(Decision No. C90-526)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AUTHORIZATION TO OFFER CERTAIN CUSTOMERS ALTERNATIVES TO COST OF SERVICE REGULATION, TO BE CALLED "THE OPTION TREE."	)	DOCKET NO. 89A-329EG COMMISSION DECISION DISMISSING APPLICATION

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April 25, 1990

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STATEMENT, FINDINGS OF FACT, AND CONCLUSIONS

BY THE COMMISSION:

Public Service Company of Colorado (Public Service) filed Docket No. 89A-329EG on June 5, 1989, seeking Commission authorization to offer certain customers alternatives to cost of service regulation. On June 5, 1989, notice of the application was given by the Commission to all interested persons, firms, or corporations. Interventions as a matter of right were filed by the Colorado Office of Consumer Counsel (OCC) and the Staff of the Public Utilities Commission (Staff). Petitions for leave to intervene, at various times, were filed by and granted to Peoples Natural Gas Company (Peoples); Centel Corporation Centel Electric-Colorado (Centel); K N Energy, Inc. (K N); Western Natural Gas and Transmission Corporation (Western Natural Gas); Colorado Interstate Gas Company (CIG); Federal Executive Agency (FEA), and Climax Molybdenum Company (Climax).

By Decision No. C89-1004, issued July 19, 1989, the Commission ordered a prehearing conference in this docket to be held on August 28, 1989. The purpose of this prehearing conference to delineate issues and resolve other procedural matters including a discovery schedule.

Subsequent to Decision No. C89-1004, Public Service filed a certification of intent to proceed and request for waiver of Rule 71(b)(6) wherein Public Service requested a waiver of the rule requiring it to file testimony and exhibits simultaneously with the submission of its certification. On August 25, 1989, the Staff filed a motion for an order to file legal briefs.

The August 28, 1989, prehearing conference commenced as scheduled. The issue of major concern to all parties focused upon whether or not the Commission had jurisdiction to proceed with this application. Accordingly, Administrative Law Judge John B. Stuelpnagel issued Decision No. R89-1189-I, on September 5, 1989, ordering Public Service to file all necessary clarifying factual information regarding the authorization it seeks to offer certain customers alternatives to cost of service regulation. The administrative law judge also ordered that on or before November 6, 1989, the Staff and any intervening party shall respond to subsequent filings by Public Service. The judge stated that any legal briefs associated with pleadings filed by any party shall be filed simultaneously with such pleading. Finally, Decision No. R89-1189-I set another prehearing conference on December 14, 1989.

A motion to dismiss and citation of authority was filed by the Staff on November 6, 1989. On December 14, 1989, the second prehearing conference was held by Judge Stuelpnagel. On December 26, 1989, Judge Stuelpnagel entered Interim Order No. R89-1701-I which indicated that the Staff's motion to dismiss was denied, that the matter would be heard by the Commission, and directed parties to expand the scope of the application to consider inclusion of a low-income assistance class or "lifeline" group. Hearing dates were also set for April 2, 3, 4, 5, and 6, 1990.

On January 5, 1990, Public Service filed a motion to remove the issue of a low-income assistance class or "lifeline" group from this proceeding. On January 9, 1990, K N filed a response supporting the motion of Public Service to remove the issue of a low-income assistance class or lifeline group from this proceeding.

On January 17, 1990, Public Service filed a motion to extend the prefiling date for the filing of additional testimony until January 26, 1990. On January 17, 1990, Peoples filed a response supporting Public Service's motion to remove the issue of the low-income assistance class or a lifeline group from this docket.

On February 14, 1990, the Commission entered Decision No. C90-241 which denied Public Service's motion to remove the issue of low-income assistance class or "lifeline" group from the proceeding, rescinded ordering paragraphs 1, 2, 3, and 4 of Decision No. R89-1701-I, dated December 26, 1989, ordered Public Service to file supplemental testimony and exhibits relating to the low-income assistance class on or before February 26, 1990, and set for hearing oral argument with respect to whether or not the Option Tree as originally filed by Public Service, and supplemented, is, or is not, contrary to Colorado law, and whether or not the application, as supplemented, must be dismissed. The date for oral argument was set for March 12, 1990.

