

Decision No. C14-1240

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0555EG

COAL CREEK VILLAGE DEVELOPMENT, INC., DOING BUSINESS AS, COAL CREEK
DEVELOPMENT, INC.,

COMPLAINANT,

V.

XCEL ENERGY, INC., DOING BUSINESS AS PUBLIC SERVICE COMPANY OF
COLORADO,

RESPONDENT.

DECISION DENYING EXCEPTIONS

Mailed Date: October 15, 2014
Adopted Date: August 13, 2014

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I. STATEMENT

1. On June 16, 2014, Coal Creek Village Development Inc. (Coal Creek) and Public Service Company of Colorado (Public Service or Company), filed exceptions to Recommended Decision No. R14-0560 (Recommended Decision). Now being duly advised in the matter, we deny their exceptions.

II. DISCUSSION AND FINDINGS**A. Background**

2. This proceeding is a formal complaint filed on May 17, 2013, by Coal Creek against Public Service. Coal Creek is a land development company and its primary witness, Mr. Richard Barton, is its president.

3. Coal Creek requested Public Service to construct extensions of electricity and natural gas lines into Coal Creek's residential development in Lafayette, Colorado. Public Service's tariff and line extension agreements with developers or builders govern the terms by which Public Service constructs line extensions. In short, developers such as Coal Creek pay Public Service an estimated amount for construction, and Public Service contributes through a method that calculates an average amount of investment expended on a per customer basis throughout the Company's service area, called a "Construction Allowance." Public Service pays an award to the developer or builder in the amount of the Construction Allowance (CA) remaining after permanent service has been established with an end user. This case is about Coal Creek's claims that Public Service's contributions in the form of the CA should have been higher, that Public Service did not follow its tariff line extension policies, and that Public Service should

not have deducted certain costs from the award of remaining CA funds. Coal Creek claims that Public Service owes \$340,000 in payments.¹

4. The Administrative Law Judge (ALJ) held an evidentiary hearing on January 23, 2014, and issued his Recommended Decision on May 27, 2014. The ALJ generally found that, although Public Service administered its line extension tariffs poorly at times and its recordkeeping regarding CAs was lacking,² the Company did not violate any tariffs or statutes, with the exception of electric CAs during 2003 through 2005. The ALJ also found Public Service did not act intentionally or manipulate the line extension process for its own gain.

5. The ALJ ordered Public Service to perform a full accounting of all construction payments and CAs arising from 16 line extension agreements to determine whether the Company owes any payments to Coal Creek. If Public Service owes any money to Coal Creek, interest accrued from the date such payments were required under the tariffs will be added at a rate consistent with Commission Rules.³

B. Exceptions

1. Electric Construction Allowance Between 2003-2005

6. Before the ALJ, Coal Creek challenged Public Service's failure to revise its CA based on the Gross Embedded Investment Methodology (GEIM) within 30 days of its adjustment in a rate case. Coal Creek argued Public Service should have updated and increased its CA for the residential class to \$720 in September 2003, after the completion of Phase I of its rate case. Public Service did not update and increase its CA until August 1, 2005. An increase in the CA in

¹ Recommended Decision, ¶¶ 39, 99.

² Recommended Decision, ¶ 142.

³ Recommended Decision, ¶¶ 104, 107.

September, 2003, would have resulted in Public Service absorbing a higher amount of the construction costs. The ALJ agreed with that claim and ordered the full accounting to be based on the CA of \$720 from September 2003 to August 1, 2005.⁴

7. On exceptions, Public Service argues CA revisions occur after completion of both Phase I and II of a rate case. Phase I of a rate case provides the Company an opportunity to recover its new revenue requirement, through a percentage rate multiplier applied to all customer classes. Phase II of a rate case designs and determines rates among customer classes, allocating the Phase I revenue requirement between the customer classes. Public Service argues a change to GEIM can be made only after the Commission approves a new allocation of distribution plant to various rate classes, which occurs in Phase II. Public Service states it completed a Phase I rate case in September 2003, but the Phase II rate case was not completed until August 1, 2005. Public Service argues it properly waited until August 1, 2005 to update its CA to \$720.

