Decision No. R20-0754

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20AL-0301E

IN THE MATTER OF ADVICE LETTER NO. 1828 - ELECTRIC OF PUBLIC SERVICE COMPANY OF COLORADO TO REVISE ITS COLORADO P.U.C. NO.8 – ELECTRIC TARIFF TO IMPLEMENT AN ADVANCED GRID RIDER TO BE EFFECTIVE ON AUGUST 17, 2020.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ROBERT I. GARVEY GRANTING THE OCC'S MOTION FOR SUMMARY JUDGEMENT, DENYING APPROVAL OF PUBLIC SERVICE'S ADVICE LETTER NO. 1828, PERMANENTLY SUSPENDING ADVICE LETTER, AND CLOSING PROCEEDING

Mailed Date: October 29, 2020

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I. STATEMENT

1. On July 17, 2020, Public Service Company of Colorado (Public Service or the Company) filed with the Colorado Public Utilities Commission (Commission), Advice Letter No. 1828 with tariff sheets to implement an Advanced Grid Rider (AGR), which is designed to recover certain costs associated with implementation of Public Service's Advanced Grid Intelligence and Security (AGIS) Initiative. The proposed effective date of the tariffs filed with Advice Letter No. 1828 is August 17, 2020.

2. In the Advice Letter, Public Service proposes to implement a time-limited AGR in order to recover costs associated with the deployment of its AGIS Initiative, in an effort to enhance the distribution system related to security, efficiency, reliability, and customer access. Proceeding No. 16A-0588E resulted in approval of a Settlement Agreement and a Certificate of Public Convenience and Necessity (CPCN) for foundational components of the AGIS Initiative,

including Advanced Metering Infrastructure (AMI), Integrated Volt-VAr Optimization Infrastructure (IVVO), and portions of the Field Area Network (FAN) communications network. Other aspects of the AGIS Initiative are being undertaken in the ordinary course of business, including the Advanced Distribution Management System and Geospatial Information System, a spatial load forecasting tool, Fault Location Isolation and Service Restoration, and private network portions of the FAN. Public Service provides testimony describing distribution system and information technology integration work related to AGIS Initiative activities.

3. Accompanying Advice Letter No. 1828 was a Motion for Extraordinary Protection of Highly Confidential Information.

4. On July 29, 2020, the Colorado Office of Consumer Counsel (OCC) filed its Protest and requested the matter be suspended and set for an evidentiary hearing.

5. On August 14, 2020, by Decision No. C20-0594, the effective date of Advice Letter No. 1828 was suspended and Proceeding No. 20AL-0301E was referred to an Administrative Law Judge (ALJ).

6. On August 14, 2020, the OCC filed its Notice of Intervention. The OCC listed numerous issues to be explored to determine if Advice Letter No. 1828 is in the public interest.

7. On August 18, 2020, by Decision No. R20-0604-I, a prehearing conference was scheduled for September 22, 2020.

8. On September 4, 2020, Colorado Public Utilities Commission Trial Staff (Staff) filed a Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a), and Request for Hearing.

9. On September 4, 2020, the OCC filed its Motion to Dismiss, Pursuant to Rules 12(b)(5) and 56(b) and (h) of the Colorado Rules of Civil Procedure, Public Service

Company of Colorado's Advice Letter No. 1828 to Revise its Colorado P.U.C. No. 8 – Electric Tariff to Implement an Advanced Grid Rider (Motion). There are two attachments to the Motion: Attachment 1 is the Unopposed Comprehensive Settlement Agreement filed in Proceeding No. 16A-0588E, and Attachment 2 is Decision No. C17-0556 issued in Proceeding No. 16A-0588E on July 25, 2017.

10. On September 10, 2020, the Colorado Energy Consumers (CEC) filed its Motion to Permissively Intervene. In its Motion to Permissively Intervene, CEC states that it was an active participant in prior Commission proceedings that are foundational to Advice Letter No. 1828. In addition, CEC states its members have pecuniary and tangible interests since any impact on electric rates or changes to electric service can result in a substantial impact to CEC members' continued ability to effectively operate their businesses.

11. On September 11, 2020, Mission:data Coalition, Inc. (Mission:data) filed its Motion to Intervene. In its Motion to Intervene, Mission:data states that it was an active participant in prior Commission proceedings that are foundational to Advice Letter No. 1828. In addition, Mission:data states its members have pecuniary and tangible interests since fair, non-discriminatory, and reasonably-priced access to Public Service's AMI meters' energy usage data directly affects the bottom line of Mission:data's members.

12. On September 11, 2020, Energy Outreach Colorado (EOC) filed its Motion to Intervene. In its Motion to Intervene, EOC states that it was an active participant in prior Commission proceedings that are foundational to Advice Letter No. 1828. In addition, EOC states it has a tangible and pecuniary interest in ensuring that Public Service's AGR proposal does not result in rate increases and/or uncertainty in rates that unjustly, unreasonably, or

disproportionately burden low-income customers and, as a result, impact the demand for EOC's services.

13. On September 11, 2020, Western Resource Advocates (WRA), filed its Motion to Intervene. In its Motion to Intervene, WRA states that it was an active participant in prior Commission proceedings that are foundational to Advice Letter No. 1828. In addition, WRA states it has a tangible and pecuniary interest in the above-captioned proceeding.

14. On September 18, 2020, Staff filed its Response to the OCC's Motion.

15. On September 18, 2020, Mission:data filed its Response to the OCC's Motion.

16. On September 18, 2020, Public Service filed its Response to the OCC's Motion.

17. On September 21, 2020, Staff filed its Revised Response to the OCC's Motion.

18. On September 22, 2020, Public Service filed its Motion for Leave to Reply and Reply to Trial Staff of the Colorado Public Utilities Commission.

19. On September 22, 2020, the ALJ convened the remote prehearing conference by video conference. Public Service and each of the intervenors were present.

20. On September 23, 2020, Public Service filed an Unopposed Motion to Approve Consensus Procedural Schedule and Request for Waiver of Response Time.

21. On September 30, 2020, by Decision No. R20-0694-I, the ALJ, among other things, granted the interventions identified above, established a procedural schedule, scheduled a remote public comment hearing to be held on October 21, 2020, and scheduled a remote evidentiary hearing to be held on January 25 through January 28, 2021.

22. On October 6, 2020, Trial Staff filed a Response in Opposition to Public Service's Motion for Leave to Reply.

23. On October 9, 2020, by Decision No. R20-0722-I, the ALJ rescheduled the public comment hearing from October 21, 2020, to December 2, 2020.

24. In reaching a decision in this matter, the ALJ is mindful of the Commission's duty, and the ALJ has carefully considered all of the facts and arguments presented by the parties, including those facts and arguments not specifically addressed in this Decision.

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

II. FINDINGS OF FACT

26. The facts below are found to be undisputed and uncontroverted.

27. On August 2, 2016, Public Service filed an Application requesting a CPCN to implement AMI, IVVO, and the associated components of an advanced communications network (*i.e.,* the FAN). This filing commenced Proceeding No. 16A-0588E.

28. On May 8, 2017, in Proceeding No. 16A-0588E, Public Service filed an Unopposed Comprehensive Settlement Agreement (Settlement Agreement), as well as a Joint Motion to Approve the Settlement Agreement.

