Decision No. C04-0011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 01F-071G

HOME BUILDERS ASSOCIATION OF METROPOLITAN DENVER,

COMPLAINANT,

v.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

ORDER GRANTING SECOND APPLICATION FOR REHEARING, REARGUMENT, AND RECONSIDERATION IN PART AND DENYING IN PART

Mailed Date: January 6, 2004
Adopted Date: December 22, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of a Second Application for Rehearing, Reargument, or Reconsideration (RRR) of Commission Decision No. C03-1292, filed on December 9, 2003, by Public Service Company of Colorado (Public Service or Company).

2. Public Service claims the Commission committed four points of error in Decision No. C03-1292. First, Public Service argues that we erred in finding that it would double recover any costs from ratepayers if it were allowed to recover reparation costs in a future rate proceeding. Next Public Service asserts that we erred in finding that preclusion of recovery of reparations does not violate the due process requirements of the United States or Colorado

Constitutions. Public Service also claims that we erred in finding that acceptance of its filed rate doctrine/rule against retroactive ratemaking arguments would undercut our authority and allow a utility to charge any sort of rate despite the requirements of the utility's own tariff. Finally, Public Service contends that we erred in finding that the 1997 Rate Case order in Docket No. 96S-290G would have triggered a recalculation of the Construction Allowance under its Gas Extension Policy tariff.

3. Now, being duly advised in the matter, we grant in part and deny in part, Public Service's second application for RRR consistent with the discussion below.

B. Reparation Cost Recovery

4. In Decision No. C03-1093, we stated that any future recovery of reparations ordered in this case would amount to double-recovery if these reparation costs were later incorporated into rates. Consequently, we ordered that Public Service was precluded from recovery of the reparations in a future rate proceeding.

5. Public Service objects to our preclusion of future cost recovery for these reparation costs. Within its second RRR pleading Public Service states, from an accounting perspective, that a double-recovery would never occur. It points out that these costs are capital cost expenditures and a line extension tariff prescribes how the Company and customer requesting new gas service extensions will share in the costs of constructing gas distribution facilities. The effect of the ordered reparations is to re-allocate the capital contributions between Public Service and Home Builders Association of Metropolitan Denver (HBA). As explained in its pleading, the net effect of this re-allocation is that the rate base, upon which the Company earns a return, is increased. However, because the Commission is not changing customer rates in

this proceeding, Public Service would actually not be allowed to earn on the ordered incremental increase in rate base. Thus, according to Public Service it will absorb the regulatory lag cost recovery until its rates are changed in its next rate case.

6. A related contention raised by Public Service is that its actual investment in gas distribution facilities is never overstated even if the construction allowance (CA) is determined, after the fact, to have been too low. As a result, Public Service asserts it has no financial incentive to intentionally set the CA low because this, would in turn, reduce the net amount of facilities included in rate base. In summary, Public Service contends that if it is required to pay reparations, but is not allowed to recover the reparations, it will be precluded not from a double-recovery, but no recovery at all.

7. We reverse our previous holding that Public Service is precluded from obtaining recovery of the reparations from its ratepayers in a future gas rate case. We also withdraw all assertions regarding potential double recovery of reparations costs that we made in Decision Nos. C03-1093 and C03-1292. Because the level of customer rates will not be changed in this proceeding, we will defer ruling on the recovery of the effect of the reparations until Public Service's next gas department rate case. At that time, Public Service will have the burden of proof to show that the re-allocation of capital expenditures as well as the associated interest on the reparations should be recoverable from ratepayers.

8. However, we emphasize that we merely determine here that Public Service should have its "day in court" regarding recovery of the reparations we ordered. By allowing Public Service to raise this issue at its next gas rate case, we make no determination as to the validity of Public Service's claim. Therefore, this action here should not be construed as our explicit or

implicit endorsement of the validity of Public Service's claim for recovery of reparations. We merely point out that given the limited resources and time available in this docket, this matter is better addressed and analyzed at a gas rate case hearing.

C. Due Process Requirements for Cost Recovery

9. Public Service again makes the unsupported argument that preclusion of recovery of reparations in a future gas rate case violates the due process requirements of the United States and Colorado Constitutions. Given our holding above, we find this argument moot and deny it as such.

