

Decision No. C20-0861

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

PROCEEDING NO. 20AL-0328E

IN THE MATTER OF ADVICE LETTER NO. 1830 FILED BY PUBLIC SERVICE COMPANY OF COLORADO IN COMPLIANCE WITH DECISION NO. C20-0505 IN PROCEEDING NO. 19AL-0268E TO INCREASE THE GENERAL RATE SCHEDULE ADJUSTMENT (GRSA) TO BECOME EFFECTIVE AUGUST 10, 2020.

**DECISION PERMANENTLY SUSPENDING TARIFF SHEETS AND DENYING REQUEST FOR A TRUE-UP SURCHARGE**

Mailed Date: December 8, 2020

Adopted Date: December 2, 2020

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**I. BY THE COMMISSION**

**A. Statement**

1. This Decision permanently suspends the tariff sheets filed by Public Service Company of Colorado (Public Service or the Company) on August 5, 2020 with Advice Letter No.

1830, as amended on August 14, 2020, and denies Public Service's request to implement "true-up surcharge" on its electric base rates related to the Commission's granting of reconsideration of Decision No. C20-0096 in Proceeding No. 19AL-0268E.

**B. Background**

2. On May 20, 2019, Public Service filed Advice Letter No. 1797 with supporting attachments and pre-filed testimony as a Phase I electric rate case in Proceeding No. 19AL-0268E. The Company initially sought to increase its base rates to cause a total increase in annual base rate revenues of approximately \$408 million or 26 percent.

3. Tariff Sheet No. 132 filed with Advice Letter No. 1797 set forth a General Rate Schedule Adjustment (GRSA) and series of charges in the form of a GRSA-Energy (GRSA-E). The initially proposed GRSA was 13.00 percent, designed to collect the sought-after increase in base rate revenues. The GRSA-E was a new base rate charge for electric service "calculated under the Company's electric base rate schedules for Kilowatt-Hours used for the various levels of service delivery" designed to recover the cost of the Rush Creek Wind Project.

4. The Commission heard Proceeding No. 19AL-0268E *en banc* and, after conducting an evidentiary hearing in November 2019, established new base rates for the Company by Decision No. C20-0096 (Final Rate Decision) issued on February 11, 2020.

5. The Final Rate Decision established base rates at levels below the Company's initial requests in Advice Letter No. 1797. The Commission directed the Company to file an advice letter compliance filing to modify the relevant tariff sheets consistent with the findings, conclusions, and directives in Decision No. C19-0096, and all applicable rules.

6. In accordance with the Final Rate Decision, Public Service filed Advice Letter No. 1818 in Proceeding No. 20AL-0061E. The modified Tariff Sheet No. 132 in that advice letter

compliance tariff filing set forth a single GRSA of 5.76 percent and a series of GRSA-E factors. These new base rates became effective on February 25, 2020.

7. On March 2, 2020, Public Service and several intervening parties in Proceeding No. 19AL-0268E filed applications for rehearing, reargument, or reconsideration (Applications for RRR) of the Final Rate Decision. In its Application for RRR, Public Service sought extensive modifications to the Final Rate, prompting the Commission initially to grant the Application for RRR for the sole purpose of tolling the statutory 30-day deadline to avoid the automatic denial of the Company's Application for RRR by operation of law. The breadth and complexity of the Company's Application for RRR further required significant effort by the Commission to complete the requested reconsiderations of Decision No. C20-0096 sought by Public Service.

8. The Commission deliberated on the merits of the Applications for RRR at its weekly meeting on May 13, 2020. Decision No. C20-0505 (RRR Decision) subsequently issued on July 14, 2020.

9. On August 5, 2020, Public Service filed a compliance tariff filing as directed by the RRR Decision through Advice Letter No. 1830. In that administrative filing, Public Service stated the Company had determined the findings, conclusions, and directives in the RRR Decision are material and that it had conferred with Staff as directed by the Commission. Public Service explained that the full base rate revenue change as a result of RRR Decision is approximately \$12 million on an annual basis. Public Service also stated that the Company "estimates it has under-collected" approximately \$4.9 million for the period February 25, 2020, the date rates established by Final Rate Decision took effect, through August 9, 2020, the date when rates calculated in accordance with the Final Rate Decision and the RRR Decision were requested to take effect.

Public Service sought to collect the \$4.9 million “back bill amount” over the period August 10, 2020 through December 31, 2020.

10. On August 7, 2020, the Commission issued Decision No. C20-0584-I setting the compliance tariff filing for hearing before the Commission *en banc* and suspending the effective date of the tariffs attached to Advice Letter No. 1830 for 120 days, or through December 8, 2020, pursuant to the provisions of § 40-6-111, C.R.S. The Commission stated that it had significant concerns with Public Service’s proposal to back bill for amounts it claims were incurred during the period February 25, 2020 through August 9, 2020. The Commission also explained that it was unaware of a similar compliance filing before this Commission by any utility under Commission jurisdiction and that the inclusion of the back billing into its compliance filing was made absent legal or regulatory justification. The Commission further stated that the form of any hearing and the issues to be resolved would be determined by separate decision.

11. On August 10, 2020, Public Service filed a pleading titled “Request for a Status Conference.” Public Service requested that the Commission confer with the Company as soon as practicable to address: the conferral that occurred between the Staff of the Colorado Public Utilities Commission (Staff) and Public Service regarding the Company’s then forthcoming compliance advice letter and tariff (*i.e.*, Advice Letter No. 1830); the process for the Company to bring forward legal and regulatory policy support for the back billing; and potential approaches to bifurcate Commission consideration of the full application of the changes and modifications made by the RRR Decision as of the effective date of rates pursuant to Final Rate Decision. Public Service also stated that such bifurcation could mitigate the “ongoing harm to the Company from the inability to implement the changes and modifications to the base rate revenue deficiency from Decision No. C20-0505.”

12. On August 14, 2020, Public Service acted to bifurcate the forward-looking base rate revenue change from the backward-looking true-up. The Company filed an amended advice letter in this Proceeding with modified tariff sheets to implement only the requested “true up surcharge” and separately filed new compliance tariff sheets with Advice Letter No. 1832 in Proceeding No. 20AL-0334E “to implement on a going forward basis the change in base rate revenue consistent with Decision No. C20-0096 as modified by Commission Decision No. C20-0505” (*i.e.*, the approximate \$12 million on an annual basis). The compliance tariff sheets filed with Advice Letter No. 1832 took effect on August 19, 2020.

13. On August 18, 2020, the Commission issued Decision No. C20-0603-I addressing the Company’s “Request for Status Conference.” The Commission scheduled a status conference on August 27, 2020 and required Public Service to file, no later than August 19, 2020, a brief supporting its claim that under the Commission’s decisions in Proceeding No. 19AL-0268E, the Company is entitled to back bill the \$4.9 million. The Commission stated that it expected to see a robust brief that sets forth the Company’s legal position; the specific language in the Final Rate Decision and the RRR Decision that authorize the proposed back billing; and the regulatory practices which allow the proposed back billing. The Commission further found that when it deems it most appropriate, it will set a hearing at which time we will hear from Staff.

14. On August 19, 2020, Public Service filed its brief in support of a “True-Up Surcharge.”

15. On August 26, 2020, by Decision No. C20-0624-I, the Commission vacated the status conference scheduled by Decision No. C20-0603-I. The Commission stated it was unnecessary to hold a status conference to discuss Public Service’s request and the arguments put forth in its brief filed on August 19, 2020.

**C. Request for a True-up Surcharge**

16. In its brief filed on August 19, 2020, Public Service argues that the intent of an Application for RRR is to correct an improper ruling by the Commission and “reverse, change or modify an unjust or unwarranted outcome” that “never should have been.” The Company argues that the granting of an Application for RRR necessarily reverses, modifies, or changes the original decision pursuant to § 40-6-114(3), C.R.S.

17. Public Service further contends that when the Commission grants an Application for RRR, the modifications to the original decision are effective as of the date the original decision issued. Public Service states that if “RRR grants” are not applied back to the date of the original decision, “the result would be an unjust and unwarranted outcome for a period of time until the Commission corrects the decision through the ARRR process (as well as any time necessary to implement the Commission’s ARRR decision).”

18. Public Service further argues that not allowing a true-up surcharge for this period of time would penalize the successful RRR petitioner for the Commission’s error, an inequitable outcome in direct conflict with the Commission’s statutory mandate of ensuring that rates are just and reasonable. Public Service claims that there is material harm to a party that prevails with its Application for RRR if the Commission does not address the time period from which the Commission’s original decision was effective and the date the Application for RRR was granted. The Company goes on to conclude that the use of refunds and surcharges is necessary to comply with the fundamental tenant of utility regulation and the Public Utilities Law that any rate charged by a utility shall be just and reasonable.

19. Public Service contends that in this instance, the Company suffered harm in the form of over \$5 million in under-collected revenue “as a direct result of decisions the Commission itself has *acknowledged* through reversal were unjust and unwarranted.”

20. Notwithstanding the Commission’s advisements in Decision No. C20-0584-I, Public Service’s August 19, 2020 brief provides no references to any previous compliance tariff filings by which a Colorado utility sought to impose a surcharge to collect revenues claimed for a period between a final Commission decision establishing base rates a decision on an Application for RRR. Public Service also provides no case law in support of its novel attempt to impose a surcharge for back billing utility customers as part of a base rate compliance tariff filing.

#### **D. Findings and Conclusions**

21. The legal support Public Service offers for its true-up request hinges on its reading of our RRR statute, § 40-6-114, C.R.S. The Company makes two arguments. The first argument is that the first sentence of § 40-6-114(3) means that when the Commission grants RRR, the initial decision is necessarily unreasonable. In this case, the company argues that the RRR Decision renders the base rates established by the Final Rate Decision unjust and unreasonable. This is not the case.

22. To begin, the first sentence of § 40-6-114(3) does not provide that any changes made on RRR render parts of the original decision unjust and unreasonable. The plain language of the provision bears this out:

“If after rehearing, reargument, or reconsideration of a decision of the commission it *appears* that the original decision is in any respect unjust or *unwarranted*, the commission *may* reverse, change, or modify the same accordingly” (emphasis added).

23. By using “unwarranted” rather than “unreasonable,” the legislature granted to the Commission the leeway to make policy-driven changes to initial decisions. The legislature could have mirrored the “unjust or unreasonable” language it used when empowering the Commission to regulate utility rates in § 40-3-101, C.R.S., but it did not. By allowing the Commission to make changes even when it *appears* that the initial decision may *in any respect* be *unwarranted*, the legislature indicated that the Commission is not constrained to only correcting “unjust or unreasonable” rates when it reconsiders its initial decisions.

24. This flexibility accords with the general tenant of ratemaking that the Commission often chooses between a range of reasonable options and, through reconsideration, may be convinced by the parties that a different (reasonable) option is preferable. Therefore, we do not agree with Public Service’s reading that any change made on reconsideration means the initial decision was in any way unjust or unreasonable. Particularly here, where both the Final Rate Decision and RRR Decision resulted in outcomes that were well within the range of reasonableness that the Commission adopted.

25. Public Service’s second argument is that the Commission’s RRR Decision modifies—rather than replaces—the initial decision, and as a result the final decision retains the effective date of the initial decision.<sup>1</sup> Put another way, Public Service’s true-up request seeks to make rates approved in a final decision effective from an earlier point in the ratemaking process, rather than from the date of the final decision.

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<sup>1</sup> Public Service also analogizes the Commission’s final RRR decision to a court granting a new trial. This analogy is misplaced. When it considered and granted the company’s request for RRR, the Commission based its decisions on the full record and the arguments the company and other stakeholders presented to it; it did not strike evidence and testimony elicited at the evidentiary hearing, and it did not order that the parties proceed anew with this rate case. So, we are unpersuaded by the analogy.



26. We disagree with the company's argument that Commission decisions on RRR are effective earlier than the date they are issued. The RRR statute provides that our ratemaking decision is final when the Commission denies an application for RRR (either by decision or by taking no action on the application within thirty days), or on the date on which the Commission serves its RRR-granting decision on the parties to the proceeding. *See* § 40-6-114(4), C.R.S. That marks the conclusion of the ratemaking process. The rates approved in the final decision can become effective from that point forward. The Commission can (and did) order interim rates as relief during the ratemaking proceeding, but it did not order that its decision on RRR was retroactive to the date of the initial decision, nor did Public Service ask for that relief at any point prior to its belated attempt in this separate compliance filing. This attempt to retroactively apply a final decision to an earlier date finds no support in our rules or our statute.

27. We reject the company's surcharge request for another reason. The relief Public Service now seeks is specific to its rate case proceeding and therefore needed to have been presented in the rate case, not in a separate compliance filing made after the ratemaking proceeding had concluded. The *People's Natural Gas* case the company cites in their brief in support of their surcharge request illustrates this point. In *People's Natural Gas*, the utility filed its surcharge request (to recover losses incurred during the proceeding) alongside its application for a rider at the beginning of the proceeding.<sup>2</sup> That would be the proper way to make such a request in a ratemaking proceeding.

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<sup>2</sup> We also note that in *People's Natural Gas*, the court quotes the Commission's position as "look[ing] with disfavor on any use of a surcharge" like the one Public Service asks for here. The Commission granted the surcharge in that case acknowledging that without the surcharge the gas utility would likely suffer financial failure. The stakes are not nearly as high here, and are another reason that we are skeptical of this belated attempt to secure additional revenue after the rate case has concluded.

28. That the Final Rate Decision established just and reasonable rates notwithstanding the possibility that Applications for RRR might be filed and later granted is a well-established regulatory principle in Colorado. Contrary to Public Service's claims, there has been no period in which the electric base rates charged to customers failed to be just and reasonable. The granting of Applications for RRR in Proceeding No. 19AL-0268E simply caused the Commission to establish a different, higher level of base rates—notably in the Company's favor—based on the same evidentiary record as the final decision subject to the Applications for RRR.

29. Neither Public Service nor any intervenor in Proceeding No. 19AL-0268E addressed during the course of that rate case a scenario where a party would be materially harmed by a Commission decision establishing rates yet subject to Applications for RRR. The evidentiary record in Proceeding No. 19AL-0268E thus lacks any basis for the Commission to conclude that Public Service would be subject to material harm if Applications for RRR were granted later in its favor such that the Company could address such harm with a compliance tariff filing.

30. There also is no basis upon which Public Service can conclude that the Final Rate Decision and the RRR Decision entitle the Company to a specific level of base rate revenue collections. Both decisions are void of any base rate revenue amount and the relief granted to Public Service in those decisions is strictly limited to allowing the Company to change its base rates for implementation on customer bills prospectively. The RRR Decision required Public Service to perform the necessary calculations to establish the new levels of *base rates* and to confer with Staff whether those new values *for base rates* were materially different than the values set forth on Tariff Sheet No. 132 filed with Advice Letter No. 1818.

31. Finally, Public Service's declaration of harm ignores the fact that its Application for RRR was sweeping and complex and that the time beyond the 30 days for automatic denial

that the Commission took to consider the relief the Company sought ultimately proved to be in the Company's favor.

32. We conclude that no additional process is required in this Proceeding to find that using a compliance tariff filing as a vehicle to introduce a new true-up surcharge is improper. Public Service's Advice Letter No. 1830, as amended, and the Company's brief filed on August 19, 2020, are unavailing with respect to supporting the need for any additional hearing process in this matter to resolve the alleged "back billing issue."

33. We further deny Public Service's request to implement a true-up surcharge related to the RRR Decision. The rates set forth in the compliance tariff sheets filed with Advice Letter Nos. 1818 and 1832 encompass the entire relief afforded Public Service with respect to the electric base rates established in Proceeding No. 19AL-0268E.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The effective date of the tariff sheets filed by Public Service Company of Colorado (Public Service) on August 5, 2020 with Advice Letter No. 1830, as amended on August 14, 2020, is permanently suspended and shall not be further amended.

2. The tariff sheets filed with Advice Letter No. 1830, as amended on August 14, 2020, are permanently suspended and shall not be further amended.

3. Public Service's request to implement "true-up surcharge" on its electric base rates related to the Commission's granting of reconsideration of Decision No. C20-0096 in Proceeding No. 19AL-0268E is denied, consistent with the discussion above.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
December 2, 2020.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

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JOHN GAVAN

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MEGAN GILMAN

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Commissioners