29. The Settling Parties included Public Service, Staff, the OCC, the Colorado Energy Office, CEC, the Colorado Solar Energy Industries Association, Energy Freedom Coalition of America, EOC, Mission:data, Southwest Energy Efficiency Project, and WRA.[1]

30. The Settlement Agreement states:

> Cost Recovery Management - The public interest is served by containing the overall costs of the CPCN Projects and limiting resulting rate impacts on customers. Thus, the Settling Parties recognize that the decision regarding the continuation of the deferred accounting mechanisms described below in

[1] The City of Boulder neither supported nor opposed the Settlement Agreement in Proceeding No. 16A-0588E.

Sections II and III, in whole or in part, should be determined in a base rate case rather than in this Proceeding. Additionally, the timelines for implementation have been modified to accommodate a longer deployment plan than originally proposed by the Company. It is also reasonable to implement financial measures to mitigate future rate impacts. Therefore, the Settling Parties agree to continued deferred accounting for operations and maintenance ("O&M") expenses as well as capital investments beyond the first rate case in which those costs could be included in base rates. The following principles will govern the deferral of costs associated with AMI, IVVO, and the associated FAN:

In accordance with the deferral language included in each section below, two deferred accounting mechanisms will be established for each project: one for deferred capital investment and one for O&M expenditures.

In the event the sum of the two capital investment deferrals totals $50 million or greater, the Company will begin to assess an interest rate equal to the Company's after-tax weighted average cost of capital ("WACC") on the balance of the deferred account until such amounts are included in base rates and an amortization of the deferred balance is initiated.[2]

31. With respect to IVVO costs, the Settlement Agreement states, in part:

After the IVVO implementation contemplated in this Settlement Agreement is complete and the associated implementation costs are fully included in base rates, the Company may file an application for approval of a performance incentive; provided, however, the Settling Parties agree that such an application is not appropriate in a demand side management ("DSM") plan proceeding or a "Strategic Issues" proceeding. . . .

The Company may apply deferred accounting treatment for expenses and any capital in service for the IVVO costs contemplated in this Settlement Agreement until these costs are included in base rates. The Company will provide a listing of the O&M expenses that will be deferred to assure that there is no double recovery of those expenses.

The Settling Parties acknowledge that continued deferral of these costs beyond the first available rate case is possible, as discussed above in the Common Settlement Principles Applicable to AMI and IVVO Implementation, Section I.B.

Transferring IVVO Costs to Rate Base - When the Company proposes to include IVVO and associated infrastructure costs in base rates, the Company will be obligated to present robust direct testimony with appropriate accompanying exhibits to justify any expenditures that are in excess of the base amount. Notwithstanding the Company's presentation of robust direct testimony, Parties

[2] Settlement Agreement in Proceeding No. 16A-0588E, pp. 5-6, ¶¶ 1, 1a, and 1b.

> are free to challenge the prudence of the expenditures to overcome such rebuttable presumption. Confidentiality may be requested as necessary.[3]

32. With respect to AMI costs, the Settlement Agreement states, in part:

> Costs incurred for deployment of AMI and associated infrastructure for capital investments and O&M expenses shall be included in a deferral mechanism to the extent such costs are not included in the existing Service and Facilities ("S&F") Charge until the costs are included in base rates. The Company will provide a listing of the O&M expenses that will be deferred to assure that there is no double recovery of those expenses.
>
> The Settling Parties acknowledge that continued deferral of these costs beyond the first available rate case is possible, and the treatment of such deferral is addressed in the Common Settlement Principles Applicable to [the] AMI and IVVO Implementation Section above.
>
> Transferring AMI Costs into Rate Base - In a rate case, when the Company proposes to include the AMI and associated infrastructure costs in base rates, the Company will be obligated to present robust direct testimony with appropriate accompanying exhibits to justify any expenditures that are in excess of the base amount. Notwithstanding the Company's presentation of robust direct testimony, Parties are free to challenge the prudence of the expenditures to overcome such rebuttable presumption. The Company may request confidential treatment of this information as necessary.[4]

33. On July 25, 2017, in Proceeding No. 16A-0588E, the Commission issued Decision No. C17-0556.

34. In Decision No. C17-0556, the Commission: (a) granted the Joint Motion to Approve the Settlement Agreement filed by Public Service on May 8, 2017; (b) approved the Unopposed Comprehensive Settlement Agreement, consistent with the Commission's discussion in Decision No. C17-0556; and (c) granted Public Service a CPCN for the proposed implementation of AMI, IVVO, and the associated components of an advanced communications network, including the FAN and Home Area Network (HAN), consistent with the terms of the Settlement Agreement.

[3] *Id.* at pp. 13-14, ¶¶ 2, 3a, 3b, and 4.

[4] *Id.* at pp. 17-18, ¶¶ E.1-3.

35. Decision No. C17-0556 states:

> Although the cost of the AGIS initiative as modified by the Settlement Agreement is greater than the $562 million estimate in the Company's initial Application filing, the Settlement Agreement states that the public interest would be served by containing the overall costs of the projects and by limiting resulting rate impacts on customers. For the purpose of mitigating an initial rate impact, the Settling Parties propose deferred accounting for operations and maintenance expenses (O&Ms) and capital investments beyond the first rate case where those costs could be included in base rates. In accordance with this proposal, two deferred accounting mechanisms would be established for each project (IVVO and AMI): one for deferred capital investment and one for O&M expenditures. In the event the sum of the two capital investment deferrals totals $50 million or more, the Company would begin to assess an interest rate equal to the Company's after-tax weighted average cost of capital. The Settlement Agreement also includes additional provisions for the subsequent deferral of costs until they are included in base rates in subsequent rate proceedings.[5]

36. Decision No. C17-0556 further states: "The terms of the Settlement Agreement adequately address potential rate impacts from these necessary investments using delayed and extended implementation and deferred accounting between base rate proceedings."[6]

37. Additionally, in Decision No. C17-0556, the Commission stated:

> We clarify that paragraph II.D.4. of the Settlement Agreement, "Transferring IVVO Costs to Rate Base," imposes on Public Service the burden of going forward and also requires Public Service, when proposing to include IVVO and associated infrastructure costs in base rates, to present robust testimony with appropriate accompanying exhibits to justify any expenditures: (1) in the base amounts set forth in Table [1 of] the Settlement Agreement; and (2) any amounts in excess of the base amount. Although the Company will enter into that proceeding with a general rebuttable presumption of prudence regarding its expenditures, the Company has the burden of going forward. Each one of the parties is free to challenge the prudence of the expenditures in order to overcome the rebuttable presumption of prudence.
>
> Similarly, we clarify that paragraph III.E.3. of the Settlement Agreement, "Transferring AMI Costs Into Rate Base," imposes on the Company the burden of going forward when proposing to include the AMI and associated infrastructure costs in base rates, to present robust testimony with appropriate accompanying exhibits to justify any expenditures: (1) in the base amounts set forth in Table 3 of

[5] Decision No. C17-0556 in Proceeding No. 16A-0588E, pp. 5-6, ¶ 17.

[6] *Id*. at p. 10, ¶ 32.

> the Settlement Agreement; and (2) any amounts in excess of the base amount. Although the Company will enter into that proceeding with a general rebuttal presumption of prudence regarding its expenditures, the Company has the burden of going forward and parties are free to challenge the prudence of the expenditures to overcome the rebuttable presumption of prudence.[7]

38. No applications for rehearing, reargument, or reconsideration were filed in response to Decision No. C17-0556.

39. On May 20, 2019, Public Service filed Advice Letter No. 1797 with supporting attachments and pre-filed testimony as a Phase I rate proceeding. The proposed effective date of the tariffs filed with Advice Letter No. 1797 was June 20, 2019. The filing of Advice Letter No. 1797 commenced Proceeding No. 19AL-0268E.

