsimons Developer, LLC; LUI Denver Broadway Office, LLC, and LUI Denver Broadway LLC (collectively, NAIOP);
- Cities of Arvada, Aurora, Centennial, Golden, Greeley, Greenwood Village, Lakewood, Littleton, Louisville, Thornton, Westminster, Wheat Ridge, and the Towns of Breckenridge, Frisco, Superior, Poncha Springs and the City and County of Broomfield (collectively, local government intervenors or LGI);

[1] Ms. La Placa subsequently filed a Motion to Withdraw as an intervenor, which was granted in Decision No. C09-1313, mailed November 23, 2009.

- POWDR-Copper Mountain, LLC,[2] Vail Summit Resorts, Inc.,[3] and Intrawest/Winter Park Operations Corporation (collectively, Ski Resorts);
- The Energy and Environmental Committee of the Arapahope Community Team;
- Climax Molybdenum Company, CF&I Steel, LP, doing business as Rocky Mountain Steel Mills (CF&I/Climax);
- Colorado Solar Energy Industries Association and Solar Alliance (CoSEIA);
- Fitzsimmons Redevelopment Authority;
- Federal Executive Agencies (FEA);
- Colorado Independent Energy Association;
- Mr. Gregg S. Eells, P.E.; and
- Mr. Paul Longrigg.[4]

5. During the prehearing conference, the Commission bifurcated the hearing in this docket into two sessions, the first one to hear Phase I revenue requirement and ECA issues and the second to hear Phase II rate design issues. The Commission also adopted a procedural schedule, scheduled a public comment hearing, and ruled on matters related to discovery. *See* Decision No. C09-0709, mailed July 1, 2009.

6. By Decision No. C09-1446 the Commission ruled on the various disputed issues in the Phase I and ECA portion of this docket. Among other things, the Commission approved a $128.3M increase in Public Service's revenue requirement.

7. A pre-hearing conference on Phase II issues was held on January 7, 2010.

8. The evidentiary hearing on Phase II issues was held on January 11, 2010, through January 14, 2010, January 19, 2010, through January 22, 2010, and January 25, 2010.

[2] Intervention was originally granted to Copper Mountain, Inc. On January 20, 2010, POWDR-Copper Mountain LLC filed an Unopposed Motion for Leave to Substitute POWDR-Copper Mountain LLC for Copper Mountain, Inc. and for Waiver of Response Time. In December, 2009, the assets of Copper Mountain Inc. were sold to POWDR Corp., and subsequently assigned to POWDR-Copper Mountain LLC. POWDR-Copper Mountain retained the same counsel as Copper Mountain and continued to represent the same interests in this proceeding. The Commission finds no party will be prejudiced by the substitution and will therefore grant the Motion.

[3] Late filed intervention granted by Decision No. C09-1075, mailed September 23, 2009.

[4] Late filed intervention granted by Decision No. C09-0765, mailed July 16, 2009.

9. Pursuant to Decision No. C09-1284, the parties filed their Statements of Position on February 16, 2010. Parties were permitted to file two Statements of Position, one covering the environmental tariff and agreement issues, and one on all other aspects of the Phase II portion of this docket.

10. Commission Deliberation Meetings on the Phase II issues were held on March 2, 2010, and March 3, 2010.

11. The Commission also addressed certain Motions discussed in this order during the February 18, 2010, and March 10, 2010, Commissioners' Weekly Meetings.

B. The Rate Setting Process

12. Ratemaking is a legislative function. *The City and County of Denver v. Public Utilities Commission*, 129 Colo. 41, 43, 226 P.2d 1105, 1106 (1954). Ratemaking is not an exact science. *Public Utilities Commission v. Northwest Water Corporation*, 168 Colo. 154, 173, 551 P.2d 266, 276 (1963). Rates should be "just and reasonable." *Id.* Under this standard, "it is the result reached, not the method employed, which is controlling." *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944).

13. In setting rates, the PUC must balance protecting the interest of the general public from excessively burdensome rates against the utility's right to adequate revenues and financial health. *Public Utilities Commission v. District Court*, 186 Colo. 278, 234, 527 P.2d 233, 282 (1974).

C. Class Cost of Service Study

14. The purpose of a class cost of service study (CCOSS) is to attribute costs to different classes of customers based on how those customers cause costs to be incurred. Performing a CCOSS involves three steps: (1) functionalize costs by assigning them to categories

such as generation, transmission, distribution, or administrative & general; (2) classify costs based on some common characteristic of what drives the costs; and (3) allocate the functionalized and classified costs among the various customer classes.

15. Public Service's CCOSS has proposed using the 4 Coincident Peak Demand (4CP), Average Excess Demand (AED) method to allocate production, transmission and distribution substation costs. Most parties who addressed the Company's CCOSS were in agreement that the shift from using Non-Coincidental Peak (NCP) to allocate "excess" bulk-power costs to using a measure of summer 4CP was an improvement from the method the Company has used historically. This shift more accurately reflects the extent to which Public Service's bulk power capacity costs are now being driven by its customers' summer loads. In the Company's view, the 4CP-AED method thus reflects an appropriate balancing of the two factors that are the principal drivers of the Company's fixed production, transmission and distribution substation costs: a class' average annual energy use and its contribution to the summer system peak demands. Because a portion of the Company's generation and transmission costs are allocated based on each class's energy use or average annual demand, the 4CP-AED method also ensures that those classes with low summer peak demands, such as street lighting, are responsible for a reasonable level of generation and transmission (G&T) cost.

16. Public Service also allocated the costs of the primary distribution system on the basis of class NCP and secondary distribution system costs on the basis of the average of class NCP and the sum of individual customers' annual maximum demands. No party challenged the reasonableness of the Company's allocation of primary and secondary distribution system costs.

17. As discussed in its Rebuttal testimony, the Company made several changes to its CCOSS. The first modification is in response to the recommendation of CEC and CF&I\Climax

to split the Commercial and Industrial (C&I) rate class into three subclasses in the CCOSS. CEC and CF&I\Climax recommend separating the C&I class into three classes based upon voltage level and separately allocating costs to each of these three classes. Public Service confirmed that separating the C&I class into three classes for CCOSS purposes will yield the appropriate rate relationships and therefore this change is reflected in its revised CCOSS.

18. The second modification to the Company's CCOSS is in response to the recommendation of OCC witness Mr. Senger to reduce the residential demand and energy allocation factors to reflect the Company's proposed elasticity adjustment. Public Service agrees with OCC's recommendation to reflect the residential elasticity adjustment in the CCOSS. The Company's proposed inverted rates will reduce the residential class' test-year coincident peak demands and energy use. Public Service also incorporated the lower residential energy use in its test-year billing determinants. The Company agrees that a similar adjustment should also be reflected in the derivation of the residential demand and energy allocation factors. This revision to the CCOSS reduces the residential test-year revenue requirement and increases the level of costs allocated to other classes.

19. The third modification the Company made was to revise the direct assignment of distribution substation plant. This modification affects the CCOSS as well as the Service and Facility (S&F) charge to Lockheed Martin.

20. The remaining major area of dispute regarding Public Service's CCOSS is the method the Company has used for allocating production and transmission plant.

21. The OCC advocated rejection of the 4CP-AED method, arguing that it failed to give sufficient weight to class energy use as a driver of the Company's production costs. Instead, the OCC used the stratification study Public Service performed to design time-of-use and

seasonal rates and to classify the Company's production fixed costs as energy-related and capacity related. The OCC then allocated the energy-related costs based on each class's annual average energy consumption and allocated the capacity-related costs using the 4CP allocator. Because the OCC considers all of Public Service's transmission costs to be capacity-related, the OCC advocated allocating those costs based on the 4CP factor.

22. The OCC argues the 4CP-AED method ignores the critical fact that production plant costs are substantially driven by the amount of energy that must be produced. The OCC further argues the 4CP-AED method contradicts the Commission's guidance in Decision No. C85-1032, in which we stated high-load factor customers should pay a greater share of production plant costs than low-load factor customers because high-load factor customers require more of the expensive base-load generation facilities. In addition, the OCC represents that the 4CP-AED method results in a lower allocation to high load factor classes than even a peak-only method such as a 4CP allocation.

23. Therefore, the OCC recommends that the Commission adopt the Stratification Method for classifying and allocating production plant costs in this proceeding instead of the 4CP-AED method. The OCC testified that the advantage of the Stratification Method is that it attempts to stay as true to cost causation as is practical. It attempts to identify that portion of production costs incurred to meet peak energy demand and allocates that to customers based on their contribution to peak. It attempts to reflect those fixed costs that are related to baseload and it allocates those to customer classes on the basis of their energy use.

24. In support of its Stratification Method, the OCC cites to the fact that Minnesota, North Dakota and South Dakota Commissions have approved the use of the Stratification Method

for other Xcel operating companies.[5] In fact, the Minnesota Commission has used the Stratification Method since 1977.

25. Public Service states the OCC rejects the AED method because it believes the 4CP-AED method insufficiently recognizes class energy use as a driver of production fixed costs. However, as Public Service explains, because OCC used a straight energy allocator as the basis for allocating "energy-related" production costs to classes, its approach likely results in too great a shift of energy-related production fixed costs from the residential and small commercial classes to large demand-metered customers.

26. Public Service further argues that because the OCC has not employed an energy allocator weighted by system hourly marginal energy costs, it is not possible to conclude that the OCC's method actually results in a more equitable allocation of production fixed costs than does the 4CP-AED method. Public Service represents that the OCC's recommended approach results in a significant shift of production costs from the residential and small commercial classes to the larger C&I classes.

27. Public Service also explained in its testimony that in the other jurisdictions where Xcel Energy's subsidiaries have used the stratification method to classify fixed production costs, "[t]he energy related component of the fixed generation costs is allocated to customer classes based on class hourly (8,760 hours) energy requirements, which are weighted by system hourly marginal energy costs."[6] As testified to by Public Service, the use of a weighted energy allocator, as opposed to the straight energy allocator used by the OCC, results in classes with a relatively higher percentage of usage during on-peak periods receiving a greater portion of the

[5] Ex. 74 at 20.

[6] Public Service, Statement of Position (Nonenvironmental), January 16, 2010 at 9.

energy-related production costs. While the impact in this case is not certain because the analysis was not performed, Public Service suspects the weighted energy allocator would result in a shift of production costs back to the residential and small commercial classes from the large C&I classes.

28. CEC also offered an opinion about Public Service's CCOSS. CEC argues that a key objective of the cost allocation process is to assign cost causality. Benefits of proper cost allocation include the prevention of inter-class subsidies, an encouragement of efficient use of energy, and the stabilization of the utility's earnings. CEC submits that the Company's 4CP-AED approach appropriately balances the interest of cost causality with the need to emphasize class contributions to rising summer peak demands among various customer classes. Thus, CEC supports the Company's 4CP-AED approach in this proceeding and recommends that the Commission adopt the method to allocate the Company's production and transmission costs. CEC states the OCC's proposal for the allocation of production and transmission plant inappropriately shifts excessively large amounts of costs from the residential class to the Primary General (PG) and Transmission General (TG) classes. Further, according to CEC, the OCC's use of the Stratification Method for the allocation of production plant is flawed because it inappropriately blurs the relationship between cost causation and peak demand.

29. CEC supports the disaggregation of the C&I classes as presented in the Company's revised CCOSS. This would allow the calculation of the cost of service for the three C&I classes – Secondary General (SG), PG, and TG – based on their respective voltage levels.

30. CF&I/Climax also advocates for the adoption of the 4CP-AED method proposed by the Company. CF&I/Climax characterizes the OCC's proposal to adopt a stratification method as an excessive shift of costs to larger-load-factor customers. Further, CF&I/Climax

states the OCC's proposal to modify the energy and demand cost allocation factors in the residential rate class to reflect an elasticity adjustment made by the Company has the effect of inappropriately shifting significant costs away from the residential class to the C&I class and should be rejected. CF&I/Climax supports the separate allocation of the SG, PG, and TG classes as presented in the Company's revised CCOSS.

31. FEA asks the Commission to reject the stratification study as well as the proposal to recover generation and transmission capacity costs exclusively through the summer charges. Instead, FEA believes the Commission should approve Public Service's "Mitigated Rates" approach in which approximately 88 percent of all fixed G&T capacity costs are allocated to the year-round revenue requirements. *See* Ex. [7] 1 at Exhibit No. SBB-8 (setting forth the "Mitigated Rates" approach). FEA states that, in its compliance filing of the final rates, Public Service should calculate the seasonal rates in proportion with the "Mitigated Rates" methodology.

32. Ms. Glustrom supports the Stratification Method proposed by the OCC, stating it will appropriately allocate more of the high cost of constructing base load facilities to rate payers that have high load factors and therefore require more of the base load energy. If rates are not allocated in this manner, Ms. Glustrom contends low load factor customers such as residential rate payers would be required to subsidize high load factor customers such as large industrial facilities.

33. Considering the totality of the arguments and evidence, we accept the Company's CCOSS as updated in its Rebuttal Testimony. Public Service, in its CCOSS, proposed a 4CP-AED method for purposes of allocating production, transmission and distribution substation costs. We find, based on the record, that Public Service's use of the 4CP-AED method in its

CCOSS results in a just and reasonable allocation of production, transmission and distribution substation costs, and is a reasoned approach to allocating summer peaking costs.

34. We believe the OCC's Stratification Method may have some merit. However, we agree with Public Service that, without knowing the impact of an energy-allocator weighted by system hourly marginal energy costs, we cannot conclude that the OCC's recommended Stratification Method actually results in a more equitable allocation of production fixed costs than does the 4CP-AED method used by the Company. As a result, we will not adopt the OCC's adjustment to Public Service's CCOSS without knowing its full ramifications. Therefore, we order Public Service in its next Phase II submission to file a CCOSS that includes a stratification adjustment in addition to the Company's proposed CCOSS. This stratification CCOSS should also contain a comparison sheet that maps its results to the results of the Company's proposed CCOSS.

D. Elasticity Adjustment

35. Public Service applied an elasticity factor to reflect the impact of the Company's proposed inverted block rates (IBRs) on residential usage. This had the effect of reducing the residential class' test-year coincident peak demands and its annual energy use.

36. The OCC believes the impact of the IBRs on residential class demand and energy should also be reflected in the residential demand and energy factors used in the Company's CCOSS. Mr. Senger argued it was unfair to use the unadjusted (higher) demand and energy allocation factors for purposes of determining the total revenue requirement to be recovered from the residential class while assuming a lower level of usage for purposes of calculating the per unit rates to be paid by residential customers. In its Rebuttal case, the Company agreed the

[7] "Ex." denotes a hearing exhibit.

expected effect of the proposed IBRs on residential usage should have been reflected in the factors used in the CCOSS.

37. CEC objects to the OCC's recommended adjustment to the residential demand and energy factors. As shown on Mr. Senger's Exhibit DJS-4, the reduction of these factors lowers the base rate revenue requirement to be recovered from the residential class and increases the revenue requirement to be recovered from the C&I class. Ex. 74. CEC complains it is unfair to adjust the residential demand and energy factors used in the CCOSS for the expected elasticity effect of the proposed IBRs, without making a similar adjustment to the C&I class' factors to reflect expected elasticity effects of the proposed TOU and seasonal differentials.

38. Public Service accepted the OCC's position that a residential elasticity adjustment be included in the demand and energy factors used for creating the CCOSS. The Company rejects CEC's contention that it is unfair to adjust the residential demand and energy factors used in the CCOSS for the expected elasticity effect of the proposed IBRs, without making a similar adjustment to the C&I class' factors to reflect expected elasticity effects of the proposed TOU and seasonal differentials. Public Service points out that, in the case of the residential class, the change in the factors used in the CCOSS is appropriate because the billing units used to design the residential base rates were reduced to reflect the effect of the IBRs on usage. This results in the two adjustments properly mirroring one another. In the case of the C&I classes, the Company has not adjusted the billing units used to design the C&I rates. Consequently, it is also not appropriate to reduce the allocation factors used to determine the test-year costs imposed by C&I customers.

39. We find merit in the OCC's recommended adjustment to the residential demand and energy factors. The change in the factors used in the CCOSS is appropriate because the

billing units used to design the residential base rates were reduced to reflect the effect of the IBRs on usage. Based on the record, we will adopt the OCC's recommendation that the impact of the IBRs on residential class demand and energy also should be reflected in the residential demand and energy factors used in the Company's CCOSS.

E. Residential and Commercial Service and Facilities Charges

40. The Service and Facilities (S&F) Charge is designed to recover customer-related costs such as billing and metering. It is a flat rate per month, charged per customer.

41. Public Service has proposed increasing the monthly Residential S&F Charge from $6.25 to $6.75. In support of this increase, the Company argues the following: (1) it is based on a conservative estimate of embedded customer-related costs; (2) when the effect of the General Rate Schedule Adjustment (GRSA) on the current Residential S&F Charge is taken into account, the Company is actually proposing a lower charge; (3) it will avoid cross-subsidization because it promotes cost-based rates; and (4) the increased Residential S&F Charge will stabilize the Company's revenue stream.

42. Public Service is also advocating for an increase in the monthly Commercial S&F Charge from $7.25 to $12.25. The Company acknowledges this represents an increase to the current charge even after the application of the GRSA. Again, the Company expresses concerns about cross-subsidization and revenue instability stating these are magnified for the commercial class. Public Service reiterates that S&F charges are designed to recover 100 percent of the customer-related costs identified in the CCOSS, not any more or any less.

43. Staff opposes the Company's proposal to increase the Commercial and Residential S&F Charges stating the Company has not presented any rationale for the increases. Instead, Staff recommends the charges be maintained at current levels. Staff points to the

objectives in Docket No. 08I-420EG (known as the "Customer Rate Incentives" docket) as a basis for rejecting the Company's proposal. Ex. 79 at 24-25.

44. SWEEP opposes the Residential S&F Charge increase. The basis for SWEEP's recommendation is that collecting more revenue in the variable charge and less in the fixed charge will encourage greater conservation, thereby providing a more efficient use of electricity. According to SWEEP, this type of rate design goal of saving energy and capacity will help keep future rate increases to a minimum. SWEEP estimates that maintaining the fixed charge at $6.25 per month and inflating the energy charge will lead to a reduction of approximately 0.3 percent in electricity use and peak demand.

45. We approve Public Service's proposed Residential S&F Charge of $6.75 and the Commercial S&F Charge of $12.25. We find that the magnitude of the requested increases are not large and that they will promote a cost-based rate structure. Additionally, a Residential S&F Charge of $6.75 is less than the current charge when the GRSA is applied [$6.25 x 1.4501 = $9.06]. We are mindful of SWEEP's concern for conserving energy and note that the rate design developed in this proceeding, specifically the IBRs, are crafted with the intent, in part, of promoting energy conservation.

F. Demand Ratchet

46. Public Service proposes unbundling the demand charge it assesses on its large customers. The result of the unbundling would be the creation of two components: a generation and transmission demand charge and a distribution demand charge. The customer's billing determinant for the distribution demand charge would be the higher of the customer's actual peak demand during the billing month or 75 percent of the customer's highest monthly peak demand, as established over the previous 11 months.

