

Decision No. R14-0369

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 13F-0110EG

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A-QUARTER CIRCLE LAZY FIVE RANCH, LLC, AKA ABEYTA RANCHES;  
ALPHONZO A. ABEYTA, PARTNER; ANDREW A. ABEYTA, PARTNER;  
MARTHA ABEYTA, PARTNER; AND LORIANN ABEYTA, PARTNER,

COMPLAINANTS,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

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**RECOMMENDED DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MANA L. JENNINGS-FADER  
DENYING AMENDED COMPLAINT AND  
SHORTENING RESPONSE TIME TO EXCEPTIONS**

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Mailed Date: April 9, 2014

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**I. STATEMENT**

1. On February 13, 2013, A-Quarter Circle Lazy Five Ranch, LLC (Ranch), Alfonzo A. Abeyta, Andrew A. Abeyta, Martha Abeyta, and Loriann Abeyta (collectively, Complainants)<sup>1</sup> filed a formal Complaint against Public Service Company of Colorado (Public Service, Company, PSCo, or Respondent). That filing commenced this Proceeding.

2. Complainants and Respondent, collectively, are the Parties.

3. On February 20, 2013, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ).

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<sup>1</sup> Unless the context indicates otherwise, reference in this Decision to the Ranch includes both the Complainant Ranch and the individual Complainants who are partners in Complainant Ranch.

4. On February 27, 2013, the Commission issued its Order to Satisfy or Answer to Respondent.

5. On March 19, 2013, the Company filed its Answer in which Public Service asked that the Complaint be denied. That filing put this case at issue.

6. The Commission issued its Order Setting Hearing and Notice of Hearing. On February 27, 2013, by Decision No. R13-0259-I, the ALJ vacated that hearing date.

7. On April 23, 2013, by Decision No. R13-0476-I, the ALJ scheduled the evidentiary hearing in this matter for August 1 and 2, 2013 and established the procedural schedule.

8. On May 3, 2013, and in accordance with the established procedural schedule, the Ranch filed an Amended Complaint. The Amended Complaint superseded in its entirety the February 13, 2013 Complaint.

9. On May 17, 2013, and in accordance with the established procedural schedule, Public Service filed an Answer to Amended Complaint.

10. On August 1, 2013, at the time and place scheduled, the ALJ called this matter for hearing and heard testimony. The Parties were present, were represented by legal counsel, and participated. Due to illness, the ALJ vacated the August 2, 2013 hearing date.

11. On August 30, 2013, by Decision No. R13-1088-I, the ALJ scheduled two days of evidentiary hearing for October 29 and 30, 2013.

12. On October 29, 2013, at the time and place scheduled, the ALJ called this matter for continuation of the evidentiary hearing. The Parties were present, were represented by legal counsel, and participated.

13. The evidentiary record consists of the oral testimony and the exhibits admitted during the three-day evidentiary hearing.<sup>2</sup> The ALJ heard the testimony of five witnesses. The Ranch presented three witnesses: Messrs. Alphonzo A. Abeyta and Alphonzo R. Dupont and Dr. John A. Palmer. Respondent presented two witnesses: Messrs. Terry L. Hamm and Brad L. Meininger.

14. Forty-two documents were marked as exhibits for identification. Of these, the following were admitted into evidence: Hearing Exhibits No. 1 through No. 6, No. 8, No. 13,<sup>3</sup> No. 16 through No. 26, No. 30, No. 31, No. 34, and No. 38 through No. 42.<sup>4</sup>

15. At the conclusion of the hearing, the evidentiary record was closed. The ALJ took the matter under advisement.

16. The Parties filed post-hearing statements of position, to which no response was permitted.

17. The events that led to the filing of the Amended Complaint concluded on May 23, 2012. For ease of understanding, this Decision is written in the present tense and, unless the context indicates otherwise, does not discuss events that occurred after May 23, 2012. Unless the context indicates otherwise, the discussion in this Decision pertains to events that occurred not later than May 23, 2012.

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<sup>2</sup> A transcript of each day of the evidentiary hearing is filed in this Proceeding. Citation to the hearing transcript is date at page number:line number. Thus, for example, citation to the August 29, 2013 transcript at page 1, line 4 is: Aug. 29 tr. at 1:4.

<sup>3</sup> This Hearing Exhibit was admitted for a limited purpose.

<sup>4</sup> Exhibits marked for identification No. 7, No. 9, No. 15, No. 28, No. 29, No. 32, No. 33, and No. 35 through No. 37 were offered but were not admitted. Exhibits marked for identification No. 10 through No. 12 and No. 14 were not offered, and the exhibit marked for identification No. 27 was withdrawn.

18. In accordance with, and pursuant to, § 40-6-109, C.R.S., the ALJ transmits to the Commission the record of this Proceeding together with a written recommended decision.

**II. MATTERS NOT AT ISSUE**

19. The following are not at issue in this Proceeding.

**A. Claims for Relief.**

20. The Amended Complaint filed on May 3, 2013 contains two claims for relief.

Each is discussed below.

**1. First Claim for Relief (Negligence).**

**a. Scope of First Claim for Relief.**

21. The First Claim for Relief rests on the assertion that Public Service negligently failed to maintain its power lines. This claim has two bases: (a) the Company's failure to remove a tree branch that overhung the overhead electric distribution line that provided power to the Ranch's irrigation system (Amended Complaint at ¶ 16); and (b) the Company's "failure to have properly tested, installed, and maintained the safety systems and protection measures and devices" described in the Amended Complaint (*id.*).

22. Three times during the course of this Proceeding, Ranch's counsel limited the scope of this Proceeding to the first issue (*i.e.*, vegetation management).

23. During the course of the evidentiary hearing, counsel for the Ranch stated: "[o]ur complaint ... is that there was lack of vegetation management with respect to the subject tree on County Road 18." Oct. 29 tr. at 76:13-15. This statement is the first time Ranch's counsel limits

the Amended Complaint to the allegation that the Company failed to remove the overhanging tree branch and that this failure violated Commission rules.<sup>5</sup>

24. During the course of the evidentiary hearing, counsel for Public Service asked her witness the following question: “Can you please briefly explain how [PSCo’s] electrical system is designed to respond to faults created by a broken power line?” Oct. 30 tr. at 97:1-3. Counsel for the Ranch objected to the

line of questioning and the answer that has been given. My understanding of this entire proceeding is that the sole issue before this Hearing Officer, before this Tribunal, is whether or not there has been a violation of PUC rules or regulations.

And in that respect, we have been talking about the National Electrical Safety Code. We have been talking about the vegetation management code.

*But, it all boils down to the fact that we are talking about: Has there been a violation of a PUC rule[] or regulation[] with respect to vegetation management?*

Now, we are getting into *engineering data*, Your Honor, *which I do not believe is the subject matter of this hearing*. So this type of questioning or answers have no relevancy as to the issue before the Court.

*Id.* at 97:11-98:5 (emphasis supplied). This statement is the second time that Ranch’s counsel limits the Amended Complaint to the allegation that the Company failed to remove the overhanging tree branch and that this failure violated Commission rules.

25. Each of these statements is a judicial admission, which is

a formal, deliberate declaration which a party or his attorney makes in a judicial proceeding for the purpose of dispensing with proof of formal matters or of facts about which there is no real dispute. ... Judicial admissions are conclusive on the party making them ... and generally continue to have effect for a subsequent part of the same proceedings. ... Such admissions need not be written when made in court, nor must they be made by a party as his counsel is impliedly authorized to make them. ... Generally, any fact whatever may be the subject of a judicial

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<sup>5</sup> This is discussed in detail *infra*.

admission, and *parties may stipulate away valuable rights*, provided the court is not required to abrogate inviolate rules of public policy.

*Kempter v. Hurd*, 713 P.2d 1274, 1279 (Colo. 1986) (emphasis supplied) (internal citations omitted). Judicial admissions may be made in memoranda of law, in legal briefs, and in oral argument. *See generally Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1213, 1216 (Colo. App. 2008) and cases cited there (same).

26. In this Proceeding, Ranch’s counsel made the quoted statements for the purpose of dispensing with proof of a portion of the claims asserted in the First Claim for Relief; made the statements during a formal proceeding; made the statements unequivocally; made the statements in the course of his representation of the Ranch; and, in so doing, stipulated away or waived the valuable right to present evidence on that portion of the First Claim for Relief. The Ranch may stipulate away or waive its right to present this evidence as doing so falls within its right to determine the scope of the Amended Complaint and does not implicate or abrogate important public policies.

27. In its Statement of Position (Ranch SOP), the Ranch asks the Commission “to find that Respondent ... failed to perform required vegetation management along its power lines in violation of a PUC regulation and as required by the *National Electrical Safety Code*[.]” Ranch SOP at 1 (italics in original). The Ranch limited its factual and legal arguments to this assertion and, in so doing, establishes that, in this Proceeding, it has abandoned the claim that the Company failed “to have properly tested, installed, and maintained the safety systems and protection measures and devices” described in the Amended Complaint (Amended Complaint at ¶ 16). This is the third time that Ranch’s counsel limits the issues in this Proceeding.

28. The scope of the First Claim for Relief is limited to vegetation management. By the three actions discussed above and for purposes of this Proceeding, the Ranch withdrew or waived the remainder of the stated bases for the First Claim for Relief.

29. Despite the Ranch's objection and the now-clear fact that Ranch's counsel limited the scope of the Amended Complaint -- and, thus, this Proceeding -- by his oral statements on October 29 and 30, 2013, the ALJ permitted Public Service to provide testimony and to introduce documents in response to the claim that the Company failed "to have properly tested, installed, and maintained the safety systems and protection measures and devices" described in the Amended Complaint (Amended Complaint at ¶ 16). *See generally* testimony of PSCo witness Meininger (Oct. 30 tr. at 83-138) and Hearing Exhibits No. 39 through No. 42. In doing so, the ALJ erroneously admitted irrelevant evidence. The ALJ has corrected that error, however, by disregarding all testimonial evidence and all documentary evidence that discuss or address whether the Company properly "tested, installed, and maintained the safety systems and protection measures and devices" described in the Amended Complaint (*id.*). In arriving at her decision in this Proceeding and as discussed below, the ALJ considered and relied on only the evidence pertaining to the issue of PSCo's vegetation management.

**b. Negligence.**

30. The Ranch characterizes the First Claim for Relief as "Respondent's *Negligent Failure to Maintain Its Main Power Lines*" (Amended Complaint at 2) (emphasis supplied). Negligence is a tort law concept. For the reasons discussed *infra* with respect to the Second Claim for Relief, the Commission has the jurisdiction to determine whether the Company complied with applicable law, applicable Commission rules and orders, and the applicable tariffs. The Commission does not have the jurisdiction to determine whether the Company performed its

vegetation management in a negligent manner, as used in tort law. Thus, the question of negligence is not an issue in this Proceeding.

## 2. Second Claim for Relief (Breach of Contract).

31. The Second Claim for Relief is a claim for breach of contract. For the following reasons, the Commission lacks subject matter jurisdiction to hear this claim for relief.

32. With respect to determining subject matter jurisdiction, Colorado courts have provided this guidance:

Subject matter jurisdiction is defined as [the Commission's] power to resolve a dispute in which it renders judgment. ... [The Commission] has subject matter jurisdiction if the case is one of the type of cases that the [Commission] has been empowered to entertain by the sovereign from which the [Commission] derives its authority. ... Whether [the Commission] possesses such jurisdiction is generally only dependent on the nature of the claim and the relief sought. ... It is the facts alleged and the relief requested that decide the substance of a claim, which in turn is determinative of the existence of subject matter jurisdiction.

*Brown v. Silvern*, 141 P.3d 871, 873 (Colo. App. 2005) (internal quotations and citations omitted).

33. The Commission derives its authority from article XXV of the Colorado Constitution<sup>6</sup> and, with respect to the electric utility service at issue here, from the Public Utilities Law.<sup>7</sup> The Commission is an administrative agency whose function is to regulate public utilities within the parameters established by the Colorado Constitution and the Public Utilities Law. *Colorado Office of Consumer Counsel v. Mountain States Telephone and Telegraph Company*, 816 P.2d 278, 283 (Colo. 1991); *City of Montrose v. Public Utilities Commission*,

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<sup>6</sup> As relevant, that article vests in the Commission “all power to regulate the facilities, service and rates and charges therefor, ... of every corporation ... operating with the State of Colorado ... as a public utility[.]”

<sup>7</sup> The Public Utilities Law is articles 1 through 7 of title 40, C.R.S.

629 P.2d 619, 622 (Colo. 1981). The Commission is aware that its jurisdiction is circumscribed by the Constitution and statute and, in that regard, has held that,

[t]o the extent the complaint raises non-regulatory issues ... (*i.e.*, issues unrelated to the rates, terms, and conditions of [the utility service at issue]), such as Complainant's alleged denial of access to his attorney, Respondents' alleged failure to comply with rules of penal discipline, and [issues under] the Colorado Consumer Protection Act, the Commission does not possess jurisdiction over those claims[.]

Decision No. C03-0801 at ¶ 4.<sup>8</sup>

34. The Commission is not the functional equivalent of a Colorado Constitution article III court, which has general jurisdiction over common law claims and which may award equitable and legal remedies, including monetary damages. *See, e.g., Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986) (powers of article III courts and of statutory courts). The Colorado Supreme Court has held consistently that the Commission does not possess general jurisdiction,<sup>9</sup> that the Commission may not entertain tort and other common law claims,<sup>10</sup> and that the Commission may not create remedies which are not authorized by statute.<sup>11</sup> Thus, there is a clear point of demarcation between the jurisdiction of the Commission and that of the article III courts.

35. The Second Claim for Relief is based in contract law. One party to the alleged contract is Public Service, which is a regulated public utility. This fact does not bring the common law-based breach of contract claim within the Commission's jurisdiction. In light of

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<sup>8</sup> This Decision was issued on July 23, 2003 in Proceeding No. 03F-146T.

<sup>9</sup> *Intermountain Rural Electric Association v. Colorado Central Power Company*, 307 P.2d 1101, 1104-05 (Colo. 1957); *Public Utilities Commission v. Manley*, 60 P.2d 913 (Colo. 1936) (PUC's statutory authority not that of an article III court); *People v. Swena*, 296 P. 271, 272 (Colo. 1931); *People ex rel. Hubbard v. Public Utilities Commission*, 178 P. 6, 14-15 (Colo. 1918).

<sup>10</sup> *Public Service Company of Colorado v. Van Wyck*, 27 P.3d 377, 384-85 (Colo. 2001); *People v. Swena*, 296 P. 271, 272 (Colo. 1931).

<sup>11</sup> *Haney v. Public Utilities Commission*, 574 P.2d 863, 864-65 (Colo. 1978).

the controlling precedents, the Second Claim for Relief lies outside the Commission's subject matter jurisdiction. Thus, the question of breach of contract is not an issue in this Proceeding.

**B. Causation.**

36. Throughout its Statement of Position, the Ranch raises and discusses the issue of causation. *See, e.g.*, Ranch SOP at 2 (Respondent's failure to perform required vegetation management "is the *direct and proximate cause* of the Complainants' damage to their irrigation equipment") (emphasis supplied); *id.* at 5 ("*but for* [PSCo's failure to perform required vegetation management], the damage of the Complainants' equipment would not have occurred") (emphasis supplied); *id.* at 10 ("the equipment failure of which the Complainants complain *was caused by* a power system disturbance resulting" from PSCo's failure to perform required vegetation management) (emphasis supplied).

37. Causation is a tort law concept. For the reasons discussed *supra* with respect to the Second Claim for Relief, the Commission has the jurisdiction to determine whether the Company complied with applicable law, applicable Commission rules and orders, and applicable tariffs. This does not include the question of whether the Company's actions caused damage to the Ranch. In fact, § 40-6-108(1)(d), C.R.S., provides that the Commission "is not required to dismiss any complaint because of the absence of direct damage to the complainant." This language is consistent with, and provides some support for, the concept that the Commission does not determine causation, as that concept is understood and applied in tort law.

38. In light of the controlling precedents, the question of causation lies outside the Commission's jurisdiction. Thus, the question of causation is not an issue in this Proceeding.

**C. Money Damages.**

39. The Amended Complaint is brought pursuant to Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1302.<sup>12</sup> This Rule governs complaints brought pursuant to § 40-6-108, C.R.S. In the Prayer for Relief, the Ranch asks the Commission to order Public Service to pay actual damages and consequential damages. Amended Complaint at 4.

40. As previously discussed, the Commission is an administrative agency and not a court of general jurisdiction. Review of article XXV of the Colorado Constitution and of the applicable provisions of the Public Utilities Law reveals that the Commission has broad authority within the scope of its jurisdiction. That review also reveals that the Commission does not have authority to award monetary damages in complaint cases brought pursuant to § 40-6-108, C.R.S.

41. For the reasons discussed above and in accordance with the decisions cited above, the Commission lacks jurisdiction to provide redress in the form of monetary damages for claims that are grounded in an alleged violation of the Public Utilities Law, of a PSCo tariff, of a Commission decision or order, or of a Commission rule. The question of damages is an issue to be determined in a court of competent jurisdiction in a private cause of action. Thus, the question of money damages is not an issue in this Proceeding.

**III. FINDINGS OF FACT**

42. The Ranch presented evidence in this Proceeding in support of one or more of the issues, identified above, that the ALJ has determined are not within the Commission's jurisdiction. The Company presented evidence in response to the Ranch's evidence.

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<sup>12</sup> This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 Code of Colorado Regulations 723.

43. Generally speaking, this Decision does not discuss the evidence offered in support of an issue the ALJ has determined to be outside the scope of this Proceeding.

**A. The Parties.**

44. Complainant Ranch is a Colorado limited liability company; has four members (also referred to as partners); was organized in 2010; and is in good standing. The Ranch is located in Conejos County, Colorado near Antonito, Colorado.<sup>13</sup>

45. Complainants Alfonzo A. Abeyta, Andrew A. Abeyta, Martha Abeyta, and Loriann Abeyta are partners in Complainant Ranch.

46. As pertinent here, Respondent Public Service is a rate-regulated public utility that provides electric service to ratepayers in the San Luis Valley, including near Antonito, Colorado. As a public utility, Public Service provides its electric service pursuant to tariffs on file with the Commission. Public Service is regulated by the Commission.

47. Respondent Public Service is a wholly-owned subsidiary of, and an operating company of, Xcel Energy.

48. As pertinent to this Proceeding, Respondent Public Service is the exclusive provider of the electricity used to operate the equipment that the Ranch uses to irrigate approximately 250 acres on which the Ranch grows alfalfa. The Ranch leases that property, which is located near the intersection of County Road 18 and County Road G in Conejos County, Colorado near Antonito, Colorado. This is the closest intersection to the site of the May 23, 2012 event that led the Ranch to file the Amended Complaint.

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<sup>13</sup> The record is unclear as to whether the Ranch and other locations (such as the intersection of County Road 18 and County Road G) are *in* Antonito, Colorado or are *near* Antonito, Colorado. As a result and for ease of reference, unless the context indicates otherwise, this Decision uses the phrase “near Antonito, Colorado” to include both in Antonito, Colorado and near Antonito, Colorado.

**B. The Witnesses.**

49. Ranch witness Abeyta<sup>14</sup> is a partner in the Ranch and is one of the Complainants. He has lived in Conejos County, Colorado for 75 years. He lives near Antonito, Colorado; purchased the Ranch in 1976; and, since 2004, has been a full-time rancher and farmer.

50. Ranch witness Dupont<sup>15</sup> is an individual who resides approximately one mile from the intersection of County Road 18 and County Road G near Antonito, Colorado. As pertinent here, he frequently travels County Road 18 by automobile and on foot and has occasion to observe the landscape, including the trees, along County Road 18. Public Service provides electric service to his residence. Ranch witness Dupont knows Ranch witness Abeyta, who is a neighbor.

51. Ranch witness Palmer is President of Palmer Engineering & Forensics, a forensic engineering consulting firm.<sup>16</sup> He holds a Ph.D. in electric power engineering, which degree was awarded in 1996 by Rensselaer Polytechnic Institute; he is a Registered Professional Engineer in Colorado and five other states; and he is a Certified Fire and Explosion Investigator. He is a member of a number of technical and professional societies, including the Institute of Electrical and Electronics Engineers, the National Society of Professional Engineers, and the National Academy of Forensic Engineers. He has provided expert testimony in numerous state and federal judicial proceedings. The ALJ certified Ranch witness Palmer as an expert witness in the area of electrical engineering and related topics.

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<sup>14</sup> Mr. Abeyta's testimony is found at Aug. 1 tr. at 67-213 and at Oct. 30 tr. at 138-66.

<sup>15</sup> Mr. Dupont's testimony is found at Aug. 1 tr. at 43-66.

<sup>16</sup> Dr. Palmer's *curriculum vitae* is Hearing Exhibit No. 16. Dr. Palmer's testimony is found at Aug. 1 tr. at 214-24, at Oct. 29 tr. at 21-104, and at Oct. 30 tr. at 166-89.

52. At the request of the Ranch, Ranch witness Palmer conducted an investigation of the events that occurred on May 23, 2012 and that led to the filing of the Amended Complaint. As part of that investigation, Ranch witness Palmer conducted an on-site inspection on June 20, 2013; prepared a preliminary report, dated July 5, 2013, that summarizes the observations he made during the June 20, 2013 on-site inspection;<sup>17</sup> and prepared an engineering report, dated July 18, 2013, that contains his findings and conclusions, “to a reasonable degree of engineering certainty” (Hearing Exhibit No. 26 at 3), concerning the cause of the events that occurred on May 23, 2012.

53. PSCo witness Hamm<sup>18</sup> is employed by Public Service as Supervisor of Vegetation Management in the Antonito, Colorado area and, more specifically, at the site at which the events at issue in this Proceeding occurred. His duties and responsibilities include coordination of vegetation management activities and supervision of Asplundh Tree Expert Company (Asplundh), the company that performs vegetation management under contract with Public Service. In the performance of his duties and responsibilities, PSCo witness Hamm schedules Asplundh’s vegetation management work; monitors and oversees Asplundh’s vegetation management work; and evaluates Asplundh’s vegetation management work.

54. PSCo witness Hamm holds a Bachelor of Science degree in forest management, which degree was awarded by Oklahoma State University in 1986. He is an International Society of Agriculture Certified Arborist.

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<sup>17</sup> The July 5, 2013 preliminary report is Hearing Exhibit No. 25.

<sup>18</sup> Mr. Hamm’s testimony is found at Oct. 29 tr. at 105-204 and at Oct. 30 tr. at 4-83.

55. PSCo witness Meininger<sup>19</sup> is employed by Public Service as Area Engineer for the electric utility. His geographic area of responsibility, as pertinent to this Proceeding, includes Antonito, Colorado and the area in which the May 23, 2012 incident occurred.

**C. Public Service's Vegetation Management.**

56. Vegetation management is the process of pruning or removing “[v]egetation that may damage ungrounded supply conductors[.]” National Electrical Safety Code (NESC) at § 218.A.1 (Exhibit No. 20 at 3). Each electric utility determines for itself, based on experience, when and how it will perform vegetation management. To assist the utility with that process, the NESC identifies

[f]actors to consider in determining the extent of vegetation management required includ[ing], but are not limited to: line voltage class, species’ growth rates and failure characteristics, right-of-way limitations, the vegetation’s location in relation to the conductors, the potential combined movement of vegetation and conductors during routine winds, and sagging of conductors due to elevated temperatures or icing.

*Id.*

57. As pertinent to this Proceeding, Public Service performs vegetation management in the Antonito area using a contractor. In the Antonito area from 2007 through 2012, Asplundh was the sole contractor providing vegetation management services for Public Service.

58. The basis for PSCo’s vegetation management program is § 218.A.1 of the NESC. To augment the NESC and to provide instruction to the companies that perform vegetation

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<sup>19</sup> Mr. Meininger’s testimony is found at Oct. 30 tr. at 83-137. For the reasons discussed above with respect to the Ranch’s limiting the scope of the First Claim for Relief, the ALJ considered only the portion of Mr. Meininger’s testimony that relates to vegetation management issues. The ALJ did not consider Mr. Meininger’s testimony with respect to the operation of PSCo’s electrical system in general and the response of PSCo’s electrical system when the distribution line was severed on May 23, 2012 in particular.

management services under contract with PSCo,<sup>20</sup> Public Service uses the Xcel Energy Vegetation Management Guidelines (Guidelines),<sup>21</sup> when performing vegetation management services. It is undisputed that the Guidelines are consistent with NESC § 218.

59. As defined in the Guidelines,

[v]egetation management includes the services of distribution and transmission line clearance, overhead safety inspection program, landscape maintenance and bare-ground weed abatement.

Guidelines (Hearing Exhibit No. 21) at 2. The Guidelines also explain there is a need for vegetation management because

trees are a major contributor of electric service interruptions nationwide. Trees cause outages in two ways, mechanical and electrical. Mechanical damage refers to entire trees or portions of trees failing and physically damaging facilities (knocking down wires, poles, etc.). Because trees can be conductive, electrical outages can also occur. These interruptions are caused when a portion of a tree becomes a short-circuit path for electricity to flow causing a protective device to operate and stop the flow of electricity. Therefore, trees must be maintained an adequate distance from the conductors in an attempt to prevent interruptions of electric service.

Guidelines at § 1.1 (Hearing Exhibit No. 21 at 4). Neither the NESC nor the Guidelines specify the distances that must be maintained for general line clearance.

60. To accomplish its vegetation management responsibilities, Public Service employs Integrated Vegetation Management, the overall goal of which (as pertinent to this Proceeding) is “to develop compliant, site-specific, environmentally sensitive, cost-effective and socially responsible solutions to vegetation control near electric ... facilities.” Guidelines at § 2.1 (Hearing Exhibit No. 21 at 6).

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<sup>20</sup> The vegetation management contractor must follow the Xcel Energy Vegetation Management Guidelines, and its work is reviewed and assessed under the Xcel Energy Vegetation Management Guidelines.

<sup>21</sup> This document is Hearing Exhibit No. 21.

61. When performing Integrated Vegetation Management, Public Service and its vegetation management contractor differentiate between a danger tree, which is “[a]ny tree on or off the right-of-way with the potential to contact electric supply lines” (Guidelines at § 2.2 (Hearing Exhibit No. 21 at 6)), and a hazard tree, which is “a danger tree that has an unacceptable risk of failing before the next maintenance cycle” (*id.*). In determining whether a particular tree is a danger tree or a hazard tree, Public Service and its contractor evaluate the level of risk that the tree may fail before the next maintenance cycle. Only a tree that has an unacceptable level of risk is deemed to be a hazard tree and to require remedial action.

62. Under the Guidelines, the fact that a particular tree may contact an electrical line may warrant designating the tree as a danger tree but is insufficient, standing alone, to warrant designating that tree as a hazard tree. To identify a hazard tree, the Guidelines direct vegetation management personnel to evaluate all the circumstances. The following conditions or factors may indicate the presence of a hazard tree (the list is not exhaustive): (a) biological factors, such as cracks, weak branch unions, decay, dead trees, deadwood, fungal bodies, and cankers; and (b) environmental factors, such as changes in exposure, root restrictions or damage, or poor architecture (*e.g.*, imbalance due to wounding, leaning, structural overloading). Guidelines at § 2.2 (Hearing Exhibit No. 21 at 6). When a hazard tree is identified, it “should be topped/pruned below line height, or felled, with the debris ... left on site for the tree owner’s disposal.” *Id.* The Guidelines contain no similar direction with respect to danger trees.

63. “Tree pruning is the selective removal of branches that are not an adequate distance from the primary line, or that will grow too close to the power line before the next

maintenance cycle.” Guidelines at § 2.3.2 (Hearing Exhibit No. 21 at 6). As general vegetation management guidance, the Guidelines state:

Remove or shorten dangerous limbs, such as those overhanging wires that have a high potential for breaking or bending into ... conductors due to ice, snow, or wind loading. Be aware of the possibility of included bark at the branch bark ridge.

Some factors to consider when selecting trees to prune include:

Tree species

Growth rates (how fast the branches grow back)

Wood strength (the chance of the branch breaking under the load of strong wind, snow, or ice)

Conductivity (how well the wood can conduct electricity)

Branch size (Larger-diameter branches coming into contact with conductors by failure or deflection create the greatest risk for tree-related interruptions.)<sup>22</sup>

Voltage conducted by the line and the line’s construction (the higher the voltage, the greater the clearance required)

Framing and spacing between phases of multi-phase lines (compact design and multi-phase lines pose higher risk to [*sic*] tree-related interruptions). See voltage gradient tables for each operating company.<sup>23</sup>

Location of the tree in relationship to protective devices

Critical customers on the circuit (hospitals, etc.)

General public safety (existence of tree houses, climbable trees, public places, etc.)

Risk of wildfire ignition

Guidelines at § 2.3.2 (Hearing Exhibit No. 21 at 7) (formatting changed slightly).

<sup>22</sup> Deflection refers to movement in wind.

<sup>23</sup> The referenced tables are not in the record in this Proceeding.

64. The Guidelines contain a section that provides vegetation management guidance specific to distribution line clearance.<sup>24</sup> As relevant here, the Guidelines state that the distribution line clearances

are based on local tree growth rates, specific to individual trees on specific circuits. Specific clearances are determined based on species growth rates, as well as [the] line voltage, construction of facilities, electric reliability performance and other factors.

Therefore, each individual tree needs to be assessed to determine adequate clearance[s] required from the conductor to prevent service interruption, damage to Xcel Energy facilities and threats to public safety. Xcel Energy expects qualified line-clearance tree workers to use their professional judgment to determine what these clearances will be in each situation, based on the proposed maintenance cycle for the circuit on which they are working. Please see “Supplemental Guidelines” document for appropriate operating area.<sup>25</sup>

Guidelines at § 3.1 (Hearing Exhibit No. 21 at 9).

65. A maintenance cycle is the period of time between one routine scheduled vegetation management inspection and the next such inspection. Although stated in years, a maintenance cycle should be thought of in terms of growing seasons. As relevant here, the growing season in the San Luis Valley (including near Antonito, Colorado) begins in early May of each year.

66. A maintenance cycle is specific to a particular circuit. In this Proceeding, the relevant circuit is circuit number Antonito 1376 (Antonito 1376), which originates at the Antonito Substation and contains approximately 71 miles of distribution lines, including the distribution line involved in the May 23, 2012 incident. Generally speaking, work done during a maintenance cycle is scheduled work.

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<sup>24</sup> A three-phase distribution line was involved in the May 23, 2012 incident that led to this Proceeding.

<sup>25</sup> The referenced document is not in the record in this Proceeding.

67. In November and December 2007, Asplundh performed vegetation management scheduled work that included all of Antonito 1376.<sup>26</sup> As pertinent to this Proceeding, Asplundh inspected the entire maintenance area (*i.e.*, Antonito 1376); identified trees that needed vegetation management; and performed that work (*e.g.*, pruning, removal). To document its work, Asplundh prepared a Line Clearance Customer Contact/Crew Audit<sup>27</sup> that listed the location of the vegetation, the type of line (*i.e.*, distribution or transmission), the type of tree, the type of work performed (*e.g.*, pruning, removal), and (in some cases) the reason the work was performed. Asplundh listed only the trees on which it did vegetation management work; if a tree is not listed, Asplundh had determined that no vegetation management was necessary.

68. The cottonwood tree involved in the May 23, 2012 incident (incident tree) is not listed in the Line Clearance Customer Contact/Crew Audit (Hearing Exhibit No. 22) for the vegetation management completed in November and December 2007. Asplundh did not regard the incident tree as requiring vegetation management (*e.g.*, pruning) under the Guidelines.

69. On February 28, 2008, PSCo witness Hamm inspected the vegetation management performed by Asplundh in November and December 2007. He conducted a visual and field inspection by vehicle, and, as necessary, on foot, of all of Antonito 1376. His purpose was to do a visual inspection of the vegetation *vis-à-vis* the power lines and other Public Service facilities in that area to determine whether the Asplundh work met the Guidelines.

70. As a result of his inspection and based on his experience, his professional judgment, and his assessment of the work performed, PSCo witness Hamm determined that, overall, Asplundh's vegetation management work met expectations -- that is, complied with the

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<sup>26</sup> Asplundh performed this work during the dormant season (*i.e.*, vegetation was not growing).

<sup>27</sup> This document is Hearing Exhibit No. 22.

Guidelines -- with respect to both the quality of work and the tree selection. To record his inspection and his assessment, on March 14, 2008, PSCo witness Hamm completed a Vegetation Management Scheduled Work Completion Evaluation (2008 Completion Evaluation).<sup>28</sup>

71. One evaluation criterion for the quality of work is the Overall Quality of Clearance. Among other things, this includes “making sure that the tree can grow before the next maintenance cycle and not cause any problems with the electrical conductors [and looking] for ... conditions that might indicate the presence of a hazard tree.” Oct. 29 tr. at 129:6-11. Asplundh received a score of 3 (meets expectations) for Overall Quality of Clearance on the 2008 Completion Evaluation.

72. Neither Asplundh (November and December 2007) nor PSCo witness Hamm (February 2008) observed any tree or condition that indicated the presence of a hazard tree under the Guidelines. Oct. 29 tr. at 132:3-6.

73. As a general practice, Public Service prunes vegetation that is overhanging three-phase power lines. Oct. 29 tr. at 131:8-12. On the 2008 Completion Evaluation, Change Potential is an evaluation criterion for tree selection and incorporates the general policy that no vegetation should overhang three-phase power lines. Asplundh received a score of 3 (meets expectations) for Change Potential. In February 2008 and insofar as PSCo witness Hamm observed (*id.* at 131:24-132:1), there were no trees overhanging three-phase power lines in Antonito 1376.

74. In the 2008 Completion Evaluation, based on his experience, his professional judgment, his knowledge of Antonito 1376, and the factors in the Guidelines, PSCo witness

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<sup>28</sup> This document is Hearing Exhibit No. 23.

Hamm recommended a maintenance cycle of three years (*i.e.*, three growing seasons).<sup>29</sup> Oct. 29 tr. at 132:7-134:16. The 2007 maintenance was performed between the 2007 growing season and the 2008 growing season. As a result, it is not clear from the document whether the next scheduled vegetation maintenance would occur at the beginning of the 2010 growing season (*i.e.*, three growing seasons following the 2007 growing season) or at the beginning of the 2011 growing season (*i.e.*, three growing seasons following the 2008 growing season). In testimony, PSCo witness Hamm clarified that, in the 2008 Completion Evaluation, he recommended that the next vegetation management occur at the beginning of the 2011 growing season.<sup>30</sup>

75. The next vegetation management maintenance in Antonito 1376 did not occur before the 2011 growing season.

76. The 2008 Completion Evaluation contains a section entitled Schedule impact comments (Hearing Exhibit No. 23 at 1) and a section entitled Circuit Ranking Detail (*id.* at 2). The purpose of these sections is to permit vegetation management maintenance cycles to be adjusted for changed circumstances, provided the numerical ranking (*i.e.*, 3, 4, or 5) indicates that doing so would not present an unreasonable risk to the reliability of the electrical system. Oct. 29 tr. at 133:9-135:8. On the 2008 Completion Evaluation, Antonito 1376 received a Schedule impact comment score of 3, which allows modification of the maintenance cycle to account for changed circumstances.

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<sup>29</sup> PSCo witness Hamm made this recommendation “considering the various tree factors, growth rates, species, as well as the site [*i.e.*, Antonito 1376] condition, characteristics for the site, such as precipitation, altitude, or the elevation[.]” Oct. 29 tr. at 132:15-18. This recommendation was consistent with the historical vegetation management maintenance cycles in Antonito 1376 since at least 2001. Print-out of vegetation management schedule for Antonito 1376 (Antonito 1376 schedule print-out) at 1 (Hearing Exhibit No. 31 at 1).

<sup>30</sup> This testimony was unrebutted. The ALJ finds this testimony credible.

77. Based on his experience, his professional judgment, and his knowledge of Antonito 1376 and the Guidelines, and taking into account changed circumstances,<sup>31</sup> in 2008, PSCo witness Hamm changed the three-year maintenance cycle to a four-year maintenance cycle. Antonito 1376 schedule print-out (Hearing Exhibit No. 31) at 1. This change meant that the 2008, 2009, 2010, and 2011 growing seasons would occur between the vegetation management performed in November and December 2007 and the vegetation management to be performed beginning in early May 2012.

78. Under the revised maintenance cycle, vegetation management in Antonito 1376 should have occurred in early May 2012. For a variety of reasons,<sup>32</sup> the start date for the 2012 Antonito 1376 maintenance cycle was delayed to September 2012 and occurred between September and December 2012.

79. At all times relevant to this Proceeding, Public Service used a contractor (*i.e.*, Asplundh) to perform vegetation management in Antonito 1376. At all times relevant to this Proceeding, no employee of Public Service performed vegetation management in Antonito 1376, other than the functions of contract management and contract work evaluation.

80. Ranch witness Dupont, who lives in the area, observed at least one limb of the incident tree overhanging at least two lines of the distribution line involved in the May 23, 2012

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<sup>31</sup> Principally, PSCo witness Hamm considered the below-normal levels of precipitation, which result in slower tree growth. He made this decision based on the conditions, including the types of vegetation, in Antonito 1376 as a whole. *See generally* Oct. 29 tr. at 137:7-40:1. This testimony is unrefuted and un rebutted, and the ALJ finds it to be credible.

<sup>32</sup> The testimony pertaining to the reasons for the delay in 2012 is unrefuted and un rebutted. The ALJ finds the testimony on this point to be credible and the reasons for the delay to be reasonable.

incident. He observed this over two or three years (*i.e.*, 2009 or 2010 to 2012). He made his observations from County Road 18.<sup>33</sup>

81. Although he conceded that he rarely noticed the incident tree, Ranch witness Abeyta testified that, before the May 23 incident, he observed one limb of the incident tree overhanging the distribution line involved in the May 23, 2012 incident. He made this observation from underneath the distribution line. When and how often Ranch witness Abeyta made such an observation is unknown.<sup>34</sup>

82. There is no evidence that, between 2008 and 2012, Public Service received any report of vegetation overhanging one or more electrical lines in Antonito 1376.

**D. The May 23, 2012 Incident.**

83. As relevant here, Public Service provides electrical service to the Ranch to power the irrigation system (including the well pumping equipment) that waters acreage that the Ranch rents for the purpose of growing alfalfa.

84. Public Service provides electricity to the Ranch's irrigation system by a three-phase distribution line that operates at approximately 13,000 volts between adjacent phase conductors. The distribution line consists of three phase conductors, each of which is energized,

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<sup>33</sup> PSCo witness Hamm did not specifically testify about the incident tree, which was destroyed in May 2012. He presented testimony about the general growth pattern/habit of the Cottonwood variety that includes the incident tree. He testified as to his opinion that, given the variety's general growth pattern/habit and the distance between the incident tree's trunk and the distribution line, it was unlikely that a branch of the incident tree would overhang the distribution line. In testifying, he relied, in part, on an aerial photograph taken in 2010 (Hearing Exhibit No. 34).

The ALJ gives little weight to this evidence. First, Ranch witness Dupont provides testimony based on personal observations made over an extended period; and the ALJ finds this testimony to be credible. Second, while perhaps relevant to the issue of whether the 2008 decision to change the maintenance cycle was reasonable, testimony about the general growth pattern/habits of the Cottonwood variety does not overcome Ranch witness Dupont's testimony about the branch of the incident tree, which he personally observed. Third, the aerial photograph (Hearing Exhibit No. 34) lacks sufficient resolution and clarity to be of value with respect to the branch *vis-à-vis* the distribution line.

<sup>34</sup> The ALJ finds this testimony to be credible but, given the lack of specificity, gives it little weight.

and one ground conductor that, under normal conditions, is not energized. The energized conductors are supported on the pole by cross-arms that are perpendicular to County Road 18, and the ground conductor is supported by the top of the poles.

85. As relevant to this Proceeding, County Road 18 runs north and south. The distribution line runs parallel to County Road 18 on the east side of the roadway. The poles supporting the distribution line are between County Road 18 and a barbed wire fence. On the east side of, but close to, the fence is an irrigation ditch.

86. On May 23, 2012, approximately 15' to 18' east of the irrigation ditch, the incident tree -- a healthy, fully leaved-out, not-yet-mature cottonwood tree -- was growing.<sup>35</sup> Its trunk was 22' to 25' west of the nearest (or field side) electrical conductor in the distribution line. Witnesses estimate that the incident tree was at least 40' to 50' in height.

87. The incident tree had at least two significant branches, one of which grew to the west (*i.e.*, in the direction of the distribution line). Witnesses estimate that the branch was attached to (or branched from) the incident tree approximately 25' up from the base of the tree and was at least 8" thick at the point of attachment or branching. Because it fell into the distribution line, Ranch witness Abeyta estimated that the limb was at least 30' from the ground and at least 20' in length. *See generally* Aug. 1 tr. at 141:24-143:17.

88. In mid-afternoon on May 12, 2012, there was a wind that Ranch witness Abeyta described on August 1, 2013 in direct examination as a "wind storm" with winds blowing "from the southwest, going on the easterly, northerly direction" at approximately 29 miles per hour

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<sup>35</sup> The tree was destroyed by a fire that started on May 23, 2012. No actual measurements of the tree exist. The estimates of the tree's size in this Decision are based on witness testimony. For the same reasons, the estimates of the size of the branch (or limb) in this Decision are based on witness testimony.

(MPH) with gusts to 40 MPH (Aug 1 tr. at 119:4-14) and as “a pretty severe wind storm” (*id.* at 143:24-14:1). Ranch witness Dupont described the wind that afternoon as “very, very strong.” Aug. 1 tr. at 54:13. *See also* testimony of PSCo witness Meininger at Oct. 30 tr. at 85:15-18 (National Weather Service forecasted wind gusts up to 50 MPH for May 23, 2012).

89. In direct examination, Ranch counsel asked Ranch witness Abeyta to “rate [the] wind storm” that occurred on May 23, 2012. Aug 1 tr. at 119:7-8. Ranch witness Abeyta did not answer that question or provide his rating of the wind. On October 30, 2013, in rebuttal testimony, however, Ranch witness Abeyta testified that the wind in the afternoon of May 23, 2012, although strong, was usual weather in near Antonito, Colorado, particularly in May and early June. He testified that, in May 2012, Antonito, Colorado experienced four different occasions of winds in excess of 40 MPH.<sup>36</sup> He stated his opinion that the winds on May 12, 2012 were from the northeast and were normal given the high winds (typically between 30 MPH and 40 MPH with gusts at greater velocity) that the area experiences during the period of mid-March through mid-June each year. *See generally* Oct. 30 tr. at 140:18-145:11. The ALJ finds this rebuttal testimony unpersuasive because, although he could have presented this testimony in response to the direct question asked on August 1, 2013, Ranch witness Abeyta did not do so. In addition, with respect to the direction of the wind, the October 30 testimony is not consistent with the August 1 testimony. Finally, the testimony is self-serving given the witness’s personal interest in the subject matter of the testimony, (*i.e.*, whether the wind was routine within the meaning of Public Service Tariff Sheet No. R100).

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<sup>36</sup> His source for this information is unknown.

90. No witness in this Proceeding saw the incident that caused the distribution line to break in the vicinity of the incident tree.

91. At approximately 3:15 p.m. on May 23, 2012, Ranch witness Dupont observed that the west-facing branch of the incident tree was broken with one end of the branch on the ground and the other attached to the trunk of the tree; that two conductors in the distribution line were down, were sparking, and were under the portion of the branch that was on the ground; and that there was a large fire at the base of the incident tree.

92. The failure of the distribution line caused a disruption of electrical service to customers served by that line. Public Service repaired the distribution line and restored electrical service by approximately 9:00 p.m. on May 23, 2012.

93. Some of the Hearing Exhibits describe the May 23, 2012 incident. These descriptions are based on second-hand information or on observations made relatively soon after the incident occurred.

94. Additional facts are found throughout this Decision.

#### **IV. DISCUSSION**

95. The Ranch requests that the Commission: (a) find that, as to the subject tree, Respondent failed to perform required vegetation management, thus violating Rule 4 CCR 723-3-3200,<sup>37</sup> Respondent's tariff, and the NESC; and (b) "enter such orders as [it] deems necessary and appropriate under the circumstances." Ranch SOP at 11.

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<sup>37</sup> This Rule is found in the Rules Regulating Electric Utilities, Part 3 of 4 *Code of Colorado Regulations* 723.

96. Respondent requests that the Commission find the Amended Complaint to be unfounded and dismiss the Amended Complaint.

**A. Burden of Proof.**

97. As the party that seeks a Commission order, the Ranch has the burden of proof with respect to the allegations in the Amended Complaint and the relief sought; and the burden of proof is preponderance of the evidence. Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 4 CCR 723-1-1500. The evidence must be “substantial evidence,” which the Colorado Supreme Court has defined as

such relevant evidence as a reasonable person’s mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.

*City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)). The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

**B. Pertinent Requirements.**

98. Section 40-6-108, C.R.S., establishes the Commission’s complaint jurisdiction over public utilities (such as Public Service). As relevant to this Proceeding, § 40-6-108(1)(a), C.R.S., provides:

[c]omplaint may be made ... by any ... person ... by ... complaint in writing, setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public

utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

Thus, a complaint may allege a violation of statute, of Commission rule, of a Commission decision or order, or of a utility tariff.

99. Section 40-3-101(2), C.R.S., requires public utilities (such as Public Service) to furnish, provide, and maintain such service, instrumentalities, equipment, and facilities as shall promote the safety, health, comfort, and convenience of its patrons, employees, and the public, and as shall in all respects be adequate, efficient, just, and reasonable.

*See also* § 40-4-108, C.R.S. (powers of the Commission).

100. Section 40-3-103, C.R.S., requires public utilities (such as Public Service) to file with the commission, within such time and in such form as the commission may designate, and shall print and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected and enforced, together with all rules, regulations, contracts, privileges, and facilities that in any manner affect or relate to rates, tolls, rentals, classifications, or service.

These filed schedules are the public utility's tariff.

101. In important respects, resolution of this case involves interpretation of Public Service's tariff. As relevant here, the tariff contains the terms and conditions of electric service provided by the Company to its retail customers; and Public Service must comply with its tariff in rendering service to customers.

102. Where a tariff is created through the Commission's "properly exercised legislative authority[, that tariff] has the force and effect of state law." *U.S. WEST Communications, Inc. v. Longmont*, 924 P.2d 1071, 1079 (Colo. App. 1995), *aff'd* 948 P.2d 509 (Colo. 1997). As a result, standard principles of statutory construction apply to the interpretation of [such a] tariff. Hence, we must give effect to the intent of the legislative body, *i.e.*, the PUC, by looking first at the language of the tariff. Further, its language must be read and considered as a whole, and when, possible, it should be construed to give consistent, harmonious, and sensible effect to all of its parts. In case of

ambiguity, a court may also be guided by the consequences of a particular construction.

*Id.* See also *Redfern v. U.S. WEST Communications, Inc.*, 38 P.3d 566, 568 (Colo. App. 2000) (standard principles of statutory construction apply to the interpretation of a tariff).

103. As relevant here, Sheet No. R100 of the Company's tariff Colorado PUC No. 7 provides: "The Company will ... maintain its electric system in such manner as to furnish good, safe, adequate, and continuous electric service in accordance with the provisions of the National Electrical Safety Code and the Rules and Regulations of The Public Utilities Commission of the State of Colorado." Hearing Exhibit No. 19 (underlining in original). In addition, Sheet No. R100 provides that Public Service "will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electric energy to customer and to avoid any shortage or interruption in delivery of same."<sup>38</sup> *Id.* Sheet No. R100 was implemented as the result of a 1995 Commission Decision,<sup>39</sup> has been in effect since 1996, and was in effect at all times relevant to this Proceeding.

104. Sheet No. R100 references the NESC as the standard to which Public Service will "maintain its electric system ... [so] as to furnish good, safe, adequate, and continuous electric

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<sup>38</sup> Sheet No. R100 also limits Public Service's liability "for interruption, shortage or insufficiency in the supply of electric service, or *for any injury, loss, or damage occasioned thereby*, if same is due to causes or contingencies beyond the control of the Company, including but not limited to accidents, breakdown of equipment, acts of God, authority and orders of government, floods, storms, fires, strikes, riots, or war." Hearing Exhibit No. 19 at 1 (emphasis supplied).

This tariff provision may have more than one purpose. For the reasons discussed *supra*, to the extent it seeks to limit the Company's *financial* liability, this tariff provision addresses matters that are outside the Commission's jurisdiction. To the extent the Company uses this tariff provision as a defense to the claim that the Company failed to perform required vegetation management and thus violated an applicable Commission Rule or the Company's tariff, or both, this tariff provision is discussed *infra*.

<sup>39</sup> This evidences that the fact that the tariff was created through the Commission's properly exercised legislative authority.

service[.]” Hearing Exhibit No. 19 at 1. In May 2012, the NESC contained two provisions -- § 214 and § 218 -- that are relevant to this Proceeding.<sup>40</sup>

105. Section 214 of the NESC is entitled Inspection and tests of lines and equipment. Hearing Exhibit No. 20 at 2. As relevant here, that section provides that, when they are in service,

[l]ines and equipment shall be inspected at such intervals as experience has shown to be necessary.

*NOTE:* It is recognized that inspections may be performed in a separate operation or while performing other duties, as desired.

*Id.* at § 214.A.2 (emphasis in original). This section permits an electric utility to combine general line inspections with vegetation management inspections, as Public Service does.

106. Section 218 of the NESC is entitled Vegetation management. Exhibit No. 20 at 3. As relevant here, that section provides:

Vegetation that may damage ungrounded supply conductors should be pruned or removed. Vegetation management should be performed as experience has shown to be necessary.

*NOTE:* Factors to consider in determining the extent of vegetation management required include, but are not limited to: line voltage class, species’ growth rates and failure characteristics, right-of-way limitations, the vegetation’s location in relation to the conductors, the potential combined movement of vegetation and conductors during routine winds, and sagging of conductors due to elevated temperatures or icing.

*Id.* at § 218.A.1 (emphasis in original).

107. In this Proceeding, both Parties rely on Rule 4 CCR 723-3-3200. In relevant part, Rule 4 CCR 723-3-3200 states:

(a) The *plant, equipment, and facilities* of [an electric] utility *shall be constructed, installed, inspected, maintained, and operated in accordance with accepted engineering practice in the electric industry* to assure continuity of

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<sup>40</sup> These NESC provisions are Hearing Exhibit No. 20.

service, uniformity in the quality of service, and the safety of persons and property.

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(c) *Any utility plant ... that is maintained and operated, in accordance with the National Electrical Safety Code in effect at the time of its construction or installation shall be presumed to be in compliance with accepted engineering practice in the electric industry and with the provisions of this rule.*

(Italics and underlining supplied.)

**C. Discussion of Amended Complaint.**

**1. Positions of the Parties.**

108. The scope of this Proceeding is discussed *supra*. In the Statements of Position, the Parties present arguments that pertain to issues not within the scope of this Proceeding. In the following discussion, the ALJ includes only those positions that are pertinent to this Proceeding.

109. The Ranch argues that the issue in this Proceeding is: whether Public Service complied with the NESC (and, thus with Commission rules and with PSCo's tariff) with respect to vegetation management as pertains to the incident tree.

110. The Ranch asserts that the following facts establish that Public Service did not comply with the NESC: (a) in February 2008, Public Service determined that the vegetation management maintenance cycle in the vicinity of the incident tree would be three years, which would have continued the historical maintenance cycle and would have resulted in vegetation management occurring in 2011; (b) later in 2008, Public Service changed the vegetation maintenance cycle from three years to four years, which would have resulted in vegetation management in early May 2012; (c) the vegetation management did not occur in early May 2012, but did occur later in 2012; (d) prior to May 23, 2012, witnesses observed a limb of the incident

tree overhanging the distribution line that provides electricity to the Ranch's irrigation and well pumping equipment; (e) in the afternoon of May 23, 2012, there was high wind that, while strong, was not unusual for the area in which the incident tree grew; and (f) on May 23, 2012, a branch from the incident tree fell into, and broke, the distribution line that provides electricity to the Ranch's irrigation and well pumping equipment.

111. Based on these facts, the Ranch asserts that Public Service violated Rules 4 CCR 723-3-3008 and 723-3-3002; violated Tariff Sheet No. R100; and violated the NESC. In addition, the Ranch argues that these facts establish that Public Service failed to comply with the Guidelines.

112. Sheet No. R100 limits Public Service's liability "for interruption, shortage or insufficiency in the supply of electric service, or for any injury, loss, or damage occasioned thereby, if same is due to causes or contingencies beyond the control of the Company including but not limited to accidents, breakdown of equipment, acts of God, authority and orders of government, floods, storms, fires, strikes, riots, or war." Hearing Exhibit No. 19 at 1. The Ranch argues that this language is inapplicable here because "[i] was well within the control of the [Company] to have proper vegetation management during its management cycles and, indeed, under the NECS [*sic*] and PUC regulations [the Company] had a duty to do so[.]" Ranch SOP at 7.

113. Public Service argues that the Ranch has not met its burden of proof. The Company asserts that the weight of the evidence establishes the following: (a) the Guidelines are consistent with the NESC; (b) the Company correctly applied, and its actions are consistent with, the Guidelines and the NESC; (c) the vegetation management performed in the vicinity of the incident tree was appropriate; (d) in light of all the attendant circumstances, the 2008 decision to

extend the vegetation management maintenance cycle was reasonable and was made using professional judgment; (e) the incident tree was a cottonwood tree, and the growth habit and the growth rate of the cottonwood make it very unlikely that, between November or December 2007 and May 2012, the incident tree could have grown to overhang the distribution line; (f) the NESC limits vegetation management to consideration of routine wind, and the velocity of the wind on May 23, 2012 was not routine; and (g) as applicable here, Sheet No. R100 limits the Company's liability when the event that led to interruption of electrical service is an act of God, and the high wind on May 23, 2012 was an act of God.

114. Given these facts, Respondent asserts that the Ranch has not met its burden of proof and that the Commission should dismiss the Amended Complaint.

## 2. Discussion.

115. For the reasons discussed below, the ALJ finds that the Ranch has not met its burden of proof in this Proceeding. The ALJ will dismiss the Amended Complaint with prejudice.

116. **Rule 4 CCR 723-3-3200(a).** The Ranch relies on an asserted violation of Rule 4 CCR 723-3-3200 as a basis for the Amended Complaint. To prevail on this basis, the Ranch must establish that, with respect to vegetation management, Public Service failed to maintain or to operate its plant in accordance with "accepted engineering practice in the electric industry[.]" Rule 4 CCR 723-3-3200(a).

117. To the extent it wishes to use the 2012 NESC (*i.e.*, Hearing Exhibit No. 20) to establish a violation of Rule 4 CCR 723-3-3200, the Ranch must establish that the 2012 NESC contains (or constitutes) the "accepted engineering practice in the electric industry" as that practice existed during the period relevant to this Proceeding. Although two engineers testified

(Ranch witness Palmer and PSCo witness Meininger), there is no evidence in this Proceeding that connects the NESC to the electric industry's accepted engineering practice during the relevant time period. For this reason, the ALJ finds that the Ranch failed to establish a violation of Rule 4 CCR 723-3-3200(a).

118. The Ranch asserts that Rule 4 CCR 723-3-3008 "explicitly incorporates the entirety of the [NESC] by reference ... . It then follows that a violation of the [NESC] is a violation of a PUC regulation as well." Ranch SOP at 4-5. The argument misapprehends the purpose of Rule 4 CCR 723-3-3008.

119. When the Commission issues a rule (*e.g.*, Rule 4 CCR 723-3-3200(c)) that incorporates by reference all or any part of a standard published by a nationally recognized organization or association (*e.g.*, the NESC), § 24-4-103(12.5)(a)(II), C.R.S., requires that the Commission provide specific information about the incorporated-by-reference document or portion of a document. The Rules Regulating Electric Utilities contain numerous rules that incorporate by reference materials covered by § 24-4-103(12.5)(a), C.R.S. For ease of reference and administrative efficiency, the Commission placed in one location (*i.e.*, Rule 4 CCR 723-3-3008), and for every document incorporated by reference into the electric rules, the information required by § 24-4-103(12.5)(a)(II), C.R.S. Rule 4 CCR 723-3-3008 is an administrative rule that provides statutorily-required information; it is not a general incorporation by reference into the substantive rules. To determine the purpose for which, and the specific provisions of, the NESC that the Commission has incorporated by reference into the electric rules, one must look to other rules, such as Rule 4 CCR 723-3-3200.

120. The Ranch also asserts that Rule 4 CCR 723-3-3200 "requires that an electric utility operate and maintain its system in conformity with the [NESC]. It then follows that a

violation of the [NESC] is a violation of a PUC regulation as well.” Ranch SOP at 5. Public Service makes a similar argument when it asserts that, in Rule 4 CCR 723-3-3200, the Commission has established the accepted engineering practice *as set out in the NESC* as the minimum standard for the maintenance and operation of the Company’s plant, facilities, and equipment. PSCo SOP at 5. This argument is not supported by a careful reading of the Rule.

121. In Rule 4 CCR 723-2-3200(c), the Commission created a *presumption of compliance* with accepted engineering practice in the electric industry provided there is evidence that the plant is operated and maintained in accordance with the NESC “in effect at the time of [the plant’s] construction or installation[.]”<sup>41</sup> In Rule 4 CCR 723-3-3200, as relevant to this Proceeding, the Commission references the NESC only in the context of the Rule 4 CCR 723-3-3200(c) presumption. As a result, the language of the Rule does not support the assertion that, through Rule 4 CCR 723-3-3200, the Commission has adopted the NESC as the minimum standard for accepted engineering practice in the electric industry.

122. ***Public Service Tariff Sheet No. R100.*** As a basis for the Amended Complaint, the Ranch relies on the Company’s tariff. In Sheet No. R100, Public Service states that the NESC is the standard to which Public Service will provide electric service.<sup>42</sup> Thus, the issue in this Proceeding is whether Public Service complied with the NESC with respect to vegetation management in Antonito 1376 and, more specifically, whether Public Service reasonably relied on its experience when it revised the vegetation management maintenance cycle in 2008.

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<sup>41</sup> In this Proceeding, there is no evidence that the version of the NESC in evidence (*i.e.*, Hearing Exhibit No. 20) is the version of the NESC that was in effect when the distribution line in question was constructed or installed. As a result, no presumption of PSCo’s compliance with accepted engineering practice arose in this Proceeding.

<sup>42</sup> This is the *Company* self-selecting the NESC as the standard and, thus, is distinguishable from the issue (discussed *supra*) of whether the *Commission* has selected the NESC as the “accepted engineering practice in the electric industry,” as that term is used in Rule 4 CCR 723-3-3200(a).

123. For the following reasons and based on the evidence in this Proceeding, the ALJ finds that, with respect to vegetation management in Antonito 1376 during the relevant period, Public Service complied with the NESC and, thus, with its tariff.

124. Vegetation management is an operations and maintenance function. NESC § 218 (Hearing Exhibit No. 20) explicitly leaves to the utility's discretion the decisions about the extent of required vegetation management, which logically includes the maintenance cycle. These decisions require, among other things, scheduling how often the work will be performed. Given the type of work involved, the amount and types of vegetation involved, and the geographic area (including the number of miles of electrical line and the terrain) involved, vegetation management in a geographic area (*e.g.*, Antonito 1376) occurs over a number of years. Hence, there is a vegetation maintenance cycle.

125. NESC § 218 states that the utility should perform its vegetation management<sup>43</sup> "as experience has shown to be necessary" (Hearing Exhibit No. 20 at 3). This, in turn, involves a determination of whether a utility's action or decision is reasonable in view of its experience.

126. The issue here is whether the 2008 change from a three-year maintenance cycle to a four-year maintenance cycle was consistent with the NESC and was reasonable. To make that assessment, the Commission must examine or evaluate the reasonableness of the Company's 2008 decision to lengthen the maintenance cycle to four years. In determining whether that decision was reasonable, the Commission examines the 2008 decision in light of what the Company knew, or reasonably should have known, at the time it made the decision and in light of the totality of the circumstances as they existed at the time the decision was made. The

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<sup>43</sup> For Public Service, this appears to include conducting line inspections.

reasonableness of the 2008 decision is not examined in light of subsequent events except to the extent that the subsequent events should have alerted the Company to the fact that the schedule either was inappropriate or should be changed due to changed circumstances. Generally speaking, the Commission takes this approach where the Company's action is a decision that, as is true of vegetation management, schedules operation and maintenance work that will occur in the future.

127. The Ranch seeks to focus this Proceeding on the incident tree and the events relevant to the May 23, 2012 incident. While this focus may be reasonable in the context of a judicial proceeding, it is not the appropriate focus in this regulatory forum. In this Proceeding, the appropriate focus is broader: the reasonableness of the Company's decision in 2008 to change, for all of Antonito 1376, the vegetation management maintenance schedule to a four-year cycle. This is because Public Service establishes vegetation management maintenance cycles by the area (in this case, Antonito 1376) and not by the specific tree (in this case, the incident tree).

128. Turning to the reasonableness of the Company's 2008 decision to move to a four-year maintenance cycle in Antonito 1376, § 218 identifies some of the factors that the utility should take into consideration when determining what vegetation management work to perform and when such work should be performed. As pertinent to, and discussed in, this Proceeding, these factors include: (a) the vegetation's location in relation to the conductors; (b) the species' growth rates and failure characteristics; and (c) the potential combined movement of vegetation and conductors during routine winds.

129. The Company presented unrefuted evidence, which the ALJ finds to be credible, with respect to the 2008 decision. The Company had a sound and reasonable basis for the

decision to extend the maintenance cycle for the entire Antonito 1376: there had been below-normal precipitation in Antonito 1376, and this had the effect of slowing the growth rate of the vegetation.<sup>44</sup> In addition, PSCo witness Hamm, the individual who made the decision: (a) had personal knowledge of, and experience with, the vegetation (including the species of trees) in the Antonito 1376 area and the growing habits of that vegetation; and (b) recently and personally had inspected the electrical lines in Antonito 1376 to assess the vegetation management, including the line clearances. Finally, in making the 2008 decision, PSCo witness Hamm considered the Guidelines, about which he is knowledgeable. Public Service has established that: (a) in deciding to change the vegetation management maintenance cycle, it exercised its discretion in a reasonable manner; and (b) the decision reached was reasonable in view of totality of the circumstances and the information known at the time.

130. The ALJ notes that there is no persuasive evidence in this record that calls into question the reasonableness of the Company's 2008 decision to extend the maintenance cycle.<sup>45</sup> The principal argument of the Ranch rests on the after-the-fact failure of the incident tree's branch. The Ranch did not present persuasive evidence to rebut the bases of the 2008 decision or to refute the reasonableness of the decision at the time it was made.

131. Given the facts that the Company knew or reasonably could have known at the time, the 2008 decision was reasonable.

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<sup>44</sup> The proper focus is on the circumstances in Antonito 1376 as a whole and not on the circumstances of an individual tree or site within Antonito 1376.

<sup>45</sup> Ranch witness Palmer testified on this issue and stated that, in his experience, a five-year maintenance cycle is unusual. This witness is an electrical engineer and neither works nor resides in Colorado. In addition, his experience with vegetation management does not include Colorado and, more particularly, the San Luis Valley and Antonito 1376. Finally, as discussed, the vegetation management maintenance cycle for Antonito 1376 during the relevant period was four years, not five years. For these reasons, the ALJ finds this testimony to be unpersuasive on this issue.

132. The Ranch argues that, irrespective of whether the 2008 decision to extend the maintenance cycle was reasonable when made, the May 23, 2012 incident by itself establishes that the Company failed to comply with the NESC and, thus, with PSCo Tariff Sheet No. R100. This argument is unpersuasive. The evidence establishes that, at no time relevant to this Proceeding, did Public Service receive a report -- from a private individual,<sup>46</sup> from a PSCo employee, or from a PSCo contractor -- of the incident tree's branch overhanging electrical lines. Thus, the Company had no notice or information that the four-year vegetation management maintenance cycle, as implemented, was or might be problematic.

133. In addition, adopting the approach advocated by the Ranch could lead to the counter-intuitive result that, in order to provide reasonable service to its customers as required by § 40-3-101(2), C.R.S., Public Service must perform vegetation management every year and must do so irrespective of whether or not the Company has information that indicates the need to perform vegetation management. Such an outcome result would nullify the vegetation management maintenance schedule concept, would be contrary to the NESC (which leaves such decisions to the utility's discretion), would place an unreasonable burden on Public Service, and would place an unreasonable financial burden on PSCo ratepayers who pay for operations and maintenance expense in rates.

134. Based on the facts of this case, the Ranch has failed to establish that, with respect to vegetation management, Public Service failed to comply with NESC, as incorporated into Sheet No. R100.

135. *Statute.* The Ranch does not assert that the Company violated a statute. As a result, this is not an issue in this Proceeding.

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<sup>46</sup> This is not to suggest that a private person is required to report overhanging vegetation to Public Service.

136. *Commission decision or order.* The Ranch does not assert that the Company violated a Commission decision or order. As a result, this is not an issue in this Proceeding.

137. *National Electrical Safety Code, standing alone.* As a basis for the Amended Complaint, the Ranch appears to rely on the NESC, standing alone. The Ranch cites no legal authority, and the ALJ has found none, to support the proposition that -- at least in the utility regulatory arena and with respect to vegetation management -- Public Service is obliged to comply with the NESC, standing alone and without reference to the incorporation of the NESC into a PSCo tariff or a Commission rule or order.

138. Based on the record in this case, the ALJ finds that the NESC, standing alone, is not a proper basis for the Amended Complaint. To the extent the Ranch relies on the NESC, standing alone, the ALJ denies the Amended Complaint.

## V. CONCLUSIONS

139. Consistent with the discussion above, the Commission has jurisdiction over the subject matter of this Proceeding and over the Parties to this Proceeding.

140. For the reasons discussed above, the Ranch has not met its burden of proving that Respondent failed to comply with its tariff or with an applicable Commission rule.

141. For the reasons discussed above, the Amended Complaint should be dismissed with prejudice.

142. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

**VI. ORDER****A. The Commission Orders That:**

1. Consistent with the discussion above, the Amended Complaint filed by A-Quarter Circle Lazy Five Ranch, LLC, Alfonzo A. Abeyta, Andrew A. Abeyta, Martha Abeyta, and Loriann Abeyta is limited to issues pertaining to vegetation management.

2. Consistent with the discussion above, the Amended Complaint filed by A-Quarter Circle Lazy Five Ranch, LLC, Alfonzo A. Abeyta, Andrew A. Abeyta, Martha Abeyta, and Loriann Abeyta, as the scope of that Amended Complaint has been limited, is dismissed with prejudice.

3. The time within which to file response to exceptions to this Decision is shortened to seven calendar days.

4. 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.

5. 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 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.

6. If exceptions to this 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

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,  
Director