40. On February 11, 2020, in Proceeding No. 19AL-0268E, the Commission issued Decision No. C20-0096.

41. In Decision No. C20-0096, the Commission states, in relevant part:

> We grant the continuation of deferred accounting for certain AGIS costs, consistent with the base levels provided in the Company's Direct Testimony. This treatment is consistent with the terms of the settlement in Proceeding No. 16A-0588E in which the settling parties proposed deferred accounting for O&M expenditures and capital investments beyond the first rate case where those costs could be included in base rates.[8]

III. ARGUMENTS

A. OCC's Arguments in Support of the Motion

42. The OCC moves to dismiss this proceeding for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(5) of the Colorado Rules of Civil Procedure (C.R.C.P.). The OCC argues that the Settlement Agreement in Proceeding No. 16A-0588E, in which the Company agreed to the continuing deferral of AGIS-related costs and the recovery of

[7] *Id*. at pp. 11-12, ¶¶ 35-36 (quoting Settlement Agreement, pp. 14 and 17) (Footnotes omitted).

[8] Decision No. C20-0096, p. 98, ¶ 291 (citing Decision No. C17-0556 in Proceeding No. 16A-0588E).

AGIS-related costs in a Phase I base rate case, precludes Public Service from seeking to recover the costs at issue through a rider, namely the AGR.

43. Alternatively, the OCC seeks summary judgment or a ruling on a question of law pursuant to C.R.C.P. 56(b) and (h), respectively.[9] The OCC makes the same argument that the Settlement Agreement approved in Decision No. C17-0556 in Proceeding No. 16A-0588E precludes the Company from seeking to recover its AGIS-related costs through this Advice Letter proceeding, rather than a Phase I base rate case.

44. With respect to the Settlement Agreement in Proceeding No. 16A-0588E, the OCC asserts "all parties agreed that in order to mitigate future rate impacts, the Company would continue deferred accounting 'beyond the first rate case in which those costs could be included in base rates.'"[10] The OCC states the parties also "agreed that the Company could earn on its deferred assets upon meeting a certain metric, and such earnings would continue 'until such amounts are included in base rates and an amortization of the deferred balance is initiated.'"[11] In light of these recitations, the OCC contends that the Settlement Agreement contemplated cost recovery through base rates and there was no contemplation of cost recovery through a rider such as the AGR.

45. In support of its argument that the Company's Advice Letter Filing is a collateral attack upon Decision No. C17-0556, the OCC contends that recovery of the costs at issue through the AGR rider is "clearly contrary to the outcome and the law of Proceeding

[9] The OCC's Motion states that it is also brought pursuant to Rules 1001 and 1400(a)(1) and (f) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

[10] OCC's Motion, p. 7.

[11] *Id*. at p. 7 (emphasis omitted).

No. 16A-0588E established in Decision No. C17-0556 because the use of the rider proposed here is not a means to recover costs in base rates. Rather it is means to accelerate cost recovery."[12]

46. The Motion specifically states:

> In this instant proceeding, the Direct Testimony of Steven P. Berman states that "[t]he AGR allows the Company to timely recover the costs associated with implementation of AGIS on an annual basis, subject to annual prudence reviews as discussed later in my Direct Testimony, rather than **"***delaying recovery until the Company's next rate* case. This includes recovery of costs that are being deferred currently under the AGIS CPCN Settlement." (Emphasis Added.) A review of the relevant discussion in Decision No. C17-0556 (Attachment 2 to this Motion), demonstrates that the delay the Company now seeks to avoid was a fundamental and *an intended benefit for consumers*. The Commission discussed and approved the Settling Parties' intent with respect to such deferred costs and that such costs would be addressed by the Commission in a Phase 1 rate case proceeding.[13]

47. The OCC further argues that the term "rider" is notably absent from both the Settlement Agreement and Decision No. C17-0556. Rather, as the OCC notes, the Commission determined "that '*the terms of the Settlement Agreement adequately address[ed] potential rate impacts from these necessary investments using delayed and extended implementation and deferred accounting between base rate proceedings*.'"[14]

48. Additionally, the OCC contends that the instant Advice Letter puts a "chilling effect" on the goal of encouraging settlement of contested proceedings, as codified in Rule 1408 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, and "frustrates parties" reaching settlements with Public Service.

[12] *Id*. at p. 11 (emphasis omitted).

[13] *Id*. at p. 10 (emphasis in original; footnote omitted).

[14] *Id*. at pp. 10-11 (emphasis in original) (quoting Decision No. C17-0556 in Proceeding No. 16A-0588E, at ¶ 32).

B. WRA's Arguments in Support of the Motion

49. WRA supports the OCC's Motion, arguing that "the relief sought by the Company in this proceeding is contrary to the comprehensive, unanimous settlement agreement approved by the Commission in Proceeding No. 16A-0588E, which repeatedly discussed recovering the costs associated with the AGIS initiative through base rates, rather than a rate rider."[15]

50. WRA also suggests that in addition to granting the Motion, the Commission should "direct the Company to bring forward a comprehensive Motion for Variance in Proceeding No. 16A-0588E . . . addressing all areas where the Company's current implementation plan deviates from the settlement agreements approved in Proceedings No. 16A-0588E and 18A-0194E, including around: (1) metering technology; (2) HAN capability and functionality; (3) installation schedule; and (4) cost recovery."[16]

C. Mission:data's Arguments in Support of the Motion

51. Mission:data supports the OCC's Motion because the instant Advice Letter "proposes significant and material modifications to previous Commission orders."[17] and "side-step[s] the AGIS Settlement's requirement that AGIS costs be recovered in a Phase 1 rate case."[18]

52. Mission:data further argues that approving the AGR would: (a) "effectively modify the Commission's decisions in Proceeding Nos. 16A-0588E and 18A-0194E without the appropriate due process required by Commission Rule of Practice and Procedure, Rule 1003,

[15] WRA's Response, p. 14.
[16] *Id*. at p. 14-15.
[17] Mission:data's Response, p. 1.
[18] *Id*. at p. 2.

4 § CCR 723-1" and (b) "render significant aspects of the AGIS Settlement moot and short-circuit the required process to amend a comprehensive settlement."[19]

53. Similar to WRA's suggestion, Mission:data also suggests that the Commission grant the Motion and "simultaneously direct the Company to file Motions for Variance in Proceeding Nos. 16A-0588E and 18A-0194E for necessary modifications to the orders in those proceedings."[20]

D. Staff's Arguments in Support of the Motion

54. Staff supports the OCC's Motion, arguing:

> The language inside the four corners of both the AGIS settlement and the Commission's decision approving it specify only one cost recovery mechanism: base rates set through a Phase I rate case. Here, Public Service's proposed tariff seeks cost recovery via a rider – a fundamentally different recovery mechanism. Because the Company's advice letter proposes a plain and obvious violation of the settlement agreement, as well as the decision approving it, the Commission possesses everything it requires to grant the OCC's motion and immediately dismiss this proceeding without prejudice.[21]

55. Staff contends that the proposed rider (*i.e.,* AGR) constitutes a fundamentally different cost recovery mechanism than a Phase I rate case, in part because "unlike a Phase I rate case, a standalone rider proceeding prevents the Commission from simultaneously evaluating Public Service's overall risk profile and, if necessary, adjust its ROE."[22]

56. In its Response, Staff points to the Commission's recent decision in the Company's Phase I electric rate case, in which "the Commission extended the deferred accounting treatment specified in the AGIS settlement agreement."[23] The Commission reasoned