47. Public Service contends a ratchet on the distribution demand charges will better reflect the distribution costs imposed by a customer because the distribution costs do not vary with changes in the customer's peak demand from month to month. The Company asserts the distribution demand charge ratchet reflects the fact that it must build its distribution system to meet projected annual peak demands, regardless of the frequency with which those occur. Additionally, the Company states the ratchet will ease the transition to more sophisticated TOU rates, which might be implemented at a future date.

48. The Ski Resorts oppose the ratchet proposed by Public Service. The Ski Resorts argue that no facts have changed since the Company requested the 75 percent demand ratchet be removed from its electric tariff several years ago. Further, the Ski Resorts claim Public Service failed to put forth any analytical basis for the 75 percent ratchet level and failed to examine the ratchet's impacts on its customers.

49. CEC recommends rejection of the Company's ratchet proposal, stating the design violates the prohibition against retroactive ratemaking. CEC claims the Company's proposal is unreasonable for the SG class in particular because there is no evidence that SG customers generally have dedicated distribution facilities. If the Commission adopts the concept of using a demand ratchet, CEC believes the Company's proposal must be modified to ensure just and reasonable rates.

50. FEA does not oppose a distribution demand charge ratchet design but states the 2001 data used by Public Service should be updated utilizing the most recent data available. Alternatively, FEA believes the ratchet should be phased-in over a 12 month period which would protect against retroactive rate making and may also provide an opportunity to more accurately

modify the billing determinants. The Company defends its use of 2001 billing data, stating that was the last test year in which a demand ratchet was in effect.

51. FEA requests the Commission deny the distribution demand ratchet as proposed by Public Service for several reasons: (1) it is contrary to public policy because it punishes customers who have invested in energy efficiency and distributed generation; (2) it is contrary to the Company's professed cost allocation principles; and (3) the ratchet level of 75 percent is arbitrary and the data used was derived from 2001.

52. The OCC supports the Company's proposed 75 percent ratchet for the distribution fixed charges based on its cost causation position taken on other issues in this proceeding. The OCC believes the ratchet ensures a customer with a demand that fluctuates greatly from month to month pays its fair share of the distribution costs. If customers with varying demand do not pay the costs they impose on the system, those costs will be recovered from the remaining customers in the class.

53. Wal-Mart does not oppose the unbundling of the Company's Demand Charge into two separate components. However, in lieu of a distribution demand charge Wal-Mart supports a fixed amount per customer per month, similar to an S&F charge, stating this is more equitable than the ratchet proposal. The OCC is opposed to this proposal asserting there is no cost based justification.

54. SWEEP does not support the 75 percent demand ratchet. SWEEP believes the Company's demand ratchet proposal is not based on the principle of charging customers based on cost causation. SWEEP is also concerned the proposal will discourage customer investment in energy efficiency and renewable energy.

55. We find merit in Public Service's argument that the distribution demand charge ratchet reflects the fact that the Company must build its distribution system to meet projected annual peak demands, regardless of when those occur. We are persuaded by the Company's argument that the distribution costs incurred to serve the ski areas and other customers with variable or seasonal loads do not change significantly even though their use of the Company's distribution facilities may vary over the course of the year. Therefore, we find that the demand ratchet ensures that these customers pay an appropriate share of the distribution costs incurred to serve them.

56. We are also persuaded by some of the comments of opponents to the ratchet charge. We find merit in their argument that the billing determinants for calculating the ratchet charge should be updated using the most recent data available. We find billing determinants based on 2001 data are stale and will not be used in the calculation of a ratchet charge.

57. Therefore, in crafting a solution which takes into account the regulatory principles that cost causers should pay their fair share of costs based on just and reasonable rates, we adopt a 50 percent rate ratchet charge and a phase-in approach which will be based on FEA's proposal. We believe this solution balances the concerns of the parties that a 75 percent rate charge may be too high and the concerns of the Company that too low of a ratchet charge will not result in any revenue, and therefore, the cost causers who the ratchet charge is aimed at may not pay their fair share of their cost of service. We also find FEA's phase-in approach is a reasonable solution to updating stale data in order that rates will be based on the Company's current cost of service.

58. Public Service shall calculate the 50 percent ratchet based on the following method: the first month will be based on the billing demand in that month, the second month demand will be compared to 50 percent of the first month demand and set at the higher of the

two, the third month demand will be compared to 50 percent of the highest demand in the first two months and set at the higher of the two, the fourth month demand will be based on a comparison of the highest of the three previous months and set at the higher of the three, etc. This has the purpose of establishing a new yearly baseline for demand-based usage in order to calculate the demand ratchet. We also direct Public Service to include the results of this rate mechanism in its next Phase II filing.

G. Secondary General Rate (SG) Issues

59. Public Service proposed changes in its rate design to its SG tariff in this case, including unbundling the demand charge and widening the seasonal difference in the demand charge rate. For the demand-metered classes the difference between the summer and winter Generation and Transmission Demand Charges is set at $3.00 per kW-month. This differential approximately doubles the current seasonal differential after the application of the GRSA.

60. The OCC agrees with Public Service's approach to unbundle the demand charge. The OCC's witness Mr. Senger recommends the Commission adopt these proposed changes. Mr. Senger believes it is widely accepted that distribution costs are closely related to the NCP of the customer irrespective of when in the year that peak occurs. So, he therefore thinks Public Service's proposal to unbundle the demand charge is an appropriate method of collecting those costs from the customers who cause them. Ex. 74 at 36. The OCC also proposed to increase the Energy Charge and decrease the Demand Charge for SG customers. The OCC felt this proposal would ensure that the fixed energy related production costs would be recovered in the Energy Charge rather than in the Demand Charge. In the OCC's opinion, an Energy Charge would collect costs from the appropriate customers, improve the price signals to these customers, and provide a better incentive for these customers to conserve energy. Ex. 74 at 37-38.

61. Further, we find that the OCC's proposal recommending that the SG energy charge be increased to recover the energy-related production costs resulting from the implementation of Mr. Senger's stratification of production plant into capacity and energy components should not be approved at this time. That proposal results in a shift to the usage charges of approximately 65 percent of the fixed production costs that have been allocated to the SG class. We disagree with the OCC's recommendation to shift recovery of fixed production costs to the energy charge assessed to SG customers. Therefore, the SG Rate Schedule is approved as proposed by Public Service, with an alteration of the ratchet to 50 percent along with a phase-in of that charge.

H. Optional Time-of-Use Rates For Large C&I Customers

62. Public Service has proposed an optional TOU tariff for C&I customers (on rate Schedules PG/SG/TG) and wants to offer it as a pilot program that would expire at the end of 2012. From 2010 through 2012, the Company hopes to gain experience with C&I TOU rates so that it might offer such tariffs on a permanent basis. Public Service seeks certain limitations on the availability of optional TOU tariffs to protect against revenue erosion. Because the proposed TOU tariffs are being offered on an optional basis, Public Service is wary of self-selection bias. The customers most likely to avail themselves of the TOU option will be those who can lower their total electric bills under the rate structure even without modifying their operations or consumption patterns. Accordingly, to mitigate the risk of revenue erosion, Public Service proposes limiting availability of its optional time of use tariffs to customers with at least a 30 percent load factor and to limit the total amount of load that can take service under each TOU tariff at any one time to 20 MW. There are certain narrow exceptions to this proposed limitation.

63. The GEO's witnesses Mr. Lyng and Mr. Wendling recommended, in their answer testimony, a variety of changes to both the applicability of the SG TOU tariff and its rate structure. The GEO's recommendations were geared towards increasing the attractiveness of the tariff to customers who install on-site photovoltaic (PV) systems. Ex. 33 at 8-9; Ex. 34 at 29-33.

64. To address this concern, Public Service has agreed to offer a special TOU tariff (SPVTOU) to accommodate the needs of customers taking service at secondary voltage who install PV systems after June 1, 2010. However, it seeks to limit availability of the optional SPVTOU tariff to guard against undue revenue erosion. The SPVTOU tariff would also be limited to customers with load factors of at least 30 percent as measured during the 12 consecutive months preceding installation of the PV system. However, in recognition of the PV system's likely effect upon the customer's load factor subsequent to installation, Public Service will allow the customer to remain on the tariff even if the load factor subsequently falls below 30 percent. Additionally, the Company proposed annual caps on the level of new load eligible for the SPVTOU tariff equal to the projected amount of new on-site solar capacity for medium sized facilities in Public Service's Solar Rewards program. Ex. 2 at 35-42.

65. We find that Public Service's proposed optional TOU rates for large, demand metered customers is a very important step toward the development of more sophisticated rate designs that will better match cost causation to cost responsibility. We further find the limitations placed on this rate are appropriate. We encourage Public Service to develop these rates further beyond the pilot program it has proposed here and to make these rates a permanent part of its tariff as soon as possible or in its next Phase II rate filing. We also acknowledge Public Service's efforts to modify the TOU rate to accommodate the PV customers. The SPVTOU rate

schedule represents a reasonable solution for customers who install PV systems. We approve the TOU tariffs as proposed, as well as the SPVTOU tariff.

I. Shifting of Cost from Demand Charge to Energy Charge for Time-of-Use (TOU) Rates

66. Interwest witness Mr. Gilliam recommends in his answer testimony that C&I demand-metered customers that install a net-metered solar electric system be offered a tariff that shifts cost recovery from demand charges to energy charges. The percentage of costs shifted would vary depending on whether the PV system is a fixed-tilt system or a single-axis tracking system. Ex. 30 at 7-8.

67. Public Service disagrees with Mr. Gilliam's testimony suggesting that either 61 percent or 71 percent of the costs currently collected through demand charges be shifted to energy charges, depending on the type of PV facility. Public Service remains skeptical that this design is better than what it has already proposed. Public Service believes its proposed design would accomplish the shift in revenue recovery from demand to energy charges that Mr. Gilliam endorses.

68. Public Service has made several steps in the right direction in offering the TOU rate to this customer class. The Company has stated its concern over revenue erosion unless the rate goes forward as designed. While revenue erosion should not be our primary concern in recommending cost responsibility in a fixed charge versus a per kWh charge, Interwest's proposal is too extreme for such a customer segment. In addition, Public Service's offering of the SPVTOU tariff represents a very good accommodation for on-site PV customers. Therefore, the cost allocation between demand and energy in this rate class should remain as proposed and Mr. Gilliam's proposal is denied.

69. CoSEIA witness Mr. Beach recommends in his answer testimony that the residential and commercial TOU tariffs the Company provided for informational purposes be offered to customers who install solar generators. Ex. 26 at 12-15. Public Service also objects to offering an optional TOU rate to residential or commercial customers served under Schedule C as proposed by the OCC, because it feels there is no pressing need for such a tariff at this time. Ex. 2 at 43-44. It further states it would be premature to offer such tariffs prior to completion of the proposed SmartGridCity pricing pilot. The Company states that, given the current and proposed design of the residential and commercial rates, the net metering tariff should already provide adequate incentive for residential and commercial customers to install PV facilities. Public Service argues because the residential and commercial rates are on a kWh basis, these customers have the opportunity for greater savings when they install PV systems than do the SG or PG customers who are charged on a demand/energy basis. Public Service states the OCC fails to show the benefit to be derived from an optional TOU tariff for the C class would be sufficient to justify the increased cost of installing the metering facilities to implement the tariff. It should be noted that in its Statement of Position, the OCC chose not to pursue this point further.

70. Residential and small commercial customers do not have the demand meters that make TOU rates practical for these customers. Public Service makes a persuasive argument regarding the investment that has already been made in SmartGridCity and how that project should yield valuable insights into programs or potential rate designs that approximate TOU rates for residential and small commercial customers. We feel that option must be explored fully before offering TOU rates to these customer classes. The proposal by the OCC and CoSEIA regarding adopting the TOU rates for these customer classes is denied.

J. Residential Inverted Block Rates

1. Background

71. IBRs have been employed in a variety of states by electric utility providers. IBRs generally stratify usage by individual customers into blocks of usage, for example 0-500 kWh, 501-1000 kWh, and 1001+ kWh. IBRs charge a customer progressively higher rates for each block as the customer's consumption of electricity increases into the higher blocks. There are two main purposes behind the concept of IBRs. First, it allows the utility to reflect the increasing long run marginal cost for electricity. Second, it is a means to achieve energy sales reduction and/or peak load reductions. IBRs are often used because the advanced metering to implement TOU rates is not deployed among the residential class.

72. This is the first time this Commission has been presented with a proposal for IBRs for the residential class. In Decision No. C09-0172, concluding Investigatory Docket No. 08I-420EG on customer incentives, we concluded that inverted block rate designs and time of use schedules were appropriate policy objectives to study further. Also, we expected further study of these regimes was appropriate for a Phase II rate case proceeding. In that order we described the policy objectives of an IBR design:

- Align the service and facilities charge with the objective(s) of the rate design. This may mean limiting the service and facilities charges to the actual incremental costs associated with metering and billing.
- If the objective is to reduce residential peak demand, consider using tiered rates seasonally.
- It has been suggested that seasonal differences in marginal capacity costs may result in seasonally differentiated rates.
- If the objective is to reduce overall residential energy usage, then consider a year-round tiered rate.

- Before considering a year-round tiered rate, consider the impact upon other large users, such as electrically heated homes.

- Recognize that substantial customer education needs to accompany transition to a tiered rate and that the desired consumption changes may not occur until after such education occurs.

73. Public Service proposes implementing a two-tier, summer-only inverted rate design for the residential class. The block's boundary would be set at 500 kWh, with the higher block (tail block) set at $0.08 per kWh. Public Service argues that its Loss of Load Probability study indicates that summer is always the peaking season and that a summer-only IBR is warranted. Public Service states that its long-run marginal cost for the peak season is $0.13 per kWh but proposes to use $0.08 per kWh to mitigate the rate impact at the higher block.

74. Public Service witness Dr. Faruqui presents four alternative designs for inverted rates for informational purposes: a variation of the summer-only, two-tier design with the second tier priced at 10 cents per kWh; a two-tier, year round rate design; a three-tier, summer-only rate design; and a three-tier, year-round rate design. He also provides the impacts of each of the five alternative rate designs on annual use and system peak demand using residential demand elasticity adjustments.

75. Public Service views IBRs as a transition to TOU rates. For this and other reasons, it wishes to keep the rate design relatively simple and easy to understand, which is one of the reasons the Company proposes a two-block scheme. The Company wants the inverted rate structure to foreshadow some of the more sophisticated TOU rates that might be offered in the future.

76. The intervening parties generally contend that Public Service has not gone far enough in its inverted block rates, in terms of the number of blocks and the rate differential

between tiers. Some argue that the calculated marginal cost of electricity for the highest block is understated by Public Service and the tail rate should be higher.

77. There is a philosophical difference among the parties between the role that costing should play versus societal requirements. For example, Public Service argues peak marginal cost in the summer is the most important issue to be addressed, which is why it objects to a year-round program. Other parties argue IBRs should be used more for energy consumption reductions year-round.

78. The following witnesses submitted answer testimony on inverted rates: Mr. Kwan on behalf of the Staff; Mr. Collins on behalf of SWEEP; Mr. Beach on behalf of CoSEIA; Ms. Livingston on behalf of Boulder County; and Mr. Senger on behalf the OCC.

79. The Staff recommends a four-tier, year-round inverted rate structure. SWEEP proposes two alternative designs, each of which features a four-tier design in the summer and a two-tier design in the winter. CoSEIA recommends a three-tier, year-round structure. Boulder County recommends a year-round structure with either three or four tiers, and suggests the SWEEP proposal is a useful starting point. The OCC supports the same two-tier, summer-only structure proposed by the Company, but with a higher tail-block rate. All intervening parties argue for a higher tail-end summer block rate ranging from around $0.09 to $0.134 per kWh.

80. Staff witness Kwan argues there is no evidence that customers will change electricity usage behavior in response to inclining block rates; therefore, there should be no accounting for price elasticity in developing the rates. Further, he argues that the price elasticities used in Dr. Faruqui's analysis are unsubstantiated and without basis.

81. Staff suggests a variety of reasons for its proposed design, based primarily on factors the Commission listed in Appendix A of Decision No. C09-0172. Staff recommends a

year-round design based on its conclusion that the Company's marginal generation capacity costs do not vary significantly by season. Public Service states that its system coincident peak demands have occurred during the summer every year since 1991, and are projected to occur during the summer during each year of the current Resource Acquisition Period ending 2015. Public Service points out that the relevant factor is system peak demand, not energy use.

82. Dr. Faruqui responds to Staff, arguing his elasticity factors are based on rigorous analyses described in the RAND Corporation and Electric Power Research Institute reports. These reports show conclusively that the elasticity adjustments that he made are based on a large body of econometric analysis, are indeed specific to residential electric service, and are further specific to the Mountain region of the United States, of which Colorado is a part.

83. SWEEP's witness Mr. Collins agrees that the rates applied to a customer's usage should reflect the marginal cost of providing service. Mr. Collins also accepts the Loss of Load Probability (LOLP) analysis that the Company provides. However, Mr. Collins suggests that the difference between winter and summer peak are not too pronounced. Thus, he states a change in relative seasonal loads prompted by initiatives such as inverted rates could increase the winter LOLP. For this reason, he believes that customers should be sent relatively consistent price signals year-round.

84. Public Service disagrees, stating its proposed flat winter rate is above the marginal cost of service. Public Service believes establishing a tail-block rate at a higher level would appear to conflict with Mr. Collins' belief that the price assessed on marginal usage should reflect the marginal cost of service. Public Service states that Mr. Collins is correct that pricing changes that increase summer rates relative to winter rates could narrow the gap between seasonal peak loads. However, it does not believe they are close to reaching that point. Public

Service also does not agree with Mr. Collins' suggestion that "consistent" price signals should be sent year-round as that would conflict with the goal of IBR and TOU rates to send less consistent prices that better capture differences in the cost of service.

85. CoSEIA's witness Mr. Beach states that a winter tiered rate is necessary to signal to customers that costs increase with higher usage year-round. Mr. Beach challenges some aspects of the Company's derivation of marginal costs, but he appears to accept the conclusion that bulk-power capacity costs are driven by summer loads. Boulder County's witness Ms. Livingston discusses the need to reduce overall energy consumption and, as a result, greenhouse gases. Public Service states that it does not believe Boulder County demonstrated any cost-based reason for a year-round inverted rate structure.

86. All intervenors believe the tail-block rate of $0.08 per kWh is too low. All intervenors that address the issue agree the long-run marginal cost of service should be the ceiling for the rate, and some contend the Company's estimate of the long-run cost is too low. Nonetheless, their most significant complaint is that the Company proposes to set the rate for the last tier too far below the estimated marginal cost.

87. The Company argues it is trying to balance two goals: efficient pricing and rate moderation. It argues that it is proposing an overall rate increase, changes to the ways riders are assessed, greater seasonal rate differentials and inverted rates. The Company states it needs to move slowly to mitigate bill impacts on customer classes as a whole, as well as individual customers within a class.

2. Analysis

88. We wish to commend the parties that addressed this issue in the oral and written testimony in this aspect of the case. They provided a rich record and gave the Commission many areas of inquiry to deliberate.

89. A number of parties, including Public Service, note that the ideal way to send appropriate price signals is TOU rates, because the cost of generation is determined more by the time of use than by a gross measure of seasonality. However, the existence of advanced metering capability required to measure and record electricity consumption by time of day is rather rare at the residential level. Public Service witness Mr. Brockett remarked that it would be likely several years before a decision is made to roll out that metering capability. Tr.[8] at 176, Jan 11, 2010.

90. We approach our decision to incorporate IBRs with a theme of caution and moderation. This is a new rate structure and we understand the uncertainties as to how residential consumers will react and adjust their behavior. We also recognize an IBR structure may have unforeseen consequences for the financial situation of Public Service. Therefore, our decision is based on the notion of doing a modest introduction of such a rate concept rather than something more aggressive. Depending on the success or failure of the IBR structure we adopt, we may modify this structure in the future as required. We also note that seasonal rates are already used in the Commercial, SG, and PG classes, among others.

91. In light of these considerations, we adopt an IBR structure that contains two blocks, one for 0-500 kWh of usage per month and one for 501+ kWh of usage per month. We are persuaded by parties such as Public Service and the OCC that a two-block rate is more

[8] "Tr." denotes the hearing transcript.

understandable to consumers and makes the tracking of usage during the month for rate impacts somewhat easier. The two-block rate will give customers the experience of this type of rate design with less risk of confusion than might be caused by more blocks.

92. We will set the highest block, known as the tail block, at $0.09 per kWh. We believe the tail block rate should be higher than the level proposed by Public Service to send a stronger price signal to the residential consumers. Other parties argued for higher tail-block rates, although it is difficult to make a strict comparison because of the differing number of blocks and the breakpoints of the blocks. Once again, we wish to be somewhat careful with the introduction of this new rate form. This argues for a less aggressive tail-block rate than that proposed by parties such as SWEEP and supported by Boulder County. Ex. 37 at Exhibit No. RSC-2; Ex. 45 at 3. Considering the current summer residential energy rate and what will become the new non-peak rate, we believe the rate differential between the blocks is a sufficiently large price signal to consumers during the summer months. We direct Public Service to calculate the appropriate first block rate (equal to the non-summer rate) so that rates recover the correct residential revenue requirement.

93. All parties other than Staff agree it is appropriate to adjust residential billing determinants, such as energy sales, for the impacts of the IBR design. We agree and order Public Service to use demand elasticities to estimate the impact on sales when preparing its residential rate design.

94. We order that Public Service file the selected IBRs for the residential class to be effective on June 1, 2010, to ensure the rates will be in effect for the summer peak season months of June through September. We direct Public Service to file the compliance tariffs containing

these rates, along with any other tariff pages stemming from this Order, on or before May 19, 2010.

95. Customer education and awareness will be key in the success of an IBR structure. *See* Tr. at 212-14, Jan. 19, 2010. We want customers to understand the design and purpose of the IBR structure we are approving. It is critical for Public Service to develop an advertising and education campaign that reaches out to the residential class and educates them about the IBR structure sufficiently in advance of its implementation. Further, we direct Public Service to modify its residential bill format so that it shows the usage and unit energy charge for each of the two summer rate blocks.

96. We direct Public Service to convene a Committee on Education and Customer Bill Information as soon as possible after the effective date of this Order. Membership on the Committee will be open to any party to this case. The purpose of the Committee is to provide feedback to the Company on customer education and bill re-design, with a goal of completing these tasks before implementation of the new rates on June 1, 2010. If the Committee determines this date cannot be met, Public Service shall inform the Commission no later than April 30, 2010. The Commission's Chief of Staff, Barbara Fernandez, will be the lead representative from this Commission on the Committee. Public Service shall file periodic reports on the progress of the work of the Committee. The updates shall commence on April 23, 2010 and be filed bi-weekly through August 1, 2010, followed by monthly updates through and including November 1, 2010, unless this schedule is modified by future Commission order.

97. Because of the novelty of IBRs in Colorado, the optional time-of-use rates, and the greater seasonality spread in rates, the Commission will seek to examine the consequences of this rate structure in Public Service's next Phase II rate case.

K. Residential Demand Rates

98. The Residential Demand (RD) rate class is a voluntary rate class that differs from the regular residential rate class (R) in that it uses a three part rate structure: a service and facility charge, an energy rate, and a demand rate element. The demand component sets it apart from the standard (R) residential rate.

99. The OCC pointed out that the RD rates need to be modified if the R rate employs IBRs. The OCC argues that, without an adjustment to the RD rate, some customers on the R rate will have an incentive to inefficiently migrate to the residential demand rate class.

100. The OCC compared what existing RD customers would pay under the proposed IBR R schedule and calculated that the RD customer class, in the aggregate, would pay over $490K more using the proposed R class inverted block rates. Using the inverse of that example, the OCC states that certain R customers could migrate to the RD class and save a comparable amount in the aggregate. It argues that an increase of $490K be recovered from the RD class through the energy charge to remove those incentives. Public Service, on rebuttal, agreed to this proposal to prevent migration incentives but argues the cost should be recovered via the demand charge.

101. We approve this adjustment as proposed by the OCC including its application to the energy charge of the RD class. Since the R schedule impact comes from a proposed increase in the energy rate, it is consistent to implement the adjustment in the comparable component in the RD class.

L. Standby Service Tariff Revisions

102. The Standby Service Tariff applies to customers who have installed their own generation facilities to serve all or a portion of their load. Through a connection to Public

Service's electric grid, these customers obtain a power supply for their load whenever a planned or unplanned outage of their generator(s) occurs. The purpose of the Standby Service Tariff is to recover customer-related costs such as billing and metering as well as costs to provide the capacity and energy to back-up or supplement the customer's self-generation. This tariff is applicable to the Company's rate schedules SST, PST, and TST.

103. Public Service proposes to revise the capacity reservation charge, revise the demand charge, reduce the Annual Grace Energy hours, eliminate various sections of the tariff, and revise definitions and calculations. Additionally, the Company seeks to increase the S&F Charge to Lockheed Martin.

104. CEC argues that Public Service's proposed standby tariff is not well designed and will generate more revenue for the utility than it costs to provide the service, resulting in discriminatory charges. Additionally, CEC disputes the amount of the increase of Lockheed Martin's S&F Charge.

105. During these proceedings, CEC and Public Service, the only parties to address this matter, entered into a settlement agreement on January 11, 2010 regarding the standby service rates and the S&F Charge applicable to Lockheed Martin. Ex. 93. No party has contested the resolution of these issues as set forth in the Settlement Agreement.

106. We find all issues raised regarding these matters have been resolved in the Settlement Agreement reached between CEC and Public Service. We have reviewed the Settlement Agreement and find the terms to be just and reasonable. We find the Settlement Agreement to be in the public interest and we will approve it without modifications.

M. Low Income Program

107. In this case, Public Service filed for the establishment of an Electric Assistance Program (EAP), similar in structure and purpose to its Public Service Energy Assistance Pilot (PEAP) established for gas customers in Docket No. 08S-146G. The program would involve a three month ramp-up and then expire at the same time as the PEAP program so that one report could be filed with the Commission on the experience of both programs.

108. EOC offered four critiques of the EAP, and made recommendations in each situation. EOC argues that Public Service continue serving participants (EAP and PEAP) until Commission's recommendations are finalized and continue collecting revenue to cover additional program expenses. Public Service concurred with the EOC's recommendations. EOC also recommended that existing PEAP customers that also receive electric service from Public Service be automatically enrolled in the EAP. Public Service agreed with automatic enrollment of PEAP customers. However, Public Service does not support limiting participation to only PEAP customers.

109. EOC urged that the EAP target electric-only customers that heat with electricity and Public Service concurred. Finally, EOC urges that Public Service include customers with zero documented income. These customers are excluded from the PEAP since some level of customer contribution is required in the calculations. EOC also requests the PEAP and the EAP have a flat customer obligation of $10 - $15 per month for each commodity (electric and gas) or that this could be deferred to the Advisory Committee. They also ask that zero income customers re-verify their income quarterly.

110. Public Service concurred with including zero income customers. It has consulted with the PEAP Advisory Committee and it supports a $10 per month flat benefit for zero income electricity customers, and a quarterly re-certification of income.

111. The outstanding issues between the parties appear to be minimal. We therefore approve the establishment of the program as outlined by EOC and Public Service and direct Public Service to start the ramp-up of the EAP on May 1, 2010.

N. Technical Conference and General Rate Schedule Adjustment

112. We shall schedule a technical conference in this matter as follows:

DATE: May 5, 2010

TIME: 1:30 p.m. to 3:30 p.m.

PLACE: Commission Hearing Room A
Second Floor
1560 Broadway
Denver, Colorado

113. We direct Public Service to provide a presentation that explains how it proposes to implement the decisions we made in this Phase II of the docket to arrive at new rates, terms, and conditions. We also order Public Service to provide a new revenue proof to indicate that the new rates and billing determinants provide revenue recovery that is consistent with the revenue requirement established in Phase I of this rate case. The General Rate Schedule Adjustment (GRSA) spread to the rate categories shall be consistent with the in-service status of Comanche 3.

114. In its Statement of Position, Public Service proposes to apply a negative GRSA for the remainder of 2010 to account for the exclusion of the property taxes associated with Comanche 3 from 2010 rates. The positive GRSA rider that goes into effect on the Comanche 3 in-service date would be adjusted to include the property tax recovery for Comanche 3. The

negative rider would expire at the end of 2010 so that recovery of property taxes would commence on January 1, 2011. Public Service asserts that such a technique would result in no GRSA rider on customer bills after January 1, 2011.

115. We agree with Public Service's initiative and approve the offsetting rider approach.

O. Power Factors

116. The Edison Electric Institute defines power factor as the ratio of real power (kW) to apparent power (kVA) at any given point in time in an electrical circuit. Generally it is expressed as a percentage. Public Service installs distribution line capacitors, distribution substation bus capacitors, and/or transmission bus capacitors as deemed necessary for voltage support and power factor correction on all facilities that serve residential, commercial and industrial customers. Public Service monitors the system power factor on an ongoing basis by measuring watts and VARs at the distribution substation low voltage bus. This data is aggregated to calculate a system power factor. Public Service witness Mr. Brossart stated in his rebuttal testimony that the power factor at system peak on July 14, 2009, was 97.85 percent lagging and the minimum power factor over the four-month period was 96.67 percent. *See* Ex. 15. The power factor is calculated as the total MW divided by the total MVA.

117. Public Service considers a system power factor of 0.95 lagging or greater at peak loading periods to be acceptable because this provides adequate voltage support for the distribution and transmission systems in addition to balancing the cost of losses on the system.

118. Public Service believes its current practice of continually measuring and monitoring power factor at its substations ensures it is achieving a power factor at or above acceptable levels.

119. Mr. Longrigg, an intervenor, states that low power factor loads can reduce the efficiency of Public Service's system and increase costs for all rate payers. He states that Public Service is addressing power factor issues at its substations—but each substation serves several thousand customers. He would like the Commission to direct Public Service to undertake studies of power factors at the site of large industrial and commercial customers and to ensure that corrective measures are taken on the customer's side of the meter. He feels this will help to ensure that smaller rate payers are not subsidizing large rate payers with low Power Factor loads. He would also request that Public Service be required to report the results of these power factor load studies at six month intervals to the Commission to ensure that cross-subsidization is not allowed.

120. As determined in the hearing, Public Service periodically monitors the power factors at its substations. Neither Ms. Glustrom, presenting the issue at hearing for Mr. Longrigg, nor Mr. Longrigg himself, presented compelling evidence that Public Service's efforts in this area are inadequate in either monitoring or maintaining power factors necessary to provide sufficient voltage support for the distribution and transmission systems. Therefore, it appears that ordering additional studies for power factors simply represents an unnecessary additional cost that would ultimately be borne by ratepayers. Therefore we will deny Mr. Longrigg's request for additional power factor studies.

P. Glustrom Issues

121. Ms. Glustrom had certain issues in her testimony moved from Phase I to the Phase II portion of this docket. Ms. Glustrom states that such items as a customer's carbon footprint, fuel mix of Public Service, and other environmental items as described in her testimony be included in the paper bill that is mailed to Public Service customers. At the present

time we deny those requests. However, we point Ms. Glustrom to the Committee to be established by Public Service on IBR education and advertising as well as bill content and formatting and urge her participation in that body.

Q. Pomerance Issues

122. Mr. Pomerance filed testimony in Phase I of this docket, some of which was excluded from the record and some of which was judged to be more appropriately considered in Phase II of this docket. Admission of Mr. Pomerance's testimony was stipulated, and he neither attended the hearing nor did he file rebuttal testimony or a statement of position. That being said, we wish to recognize the points he made. He asks that the Commission establish a policy requiring Public Service to charge new customers hook-up fees that reflect the real long term cost of meeting their future demand for electricity. He also asks that the Commission take into account the uncertainty of the revenue recovery from new rate structures and increased energy efficiency into the establishment of Phase I revenue requirement recovery. Finally, he asks that the Commission require Public Service to account for carbon taxes, cap and trade costs and converting to a low CO2 supply into its rate structure.

123. We are not inclined to establish hook up fees that are similar in concept to what certain water utilities use for new customers. Public Service notes that such a scheme ignores the issue of equity across ratepayers. Notwithstanding these considerations, the Commission finds there is not an adequate record in this case to deal with this issue at the present time.

124. With respect to the interplay between Phase I revenue requirement, we make the following observation. The elasticity adjustments we approved in this Order effectively tie the Phase I revenue requirement to the expected impact of the new residential rate structures on sales

and revenues. We also note that if Public Service suffers significant earning erosion it is possible to file a new rate case to address those issues.

125. Finally, we believe it is premature to require Public Service to account for possible carbon taxes and/or cap and trade costs. We note that some of these factors were built into the Electric Resource Plan portfolio examination in Docket No. 07A-447E.

R. Street Lighting and Traffic Signaling Tariffs

1. Motion For a Determination of a Question of Law

a. Background

126. LGI, the City and County of Denver, and the City of Boulder (collectively Local Governments) filed a Motion For a Determination of a Question of Law and Brief in Support (Motion) on December 4, 2009. The Local Governments contend many municipalities are interested in acquiring street lighting facilities and paying a non-metered energy-only rate to Public Service. The Local Governments explain that they would like to save money, take advantage of advancements in street lighting technologies and thus use more energy-efficient lighting, and reduce their energy consumption. *See* Motion, p. 3.

127. The Local Governments state that they sought a non-metered energy-only rate from Public Service with the above-mentioned goals in mind. In response, Public Service proposed the terms by which municipalities could acquire existing street lighting facilities in this docket. This proposed tariff, Schedule COL, would apply in cases where municipalities acquire existing street lighting facilities from Public Service and in cases where municipalities install and own the street lighting facilities in new developments.

128. Public Service proposed the following terms pursuant to which municipalities could acquire existing street lighting facilities:

Rules and Regulations-Electric Service-Street Lighting
CONVERSIONS BETWEEN STREET LIGHTING SERVICE AND CUSTOMER OWNED LIGHTING SERVICE.

(1) The Company shall allow conversion only in instances where a minimum of ten (10) lights are converted within a defined area such as a subdivision, an entire block of a street thoroughfare, or some other defined area. The Company may allow conversions of less than ten (10) lights in specific instances where the Company is able to determine that a clear delineation of lighting ownership is achievable within a defined area such as a subdivision or some other defined area.

(2) The municipality shall purchase the street lighting units and appurtenant equipment, including pole bases, poles, luminaires, brackets, light sensitive devices, lamps, glass or plastic lenses and lamp covers, foundations, street lighting conductors at two and one-half (2 ½) times the Company's book value. The Company's book value shall be calculated by the Company using its average book value for the vintage of the street lighting facilities at the year installed depreciated by the life of the plant as approved by the Commission.

(3) The municipality shall reimburse Company for all costs to convert the street lights, including any relocation or reconfiguration of the Company's distribution system and interconnection facility (junction or splice box) as determined by Company.

See Motion, p. 4, *citing* Tariff Sheet No. R82.

b. Positions of the Parties

(1) The Local Governments

129. In the Motion filed on December 4, 2009, the Local Governments claim they have the power to acquire utility facilities, including street lights, by eminent domain. The Local Governments state they have the power of eminent domain under the Colorado Constitution, statutes, and franchise agreements. The Local Governments argue the tariffs proposed by the Company conflict with the provisions pertaining to eminent domain and calculation and payment of just compensation contained in the Colorado Constitution, statutes, and franchise agreements that many municipalities previously have entered into with the Company.

130. The Local Governments state that both home rule and statutory municipalities have the power to condemn and purchase public utility property. *See* Colo. Const. Art. XX, § 1; Colo. Const. Art. XX, § 6; § 38-6-101, *et seq.*, C.R.S. The owner of the property being condemned is guaranteed to receive just compensation. *See* Colo. Const. Art. II, § 15. In the event the parties to an eminent domain proceeding cannot agree on the value of just compensation, the owner can request that a jury or a court-appointed board of commissioners determine just compensation. That evaluation is done on a case by case basis, taking into account the fair market value of the condemned property and specific circumstances of each transaction. *See* Motion, at 6-7 and authorities cited therein. The Local Governments state that valuation of public utility assets is complex, and that book value is only one germane factor.

131. The Local Governments argue that the Commission does not have any authority to adjudicate property rights. *See Pub. Serv. Co. of Colorado v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001). The Local Governments argue that neither the general assembly, nor the Commission (an agency to which the general assembly delegated certain legislative functions) has the power to interfere with the just compensation provisions of the Colorado Constitution. *See* Motion at 7-8, *citing Trippe v. Overacker*, 7 Colo. 72, 1 P. 695 (1883); *Poudre Valley Rural Elec. Ass'n v. City of Loveland*, 807 P.2d 547, 554-55 (Colo. 1991). The Local Governments contend the Commission does not have the authority to set a formula for determining the value of street lights or to dictate that a municipality acquiring street lights must pay all conversion costs in an amount unilaterally determined by Public Service without any review by any other party.

132. The Local Governments conclude that the proposed tariffs are unlawful insofar as they require that: (1) the municipality shall purchase the street lights at two and one-half times the book value and (2) the municipality shall reimburse Public Service for conversion costs as

determined by the Company are unlawful. The Local Governments point out that, pursuant to eminent domain laws, the owner of the property being condemned has the burden of proving the amount of any reasonable costs incurred due to the condemnation and argue the tariffs proposed by Public Service would conflict with that.

133. Finally, the Local Governments argue the proposed tariffs will affect the rights to acquire existing utility facilities pursuant to the franchise agreements that many municipalities have entered into with Public Service. The Local Governments conclude the proposed tariffs unconstitutionally impair previously negotiated contracts and would eliminate the contractual provisions already agreed to in municipal franchise agreements. This argument extends to the proposed provision that municipalities generally can acquire only a minimum of ten streetlights within a certain area.

134. In the Motion filed on December 4, 2009, the Local Governments ask the Commission to determine, as a matter of law, that the tariff provisions proposed by Public Service violate the constitutional and statutory eminent domain provisions as well as existing franchise agreements. The Local Governments request a ruling under C.R.C.P. 56(h), which states that "[a]t any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question."

(2) Public Service

135. Public Service submitted its Response to the Motion on December 18, 2009. In its Response, Public Service does not concede that municipalities have the power of eminent domain with respect to existing street lighting facilities. However, Public Service argues that the

Commission does not need to resolve this issue because, even if the Local Governments have that power, the proposed tariffs do not conflict with the constitutional and statutory eminent domain provisions. Public Service argues this is the case because the proposed tariffs do not constitute an exclusive remedy, but are an alternative to any eminent domain remedies the municipalities may have under state law.

136. Public Service states that § 40-5-105, C.R.S., permits the Company to voluntarily sell public utility assets, including the street lighting facilities at issue here, upon authorization of the Commission and upon such terms and conditions as the Commission may prescribe. Section 40-5-105(1), C.R.S., states:

> (1) The assets of any public utility, including any certificate of public convenience and necessity or rights obtained under any such certificate held, owned, or obtained by any public utility, may be sold, assigned, or leased as any other property, but only upon authorization by the commission and upon such terms and conditions as the commission may prescribe; except that this section does not apply to assets that are sold, assigned, or leased:
>
> (a) In the normal course of business; […]

137. Public Service contends the purpose of the proposed tariffs is to establish in advance the terms under which the Commission will authorize Public Service to voluntarily sell its existing street lighting facilities to municipalities under § 40-5-105, C.R.S. If a voluntary sale (either on the terms approved by the Commission in advance and established in the tariffs or on the terms negotiated on a case by case basis and then approved by the Commission) could not be agreed to, the municipalities would retain any eminent domain rights they may have with respect to street lighting facilities and would be free to pursue these rights.

138. Public Service argues that voluntary sales of public utility facilities pursuant to § 40-5-105(1), C.R.S., and involuntary sales in the context of eminent domain are two different

methods by which municipalities may acquire street lighting facilities. The tariffs proposed in this proceeding would apply only to the first method, not the second method. Public Service contends the proposed tariffs are not intended to regulate the conditions pursuant to which an involuntary sale under constitutional or statutory eminent domain provisions or a franchise agreement would occur if the parties cannot agree on a voluntary sale.

139. Public Service argues that this interpretation gives effect to both § 40-5-105(1), C.R.S., and the eminent domain provisions relied on by the Local Governments consistent with the basic principles of statutory construction. The Company also argues that, even if the proposed tariff provisions were to be construed as applying to involuntary sales in the context of eminent domain, these tariff provisions would yield to conflicting statutes. This is because utility tariffs do not rise to the level of a state statute. *U.S. West Communications, Inc., v. City of Longmont*, 948 P.2d 509, 517 (Colo. 1997).

140. Public Service also argues that the issue of whether it is reasonable to establish a formula at which it will voluntarily sell its street lighting facilities to a municipality pursuant to § 40-5-105(1), C.R.S., or whether this should be done on a case by case basis is a question of fact that cannot be resolved summarily. Public Service states that the issue of what is an appropriate proxy is an issue of fact as well. Finally, Public Service contends the proposed tariffs do not delegate the power to unilaterally establish conversion costs to the Company since these will be the actual costs incurred. It states that the reasonableness of the proposed tariff provision is also an issue of fact that cannot be resolved summarily.

c. Other Pleadings

141. On December 22, 2009, the Local Governments filed a Motion For Leave To File Reply to Public Service's Response. Public Service filed a Response In Opposition To Local

Governments' Motion For Leave To File Reply on December 23, 2009. The Local Governments then filed a Request to Strike Public Service's Response In Opposition To Local Governments' Motion For Leave To File Reply on December 28, 2009. We denied the Motion For Leave To File Reply, rendering the subsequent two pleadings moot, during the prehearing conference held on January 7, 2010.

d. Analysis[9]

142. We agree with Public Service that voluntary sales of public utility facilities, such as street lighting facilities, pursuant to § 40-5-105(1), C.R.S., and involuntary sales pursuant to eminent domain laws are two different methods by which municipalities could acquire existing street lighting facilities. We also agree that whatever rights municipalities may have under the first method of acquiring street lights do not affect their rights under the second method.[10]

143. First, the Commission, unlike a district court that has jurisdiction over an eminent domain case, cannot order a utility to sell its property. *See Pub. Utils. Comm'n v. Home Light and Power Co.*, 163 Colo. 72, 85, 428 P.2d 928, 935 (1967). The Commission only regulates the terms and conditions of voluntary sales. The Commission may refuse to approve a voluntary sale if it deems these terms and conditions to be inappropriate, so long as it does not abuse its discretion. It may also *encourage* a sale, and may indicate to the parties what it feels would be a fair price should a sale of public utility facilities take place. However, it may not order such a

[9] In this section, we also address the arguments subsequently presented by LGI and the City of Boulder in their Statements of Position that augment the arguments presented in the Motion For a Determination of a Question of Law.

[10] In this Order, we do not decide whether municipalities have the power of eminent domain with respect to existing street lighting facilities. We only decide that, assuming municipalities have that power, the proposed tariffs do not conflict with the constitutional and statutory eminent domain provisions.

sale. *Id*. Because the Commission cannot order an involuntary sale of utility property, it follows that a tariff approved by the Commission would not apply to such involuntary sales.

144. Second, as the parties point out in their pleadings, municipalities must negotiate in good faith to acquire the property sought before instituting an eminent domain action. *See* § 38-1-121(3), C.R.S. In the case of public utility property, that negotiation would be in the form of a voluntarily sale pursuant to § 40-5-105, C.R.S. In other words, municipalities must attempt to acquire the property through the first method before pursuing the second method. This further supports the conclusion that eminent domain and voluntary sales under § 40-5-105, C.R.S., are two different methods by which municipalities may acquire public utility property, with separate rights under each method.

145. Third, this conclusion harmonizes § 40-5-105(1), C.R.S., with the constitutional and statutory eminent domain provisions relied on by the Local Governments. *See Brown v. Am. Family Mut. Ins. Co.*, 809 P.2d 1055, 1056 (Colo. App. 1990) (when there is an apparent conflict between two statutes, the courts must attempt to harmonize the statutes to give effect to the intent of the general assembly).

146. Fourth, although no Colorado cases address the issue of whether voluntary sales of public utility assets and involuntary sales pursuant to eminent domain are different methods by which a municipality may acquire public utility assets, the rationale used by the courts from other jurisdictions to resolve this issue is persuasive. We note that § 40-5-105(1), C.R.S, does not explicitly mention involuntary sales pursuant to eminent domain laws. In *United Water New Mexico, Inc., v. New Mexico Pub. Util. Comm'n*, 121 N.M. 272, 910 P.2d 906, 910 (1996), the Supreme Court of New Mexico ruled that a New Mexico statute similar to § 40-5-105(1), C.R.S., applied only to voluntary sales by a public utility. That statute provided that "[w]ith the prior

express authorization of the commission … any public utility may sell, lease, rent, purchase, or acquire any public utility plant or property…" The court noted that the statute referred only to affirmative, voluntary acts undertaken by a utility. *Id.* By contrast, a forced condemnation of utility property by a municipality is not a voluntary, affirmative act of that utility. *Id*. The court concluded that the statute did not apply to a condemnation action. *See also, Decatur County Rural Elec. Membership Corp. v. Pub. Serv. Co. of Indiana*, 307 N.E.2d 96, 104 (Ind. App. 1974) (holding that a statute requiring approval of purchases by the state utility commission dealt only with voluntary sales or leases); *Pub. Utils. Comm'n v. City of Fresno*, 254 Cal.App.2d 76, 82-83 (1967) (finding a statute preventing a utility from selling its systems without approval of the state commission did not govern involuntary condemnation actions brought by a city).

147. We find the proposed tariff provisions do not conflict with the constitutional and statutory eminent domain provisions and are not unlawful. Voluntary sales of public utility property, such as street lighting facilities, pursuant to § 40-5-105(1), C.R.S., and involuntary sales pursuant to eminent domain provisions are two different methods by which municipalities can acquire these facilities. If the first method is not successful, Local Governments would retain any rights they may have under the second method. We construe the proposed tariff provisions as not applying to involuntary sales in the eminent domain context and deny the Motion filed by the Local Governments. Further, because the proposed tariff provisions would apply to voluntary sales only, where the parties have already agreed that the transfer of property should occur, the Commission would not be adjudicating property rights. We therefore find that the *Van Wyk* case is inapposite here.

148. We also find the Commission has authority to establish a formula for valuing street lighting facilities in its tariffs. The Commission "…has power to ascertain the value of the

property of every public utility in this state and the facts which in its judgment have or may have any bearing on such value." § 40-4-110, C.R.S. Further, "[f]or the purpose of ascertaining the matters and things specified in section 40-4-110, concerning the value of the property of public utilities, the value of the property of public utilities, the commission *may* cause a hearing to be held ..." § 40-6-118(1), C.R.S. (emphasis added). The default rule of statutory construction is that "may" indicates discretion and "shall" is mandatory. *See, e.g.*, *Larry H. Miller Corporation-Denver v. Urban Drainage and Flood Dist.*, 64 P.3d 941, 946 (Colo. App. 2003). This implies that a case by case determination and a hearing on the value of public utility property every time there is a proposed sale is not required.

2. Conversion Costs

a. Positions of the Parties

(1) The Local Governments

149. As mentioned above, Public Service proposed that the following tariff provision apply to conversion costs incurred as a result of municipal acquisitions of existing street lighting facilities:

> The municipality shall reimburse Company for all costs to convert the street lights, including any relocation or reconfiguration of the Company's distribution system and interconnection facility (junction or splice box) as determined by Company.

The Local Governments contend this proposed tariff would require municipalities to pay all conversion costs in an amount unilaterally determined by Public Service without any review by any other party. The City of Boulder also argues that, if the Commission approves this proposed tariff, it would impermissibly delegate its authority to Public Service. The Commission cannot delegate its authority to third parties. *Baca Grande Corp. v. Pub. Utils. Comm'n*, 190 Colo. 201,

203, 544 P.2d 977, 979 (1976). In *Baca Grande*, a real estate developer advanced the funds necessary to provide underground electrical services to the utility. The Commission permitted the utility to choose between two alternatives: (1) to charge uniform rates to all customers regardless of whether they were served by underground or overhead lines and not to refund the difference in costs to the developer, or (2) to refund the difference to the developer by charging the underground customers a higher rate. The Colorado Supreme Court ruled that the Commission cannot permit a utility to decide what rates to charge to its customers and that the Commission unlawfully delegated its authority. *See also Colorado Energy Advocacy Office v. Pub. Utils. Comm'n*, 704 P.2d 298 (Colo. 1985).

150. LGI agrees with the City of Boulder. In its Statement of Position, LGI states Public Service conceded it was requesting that the Commission delegate to it the authority to determine and impose upon municipalities the amount of conversion costs.[11] LGI also argues that the Commission should consider requiring Public Service to competitively bid the work needed to convert street lights facilities to municipal ownership in order to ensure that conversion costs are reasonable. LGI proposes the following language for the tariff:

> The municipality shall reimburse Company for ~~all~~ its reasonable and necessary costs to convert the street lights, including any relocation or reconfiguration of the Company's ~~distribution system and interconnection facility (junction or splice box) as determined by Company.~~ facilities that are required solely by virtue of the conversion.[12]

(2) Public Service

151. During the hearing, Public Service witness Mr. Niemi testified that conversion costs are comprised of the costs of labor and materials needed to convert existing street lights to

[11] Tr. at 159, Jan. 14, 2010.

[12] The language that LGI proposes to strike from the proposed tariff is in ~~strikethrough~~ and language that LGI proposes to add is underlined.

municipal ownership. In some cases, conversion is relatively simple. In other cases, conversion and disentanglement of Public Service's facilities from municipal facilities may be complicated, especially in congested areas and when some of the facilities are underground. In such cases, it would be more difficult to estimate conversion costs in advance.[13] Mr. Niemi testified that if a municipality believes the amount of conversion costs charged is not reasonable, it may file a formal complaint with the Commission.[14]

152. In its Statement of Position, Public Service contends that its proposed tariff is no different than other tariff provisions imposing the obligation on the customers to pay the actually incurred costs of an activity as determined by the Company, such as line extension tariffs. Public Service argues that its obligation to act reasonably and to charge no more than the actual costs is already implicit in the proposed tariff and thus objections of the Local Governments are not well taken.

b. Analysis

153. We find this proposed tariff, if adopted, would not result in the Commission impermissibly delegating its authority to Public Service. The tariff would require that the municipality pay only the actual costs incurred as a result of the conversion. It would not give Public Service the room to make the types of broad policy choices at issue in *Baca Grande*. Public Service would merely add the actually incurred costs and present the bill to the municipality.

[13] Tr. at 149-150, Jan.14, 2010.
[14] *Id.*, at 159.

154. On the other hand, we find the language proposed by LGI better reflects the Company's obligation to act reasonably and to charge no more than the costs actually incurred. We therefore adopt the language proposed by LGI, with modifications, as follows:

> The municipality shall reimburse Company for all reasonable and necessary costs to convert the street lights, including relocation or reconfiguration of the Company's distribution system and interconnection facility (junction or splice box).

155. We will not require Public Service to competitively bid conversion costs. We are not persuaded that savings resulting from competitive bidding will be outweighed by the costs of administering a competitive bidding process. However, we will require Public Service to provide an estimate of conversion costs in advance, as it does in line extension cases. The municipality would then be able to come before the Commission in advance of incurring the costs, if it finds the amount of conversion costs to be unreasonable, rather than only after the fact.

3. Valuation of Street Lights

156. In this proceeding, Public Service proposed to establish in advance the price at which a municipality would purchase existing street lighting facilities as two and one-half times the book value. In response, the Local Governments argued that a one size fits all formula is not appropriate. In the alternative, the City of Boulder argued the formula should be set at the amount actually paid by the Company for the street lights, less depreciation.

a. Positions of the Parties

157. Public Service argues two and one-half times the book value was the amount provided for in the annexation agreements with municipal utilities, such as the agreement Public Service entered into with the City of Fort Collins. Public Service also argues this is a reasonable way for the Company to cover its cost of plant and a portion of the foregone earnings associated

with the transfer.[15] Public Service states that a formula established in the tariff would not require the parties to come before the Commission for further approval.

158. The Local Governments argue that a one size fits all formula is not appropriate and that valuation of street lights should be done on a case-by-case basis. Ms. Hughes, testifying for LGI, pointed out that there are various methods to value street lights, including cost, income, and value.[16] The Local Governments also contend that Public Service previously used the two and one-half times the book value formula only once, in the annexation agreement with the City of Fort Collins in 1978. The City of Boulder argues that, in the annexation agreement with the City of Fort Collins, the purchase price also compensated Public Service for the transfer of customers to the municipal utility and the associated loss of income, which are inapposite here.

b. Discussion

159. We decline to adopt a formula for valuing the existing street lighting facilities in this proceeding. We agree with the Local Governments that Public Service has not shown the two and one-half times the book value formula is reasonable. First, Public Service offered only one instance where that formula was used previously, in substantially different circumstances than these. In the annexation agreement with the City of Fort Collins, the two and one-half times the book value formula also compensated Public Service for the transfer of customers to the municipal utility and the associated loss of income, which are not at issue here. That formula also resulted from negotiations between the City of Fort Collins and the Company. Second, we find a fair purchase price for existing street lighting facilities may be based on several factors, depending on the circumstances. Finally, we do not find any alternative formula presented in

[15] Ex. 11, at 12.
[16] Ex. 47, at 13-14.

this case to be satisfactory. We therefore find street lighting facilities should be valued on a case-by-case basis at this time.

160. This does not mean we will not entertain a proposal for a different formula in the future. We agree with Public Service that certainty and expediency have value. We note that if Public Service enters into more sales of street lighting facilities in the near future and presents these to the Commission for approval, we will gather recent and relevant data points on what an appropriate proxy for valuing street lighting facilities could be.

4. Minimum Number of Street Lights

161. Public Service proposed that, in general, municipalities should be able to purchase only a minimum of ten lights within a defined area, unless the Company determines a clear delineation of lighting ownership is achievable with a lesser number of lights. In his direct testimony, Public Service witness Mr. Niemi discussed the difficulties associated with ownership identification of small areas or a small number of lights intermingled with the surrounding Company-owned lights. He stated that another reason for the proposed tariff is to minimize the potential impacts of increased administrative and operation and maintenance costs.[17] On the other hand, LGI argues it is not uncommon to have less than ten street lights in municipal parks, municipally-owned parking lots, or alleys.

162. We find the tariff proposed by Public Service is reasonable and will adopt it. We understand that in certain cases municipalities may wish to acquire less than ten street lights, but we are persuaded by the concerns expressed by the Company. Further, the tariff will allow a municipality to acquire less than ten lights if clear delineation of lighting ownership is possible.

[17] Ex. 11, at 11-12.

5. Maintenance

163. In this proceeding, the Local Governments argued that they should be able to own *and maintain* street lights. In its Statement of Position, the City of Boulder contends this arrangement would allow the municipalities greater control over its street lighting expenses and a greater choice in street lighting facilities. The Local Governments offered to pay an inspection fee to Public Service, so that the Company can obtain current information regarding the expected energy usage from each lighting type and ensure no unauthorized energy use occurs.

164. In response, Public Service argued that the municipalities have not established the monitoring approach would as effectively and efficiently ensure the data that Public Service has in its billing system is accurate and that unauthorized energy use does not occur. At the hearing, Mr. Niemi testified that Public Service generally performs routine maintenance by replacing the lamps in *en masse*.[18] In its Statement of Position, Public Service argues that unless the Company installs the lamp and light sensitive device itself, which together serve as a meter for the street light, it will not have assurances that the data in its billing system is accurate.

165. We agree with Public Service that the monitoring approach proposed by the Local Governments has not been fully developed. The extent of the monitoring envisioned by the Local Governments and whether it will adequately address the concerns expressed by Public Service is not clear. We will therefore not adopt this proposal. However, we encourage the parties to come back before the Commission with a more fully developed proposal wherein municipalities will own, operate, and maintain street lighting facilities and Public Service will monitor the street lights to ensure it has accurate billing data and unauthorized energy use does not occur.

[18] Tr. at 86-87, Jan.14, 2010.

6. Types of Lighting Facilities

166. In this proceeding, the Local Governments argued that the proposed Schedule COL should offer a wider array of energy efficient street lighting options, including LED lights. The Local Governments also argued that, at a minimum, Schedule COL should include all lighting types available under Schedule SL. Mr. Niemi, on behalf of the Company, agreed with the latter position. In its Statement of Position, LGI further argued that LED lights will result in a variety of benefits, yet Public Service does not offer LED lighting options, nor will it provide any commitment as to when it may do so.