On February 27, 1990, Public Service filed the supplemental testimony of its witness, J. H. Ranniger.

On March 12, 1990, the Commission heard oral argument with respect to whether or not the Option Tree as originally filed by Public Service, and supplemented, is, or is not, contrary to Colorado law and whether or not the application, as supplemented, must be dismissed. At the conclusion of the hearing, the Commission took the matter under advisement. On March 21, 1990, the Commission discussed this matter at its open meeting. This decision is being entered on April 25, 1990. On March 16, 1990, Climax filed a motion for the leave to file a statement of position and a statement of position which will not be considered since the Commission did not solicit written statements of position from the parties.

FINDINGS AND CONCLUSIONS

A. The "Option Tree" as Proposed by Public Service

In its application, Public Service begins with a historical recognition that gas, electricity, and steam which Public Service provides its various classes of customers is generally provided pursuant to traditional cost of service regulation. What this means is that the Commission sets the rates which customers pay for the service and the rates are designed to cover the complete cost of providing the service, including costs of capital. Service standards are likewise set by the Commission at a general level throughout the various customer classes. Public Service, in turn, has a duty to provide gas, electricity, and steam at the prescribed service levels to all customers within its service territory. Public Service acknowledges that traditional cost of service regulation, including generic service levels, has for many years met the needs of its customers. However, Public Service states that in recent years some potential and existing customers of Public Service, particularly those categorized as industrial and large commercial customers, have available to them alternative sources of energy which can vary from the types of service that Public Service traditionally has supplied pursuant to traditional cost of service regulation. In addition, Public Service states that it is attempting to compete with out-of-state locations for existing and new businesses and that retaining business and attracting new business to Colorado are important efforts in the economic development of the state.

According to Public Service, some large customers interested in "standard" service may have the need or desire to avail themselves of an alternative form of regulation. Thus it has become apparent to Public Service that some of these customers require customized rather than generic utility services and that in order for Public Service to successfully compete with these customers' alternatives and retain and attract these types of customers and their business enterprises, Public Service states that it needs to be able to negotiate rates and service conditions that are specific to the individual customer. Thus, according to Public Service, the rates and service conditions which are typical of cost of service regulation are too general to be responsive to the individualized needs of these customers.

Public Service states that certain customers are willing to pay a premium price for premium service. Other customers may be willing to receive a substandard level of service and pay a lesser rate. The precise level of the premium service or the substandard service would require individual negotiations specific to the particular customer. In addition, according to Public Service, it may be beneficial for the customer and Public Service to negotiate a price other than a standard tariff rate for reasons of economic development or load retention.

By its application, Public Service has proposed a program that would permit Public Service to negotiate with industrial and large commercial customers desiring to do so and to provide the services in a way that would be an alternative to traditional cost of service regulation. Public Service has denominated its proposed program as "The Option Tree." Under the Option Tree, certain customers would have the option of obtaining services from Public Service through direct negotiation rather than through traditional cost of service regulation. Public Service proposes that the Commission would continue to regulate this optional service by overseeing and approving the allocation of the investment and cost associated with that service out of the traditional cost of service. Public Service states that its Option Tree program does not call for the deregulation of service, but rather an alternative form of regulation which would address the allocation of investment and costs associated with the optional service and would leave other considerations to negotiated agreements. An important aspect of its Option Tree program is that there would be no cross-subsidy to the benefit of customers who choose the Option Tree option from Public Service's general body of ratepayers. In other words, the cost of service ratepayers would not be responsible for covering the cost in any way different from cost of service regulation and, accordingly, the risk of providing optional services would be borne by Public Service's shareholders. According to Public Service, there would be no negative impact upon customers whose services would continue to be regulated in the traditional manner by the Commission. In addition, customers who have the option to choose to receive services which are alternatively regulated under the Option Tree would have the option of returning to traditional cost of service regulation under tariff, thus preserving their rights to the protection of regulation.