[19] *Id*. at p. 3.
[20] *Id*. at p. 1.
[21] Staff's Response, p. 1.
[22] *Id*. at pp. 1-2.
[23] *Id*. at p. 2.

that "'[t]his treatment is consistent with the terms of the settlement in Proceeding No. 16A-0588E in which the settling parties proposed deferred accounting for O&M expenditures and capital investments beyond the first rate case where those costs could be included.'"[24]

57. Arguing that Public Service's advice letter filing in this proceeding undermines the Commission's longstanding policy of encouraging settlements, Staff states that "the Company's rider request, if permitted to go forward, chills the Commission's tradition of encouraging settlements, as codified in its rules."[25]

58. Staff also objects to WRA's suggestion that the Commission direct the Company to file a motion for variance, arguing that "[t]o do so exceeds the scope of this proceeding (and, indeed, the scope of the OCC's motion) and potentially requires evidentiary findings that would unnecessarily complicate an otherwise straightforward dismissal of the advice letter as violative of the settlement agreement and the Commission decision approving it."[26]

E. Public Service's Arguments in Opposition to the Motion

59. As an initial matter, the Company argues that neither the Commission's Rules nor the C.R.C.P. permit a Motion to Dismiss an Advice Letter filing.[27]

60. Public Service asserts that the Commission's Rules of Practice and Procedure foreclose any responsive pleading on an advice letter.[28] Specifically, the Company points to Rule 1308(a), 4 CCR 723-1, contending that it provides an "exclusionary list" and that "advice

[24] *Id*. at p. 2-3 (quoting Decision No. C20-0096 in Proceeding No. 19AL-0268E, at ¶ 291) (emphasis omitted).

[25] *Id*. at pp. 4-5.

[26] *Id*. at pp. 5-6.

[27] Public Service's Response, p. 1.

[28] *Id*. at p. 5.

letters are specifically excluded from the types of submissions for which a response is permitted."[29] The Company also points to Rule 1308(e) and Commission Decision No. C16-1075 in Proceeding No. 16AL-0048E, arguing that the filing of a motion to dismiss is limited to respondents in complaint proceedings.[30]

61. Public Service further avers that C.R.C.P. 12(b) and 56(b) are not applicable under the circumstances in this proceeding.[31] With respect to Rule 12(b)(5), the Company specifically asserts it is applicable only as a "defense" to a claim and there are no claims against which the OCC needs to defend in this advice letter proceeding.[32] Public Service states that even if Rule 12(b)(5) applied, only facts alleged in the complaint or initial pleading may be considered and here, the OCC requests consideration of the attachments to its Motion (*i.e.,* the Settlement Agreement and Commission Decision approving it), which fall outside of the Company's Advice Letter and attendant tariffs.[33]

62. Public Service makes a similar argument with respect to Rule 56(b), asserting that it only applies to a "defending party" in which the movant is "defending" a claim or counterclaim, and here, the OCC is a voluntary intervenor with no standing to move for summary judgment.[34] Even if the Motion could proceed under Rule 56(b), Public Service contends that summary judgment "is a drastic remedy" and "[t]he OCC has not met its burden."[35]

[29] *Id*. at p. 6.
[30] *Id*. at p. 7.
[31] *Id*. at p. 5.
[32] *Id*. at p. 7.
[33] *Id*. at p. 8.
[34] *Id*. at pp. 8-9.
[35] *Id*. at p. 10.

63. The Company argues that because the Motion does not "identify a specific legal question that can be resolved solely as a legal determination[,]" the OCC has not met the legal standard for a determination of a question of law under Rule 56(h).[36]

64. The crux of the Company's argument opposing dismissal is that the Motion is "premised on a strained reading of the plain language of the Settlement Agreement" in Proceeding No. 16A-0588E.[37] Public Service contends that rather than limiting all future cost recovery for the AGIS CPCN Projects to rate cases, the Settlement Agreement specifies that the Company may defer AGIS-associated costs beyond the first electric rate case following CPCN approval.[38] Public Service maintains that "[t]he Settlement Agreement does not say anything at all about . . . actual recovery (as opposed to deferrals) beyond the first rate case."[39] Public Service further argues that the Motion "misconstrues the actual words and intent of the Settlement, as well as the broader context of the Grid CPCN proceeding, which allowed the Company to defer Grid CPCN costs up to and through the Company's first subsequent rate case, without foreclosing other methods of cost recovery."[40]

65. Public Service specifically avers that the Settlement Agreement does not mandate deferred accounting beyond the first rate case in which the CPCN costs were at issue.[41] In support of this argument, the Company points to the language in the Settlement Agreement,

[36] *Id*. at p. 9.
[37] *Id*. at p. 1.
[38] *Id*. at p. 1-2.
[39] *Id*. at p. 2.
[40] *Id*. at p. 4.
[41] *Id*. at p. 11.

stating that "the deferred accounting mechanism for Grid CPCN costs could continue 'beyond the first rate case in which these costs could be included in base rates.'"[42]

66. Public Service further argues that "it would not have been appropriate in a CPCN proceeding to dictate all possible future forms of cost recovery"[43] and that "the reference to 'base rates' [in the Settlement Agreement] states only that the Company could not continue to defer a cost once that cost was included in base rates" thereby "ensur[ing] no double recovery, rather than speaking to requiring a deferral and base rate recovery indefinitely."[44]

67. Put simply, the Company contends that the language of the Settlement Agreement is "permissive – not mandatory – especially after the first electric rate case involving such costs"[45] and that "it is possible – but not required or guaranteed – that deferral would continue beyond" the Company's 2019 Electric Phase I rate case, in which the Commission "said nothing about how long the Company could or must continue the deferral."[46]

68. Public Service takes this argument one step further, asserting that there is no collateral attack on the Commission Decision approving the Settlement Agreement because Decision No. C17-0556 "reinforces that deferred accounting was available and a possibility beyond the first rate case, not a requirement."[47] The Company specifically points to the Commission's statement in Decision No. C17-0556 that "[t]he deferred accounting mechanism and the ability for such mechanisms to be utilized further in a future rate case will allow the

[42] *Id*. (emphasis included in original).
[43] *Id*. at p. 15.
[44] *Id*. at p. 13.
[45] *Id*. at p. 12.
[46] *Id*. at pp. 13-14 (citing Decision No. C20-0096, ¶ 291).
[47] *Id*. at p. 16.

Company to manage the impacts on customers to help ensure that the AGIS investment is affordable."[48]

69. The Company next asserts that the Motion "overlooks that the AGR proposal would benefit customers by providing shared credits back to customers on a more timely basis."[49]

70. Finally, Public Service contends granting the Motion saves neither time nor costs as it would "necessitate re-raising these issues" in a future rate case, and in any event, granting the Motion could not result in dismissal of the Advice Letter in its entirety as the Settlement Agreement approved in Decision No. C17-0556 "only governs a subset of the projects included in the AGR."[50]

F. Public Service's Arguments in its Motion for Leave to Reply and its Reply to Staff's Response to the OCC's Motion

71. In its Motion for Leave to File Reply, Public Service seeks to correct a material misrepresentation in Staff's Response pursuant to Commission Rule 1400(e), 4 CCR 723-1.[51] Specifically, the Company argues that Staff's assertion it was "quite stunned" that the instant Advice Letter filing is a material misrepresentation.[52] Rather, Public Service contends the filing was not a surprise, and when it was previewed on multiple occasions, Staff neither expressed dismay nor suggested the Advice Letter was barred by the Settlement Agreement in Proceeding

[48] *Id*. (emphasis omitted)
[49] *Id*. at p. 2.
[50] *Id*. at pp. 1-2.
[51] Public Service's Motion for Leave to Reply, p. 1.
[52] *Id*. at p. 1.

No. 16A-0588E.[53] The Company insists that "[t]he accuracy of this factual history is important to consideration of [the] OCC's Motion."[54]

72. In its Reply, Public Service reiterates that "the material misrepresentation at issue is Staff's feigned surprise and dismay" at the Company's filing of Advice Letter No. 1828.[55] Attached to its Reply, the Company submits the affidavit of Ms. Brooke A Trammell, which describes the preliminary considerations shared by Public Service during its meeting with Staff on March 11, 2020, and includes as an attachment the presentation shared with Staff at this meeting.[56] The Company specifically asserts it "provided Staff with a comprehensive preview of its AGR filing that documented the scope, timing, revenue requirement calculations, notice, and preliminary customer bill impacts of this proposed rider" and that "the Settlement Agreement was identified as a factor in multiple respects."[57]

G. Staff's Arguments in its Response Opposing Public Service's Motion for Leave to Reply

73. In its Response, Staff counters that the Company's Motion for Leave to Reply does not establish a material misrepresentation of fact.[58] Staff specifically argues that the alleged misrepresentation – Staff's statement in its Response to the OCC's Motion that "[i]t is quite stunning that the Company chose to file this advice letter" – is neither material to Staff's arguments in favor of the OCC's Motion, nor constitutes a misrepresentation.[59]

[53] *Id*. at pp. 1-2.
[54] *Id*. at p. 2.
[55] Public Service's Reply, p. 2.
[56] *Id*. at pp. 2-3.
[57] *Id*. at p. 3.
[58] Staff's Response to Public Service's Motion for Leave to Reply, p. 1.
[59] *Id*. at p. 2.

74. Staff contends arguments describing its thoughts and emotions concerning the instant Advice Letter filing "do not rise to the materiality required by Rule 1308(b)."[60] Staff states that it does, in fact, feel stunned and vexed by Public Service's action of filing Advice Letter No. 1828 in contravention of the plain language of the Settlement Agreement and Commission Decision approving it.[61] Moreover, Staff argues that it "simply does not bear the responsibility to vet the Company's advice letters in advance" and that "Staff never indicated *approval* of the advice letter to the Company prior to [the filing of it on] July 17, 2020."[62]

IV. LEGAL STANDARD

A. Summary Judgment

75. Rule 1400(f) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, permits summary judgment motions filed in accordance with Rule 56 of the C.R.C.P.

76. Summary judgment is proper when the moving party can demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[63]

77. The principles applicable to ruling on a motion for summary judgment are well-established and have been summarized by the Colorado Supreme Court as follows:

> Summary judgment is a drastic remedy and should only be granted if there is a clear showing that no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *See* C.R.C.P. 56; *Greenwood Trust Co. v. Conley,* 938 P.2d 1141, 1149 (Colo.1997). The moving party has the initial burden to show that there is no genuine issue of material fact. *See Greenwood Trust,* 938 P.2d at 1149. Once the moving party has met its initial burden, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *See id.* The nonmoving party is entitled to all favorable inferences

[60] *Id*.

[61] *Id*. at pp. 2-3.

[62] *Id*. at p. 5 (emphasis in original).

[63] Rule 56(c), C.R.C.P.

> that may be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party. *See Bayou Land Co. v. Talley,* 924 P.2d 136, 151 (Colo. 1996).[64]

78. Colorado courts, in construing and further defining the summary judgment standards set forth in Rule 56, typically recognize that the purpose of summary judgment is "to permit the parties to pierce the formal allegations of the pleadings and *save the time and expense connected with a trial* when, as a matter of law, based on undisputed facts, one party could not prevail."[65] "Thus, a [decision maker] may enter summary judgment on behalf of a moving or nonmoving party if, in addition to the absence of any genuine factual issues, the law entitles one party or the other to a judgment in its favor."[66] "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact."[67] "If the evidence opposing summary judgment is merely colorable or is not significantly probative, summary judgment may be granted."[68]

79. A "material fact" is "a fact the resolution of which will affect the outcome of the case."[69] If a trier of fact could draw different inferences from the application of the legal criteria to the facts, a motion for summary judgment should be denied.[70] "The determination of whether

[64] *AviComm, Inc. v. Colorado Public Utilities Comm'n.*, 955 P.2d 1023, 1029 (Colo. 1998) (affirming the Commission's decision granting a motion for summary judgment). (emphasis in original)

[65] *Mt. Emmons Mining Co. v. Crested Butte*, 690 P.2d 231, 238 (Colo. 1984) (quoting *Ginter v. Palmer & Co.,* 585 P.2d 583, 584 (Colo. 1978)) (emphasis added).

[66] *Id.* at 239.

[67] *Anderson v. Lindenbaum*, 160 P.3d 237, 239 (Colo. 2007) (emphasis in original) (citations omitted).

[68] *Id.* (citations omitted).

[69] *Mt. Emmons*, 690 P.2d at 239.

[70] *Id*.

a genuine issue regarding a material fact exists is itself a question of law."[71] The moving party has the initial burden to show that no genuine issue of material fact exists.[72]

80. Once the moving party meets this initial burden, "the burden shifts to the nonmoving party to establish that there is a triable issue of fact."[73] The nonmoving party, however, "may not rest on mere allegations or demands in its pleadings but must provide specific facts demonstrating a genuine issue for trial."[74]

81. Therefore, "[s]ummary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law."[75]

B. Interpretation of Agreements

82. "[A] mere disagreement between the parties as to the interpretation of an agreement does not in itself create an ambiguity as a matter of law."[76]

83. In a case involving the interpretation of an agreement between Public Service and Union Rural Electric Association, Inc. (Union) following Public Service's allegations that Union violated Commission Decision No. 63322, which approved and incorporated that underlying agreement, the Colorado Supreme Court specifically stated:

> Interpretation of contract language is generally a question of law. *Radiology Professional Corp. v. Trinidad Area Health Ass'n, Inc.*, 195 Colo. 253, 577 P.2d 748 (1978). . . . To aid in construing the language of the agreement, [the Colorado Supreme Court] rel[ies] on familiar principles of contract law. The intent of the parties is to be determined from the contract language itself. *Id.* Extrinsic evidence of intent is relevant only if, after examination of the entire agreement,

[71] *Sender v. Powell,* 902 P.2d 947, 950 (Colo. App. 1995).

[72] *AviComm*, 955 P.2d at 1029.

[73] *Id.* (citations omitted).

[74] *Hardegger v. Clark,* 403 P.3d 176, 180 (Colo. 2017).

[75] *Martini v. Smith*, 42 P.3d 629, 632 (Colo. 2002).

[76] *Union Rural Electric Assoc. v. Colorado Public Utilities Comm'n.*, 661 P.2d 247, 251 (Colo. 1983).

> the terms are ambiguous. *Id.* However, a mere disagreement between the parties as to the interpretation of an agreement does not in itself create an ambiguity as a matter of law. *Id.*[77]

84. The Court further recognized that it "must adopt a construction of the agreement that will give effect to all of its provisions" and that "construction of an agreement concerning public utilities must be consistent with the public interest."[78]

C. Collateral Attack

85. Section 40-6-112(2), C.R.S., provides: "In all collateral actions or proceedings, the decisions of the [C]ommission which have become final shall be conclusive."[79]

86. With respect to this statute, the Commission has held that "the intent of the General Assembly is clear."[80] It enacted § 40-6-112(2), C.R.S., "to prevent re-litigation of matters finally decided, especially when the time period to appeal Commission decisions has expired."[81]

V. DISCUSSION AND CONCLUSIONS

A. Public Service's Motion for Leave to Reply Pursuant to Commission Rule 1400(e)

87. Commission Rules 1308(b) and 1400(e)(I), 4 CCR 723-1, in relevant part, permit a reply to a response if the motion for leave to file the reply demonstrates a material misrepresentation of fact.

88. The ALJ is not necessarily persuaded that the Company's Motion for Leave to Reply demonstrates that Staff's "quite stunning" statement in its Response to the OCC's Motion

[77] *Id*.

[78] *Id*. at 252.

[79] § 40-6-112(2), C.R.S.; *see also Lake Durango Water Co. v. PUC*, 67 P.3d 12, 22 (Colo. 2003).

[80] Decision No. C06-0004 in Proceeding No. 05F-337E, at ¶ 9.

[81] *Id*.

rises to the level of a material misrepresentation of fact. The ALJ finds, however, that under the unique circumstances in this proceeding, it is prudent to consider all of the pleadings filed in conjunction with the OCC's Motion. Therefore, the ALJ will grant Public Service's Motion for Leave to Reply and will consider the Company's Reply.

B. OCC's Motion for Summary Judgment Pursuant to Rule 56, C.R.C.P.

1. The OCC's Motion for Summary Judgment is Permissible Under the Commission's Rules of Practice and Procedure and the Colorado Rules of Civil Procedure.

89. As an initial matter, the ALJ considers whether the OCC's Motion for summary judgment pursuant to Commission Rule 1400(f) and Rule 56(b), C.R.C.P., is permitted under the Commission's Rules and the C.R.C.P..

90. Commission Rule 1001, 4 CCR 723-1, allows the ALJ to "seek guidance from" or "employ" the C.R.C.P. "[w]here not otherwise inconsistent" with Title 40 or the Commission's Rules of Practice and Procedure.

91. Rule 1400 of the Commission's Rules of Practice and Procedure governs the filing of motions in Commission proceedings. Subsection (f) of Rule 1400 permits motions filed in accordance with Rule 56, C.R.C.P. Specifically, Rule 1400(f), 4 CCR 723-1, states: "A motion for summary judgment may be filed in accordance with [R]ule 56 of the Colorado Rules of Civil Procedure."

92. Commission Rule 1400(f) neither specifies nor limits the types of proceedings in which motions for summary judgment pursuant to Rule 56, C.R.C.P., may be filed.

93. Moreover, for purposes of ruling on a dispositive motion, the Commission has previously construed the information contained in an advice letter and the proposed tariff sheets

attached thereto, collectively, as a complaint.[82] Specifically, in deciding a motion to dismiss, ALJ Jennings-Fader found this to be "reasonable because the Advice Letter and the proposed tariff sheets together contain information that parallels the content of a complaint in a civil action."[83] ALJ Jennings-Fader further elaborated:

> The Advice Letter and proposed tariffs inform the Commission and the affected members of the public of the harm alleged (*i.e.*, the revenue requirement deficiency), of the general facts that support its claim, and of the remedy sought (*i.e.*, the rate increase) just as a complaint informs the court and a defendant of the harm that the defendant allegedly caused the plaintiff (*e.g.*, interference with commercial contract), of the general facts that support that claim, and of the remedy sought (*e.g.*, monetary damages or injunction).[84]

94. Although the Commission is not bound by *stare decisis,* the undersigned ALJ finds persuasive the decision made by ALJ Jennings-Fader and believes that it stands on firm legal ground.

95. Here, for purposes of deciding the OCC's Motion for summary judgment pursuant to Rule 56, C.R.C.P., the information contained in Advice Letter No. 1828 and the proposed tariff sheets attached thereto, taken together, will be considered the complaint. The ALJ finds this to be reasonable because Advice Letter No. 1828 and the proposed tariff sheets, collectively, "contain information that parallels the content of a complaint in a civil action."[85] Specifically, Advice Letter No. 1828 and the proposed tariffs inform the Commission and affected members of the public of the harm alleged (*i.e.,* seeking to recover the costs associated with the deployment of its AGIS Initiative), of the general facts that support its claim, and of the remedy sought (*i.e.,* the AGR rider), just as a complaint informs the court and a defendant of the harm

[82] Decision No. R08-1004-I in Proceeding No. 08S-290G issued September 22, 2008, p. 8, ¶ 22.
[83] *Id.*
[84] *Id.* at n.10.
[85] *Id.* at ¶ 22.

that the defendant allegedly caused the plaintiff (*e.g.,* interference with commercial contract), of the general facts that support that claim, and of the remedy sought (*e.g.,* monetary damages or injunction).

96. Because Advice Letter No. 1828 has been construed as the complaint, it follows that the Company will be considered the complainant, and the OCC, along with Staff, Mission:data, and WRA, will be construed as defending parties, for purposes of Rule 56(a) and (b), respectively.

97. Additionally, the ALJ recognizes that one purpose of summary judgment is to "save the time and expense connected with [an evidentiary hearing] when, as a matter of law, based on undisputed facts, one party could not prevail."[86] Permitting a motion for summary judgment in an advice letter proceeding in which the proponent could not prevail serves this important purpose. The undersigned ALJ believes he has a duty to the ratepayers of the utility to ensure that the legal costs of the utility are not needlessly increased through futile litigation in which, as a matter of law, the utility could not prevail because all such legal costs are passed on to the ratepayers.

98. With respect to Commission Rule 1308(a), 4 CCR 723-1, the ALJ does not find persuasive the Company's argument that it precludes the OCC's Motion for summary judgment in this proceeding. Rule 1308 of the Commission's Rules of Practice and Procedure governs responses. Rule 1308(a) provides a specific list of filings to which a response may be filed in Commission proceedings. The ALJ finds that the OCC's Motion does not constitute a "response" within the meaning of Rule 1308. In fact, Rule 1308(a) identifies "a motion, as

[86] *Mt. Emmons*, 690 P.2d at 238.

provided in rule 1400" as one of the filings to which a response may be filed, thereby distinguishing such motions from the responses thereto. Here, the OCC's Motion was filed, in part, pursuant to Rule 1400(f), and is thus distinguishable from a response to the Motion filed pursuant to Rule 1308(a).

99. Nor is the ALJ persuaded that the OCC's Motion is not permitted with respect to an advice letter filing. Commission Rule 1210, 4 CCR 723-1, governs tariffs and advice letters. There is nothing in Rule 1210 expressly barring a motion for summary judgment pursuant to Rule 56, C.R.C.P., in a proceeding commenced by the filing of an advice letter. Further, Commission Rule 1400(f) does not specify or limit the types of proceedings in which Rule 56 motions for summary judgment may be filed.

100. When taken together and considered harmoniously, the Commission's Rules of Practice and Procedure and the C.R.C.P. appear to contemplate, and do not expressly preclude, the filing of a motion for summary judgment in an advice letter proceeding.

101. Accordingly, the ALJ finds that the OCC may move for summary judgment pursuant to Commission Rule 1400(f) and Rule 56, C.R.C.P.

102. Summary judgment is proper when, on the record before the ALJ: (a) "there is no genuine issue as to any material fact" and (b) "the moving party is entitled to a judgment as a matter of law."[87]

2. There Is No Genuine Issue as to Any Material Fact.

103. The ALJ next considers whether there is any genuine issue of material fact.

[87] Rule 56(c), C.R.C.P.

104. Public Service argues that, as a matter of law, the OCC's Motion "fails because there are disputed issues of material fact."[88] Specifically, the Company avers the OCC mischaracterizes the provisions in the Settlement Agreement, arguing "deferred accounting was not mandated beyond the first rate case in which Grid CPCN costs were at issue."[89] Rather, according to Public Service, the Settlement Agreement "allowed the Company to defer Grid CPCN costs up to and through the Company's first subsequent rate case, without foreclosing other methods of cost recovery."[90]

105. The OCC counters that "[t]he terms and conditions of the Settlement Agreement and the Commission's Decision approving that Settlement Agreement demonstrates that there are no genuine issues as to any material fact and, thus, supports a Commission finding that a summary judgment should be ordered in the OCC's favor."[91] The OCC specifically argues that the Settlement Agreement "requires [the costs at issue] to be passed on to ratepayers in base rates following a rate proceeding rather than through a rider."[92] Staff, Mission:data, and WRA support the OCC's position.

106. Interpretation of the language in the Settlement Agreement is "generally a question of law" and the intent of the Settling Parties "is to be determined from the contract language itself."[93] Extrinsic evidence of the Settling Parties' intent is relevant only if, after examining the Settlement Agreement in its entirety, the terms are ambiguous.[94]

[88] Public Service's Response, p. 2.
[89] *Id.* at p. 11.
[90] *Id.* at p. 4.
[91] OCC's Motion, p. 4.
[92] *Id.*
[93] *Union Rural Electric,* 661 P.2d at 251.
[94] *Id.*

107. Here, however, the terms of the Settlement Agreement are not ambiguous. While there is a discrepancy amongst some of the Settling Parties about whether the provisions of the Settlement Agreement permit recovery of the AMI and IVVO costs through a rider after the Company's first rate case in which those costs were at issue, or whether the terms of the Settlement Agreement mandate cost recovery in base rates, it boils down to "a mere disagreement between the parties as to the interpretation of an agreement [that] does not in itself create an ambiguity as a matter of law."[95]

108. Put simply, the disagreement between Public Service, on the one hand, and the OCC, Staff, Mission:data, and WRA, on the other hand, as to the interpretation of the cost recovery provisions in the Settlement Agreement does not equate to ambiguity in those provisions. Therefore, extrinsic evidence of the Settling Parties' intent as to the terms of the Settlement Agreement is not relevant to the interpretation of the language therein.

109. With respect to the language of the contract itself, the Settlement Agreement is detailed, thorough, and precise. There are numerous references to cost recovery in base rates. There is no reference to cost recovery through a rider. Nor is there even the slightest indication that other methods of cost recovery were contemplated under the terms of the Settlement Agreement.

110. Further, even if any other factual disputes purportedly exist, "an otherwise properly supported" summary judgment motion will not be defeated by "the mere existence of

[95] *Id*.

some alleged factual dispute between the parties."[96] Rather, "the requirement is that there be no *genuine* issue of *material* fact."[97]

111. Based upon the foregoing discussion, the ALJ finds that there is no genuine issue as to any material fact.

3. The OCC is Entitled to Judgment as a Matter of Law Because the AGR Rider Proposed in Advice Letter No. 1828 Constitutes a Collateral Attack on Decision No. C17-0556 Issued in Proceeding No. 16A-0588E, Thereby Precluding, as a Matter of Law, the Relief Sought in Advice Letter No. 1828.

112. Because there is no genuine issue as to any material fact, the ALJ turns to the issue of whether the OCC is entitled to judgment as a matter of law. In doing so, the ALJ specifically considers whether the AGR rider proposed in Advice Letter No. 1828 constitutes a collateral attack on Decision No. C17-0556 issued in Proceeding No. 16A-0558E, thereby precluding, as a matter of law, the relief sought in Advice Letter No. 1828 with respect to cost recovery for projects governed by the Settlement Agreement approved in Decision No. C17-0556 in Proceeding No. 16A-0588E.

113. The OCC contends the instant Advice Letter filing is a collateral attack upon Commission Decision No. C17-0556 approving the Settlement Agreement. Specifically, the OCC argues that because the proposed AGR rider is "not a means to recover costs in base rates" but rather "a means to accelerate cost recovery[,]" it is "clearly contrary to the outcome and the law of Proceeding No. 16A-0588 established in Decision No. C17-0556" and thus, "a collateral attack on the Commission's [D]ecision."[98] It is the OCC's position that such accelerated cost

[96] *Anderson*, 160 P.3d at 239 (emphasis in original) (citations omitted).

[97] *Id*. (emphasis in original)

[98] OCC's Motion, p. 11. (emphasis omitted)

recovery contravenes "the Commission's finding that the delays contemplated by the Settlement help manage and mitigate the deployment and resulting customer cost impact; which was a significant stated reason for the Commission's approval of the Settlement Agreement and its finding that the Settlement Agreement was in the public interest."[99]

114. Public Service counters that there is no collateral attack on Decision No. C17-0556, arguing that the "delays contemplated by the Settlement" were not delays in cost recovery, as cited by the OCC, but were "in fact . . . specifically negotiated delays in implementation of the AMI meter deployment" and "say nothing about rider versus base rate cost recovery."[100] The Company further contends that Decision No. C17-0556, "like the Settlement itself, does not require deferred accounting indefinitely" but rather "reinforces that deferred accounting was available and a possibility beyond the first rate case, not a requirement."[101] Public Service emphasizes the following statement in the Decision, "[t]he deferred accounting mechanism and the ability for such mechanisms to be utilized further in a future rate case will allow the Company to manage the impacts on customers to help ensure that the AGIS investment is affordable."[102]

115. Pursuant to § 40-6-112(2), C.R.S., "final" Commission decisions "shall be conclusive" in "all collateral actions or proceedings."[103]

[99] *Id.* at p. 11. (emphasis omitted)
[100] Public Service's Response, p. 16. (emphasis omitted)
[101] *Id.*
[102] *Id.* (emphasis omitted)
[103] § 40-6-112(2), C.R.S.; *see also Lake Durango Water*, 67 P.3d at 22.

116. The Commission has recognized that the legislative intent of § 40-6-112(2), C.R.S., is "to prevent re-litigation of matters finally decided, especially when the time period to appeal Commission decisions has expired."[104]

117. Decision No. C17-0556 issued in Proceeding No. 16A-0558E is a final decision within the meaning of § 40-6-112(2), C.R.S., and thus conclusive in all collateral proceedings. The instant proceeding, in which the Company seeks to recover costs associated with the CPCN projects approved in Decision No. C17-0556, is a collateral proceeding to Proceeding No. 16A-0558E. Therefore, pursuant to § 40-6-112(2), C.R.S., Decision No. C17-0556 approving the Settlement Agreement reached in Proceeding No. 16A-0558E is conclusive in this proceeding.

118. The Settlement Agreement expressly addresses cost recovery management principles that applied to the implementation of the IVVO implementation and AMI development addressed therein. There are numerous references in the Settlement Agreement to cost recovery in base rates. There is no reference to cost recovery through a rider. Nor is there any indication that the Settling Parties contemplated cost recovery through anything other than base rates.

119. For instance, the Settlement Agreement states:

> *Transferring IVVO Costs to Rate Base - When the Company proposes to include IVVO and associated infrastructure costs in base rates,* the Company will be obligated to present robust direct testimony with appropriate accompanying exhibits to justify any expenditures that are in excess of the base amount. Notwithstanding the Company's presentation of robust direct testimony, Parties are free to challenge the prudence of the expenditures to overcome such rebuttable presumption. Confidentiality may be requested as necessary.[105]

[104] Decision No. C06-0004 in Proceeding No. 0 5F-337E, at ¶ 9.

[105] Settlement Agreement, p. 14, ¶ II.D.4 (emphasis added).

120. Notably, the Settlement Agreement does not include any contingent language concerning the inclusion of IVVO costs in base rates. Rather, the plain language of the Settlement Agreement expressly provides for the transfer of IVVO costs to rate base and then outlines the terms and requirements of such transfer. It specifically states "*when*" – not "*if*" – "the Company proposes to include IVVO and associated infrastructure costs in base rates."

121. There is a similar provision with respect to AMI costs. It states:

> *Transferring AMI Costs into Rate Base* - In a rate case, *when the Company proposes to include the AMI and associated infrastructure costs in base rates,* the Company will be obligated to present robust direct testimony with appropriate accompanying exhibits to justify any expenditures that are in excess of the base amount. Notwithstanding the Company's presentation of robust direct testimony, Parties are free to challenge the prudence of the expenditures to overcome such rebuttable presumption. The Company may request confidential treatment of this information as necessary.[106]

122. Once again, the plain language of the Settlement Agreement expressly provides for the transfer of AMI costs to rate base, rather than including any contingent language with respect to this provision.

123. In Decision No. C17-0556, the Commission approved the Settlement Agreement, specifically recognizing that it provides "for the subsequent deferral of costs *until* they are included in base rates in subsequent rate proceedings."[107] The Commission further recognized that the Settling Parties proposed deferred accounting beyond the first rate case in which those costs could be included in base rates *to serve the public interest* by mitigating initial rate impacts on customers.[108]

[106] *Id*. at pp. 17-18, ¶ I.E.3 (emphasis added).
[107] Decision No. C17-0556, p. 6, ¶ 17 (emphasis added).
[108] *Id*. at p. 5, ¶ 17.

124. The Commission also stated that "[t]he terms of the Settlement Agreement adequately address potential rate impacts from these necessary investments using delayed and extended implementation and deferred accounting *between base rate proceedings*."[109]

125. The Commission further clarified paragraphs II.D.4. and III.E.3. of the Settlement Agreement, reiterating that "when" Public Service proposes to include IVVO and AMI costs, respectively, in base rates, the Company will have the burden of going forward and be required to present robust testimony consistent with paragraphs 35 and 36 of Decision No. C17-0556.[110]

126. It is clear from the plain language of Decision No. C17-0556 that the costs at issue would be included in base rates in a future rate proceeding(s). Yet again, there is no contingent language or alternative circumstances giving rise to other cost recovery methods.

127. Most recently, in Decision No. C20-0096 issued on February 11, 2020, in Proceeding No. 19AL-0268E, the Commission acknowledged that Settling Parties in Proceeding No. 16A-0588E "proposed deferred accounting for O&M expenditures and capital investments beyond the first rate case where those costs could be included in base rates."[111]

128. Based upon the plain language of the Settlement Agreement and Decision No. C17-0556, as well as the Commission's recent reference in Decision No. C20-0096, the ALJ finds that the AGR rider proposed in the instant Advice Letter will, for all intents and purposes, require the Settling Parties to re-litigate an issue finally decided in Decision No. C17-0556.

129. Even drawing in favor of Public Service all inferences from the undisputed facts, the ALJ finds and concludes that the AGR rider proposed in Advice Letter No. 1828

[109] *Id*. at p. 10, ¶ 32 (emphasis added).
[110] *Id*. at pp. 11-12, ¶¶ 35-36 (quoting Settlement Agreement, pp. 14, 17).
[111] Decision No. C20-0096, p. 98, ¶ 291 (citing Decision No. C17-0556 in Proceeding No. 16A-0588E).

constitutes a collateral attack on Decision No. C17-0556 issued in Proceeding No. 16A-0558E, thereby precluding, as a matter of law, the relief sought in Advice Letter No. 1828 with respect to cost recovery for projects goverened by the Settlement Agreement approved in Decision No. C17-0556 in Proceeding No. 16A-0588E. Because the Company could not prevail on the aforementioned relief sought in its Advice Letter No. 1828, the OCC is entitled to judgment as a matter of law pursuant to Rule 56, C.R.C.P.

130. While summary judgment is a drastic remedy, the ALJ recognizes the fundamental importance of settlements and that permitting cost recovery through a rider rather than in base rates as contemplated, and agreed upon, by the Settling Parties in the Settlement Agreement approved in Decision No. C17-0556 would have a chilling effect on the Commission's objective of encouraging settlement of contested proceedings pursuant to Rule 1408, 4 CCR 723-1. Put simply, approving the AGR proposed in the instant Advice Letter would be contrary to, and ultimately frustrate, the Commission's goal of encouraging settlement agreements in the public interest.

131. Moreover, the undersigned ALJ believes he has a duty to ratepayers to ensure that the utility's legal costs are not needlessly increased through futile litigation in which, as a matter of law, the utility could not prevail because such legal costs are passed on to ratepayers. With this duty in mind, the ALJ recognizes that when, as a matter of law, based on undisputed facts, the utility could not prevail, summary judgment spares the expense associated with an evidentiary hearing.

132. Finally, even if Public Service presented Staff and the OCC with a comprehensive preview of its AGR filing prior to commencing this proceeding as described in the Company's Reply, and even if neither Staff nor the OCC raised any concerns that the proposed rider would

contradict the terms of the Settlement Agreement and Commission Decision approving it, this contextual background information does not change the plain language of the Settlement Agreement or Decision No. C17-0556. Nor does it affect the ALJ's other findings and considerations, set forth above.

133. While it may have been preferable for the concerns of Staff and the OCC to be raised prior to Public Service initiating this proceeding, the ALJ finds that the lack of concern expressed by Staff and the OCC in response to the Company's comprehensive preview of its AGR filing is not dispositive of the legal issues addressed in the OCC's Motion.

134. For the foregoing reasons, the OCC's Motion for summary judgment pursuant to Rule 56, C.R.C.P., will be granted.

135. The remainder of the OCC's Motion, including its motion to dismiss pursuant to Rule 12(b)(5), C.R.C.P., will be denied as moot.

136. Because summary judgment is granted in favor of the OCC, and against Public Service, with respect to Advice Letter No. 1828 and the proposed tariff sheets attached thereto, the deadlines established in the procedural schedule, the December 2, 2020 public comment hearing, and the evidentiary hearing scheduled to be held on January 25, 2021, through January 28, 2021, will be vacated, and this proceeding will be closed.

137. To the extent the Company's Advice Letter No. 1828 includes relief sought beyond what is governed by the Settlement Agreement approved in Decision No. C17-0556 in Proceeding No. 16A-0558E, Public Service may file, in a new proceeding, another advice letter seeking such relief.

VI. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss Pursuant to Rules 12(b)(5) and 56(b) and (h) of the Colorado Rules of Civil Procedure, Public Service Company of Colorado's Advice Letter No. 1828 to Revise its Colorado P.U.C. No. 8 – Electric Tariff to Implement an Advanced Grid Rider filed by the Colorado Office of Consumer Counsel on September 4, 2020 is granted.

2. The procedural schedule in the above caption proceeding is vacated including the evidentiary hearing scheduled for January 25 through January 28, the public hearing scheduled for December 2, 2020, and all dates for the filing of testimony.

3. Advice Letter No. 1828 filed on July 17, 2020 by Public Service Company of Colorado is permanently suspended.

4. Proceeding No. 20AL-0301E is closed.

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

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

7. Response time to exceptions shall be shortened to seven days.

8. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

9. If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may

stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

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

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director