167. During the hearing and in pre-filed testimony, Public Service expressed concerns with the lack of uniformity and standardization of LED lights. Public Service further argued that it must ensure that LED lights are utility-grade and will meet reliability and performance standards. During the hearing, Public Service witness Mr. Smith testified about the current LED street lighting pilot program in Minnesota performed by Xcel Energy. Mr. Smith stated that the information from the Minnesota pilot project will be made available to Public Service and that the Company will consider this information in deciding when to offer LED street lights. However, he did not specify when the pilot results would be available or when Public Service expects to offer LED lights in Colorado.[19]

168. We will modify the proposed Schedule COL to include all lighting types currently available under Schedule SL. However, we will not require the Company to offer LED lights at this time. We will reevaluate that issue after the information from the Minnesota pilot program becomes available and will entertain proposals to include LED lights in Schedule COL or other tariffs at that time.

[19] *Id.*, at 195-96.

169. We adopt the remaining provisions that Public Service proposed within Schedule COL.

7. Traffic Signaling Tariffs

170. In this proceeding, Public Service proposed to gradually shift to metered traffic signal service. The Company proposed that any new traffic signals installed starting on January 1, 2011, and existing traffic signals reconfigured after that date will be required to be metered. Public Service witness Mr. Niemi testified that many municipalities are installing a variety of new devices at the intersections, such as red light cameras, thereby changing traffic signal lighting loads. He opined that a non-metered rate is no longer appropriate due to the varying set of load factors. Mr. Niemi testified that customers will have a choice between service under Schedule C or Schedule SG.[20]

171. Public Service also proposed Schedule NMTR, a new non-metered service tariff, which would be applicable to governmental and quasi- governmental entities, and other utilities for electric service to small loads limited to single phase, 20 amps at 120 volts. The monthly rate will consist of a billing charge of $2.50 to cover billing and customer costs, as well as secondary voltage energy charge.[21]

172. In response, LGI stated that, while it does not oppose metering for new intersections after January 1, 2011, it objects to being billed under either Schedule C or Schedule SG, because load characteristics of traffic signal intersections are very different from the load

[20] Ex. 11, at 22-25.
[21] *Id.*, at 5-7.

characteristics of the customers that are served by these schedules.[22] For its part, the City of Boulder contended that traffic signal metering should not be required due to aesthetic considerations and cost impacts. The City of Boulder also argued that requiring a separate service and billing arrangement for small loads, as contemplated in proposed Schedule NMTR would not be efficient or cost effective. It argued that a monthly billing charge can become a large portion of the overall bill with such small loads. The City of Boulder argues that either the monthly billing charge should be reduced or that the customers be permitted to aggregate loads connected at a different location into a single point of delivery for billing purposes.[23] Overall, the City of Boulder recommended that the Commission investigate the possibility of developing a pilot project regarding remote metering of traffic lights and other small loads.

173. We will modify the date after which reconfigured traffic lights will be required to be metered to January 1, 2012, to allow Public Service and interested municipalities more time to develop a satisfactory solution, whether in the form of a separate metered class for traffic signals, continued non-metered service, or aggregation of small loads for billing purposes. We adopt the remaining traffic signaling and street lighting tariff provisions proposed by Public Service in this proceeding, including Schedule NMTR. Finally, we encourage all interested parties to explore the possibility of remote metering further in the future and present future proposals related to this matter to the Commission.

S. Environmental Liability Proposal

174. Public Service proposed certain changes to its Environmental Tariffs in order to augment its potential liability for environmental contamination and remediation costs. This

[22] Ex. 47, at 21-23.
[23] Ex. 42, at 7-8.

proposal is presented most thoroughly in the Direct and Rebuttal testimony filed by Public Service witness Terry D. Staley. Ex. 15 and 16. The final version of Public Service's proposal was attached to its February 1, 2010, filing entitled Notice of Filing of Edits to Tariff and Agreement Language.

1. The Environmental Tariff and Agreement

175. The proposed tariff sets forth terms relating to environmental liability that would apply to all customers requesting extension of service to a property containing or suspected to contain pre-existing environmental contamination. This tariff language requires that a customer release Public Service from liability and indemnify Public Service for any claims stemming from liabilities arising out of pre-existing contamination, except where Public Service engages in negligence, intentional or willful misconduct, or criminal behavior. In addition, the proposal allows Public Service to require the customer to provide clean corridors. Under the tariff, Public Service is allowed to cease all work if hazardous materials are discovered.

176. The tariff also incorporates by reference a standard environmental agreement, which Public Service may require if it discovers or suspects contamination on the property. The environmental agreement contains the indemnification and release provisions described above, but also allows Public Service, at its sole discretion, to require financial assurances to back the indemnity. The environmental agreement also contains language that may require a customer to address or otherwise take responsibility for contamination occurring on offsite property owned by a third party, if Public Service must cross that property in order to provide service to the customer.

2. Intervenor Challenges to the Proposal

177. On September 23, 2009, Wal-Mart and CDOT filed a Joint Motion *In Limine* for a Ruling to Limit the Scope of PSCo's Advice Letter Request and a Request for Expedited Response Time. This Motion argued: (1) the proposed environmental tariff and agreement were not properly noticed when filed with the Commission; (2) the additions conflict with Federal and state environmental laws; and (3) the additions are not within the scope of a rate case before the Commission. In Decision No. C09-1446 we denied the first argument raised by the movants.[24] CEC, the Ski Resorts and the Local Governments filed Responses in Support of Wal-Mart's Motion on September 23, 2009, and September 24, 2009. NAIOP filed a Response in Partial Support on September 24, 2009. The Ski Resorts and CEC filed a Joint Motion for Partial Summary Judgment and Request for Expedited Response Time on September 24, 2009.

178. The Commission set a procedural schedule by which it would receive briefing on these issues in Decision No. C09-1268, mailed November 10, 2009. Public Service filed a Response brief in support of its proposal. Wal-Mart, CDOT, the Local Governments, the Ski Resorts and NAIOP filed reply briefs. In addition, the CDPHE, as *amicus curiae*, filed comments addressing concerns with the proposed environmental tariff provisions.

179. As is evident from the discussion below, we will deny the second and third arguments presented in the Joint Motion *In Limine* for a Ruling to Limit the Scope of PSCo's Advice Letter Request and a Request for Expedited Response Time filed by Wal-Mart and CDOT are denied. We also deny the Motion for Partial Summary Judgment filed by Ski Resorts and CEC.

[24] *See* Decision No. C09-1446, mailed December 24, 2009, ¶¶ 7-26.

3. Preliminary Legal Rulings

180. In response to the Commission's request, the interested parties filed a number of pleadings identifying issues they considered to be threshold legal determinations. A number of parties requested the Commission make decisions on these legal issues prior to receiving testimony by witnesses, in hopes of limiting the scope of the hearings. Based on these pleadings, the Commission identified seven legal issues to resolve prior to conducting evidentiary hearings on this topic. These deliberations were undertaken on January 14, 2010, s*ee* Tr. at 5-55, Jan. 14, 2010, and are summarized here.

a. The Provision May Be Evaluated as Part of a Rate Setting Proceeding

181. In the Motion *In Limine*, Wal-Mart argued the proposed changes to the environmental tariff were outside the scope of a ratemaking proceeding, and therefore should be excluded from Phase II.[25] Alternatively, some parties argue the environmental tariff proposal requires the Commission to regulate matters beyond its jurisdiction.[26] Specifically, Copper Mountain argues that, because the CDPHE is the sole entity in the state responsible for the regulation of hazardous waste,[27] the Commission may not regulate anything concerning hazardous waste. The Local Governments argue the environmental tariff proposals are contrary to existing state law, and therefore the Commission has no jurisdiction to approve them because the Commission does not have the authority to issue orders that violate the laws of Colorado.[28]

[25] *See* Wal-Mart Motion *In Limine*, filed Sept. 22, 2009, at 16.

[26] *See* Copper Mountain Summary Judgment Motion, filed Sept. 24, 2009, at 8; CDOT Response in Support of Wal-Mart's Motion *in Limine*, filed Sept. 23, 2009, at 1-2.

[27] § 25-15-301(1), C.R.S.

[28] Local Governments Motion in Support of Wal-Mart's Motion *in Limine*, filed Oct. 8, 2009, at 3.

182. The Commission found it could properly consider the proposal in this proceeding. Section 40-3-103, C.R.S., provides, "every public utility shall file with the commission [. . .] schedules showing all rates[,] together with all rules, regulations, contracts, privileges, and facilities that in any manner affect or relate to rates, tolls, rentals, classifications, or service." The environmental tariff provisions "affect" the manner in which Public Service provides "service." Therefore, the Commission held the proposal could be appropriately considered in Phase II of this proceeding.

b. A Commission-Approved Tariff is More Akin to a Contract than a Statute

183. While a number of parties made assumptions in their pleadings about the legal significance of a Commission-approved tariff, the law in this area is not settled. The Commission found it must make a determination about the legal effect of an approved tariff, because this determination would impact the resolution of other issues, such as the preemption arguments, more thoroughly briefed by the parties.

184. Sources are split on whether an approved utility tariff functions as a state statute or rather represents a contract between the customer and the utility.[29] Compare *Harrell v. City of Chicago Heights*, 1996 WL 51835 (N.D. Ill. 1996) (citing *Illinois Cent. Gulf R. Co. v. Sarkey Bros., Inc.*, 384 N.E.2d 543, 545 (Ill. App. 1979)) ("A tariff is a law, not a contract, and has the force and effect of a statute.") with *Metro East Center for Conditioning and Health v. Qwest Communications Intern. Inc.*, 294 F.3d 924, 926 (7th Cir. 2002) (describing tariffs as a "species

[29] As an example of the existing confusion, American Jurisprudence, a definitive legal treatise, seems to characterize it as both. 64 Am. Jur. 2d, Public Utilities § 61 states, "A tariff that has been approved by a public service utility becomes law and has the same force and effect as a statute enacted by the legislature; it amounts to a binding contract between the utility and its customer and supersedes all other agreements between the parties."

of contract") and *Walsh v. America's Tele-Network Corp.*, 195 F.Supp.2d 840, 849 (E.D. Tex. 2002) (characterizing a tariff as a "mutually binding contract").

185. The most on-point Colorado law is *U S West Communications, Inc. v. City of Longmont*, 948 P.2d 509 (Colo. 1997). In *U.S. West*, the Colorado Supreme Court was presented with a conflict between a Longmont city ordinance and a Commission-approved tariff. In evaluating which source of law was controlling, the Court undertook an analysis of the effect of approved tariffs. The Court acknowledged "establishing rates through tariffs filed with the P.U.C. is a properly delegated legislative function." *Id.* at 517. However, the Court clarified that this legislative source of authority "does not mean . . . that a tariff rises to the level of statute." *Id.* In reaching this conclusion, the Court noted its concern that, if a tariff were considered statute, a utility could avoid common law and other legal duties by amending its tariff. *Id.* at 518.

186. The Commission found the existing law on the legal weight or characterization of Commission-approved tariffs in Colorado to be unclear.[30] However, the Commission acknowledged that the Colorado Supreme Court definitively stated a tariff is not a statute. The Commission therefore concluded the characterization of a tariff as a contract is more consistent with the holding of *U.S. West* than the alternative proposed by the intervenors. This is not to say a tariff is purely contractual, however. The Commission recognizes an approved tariff represents

[30] While *U S West* stands for the proposition that an approved tariff is not the equivalent of state statute, it also indirectly declined to interpret the tariff as a contract. Under *City & County of Denver v. Mountain States Telephone & Telegraph Co.*, 754 P.2d 1172, 1176 (Colo. 1988), a common law duty may be avoided if it conflicts with a "*contract*, franchise agreement, or statute to the contrary." (Emphasis added.) Applying this test in *U.S. West*, the Court declined to find the common law duty was superseded. The Court therefore impliedly held the tariff was also not a contract. However, the Commission believes this carries less weight than the Court's specific refusal to characterize the tariff as a contract, in part because the utility did not raise this argument in that case.

a hybrid between law and contract. However, given the holding of *U.S. West*, the Commission believes an approved tariff is more akin to a contract than a state statute.

187. This outcome is consistent with regulatory principles. During a rate setting proceeding, the Commission essentially stands in the shoes of customers in negotiating a tariff, which acts as a model agreement between the utility and all customers. We assume this role because an electric utility, as a natural monopoly, would otherwise have excessive bargaining power relative to individual consumers.

c. Conflict with § 13-21-111.5(6)(b), C.R.S.

188. Section 13-21-111.5(6)(b), C.R.S., states, "any provision in a construction agreement that requires a person to indemnify, insure, or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee is void as against public policy and unenforceable." NAIOP argued the proposed environmental tariff and environmental agreement, as originally proposed, violated this statute because they required customers to indemnify Public Service for its own negligence.[31] Public Service argued the statute applied only to construction companies and was therefore inapplicable to Public Service, a utility.[32] Public Service contended this statute does not apply to Public Service because it does not appear in the Title 40 of the Colorado Revised Statutes, which sets forth the public utility law.[33]

[31] *See* NAIOP Reply, filed Dec. 16, 2009, at 7-9; NAIOP Response to Copper Mountain Summary Judgment Motion, filed October 8, 2009, at 7-9.

[32] Public Service Response, filed Nov. 20, 2009, at 29-30.

[33] *Id.*

189. In order to evaluate the applicability of § 13-21-111.5(6)(b),C.R.S, the Commission first determined whether the tariff, understood as a contract, was a "construction agreement" for purposes of the statute. Section 13-21-111.5(6)(e)(I),C.R.S., defines a "construction agreement" as:

> a contract, subcontract, or agreement for materials or labor for the construction, alteration, renovation, repair, maintenance, design, planning, supervision, inspection, testing, or observation of any building, building site, structure, highway, street, roadway bridge, viaduct, water or sewer system, *gas or other distribution system, or other work dealing with construction or for any moving, demolition, or excavation connected with such construction*.

(Emphasis added.) The Commission held the proposed tariff and the environmental agreement both fell within this definition because they apply when a customer has requested Public Service "extend, relocate, or perform upgrades, maintenance or repair of any facilities and service to or on any property."[34] As such, the Commission held the tariff language, as originally presented, violated § 13-21-111.5(6)(b),C.R.S., because it clearly required a customer to indemnify Public Service for its own negligence. Further, unlike the environmental agreement, the proposed tariff language did not contain a savings clause clarifying the indemnification provision applies only to the extent allowed by law.[35] The Commission invited parties to provide documentation regarding the legislative history of the statute.

190. However, at hearing, Public Service proposed to alter its tariff proposal, eliminating the indemnification for negligence provision. This concession effectively eliminated

[34] Proposed Tariff Sheet No. R33.

[35] Paragraph 7 of the original environmental agreement contained such a savings clause, which saves it from violating § 13-21-111.5(6)(b),C.R.S. The agreement, as originally proposed, can be found as Exhibit TDS-1, attached to the Rebuttal Testimony of Public Service Witness Staley. Ex. 17. Paragraph 7 states, "[t]o the extent this Agreement is construed as a 'Construction Agreement' pursuant to C.R.S. § 13-21-111.5(6), the obligations of Owner under this Section 7 shall not be applicable to any liability of claim arising solely from the negligence of PSCo."

the conflict with § 13-21-111.5(6)(b), C.R.S., as originally considered by the Commission. The Commission's evaluation of the most recent version of the proposal is discussed later in this Order.

d. Preemption by CERCLA

191. Wal-Mart and Copper Mountain argued some or all of the environmental tariff provisions are preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), a federal statute commonly known as "Superfund."[36]

192. The federal constitution establishes the supremacy of federal laws over state laws, Const. Art. VI, cl. 2, and therefore, state laws that conflict with federal laws are "without effect." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). As such, preemption analysis is only applicable to the environmental tariffs if they are understood as having the effect of state statute, rather than contract. Because the Commission characterizes an approved tariff as more akin to a contract, the inquiry becomes, "may two parties contractually allocate CERCLA liability?"

193. CERCLA addresses indemnification in 42 U.S.C.A. § 9607(e)(1), which provides, "No indemnification, hold harmless, or similar agreement or conveyance shall be effective to transfer from the owner or operator of any vessel or facility or from any person who may be liable for a release or threat of release under this section, to any other person the liability imposed under this section. Nothing in this subsection shall bar any agreement to insure, hold harmless, or indemnify a party to such agreement for any liability under this section." This seemingly contradictory language has been interpreted to mean "agreements to indemnify or hold harmless are enforceable between the parties but not against the government." *Smith Land*

[36] *See* Wal-Mart Motion *In Limine*, filed Sept. 23, 2009, at Copper Mountain Motion for Summary Judgment, filed Sept. 24, 2009, at 17-18; Wal-Mart Reply Brief, filed Dec. 17, 2009, at 4-12.

& Improvement Corp. v. Celotex Corp., 851 F.2d 86, 89 (3d Cir. 1988), *cert. denied*, 488 U.S. 1029 (1989); *see also United States v. Hardage*, 985 F.2d 1427, 1433 (10th Cir. 1993) (Under § 9607(e)(1), "responsible parties may not altogether *transfer* their CERCLA liability, [but] they have the right to obtain indemnification for that liability.") (citations omitted) (emphasis in original).

194. Therefore, the Commission concluded the indemnity provisions of the proposed environmental tariff would conflict with CERCLA only to the extent they bind government parties. The Commission believed the tariff language sufficiently addressed this concern. It states, "[c]ustomer, *including any governmental entity to the extent permitted by law*, indemnifies . . . Company." (Emphasis added.) Because indemnification by governments is not allowed by CERCLA, this clause would effectively preclude indemnification under this circumstance. The Commission therefore held the proposal was not preempted by or otherwise in fatal conflict with CERCLA.

e. Preemption by RCRA

195. Wal-Mart and Copper Mountain also argued some or all of the environmental tariff provisions were preempted by the Resource Conservation and Recovery Act (RCRA). As with the CERCLA arguments, preemption analysis is inapplicable when the tariff is viewed as being akin to a contract. The inquiry is again transformed, into "may two parties contractually allocate RCRA liability?" The Commission is aware of no provision prohibiting contractual allocation of liability for environmental costs.[37] Therefore, the Commission held the proposal was not preempted by or otherwise in fatal conflict with RCRA.

[37] *See Singer v. Bulk Petroleum Corp*., 9 F.Supp.2d 916, 922-24 (N. D. Ill. 1998) (declining to invalidate a contractual indemnification provision that shifted liability for any and all past and future environmental clean-up and removal costs).

f. Preemption by Art. XI of the Colorado Constitution

(1) Art. XI, § 1

196. Art. XI, § 1 of the Colorado Constitution provides state or local governments shall not "lend or pledge the credit of faith thereof, directly or indirectly, in any manner to, or in aid of, any person, company or corporation, public of private, for any amount, or for any purpose whatever; of become responsible for any debt, contract of liability of any person, company of corporation, public or private, in or out of the state." The Local Governments, CDOT, Wal-Mart and NAIOP contended all or part of the environmental tariff proposals conflict with Art. XI, § 1 of the Colorado Constitution.[38] "The thrust of this constitutional provision is that cities and towns should not allow their tax-derived general funds to secure assistance for private corporations." *Lyman v. Town of Bow-Mar*, 188 Colo. 216, 223, 533 P.2d 1129, 1134 (1975). There are two exceptions to this prohibition. First, Art. XI, § 1 has been held inapplicable where the government incurs obligations for a public purpose. *Gude v. City of Lakewood*, 636 P.2d 691, 695 n.2 (Colo. 1981). Second, Art. XI § 1 "cannot be so construed as to keep the state or any subdivision thereof from pledging its own credit for its own debts or obligations." *Bradfield v. Pueblo*, 143 Colo. 559, 570, 354 P.2d 612, 618 (1960).