In its initial application, Public Service did not add residential and small commercial branches to its Option Tree alternative regulation side since it was of the opinion that customers choosing the option would be larger customers. According to testimony filed by Public Service witness J. H. Ranniger, only large customers have significant alternative sources of energy. It is the large customers that have specific or unique service needs. According to Mr. Ranniger, it takes a sizable customer to justify the increased administrative costs that would be associated with providing service on the alternative regulation side of the Option Tree. That being the case, Public Service has proposed

that any commercial electric customer of 500 KW or more demand be considered a large customer for the Option Tree program and that any gas customer of 10,000 mcf per year total usage be considered large commercial and that any steam customer of 500 M lbs per year be considered large commercial.

Mr. Ranniger illustrated the Public Service Option Tree Proposal by attaching pictorial exhibits to his initially filed testimony. The Option Tree would have branches of traditional regulation on the left hand side of the tree and alternative regulation on the right hand side of the tree. In conventional regulation a cost of service allocations study would be prepared by allocating rate base and expenses to the branches on the regulated side of the tree. Public Service has proposed that, under the Option Tree, exactly the same allocation procedures be used, but instead of limiting the allocations to the four branches on the left side of the tree (the traditional side) that the allocations be made consistently and uniformly to all branches on the tree, both those on the left side and the right side. According to Public Service it makes no difference which allocation methodology is used, just as long as the same method is used for all branches on both sides of the tree. Thus, according to Public Service, the Commission retains full jurisdiction and exercises regulation over the allocation of investments and costs and there can be no biasing between the traditional regulation and the alternative regulation sides of the tree.

For those customers opting to be served on the alternative regulation side of the tree, Public Service would enter negotiations with those customers on an individual basis and, based upon those negotiations, if agreements could be reached, a proprietary contract would be entered into with the customer. Whether Public Service made more than or less than its authorized rate of return from these customers would be immaterial so far as the other customers are concerned since there would be no cross-subsidization between the two sides of the tree. Such negotiation, according to Public Service, would allow it to tailor its services to the needs of the individual customers. If negotiations between Public Service and a large commercial or industrial customer did not prove to be availing, that customer could return to the traditional regulation side of the tree and receive service under specific prices, terms, and conditions as prescribed by the Commission and as set forth in Public Service's filed tariffs. Accordingly, Public Service contends that the customer would not be deprived of the benefits of regulation in any form whatsoever in that if a customer did successfully negotiate an alternative regulation service agreement with Public Service and subsequently became disenchanted with that service, the customer would have the option, at predetermined points in the contract, to return to the traditional regulation side of the Option Tree.

Mr. Ranniger described more specifically how the regulatory process would occur following a customer's request to negotiate an alternative regulation contract. Upon receipt of an indication that the customer wishes to consider opting for alternative regulation, Public

Service would enter into confidential negotiations with that customer. Assuming that those negotiations were successful and that a mutually agreeable contract resulted, Public Service would start serving the customer under terms of that contract. At that point in time, nothing happens to the allocation of cost and rate base assuming there is no simultaneous proceeding involving such allocations before the Commission. At a future time, when an allocation matter comes before the Commission (at the time of a formal rate case, at the time of an earnings review and settlement agreement, or at the time that a stand-alone allocation proceeding might come before the Commission), the allocation procedure determined to be appropriate as part of that process would then be applied for determination of revenue requirements on the traditional regulation side of the tree. As such, the allocation methodology to be employed is a matter to be determined at future times and from time-to-time and is independent from the Option Tree application. Mr. Ranniger, in his prefiled testimony, presented an eight-page exhibit setting forth an analysis of the impact of the Option Tree on traditional regulation customers under 12 different scenarios which, according to Public Service, represent all possible combinations of events and demonstrate that the full spectrum of potential impact on traditional regulation customers. In Public Service's view, the 12 scenarios demonstrate that there are no circumstances under which traditional regulation customers will be impacted adversely in comparison to similar loads being added under the traditional regulation scenario.