8. Public Service argues it is legally bound by § 40-3-103, C.R.S., to apply the CA contained in its tariff during the subject time period. Public Service finally argues Coal Creek should have raised its claim for Public Service to update the CA in its tariffs within two years, pursuant to § 40-6-119(2), C.R.S.

9. Coal Creek argues the electric tariff does not distinguish between Phase I and Phase II rate cases in describing when Public Service must revise the GEIM. Coal Creek states Public Service does not wait until Phase II before increasing rates to all classes of customers, but instead implements a General Rate Schedule Adjustment (GRSA). The GRSA applies a uniform percentage increase to all customer classes and is effective until it implements subsequent Phase II rate revisions. Coal Creek contends nothing prevents the Company from also adjusting

⁴ Recommended Decision, ¶ 127.

the CA after a Phase I rate case in a similar manner. Coal Creek argues Public Service failed to update the CA in conformance with its tariffs. Coal Creek also argues Public Service improperly raises the statute of limitations claim for the first time on exceptions.

10. Public Service's electric line extension tariff states:

The above allowances are subject to review and appropriate revision by filing of new Construction Allowances with the Public Utilities Commission within thirty days following a final decision in a Company rate proceeding, based on the appropriate gross distribution investment amounts included in that proceeding.

Tariff Sheet No. R114, p. 5 to Exhibit TLN-5, Hearing Exhibit 3.

11. We agree with Coal Creek that this language requires Public Service to update CAs at the end of any rate proceeding, not just after Phase II. Phase I rate cases provide the overall cost level increase for the GEIM. CA updates may be accomplished by applying a uniform percentage increase across rate classes, similar to a GRSA.⁵

12. Coal Creek is correct that Public Service did not raise a statute of limitations defense until exceptions. Statute of limitations is an affirmative defense⁶ and must be timely raised by the defendant. Further, the Commission disfavors new arguments on exceptions.⁷ By waiting until exceptions, Public Service waived its statute of limitations defense and prevented Coal Creek from arguing, for example, that the statute of limitations does not apply under the circumstances.

⁵ Subsequent to the time period addressed in this case, the Commission approved a change to Public Service's electric extension policy to require the Company to update its CAs within 30 days "following a final decision in a Company cost allocation and rate design proceeding." This language results in the Company updating its GEIM/CA after a Phase II rate case. Decision No. C14-0151, consolidated Proceeding Nos. 13AL-0685G and 13AL-0965E issued February 7, 2014, ¶ 14. This new policy is not applicable to the instant case.

⁶ *Garret v. Arrowhead Improvement Ass'n*, 826 P.2d 850, 855 (Colo. 1992).

⁷ Decision No. C12-0276, mailed March 13, 2012 in Proceeding No. 08F-259T, ¶¶ 82-86.

13. Public Service is correct that utilities must charge its customers the rates stated in its tariffs under the filed rate doctrine.⁸ The issue, however, is whether Public Service acted in compliance with all terms and conditions contained in its tariffs, including the requirement to update its CA. The filed rate doctrine does not apply if the utility does not follow the standards set forth in its tariffs.⁹ In this case the filed rate doctrine is not available as a defense, because Public Service did not comply with the terms of its tariffs during 2003 through 2005.

14. Therefore, we deny Public Service's exceptions on this point and uphold the Recommended Decision.

2. Electric Service Laterals:

15. "The Service Lateral is an electric conductor or gas service pipe that is installed from the electric Distribution Line or gas Main Extension to the service meter dedicated to each customer or, in the instance of multiple unit buildings, groups of customers."¹⁰ Public Service deducted the cost of constructing electric service laterals from CA funds awarded to Coal Creek. Coal Creek argues Public Service's assessment of service lateral construction costs upon Coal Creek was improper, because the electric line extension agreements with Public Service exclude service laterals from construction payments, and because Coal Creek should not have to incur the costs for service lateral construction it did not request.¹¹

16. Public Service responded by citing tariffs and prior Commission decisions requiring the inclusion of service lateral construction costs with distribution line costs for a

⁸ Section 40-2-103, C.R.S.; *U.S. West Communications v. City of Longmont*, 948 P.2d 509, 516 (Colo. 1997).

⁹ See generally, Decision Nos. C02-687 issued June 19, 2002 and C03-1292 issued November 19, 2003, Proceeding No. 01F-071G (*Home Builders Ass'n of Metropolitan Denver v. Public Service*).

¹⁰ Answer Testimony of Ted L. Niemi, at p. 14, lines 17-20.

¹¹ Post Hearing Statement of Position of Coal Creek, at 12-13.

combined CA amount. The Company argued that inclusion of service lateral costs into the CA calculation means that the Company invests into construction of the service lateral lines, and thus its investment into service laterals as part of the line extension project warrants deduction of the actual costs of service lateral construction from any award paid to Coal Creek.¹²

17. The ALJ found for Public Service and ruled that the Company followed its tariffs when it deducted service lateral construction costs from Coal Creek's award of the CA.¹³

18. In its exceptions, Coal Creek reiterates the positions asserted before the ALJ, emphasizing the absence of service lateral costs from the construction payment advanced by Coal Creek prior to construction.¹⁴

19. We deny Coal Creek's exceptions. Coal Creek does not make any showing in its exceptions of a violation by Public Service of its tariffs or of Commission decisions when it included costs of service laterals in the CA or when it deducted costs of the service laterals from any CA award to Coal Creek.

3. Service Lateral Markups for Company Overhead

20. Coal Creek argues the ALJ erred in failing to order a refund to Coal Creek for an estimated \$54,450.00, because Public Service based its calculation of overhead costs upon an excessive markup of costs and materials beyond industry standards. Using one of the homes as an example, Coal Creek testified the cost of the service lateral was \$332.54, yet the cost of subcontractor and materials was estimated at \$117.60, resulting in the markup of overhead costs

¹² Statement of Position of Public Service, at 18-21

¹³ Recommended Decision, ¶ 113.

¹⁴ Coal Creek Exceptions, at 9.

of \$214.94. Mr. Barton opined “[t]he overhead for PSCo should not be more than 15% to 20% which would be \$17 to \$23 but not \$215.”¹⁵

21. Public Service responded that Coal Creek’s example is flawed, because the costs of materials supplied by Public Service and other associated overhead was not included in the base. Public Service further argued the record has not established that any of the Company’s overhead costs are illegitimate expenses.¹⁶

22. The ALJ denied Coal Creek’s claim, finding that Coal Creek’s calculations of markups were not grounded in any law or tariff but solely upon Mr. Barton’s conclusion of reasonableness.¹⁷ The ALJ concluded the lack of a basis for Coal Creek’s alternative calculation other than Mr. Burton’s personal judgment results in Coal Creek not meeting its burden of proof.

23. We affirm the Recommended Decision and deny Coal Creek’s exceptions. Coal Creek does not show Public Service violated its tariffs, which authorize Public Service to charge for “all incidental and overhead expenses” associated with line extensions.¹⁸ Coal Creek provided only a subjective opinion without foundation. We also agree with Public Service that Coal Creek did not include all relevant costs in its calculations.

4. Reparations

24. Coal Creek argues the ALJ erred in failing to grant reparations to Coal Creek. Coal Creek argues it should be awarded reparations because Public Service failed to refund construction payment amounts to Coal Creek and abide by the tariffs in a timely manner.

¹⁵ Rebuttal Testimony of Richard Barton, p. 31, lines 14-15.

¹⁶ Public Service SOP, p. 21-22.

¹⁷ Recommended Decision, ¶ 131.