D. Filed Rate Doctrine

10. According to Public Service, in Decision No. C03-1292, we moved beyond our previous analyses regarding the filed rate doctrine and the rule against retroactive ratemaking and "significantly overstates the importance of this proceeding with respect to its potential impact in the Commission's authority and a utility's incentive to ignore its tariff." The passage in question is as follows:[1]

> Based upon the findings of the U.S. Supreme Court and our own supreme court regarding this matter, we find that if a utility misleads us or fails to follow the explicit standards of its own tariff, the rule against retroactive ratemaking and the filed rate doctrine are not available as a defense to an order of reparations. These two doctrines were not intended to permit a utility to subvert the integrity of our ratemaking authority or even the utility's own tariff. To give credence to Public Service's reasoning would surely undercut this Commission's authority and allow a utility to charge any sort of rate despite the requirements of its own tariff, and refund nothing if caught. No incentive would exist for a utility to comply with its own tariff.

[1] *See* Commission Decision No. C03-1292, ¶ 22.

Public Service construes this paragraph to imply that we find that it intentionally misled the Commission or intentionally violated its tariff; that the filings it makes in compliance with its Tariff Sheet Nos. R30 through R43 are rate filings that result in an automatic change in the CAs; that Public Service's failure to update the CA or request a waiver resulted in a change to the rates previously approved by the Commission; that Public Service benefited financially or otherwise as a result of its failure to update the CA or request a waiver; and that Public Service hid its failure to update the CA or request a waiver from the Commission.

11. Public Service reads too much into a sentence in *dicta* in Decision No. C03-1292. Nowhere in this passage exists the explicit or implicit findings Public Service asserts we made. Rather than reading the entire Filed Rate Doctrine section of the Order (pages 7 through 11, paragraphs 14 through 22), Public Service focuses on a single sentence from that section and contends that we made the findings as indicated above. Taking the context of the sentence Public Service focuses on with the entire Filed Rate Doctrine section of our Order reveals our point of view that the filed rate doctrine and the rule against retroactive ratemaking do not apply to the matter at hand. However, in order to clear up any confusion Public Service may harbor regarding this issue, we clarify that our *dicta* statement regarding the Commission's viewpoint on the proper use of the filed rate doctrine and the rule against retroactive ratemaking does not constitute findings of fact as asserted by Public Service.

12. We do not deviate however, from our previous findings that the filed rate doctrine and the rule against retroactive ratemaking are not available as a shield to the reparations Public Service is required to pay to HBA, as we ordered in this matter.

E. 1997 Rate Case

13. Public Service argues that we erred in granting reparations based on the Phase I rate case proceeding in 1996 through 1997 in Docket No. 96S-290G (1997 Rate Case). Public Service includes an affidavit by Frederic C. Stoffel, which provides background information regarding the 1997 Rate Case and the Commission's concerns with the CA in that case.

14. We do not find Public Service's arguments here compelling. In rebutting HBA's proposed annual adjustments, Public Service generally argued that an annual review and recalculation is not proper outside the context of a rate case.[2] We agreed with the principle behind this argument, and found in favor of Public Service in all years except 1997. However, in 1997 we found that since a rate increase occurred as a result of a rate case, the level of the CA should correspond to the level of rates. On that basis, we found that Public Service did not adequately rebut HBA's proposed increase for the year 1997. Though the Commission undertook significant discussion about CAs during the 1997 Rate Case, the Commission did not waive Public Service's tariff requirements. The facts remain unchanged: 1) Public Service failed to recalculate or request a waiver, as required by tariff; 2) the tariff states that the CA is to be based on gross embedded plant; 3) a rate change occurred in 1997, increasing rates to customers based on an increase in gross embedded plant; 4) the percentage riders from the Phase-I-only 1997 Rate Case were applied to the rates resulting from the 1994 cost allocation rate proceeding; and 5) HBA witness Binz proposed to allocate the updated gross embedded plant based on the same 1994 allocations. As discussed in detail below, Public Service violated its tariff and failed to adequately rebut HBA's proposed reparations for the annual recalculation for 1997.

[2] Public Service argued that the CA should only be adjusted after both Phase I and Phase II of a rate case are completed. This issue is discussed separately, below.

15. Public Service argues that the 1997 Rate Order would not have "triggered" any kind of revision in the CA. Public Service generally asserts that the Commission **explicitly** ordered Public Service to include several computational factors in its order requiring a Phase II case, and then **implicitly** waived the CA filing requirement by not addressing the issue in the following order relieving Public Service of its obligation to file a Phase II case. Public Service argues that the Commission contemplated initiating a subsequent proceeding to address CA issues, but chose not to do so.

16. Public Service seems to indicate here that it is the Commission's responsibility to order a change in the CA. On the contrary, Public Service has the tariff obligation to revise the CA 30 days after a rate case, and also annually.[3] The Commission orders do not explicitly relieve Public Service of its obligation to make a filing 30 days after that particular rate case, and we do not agree with Public Service's assertion that the Commission order implicitly waived the tariff requirements. Further, the order language raised by Public Service in Decision No. C97-118 only addresses what should have occurred if Public Service followed normal procedures and filed both Phase I and Phase II components of the rate case. Commission Decision Nos. C97-118 and C97-478 provide no direction as to how the CA should be addressed in a Phase-I-only proceeding.

17. Next, Public Service argues that "the Commission adopts a novel interpretation and application of the tariff provisions at issue in this case which have never before been publicly articulated…" Public Service also states that the CA cannot be revised without a Phase II cost

[3] Public Service argues that its tariffs do not require it to revise the CAs annually. This issue is discussed separately, below.

allocation proceeding, and that the Commission's position diverges from historical application of the CA.

18. As we stated in previous decisions, we agree that in a traditional rate case during the period at issue where Public Service files both Phase I and Phase II components, then the CA is to be revised after costs are allocated in the Phase II proceeding. However, in 1997 Public Service requested that the Commission allow the Phase I percentage rate riders to remain in place permanently, without a subsequent Phase II allocation proceeding. Public Service requested this non-standard Phase-I-only rate case method, but did not address the resulting unanswered questions about its tariff CA requirements for that particular rate case (*i.e.*, whether the CA should be revised in 30 days), and, more importantly, failed to comply with the annual tariff requirement (*i.e.*, review and recalculate or request a waiver).

19. Further, the percentage riders from the 1997 Phase I case were applied directly to the rates that resulted from the 1994 Phase II cost allocation proceeding. Witness Binz applied cost allocation factors from the 1994 rate case to the level of gross embedded plant in subsequent years to calculate the CA amounts proposed by HBA. Therefore, both the final rates resulting from the 1997 Phase-I-only case, and the CA rates proposed by HBA, are based on allocations in the 1994 Phase II case. Phase I rate riders are applied to rates from the previous case, which are based on an allocations procedure. Phase I rates are based on the last allocations, and we do not believe that the adoption of a similar treatment for the CA is the "novel" approach that Public Service claims it is.

20. Public Service then argues that the Commission regularly issues "final" orders after the Phase I portion of rate cases, and that the Commission's course of conduct of not

requiring an annual review and recalculation at that point did not signal Public Service to perform the recalculation after the 1997 Rate Case. *See* RRR page 12.

21. We disagree. The 1997 Rate Case implemented final rates with the explicit exemption of a subsequent Phase II allocation of those rates. As we have stated, this was a "complete" rate case, and the expectations of such are different from a "final" order implementing Phase I rates that will be revised upon the allocation of those rates in a Phase II proceeding. Further, regardless of what signal Public Service interpreted from other cases, its tariff required it to file either a waiver or recalculate the CAs on an annual basis.

22. Last, Public Service reargues its position that its tariff requirement to "review and recalculate" does not require it to file revised construction allowances. *See* RRR page 14. We disagree. Taken in context with the entire paragraph, the tariff clearly requires Public Service to file either a waiver or recalculated construction allowances once a year. Further, Public Service's historical filing for waivers up to 1995 demonstrates that it believed that the waivers were necessary.

II. ORDER

A. The Commission Orders That:

1. The Second Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C03-1292 filed by Public Service Company of Colorado is granted in part and denied in part consistent with the discussion above.

2. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 22, 2003.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners

CHAIRMAN GREGORY E. SOPKIN
RECUSED HIMSELF IN THIS DECISION.