Mr. Ranniger acknowledges that House Bill 1104, which was enacted in 1989 (now codified as § 40-3-104.3, C.R.S.), does not permit Public Service to do what it is seeking in its Option Tree application. Mr. Ranniger recognized that House Bill 1104 is limited in two specific ways. First it is limited to the case of bypass by current customers and does not address the issue of the attraction of new customers or customized services. Secondly, it is limited to specific customers. Mr. Ranniger stated that the Option Tree plan can be used in bypass as well as in the attraction of new customers, and in providing innovative services for existing and new customers. Unlike House Bill 1104, the Option Tree would permit Public Service to be flexible and to move swiftly with a changing market whereas House Bill 1104 requires a specific filing with the Commission each time Public Service desires to negotiate with a specific customer. The Public Service Option Tree proposal would not require customer specific filings for permission to negotiate.

Mr. Mel Andrew of Public Service also prefiled testimony which went into more detail as to how the Option Tree program would be beneficial to large customers and how Public Service is facing increasing competitive pressures for energy services. Mr. Andrew's prefiled testimony also discussed the various ways in which Public Service could provide customized services to customers over and above the mere supply of energy, such as electric, gas, and steam system design, operation, maintenance, diagnosis, repair, etc. Mr. Andrew's prefiled testimony states that these same services are desired by Public Service's customers in relation to their energy using equipment within their operations

(turbines, compressors, motors, lighting, appliances, etc.). As the Commission understands the Option Tree proposal, Public Service would be presumably entering into contracts, at least with some customers, which would package energy supply with customized services. The Commission also understands, of course, that in all likelihood certain contracts would be for energy provision only, but the option would remain to package energy provision with the rendition of specific unregulated services such as repair, diagnosis, system design, operation, and maintenance services, etc.

B. Dismissal on Legal Grounds

The Commission is not addressing, in this decision, the merits or lack of merit of the proposed Public Service Option Tree plan because the Commission finds that it is without legal authority to grant the application under the current provisions of the Public Utilities Law as it relates to the provision of gas, electric, and steam service. There are two fundamental reasons why the Commission cannot legally grant Public Service's Option Tree application even if the Commission were persuaded that the Option Tree, on the merits, was a good plan. These legal reasons are: (a) the Commission is required, under § 40-3-102, C.R.S., to adopt all necessary rates and charges as well as to adopt regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state, and (b) the approval of economic development rates solely for the purpose of economic development would violate the holding in Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P2d 495 (1979).

1. Rate Regulation. What is now § 40-3-102, C.R.S., and was previously codified as § 115-3-2, C.R.S., 1963, was constructed and applied by the Colorado Supreme Court in the case of Consolidated Freightways v. Public Utilities Commission, 158 Colo., 239, 406 P2d 83 (1965); accord in, Baca Grande Corporation v. Public Utilities Commission, 190 Colo. 201, 544 P2d 977 (1966). Accordingly, the judicial construction given by the Colorado Supreme Court to § 115-3-2, C.R.S., 1963, is applicable to § 40-3-102, C.R.S. In Consolidated Freightways, the Colorado Supreme Court said:

> The legislature itself has declared the necessity and the duty and left to the Commission the determination of a rate that is fair to the public and sufficiently compensatory to the utility to achieve a fair return on its investment. Regulation -- not non-regulation -- has been declared to be in the public interest. (emphasis in the original) 158 Colo. at 249.

Consolidated Freightways further relied upon what was then § 115-11-5(1), C.R.S., 1963, now § 40-11-105(1), C.R.S., requiring the Commission to ". . . prescribe minimum rates, fares, and charges . . ." for contract carriers.

In Consolidated Freightways, the Commission had illegally "cut-loose" (the Colorado Supreme Court's terminology) the transportation

of petroleum and petroleum products from any further regulation of the Commission other than to require that whatever charges the carrier initiated be filed with the Commission. The Commission had done this by revoking a previous rate prescription order, entered in 1957, which required carriers of petroleum and petroleum products to cease demanding, charging, and collecting rates and charges which were greater or less than those prescribed by the Commission. The Commission, therefore, did not set any rates for those carriers of petroleum and petroleum products.

In rescinding the 1957 rate prescription order the Commission had committed legal error according to the Colorado Supreme Court under what are now §§ 40-3-102 and 40-11-105(1), C.R.S. The Court in its opinion said that the Commission had a duty to adopt all necessary rates, among other things, relied heavily on § 40-11-105(1), C.R.S., which, while establishing specific requirements for motor carrier regulation, has little or no application here. Under statutory construction, had the legislature desired to limit the Commission's rate jurisdiction in other areas, it would have done so as it did in Article 11, of Title 40, C.R.S. Accordingly, we do not view the holding in this case as precluding us from establishing banded rates or from allowing certain relaxed regulatory treatment under proper circumstances, so long as we continue to regulate the utility's rates. The issue is whether we regulate the rates, not the degree of regulation over the rates. Although rate base or rate-of-return regulation has been traditional, it is not mandated by statute.

The Commission has historically exercised differing levels of regulation among the industries we regulate and among different providers. For example, The Mountain States Telephone and Telegraph Company, d/b/a U S WEST Communications, Inc., has been required to provide more reports to the Commission and has been subjected to greater regulatory scrutiny than some of the independent telephone companies operating throughout Colorado even prior to HB 1264 and HB 1336. Likewise, water utilities have not always been subjected to traditional rate-of-return regulation. Transportation utilities have been regulated using operating ratios as the bellweather. Smaller providers have frequently received greater regulatory flexibility.

Here, Public Service, in its Option Tree plan, is requesting Commission authorization to "cut-loose" from rate setting and rate regulation insofar as it affects large commercial and industrial customers. The legal ruling in the Consolidated Freightways Case -- that the Commission has the necessity and duty to determine the fair rates -- has never been modified or overruled subsequently. We believe the suggestion by Public Service that the Commission can fulfill its duty of rate regulation by an after the fact cost allocation review in a subsequent rate case, which may be one or more years distant from the time Public Service enters into its special arrangements with its customers, is unlikely to withstand challenge under Consolidated Freightways. Accordingly, the Commission, under its reading of Consolidated Freightways, holds that the Option Tree goes too far in curtailing the Commission's responsibility for setting and regulating rates for gas, electric, and steam services.

The contention was raised during oral argument that the Commission has "ample legal authority" to grant the Option Tree application as originally filed because Article XXV of the Colorado Constitution grants full legislative authority to the Commission to regulate public utilities, including the broadly based authority to take whatever steps it deems necessary or convenient to accomplish the legislative function of ratemaking delegated to the Commission. The foregoing contention, however, failed to factor in the Consolidated Freightways case, even as we interpret its holding.

Since 1985, the Colorado General Assembly has repeatedly enacted legislation, which allows telephone utilities (HB 1264 and HB 1336) and even gas, electric, and steam utilities to engage in certain forms of competitive ratemaking, and sets standards for the Commission to use when it should relax or refrain from regulating a specific service. Article 15 of Title 40, C.R.S., even authorizes the Commission to detariff or deregulate services, effectively granting the Commission the power, under defined circumstances, not to regulate, which but for this legislation would be contrary to Consolidated Freightways. House Bill 1104, now codified as § 40-3-104.3, C.R.S., also enables the Commission to authorize a gas, electric, or steam utility to negotiate prices with a present customer who will discontinue using the services of the public utility if the authorization to negotiate prices is not granted. HB 1104 even allows the Commission to grant preferences otherwise prohibited by § 40-3-106, C.R.S. However, Public Service has admitted that the Option Tree goes beyond what is authorized in House Bill 1104.

A telephone utility may apply to the Commission to refrain from regulation for competitive purposes and authorize the local exchange telephone provider to provide all or a portion of a private telecommunications network service under stated or negotiated terms to any person or entity that has acquired, or is contemplating the acquisition of, or is operating a private telecommunications network. But even this power was noted to be in addition to any other powers the Commission had to refrain from regulating utilities in this state. See § 40-15-108(9), C.R.S. (1985), and § 40-15-203(8), C.R.S. (1987).

Accordingly, we are not persuaded that this Commission has the broad, general power to authorize Public Service to implement an Option Tree plan in the absence of specific enabling legislation which would allow utilities to negotiate prices for service apart from tariffed rates filed at, and approved by, the Commission.

2. Preferential Ratemaking. We also recognize that the case of Mountain States Legal Foundation v. Public Utilities Commission, 197 Colo. 56, 590 P2d 495 (1979), invalidated a Commission order establishing a discounted gas rate for low income consumers on the basis that this rate constituted a preference and was therefore prohibited by § 40-3-106(1), C.R.S. We believe that the essence of the Mountain States decision was premised upon the fact that the lower rate to selected customers was unrelated to the cost or type of service provided. If

Public Service can effectively establish that there are indeed differences in the costs of providing services to discrete customers, or groups of customers, it may very well be able to establish discrete rates not only to large customers, but also to low-income customers upon a valid cost of service basis. We would encourage Public Service to explore the possibilities of refining its Option Tree proposals within current regulatory frameworks along the lines suggested in this decision. However, economic development rates, purely for the sake of economic development, would appear to violate the holding in Mountain States. Further, economic development rates in the form of reduced rates are unlikely to ever meet our growing concern about the present underpricing of electricity because of the failure to include external societal costs. If economic incentives were to be approved, the Commission would expect subsidies to be directed toward efficiency, in the form of technology or "know-how". These subsidies could provide the targeted customer with the same reduction of energy costs while providing the added benefit of being ongoing and while reducing the exposure to fuel cost increases.

In summary, we find that the Public Service Option Tree plan, if authorized by the Commission, would not be in conformity with the public utilities law which we are bound to uphold. Accordingly, there is no alternative but to dismiss Public Service's application on legal grounds.

C. Future Alternatives

The Commission recognizes that regulatory and economic changes have been accelerating in scope and intensity within recent years and that it may be appropriate to explore legislative changes which would enable certain broader forms of more flexible regulation to be implemented by the Commission with respect to gas, electric and steam utilities within the State of Colorado. As indicated above, the Commission by this Decision and Order is not expressing its views with respect to the merits of the Option Tree plan as proposed by Public Service. It is our view, however, that before more flexible regulation can be scrutinized in a meaningful way, certain base line information must be established with respect to the costs of service and reasonable revenue levels which would result from Public Service's operations. In other recent regulatory filings with this Commission, Public Service has committed itself to the filing of a general rate case in the latter part of 1990, and we believe that this is a necessary first step in paving the way for whatever new type of regulation may ensue in the future in response to new regulatory initiatives.

In the preceding paragraph we have alluded to the possibility of exploring legislative changes which would enable certain broader forms of more flexible regulation. It should also be recognized, however, that Public Service may very well be able to accomplish its flexible goals by using mechanisms that already are in place. For example, under the existing regulatory structure, Public Service can negotiate a special

contract with a customer for the provision of service and file that contract with the Commission on the same 30-day notice basis that it files tariffs. The contract is, in essence, a special tariff filing. If the Commission takes no action, the contract can go into effect according to its terms. If circumstances warrant placing the contract into effect upon less than statutory notice, Public Service has the option of filing the special contract under the provisions of Rule 41(e) of the Commission's Rules of Practice and Procedure.

THEREFORE THE COMMISSION ORDERS THAT:

1. Application No. 89A-329EG, being the application of Public Service Company of Colorado for authorization to offer certain customers alternatives to cost of service regulation, generally known as the Option Tree, is dismissed without prejudice.

2. All pending motions, including the motion filed on March 16, 1990, for leave to file a statement of position by Climax Molybdenum Company, are denied.

3. The 20-day time period provided for by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration begins on the first day after the mailing or serving of this Decision and Order.

This Decision is effective 30 days from this date.

DONE IN OPEN MEETING April 25, 1990.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ARNOLD H. COOK

Chairman

COMMISSIONER RONALD L. LEHR ABSENT
BUT CONCURRING IN THE RESULT.

COMMISSIONER GARY L. NAKARADO
CONCURRING IN THE RESULT.

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COMMISSIONER GARY L. NAKARADO CONCURRING IN THE RESULT.

I concur in the dismissal of Public Service Corporation's application to utilize the Option Tree, because I believe it more likely than not prohibited under Consolidated Freightways. I do, however, think that many aspects of the filing are innovative in precisely the direction that regulation must move as markets become ever more competitive, global, and information rich.

The Need for Greater Flexibility. As the information revolution gathers speed, with the accompanying globalization of the marketplace, consumers of the utility services which we regulate will have ever increasing access to competitive alternatives, and will be better able to evaluate increasingly sophisticated marketing programs specifically designed for their individual needs. A regulatory framework formulated in the late 1800's, when the electric and telephone markets tended to be much less diverse, is unlikely to be optimal for the circumstances in which we find ourselves today. We must continue either legislatively, or by cautiously exploring the limits of our authority, to allow regulated entities to be responsive to their evolving markets.

Price Discrimination. There is among regulators a tendency to assume that somehow a Commission has the power to require one class of customers to subsidize another class. This power is limited in several ways. It is simply not true that where a sophisticated, well-capitalized business can build its own facility (whether power generation or telecommunications facilities) and operate it on a stand-alone basis at a rate less than we would require in order to make a contribution to some other class, that we have any practical power to raise prices above the stand-alone rate. Further, to attempt to do so where the entity with a stand-alone alternative would be willing to pay more than the utility's marginal costs actually harms the ratepayer. Thus I believe that we should have the authority, on a more flexible basis than provided by HB 1104, to allow a utility to price its product anywhere above marginal costs when a customer has a stand-alone or other competitive alternative which would be less than tariffed rates. The Option Tree scheme, if legislatively approved, may well be an appropriate starting place.

It is and will likely remain true that bigger, more sophisticated customers will have the most alternatives, for a variety of reasons. As long as the reasons relate to the practical availability of competitive alternatives, that such is the reality of the marketplace should not lead us to pretend we have the ability to create equity where we do not. The practical challenge is in efficiently determining where the threshold of a genuine competitive alternative lies. On the other hand, merely because a customer is large should not justify discriminatory pricing, and we also need to find a way to competently and expeditiously determine the existence of stand-alone capacity or other cost justification for price discrimination.

Efficiency of Co-Generation. It may also be true that inherent efficiencies of certain co-generation facilities are such that we want to eliminate disincentives to efficient and economic bypass in appropriate circumstances.

Why not Tarriffed? Finally, some of the services proposed to be offered under the Option Tree, while undoubtedly appropriate services or products and responsive to the marketplace, may well be easily offered under the standard tariffing procedures. Where such is the case, I would encourage their introduction immediately through the traditional means.

(S E A L)

ATTEST: A TRUE COPY

James P. Spiers
Executive Secretary

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GARY L. NAKARADO

Commissioners

JEA:jk[redacted]