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REGULATION OF ENERGY BY THE COLORADO PUBLIC UTILITIES COMMISSION

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I. INTRODUCTION.

The Colorado Public Utilities Commission ("PUC" or "Commission") is an administrative agency, endowed broadly with constitutional and statutory authority to regulate public utilities operating within the state. This paper will address only one aspect of the PUC's responsibility: regulation of public utilities that produce, distribute or otherwise sell electricity or natural gas. Note, however, that the Commission does regulate other utilities, such as telephone and public transportation companies.

Rather than exhaustively discuss all of the PUC's activities in the areas of electric and natural gas, this paper will broadly describe how the PUC operates, providing source material to which the reader can refer should questions later arise. Accordingly, the information below is presented in annotated memorandum form, including citation to the most important authorities.

II. PUC JURISDICTION OVER ELECTRIC AND GAS SUPPLIERS.

In Colorado, electric and gas utilities are organized in one of three ways: investor-owned companies, cooperatively-owned associations, or municipally-owned

utilities. PUC jurisdiction over each of the three kinds of utilities will be treated, in order, below.

A. Investor-Owned Utilities.

1. An investor-owned utility ("IOU"), much the same as any other publicly held corporation, is one which is owned by shareholders of the company's stock. The cardinal difference between an investor-owned utility and other publicly held corporations is that most of a utility's activities, both financial and operational, are controlled by the PUC.

2. The Commission's regulatory jurisdiction over non-municipally owned utilities, including IOU's, is based upon Article XXV of the Colorado Constitution, adopted in 1954. Title 40 of the Colorado Revised Statutes, which implements Article XXV, is often referred to as the Public Utilities Law.

3. The state legislature has declared that all electrical and gas corporations, among other businesses, supplying the public for domestic, mechanical, or public uses are public utilities, subject to the jurisdiction and control of the PUC under Articles 1 through 7 of Title 40. C.R.S. § 40-1-103.

a. In order for a business to be considered a public utility within this statutory definition, it must be impressed with a public interest and hold itself out to serve all members of the public who require its service. Public Util. Comm'n v. Colorado Interstate Gas Co., 142 Colo. 361, 351 P.2d 241 (1960); City of Englewood v. City & County of Denver, 123 Colo. 290, 229 P.2d 667 (1951).

4. The PUC has the power and authority to govern and control all rates, charges, and tariffs of public utilities within its jurisdiction. C.R.S. § 40-3-102.

5. With some exceptions, a public utility must obtain a certificate of public convenience and necessity from the Commission before constructing new facilities, extending present facilities, or exercising any right to operate under a franchise. C.R.S. § 40-5-101 & 102. Rule 18 of the Commission's Rules Regulating the Service of Electric Utilities contains construction standards and planning procedures. 4 C.C.R. 723-3 at 7.

6. The PUC must prescribe rules and regulations generally governing the performance of any kind of service, or the furnishing of any kind of commodity, by a public utility. C.R.S. § 40-4-101. The Commission has promulgated such rules for electric and gas utilities. The rules governing electric utilities may be found at 4 C.C.R. 723-3, and those governing gas utilities at 4 C.C.R. 723-4.

7. The issuance of securities, such as stocks, bonds, notes and other evidences of indebtedness, by most gas or electric corporations operating in Colorado must be approved by the PUC. Commission approval must be obtained if the electric or gas corporation derives more than five percent of its consolidated gross revenues in Colorado as a public utility, or derives a lesser percentage if those revenues are realized by supplying an amount of energy equal to five percent or more of statewide consumption. C.R.S. § 40-1-104.

8. Except transactions performed in the ordinary course of business, no public utility may sell, assign or lease its assets, including certificates of public convenience and necessity, without authorization from the Commission. C.R.S. § 40-5-105.

B. Cooperatively-Owned Utilities.

1. A cooperatively-owned utility ("Co-op") is one which is owned by its customers, who have become members of the co-op. Member-customers of a co-op have a voice in the co-op's affairs, the extent of which depends, however, on statutory enactments, the co-op's by-laws and policies adopted by the co-op's board of directors.

2. Most, if not all, natural gas is supplied by investor-owned and municipally-owned utilities in Colorado. Accordingly, the discussion of utility co-ops below will be confined to cooperative electric associations. Most electric co-ops were established with loan funds and technical assistance provided by the federal Rural Electrification Administration in accordance with the Rural Electrification Act of 1936, 7 U.S.C.A. § 901 et seq. (1985 Cum. Supp.).

3. There are two kinds of electric co-ops. Some co-ops only generate and/or transmit electricity ("G&T's"), selling it at wholesale to other utilities. Other co-ops, which do not generate, purchase power at wholesale and distribute it at retail to consumers.

4. In accordance with the concept of cooperative ownership, generation and transmission co-ops have as their member-owners other cooperatives, those that distribute electricity at retail. Distribution co-ops have as their member-owners, in turn, the people and businesses that actually consume electricity. Colorado law treats G&T co-ops differently from those that only distribute electricity to consumers.

5. Article 9.5 of Title 40, C.R.S. was enacted as Senate Bill 224 in 1983. As a general matter this legislation gave the members of cooperative electric associations that distribute electricity, but which do not generate or transmit, the option of voting to remove their co-ops from primary regulation by the PUC. C.R.S. § 40-9.5-102 & 103. The theory behind allowing electric distribution co-ops to withdraw from primary Commission oversight was that the co-op's customers, also being its owners, have the ability to control the utility and thereby protect themselves. Member customers of a distribution co-op were seen as having a very different position than customers of an investor-owned utility, who do not necessarily have any control over the company unless they own its stock. Unlike the buffer needed between an IOU and its "captive" customers, protection of a co-op's consumers by the PUC was viewed as unnecessary. See C.R.S. § 40-9.5-101.

6. Of the 24 electric distribution co-ops that predominantly serve in Colorado, 21 have voted to withdraw from PUC regulation since Article 9.5 was enacted. Those distribution co-ops whose members have not voted to withdraw from primary PUC control, or who have not held a vote, remain completely regulated by the Commission, under the same broad constitutional and statutory authority as are investor-owned utilities.

7. As stated above, however, electric cooperatives that generate and transmit, but do not distribute electricity are specifically not covered by Article 9.5. These entities may not, therefore, choose to withdraw from primary Commission regulation. They are regulated as public utilities by the PUC, under the same authority as are investor-owned utilities. See C.R.S. §§ 40-9.5-102; 40-1-103(2)(a) & (b)(I).

8. A further distinction must be made between regulation of those G&T co-ops that operate wholly within Colorado and those that operate both in Colorado and other states. Wholesale rates for electricity charged by

generation and transmission co-ops operating exclusively in Colorado, or whose interstate business might be considered very minimal, may be regulated by the PUC. Such regulation is not currently preempted by federal legislation and does not offend the Supremacy or the Commerce clauses of the United States Constitution. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Comm'n, 462 U.S. 375, 76 L. Ed.2d 1, 103 S. Ct. 1905 (1983). Such is the basis for PUC regulation of the Colorado-Ute Electric Ass'n, which is a Colorado based G&T co-op that sells electricity at wholesale to its members, all distribution co-op's principally located in Colorado.

On the other hand, a G&T co-op that transports electricity across state lines or markets electricity to entities in more than one state will probably be considered to be engaged in interstate commerce. Any assertion of regulation by a state agency that places more than a minimal burden on that interstate commerce may be prohibited by the federal constitution's commerce clause. See e.g., Tri-State Generation & Transmission Ass'n, Inc. v. Public Service Comm'n of Wyoming, 412 F.2d 115 (10th Cir. 1969). Therefore, the PUC does not regulate the wholesale rates charged by Tri-State Generation & Transmission Ass'n, Inc., a G&T co-op that transports and sells electricity to its member distribution co-ops in Wyoming, Colorado and Nebraska.

C. Municipally-Owned Utilities.

1. A municipally-owned utility, unlike an IOU or a co-op, is owned and operated by a city or town. Depending upon a municipality's internal organization, the utility may be operated as a department of the municipality or it may be administered by a subentity such as a power board or commission. Approximately 30 municipalities in Colorado presently own and operate their own electric utility systems.

2. While the PUC is broadly charged with regulation of public utilities as described above, Article V, § 35 and Article XXV of the Colorado Constitution historically carved an exception to PUC regulation where municipal utilities were concerned. These sections have been construed to allow PUC regulation of municipally-owned utilities only if, and to the extent that, they provide utility service outside of city or town boundaries. The PUC was, and is, considered constitutionally prohibited from regulating the activities of municipal utilities conducted within municipal limits. City of Loveland v. PUC, 195 Colo.

298, 580 P.2d 381 (1978); City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926).

3. PUC jurisdiction over the activities of municipally-owned utilities outside municipal boundaries was significantly changed in 1983 when the General Assembly enacted House Bill 1283. Codified principally as Article 3.5 to Title 40, C.R.S., House Bill 1283 removed from direct PUC jurisdiction even those activities of municipal utilities conducted outside municipal boundaries. In place of PUC jurisdiction, regulation of municipal utility activities outside municipal boundaries was relegated to the "governing body" of each municipal utility.

4. It is important to note that H.B. 1283 authorized local control over municipal utilities in place of centralized state control, but it did not completely "deregulate" municipal utilities. A notice must be given and a public hearing held by each municipal utility's governing body before any change may be made in any rate, charge, "or in any rule, regulation, or contract relating to or affecting any base rate, charge or service, or in any privilege or facility." C.R.S. § 40-3.5-104(1)(a). Under certain circumstances, the notice and hearing requirement need not be satisfied if "good cause" is shown. C.R.S. § 40-3.5-104(3).

5. It is equally important to note that the PUC may "regain" jurisdiction over the activities of municipal utilities conducted outside municipal limits, should certain circumstances detailed in House Bill 1283 arise. Significant exceptions to local control, allowing the PUC to regulate, are: (a) when customers outside municipal boundaries are charged rates that vary from those charged to customers within the same class of service inside the municipality, and (b) when the greater of five percent or five of the "affected electric or natural gas customers outside the corporate limits of the municipality" file a complaint with the PUC. C.R.S. §§ 40-3.5-102 and 40-3.5-104(4).

III. REGULATION BY THE PUC.

As noted above, the PUC exercises control over many aspects of the operation of a public utility within its jurisdiction. One of the primary tasks performed by the Commission is oversight and regulation of the rates public utilities charge their customers. The PUC's power to regulate rates, the theory under which it does so, and the

process by which ratemaking is accomplished, are summarily described below.

A. The Power of the Public Utilities Commission.

1. Article XXV of the Colorado Constitution broadly grants the General Assembly, through the PUC or such other agency as it may designate, all power to regulate public utilities (except municipal utilities operating within corporate boundaries).

2. Thus, in Colorado the basis of the Commission's power is constitutional, not statutory. The PUC has full constitutionally-granted legislative authority to regulate public utilities, unless specifically restricted in its exercise of such powers by the General Assembly. Mountain States Legal Foundation v. PUC, 197 Colo. 56, 590 P.2d 495 (1979); Miller Bros., Inc. v. PUC, 185 Colo. 414, 525 P.2d 443 (1974). Possible ways in which the General Assembly can limit the Commission's power are through redefinition of those entities that are considered public utilities or through a direct statutory restriction on the Commission's powers.

3. This authority is reflected in the legislature's very broad charge to the Commission:

to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title [40] or in addition thereto, which are necessary or convenient in the exercise of such power

C.R.S. § 40-3-102.

4. Some of the powers vested in the PUC, that have been specifically enumerated by the legislature, include:

- a. The power to issue summonses and subpoenas effective statewide (C.R.S. § 40-6-102);
- b. The power to issue orders to satisfy or answer (C.R.S. § 40-6-102);
- c. The power to compel the attendance of witnesses and the production of documents (C.R.S. §§ 40-6-103 and 40-6-107); and

d. The power to inspect the records and documents of any public utility (C.R.S. § 40-6-106).

B. Territorial Regulation.

1. In Colorado, the territory in which an electric or gas public utility may serve is governed by the doctrine of regulated monopoly. Each utility is authorized by the PUC to provide service in a particular area. Once an area has been certified by the Commission to one public utility, another public utility may not be certificated to serve the same territory. PUC v. Home Light & Power Co., 163 Colo. 72, 428 P.1d 928 (1967).

2. However, the PUC may grant a certificate to a competing public utility when the original certificated utility is either unwilling or unable to service part, or all, of its territory. Town of Fountain v. PUC, 167 Colo. 302, 447 P.2d 527 (1968).

3. Conflicts sometimes arise when a municipality that operates a utility annexes territory previously certificated by the PUC to another public utility. In such situations, the municipal utility has the right to compete with the previously certificated utility for new customers in the newly annexed area. Union Rural Electric Ass'n. v. Town of Frederick, 670 P.2d 4 (Colo. 1983).

C. The Theory of Rate Regulation.

1. Ratemaking is not an exact science. Rather, it involves the weighing of many factors and the exercise of judgment in considering the relationships between those factors. Colorado Ute Electric Ass'n v. PUC, 198 Colo. 534, 602 P.2d 861 (1979).

2. In exercising its jurisdiction and power, the PUC must determine that all services rendered, products furnished, and rates or charges made by a public utility are "just and reasonable." C.R.S. § 40-3-101(1).

3. All services, equipment and facilities provided by a public utility must promote the health, safety, comfort and convenience of its customers, its employees, and the public alike. C.R.S. § 40-3-101(2).

4. The PUC must prevent unjust discriminations and extortions in the rates of public utilities. C.R.S. § 40-3-102.

5. The Commission's concomitant duty, in determining just and reasonable rates, is to evenhandedly set rates that are sufficient to protect a utility's financial integrity. Public Service Co. v. PUC, 644 P.2d 933 (Colo. 1982).

a. This includes ensuring that a utility, through its rates, receives revenues adequate to cover its operating expenses and the capital costs of doing business. "The revenues must be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital." PUC v. Dist. Ct., 186 Colo. 278, 282-83, 527 P.2d 233 (1974).

6. In establishing just and reasonable rates, the Commission generally must address two major questions: a) What level of revenue must the utility be authorized to earn to enable it to render its service (called the "revenue requirement"); and b) How are the revenues to be collected from the utility's customers (called the "spread of the rates"). It should be noted that the revenue requirement determined by the Commission is an amount which the utility should be authorized to earn. Rate cases are often bifurcated, with the revenue requirement determined first, in Phase I, followed by a determination in Phase II of how to structure rates that will allow recovery of the authorized revenues.

7. The Commission must not allow a public utility's rates to confer any advantage or privilege on anyone, or subject anyone to a disadvantage or prejudice. C.R.S. § 40-3-106. This is true no matter how laudable the goals of a preferential rate may be. In Mountain States Legal Foundation v. PUC, 197 Colo 56, 590 P.2d 495 (1979), a PUC order establishing discounted gas rates for low-income elderly and disabled people, the revenue loss from which would be recovered in higher rates to all other customers, was invalidated as preferential.

D. The Process of Regulation.

1. Public utilities under the PUC's regulation must file schedules of all rates, charges, rules and regulations with the Commission. C.R.S. § 40-3-103. These schedules, commonly called tariffs, are the documents used to establish and maintain a utility's current rates. Utilities are obliged to adhere to those rates, charges, rules and regulations contained in their filed schedules.

C.R.S. § 40-3-105(2). See Shoemaker v. Mountain States Tel. & Tel. Co., 38 Colo. App. 321, 559 P.2d 721 (1976).

2. When a public utility desires to change any of its rates, charges, rules or regulations, it files the tariff sheets containing the changes with the Commission, where they are kept open for public inspection. These changed tariff sheets are often accompanied by what is called an "Advice Letter," which explains the changes proposed in the new tariff sheets.

3. No change in any rate, charge, rule or regulation may go into effect except after thirty days' notice to the PUC and the public. C.R.S. § 40-3-104(1)(a) (as amended by Senate Bill 33, 1985). Such notice is given by filing the changes with the Commission, and by any of the following methods (at the option of the utility):

a. By publication, in each newspaper of general circulation in each county in which the utility provides service, once each week for two successive weeks during the first twenty days of the thirty-day period that precedes the effective date of the change. If notice is given by publication, a bill insert must be mailed to all affected customers of an electric or gas utility during the first regular billing cycle after filing of the change, containing the same information as that published;

b. By mailing a notice to each affected customer within the first twenty days of the thirty-day notice period;

c. By including a bill insert in a regular billing mailed to each affected customer within the first twenty days of the thirty-day notice period; or

d. By such other method as the PUC may prescribe upon application by the utility.

C.R.S. § 40-3-104 (as amended by Senate Bill 33, 1985).

4. If the thirty-day notice period passes and the PUC takes no action, the new rate becomes effective automatically. The Commission has discretion to allow this to occur. See C.R.S. § 40-3-104 (as amended by Senate Bill 33, 1985); PUC v. Dist. Ct., 186 Colo. 278, 527 P.2d 233 (1974).

5. However, within the thirty-day notice period the Commission has the authority to set a hearing concerning the propriety of any proposed rate (for utilities that are not electric co-ops). C.R.S. § 40-6-111(1)(a) & (4)(a). If this is done, the effective date of the proposed rate is automatically suspended for a period of 120 days, unless the PUC issues a decision earlier. The Commission has the option of continuing the suspension period for an additional 90 days, for a total of up to 210 days or approximately 7 months. C.R.S. § 40-6-111(1)(b). If, before expiration of the suspension period, the PUC has not ordered the proposed rate to become effective or established a different new one, the proposed rate becomes effective by operation of law. The proposed rate remains effective until the Commission enters an order establishing the proper rate. C.R.S. § 40-6-111(2)(a). In certain circumstances, the PUC may order that the new rate be considered effective as of the date the new tariffs were originally filed. See Peoples Natural Gas Div. v. PUC, 197 Colo. 152, 590 P.2d 960 (1979).

6. Even if the PUC allows a proposed rate to go into effect by not suspending it during the thirty-day notice period, the Commission still has the power to hold an investigation into the propriety of the rate. C.R.S. § 40-3-111. However, under this procedure, the proposed rate stays in effect while the investigation is proceeding. Any order issued as the result of such an investigation can only prescribe the rate to be "thereafter observed." Id. Such a new rate cannot be considered effective from the date the tariffs were originally filed, as is allowable in cases where the proposed rate is first suspended, then investigated. Moreover, this is the only procedure available to the Commission insofar as co-ops are concerned. As noted above, the PUC may not suspend the rates, charges, rules or regulations of a co-op while they are being investigated. C.R.S. § 40-6-111(4)(a).

7. Regardless of the procedures under which a case begins, "persons, firms or corporations" that may be interested in, or affected by, any order of the Commission may move to become a party in a case. C.R.S. § 40-6-108(2). Anyone permitted to intervene is entitled to be heard, examine and cross-examine witnesses, and introduce evidence. C.R.S. § 40-6-109(1).

8. In 1984 the legislature created the office of Consumer Counsel, whose purpose it is to represent the public interest in utility cases. See C.R.S. § 50-6.5-101 to 109. To the extent consistent with the

public interest, the consumer counsel is charged with representing the specific interests of residential, agricultural, and small business consumers. C.R.S. § 40-6.5-104(1).

9. It is possible for intervenors, under certain circumstances, to obtain an order from the PUC requiring the utility involved to pay the attorney and expert witness fees, and costs, incurred by the intervenor. If the Office of Consumer Counsel intervenes in a proceeding before the PUC in which other intervenors are present, the determination of the Commission "with regard to payment of expenses of intervenors, . . . and the amounts thereof" are to be based upon the considerations enumerated in C.R.S. § 40-6.5-105. This statute, pertaining to intervenors' expenses, has not yet been construed by an appellate court in Colorado.

10. The PUC has promulgated Rules of Practice and Procedure, to which the Commission adheres in conducting cases. These rules may be found at 4 C.C.R. 723-1. The Commission is presently conducting a proceeding to comprehensively revise its procedural rules, Case No. 6370.

IV. RELIEF FROM COMMISSION DECISIONS.

A. What Kind of Relief is Available?

1. If the PUC allows proposed rates to become effective through operation of law, without initially suspending them for investigation, no appeal may be taken challenging the nonsuspension. This is because "[i]nitial nonsuspension of new rates is within the sole prerogative of the PUC, and may not be challenged in court." PUC v. Dist. Ct., 186 Colo. 278, 527 P.2d 233, 235 (1974).

2. Under such circumstances, the appropriate remedy is to file a complaint with the PUC challenging the justness, reasonableness or fairness of the new rates. Id. See C.R.S. § 40-6-108.

3. On the other hand, appellate relief may be pursued from Commission decisions that actually establish rates after hearing.

B. The Appellate Route.

1. Cases before the PUC may be assigned to a hearing examiner or a single commissioner for initial

disposition, or the full commission may preside.
C.R.S. § 40-6-101(2) & (3).

2. If the case is originally heard by a single commissioner or hearing examiner, a written recommended decision is made by the trier of fact and transmitted to the Commission. C.R.S. § 40-6-109(2). The Commission may make modifications to the recommended decision on its own motion. Moreover, parties aggrieved by the recommended decision may file exceptions within twenty days after service. If exceptions are filed the Commission must review the case, and may employ the original record or may hold further hearings. Pending the Commission's review on exceptions, the effective date of the recommended decision is stayed. The Commission is free to adopt the recommended decision, modify it, or reject it entirely and enter its own decision without any regard to the findings of fact and conclusions of law made below. If no exceptions are timely filed, the recommended decision becomes the decision of the Commission by operation of law. Id.

3. Once a Commission decision has been made, the appellate route for cases initially heard by a hearing examiner or the full commission are the same. Within twenty days of a Commission decision, aggrieved parties must file an application for reconsideration, reargument or rehearing. If the PUC does not act upon such an application within thirty days, it is deemed to be denied C.R.S. § 40-6-114(1).

4. Unless so requested, the filing of an application for reconsideration, reargument, or rehearing does not automatically stay the effective date of the Commission's decision. C.R.S. § 40-6-114(2).

5. The Commission may, upon reconsideration, reverse or modify its decision. Similarly, the Commission may reject the application and leave its decision intact. C.R.S. § 40-6-114(3).

6. Filing and disposition of an application for reconsideration, reargument or rehearing is a prerequisite to pursuit of further appellate remedies. C.R.S. § 40-6-114(4). No ground for reversal or modification, not set forth in an application for reconsideration, reargument or rehearing, may be argued in any court on appeal. C.R.S. § 40-6-114(5).

7. Parties aggrieved by denial of an application for reconsideration, reargument or rehearing may

apply to the state district court for a writ of certiorari or review. The district court must resolve the matter based on the record compiled before the PUC, and may not hear new evidence. The Commission and every party to the PUC proceeding has a right to appear in the district court review proceedings. C.R.S. § 40-6-115(1).

8. The district court's review is limited to determination of: a) whether the PUC has regularly pursued its authority; b) whether the Commission's decision violates any of the petitioner's constitutional rights; c) whether the decision is just and reasonable; and d) whether the PUC's decision is in accordance with the evidence. C.R.S. § 40-6-115(3). Decisions not supported by substantial evidence must be set aside. City of Montrose v. PUC, 629 P.2d 619 (Colo. 1981).

9. The filing or pendency of a writ of certiorari or review does not automatically stay the effective date of the Commission's decision. The court does have the power and discretion, however, to order such a stay. C.R.S. § 40-6-116.

10. Parties further aggrieved by the district court's disposition of the case may pursue appellate review in the state supreme court. The procedure to be followed is the same as that applicable to review of district court judgments in other civil cases. C.R.S. § 40-6-115(5).

11. Court cases involving review of PUC decisions must be given priority over all other civil matters, except election cases, regardless of their relative position on the court's calendar. C.R.S. § 40-6-117.

Dated: October, 1985

For further reading, the Journal recommends Federal Regulation of Energy, by William Fox, Shepard's/McGraw-Hill, Colorado Springs, CO (1985).