197. Intervenors argued the environmental tariff provisions require governments to become responsible for the liabilities of Public Service, and therefore violate this constitutional provision. Public Service, keeping with its characterization of the tariff as a contract, argues the liabilities and duties incurred by governments are consideration for service provided. Under this logic, the provisions of the tariff would fall within the "pledging its own credit for its own debts"

[38] Wal-Mart Motion *In Limine*, filed Sept. 23, 2009, at 11; Local Governments Motion in Support of Wal-Mart's Motion *In Limine*, filed Oct. 8, 2009, at 4-5; CDOT Motion in Support of Wal-Mart's Motion *In Limine*, filed Sept. 23, 2009, at 2; NAIOP Decision Tree, filed Jan. 11, 2009, at 2.

exception. The Commission agreed with Public Service that the indemnification terms fell under this exception, avoiding any conflict with Art. XI, § 1.

(2) Art. XI, § 2

198. Art. XI, § 2 of the Colorado Constitution provides state or local governments shall not "make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company or a joint owner with any person, company, or corporation, public or private, in or out of the state." "The purpose of this provision is to prohibit the state or a political subdivision from transferring funds to a private company or corporation without receiving any consideration in return." *City and County of Denver v. Qwest Corp.*, 18 P.3d 748, 758 (Colo. 2001). The Local Governments argued[39] they would be required, under the environmental tariff provisions, to pay public funds to Public Service for no consideration.[40]

199. However, understanding the tariff as a contract, there is consideration. In order for the environmental tariff provisions to apply to governments, the governments would have to be requesting electricity service from Public Service. In return for receiving electricity service, the governments would agree to provide indemnification and otherwise agree to abide by the Public Service's terms of service. Therefore, the Commission found the proposal did not conflict with Art. XI, § 2 of the Colorado Constitution.

g. Commission's Jurisdiction

200. Copper Mountain argued the proposal concerns subjects that are solely within the jurisdiction of the CDPHE.[41] Wal-Mart also raised a number of concerns about how the tariff

[39] Local Governments Motion in Support of Wal-Mart's Motion *In Limine*, filed Oct. 8, 2009, at 6.

[40] Consideration is defined as "something of value (such as an act, a forbearance, or a return promise) received by a promisor from a promise." Black's Law Dictionary (2d Pocket Ed. 2001).

[41] Copper Mountain Summary Judgment Motion, filed Sept. 24, 2009, at 10-14.

would impact the role and mission of the CDPHE.[42] The Commission determined that the concerns raised issues about the mixed questions of law, fact and policy and therefore decided to take further testimony on these issues prior to rendering a decision on the merits.

201. However, the Commission did address the arguments of some intervenors that the Commission was wholly precluded from approving the proposed environmental tariff provisions because the Commission had no jurisdiction over the underlying subject matter. The Commission has the authority to evaluate whether a utility's provision of service, which necessarily includes the terms of that service, is "adequate, efficient, just and reasonable." § 40-3-101, C.R.S. In addition, the Commission enjoys the authority to "regulate all rates, charges, and tariffs of every public utility in this state and to correct abuses," as well as the ability to "do all things, whether specifically designated in articles 1 to 7" of title 40 that are "necessary or convenient in the exercise of such power." § 40-3-102, C.R.S. The environmental tariff provisions implicate the terms by which Public Service provides electricity service to customers. This is decidedly within the Commission's broad authority.

4. Changes to the Proposal

202. Public Service offered three changes to its proposal during the hearing and within its Statement of Position. First, at hearing, Public Service offered to alter its indemnification provision in order to remove any indemnification for Public Service's own negligence. When it made this alteration it also made other changes to the text of this provision. Specifically, it edited the provision to specify that the indemnity carve out applies only to the extent of the "divisible or allocable share directly attributed" to Public Service's conduct. In addition, Public Service added the following text: "Customer shall have the burden of proving any negligence or

[42] Wal-Mart Reply, filed Dec. 17, 2009, at 17-22.

willful misconduct on the party of Company. Company's work activities (even to the extent that the same caused, contributed to or exacerbated the release of any Hazardous Materials) shall not be considered negligent if performed in a commercially reasonable fashion as compared to a similarly situated utility provider." This change is reflected in the most recent version of the proposal, filed by Public Service on February 1, 2010.

203. Second, Public Service stated at hearing that the proposal would not unilaterally replace any existing agreements. Counsel for Public Service stated, "If the customer wants to continue under the preexisting agreement, then the [C]ompany will honor the preexisting agreement." Tr. at 108, Jan. 22, 2010. This change has not been incorporated into the most recent version of Public Service's proposal.

204. Third, in its Statement of Position, Public Service stated its intent to limit the environmental agreement to a term of ten years, in an attempt to address certain intervenors' concerns about the effect of the agreement on property values.[43] This change has not been incorporated into the most recent version of Public Service's proposal.

5. Outstanding Motions

a. Wal-Mart Motion for Administrative Notice

205. On January 21, 2010, Wal-Mart filed a Motion for the Commission to Take Administrative Notice of the Small Business Liability Relief and Brownfields Revitalization Act; C.R.S. § 13-21-111.5; Colorado Lawyer Article; Chapter 337 of the Minnesota Statutes Annotated 33; Excerpts From the Senate Committee on Local Government Regarding SB 07-87.

[43] Public Service Statement of Position at 5.

206. Commission Rule 1501(c), 4 CCR 723-1, allows the Commission to take administrative notice of, *inter alia*, state and federal statutes, matters of common knowledge, matters within the expertise of the Commission, and facts capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

207. In the absence of administrative notice, counsel for Wal-Mart indicated her intent to offer each of the documents as exhibits during cross-examination of witnesses. The Commission instructed Wal-Mart to offer the documents as hearing exhibits, rather than through the administrative notice process. The motion was therefore denied.

b. Wal-Mart Offer of Proof

208. At hearing, Wal-Mart made an oral motion seeking leave to "present live surrebuttal narrowly focused on the public policy issue of reasonableness of a tariff that could potentially impact the defenses under CERCLA and also the reasonableness or the impact on the utility's obligation to serve." Tr. at 129, Jan. 14, 2010. In support of this motion, counsel for Wal-Mart argued the previous focus of testimony regarding the environmental tariff was legal in nature and that, upon the Commission's resolution of certain threshold legal issues, Wal-Mart was now forced to change its strategy to focus on policy implications. *Id.* at 130. This oral motion was denied. *Id.* at 132.

209. Wal-Mart subsequently filed a Motion for Leave to Request Reconsideration and, in the Alternative, to Make an Offer of Proof on January 21, 2010. In this Motion, Wal-Mart asked the Commission to reconsider its rejection of Wal-Mart's oral motion. In the alternative, Wal-Mart sought to enter an Offer of Proof into the record, in order to document what evidence Wal-Mart's witness would have presented had he been given an opportunity to testify at hearing. The Commission addressed this Motion at hearing on January 21, 2010. The motion to

reconsider was denied. Tr. at 301, Jan. 21, 2010. The Offer of Proof was allowed by the Commission for the limited purpose of preserving the evidentiary issue on appeal. *Id.* The Offer of Proof is contained in Wal-Mart's Motion, under the heading "Offer of Proof."

c. NAIOP Administrative Notice

210. On January 26, 2010, NAIOP filed a Motion For Commission to Take Notice of Certain Documents in its Files. In that Motion, NAIOP stated that during the January 22, 2010, hearings, Mr. Staley testified he was unaware of any complaints filed against Public Service relating to environmental liability allocation. NAIOP requested this Commission take notice of an informal complaint filed by LUI Denver Broadway LLC (LUI) concerning an Environmental Covenant and Release Public Service was attempting to require of LUI. NAIOP sought to notice the documents for the limited purpose of impeaching Mr. Staley's testimony regarding the presence of complaints.

211. LUI is one of the NAIOP group of intervenors. Further, when it filed the informal complaint, LUI was represented by the law firm of Kaplan, Kirsch & Rockwell, LLP, which is also representing the NAIOP group in this proceeding.

212. On January 27, 2010, Wal-Mart filed an Objection, taking issue with NAIOP's motion. In its Objection, Wal-Mart argued approving NAIOP's motion would unfairly allow NAIOP to supplement the record with additional material after the conclusion of hearings and would prejudice the other parties.

213. On February 9, 2010, Public Service filed a Response to NAIOP's Motion. In this Response, Public Service took no position on whether taking Administrative Notice of these documents would be appropriate in this circumstance. Rather, Public Service argued the documents to be noticed demonstrate the usefulness of the proposed environmental tariff and

agreement, which, it argues, would spare the Commission from resolution of similar future disputes by employing consistent and uniform standards on all customers.

214. On February 10, 2010, Wal-Mart filed an "Emergency Response" to Public Service's Response, in which it requested the Commission disallow Public Service's Response. In this Emergency Response, Wal-Mart again argued it would be unfairly prejudiced by noticing these documents because it will have no opportunity to cross-examine any witness who would sponsor them.

215. At the February 18, 2010 Commissioners' Weekly Meeting, the Commission denied NAIOP's Motion.[44] The Commission found that, since the documents to be noticed were filed by a party to this proceeding, the documents should have appropriately been introduced during hearing, if NAIOP intended to impeach Mr. Staley's testimony. The NAIOP motion is therefore denied.

d. Public Service Leave to File Statement of Position in Excess of Thirty Pages and Seeking Consideration of Addendum to Environmental Statement of Position

216. On February 16, 2010, Public Service filed a Motion for Leave to File a Statement of Position in Excess of 30 Pages and Seeking Consideration of its Addendum to its Environmental Tariff Statement of Position and for Waiver of Response Time. Public Service's Non-Environmental Statement of Position was in excess of the 30 page limit established at hearing. *See* Tr. at 255, Jan. 22, 2010. In this motion, Public Service also asks the Commission to consider an addendum to its environmental Statement of Position, in which it provides a line by line commentary of NAIOP's alternative proposal.

[44] Chairman Binz was not present at this Commissioners' Weekly Meeting and therefore did not participate in this ruling.

217. NAIOP filed a response to this motion, opposing both the page limit waiver and consideration of the environmental addendum. In its response, NAIOP notes the Commission specifically stated attachments should not be used to supplement the substance of Statements of Position. *See* Tr. at 105, Jan. 25, 2010.

218. The Commission finds the additional briefing on the non-environmental issues in Public Service's Statement of Position to be concise and helpful and will therefore grant the page extension portion of Public Service's motion. However, the Commission will deny the motion as applicable to the environmental Statement of Position addendum consideration. NAIOP's alternative tariff language was filed on February 1, 2010. If Public Service wished to offer a substantive response to this filing, the Commission believes Public Service should have made such a request in advance of the Statement of Position due date.

e. Public Service Leave to File Response

219. On February 25, 2010, Public Service filed a Motion for Leave to Respond to Intervenors' Environmental Statements of Position with Respect to the Tariff Provisions and Agreement. In this Motion, Public Service argues it must respond to the intervenors' environmental Statements of Position because the intervenors: (1) misrepresented the record evidence; (2) misstated the relevance of facts or holding of cited case law; (3) misunderstood how the tariff language would apply; or (4) raised new arguments for the first time.

220. NAIOP, Denver, Boulder, CDOT, Wal-Mart, LGI, and the Ski Resorts filed a joint response opposing Public Service's Motion. In this Response, the intervenors argue the record, case law, and proposal should speak for themselves, and that the Commission may independently judge the representations made by intervenors. Additionally, the intervenors argue no rule prohibits parties from raising new arguments in Statements of Position.

221. The Commission denies Public Service's motion.[45] If Public Service desired an alternative briefing schedule or an opportunity to respond, it should have raised that with the Commission prior to the Statement of Position due date. Because the Commission believes it would be unfair to the intervenors to allow Public Service alone an opportunity to respond, the Commission will deny the Motion.

6. Positions of the Parties

a. Public Service

222. In support of the environmental tariff proposal, Public Service presents five arguments. First, it argues its proposal will promote uniform treatment of its customers. Second, it argues the use of this uniform language will reduce transaction costs and delays that result from the current practice of case-by-case negotiations to address environmental liability concerns. Third, it argues the proposal, specifically the contamination notification and cessation of all work provisions, will allow it to protect the health of its employees. Fourth, it argues the proposal will protect the environment by encouraging customers to better evaluate the potential for contamination on their property and by identifying optimal locations for utility corridors to minimize the risk of disturbing pre-existing site contamination. Fifth, Public Service argues the proposal protects it and its ratepayers against significant environmental liabilities related to pre-existing contamination.

223. In its environmental agreement proposal, Public Service presents the following arguments. First, Public Service argues the proposal is fair and reasonable in granting Public Service significant discretion. Second, Public Service argues its proposed indemnification and release reasonably applies to offsite properties because this provision would be implicated in

[45] Chairman Binz would have granted the Motion.

limited circumstances and, when it is implicated, it is fair and reasonable for a customer to bear the risks and liabilities associated with offsite contamination. Third, it argues indemnification by governmental customers "to the extent provided by law" is reasonable and appropriate because this language will allow the Company to litigate questions of the tariff's applicability in a case-by-case basis. Fourth, Public Service argues its proposal does not conflict with any existing environmental risk allocation or franchise agreements. Fifth, Public Service contends its indemnification provision does not conflict with § 13-21-111.5, C.R.S., and further defends – as reasonable and consistent with current law – the language it added when this provision was altered, which identifies specific burdens of proof and standards of care to be utilized in any subsequent negligence action. Sixth, Public Service argues its proposal will support, rather than hinder brownfield development. Finally, seventh, Public Service states its successor and assigns provision is reasonable.

224. Public Service also utilizes its Statement of Position to address NAIOP's alternative proposals. Public Service argues the Commission should wholly disregard NAIOP's Tariff-Only Alternative, on the basis that it is outside the scope of what was requested by the Commission. Public Service does not provide a line-by-line analysis of NAIOP's Tariff-Only Alternative, but it does argue the Tariff-Only Alternative: (1) utilizes improperly narrow definitions and terms of art; (2) improperly disallows the company from seeking indemnification for pre-existing contamination, in conflict with NAIOP's filed testimony; (3) limits the Company's recovery to direct costs necessary to manage and dispose of contamination while maintaining facilities, precluding financial assurances and improperly failing to address the risks Public Service encounters while installing or relocating facilities; (4) improperly places the burden of proof on Public Service if the parties do not agree about the presence, nature, or extent

of unremediated contamination; (5) improperly provides an exemption from the tariff's provisions if a customer obtains a "No Further Action" letter from the CDPHE, or if Phase I or II site assessments do not indicate a likelihood of contamination; (6) changes a provision of the existing tariff, thereby limiting the Company's authority to require a new easement; and (7) improperly allows customers to sue Public Service.

b. NAIOP

225. At hearings on January 14, 2010, the Commission encouraged parties to submit alternative versions of Public Service's proposed environmental tariff and agreement language. On February 1, 2010, NAIOP filed its proposed alternative language. It was the only party to file such language.

226. In its filing, NAIOP presents two alternatives. The first, set forth in Exhibit A, is a tariff-only alternative which, it argues, addresses Public Service's liability concerns in a more commercially reasonable manner. This proposal is NAIOP's original language – it was not based on Public Service's proposal. The second, set forth in Exhibit B, includes both environmental tariff language as well as a re-worked environmental agreement. This exhibit was derived from Public Service's proposal. As such, NAIOP provided a redline comparison to Public Service's proposal as presented as an attachment to Public Service witness Staley's testimony. This was not the most recent version of Public Service's proposal.[46]

227. NAIOP's Statement of Position reiterates its belief that tariff language uniformly addressing environmental contamination liability is necessary and appropriate. However, NAIOP nonetheless opposes the environmental tariff and agreement as proposed by Public

[46] The most recent versions of the proposal were presented in Public Service's February 1, 2010, filing, entitled Notice of Filing of Edits to Tariff and Agreement Language, which was an update of Hearing Exhibits 121 and 122, reflecting what Public Service characterized as "some minor 'clean up' edits."

Service. NAIOP argues Public Service has not met its burden of proof. NAIOP states Public Service exaggerates the potential liability it may face and has failed to demonstrate risk sufficient to justify the proposed language. In addition, NAIOP specifically challenges portions of Public Service's Proposal.

228. First, NAIOP argues the proposal vests excessively broad discretion with Public Service to determine when an environmental agreement will be required. NAIOP is not reassured by Public Service's statements that it would use its "best judgment" in determining when to require an agreement. Further, NAIOP is concerned that the tariff provides no safe harbor for customers who may have already completed satisfactory remediation work yet nonetheless own property with some unactionable level of contamination. Because the proposal contains no minimum action level, NAIOP argues Public Service has granted itself the discretion to require an onerous environmental agreement at nearly every property in the metro area. NAIOP argues workable standards exist and recommends inclusion of a *de minimis* exception.

229. Second, NAIOP takes issue with the "clean corridors" provisions of Public Service's proposal, arguing satisfaction of these standards is an unattainable and unreasonable burden on customers. The proposal requires customers to provide a corridor "free from Hazardous Materials," a standard NAIOP argues is excessively burdensome and may be impossible. NAIOP argues that, as a practical matter, this provision grants Public Service excessive discretion to determine when a corridor is "clean enough."

230. Third, NAIOP argues the financial assurance provisions are unreasonably broad. NAIOP argues either the tariff or agreement should contain standards by which customers may be assured excessive financial guarantees will not be required.

231. Fourth, NAIOP opposes the offsite property provisions of Public Service's proposal. NAIOP argues offsite properties, including public rights-of-way in which Public Service often has rights under franchise agreements, are outside the knowledge and control of customers. NAIOP argues customer liability should be limited to only the property they control, as current law already makes customers liable for pollution that spreads from their property.

232. Fifth, NAIOP takes issue with negligence language added to Public Service's proposal during hearing. NAIOP argues standards of negligence and burdens of proof should be determined by existing law, rather than by tariff. Further, NAIOP takes issue with the tariff's definition of negligence as measured against the standard of a "similarly situated utility." Public Service could not identify what a similarly situated utility would be. As such, NAIOP is concerned Public Service will be able to craft its own standard of care for use in negligence claims.

233. Sixth, NAIOP argues the tariff should specifically address its relationship to existing agreements.

234. In addition to these specific arguments, NAIOP spends a portion of its Statement of Position arguing adoption of Public Service's proposal, as it currently exists, would unduly burden brownfield and infill development, and undermine the public interest served by that development.

c. Wal-Mart

235. Wal-Mart makes two arguments in its Statement of Position. First, it argues Public Service's proposal is unjust and unreasonable and should be rejected as an inappropriate tariff. Second, it argues the proposal must be rejected because it is unlawful and preempted.

236. Wal-Mart believes the tariff is not "just and reasonable," as required by § 40-3-101, C.R.S. In support of this contention, Wal-Mart argues Public Service failed to meet the burden of proof necessary to support adoption of the tariff. Wal-Mart also contends the proposal is unduly burdensome on customers, as it would require customers to lose CERCLA defenses, or place impossible standards upon customers, such as the requirement for completely clean corridors. Finally, Wal-Mart argues the proposal is not just and reasonable because it grants unfettered discretion to Public Service in many areas, such as when to require an environmental agreement, what off-site property will be subject to the proposal, as well as the type and size of required financial assurances.

237. Wal-Mart also presents several arguments in support of its contention that the tariff is unlawful. Wal-Mart disagrees with this Commission's finding that tariffs have the effect of contract, rather than statute. Further, it argues this Commission should rule on the preemption arguments raised by intervenors because customers will have no opportunity to negotiate the terms of the tariff or agreement. Wal-Mart continues to believe the tariff conflicts with both state and federal law.

d. Ski Resorts

238. The Ski Resorts also argue Public Service has not met its burden of proof in demonstrating the necessity of the environmental tariff. The Ski Resorts argue the environmental proposal is not necessary to protect worker safety, because Public Service currently has a stop work policy when it encounters hazardous materials. The Ski Resorts also argue the environmental proposal is not necessary to address any significant risk of environmental liability, because the risks Public Service identifies are based on a selective misreading of CERCLA case law. To this end, the Ski Resorts state Public Service has never incurred any CERCLA liability.

Further, the Ski Resorts argue the proposal is unnecessary because Public Service only negotiates one or two environmental agreements each year and has always been able to negotiate a mutually agreeable agreement with its customers. The Ski Resorts also argue Public Service has not shown customers should bear all risk of environmental contamination in all circumstances. Finally, the Ski Resorts argue that, although Public Service claims its proposal will have the benefit of encouraging uniform treatment, such uniformity is inappropriate given the vast variety of situations that could be encountered and controlled by the tariff.

239. The Ski Resorts also claim the proposal is not just and reasonable for a number of reasons. First, the Ski Resorts believe the indemnity and release provisions are overbroad because they target the customer's entire property, utilize a definition of "Hazardous Materials" that is overly inclusive, and require customers to engage in a lopsided indemnity scheme. Second, the Ski Resorts argue the application of the proposal to off-site property is unreasonable because it may force customers to bear a third-party's liability in order to receive service. Third, the Ski Resorts believe it is unreasonable for Public Service to utilize the terms of the proposal unless some minimum and objective showing of environmental risk is made. Fourth, the Ski Resorts argue a number of provisions of the proposal vest Public Service with excessively broad discretion in the absence of a carve-out for *de minimis* contamination, including: the ability to require an environmental agreement, the cessation of all work provision, the clean corridor provision, and the financial guarantee provision. Finally, the Ski Resorts contend the proposal improperly forces the Commission to decide environmental matters beyond its expertise and further complicates inevitable disputes by failing to specify standards by which disputes may be resolved.

e. City and County of Denver

240. Denver argues Public Service has not met its burden of proof. Denver argues Public Service's justification for the proposal – that it is necessary to respond to emerging CERCLA case law that subjects it to substantial liability – was insufficiently demonstrated.

241. Further, if the Commission should choose to approve Public Service's proposal, Denver argues governmental entities should be wholly excluded. Specifically, Denver is concerned with the indemnification provisions, the release provisions, the financial assurances provision, the insurance provisions, the breadth of the easement provisions and the off-site environmental liabilities provisions. Denver further states the inclusion of the phrase "to the extent provided by law" in the indemnification provision is insufficient to address their concerns because this phrase is not included in the environmental agreement, the phrase does not provide sufficient clarity, and it is insufficient to address the conflicts between the tariff and existing franchise agreements.

242. Finally, Denver contends the proposal conflicts with Section 7.2.2 of Denver's Home Rule Charter, which prohibits Denver from agreeing to incur any liability without first obtaining an appropriation. Thus, Denver contends it is prohibited from agreeing to pay some unspecified amount, as required by Public Service's proposal.

f. City of Boulder

243. In its Statement of Position, the City of Boulder reiterates a number of its arguments presented in preliminary briefing and already resolved by the Commission at hearing. In addition, the City of Boulder argues a tariff may not conflict with the terms of a municipal franchise by which a municipality exercises its police powers over its rights-of-way and other public property. The proposal would require customers to grant the Company easements for

equipment necessary or related to the provision of service. The City of Boulder points out that its franchise agreement already grants the Public Service the reasonable use of streets and other public places. The City of Boulder expresses its concern that Public Service will use the "standard form of right-of-way agreement" contemplated by the proposal to seek private easements for its facilities wherever possible, rather than confining itself to its pre-existing franchise easements. The City of Boulder is also concerned the indemnification provisions conflict with pre-existing indemnification clauses of franchise agreements.

244. The City of Boulder also argues the indemnification provision of the proposal violates Art. X, Section 20 of the Colorado Constitution (known as the Taxpayer's Bill of Rights, or TABOR) because it would force governmental entities to incur financial obligations without adequate cash reserves or without voter approval to incur such debt, contrary to TABOR's terms. The City of Boulder argues that because the scope of future liability is uncertain, it would be excessively difficult for governments to show they had cash reserves to cover the potential liability and even more difficult to obtain voter approval to incur such a debt.

245. The City of Boulder further argues approval of the proposal, in its current form, would constitute an unconstitutional delegation of the Commission's regulatory power to Public Service.[47] The City of Boulder argues the following portions of the proposal vest so much discretion with Public Service as to constitute an improper delegation: when an environmental agreement is required; when clean corridors must be provided; whether environmental specialists or professionals must be hired by the customer; the use of excessively broad or non-specific

[47] *See Baca Grande Corp. v. Pub. Utils. Comm'n*, 544 P.2d 977, 979 (Colo. 1976) ("The commission unlawfully delegated its rate-making obligations to the utility when it conferred upon it the discretion to determine whether or not the developer should receive a refund of the underground component of its cash advances and whether to charge underground customers higher rates.")

definitions; failure to attach the referenced Performance Guarantee Agreement to the Environmental Agreement.

246. The City of Boulder also contends Public Service's changes to the negligence provisions of the proposal have not cured its defects. The City of Boulder argues the proposal still conflicts with § 13-21-111.5(6)(b), the construction contract statute. The City of Boulder argues the statute's definitions render it applicable to Public Service's proposal and further states that, even under the revised language offered by Public Service, a customer could have to pay for the Company's *fault* even if it could not show *negligence*, in violation of § 13-21-111.5(6)(b). Further, the City of Boulder expresses concern that a customer may be liable on Public Service's behalf for CERCLA liability, but would be unable to seek contribution from Public Service unless it could prove Public Service's negligence – a higher standard than that used to apportion CERCLA liability.

247. The City of Boulder also objects to the application of the financial assurances provision of the environmental agreement to governmental entities. The City of Boulder argues such assurances are unnecessary from governmental entities because they do not pose the same types of financial risk as commercial developers or single purpose entities.

248. Finally, the City of Boulder argues Public Service has not met its burden of proof necessary to show the need for the proposal. The City of Boulder does believe the environmental agreement should be used only voluntarily, and that customers should be given the opportunity to negotiate different terms in an environmental agreement.

g. Colorado Department of Public Health and Environment

249. In its Statement of Position,[48] the CDPHE reiterates its belief that the language added to the proposal as a result of its negotiations with Public Service sufficiently addresses any concerns it may have had about the proposal.[49] The CDPHE believes inclusion of this language will allow it to fend off attempts to use the tariff against the CDPHE. If the Commission adopts the environmental tariff in any form, CDPHE argues it should include this language.

h. Colorado Department of Transportation

250. CDOT argues Public Service's proposal conflicts with Art. XI, Section 1 of the Colorado constitution because its indemnification provision improperly forces governmental entities to become responsible for the debts of a private person or corporation. CDOT argues the phrase "Customer, including any governmental entity *to the extent permitted by law* . . ." (emphasis added) is insufficient to cure this defect because it will force governmental entities to litigate their potential liability on a case-by-case basis. As an alternative, CDOT suggests changing the phrase to read "Customer, excluding any governmental entity . . . ," thereby completely excluding governmental entities.

[48] On February 16, 2010, CDPHE filed a Motion for Leave to File a Statement of Position. CDPHE was not a party to this proceeding, but rather was granted leave to participate as *amicus curiae*. In that capacity, CDPHE submitted Comments and Reply Comments on certain issues in this proceeding. The Commission finds the insight and perspective of CDPHE to be helpful and will therefore grant CDPHE's motion.

[49] That language states: "Nothing in this ENVIRONMENTAL MATTERS section, nor any environmental agreement under any provision in the tariff, shall be construed to affect or limit the authority of the State of Colorado to administer and enforce any state or federal environmental law, including but not limited to the Voluntary Cleanup and Redevelopment, C.R.S. § 25-16-301 et seq., nor shall R48 – ENVIRONMENTAL MATTERS, nor any environmental agreement under R32 or R 33 or under any other provision in the tariff be construed to modify, revise, limit, subordinate, or amend any state or federal environmental law, including but not limited to, the Voluntary Cleanup and Redevelopment Act, C.R.S. § 25-16-301 et seq. and any applicable agreement or No Further Action determination by the State of Colorado under the Voluntary Cleanup and Redevelopment Act, C.R.S. § 25-16-301 et seq."

251. CDOT also claims the proposal, in its current form, is unduly vague and unclear, vesting excessive discretion with Public Service.

7. Analysis

252. Intervenors' arguments against Public Service's proposal break down into three categories. First, arguments contending Public Service has not met its burden of proof in demonstrating the need for and appropriateness of the proposal. Second, arguments opposing specific provisions of the proposal as over-broad or as vesting excessive discretion with Public Service. Third, arguments contending the proposal conflicts with state or federal law when applied to some or all customers. Because the burden of proof determination is a threshold issue, the Commission considers it first.

a. Public Service Did Not Meet Its Burden of Proof

253. In cases involving proposed tariffs, the burden of proof is on the regulated entity. Rule 1500, 4 CCR 723-1. To satisfy this burden, the utility must show its proposed tariff comports with the standards of the law as set forth in statute. *See Pub. Util. Comm'n v. Dist. Court*, 186 Colo. 278, 282-83, 527 P.2d 233, 234-45 (1974). In other words, Public Service bears the burden of showing that all services rendered under the terms of the proposed tariff would be just and reasonable pursuant to § 40-3-101, C.R.S., and that nothing in the tariff constitutes an unjust discrimination and extortion pursuant to § 40-3-102, C.R.S. The Commission finds Public Service did not meet this burden.

254. Public Service presented a lengthy, complex proposed amendment to its tariff as well as an expansive standard environmental agreement, which functions in concert with the tariff. Rather than presenting individual provisions, drafted to address specific, identifiable and well-documented concerns surrounding environmental contamination, Public Service filed a

complex amalgamation of the provisions, in which the individual motivation for each particular provision is difficult to identify. Further, Public Service has vehemently objected to the proposed alternatives filed by NAIOP, arguing they ought not be even considered by the Commission because they constitute a "fundamental rewrite . . . entirely inconsistent with the proposal presented by the Company."[50]

255. In taking this position, Public Service has attempted to limit the Commission's discretion, forcing the Commission to accept the entire proposal, or nothing at all. There are portions of the proposal that are reasonable and consistent with statutory standards. However, when taken as a whole, the proposal is significantly flawed, and Public Service's arguments in support of the tariff are insufficient to justify its problematic language.

256. In Mr. Staley's rebuttal testimony, Public Service offers seven arguments in support of the Company's proposal. Ex. 17 at 9-10. These arguments are not compelling and are insufficient to justify the scope of the proposal.

257. First, Public Service states the proposal will help it protect its workers' safety by requiring disclosure of known contaminants and provision of clean corridors. The Commission agrees with Public Service that requiring customers to disclose known contamination could serve the goal of improving worker safety. However, the entire proposal cannot be justified on the basis of worker safety, for two reasons. First, a number of the problematic provisions, such as the environmental agreement trigger or the financial assurances standards, do not implicate worker safety. Second, while worker safety is an important concern of this Commission, it is not the only concern. Therefore, while it may be wise to include a mandatory disclosure provision in

[50] Public Service Statement of Position (Environmental), at 26.

some future incarnation of the proposal, worker safety does not provide sufficient justification for the entire proposal.

258. Second, Public Service argues the proposal will protect it from excessive clean-up requirements under CERCLA. Public Service is correct that the proposal would protect it from a significant amount of CERCLA liability. However, as was presented at hearing, with the exception of a single confidential settlement, Public Service has never incurred this type of liability for this type of installation or maintenance work. Tr. at 137, Jan. 22, 2010. Even in attempting to parse the possible risk from existing case law, it seems very unlikely Public Service would face the type of absolute liability under CERCLA it fears. The proposal does not address the possible risk in any measured way. Rather, it is out of proportion to the risks Public Service faces. As such, the Commission does not believe this argument supports adoption of the proposal.

259. Third, Public Service states the proposal is a "commonly-used contractual risk allocation mechanism" that it should have the same ability to utilize as any private non-regulated company. Yet neither Public Service, nor any other intervenor in this proceeding, was able to identify similar language in a public utility tariff. *See* Tr. at 19-20, Jan. 22, 2010; Tr. at 15-16, Jan. 25, 2010; Tr. at 89-90, Jan. 25, 2010. While the general subject matter of the proposal – allocation of risk stemming from environmental contamination – may be commonplace, the specific language proposed by Public Service is anything but. As such, the Commission declines to approve the proposal on the basis that is represents "common" tariff language.

260. Fourth, Public Service believes the proposal embodies the preferred policy treatment of environmental contamination by forcing the customer, rather than ratepayers, to bear the risk associated with contamination. Public Service argues this is the preferred policy

position because the customer should have better information about property conditions, the customer has an opportunity to perform environmental due diligence, the presence of contamination should have been reflected in the purchase price the customers paid for the property, and the customer controls and is aware of activities on the property. The Commission is unconvinced that absolute customer responsibility for contamination represents the preferred policy treatment, particularly since numerous environmental statutes – such as CERCLA – have chosen to apportion liability in other ways. Additionally, even if this Commission agrees customers should bear a higher portion of liability, the language proposed by Public Service shifts the burden of risk so sharply to the customer as to render its proposal excessive, even if the underlying policy considerations are valid.

261. Fifth, Public Service contends its proposal will reduce transaction costs and delays associated with the current process of case-by-case negotiations. NAIOP agrees with this argument, using similar reasoning in its support of some universally applicable tariff language concerning treatment of environmental liabilities. The other parties contend these transaction costs are insignificant, since Public Service testified it enters into only one or two environmental agreements per year. The Commission finds this to be a compelling argument in support of the proposal. However, the interest in increased efficiency is insufficient to overcome the very significant problems with the specific language proposed by Public Service. At various times during this process, Public Service has contended it will litigate certain questions about the proposal language down the road, such as levels of actionable contamination, what types of financial assurances would be required, or to what extent local governments can be required to indemnify Public Service pursuant to the proposal. *See* Tr. at 56-59, Jan. 22, 2010; Tr. at 71, Jan. 22, 2010; Tr. at 132-33, Jan. 22, 2010; Public Service Environmental Statement of Position at 21-

22. The Commission believes this indicates approval of the proposal will actually *increase* transaction costs and delays, as Public Service is pulled into litigation with its customers in an attempt to untangle the terms of the tariff. The Commission agrees with NAIOP's position that, while some reasonable uniform language would be beneficial to many customers, the proffered proposal essentially does more harm than good.

262. Sixth, Public Service argues the proposal allows for uniform treatment of customers. The Commission agrees that, under the proposal, all customers would be subject to the same terms. However, the Commission is unconvinced of what benefit this degree of uniformity provides in the situation of environmental contamination, which is necessarily complex and site-specific. Public Service repeatedly stated it was unable to provide any additional specificity to the proposal because the vast number of distinct factual possibilities necessitated flexibility. If the factual scenarios are so diverse as to defy categorization or some basic level of commonality, the Commission believes the type of uniformity advocated by Public Service is simply inappropriate. Therefore, the Commission declines to approve the proposal on the basis that it provides uniformity.

263. Seventh, Public Service believes the proposal is a preventative tool, which will allow it to avoid risks of future liabilities. This argument is substantially similar to the argument that the proposal is necessary to protect against risks of CERCLA liability. Again, the Commission agrees the proposal would significantly limit the future risks encountered by Public Service. However, reduction or elimination of utility risks is not the Commission's goal. Rather, we are tasked with balancing the risks Public Service faces against the terms and conditions that are reasonable for customers. Therefore, the Commission does not find this argument compelling to support approval of the proposal.

264. Finally, in its Statement of Position (Environmental), Public Service identifies an eighth argument in support of the proposal. Public Service argues the proposal will promote protection of the environment by encouraging: (a) better customer evaluation of their properties to determine where any pre-existing contamination may exist; (b) identification of optimal locations for utility corridors to minimize the risk of disturbing pre-existing site contamination; and (c) participation in the CDPHE's Voluntary Clean-Up Program. However, Public Service does not identify *how* its proposal will accomplish these goals. The Commission is unclear as to how the proposal creates any additional incentives for customers to undertake any of the activities identified by Public Service. Therefore, the Commission does not believe environmental protection justifies adoption of the proposal.

265. In conclusion, while Public Service has met its burden for some discrete portions of the proposal, it has not presented sufficient evidence or compelling arguments that would support approving the proposal as a whole. As such, the Commission finds Public Service has not met its burden of proof and will therefore reject the proposal.

b. Additional Guidance to Parties

266. Although Public Service did not meet its burden of proof in this proceeding, the Commission recognizes the benefit of uniform tariff language addressing environmental contamination liability. The Commission anticipates Public Service may, in the future, file an alternative proposal after receiving additional input from parties. As such, the Commission undertook additional deliberations at the March 10, 2010, Commissioners' Weekly Meeting in order to provide additional guidance to parties about the current proposal. This guidance is not a ruling on the merits of the current proposal, nor does it indicate prejudgment of the merits of any future filing. Rather, the Commission merely wishes to provide parties with some additional

input, which may guide the terms of any future proposed uniform tariff language addressing environmental contamination liability.

267. The Commission identified and discussed what it viewed as the most contested or controversial components of Public Service's proposal. These fall into four categories: instances in which the proposal vests Public Service with excessive discretion or lacks specific standards; conflict with existing agreements; the indemnification provision; and incorporation of an environmental agreement in an approved tariff.

(1) Excessive Discretion and Lack of Specific Standards

268. There are a number of provisions in the proposal that vest Public Service with substantial discretion. Intervenors argue this discretion is excessive and may constitute an improper delegation of the Commission's authority to Public Service.

(a) Hazardous Materials Definition

269. The proposal's existing definition of Hazardous Materials[51] includes any substance regulated under environmental laws, regardless of the quantity or concentration present or whether the contamination presents any risk to human health or the environment. This instance of broad discretion implicates all other provisions that hinge on the presence of Hazardous Materials, such as the cessation of work provision, the environmental agreement provision, and the clean corridors provision. NAIOP suggested changing this definition to

[51] Proposed Tariff Sheet No. R48 defines Hazardous Materials as "Any substance, pollutant, contaminant, chemical, material or waste (regardless of physical form or concentration) that is regulated, listed, or identified under any Environmental Laws, or which is deemed or may be deemed hazardous, dangerous, damaging or toxic to living things or the environment, and shall include, without limitation, any flammable, explosive or radioactive materials; hazardous materials; hazardous wastes; hazardous or toxic substances or related materials; polychlorinated biphenyls; petroleum products, fractions and by-products thereof; asbestos and asbestos-containing material; medical waste, solid waste, and any excavated soil, debris, or groundwater that is contaminated with such materials."

include a minimum action standard. NAIOP would add the following sentence to the definition of Hazardous Materials: "Any such materials that are present in a form, location, or concentration that does not trigger worker protection, cleanup, or solid or hazardous waste management requirements under Environmental Laws shall not be considered Hazardous Materials."[52] However, Public Service says any such alteration is "too narrow." The Commission believes inclusion of this type of *de minimis* exception is reasonable and would add significant clarity to the proposal. The Commission recommends any subsequent environmental tariff filing include such an exception.

(b) Environmental Agreement Requirement

270. The proposal gives Public Service the authority to require an environmental agreement[53] of any customer if Hazardous Materials are known to exist, encountered, or "reasonably suspected to exist." In determining whether materials are reasonably suspected to exist, the language provides Public Service may look to historic land uses. Intervenors have expressed concern that nearly any prior land use could create suspicion about the presence of hazardous materials. In addition, given the excessively broad definition of Hazardous Materials, an environmental agreement could be required when the limited amount of contamination present poses no risk to human health or the environment and need not be remediated under environmental laws.

[52] This language will hereinafter be referred to as the "*de minimis* exception."

[53] Proposed Tariff Sheet No. R33 states, "the Company may require any customer to execute the Company's standard form Environmental Agreement in the event that Hazardous Materials: (1) are known to the Company to exist in the area of the site (based on, for example, but not limited to, disclosures by the customer, publicly available documents regarding site contamination); (2) are encountered by the Company while performing work at the site; and/or (3) are reasonably suspected to exist in the area of the site (based on considerations including, but not limited to, historic land uses of the site or land uses of adjacent properties."

271. While the Commission agrees it is unlikely Public Service would abuse this provision to require unnecessary environmental agreements, it nonetheless remains that the provision, as written, grants Public Service significant discretion about when to require an environmental agreement by creating "standards" that are so broad as to encompass the vast majority of customer land parcels. Inclusion of a *de minimis* exception to the Hazardous Materials definition would significantly improve the reasonableness of this provision.

272. Additionally, while there may be circumstances in which Public Service should be able to require an environmental agreement based on the mere suspicion of contamination, the provision should include additional procedural safeguards. Reasonable suspicion of contamination should only be the basis for requiring an agreement if Public Service provides significant information to the customer regarding the basis and scope of the suspected contamination. The customer should also have an opportunity to respond to this information or to address Public Service's concerns. Finally, the proposal should identify a procedural mechanism to resolve disputes between Public Service and customers about suspected contamination and the necessity of an environmental agreement; these inevitable disputes should be resolved by an independent third party according to a set of uniform standards.

273. The Commission recommends any environmental agreement trigger provision include these minimum safeguards.

(c) Clean Corridor Provision

274. The clean corridor provision[54] allows Public Service to require the customer to provide a corridor "free from Hazardous Materials" if Public Service believes "the presence of Hazardous Materials is of such a nature, extent or severity that the performance of the work presents risk or liability to the Company of its employees, contractors, or agents." At hearing, Public Service repeatedly stated its concern that the presence of *any* contamination could subject it to potential liability or risk. As a result, and combined with the lack of identifiable standards for actionable levels of contamination in the proposal, intervenors are concerned Public Service would have absolute discretion to demand a corridor be remediated to a level surpassing any relevant regulatory standards.

275. The Commission believes altering the definition of Hazardous Materials to include a *de minimis* exception would address this concern. Therefore, any subsequent version of the proposal should include this exception.

[54] Proposed Tariff Sheet No. R33 states, "If requested by the Company, customer shall provide Company with utility corridors that are free from Hazardous Materials and/or perform trenching/boring and backfill pursuant to dimensions and other specifications provided by the Company. However, such trenching and backfill/boring will be the responsibility of the customer only in the event that (1) the customer requests to perform such work and Company agrees, or (2) the Company determines that the presence of Hazardous Materials is of such nature, extent of severity that the performance of the work presents risk of liability to the Company of its employees, contractors or agents."

(d) Cessation of All Work

276. The cessation of all work provision[55] allows Public Service to stop all installation or maintenance work if it discovers Hazardous Materials. This provision suffers from the absence of a *de minimis* exception from the Hazardous Materials definition. Because Hazardous Materials, as defined in Public Service's proposal, includes materials regulated by any environmental law at *any* concentration or level, Hazardous Materials are almost surely present at every customer location, granting Public Service unlimited discretion to decide when to actually invoke the provision.

277. Addition of a *de minimis* exception to the Hazardous Materials definition would address this problem. The Commission therefore recommends that any subsequent version of the proposal contain this exception.

(e) Financial Assurances

278. The financial assurances provision[56] allows Public Service to require unspecified financial assurances from a customer in whatever amount and scope Public Service deems appropriate. NAIOP and the Ski Resorts testified to the burdensome impact such financial assurances can have on the operations of a business. As such, they argue the provision should contain additional specificity regarding how minimum financial assurances will be determined.

[55] Proposed Tariff Sheet No. R48 states, "If any Hazardous Materials on Property, Customer Controlled Property or in other locations in connection with Company's installation, relocation, maintenance or repair of Company facilities are encountered, Company may cease all activities related to such installation, relocation, maintenance or repair related to such installation, relocation, maintenance or repair until customer has provided the Company notification that such Hazardous Materials have been excavated/removed, managed and/or disposed of in accordance with applicable Environmental Laws. If requested by Company, customer shall provide Company with written documentation evidencing the same. Company may also require that customer enter into its standard Environmental Agreement . . ."

[56] R 33 states, "In connection with the execution of the Environmental Agreement, the Company may require customers to provide financial assurance, such as guarantees, environmental liability insurance, or similar mechanisms, in amounts and scope commensurate with the site risks as determined by the Company."

Currently, Public Service retains sole discretion to identify mandatory financial assurances and states it cannot provide the standards by which it would determine those assurances. Tr. at 69-73, Jan. 22, 2010. NAIOP included detailed standards in its alternative full proposal to the Public Service provisions, but Public Service claims NAIOP's proposal is inappropriate because all decisions about financial assurances need to be determined on a case-by-case basis.

279. The Commission believes both parties are correct: Public Service's desire for adequate financial assurances is sensible, as is NAIOP's belief that those assurances should be tempered by accepted financial guidelines. The Commission would therefore recommend any future proposal contain standards by which Public Service will evaluate the need for financial assurances. In addition, to the extent any information provided by the customer is subject to a claim of confidentiality, the Commission expects Public Service would protect that information using the same standards utilized by other parties when Public Service files confidential information with the Commission. If Public Service found these standards to be inadequate for whatever reason, they would of course retain the ability to ask the Commission for permission to seek additional protection.

(f) Adjacent Property

280. The adjacent property provision is set forth in footnote two of the environmental agreement.[57] In order for the agreement to apply to offsite property, that property must be adjacent, which is defined as property which borders the customer's property. A number of intervenors express concern that the definition of "adjacent" does not sufficiently specify what portion of an adjacent property would fall under the agreement.

281. The Commission understands why Public Service would want to avoid potential liability stemming from contamination on adjacent offsite property. However, the Commission is unconvinced that, in the alternative, consumers should bear that risk, especially when the extent of that risk is unclear due to lack of specificity regarding the concept of adjacency. The Commission believes these are risks that could better be addressed through case-by-case negotiations and would therefore recommend exclusion of this provision or, as discussed further below, exclusion of the environmental agreement.

(2) Conflict with Existing Agreements

282. A number of parties raised concerns than an approved tariff would supersede any existing agreements addressing easements or containing indemnification provisions. Counsel for Public Service addressed this issue at hearing, stating, "If the customer wants to continue under

[57] Footnote two of the Environmental Agreement provides it will apply to offsite or public property: "A. If Owner does not grant PSCo easement(s) on the Property for Utility Facilities associated with Owner's request, then any property (i) that PSCo requires to install such utility facilities, (ii) is adjacent to the Property, and (iii) that otherwise satisfies the definition of Offsite Property and/or Public Property, will be identified in Exhibit B; and B. Where PSCo must cross contaminated properties known of suspected to contain Hazardous Materials to reach the Property, and Owner is not willing to pay for an alternative route, any such property that PSCo has to cross, which is adjacent to the Property and otherwise satisfies the definition of Offsite Property or Public Property, will be identified in Exhibit B." The footnote goes on to state, "[f]or the purpose of this footnote, 'adjacent' means (x) property that borders, at some point, the Property, and/or (y) property that would border the Property at some point but for interruptions or gaps due to immediately adjacent items, such as public right-of-way, other rights-of-way or natural/manmade interruptions, e.g., a stream or a railroad right-of-way."

the preexisting agreement, then the [C]ompany will honor the preexisting agreement." Tr. at 108, Jan. 22, 2010.

283. However, this concession has not been reflected in the proposed tariff language itself. Any future version of the proposal should include language stating the tariff language does not replace, supersede or conflict with any existing agreements. In addition, the Commission recommends the proposal contain some guidance about what constitutes a "preexisting agreement." For instance, under what circumstances would amendment of an existing agreement transform it into a new agreement? Alternatively, if sub-contracts are negotiated pursuant to a preexisting master agreement, are they also considered to pre-date the tariff?

(3) Indemnification Provision

284. The indemnification provision[58] of the proposal has been subject to a great deal of scrutiny in this proceeding. The Commission believes any future version of the proposal should reflect two changes to the indemnification provision, as suggested by intervenors.

[58] Proposed Tariff Sheet No. R48 states, in relevant part, "Environmental Release for Customer Controlled Property – Cont'd Further, customer agrees to release and hold harmless Company Parties for Claims that arise out of or relate to: (a) the application, discharge, release, spill, handling, storage, or disposal of Hazardous Materials in, on, or under Customer Controlled Property; (b) any off-site transportation and disposal of such Hazardous Materials; and (c) the presence of any Hazardous Materials in, on or under the Customer Controlled Property. This release is effective irrespective of whether work or activities of the Company causes, contributes to or exacerbates the release of any Hazardous Materials. This release shall not apply, however, (1) in the case of Company materials, but only to the extent of such Company Materials or (2) for damages, costs or expenses direction incurred as a result of any negligence of intentional or willful misconduct by the company but only to the extent of such divisible or allocable share directly attributed to such negligence or intentional or willful misconduct. Nothing in this paragraph is intended to narrow the scope of the "Liability" section and/or "Indemnification" section of these Rules and Regulations. Customer shall have the burden of proving any negligence or willful misconduct on the party of Company. Company's work activities (even to the extent that the same caused, contributed to or exacerbated the release of any Hazardous Materials) shall not be considered negligent if performed in a commercially reasonable fashion as compared to a similarly situated utility provider." (Underline indicates text added during hearing.)

(a) Applicability to Government Entities

285. Denver and the City of Boulder are concerned they would be unable to satisfy the terms of the proposal because they would not be permitted to undertake the potential responsibilities incurred from the proposal without first obtaining a public funding source. The City of Boulder argues the indemnification provision of the proposal violates Art. X, § 20 of the Colorado Constitution (known as the Taxpayer's Bill of Rights, or TABOR) because it would force governmental entities to incur financial obligations without adequate cash reserves or without voter approval to incur such debt, contrary to TABOR's terms. The City of Boulder argues that because the scope of future liability is uncertain, it would be excessively difficult for governments to show they had cash reserves to cover the potential liability and even more difficult to obtain voter approval to incur such a debt. For its part, Denver contends the proposal conflicts with Section 7.2.2 of Denver's Home Rule Charter, which prohibits Denver from agreeing to incur any liability without first obtaining an appropriation. Thus, Denver contends it is prohibited from agreeing to pay some unspecified amount, as required by the proposal.

286. To be clear, the Commission does not believe either TABOR or the Home Rule charter would *prohibit* a governmental entity from satisfying the terms of the proposal. But, the Commission believes TABOR and the Home Rule Charter could significantly complicate municipalities' ability to obtain utility service as a customer.

287. Further, the Commission is concerned the language "[c]ustomer, including any governmental entity to the extent permitted by law . . ." will lead to conflicts and litigation, as parties attempt to define the limits of whether governmental entities are permitted to indemnify Public Service in any particular situation.

288. As a result, the Commission recommends that any future proposal exclude governmental entities from the indemnity requirements. The Commission believes such an exclusion would, in the end, avoid more disputes than it would cause. Public Service would still be free to negotiate specific agreements with governmental entities to address environmental liability risks that may arise when governments are engaged with Public Service as customers.

(b) New Negligence Language

289. During hearing, Public Service proposed to alter its indemnity carve out, thereby no longer allowing Public Service to be indemnified for its own negligence. However, when it made this alteration (by removing the word "gross" from the phrase "gross negligence") it also made other changes to the text of this provision. It edited the provision to specify that the indemnity carve out applies only to the extent of the "divisible or allocable share directly attributed" to Public Service's conduct. In addition, Public Service added the following text: "Customer shall have the burden of proving any negligence or willful misconduct on the part of Company. Company's work activities (even to the extent that the same caused, contributed to or exacerbated the release of any Hazardous Materials) shall not be considered negligent if performed in a commercially reasonable fashion as compared to a similarly situated utility provider." Ex. 121.

290. A number of intervenors expressed concern about this second addition. They argue it contradicts or at least confuses established legal standards and tests used to determine negligence. Public Service contends this language is consistent with existing standards of negligence. If Public Service is incorrect, this language could further confuse an already complex document. On the other hand, if Public Service is correct, the language serves no

purpose. As such, the Commission recommends any future proposal exclude these two sentences, leaving issues of standard of care and burden of proof to the existing state of the law.

(4) Incorporation of Environmental Agreement into Tariff

291. Public Service seeks Commission approval of a standard environmental agreement, incorporated by reference into the tariff. A number of intervenors express concern about the wisdom of including such an agreement in the tariff.

292. Public Service is, of course, free to develop a model environmental agreement it may use as a starting point in its negotiations with customers. However, the Commission does not believe it is appropriate to incorporate such an agreement into the tariff. Further, the Commission believes it would benefit Public Service to maintain flexibility in the terms of any such agreement. Commission approval would require Public Service to seek permission for any deviation from the standard terms. As such, the Commission recommends any future proposal consist only of tariff language, leaving the terms of the environmental agreement to internal Public Service processes.

II. ORDER

A. The Commission Orders That:

1. The second and third arguments presented in the Joint Motion *In Limine* for a Ruling to Limit the Scope of PSCo's Advice Letter Request and a Request for Expedited Response Time filed by Wal-Mart Stores Inc. and Sam's West Inc. (collectively, Wal-Mart) and the Colorado Department of Transportation filed on September 23, 2009 are denied, consistent with the discussion above.

2. The Motion for Partial Summary Judgment filed by Copper Mountain, Intrawest/Winter Park Operations Corporation, Vail Summit Resorts, Inc., and Colorado Energy Consumers on September 24, 2009, is denied, consistent with the discussion above.

3. The Motion For a Determination of a Question of Law and Brief in Support filed by the Cities of Arvada, Aurora, Centennial, Golden, Greeley, Greenwood Village, Lakewood, Littleton, Louisville, Thornton, Westminster, Wheat Ridge, the Towns of Breckenridge, Frisco, Poncha Springs, Superior, City of Boulder and the City and County of Denver (collectively, Local Governments) on December 4, 2009 is denied, consistent with the discussion above.

4. The Motion For Leave To File Reply to Public Service's Response filed by the Local Governments on December 22, 2009 is denied.

5. The Response In Opposition To Local Governments' Motion For Leave To File Reply filed by Public Service on December 23, 2009 and the Request to Strike Public Service's Response In Opposition To Local Governments' Motion For Leave To File Reply filed by the Local Governments on December 28, 2009 are denied as moot.

6. The January 11, 2010, Settlement Agreement reached between Colorado Energy Consumers and Public Service is approved without modification.

7. The Motion for Leave to Substitute POWDR-Copper Mountain LLC for Copper Mountain Inc. and for Waiver of Response Time filed by POWDR-Copper Mountain LLC (Copper Mountain) on January 20, 2010, is granted.

8. The Motion for the Commission to Take Administrative Notice of the Small Business Liability Relief and Brownfields Revitalization Act; C.R.S. § 13-21-111.5; Colorado Lawyer Article; Chapter 337 of the Minnesota Statutes Annotated 33; Excerpts fro the Senate

Committee on Local Government Regarding SB 07-87 filed by Wal-Mart on January 21, 2010, is denied.

9. The Motion for Leave to Request Reconsideration and, in the Alternative, to Make an Offer of Proof filed by Wal-Mart on January 21, 2010, is granted in part, consistent with the discussion above.

10. The Motion For Commission to Take Notice of Certain Documents in its Files filed by the Commercial Real Estate Development Association, the Colorado Association of Home Builders, the Denver Metro Building Owners and Managers Association, Forest City Stapleton, Inc., Fitzsimons Developer, LLC, LUI Denver Broadway Office, LLC, and LUI Denver Broadway LLC (collectively, NAIOP) on January 26, 2010, is denied.

11. The Motion for Leave to File a Statement of Position filed by the Colorado Department of Health and the Environment on February 16, 2010, is granted.

12. The Motion for Leave to File a Statement of Position in Excess of 30 Pages and Seeking Consideration of its Addendum to its Environmental Tariff Statement of Position and for Waiver of Response Time filed by Public Service Company of Colorado (Public Service) on February 16, 2010, is granted in part, consistent with the discussion above.

13. The Motion for Leave to Respond to Intervenors' Environmental Statements of Position with Respect to the Tariff Provisions and Agreement filed by Public Service on February 25, 2010, is denied.

14. Public Service shall convene and organize a Committee on Education and Customer Bill Information as soon as possible after the effective date of this Order with a bill design completion goal of June 1, 2010. Public Service shall permit participation by any

intervenor in this docket that wishes to participate. Public Service shall comply with all meeting and filing deadlines associated with this committee consistent with the above discussion.

15. Public Service shall start the implementation of the Electric Assistance Program on May 1, 2010.

16. The Commission will convene a technical conference to provide a presentation that explains how Public Service proposes to implement the tariff sheets and rates stemming from the decisions made in this docket consistent with the discussion above, as follows:

DATE: May 5, 2010

TIME: 1:30 p.m. to 3:30 p.m.

PLACE: Commission Hearing Room A
Second Floor
1560 Broadway
Denver, Colorado

17. Public Service shall file its compliance tariffs consistent with this order and Decision No. C09-1446 on or before May 19, 2010 to be effective on June 1, 2010.

18. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this order.

19. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING March 10, 2010.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners