

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18AL-0803G

IN THE MATTER OF ADVICE LETTER NO. 936 - GAS FILED BY PUBLIC SERVICE COMPANY OF COLORADO TO REVISE ITS PIPELINE SYSTEM INTEGRITY ADJUSTMENT IN ITS COLORADO P.U.C. NO. 6 – GAS TARIFF TO BECOME EFFECTIVE JANUARY 1, 2019.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
REQUIRING CONFERRAL
AND FILING OF JOINT STATUS REPORT**

Mailed Date: July 16, 2020

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I. STATEMENT

A. Procedural History.

1. Approved initially in Proceeding No. 10AL-963G, the Pipeline System Integrity Adjustment (PSIA) is a rate adjustment mechanism that allows Public Service Company of

Colorado (Public Service) to track and to recover the costs associated with natural gas pipeline system integrity programs.¹ The Commission may subject annual PSIA expenses to prudence reviews.

2. By Decision No. C13-0964 (mailed on August 8, 2013) in Proceeding No. 10AL-963G, the Commission directed an Administrative Law Judge (ALJ) to open a miscellaneous proceeding (later opened as Proceeding No. 13M-0915G) and to take comment on the procedures to be used in conjunction with a PSIA advice letter and report, and then to establish requirements for PSIA filings. In Decision No. R14-0694, Judge Mana Jennings-Fader established requirements for PSIA filings.²

3. The procedures in Decision No. R14-0694 include provisions for the Commission to issue notice of Public Service's annual PSIA report filings for potential prudence reviews. Specifically, the Commission provides notice of Public Service's annual PSIA filing to all persons registered to receive notices about natural gas matters through the Commission's E-Filings System. The notice must state that Public Service has made its annual PSIA filing and identify the proceeding in which the report filing was made. A challenge to a PSIA project or its costs (or both) must be filed in the appropriate advice letter proceeding and must be filed not later than 30 days from the date of the Commission's notice of the annual PSIA report filing. If there are challenges to PSIA expenses in the annual report, upon a finding of good cause, the

¹ See Decision No. R11-0743 (mailed on July 8, 2011), affirmed and modified on exceptions by Decision No. C11-0946 (mailed on September 1, 2011) in Proceeding No. 10AL-963G.

² Decision No. R14-0694 (mailed on June 25, 2014) in Proceeding No. 13M-0915G, ¶¶ 63 and 64. Pursuant to § 40-6-109(2), C.R.S., Decision No. R14-0694 became a decision of the Commission on July 15, 2014.

Commission may initiate a PSIA prudency review in accordance with the terms and procedures set forth in Decision No. R14-0694.³

4. In Decision No. C18-0983 (mailed on November 6, 2018) in Proceeding No. 18A-0422G, the Commission approved a comprehensive Settlement Agreement extending the PSIA through 2021.

5. The instant proceeding started when Public Service filed Advice Letter No. 936-Gas filed on November 15, 2018, seeking to revise and to implement new PSIA rates applicable to all retail gas sales and gas transportation customers, effective January 1, 2019.⁴ By Decision No. C18-1054-I (adopted on November 21, 2018; mailed on November 29, 2018), the Commission allowed Public Service to utilize alternative forms of notice, detailed in the Decision, to provide notice to its general body of gas ratepayers and other interested persons of the proposed changes to its PSIA rates.

6. On December 14, 2018, Public Service filed an Amended Advice Letter No. 936-Gas, along with an Amended PSIA Tariff and amended supporting exhibits. The purpose of the Amended Advice Letter and Amended PSIA Tariff was to propose a 2019 PSIA revenue requirement and PSIA rates based upon the Commissions determinations in Proceeding No. 17AL-0363G (Public Service's 2017 Phase I Gas Rate Case) regarding return on equity, cost of long-term debt, and capital structure.

7. The amended 2019 PSIA rate was designed to allow Public Service to recover a total 2019 PSIA Revenue Requirement of \$88,840,479 from its gas customers during 2019. The 2019 PSIA Revenue Requirement was an increase of \$7,510,887 from the effective

³ See e.g., Decision No. C18-0324-I (mailed on May 9, 2018), opening prudency review; and Decision No. R18-0838 (mailed on September 18, 2018) in Proceeding No. 16AL-0883G, acknowledging withdrawal of challenges to 2017 PSIA expenses and closing the proceeding.

2018 PSIA revenue requirement of \$81,329,592 established in Proceeding No. 18AL-0191G. The 2019 PSIA Revenue Requirement reflected the difference between the total projected 2019 Pipeline System Integrity Costs of \$92,432,544 (2019 PSIA Costs) and net adjustments in the amount of (\$3,592,065), all of which are further detailed in Amended Advice Letter No. 936-Gas and the accompanying amended exhibits.

8. Thereafter, the new PSIA rates became effective on January 1, 2019.

9. On April 1, 2020, Public Service filed its 2019 PSIA Actuals Report (2019 PSIA Report or Report). The Report explains the activities Public Service undertook pursuant to its PSIA-eligible programs during calendar year 2019, how the costs it incurred for these PSIA activities were managed, and any deviations between previously forecasted and actual costs for 2019. According to the Report, the 2019 PSIA rates provided for the recovery of costs incurred pursuant to the following four integrity management programs and projects: (1) Accelerated Main Replacement Program (AMRP); (2) Distribution Integrity Management Program (DIMP); (3) Transmission Integrity Management Program (TIMP); and (4) the West Main Replacement Project. Attachments to the 2019 PSIA Report provide detailed support for the actual capital expenditures incurred during 2019 in connection with the four integrity management programs and projects. The Report states that in 2019, Public Service's actual net revenue requirement was about 1.6 percent lower than the forecast provided in the November 2018 PSIA filing and that the level of variance differed for each of the four programs. According to the Report, eight

⁴ See the PSIA provisions in Public Service's Colorado P.U.C No. 6 – Gas tariff, Sheet Nos. 47 through 47B.

different factors contributed to the variance between the November 2018 PSIA filing of projected costs of capital and the actual costs included in the 2019 PSIA Report.⁵

10. On April 2, 2020, the Commission issued a “Notice of 2019 PSIA Annual Report Filed” (Notice). The Notice was issued pursuant to the procedures for initiating a prudency review of the PSIA projects and their costs for the 2019 calendar year, which were established by Decision No. R14-0694 in Proceeding No. 13M-0915G and Decision No. C18-0983 in Proceeding No. 18A-0422G. The Notice set a 30-day intervention deadline, which ended on May 4, 2020.⁶

11. On April 27, 2020, Trial Staff of the Colorado Public Utilities Commission (Staff) filed its Notice of Intervention as of Right, alleging that the attachments to the 2019 PSIA Report contain significant variances and inconsistencies, which Staff argues are not acceptable. Further, Staff requested a hearing on the 2019 PSIA Report.⁷

12. No other interested persons filed intervention pleadings in this proceeding.

13. On May 6, 2020, Public Service filed an Affidavit of Publication, confirming that the notice to customers about the filing of the 2019 PSIA Report was published in *The Denver Post* on May 3, 2020.

14. During the weekly meeting held on June 17, 2020, by Minute Order, the Commission referred the matter to an ALJ for disposition. Subsequently, the undersigned ALJ was assigned to preside over this proceeding.

⁵ 2019 PSIA Report, Overview, at pages 1 through 3.

⁶ The 30-day interventions period fell on Saturday, May 2, 2020. Therefore, pursuant to § 40-6-121, C.R.S., the intervention deadline was extended by operation of law to the next business day, or Monday May 4, 2020.

⁷ Staff’s Notice of Intervention as of Right, ¶ 2 at pages 1 through 3.

II. FINDINGS AND CONCLUSIONS

A. **Burdens of Proof and Prudency Review Standard.**

15. The Commission has held that, in a prudency review hearing on a PSIA annual report, Public Service has the burden of going forward and the burden of proof by a preponderance of the evidence.⁸ The preponderance standard requires that the evidence of the existence of a contested fact outweighs the evidence to the contrary.⁹ That is, the finder of fact must determine whether the existence of a contested fact is more probable than its non-existence. A party has met this burden of proof when the evidence, on the whole, slightly tips in favor of that party.¹⁰

16. Challengers to specific capital cost or expense items in a PSIA annual report have the burden of going forward and the burden to prove, by a preponderance of the evidence, that their challenge is valid and should be accepted.¹¹

17. Although the preponderance standard applies, the evidence to satisfy one's burden of proof must be substantial. Substantial evidence is more than a scintilla, and it must do more than create a suspicion of existence of the fact to be established. Substantial evidence is such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion; it must be enough evidence 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.¹²

⁸ See Decision No. R11-0743 (mailed on July 8, 2011), ¶¶ 20 through 26 at pages 6 through 8, in Proceeding No. 10AL-963G; *see generally*, § 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723.

⁹ *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013).

¹⁰ See *Swain v. Colorado Department of Revenue*, 717 P.2d 507, 508 (Colo. App. 1985); and *Schocke v. Dep't of Revenue*, 719 P.2d 361, 363 (Colo. App. 1986).

¹¹ See *Western Distributing Co. v. Diodoso*, 841 P.2d 1053, 1057-1059 (Colo. 1992).

¹² *City of Boulder v. Public Utilities Comm'n*, 996 P.2d 1270, 1278 (Colo. 2000); *Integrated Network Services, Inc. v. Public Utilities Comm'n*, 875 P.2d 1373, 1378 (Colo. 1994).

18. In a PSIA prudency review hearing, what standard should the ALJ apply to determine whether the PSIA projects and their costs for the subject calendar year were prudent? For many years, the Commission's Rules regulating Gas Utilities and Pipeline Operators (Gas Utility Rules) have contained standards for assigning the burden of proof in certain evidentiary hearings and for determining whether a gas utility's actions, omissions, and costs were prudent. If an evidentiary hearing is held to review the prudency of a natural gas utility's filed Gas Purchase Report (GPR) and recovery of gas costs through the utility's Gas Cost Adjustment (GCA), "the utility shall have the burden of proof and the burden of going forward to establish the reasonableness of actual gas commodity and upstream service costs incurred during the review period."¹³ Thus, hearings on prudency review of GPR and GCA filings have a similar purpose – to determine the prudency of the utility's actions (or non-actions) and costs – and they are analogous to prudency review hearings on PSIA filings and costs.

19. The review standard the Commission has used for GPR and GCA prudency review proceedings is the following:

For purposes of GCA recovery, the standard of review to be used in assessing the utility's action (or lack of action) in a specific gas purchase year is: whether the action (or lack of action) of a utility was reasonable in light of the information known, or which should have been known, at the time of the action (or lack of action).¹⁴

20. The ALJ finds and concludes that the review standard for determining whether the PSIA projects and their costs for the 2019 calendar year were prudent will be: whether the

¹³ Rule 4607(d) of the Rules Regulating Gas Utilities and Pipeline Operators, 4 CCR 723-4 (2017).

¹⁴ Rule 4607(c) of the Rules Regulating Gas Utilities and Pipeline Operators, 4 CCR 723-4 (2017). The burden of proof and prudency review standards for gas utilities were first adopted by the Commission in Decision No. C97-467, Attachment A at pages 19 and 20, (mailed on May 7, 1997) in Docket No. 96R-089G and were codified as Rule 4 CCR 723-8-8 (Prudence Review Standard) and Rule 4 CCR 723-8-9 (Burdens). These rules were re-codified as Rules 4607(c) and 4607(d), 4 CCR 723-4, by Decision No. C05-1474, Attachment A (mailed on December 16, 2005) in Docket No. 03R-520G *et al.*, and became effective on April 1, 2006. Rule 4607(c) on the Prudence Review Standard has not been modified since then, while only minor revisions have been made to Rule

actions (or lack of action) of Public Service and the PSIA costs incurred by Public Service were reasonable in light of the information known, or which should have been known, at the time of the action (or lack of action) and of the incurrence of the PAIA costs.

B. Interventions.

21. No motions for permissive intervention, pursuant to Rule 1401(c) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, were filed by the March 25, 2020 deadline.

22. As noted on April 27, 2020, Staff filed its Notice of Intervention as of Right and requested a hearing on the 2019 PSIA Report.

23. Staff's intervention as of right is acknowledged.

24. The Parties to this proceeding are Public Service and Staff.

C. Process for Adopting a Procedural Schedule and Setting the Hearing.

25. Public Service did not file supporting direct testimony and attachments with the 2019 PSIA Report filing on April 1, 2020. Because this filing is not an application, the time deadlines for the issuance of a Commission decision, found in § 40-6-109.5, C.R.S. (2019), do not apply.¹⁵

26. It will be necessary to schedule an evidentiary hearing in this proceeding. To establish a procedural schedule, prehearing disclosure requirements, and hearing date(s), the ALJ will order counsel for Public Service to confer with counsel for Staff regarding these matters.

4607(d). See e.g. Decision No. R18-0090, Attachment A at page 97 (mailed on February 5, 2018) and Decision No. C18-0236, Attachment A at page 97 (mailed on April 11, 2018) in Proceeding No. 17R-0569G.

¹⁵ When supporting testimony is filed with an application, § 40-6-109.5(1), C.R.S. (2019) requires that the Commission's initial decision is due within 120 days after the application is deemed complete. If no supporting testimony is filed with an application, § 40-6-109.5(2), C.R.S. (2019) requires that the Commission's initial decision is due within 210 days after the application is deemed complete.

The Parties shall confer and agree, if possible, on three different hearing dates when the Parties and their witnesses will be available during the month of September 2020.¹⁶

27. The Parties are advised and on notice that, consistent with current Executive Order Declaring an Emergency Disaster and public health orders and advisories to prevent the spread of coronavirus (COVID-19) in Colorado, the evidentiary hearing may be held remotely, using video conference technology. The ALJ will provide to the Parties and counsel the link and instructions for attending the hearing remotely by video conference.

28. In conferring about the procedural schedule, prehearing disclosure requirements, and hearing date(s), the ALJ directs counsel for the Parties to discuss the following: (a) the date by which Public Service will file direct testimony and attachments; (b) the date by which Staff will file answer testimony and attachments; (c) the date by which Public Service will file rebuttal testimony and attachments; (d) the date by which each Party will file corrected testimony and attachments;¹⁷ (e) the date by which each Party will file prehearing motions, other than motions relating to discovery, but including any dispositive motions, motions *in limine*, or motions to strike;¹⁸ (f) the date by which the Parties will file any stipulations or a settlement agreement;¹⁹ (g) the date(s) for the evidentiary hearing as required by Paragraph No. 26 above, including a statement of how many days the Parties will need to try this case; and (h) the date by which each

¹⁶ To assist the Parties in choosing hearing dates, please note that the ALJ is unavailable for hearing on the following dates: September 1, 7, 14, 2020.

¹⁷ Filing of corrections is limited to correcting errors (*e.g.*, mathematical errors, typographical errors) in the testimonies or attachments as filed. Without a finding of good cause and leave of the ALJ, corrections may not be used for any other purpose (*e.g.*, to make material or substantive changes to prefiled testimony or attachments).

¹⁸ This date shall be at least 21 calendar days before the first day of the hearing.

¹⁹ This date shall be at least ten calendar days before the first day of hearing.

Party will file its post-hearing statement of position (statements of position will be simultaneous and no responses will be permitted).²⁰

29. As part of their conferral, the ALJ directs counsel for the Parties to discuss and to report whether a prehearing conference is necessary and, if it is, the date for that prehearing conference.

30. As part of their conferral, the ALJ directs counsel for the Parties to discuss and to report whether the Unopposed and Comprehensive Stipulation and Settlement Agreement in Proceeding No. 20AL-0049G, filed on July 10, 2020, has any impact on the issues to be litigated in the instant proceeding.

31. As part of their conferral, the ALJ directs counsel for the Parties to discuss and to report any matter pertaining to discovery if the procedures and timeframes contained in Rule 1405 of the Rules of Practice and Procedure, 4 CCR 723-1, are not sufficient.

32. As part of their conferral, the ALJ directs counsel for the Parties to discuss and to report any matter pertaining to the treatment of information claimed to be confidential if the procedures and timeframes contained in Rules 1100 and 1101 of the Rules of Practice and Procedure, 4 CCR 723-1, are not adequate. This discussion will include the treatment of additional information for which extraordinary protection may be sought, assuming that there may be such additional information.

33. As part of their conferral, the ALJ directs counsel for the Parties to discuss and to report whether the presentation of evidence at the hearing should be done through electronic exhibits to the fullest extent possible, with the exception of exhibits to be used for impeachment, to refresh recollection of a witness, or during redirect.

²⁰ Post-hearing statements of position should be filed no later than 14 calendar days from the conclusion of

34. As part of their conferral, the ALJ directs counsel for the Parties to discuss and to report any additional issues relevant to this proceeding.

35. Public Service and Staff will be ordered to file a Joint Status Report, no later than July 30, 2020, informing the undersigned ALJ of the results of their conferrals. If the Parties agree to the proposed hearing dates within the month of September 2020, the Joint Status Report shall identify the agreed-upon dates and state the estimated number of days needed for the hearing. The ALJ will choose, if possible, one of the dates proposed in the Joint Status Report. The Joint Status Report should also report any and all agreements on the other procedural matters required by this Decision. The ALJ will choose, if possible, one of the dates proposed in the filed Joint Status Report.

36. If counsel for Staff fails to confer with counsel for Public Service, counsel for Public Service shall file an individual Status Report, no later than July 30, 2020, stating: (a) the reasonable, good faith efforts made to confer with counsel for Staff; (b) Public Service's available dates for the hearing during September 2020; and (c) Public Service's positions on the other procedural matters required by this Decision.

37. If counsel for Public Service fails to confer with counsel for Staff, counsel for Staff shall file an individual Status Report, no later than July 30, 2020, stating: (a) the reasonable, good faith efforts made to confer with counsel for Public Service; (b) Staff's available dates for the hearing during September 2020; and (c) Staff's positions on the other procedural matters required by this Decision.

38. The Parties are advised and are on notice that failure to file the Joint Status Report, or an individual Status Report, as ordered in this Decision will result in the ALJ setting a

the evidentiary hearing. Page limits, if any, for Statements of Position will be addressed at the evidentiary hearing.

hearing date and establishing a procedural schedule without further input from the Parties. In that event, after scheduling the hearing, the ALJ will not consider future requests to continue the hearing or to extend filing deadlines, unless a Party files a motion and shows good cause.

39. After selecting the date for the hearing, the ALJ will issue an Interim Decision that schedules the dates(s) for the evidentiary hearing and establishes the procedural schedule addressing the procedural matters discussed in this Decision.

D. Other Advisements.

40. The Parties are advised that an order may issue requiring that the presentation of evidence at the hearing shall be done through electronic exhibits to the fullest extent possible, with the exception of exhibits to be used for impeachment, to refresh recollection of a witness, or during redirect.

41. The Parties are advised, and are on notice, that they must be familiar with, and strictly abide by, the Rules of Practice and Procedure, 4 CCR 723-1. These Rules are available on-line at www.dora.colorado.gov/puc and in hard copy format from the Commission.

42. All Parties are represented by counsel. The ALJ reminds counsel of the requirement in Rule 1202(d), 4 CCR 723-1, that, “[e]very pleading of a party represented by an attorney shall be signed by the attorney, and shall state the attorney’s address, telephone number, e-mail address, and attorney registration number.” (Emphasis supplied.) The Parties are advised, and are on notice, that filings must comply with this requirement and with the other requirements found in the Commission’s rules pertaining to filings made with the Commission.²¹

²¹ During the course of this proceeding, the ALJ may have occasion to inform counsel, on short notice, of his rulings. The ALJ will make such notifications by email and will rely solely on the signature blocks of pleadings for the appropriate email addresses. If any counsel’s email address changes during the pendency of this proceeding, please promptly update it with the ALJ and the Commission.

43. The Parties are advised, and are on notice, that timely filing with the Commission means that the Commission receives the filing by the due date. Thus, if a document is placed in the mail on the date on which the document is to be filed, then the document is not filed timely with the Commission. Pleadings and other documents are filed with the Commission either by using the E-filings System, or by filing the original of a paper document along with three copies. Emailing pleadings and other documents to the ALJ, the Commissioners, the Director of the Commission, or other employees of the Commission does not constitute a proper filing under Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1.

44. Each Party is specifically advised that all filings with the Commission must also be served upon counsel for the other Party, in accordance with Rule 1205 of the Rules of Practice and Procedure, 4 CCR 723-1.

45. Each Party is specifically advised that, pursuant to Rule 1400(b) of the Rules of Practice and Procedure, 4 CCR 723-1, responding Parties (*i.e.*, the Parties that did not file a motion) have the procedural right to file a written response to motions within 14 days after service of the motion, unless that time is shortened by the ALJ.

46. Additional procedural requirements and other advisements may be provided in subsequent Interim Decisions.

III. ORDER

A. It Is Ordered That:

1. The Notice of Intervention as of Right, filed by Trial Staff of the Colorado Public Utilities Commission (Staff) on April 27, 2020, is acknowledged.

2. Consistent with the Findings and Conclusions in this Decision, counsel for Public Service Company of Colorado (Public Service) shall confer with counsel for Staff regarding

establishing a procedural schedule, prehearing disclosure requirements, and hearing date(s) (Procedural Matters).

3. Consistent with the Findings and Conclusions in this Decision, Public Service and Staff shall file a Joint Status Report, **no later than July 30, 2020**, reporting to the Administrative Law Judge the results of their conferrals and agreements about the Procedural Matters.

4. If counsel for Staff fails to confer with counsel for Public Service, counsel for Public Service shall file an individual Status Report, **no later than July 30, 2020**, stating: (a) the reasonable, good faith efforts made to confer with counsel for Staff; (b) Public Service's available dates for the hearing during September 2020; and (c) Public Service's positions on the Procedural Matters required by this Decision.

5. If counsel for Public Service fails to confer with counsel for Staff, counsel for Staff shall file an individual Status Report, **no later than July 30, 2020**, stating (a) the reasonable, good faith efforts made to confer with counsel for Public; (b) Staff's available dates for the hearing during September 2020; and (c) Staff's positions on the Procedural Matters required by this Decision.

6. The Parties shall comply with the requirements established in this Decision and shall make the filings required by this Decision.

7. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director