¹⁸ Tariff Sheet R31, TLN-6, p. 2, and Tariff Sheet 110, TLN 5, p. 1.

Coal Creek also argues the ALJ's finding that Coal Creek sought reparations to punish Public Service is not supported by the record.

25. We deny exceptions on this issue. First, any request for reparations as a result of Public Service's alleged failure to refund construction payments when due is duplicative of the order requiring the Company to perform a full accounting and to compensate Coal Creek for the time value of money through payments of interest accrued from the date such payments were required. Second, we agree with the ALJ's conclusion that Coal Creek's request for reparations was punitive and not compensatory. Coal Creek argued reparations should be "adequate in size to make sure [Public Service] does not do this again," proving the request was for retribution, not compensation for actual injury.¹⁹

5. Attorney Fees and Costs

26. In considering Coal Creek's request for attorney fees and costs, the ALJ relied on *Mountain States Tel & Tel. Co. v. Pub. Utils. Comm'n*, 576 P.2d 544, 548 (Colo. 1978), which established the following three pronged standard:

- a. The representation and the expenses incurred relate to the general consumer interest and not to a specific class of ratepayers;
- b. The testimony, evidence, and exhibits have or will materially assist the Commission in fulfilling its statutory duty to determine just and reasonable rates; and,
- c. The fees must be the reasonable rate or preferential treatment of a particular for the services rendered on behalf of the general consumer interests.

27. The ALJ found Coal Creek failed the first prong because its complaint did not apply to the general body of ratepayers but to only Coal Creek's particular case. The ALJ stated

¹⁹ Recommended Decision, ¶¶ 133-134, citing to Rebuttal Testimony of Richard Barton, p. 50, lines 6-7.

there was no support for the claim that, but for the complaint, Public Service would not have amended its line extension tariffs in Proceeding Nos. 13AL-0685G/13AL-0695E.²⁰ The ALJ also found Coal Creek failed to meet the other two prongs, by failing to provide evidence of either material assistance to the Commission or that the requested fees and costs were reasonable under the circumstances.

28. Coal Creek challenges the ALJ's decision not to award attorneys' fees and costs. Coal Creek argues that setting correct rates for line extensions serves the general consumer interest. Coal Creek states its advocacy also benefited end-use customers, because real estate developers usually pass their line extension costs to end use customers. Coal Creek reiterates that, but for its complaint, the Commission would not have been aware of Public Service's actions and failure to abide by tariff language. Regarding the reasonableness of fees and costs, Coal Creek states it has not had an opportunity to present its fees and costs because this proceeding is not complete.

29. We affirm the Recommended Decision and deny exceptions. The ALJ found Coal Creek's claims inured to its individual benefit and not to ratepayers generally, and that the record did now show Coal Creek's claims caused Public Service to amend its tariff.²¹ On exceptions, Coal Creek merely repeats this claim without citing record evidence contradicting the ALJ's findings. Because the absence of any one element to the *Mountain States* test results in denial of an attorneys' fees claim, we need not rule upon the reasonableness of the requested amount.

²⁰ Rebuttal Testimony of Richard Barton, p. 49, lines 9-10.

²¹ The Commission previously required parties seeking attorney fees and costs on the basis of claimed representation of a general consumer interest to show a particular outcome would not have been reached without their participation. Decision No. R09-0303, ¶ 15, issued March 23, 2009, in Proceeding No. 07A-003BP-Extension; Decision No. C92-611, note 32, issued May 8, 1992 in Case No. 6402.

C. Conclusion

30. We deny all exceptions presented by Coal Creek and Public Service. Issues raised in exceptions that are not explicitly addressed in this Decision are denied.

III. ORDER

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R14-0560 filed on June 16, 2014, by Coal Creek Village Development Inc., are denied, consistent with the above discussion
2. The exceptions to Recommended Decision No. R14-0560 filed on June 16, 2014, by Public Service Company of Colorado are denied, consistent with the above discussion.
3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Decision.
4. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 13, 2014.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners