Decision No. R11-0878

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 10AL-908E

IN THE MATTER OF ADVICE LETTER NO. 1576-ELECTRIC FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE THE RULES AND REGULATIONS SECTION IN THE COMPANY'S P.U.C. NO. 7 ELECTRIC TARIFF TO INCORPORATE A NEW ENVIRONMENTAL MATTERS SECTION TO BE EFFECTIVE JANUARY 3, 2011.

DOCKET NO. 10AL-910G

IN THE MATTER OF ADVICE LETTER NO. 790-GAS FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE THE RULES AND REGULATIONS SECTION TO INCORPORATE A NEW ENVIRONMENTAL MATTERS SECTION IN THE COMPANY'S COLORADO P.U.C. NO. 6-GAS TARIFF TO BE EFFECTIVE JANUARY 3, 2011.

DOCKET NO. 10AL-911ST

IN THE MATTER OF ADVICE LETTER NO. 114-STEAM FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE THE RULES AND REGULATIONS SECTION TO INCORPORATE A NEW ENVIRONMENTAL MATTERS SECTION IN THE COMPANY'S P.U.C. NO. 1-STEAM TARIFF TO BE EFFECTIVE JANUARY 3, 2011.

RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
DALE E. ISLEY
MODIFYING AND APPROVING TARIFFS, IN PART, AND
PERMANENTLY SUSPENDING TARIFFS, IN PART

Mailed Date: August 15, 2011

Appearances:

Dudley P. Spiller, Esq., Dudley Spiller, P.C., Denver, Colorado, and Kristen Shults Carney, Esq., Xcel Energy Services, Inc., Denver, Colorado, for Public Service Company of Colorado;

Holly Rachael Smith, Esq., Holly Rachael Smith, PLLC, Marshall, Virginia, for The Colorado Retail Counsel, Wal-Mart Stores, Inc., and Sam's West, Inc.;

Michelle Brandt King, Esq., Thorvald A. Nelson, Esq. and Maryt L. Fredrickson, Esq., Holland & Hart, LLP, Denver, Colorado, for Colorado Energy Consumers;

Christopher J. Neumann, Esq. and Gregory R. Tan, Esq., Greenberg Traurig, LLP, Denver, Colorado, for the City of Commerce City and Intrawest/Winter Park Operations Corporation;

Jane W. Greenfield, Esq., City of Westminster Assistant City Attorney, Westminster, Colorado, for the City of Westminster;

Charles Richardson, Esq., City of Aurora City Attorney, and Glenda Dominguez, City of Aurora Assistant City Attorney, Aurora, Colorado, for the City of Aurora;

Debra S. Kalish, Esq., City of Boulder Senior Assistant City Attorney, Boulder, Colorado, for the City of Boulder;

Charles T. Solomon, Esq., City and County of Denver Assistant City Attorney, Denver, Colorado, for the City and County of Denver;

Christopher K. Daly, Esq., City of Arvada City Attorney, and Roberto Ramirez, Esq., City of Arvada Senior Assistant City Attorney, Arvada, Colorado, for the City of Arvada;

Richard L. Fanyo, Esq., Richard L. Corbetta, Esq., and Mark T. Valentine, Esq., Dufford & Brown, PC, Denver, Colorado, for Climax Molybdenum Company and CF&I Steel, LP, doing business as Evraz Rocky Mountain Steel; and

Jeffrey J. Friedland, Esq., City of Longmont Assistant City Attorney, Longmont, Colorado, for the City of Longmont.

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I. PROCEDURAL BACKGROUND

1. The captioned proceedings were initiated on December 3, 2010, when Public Service Company of Colorado (PSCo) filed Advice Letter No. 1576-Electric, Advice Letter No. 790-Gas, and Advice Letter No. 114-Steam with the Colorado Public Utilities Commission (Commission). The stated purpose of these filings is to revise the rules and regulations in PSCo's PUC No. 7-Electric, PUC No. 6-Gas, and PUC No. 1-Steam tariffs to incorporate new environmental matters sections.[1] PSCo initially requested that the tariff pages accompanying the subject advice letters become effective on January 3, 2011.

[1] The environmental matters sections (hereinafter, "Environmental Tariffs") are set forth in Advice Letter No. 1576-Electric, Sheet Nos. R49-R60; Advice Letter No. 790-Gas, Sheet Nos. R13-R25, and Advice Letter No. 114-Steam, Sheet Nos. R16-R28; and in Exhibit 1; JRS-1, JRS-2, and JRS-3. Since the Environmental Tariffs contained in each Advice Letter are virtually identical, references in this decision to specific sections will be to those contained in Advice Letter No. 1576-Electric; *i.e.*, for the Mandatory Disclosure provision the reference would be to R52.

2. On December 28, 2010, the Commission suspended the tariffs accompanying these advice letters and referred these matters to the undersigned Administrative Law Judge (ALJ). *See*, Decision Nos. C10-1376, Docket No. 10AL-908E; C10-1378, Docket No. 10AL-910G; and C10-1379, Docket No. 10AL-911ST.

3. On January 12, 2011, the Commission consolidated these proceedings, established a procedural schedule, and established an initial suspension date of May 3, 2011, pursuant to § 40-6-111(1)(b), C.R.S. *See,* Decision Nos. C11-0032 and C11-0033.

4. On January 31, 2011, PSCo filed its direct testimony and exhibits.

5. On February 3, 2011, the ALJ vacated the procedural schedule established by Decision No. C11-0033, set a pre-hearing conference for February 23, 2011, and extended the suspension period for an additional 90 days. *See,* Decision No. R11-0122-I.

6. Timely interventions were filed in this consolidated matter by Colorado Energy Consumers (CEC); the City and County of Denver (Denver); the City of Boulder (Boulder); the City of Arvada (Arvada); the City of Westminster (Westminster); the City of Aurora (Aurora); the City of Longmont (Longmont); the City of Commerce City (Commerce City); Intrawest/Winter Park Operations Corporation (IWPOC); the Colorado Retail Council (CRC); Safeway, Inc. (Safeway); Sam's West, Inc. (Sam's); and Wal-Mart Stores, Inc. (Wal-Mart). These interventions were granted by Decision No. R11-0203-I on February 24, 2011. A Petition for Late Intervention filed by Climax Molybdenum Company (Climax) and CF&I Steel, LP, doing business as Evraz Rocky Mountain Steel (CF&I) was also granted. *See,* Decision No. R11-0168-I mailed February 15, 2011. These parties are collectively referred to herein as "Intervenors."

7. A pre-hearing conference was held on February 23, 2011, at which time the parties agreed to a procedural schedule which, among other things, provided for hearings to be held on May 9, 10, and 11, 2011. In order to accommodate this schedule, PSCo filed amendments to the subject advice letters extending the proposed effective date of the tariffs to February 2, 2011, thereby further extending the suspension period to August 31, 2011.[2] *See*, Decision No. R11-0203-I.

8. Between March 23 and 31, 2011, answer testimony and exhibits were filed by Denver, IWPOC, Westminster, CRC, Wal-Mart, Sam's, Boulder, Commerce City, and Aurora.[3]

9. On March 29, 2011, the ALJ granted a motion by CRC, Safeway, Wal-Mart, and Sam's to merge Safeway's intervention into the intervention filed by CRC and for the withdrawal of Safeway's individual intervention. *See*, Decision No. R11-0326-I.

10. On April 18, 2011, PSCo filed its rebuttal testimony and exhibits.

11. On April 20, 2011, the ALJ denied a Motion for Leave to Correct Material Misstatements and Motion for Determination of a Question of Law filed by Aurora, Arvada, Boulder, CRC, Denver, Longmont, Sam's, Wal-Mart, and Westminster. *See*, Decision No. R11-0413-I .

12. On April 21, 2011, the ALJ denied a Motion for Summary Judgment filed by Aurora. *See*, Decision No. R11-0427-I.

[2] On or about August 9, 2011, PSCo informally agreed to further amend the subject advice letters for the purpose of extending the suspension period for an additional 45 days; i.e., to October 17, 2011.

[3] On April 29, 2011, Wal-Mart and Sam's withdrew the answer testimony previously submitted by its witness, Jennifer Clark. *See*, TR I, p. 10. The following Intervenors did not submit pre-filed answer testimony: CEC, Arvada, Longmont, Climax, and CF&I.

13. On May 2 and 3, 2011, Commerce City filed a Motion for Sequestration of PSCo Witnesses Staley and Spaanstra (Motion to Sequester), a Motion to Compel Discovery Relating to Terry Staley Testimony (Staley Motion to Compel), and a Motion to Compel Discovery Relating to James Spaanstra Testimony (Spaanstra Motion to Compel). PSCo filed its responses to these motions on May 5, 2011. *See*, Decision No. R11-0470-I mailed May 3, 2011.

14. On May 6, 2011, the ALJ denied the Motion to Sequester, granted the Staley Motion to Compel, and granted the Spaanstra Motion to Compel, in part. In granting the Spaanstra Motion to Compel, the ALJ ordered that certain portions of Mr. Spaanstra's direct and rebuttal testimony be stricken.[4]

15. On May 9, 2011, the ALJ called the matter for hearing at the assigned time and place. All parties, except Aurora, appeared through their respective legal counsel.[5] During the course of the hearing testimony was presented by PSCo through the following witnesses: James R. Spaanstra, Esq. (Exhibits 1 and 2), and Terry D. Staley, PSCo's Environmental Manager (Exhibits 3 and 4).[6] Testimony was presented by the Intervenors through the following witnesses: Professor Craig N. Johnson on behalf of CRC (Exhibit 5);[7] Gerald L. Pouncey, Esq.

[4] In light of the ALJ's inability to issue written orders prior to commencement of the hearing on May 9, 2011, these ruling were communicated to the parties' counsel via electronic mail on the afternoon of May 5, 2011. They were then summarized and made part of the record prior to commencement of the May 9, 2011 hearing. *See*, Hearing Transcript of May 9, 2011, pp. 8-10. Exhibits 1 and 2, Mr. Spaanstra's direct and rebuttal testimony, do not include those portions of his testimony that were stricken by the ALJ's ruling. Hereinafter, references to the Hearing Transcript shall be as follows: May 9, 2011 Hearing Transcript: TR I, p. __; May 10, 2011 Hearing Transcript: TR II, p. __; and May 11, 2011 Hearing Transcript: TR III, p.__.

[5] Aurora did not actively participate at the hearing by, for example, cross-examining PSCo's witnesses or calling its own witness, Mr. Chambers, to sponsor his pre-filed answer testimony. It did, however, reserve the right to submit a Statement of Position.

[6] Many of the exhibits containing the witnesses' pre-filed testimony also contain sub-exhibits. These sub-exhibits are identified by the witnesses' initials and are numbered consecutively. For example, Exhibit 1, Mr. Spaanstra's direct testimony, contains three sub-exhibits, TJS-1 through TJS-3. His rebuttal testimony, Exhibit 2, contains four sub-exhibits, TJS-4 through TJS-7.

[7] Professor Johnson did not appear at the hearing. Cross-examination of Professor Johnson was waived and his pre-filed answer testimony was admitted into evidence pursuant to a stipulation between the parties. TR I, p. 10.

on behalf of CRC (Exhibit 6); Kevin Magner, Denver's Utilities Administrator (Exhibit 7); Michael Sheenan, an Engineering Specialist for Denver (Exhibit 8); Robert J. Duncanson, Denver's Director of Right-of-way Services (Exhibit 9); Alice Nightengale, an Environmental Health Manager for Denver (Exhibit 10); Stewart J. Ellenberg, Boulder's Risk Manager (Exhibit 11);[8] Hal D. Newberry, IWPOC's Director of Base Operations (Exhibit 12); John T. "Tom" Acre, Commerce City's Deputy City Manager (Exhibit 13); Rachael Harlow-Schalk, an Environmental and Administrative Services Officer for Westminster (Exhibit 14); David Downing, Westminster's City Engineer (Exhibit 15); and Mark E. Garrett, Esq., on behalf of CRC (Exhibits 16 and 17).

16. During the course of the hearing Exhibits 1 through 15, 15A, 16 through 41, and 44 through 65 were marked, offered, and admitted into evidence.[9] Exhibits 42 and 43 were marked but were not offered or admitted into evidence.

17. The hearing concluded on May 11, 2011, at which time the evidentiary record was closed and the ALJ took the matter under advisement.

18. On May 25, 2011, Statements of Position (SOP) were filed by the following parties: PSCo; Boulder; CRC, Sam's West, and Wal-Mart; CEC; Commerce City and IWPOC; Westminster and Aurora; Denver; and Arvada.[10]

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

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[8] Mr. Ellenberg appeared at the hearing via telephone pursuant to a stipulation between the parties.

[9] Exhibit 60 was marked as Confidential and was admitted under the provisions of the Commission's confidentiality rules. *See,* Rules of Practice and Procedure 4 *Code of Colorado Regulations* (CCR) 723-1-1100. Testimony relating to Exhibit 60 was also received on a confidential basis. TR II, pp. 201-205.

[10] Portions of page 5 of the Statement of Position filed by CRC, Sam's West, and Wal-Mart and portions of pages 28-29 of the Statement of Position filed by Commerce City and IWPOC were marked as Confidential and were submitted under the provisions of 4 CCR 723-1-1100.

II. DOCKET NO. 09AL-299E; DECISION NO. C10-0286

20. This is the second time the Commission has considered a request by PSCo to include provisions relating to environmental matters in its tariffs. In Docket No. 09AL-299E the Commission considered, and rejected, a similar proposal to incorporate such provisions into PSCo's electric tariff. *See,* Decision No. C10-0286 mailed March 29, 2010, ¶¶ 174-292 (hereinafter, the Decision). In so ruling, the Commission found that PSCo failed to meet its burden of proving that the proposed tariff provisions, when taken as a whole, were just and reasonable pursuant to §§ 40-3-101 and/or 40-3-102, C.R.S. The Commission did, however, "recognizes the benefit of uniform tariff language addressing environmental contamination liability." Decision at ¶ 266. As a result, it provided "additional guidance" to the parties in the event PSCo might, as it has done here, submit an alternate proposal. Decision at ¶¶ 266-292. PSCo contends that the Environmental Tariffs address and cure all the deficiencies noted in the Decision relating to its earlier proposal.[11] Exhibit 1, pp. 28-34; Exhibit 2, pp. 6-7.

III. SUMMARY OF ENVIRONMENTAL TARIFFS AND MODIFICATIONS DESIGNED TO IMPLEMENT GUIDANCE PROVIDED BY THE COMMISSION IN DOCKET NO. 09AL-299E

21. **Applicability (R49).** The introductory paragraph provides that all electric service provided by PSCo will be subject to the Environmental Tariffs; that nothing contained therein, or in any Environmental Agreement (EA) entered into under its terms, shall be construed to limit the authority of the State of Colorado to enforce any state or Federal Environmental Law (R50); and that nothing contained therein, or in any EA entered into under its terms, shall be construed

[11] PSCo indicates that the modifications to the Environmental Tariffs fashioned in response to the guidance contained in Decision No. C10-0286 resulted largely from settlement negotiations with a number of parties who intervened in Docket No. 09AL-299E but who, as a result of the modifications, did not intervene in this proceeding. Exhibit 1, p. 5; Exhibit 2, p. 52; Exhibit 3, pp. 2-3. *See also,* Exhibit 2, JRS-4 showing in redline format the modifications made to the environmental matters tariffs originally filed in Docket No. 09AL-0299E.

to modify, revise, limit, subordinate or amend any state or federal Environmental Law. PSCo emphasizes that the Environmental Tariffs only apply when it is providing or maintaining service to a Customer on Customer Owned or Customer Controlled Property as those terms are defined by the Environmental Tariffs. PSCo SOP, p. 4.

22. **Definitions (R49-R51).** This section provides definitions of key terms used in the Environmental Tariffs. They include the following:

> **Company Materials (R49)**: Any Hazardous Materials first brought onto and introduced to Property or Customer Controlled Property by PSCo.
>
> **Customer Controlled Property (R50)**: Any real property not owned by the customer but to which customer requests that PSCo provide service. This definition was not included in the tariff proposal considered by the Commission in the Decision and is designed to cure deficiencies noted therein relating to the applicability of the Environmental Tariffs to "offsite" or "adjacent" property. Decision ¶¶ 280-281. The Environmental Tariffs no longer contain a definition of "offsite" property.
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> **Environmental Laws (R50)**: Includes any federal, state, or local laws, regulations, ordinances, orders or decrees of any applicable authority relating to, or claiming jurisdiction over, the property in question, concerning protection or preservation of human health, the environment or natural resources including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) and any other environmental laws.
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> **Hazardous Materials (R51)**: Any substance that is regulated, listed, or identified under any Environmental Laws, or which is deemed or may be deemed hazardous to living things or the environment. This broad definition is, however, subject to a *de minimus* provision providing that Hazardous Materials do not include materials that a customer demonstrates to PSCo's satisfaction are present in a form, location, or concentration that do not trigger worker protection, cleanup, or solid waste, radioactive waste management or disposal requirements under Environmental Laws or, if disturbed, may not otherwise pose an imminent and substantial risk to human health or the environment. Inclusion of the *de minimus* exemption is designed to cure deficiencies noted in the Decision that the prior definition of Hazardous Materials, which did not include such an exemption, vested excessive discretion with PSCo, especially with regard to the tariff provisions relating to cessation of work, EAs, and clean corridors. Decision at ¶¶ 269, 271, 275, and 277.
>
> **Property (R51)**: Includes any property owned by customer and/or real property dedicated by customer to a governmental entity for public purposes

(but with respect to dedicated property only for three years following dedication unless an EA adjusts that time period). For governmental entities Property does not include public streets, highways or alleys (including any associated sidewalks, median strips and highway shoulders) owned in fee except when PSCo is providing utility service associated with the construction, operation, maintenance or improvement of a public street, highway or alley, or has been requested to provide such utility service by the governmental entity.

Work Area (R51): Includes any areas where work to extend, install, relocate, maintain and/or repair utility facilities occurs on the Property or Customer Controlled Property.

23. **Mandatory Disclosures (R52).** Upon PSCo's request, requires customers (except residential customers) to disclose to PSCo information concerning the presence of Hazardous Materials the customer knows or reasonably suspects to be present in the vicinity of the Work Area or that could be reasonably expected to impact the Work Area, and any other information that would help PSCo assess the risks of working in the area. If requested by the customer, PSCo agrees to treat such information as confidential (to the extent it is not publicly available) unless its disclosure is required by law or is ordered to be disclosed by the Commission or a court of law.

24. **Clean Corridor Requirement (R52).** Upon PSCo's request, requires the customer (except residential customers) to provide PSCo with utility corridors that are free of Hazardous Materials and/or to perform trenching/boring and backfill in utility corridors or alternate locations agreed to by PSCo and the customer. The customer will perform such work only if: (a) it requests to do so and PSCo agrees in writing; or (b) if PSCo determines that the presence of Hazardous Materials is of such a nature that performance of the work presents a risk to the environment or PSCo. In that event, PSCo will, upon the customer's written request, provide a general statement as to why it believes there is a risk.

25. **Management, Transportation and Disposal of Hazardous Materials (R53-R54).** Requires the customer (except residential customers): (a) to provide PSCo with an environmental professional to oversee and direct the disposal of Hazardous Materials in the event Hazardous Materials (except Company Materials) are suspected to exist or are encountered by PSCo; (b) to be responsible for the management, transportation, and/or disposal of any Hazardous Materials (except Company Materials) that PSCo may encounter; and (c) to reimburse PSCo for costs and expenses (including, among others, construction delay costs and lost profits) it might incur in connection with the management, transportation, and/or disposal of any Hazardous Materials (except Company Materials). These obligations apply whether or not the customer performs trenching/boring, backfill, or other utility service work.

26. **Cessation of All Work (R54-R55).** Allows PSCo to cease all activities related to the installation, relocation, maintenance or repair of its facilities in the event it encounters or disturbs any Hazardous Materials on Property, Customer Controlled Property, or any other property until the customer or other responsible party provides notice (in writing, if requested by PSCo) that the Hazardous Materials have been removed and/or disposed of. If PSCo stops work under this provision, it may resume work if the customer or other responsible party makes an alternate clean corridor and Work Area available.

27. **Environmental Indemnification for Property (R55-R56).** Requires customers (except residential or government entity customers) to indemnify, hold harmless, and defend PSCo and Company Parties (PSCo's directors, officers, partners, shareholders, members, managers, owners, agents, employees, guests, invitees, and representatives) from all civil claims and liabilities, including court costs and reasonable attorneys fees, for violations of

Environmental Laws arising out of or relating to: (a) the application, discharge, release, spill, handling, storage, or disposal of Hazardous Materials in, over, on, or under Property; (b) any off-site transportation and disposal of Hazardous Materials; and (c) the presence of any Hazardous Materials in, over, on, or under Property. The indemnity is effective even if PSCo's work activities causes, contributes to, or exacerbates the release of any Hazardous Materials. However, the indemnity does not apply in the case of Company Materials (but only to the extent of Company Materials) or for damages, costs, or expenses directly associated with PSCo's negligence or the intentional or willful misconduct of PSCo or Company Parties (but only to the extent of the divisible or allocable share directly attributed to such negligence or intentional or willful conduct). This section also provides that EAs may include indemnity provisions in favor of PSCo for Customer Controlled Property and that EAs with governmental entities are to be governed by the Governmental Entities section of the Environmental Tariffs (R59-R60).

28. The exclusion of governmental entities from the Environmental Indemnification for Property section was designed to address concerns raised by the Commission in Docket No. 09AL-299E that such a provision might "…lead to conflicts and litigation, as parties attempt to define the limits of whether governmental entities are permitted to indemnify [PSCo] in any particular situation." Decision at ¶ 287. Also, PSCo removed language from the tariff proposed in the prior proceeding that would have required the customer to bear the burden of proving PSCo's negligence or willful misconduct and, in addition, would have modified established legal principles relating to the standard of care used to determine negligence. Decision at ¶¶ 289-290.

29. **Environmental Release for Property (R56).** Requires all customers to release Company Parties from all civil claims and liabilities, including court costs and reasonable attorneys fees, for violations of Environmental Laws arising out of or relating to:

(a) the application, discharge, release, spill, handling, storage or disposal of Hazardous Materials in, over, on, or under Property; (b) any off-site transportation and disposal of Hazardous Materials; and (c) the presence of any Hazardous Materials in, over, on, or under Property. The release is effective even if PSCo's work activities causes, contributes to, or exacerbates the release of any Hazardous Materials. However, the release does not apply in the case of Company Materials (but only to the extent of Company Materials) or for damages, costs, or expenses directly associated with PSCo's negligence or the intentional or willful misconduct of PSCo or Company Parties (but only to the extent of such divisible or allocable share directly attributed to such negligence or intentional or willful misconduct).

30. **Environmental Release for Customer Controlled Property (R57).** Requires all customers to release Company Parties from all civil claims and liabilities, including court costs and reasonable attorneys fees, for violations of Environmental Laws arising out of or relating to: (a) the application, discharge, release, spill, handling, storage or disposal of Hazardous Materials in, over, on, or under Customer Controlled Property; (b) any off-site transportation and disposal of Hazardous Materials; and (c) the presence of any Hazardous Materials in, over, on, or under Customer Controlled Property. The release is effective even if PSCo's work activities causes, contributes to, or exacerbates the release of any Hazardous Materials. However, the release does not apply in the case of Company Materials (but only to the extent of Company Materials) or for damages, costs, or expenses directly associated with PSCo's negligence or the intentional or willful misconduct of PSCo or Company Parties (but only to the extent of such divisible or allocable share directly attributed to such negligence or intentional or willful misconduct).

31. **Environmental Agreement (R57-R59).** Allows PSCo to require that a customer (except residential and governmental entity customers) negotiate and enter into an EA in the event Hazardous Materials: (a) are known to exist in the vicinity of the Property or Customer Controlled Property; (b) are encountered by PSCo while performing work; and/or (c) are objectively and reasonably suspected to exist in the vicinity of the Property or Customer Controlled Property. If PSCo requires an EA pursuant to (c), it will provide the customer with information as to why it suspects Hazardous Materials exist in the subject area. If the customer disagrees with this assessment, PSCo will not require an EA if the customer can demonstrate that Hazardous Materials are not present or are no longer present in the area and that they are not expected to migrate into the area. Environmental Matters requirements addressed by the EA shall not directly conflict with the provisions of the Environmental Tariffs.

32. The Environmental Agreement section also allows PSCo to require that the EA contain financial assurances (guarantees, environmental liability insurance, etc.) from customers. The section provides that the scope and amount of such financial assurances will be based on site specific risks and that PSCo will work with the customer to evaluate these risks. However, in the event PSCo and the customer cannot agree on the amount and type of financial assurances, a $10 million (in 2010 dollars adjusted for inflation) ten-year term maximum default pollution legal liability insurance coverage amount will apply, provided such insurance exists in the insurance marketplace at the time the EA is executed. If PSCo reasonably believes that the $10 million default amount is inadequate, it may petition the Commission for a larger amount and will bear the burden of proving that the larger amount is reasonable.

33. The Environmental Tariffs do not incorporate by reference a “standard” EA. This change was designed to follow the guidance provided by the Commission in

Docket No. 09A-299E recommending that such an EA not be incorporated into a future environmental matters tariff proposal. Decision at ¶¶ 291-292. Similarly, the provision described in paragraph 31 above which allows a customer to potentially avoid entering into an EA (upon a showing that Hazardous Materials are not present or are no longer present in the area and that they are not expected to migrate into the area) is designed to satisfy guidance provided by the Commission. Decision at ¶ 272.

34. **Pre-Existing Environmental Agreements (R59)**. Provides that an agreement entered into between a customer and PSCo prior to December 1, 2010, addressing environmental liabilities and responsibilities may control over the provisions of the Environmental Tariffs at the customer's election subject to certain conditions. The environmental provisions of the pre-existing agreement must be contrary to the provisions of the Environmental Tariffs, must specifically address environmental liabilities and responsibilities for ongoing or planned future installation or relocation of utility facilities in the actual area PSCo will be working, and must apply to the Property or Customer Controlled Property. If these conditions are met and the customer does not elect to proceed under the pre-existing agreement, it may negotiate a new EA with PSCo. The amendment, assignment (if allowed by the agreement), or extension of a pre-existing agreement after December 1, 2010, will not render it a "new" agreement for purposes of the Environmental Tariffs. Inclusion of this section in the Environmental Tariffs was designed to follow guidance provided by the Commission in Docket No. 09AL-299E recommending that any future environmental matters tariff proposal contain language providing that such tariff "…does not replace, supersede or conflict with any existing agreements" and, further, that "…the proposal contain some guidance about what constitutes a pre-existing agreement." Decision at ¶ 283.

35. **Governmental Entities (R59-R60).** Provides that, to the extent a municipality is a customer requesting service from PSCo, a franchise agreement entered into between the municipality and PSCo prior to December 1, 2010, will control over the provisions of the Environmental Tariffs if there is a direct conflict between the franchise agreement and the Environmental Tariffs. Inclusion of this provision was, again, designed to follow the guidance provided by the Commission in Docket No. 09AL-299E relating to pre-existing agreements. Decision at ¶ 283. This section of the Environmental Tariffs also provides that PSCo and governmental entity customers may negotiate, on a case-by-case basis, whether an EA will be entered into and the provisions of any such EA including: (a) to the extent permitted by law, whether any indemnification in PSCo's favor will be included in the EA; and (b) whether financial assurances will be provided by the governmental entity. Presumably, this portion of the Governmental Entities section was included to incorporate PSCo's understanding of guidance provided by the Commission in Docket No. 09AL-299E regarding indemnification by governmental entities; *i.e.,* that future tariff proposals exclude such provisions but that PSCo "…would still be free to negotiate specific agreements with governmental entities to address environmental liability risks that may arise when governments are engaged with Public Service as customers." Decision at ¶ 288.[12]

36. **Dispute Resolution (R60).** In the event a dispute arises between the customer and PSCo regarding matters addressed by the Environmental Tariffs, either party may request that the dispute be resolved through an expedited, non-binding mediation process.

[12] PSCo interprets this language to mean that it and a governmental entity could negotiate an EA that contained an indemnity in PSCo's favor. Exhibit 1, p. 27; PSCo SOP at p. 5. However, certain Intervenors disagree with this interpretation. *See,* Denver SOP, at p. 37; Commerce City/IWPOC SOP at pp. 3-4. *See also,* Decision No. C10-0490, Docket No. 09AL-299E, mailed May 19, 2010, at ¶¶ 35-38.

Potential disputes mentioned in this section include the requirement to enter into an EA, the terms of an EA, the amount or type of any financial assurances, and the sufficiency of any customer demonstration. This section also sets out procedures and deadlines for the mediation process. In the event the dispute cannot be resolved through mediation, either party may seek resolution from the Commission or a court of law, as applicable. Inclusion of this section in the Environmental Tariffs is designed to implement another recommendation provided by the Commission in Docket No. 09AL-299E. Decision at ¶ 272.

IV. FINDINGS OF FACT

37. PSCo is a wholly owned subsidiary of Xcel Energy, Inc. It provides electric, gas, and steam utility services within Colorado pursuant to authority issued to it by the Commission. It performs 7,000 to 10,000 projects annually on customer owned and/or controlled property. Exhibit 3, p. 6; TR I, p. 49; TR II, p. 160.

38. PSCo's tariffs do not now contain provisions specifically relating to environmental matters. Currently, it relies on various approaches to address environmental risks and liabilities, ranging from its "Contingency List" form to environmental covenants. TR II, pp. 156. When requested to perform services on property with known environmental hazards it attempts to negotiate and enter into comprehensive EAs for the involved property. It entered into six such "complex" EAs in the 2009-2010 time period. TR III, p. 42-43. PSCo anticipates that it will enter into a like number of EAs in the future even if the Commission approves the Environmental Tariffs. TR III, p. 43. Legal fees incurred in connection with the negotiation and drafting of such EAs average about $26,000 each. Exhibit 3, pp. 6 and 18; Exhibit 13, TA-3; Exhibit 16, MG-3.

39. PSCo also enters into franchise, license, easement, and other agreements with various parties, some of which either contain environmental matters provisions or general indemnification/release provisions that could apply to environmental liability. The EAs and other agreements to which PSCo is or has been a party vary with regard to the assumption of responsibility for such liability. They sometimes require the party with whom PSCo is contracting to assume environmental liability, usually by agreeing to indemnify and/or release PSCo. Exhibit 2, JRS-5 and JRS-6; Exhibit 13, JRS-12 and JRS-13; Exhibit 20; Exhibit 23; Exhibit 46; Exhibit 51; and Exhibit 56. Others require PSCo to assume environmental liability, either by agreeing to indemnify and/or release the party with whom it is contracting or by agreeing to comply with all environmental laws. Exhibit 7, KM-1, KM-2, KM-3, and KM-4; Exhibit 13, TA-1 and TA-2; Exhibit 15A; Exhibit 21; Exhibit 25; Exhibit 44; Exhibit 52; Exhibit 53; Exhibit 54; and Exhibit 55.

40. PSCo sometimes encounters environmental contamination when providing service to its customers. Exhibit 4, pp. 8-9. From 1994 to 2005, 400 sites were cleaned up in Colorado under Colorado's Voluntary Cleanup Program (VCUP) and over the last five years another 100 sites have entered the VCUP. TR III, pp. 37-38; Exhibit 63.

41. In the past 16 years PSCo or other Xcel Energy operating companies have faced potential CERCLA liability for environmental cleanup costs ranging from $5,000 to $90 million. Exhibit 3, p. 6; Exhibit 16, MG-3. However, none of the examples of potential environmental liability cited by PSCO involve situations in which it was providing service on customer owned or controlled property. Exhibit 16, MG-5; TR II, p. 194-195. The potential $90 million environmental liability cited by PSCo relates to a CERCLA claim in Wisconsin against one of Xcel's operating companies, Northern States Power (NSP) on company-owned or

leased property. NSP does not conduct operations in Colorado. Exhibit 17, pp. 1-2; Exhibit 16, MG-3 and MG-5. Recently, PSCo entered into a highly confidential settlement agreement in an undisclosed amount to resolve potential threatened liability relating to the installation of electric facilities at a contaminated site. Exhibit 13, TA-2. With the exception of this confidential settlement, PSCo has not incurred any environmental liability resulting from its provision of service on customer owned or controlled property.

42. Defense costs for defending a CERCLA claim can potentially run into the $2.5 to $3 million range. TR I, p. 75; TR II, p. 110. However, within the past five years PSCo has not tendered a claim to an insurance carrier relating to environmental contamination arising from utility service it provided to a customer. Exhibit 13, TA-8. Similarly, within the last three years it has not been sued by a residential customer, the State of Colorado, or a Colorado local government involving the release of hazardous materials that occurred in connection with its provision of service to a customer on the customer's property, or for the off-site transportation and disposal of hazardous materials. Exhibit 11, SJE-1.

43. PSCo has an internal policy which allows it to immediately stop work on a project in the event of a "perceived imminent hazard" which would include encountering hazardous materials at a work site. Exhibit 59. This policy has generally been effective in protecting the safety of PSCo's workers. TR III, p. 34.

44. PSCo generally requires its contractors who perform trenching or backfilling work to release and/or indemnify it for environmental liability and to secure commercial general liability insurance covering this indemnity obligation. Exhibit 13, TA-7; Confidential Exhibit 60; TR II, pp. 201-205 (confidential).

45. PSCo does not specifically track internal transaction costs involving its efforts to resolve environmental liability issues for work performed on customer property. Exhibit 4, p. 12; Exhibit 13, TA-2 and TA-3; Exhibit 16, MG-3. Neither has it conducted a cost-benefit study to determine the transaction cost savings that might result from implementation of the Environmental Tariffs. TR III, p. 51-52. As a result, it does not know and cannot quantify the extent to which implementation of the Environmental Tariffs will result in reduced transaction costs. TR III, p. 51. PSCo has not yet determined whether it will attempt to track cost savings that might result from implementation of the Environmental Tariffs. TR III, p. 52-53. Similarly, PSCo has not conducted a statistical analysis attempting to quantify the manner in which adoption of the Environmental Tariffs might decrease its risk for environmental liability. TR III, p. 71.

46. Westminster has entered into a Franchise Agreement with PSCo which allows PSCo to access all Westminster's public rights-of-way as well as utility easements it owns. Exhibit 15, p. 7; Exhibit 15A. The Franchise Agreement requires PSCo to indemnify Westminster from any claims arising out of the grant of the franchise so long as the claim does not arise out of Westminster's negligent or intentional acts. *Id.* Westminster performs environmental due diligence prior to acquiring any new property and, as a result, has knowledge about environmental conditions on properties it owns. Exhibit 14, p. 4-5; TR III, p. 16; TR III, p. 179. PSCo has never encountered hazards on Westminster property for which environmental cleanup was required. TR III, p. 20. Nor has Westminster ever requested that PSCo pay for environmental cleanup in order to provide service to one of its facilities. Exhibit 14, p. 6.

47. Denver has entered into a Franchise Agreement, an Operating Agreement, a Street Lighting Agreement, and an Operating Agreement for Denver International Airport with PSCo.

Exhibit 7, KM-1, KM-2, KM-3, and KM-4. Each of these agreements provides that PSCo will comply with all environmental laws and will indemnify Denver from liability arising out of the agreement. Exhibit 7, p. 5. It is Denver's practice to clean up environmental contamination encountered on land it owns and in its rights-of-way. Exhibit 7, p. 5; Exhibit 8, p. 3-4; Exhibit 9, p 4; Exhibit 10, p. 5-8. In the last three years, PSCo has not been held responsible for any environmental clean-up in connection with any Denver projects. Exhibit 8, p. 5; Exhibit 10, p. 8. Denver provides sanitary sewer and storm water utility services to Denver customers. Exhibit 9, p. 4. As a utility provider, it generally requires its customers to assume environmental liability that arises from a customer's property. TR III, p. 169-170. Denver requires those doing work in its rights-of-way on non-Denver projects to secure a permit which requires the permit holder to address any environmental issues they encounter in the right-of-way. Exhibit 9, p. 6; Exhibit 10, p. 8-9. PSCo has not encountered any environmental contamination in Denver's rights-of-way in the last three years in connection with non-Denver projects. Exhibit 9, p. 6.

48. IWPOC has never encountered hazardous waste in connection with the installation of utility facilities on its property. Exhibit 12, p. 4.

49. Commerce City has entered into a Franchise Agreement with PSCo. Exhibit 13, TA-1. The Franchise Agreement requires that PSCo indemnify Commerce City from claims arising out of its operations within Commerce City. Exhibit 13, p. 30. Commerce City has also entered into other agreements with PSCo that include provisions relating to environmental liability. TR III, p. 201; Exhibit 13, TA-12. During the last 13 years PSCo has not encountered a potentially hazardous waste during excavation or trenching for utility installation or maintenance at a Commerce City project. Exhibit 13, p. 7-8.

V. LEGAL STANDARD

50. The Commission has the authority to "regulate all rates, charges, and tariffs of every public utility in this state" as well as the authority to "do all things, whether specifically designated in articles 1 to 7" [of title 40] that are "necessary or convenient in the exercise of such power." *See,* § 40-3-102, C.R.S. (Emphasis added). In this regard, the Commission has the authority to evaluate whether a utility's provision of service, which necessarily includes the terms of that service, is "adequate, efficient, just and reasonable." *See,* § 40-3-101, C.R.S.; Decision at ¶ 201. Under applicable law the proponent of a Commission's order bears the burden of proof. *See,* § 24-4-105(7), C.R.S.; 4 CCR 723-1-1500. Thus, in this proceeding, PSCo bears the burden of proving that the requested addition of the Environmental Tariffs to its electric, gas, and steam tariffs would be "just and reasonable" and would not be unjustly discriminatory.[13]

VI. DISCUSSION, FINDINGS, AND CONCLUSIONS

A. Summary.

51. According to PSCo, the Environmental Tariffs are designed to satisfy two primary needs. The first is to protect it and its ratepayers from incurring liability from pre-existing environmental contamination on customer-owned Property or Customer Controlled Property.

[13] A large part of the argument PSCo advances in support of its position relies on the guidance provided by the Commission in the Decision; *i.e.,* that PSCo's modification of its prior environmental tariff proposal should necessarily result in approval of the instant proposal or, at the very least, weigh heavily in favor of its approval. *See,* PSCo SOP at pp. 6-23. However, in the Decision the Commission was careful to state that its guidance should not be deemed a prejudgment of the issues surrounding a subsequent proposal. Decision at ¶ 266. *See also,* Decision No. C10-0490 at ¶ 28 ("…all such guidance was technically rendered *dicta* after the Commission rejected the proposal on the grounds that Public Service failed to meet its burden of proof"). Therefore, the fact that PSCo may have implemented some or all of the recommendations contained in the Decision does not, in and of itself, warrant approval of the Environmental Tariffs.

The second is to protect it, its employees, its contractors, and the general public from physical harms that may arise from exposure to pre-existing environmental contamination on property to which it has been asked to extend or maintain utility service. *See,* PSCo SOP at pp. 1-2. Having heard the evidence presented in this proceeding and having reviewed the arguments advanced by the parties, the ALJ finds and concludes that certain portions of the Environmental Tariffs do, in the absence of a written agreement between PSCo and its customer to the contrary, reasonably satisfy one or more of these needs and, as a result, their adoption is warranted; *i.e.*, their inclusion in PSCo's electric, gas, and steam tariffs would be just and reasonable. However, other portions of the Environmental Tariffs would not reasonably satisfy these needs, are not just and reasonable, and should not, therefore, be included in the subject tariffs.

B. Inclusion of Modified Mandatory Disclosures; Clean Corridors; Cessation of Work; and Related Definitional Provisions Into PSCo's Tariffs is Just, Reasonable, and is Not Unjustly Discriminatory.

52. The ALJ has concluded that inclusion of the proposed Mandatory Disclosures (R52), Clean Corridor (R52), Cessation of Work (R54), and related definitions provisions (R49-R51) into its electric, gas, and steam tariffs is warranted, subject to the condition that PSCo and the customer have not entered into a written agreement governing these matters. While PSCo has presented little evidence establishing that the safety of its workers or the general public has been impaired under existing company policies, it is reasonable to conclude that these provisions will assist in protecting from physical harm that may arise from human exposure to environmental contamination. Inclusion of the *de minimis* exception to the definition of Hazardous Materials narrows the scope of PSCo's discretion to invoke the requirements of these provisions regardless of the quantity or concentration of Hazardous Materials that might be present or whether the contamination presents any risk to human health or the environment.

This addresses a primary concern of the Commission in connection with PSCo's prior environmental matters tariff proposal. Decision at ¶¶ 269, 274, and 276.

53. Also, consistent with other findings contained in this decision, the ALJ has concluded that PSCo and its customers should be free to negotiate and agree to different terms and conditions relating to Mandatory Disclosure, Clean Corridor or Cessation of Work requirements if they so desire. Therefore, these portions of the Environmental Tariffs will be modified by including language making it clear that they will apply only in the absence of a written agreement between PSCo and its customer to the contrary.[14] The ALJ believes that this approach balances the Commission's recognition of the benefit of tariff uniformity while, at the same time, accommodating the complex and site-specific nature of environmental contamination issues. Decision at ¶¶ 262 and 266.

54. These provisions also, for the most part, adopt procedures that are already in use and, as a result, do not impose new or significantly onerous obligations on the PSCo customers to whom they apply. This generally stems from the recognition that, as between PSCo and the customer, the customer has superior knowledge about the presence of hazardous materials that might inhibit PSCo's ability to safely access property the customer owns or controls.[15]

[14] *See*, Appendices I, II, and II attached hereto.

[15] *See*, TR III, pp. 21-22 (Westminster has "a lot of information" about the environmental circumstances of property it owns); TR III, p. 180 (Denver has "extensive information" about environmental contamination on its property).

A number of government entity Intervenors already employ these practices and, as a result, do not object to their inclusion in the subject tariffs.[16]

55. As summarized more fully in paragraph 23 above, the Mandatory Disclosures provision would, upon PSCo's request and subject to confidentiality protections, require a customer to disclose information about the presence of contamination that it knows or suspects could impact the area where PSCo will perform work. The Commission has previously indicated that such a provision is reasonable and could serve the goal of improving worker safety. Decision at ¶ 257.

56. The ALJ disagrees with arguments advanced by certain Intervenors that compliance with the Mandatory Disclosures provision would be burdensome, that it is ambiguous and/or unnecessary, is too broad, or that the confidentiality obligation provides inadequate protection for customers. *See*, CEC SOP at pp. 7-8; Denver SOP at p. 25; Boulder SOP at p. 28. The provision does not require customers to engage in extensive investigations concerning what Hazardous Materials may be present in the Work Area, but only to disclose the presence of Hazardous Materials it actually knows about or **reasonably** suspects to be present. Neither does it require the customer to provide documentation in furtherance of such a disclosure. The provision clearly provides that, upon the customer's request, PSCo will maintain the confidentiality of non-public information unless disclosure is otherwise required by law. The ALJ is not convinced that the confidentiality obligation is too vague to be enforced or

[16] *See*, Exhibit 13, p. 8 (Commerce City agrees that PSCo should immediately stop work if it encounters hazardous materials while installing or maintaining utility facilities on its property); TR III, p. 12-13 (Boulder does not object to Mandatory Disclosures, Clean Corridor, and Cessation of Work provisions); TR III, p. 28 and p. 21 (Westminster does not object to Mandatory Disclosures and Cessation of Work provisions); TR III, p. 155 and p. 160 (Denver does not object to Cessation of Work, Mandatory Disclosures, or Clean Corridors provisions); TR III, pp. 180-181; TR III, pp. 188-189 (IWPOC does not object to Cessation of Work provision).

that PSCo could unreasonably delay work on a project pending further negotiation of a more comprehensive confidentiality agreement. Given the definition of Work Area (areas where work to extend, install, relocate, maintain, and/or repair utility facilities occurs on Property or Customer Controlled Property), the ALJ does not share Boulder's concern that the Mandatory Disclosures provision includes no limit on its applicability.

57. As summarized more fully in paragraph 24 above, the Clean Corridor provision would, upon PSCo's request, require a customer to provide PSCo with access to Property or Customer Controlled Property that is free of Hazardous Materials or; in the alternative, require the customer to perform the trenching/backfill work necessary for the installation of utility facilities on such property. As summarized more fully in paragraph 26 above, the Cessation of Work provision allows PSCo to immediately cease work on a project if it encounters hazardous materials. Again, the Commission has previously indicated that these provisions could address the stated goal of improving worker safety if PSCo's discretion to invoke them is tempered by a *de minimis* exception to the Hazardous Materials definition. Decision at ¶¶ 275 and 277. As indicated in paragraph 22 above, such an exception is now included in the Hazardous Materials definition.

58. The ALJ disagrees with arguments advanced by certain Intervenors that these two tariff provisions are unnecessary either because PSCo failed to show that it has been unable to protect the safety of its workers in the absence of such provisions, or because PSCo's existing "stop-work" policy already gives it the authority to cease work if it encounters Hazardous Materials. *See*, Exhibit 59; Commerce City/IWPOC SOP at pp. 13-14; CRC SOP at pp. 2-3; Denver SOP at p. 4; Westminster SOP at p. 12. Notwithstanding PSCo's apparent ability to protect the safety of its workers under its existing policies, there is no doubt that it will

continue to encounter contamination when performing services for its customers. Exhibit 4, pp. 8-9. As a result, the ALJ agrees with PSCo that it would be beneficial to include the Clean Corridor and Cessation of Work provisions in the subject tariffs so that when contamination is encountered both PSCo and its customers will know how contamination should be addressed and by which party. PSCo SOP at p. 25. Also, in light of the general recognition that PSCo already has the authority to stop work if it encounters Hazardous Materials, there appears to be no "downside" to including this policy in its tariffs.

59. The ALJ also disagrees with arguments advanced by Commerce City and IWPOC that the *de minimis* exception to the Hazardous Materials definition is subjective, vague, and grants PSCo inappropriate discretion to determine whether or when it is applicable. *See*, Commerce City/IWPOC SOP at pp. 38-39. The concern is twofold. First, that the first prong of the *de minimis* exception (that the customer demonstrate that the exception applies by providing "sufficient and applicable information" to PSCo that the presence of Hazardous Materials is not sufficient to trigger certain remedial requirements under Environmental Laws) leaves too much direction with PSCo to determine whether the information is, indeed, "sufficient and applicable." The ALJ agrees with PSCo that the customer is in the best position to demonstrate the presence or absence of contamination on the involved property since the customer generally has superior knowledge about, and access rights to, the same. *See*, PSCo SOP at pp. 7-8.

60. The second concern is that the second prong of the *de minimis* exception (that the customer demonstrate that the disturbance of any materials will not will not pose an imminent and substantial risk to human health or the environment) incorporates a term ("imminent and substantial risk") that is unknown and undefined under existing Environmental Laws. The ALJ also agrees with PSCo that use of this terminology is appropriate since, as testified to by

PSCo witness Staley, there are times when a government agency will make a site specific determination that a certain material poses a threat to public health even though no numeric standard or threshold in an environmental law or regulation has been exceeded. TR II, pp 221-222; PSCo SOP at p. 8.

61. Boulder, Westminster, Aurora, and Denver argue that that portion of the Property definition dealing with governmental entities is ambiguous and confusing. Boulder SOP at p. 27; Westminster/Aurora SOP at pp. 2-6; Denver SOP at pp. 22-24; TR II, pp. 16-18; TR III, pp. 121-124. The ALJ agrees and, as a result, will modify that portion of the Property definition in the manner proposed by Westminster and Aurora; *i.e.,* by excluding public rights-of-way, whether owned in fee or not, from the definition. *See,* Westminster/Aurora SOP at p. 6.

62. Various Intervenors have argued that the Environmental Tariffs are discriminatory and in violation of § 40-3-102, C.R.S., since they apply to some customer classes but not to others.[17] *See,* CEC SOP at pp. 10-12; CRC SOP at pp. 7-9; Exhibit 16 at pp. 12-16. While it is true that the Mandatory Disclosures and Clean Corridors provisions would apply to commercial and governmental entity customers but not to residential customers, the ALJ does not deem this to be "unjustly" discriminatory within the meaning of § 40-3-102, C.R.S. Applicable law does not prevent the Commission from making distinctions between and among customers and customer classes if such distinctions are reasonable. *See, Integrated Network Services, Inc. v. PUC,* 875 P.2d 1373, 1383 (Colo. 1994). Here, it is reasonable to exclude residential customers from the Mandatory Disclosures and Clean Corridors provisions given the superiority in knowledge commercial and government entity customers have over residential customers

[17] § 40-3-102, C.R.S. provides, in relevant part, that the Commission has the power and authority to prevent unjust discriminations and extortions in the rates, charges, and tariffs of public utilities.

concerning the presence of hazardous materials on or near their property. *See also,* Decision at ¶ 288 (wherein by recommending that any future PSCo environmental tariff proposal exclude governmental entities from the indemnification requirements the Commission implicitly sanctions the disparate treatment of commercial and governmental entity customers).

63. Westminster, Aurora, and Boulder contend that portions of the Environmental Tariffs conflict with the terms of a Partial Stipulation and Settlement Agreement entered into between PSCo and a number of governmental entities in Docket No. 05A-288E (Settlement Agreement).[18] *See,* Westminster/Aurora SOP at p. 16; Boulder SOP at pp. 21-23. Specifically, these Intervenors contend that paragraph 4 of the Settlement Agreement requires PSCo to address the following issues within the context of franchise agreement negotiations and in franchise agreements: (a) terms and conditions governing relocation of PSCo facilities in municipal rights-of-way; (b) terms and conditions governing the conversion of overhead facilities to underground; and (c) terms and conditions governing installation of new or modified utility service for municipal projects.[19] They submit that, among others, the Mandatory Disclosures, Clean Corridor, and Cessation of Work provisions include "terms and conditions" addressed by paragraph 4. As a result, they further submit that including these provisions in PSCo's tariffs would: (a) negate their ability to negotiate these terms and conditions within franchise agreements; and (b) constitute a violation of the Settlement Agreement and the Commission's order approving it. PSCo did not address this argument at hearing or in its SOP.

[18] Docket No. 05A-288E involved an application by PSCo to implement an electric quality of service monitoring and reporting plan for 2007 through 2010. Of the 16 governmental entities who are parties to the Settlement Agreement, four (Westminster, Aurora, Boulder, and Arvada) are intervenors in this proceeding.

[19] The Settlement Agreement was approved by the Commission in Decision No. C06-1303, Docket No. 05A-288E, mailed November 6, 2006. The Settlement Agreement terminated on December 31, 2010, except as to the commitments of PSCo contained in paragraph 4.

64. The ALJ does not agree that the Settlement Agreement precludes the Commission from approving a tariff which has broader applicability (*i.e.,* to governmental entities that are not parties to the Settlement Agreement) or that these tariff provisions necessarily "trump" the terms of the Settlement Agreement. The concerns posed by Westminster, Aurora, and Boulder are specific to the parties to the Settlement Agreement and are not ripe for determination here. Parties to the Settlement Agreement may choose to raise these issues in a subsequent proceeding if they believe that PSCo's actions to impose the Mandatory Disclosures, Clean Corridor, and Cessation of Work provisions on them constitutes a breach of the Settlement Agreement.

C. Inclusion of the Management, Transportation and Disposal of Hazardous Materials; Environmental Indemnification for Property; Environmental Release for Property; Environmental Release for Customer Controlled Property; Environmental Agreement; Pre-Existing Environmental Agreements; Governmental Entities; Dispute Resolution; and Certain Definitional Provisions Into PSCo's Tariffs is Not Just and Reasonable.

65. The ALJ agrees with Intervenors that PSCo has failed to provide adequate justification for including the Management, Transportation and Disposal of Hazardous Materials (R53-R54), Environmental Indemnification for Property (R55-R56), Environmental Release for Property (R56), Environmental Release for Customer Controlled Property (R57), Environmental Agreement (R57-R58), Pre-Existing Environmental Agreements (R59), Governmental Entities (R59-R60), and Dispute Resolution (R60) provisions into its tariffs.[20] In general, the ALJ believes that these provisions do not deal with subjects that lend themselves to uniform applicability among PSCo's customers and should continue to be dealt with on a case-by-case basis. Therefore, including these provisions in PSCo's tariffs would not be just and reasonable.

[20] The exclusion of these provisions from the Environmental Tariffs results in: (a) the deletion of certain definitions that are no longer needed to interpret these provisions; and (b) the modification of the certain definitions and the introductory paragraph to the Environmental Matters section of the tariffs. *See,* Appendices I, II, and III attached hereto.

66. The record does not support PSCo's contention that these tariff provisions are needed; *i.e.,* that its existing approach of managing the risk of environmental liability through the negotiation of site-specific EAs with its customers is inadequate or creates undue administrative or financial burdens. Despite PSCo's contentions to the contrary, the evidence establishes that it has not incurred significant costs relating to pre-existing site contamination as a result of providing service on Property or Customer Controlled Property. Although CERCLA has been in effect for approximately 30 years, with the exception of one confidential settlement, PSCo has never incurred CERCLA liability for extending service to a contaminated site. TR II, p. 195; CRC SOP at pp. 3-6; CEC SOP at pp. 4-5; Denver SOP at pp. 3-6. Therefore, none of the actual or potential CERCLA-related liabilities cited by PSCo would have been covered by the Environmental Tariffs. *See*, paragraph 41 above. No evidence was presented indicating that PSCo expects an increase in its future exposure to environmental liability from providing service to its customers. Indeed, the evidence suggests that such exposure within Colorado may be less in the future as a result in the apparent decrease in the development of Brownfield sites. *See*, paragraph 40 above.

67. Similarly, the evidence does not support PSCo's claim that inclusion of these provisions in its tariffs will materially lower the transaction costs it incurs in addressing environmental issues; *i.e.,* the purported need to avoid site-specific EA negotiations. The evidence establishes that transaction costs incurred in connection with such negotiations have not been significant; about $26,000 each for an average of three EAs per year. More importantly, PSCo does not anticipate that the number of EAs it will need to negotiate in the future will vary even if the Environmental Tariffs are approved. *See,* paragraph 38 above.

It follows, therefore, that adoption of the Environmental Tariffs will not result in significant savings in transaction costs.

68. It is undisputed that the Management, Transportation and Disposal of Hazardous Materials, Environmental Indemnification for Property, Environmental Release for Property, and Environmental Release for Customer Controlled Property provisions serve to automatically shift liability for non-*de minimis* environmental contamination encountered by PSCo in the course of provisioning or extending utility service to its customers. This is true regardless of whether PSCo causes, contributes to, or exacerbates the contamination or whether the contamination was previously unknown to the customer. As such, in addition to shifting the risk for environmental liability to PSCo's customers, these provisions would alter the current CERCLA liability framework by, among other things, denying PSCo's customers the right to bring contribution claims against PSCo[21] and potentially negating defenses customers might otherwise have under CERCLA.[22]

69. PSCo contends that such automatic "risk-shifting" is warranted since, as a matter of policy, individual customers, and not PSCo or its ratepayers, should be responsible for environmental costs arising from PSCo's performance of work on Property or Customer Controlled Property. PSCo SOP at pp. 27-28; Exhibit 1, p. 61 and pp. 44-45. In support of this contention, PSCo submits that including the Environmental Tariffs in its tariffs is supported by "common commercial practice" since, in its opinion, they are generally similar to or the same as

[21] 42 U.S.C. § 9607(a)(4)(B) provides CERCLA defendants with the right to seek contribution from others for the same release or threat of release and instructs courts to allocate responsibility among the jointly and severally liable parties in an equitable manner by applying so-called "Gore factors." *See,* CRC SOP at p. 34, footnote 117.

[22] The ALJ finds the testimony provided by Professor Johnson and Mr. Pouncey on this point convincing. *See,* Exhibit 5; Exhibit 6; and TR II, p. 117. *See also,* CRC SOP at p. 33, footnotes 113 and 114. PSCo's witness, James Spaanstra, disagrees that the Environmental Tariffs would potentially negate certain CERCLA defenses. *See,* Exhibit 1 at pp. 49-53; Exhibit 2, pp. 32-34.

those contained in private contracts. Exhibit 1, pp. 35-36; Exhibit 2, pp. 30 and 37. Similarly, PSCo submits that including such provisions in its tariffs is warranted since, again in its opinion, a number of other regulatory agencies throughout the country have authorized other utilities to include similar provisions in their tariffs. Exhibit 2, pp. 41-48.

70. However, the evidence presented at hearing belies these contentions. The many agreements admitted into the record establish that negotiations concerning environmental liability matters result in many variations concerning risk allocation depending on the unique circumstances of each individual site or, in some instances, the bargaining position of the parties. *See,* paragraph 39 above; Exhibits 22, 24, 26, 27, 45, 47, 48, and 49; and CRC SOP at pp. 9-15. Similarly, a review of the many tariffs admitted into the record establish that no other regulatory agency has heretofore authorized inclusion of the type of comprehensive environmental matters provisions into utility tariffs as are proposed here. *See,* Exhibits 28 through 34, 36 through 39; CRC SOP at pp. 15-28; TR I. pp. 134-175.[23] This is consistent with the Commission's findings in connection with PSCo's prior environmental tariff proposal. Decision at ¶ 259.

71. The Commission and this ALJ have previously held that there is no legal impediment to including the above-described risk-shifting provisions in PSCo's tariffs so long as they are "just and reasonable." Decision at ¶¶ 183-187 (since a tariff is more akin to a contract than a statute, it is consistent with regulatory principles for the Commission to "stand in the shoes" of utility customers in effectively negotiating the terms of a tariff on their behalf);

[23] *See also,* Exhibit 16 at pp. 10-12 wherein, after reviewing 75 other investor-owned utility tariffs in 21 western states, CRC witness Mark Garrett concludes that none of these tariffs contain environmental matters provisions substantially similar to those proposed by PSCo in this proceeding. A copy of Mr. Garrett's tariff survey is attached to Exhibit 16 as MG-2.

Decision No. R11-0413-I at ¶¶ 14-18. However, applying this principle to the provisions in question requires the Commission to assume that all PSCo's customers to whom they would apply are "similarly situated" regarding environmental matters and, therefore, should be subject to an identical risk allocation scheme. As indicated previously, the evidence establishes that this is not the case.

72. While some of the Environmental Tariffs provisions are suitable for uniform application (*i.e.,* the mandatory disclosures, clean corridor, and cessation of work provisions discussed above), the risk-shifting provisions are not. If not unlawful, the ALJ believes it is unwise for the Commission to adopt a policy that allows for the automatic shifting of what could be significant environmental liabilities from one party to another through tariff provisions that have universal and rigid applicability.[24] Given the variety of environmental circumstances that could apply in any particular situation, the better practice, in this ALJ's opinion, is to allow parties to continue their practice of negotiating individual EAs that, if the parties deem applicable or desirable, include site specific environmental risk allocation provisions.

73. In addition, the ALJ is not convinced that existing environmental laws are insufficient to equitably address environmental liability issues between PSCo and its customers and/or that PSCo faces significant CERCLA liability. Under CERCLA it is true that PSCo could potentially be held strictly liable for environmental cleanup costs on a joint and several basis even if it is not at fault for contamination at a particular site. *See, United States v. Colorado & Eastern R.R. Co,* 50 F.3d 1530, 1535 (10th Cir. 1995). However, it would then have the right to

[24] In this regard, the ALJ finds persuasive the argument that it may not be desirable to incorporate environmental liability terms into a tariff since the changing nature of such terms would require the utility to frequently engage in the rather cumbersome process of petitioning the Commission for modification of its tariff. *See,* TR I, pp. 47-48; Commerce City/IWPOC SOP at p. 10.

seek contribution from any other potentially responsible party. *See,* 42 U.S.C. § 9607(a)(4)(B). Therefore, if PSCo can establish a basis for apportioning harm at a particular site, it is only responsible under CERCLA for site remediation costs attributable to its harm. *See, Burlington N. & Santa Fe R. Co. v. U.S.,* 129 S. Ct. 1870 (2009). As a result, the ALJ agrees with the conclusions reached by the Commission in connection with PSCo's prior environmental tariff which questioned whether the proposed risk-shifting provisions of the Environmental Tariffs are in proportion to the level of risk PSCo seeks to avoid. Decision at ¶ 258.

74. PSCo contends that adoption of the Environmental Tariffs will not necessarily preclude individually negotiated EAs and, indeed, specifically allows this to occur. *See,* R57-R60. However, for commercial customers the Environmental Agreement provision gives PSCo discretion to determine whether an EA will be entered into, whether financial assurances will be required and, ultimately, the amount of such financial assurances.[25] For governmental entities, negotiation of an EA is permissive.[26] In either case, however, the terms of the EA may not conflict with any other provision of the Environmental Tariffs.[27] In addition, virtually all the substantive terms of the standard environmental agreement PSCo sought to incorporate into the tariff it proposed in Docket No. 09AL-299E are now incorporated into the Environmental Tariffs. TR II, pp. 225-233. The ALJ agrees with Intervenors that these provisions give PSCo too much discretion to determine whether an EA will be entered into and what the terms of an EA will be. *See,* Denver SOP at pp. 31-37; CRC SOP at pp. 28-30.

[25] *See,* R57-R58 (PSCo may "require" that a customer negotiate and enter into an EA; PSCo may "require" customers to provide financial assurances; and, if the amount of financial assurances cannot be agreed to, a default amount will apply).

[26] *See,* R60 (PSCo and a governmental entity customer "may" negotiate an EA).

[27] *See,* R59 (To the extent an EA addresses any Environmental Matters requirements, those provisions of such EA shall not directly conflict with any requirements that are set forth herein).

This effectively renders EA negotiations illusory and does not comport with the Commission's expressed desire that flexibility be maintained in connection with the terms of EAs. Decision at ¶ 292.

75. The ALJ also agrees with the arguments of certain Intervenors that many of the terms or processes included in the Environmental Tariffs may produce undesirable unintended consequences. For example, since the indemnity and release provisions require certain customers to automatically indemnity and/or release PSCo for environmental liability, they may have little incentive not to seek a different result through the non-binding mediation process outlined in the Dispute Resolution provision (R60). Also, notwithstanding the requirement that mediation be "expedited," the process resulting from the inability to reach agreement through mediation could potentially be time consuming and result in significant transaction costs. In addition, there is a possibility that PSCo could refuse or delay providing service pending resolution of a dispute that could not be successfully mediated. *See,* TR I, pp. 221-222; TR II, pp. 9-10.

76. In addition, the ALJ shares the concerns of CEC that, if adopted, the Dispute Resolution provision may ultimately require the Commission to resolve issues that are outside the areas of its expertise and that may already be overseen by other regulatory agencies.[28] *See,* CEC SOP at pp. 8-10. This may necessitate the retention of additional Commission Staff to resolve disputes involving environmental matters. This is especially true

[28] R60 (If unable to reach agreement through mediation, the customer or PSCo may seek resolution under existing law <u>from the Commission</u> or from a court of law, as applicable). (Emphasis added).

if other utilities follow PSCo's lead by incorporating similar environmental matters provisions into their tariffs. While the Commission has generally expressed a desire that any environmental tariff proposal presented by PSCo contain a dispute resolution mechanism, it is doubtful that it contemplated such a mechanism would require it to be the ultimate arbiter of environmental disputes. Decision at ¶ 272 (disputes should be resolved by "an independent party").

77. In addition to the infirmity relating to the definition of Property (R51) discussed in paragraph 61 above, the ALJ also agrees with the arguments of certain Intervenors that a number of other terms included in the Environmental Tariffs are unclear or ambiguous and, as a result, may need to be litigated in order to fully define the rights and obligations of PSCo and its customers. For example, it is unclear what constitutes a "private" agreement that "specifically addresses environmental liabilities and responsibilities" for purposes of determining whether such an agreement constitutes a "Pre-existing Environmental Agreement" (R59). *See*, TR II, pp. 12-13; TR III, pp. 102-106; TR III, pp. 86-87. There is also confusion regarding what: (a) constitutes a "direct conflict" between an EA and the provisions of the Environmental Tariffs for purposes of determining which environmental provision will apply under the Environmental Agreement (R57-R59) provision; (b) constitutes a "direct conflict" between a franchise agreement entered into before December 1, 2010, and the Environmental Tariffs for purposes of determining which provision will apply under the Governmental Entities (R59-R60) provision; and, (c) whether the "direct conflict" term is synonymous with the "contrary to" term used in the Pre-Existing Environmental Agreements (R59) provision. *See*, TR II, pp. 10-14; TR II, pp. 48-51; TR II, pp 236-238; TR III, pp. 27-28; TR III, pp. 101-103; TR III, pp. 106-107.

78. The governmental entity Intervenors argue that they should be excluded from the requirements of the Environmental Tariffs on the ground that they violate various provisions of

the Colorado or U. S. Constitutions or other provisions of law relating to governmental entities. *See*, Denver SOP at pp. 7-17; Boulder SOP at pp. 14-21. Most of these arguments target those provisions of the Environmental Tariffs that shift environmental liability away from PSCo to its customers or have the potential for imposing other financial obligations on governmental entities; *i.e.*, the Management, Transportation and Disposal of Hazardous Materials, Environmental Release for Property, or the Environmental Release for Customer Controlled Property provisions. By this decision the ALJ has found and concluded that these provisions are not "just and reasonable" and should not be included in PSCo's tariffs. This effectively satisfies the underlying rationale for these arguments. In addition, and as indicated in paragraph 54 above, most of the governmental entities have indicated that they do not object to those provisions found by the ALJ to be "just and reasonable" (the Mandatory Disclosures, Clean Corridors, and Cessation of Work provisions). This indicates, by implication at least, that the governmental entity Intervenors do not believe that the inclusion of these provisions in PSCo's tariffs would impermissibly violate the constitutional and other provisions of law cited in their SOPs.

79. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

VII. ORDER

A. The Commission Orders That:

1. Those portions of the tariff sheets filed by Public Service Company of Colorado relating to Advice Letter No. 1576-Electric, as modified by this Recommended Decision and as more fully set forth on Appendix I attached hereto, are approved.

2. Those portions of the tariff sheets filed by Public Service Company of Colorado relating to Advice Letter No. 1576-Electric not approved by this Recommended Decision are permanently suspended.

3. Those portions of the tariff sheets filed by Public Service Company of Colorado relating to Advice Letter No. 790-Gas, as modified by this Recommended Decision and as more fully set forth on Appendix II attached hereto, are approved.

4. Those portions of the tariff sheets filed by Public Service Company of Colorado relating to Advice Letter No. 790-Gas not approved by this Recommended Decision are permanently suspended.

5. Those portions of the tariff sheets filed by Public Service Company of Colorado relating to Advice Letter No. 114-Steam, as modified by this Recommended Decision and as more fully set forth on Appendix III attached hereto, are approved.

6. Those portions of the tariff sheets filed by Public Service Company of Colorado relating to Advice Letter No. 114-Steam not approved by this Recommended Decision are permanently suspended.

7. Public Service Company of Colorado shall file, on not less than ten days' notice, tariffs consistent with this Recommended Decision.

8. 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.

9. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) 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.

b) If a party seeks to amend, modify, annul, or reverse basic findings 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

DALE E. ISLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director