BEFORE THE PUBLIC UTILITIES COMMISSION

STATE of COLORADO

DOCKET NO. 09A-772E

ANSWER TESTIMONY OF CARLY GILBERT ON BEHALF OF THE GOVERNOR'S ENERGY OFFICE

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2010 RENEWABLE ENERGY STANDARD COMPLIANCE PLAN

Q. WOULD YOU PLEASE INTRODUCE YOURSELF?

A. My name is Carly Gilbert. I serve as the Utilities Program Associate at the Colorado Governor's Energy Office (GEO). My business address is 1580 Logan Street, Denver, Colorado 80203. At the GEO I am responsible for developing statutory and regulatory policies that lead to additional renewable energy capacity in Colorado.

Q. WHAT IS THE MISSION OF THE GOVERNOR'S ENERGY OFFICE?

A. The GEO's mission is to lead Colorado to a New Energy Economy by advancing energy efficiency and renewable, clean energy resources.

Q. WHAT IS THE FOCUS OF YOUR TESTIMONY?

A. In this testimony, I will outline the GEO's concerns regarding certain restrictions in state law and policy which inhibit state participation in the Public Service Company (PSCo) of Colorado's Solar*Rewards program. Some of the concerns I will outline were previously expressed in testimony the GEO submitted in the proceeding to amend the RES rules, Docket No. 08R-424E. An outcome from 08R-424E was proposed Section 3658(d) requiring PSCo to address the limitations of state agencies in regards to contracts. Accordingly, PSCo made changes to the model Solar*Rewards contracts for state agencies in an attempt to resolve such concerns. While the GEO appreciates PSCo's efforts, the GEO finds that the revised model contracts continue to present significant legal barriers to state agencies. I will address some of the more significant of these remaining barriers in this testimony.

Ultimately, each agency will need to have its own legal counsel review the specifics of any contract it would sign, and any contract involving the expenditure of funds is subject to the approval of the state controller. That said, these model contracts have the potential to alleviate the primary legal concerns facing any state agency which chooses to participate in the Solar*Rewards program.

Q. WHY IS THE STATE OF COLORADO INTERESTED IN PARTICIPATING IN THE SOLAR*REWARDS PROGRAM?

A. The State of Colorado is particularly interested in increasing the use of solar PV at its facilities because it is consistent with the GEO's mission. Installation of these systems would reduce electric power consumption at state facilities and help state agencies reach the Greening Government goals outlined by Governor Ritter: a 20% reduction in energy use by 2020 at state-owned facilities. In addition to helping reach goals, these systems can also reduce energy bills, which could free up much needed funds during the current state budget crisis. As noted in Jeff Lyng's testimony in proceeding 08R-424E, *"Arguably the best investment for the Colorado bill payer is to have their RESA dollars reinvested in solar projects installed on public infrastructure."* The GEO has worked with several state agencies and the attorney general's office, which provides legal counsel to state agencies, in an effort to resolve contract issues to enable state agency participation in the Solar*Rewards program.

Q. IS THERE ANY HISTORY OF A STATE AGENCY PARTICIPATING IN PSCO'S SOLAR*REWARDS PROGRAM?

A. Yes, there have been some limited cases where a state agency participated in PSCo's Solar*Rewards program. Although a small number of these contracts were executed by state agencies in the past, these contracts contain impermissible terms and therefore cannot be used as a model for the state going forward. The GEO believes it is in the best interest of state agencies and PSCo to participate in the Solar*Rewards program in full compliance with state law. The state's executive agencies, except in the very limited circumstances noted above, have been unable to participate in the PSCo's Solar*Rewards program because of an inability of the state to agree to certain contractual terms. The state constitution and certain state laws, regulations, and policies preclude state agencies from agreeing to specific provisions in the multiple contracts necessary to participate in the program. It is has been established that these restrictions and the lack of contractual language accommodating them have excluded several interested state agencies and potential partners.

Q. WHAT ARE THE CENTRAL LEGAL CONCERNS WITH PSCO'S SOLAR*REWARDS CONTRACTS?

A. The issue of the Solar*Rewards contracts being unfit for state agencies has been expressed in a previous proceeding. The GEO initially noted the state's limitations and concerns in Docket No. 08R-424E. The most imperative piece to take into account, when considering the state's limitations, is that state agencies must comply with the state's constitution, statutes, fiscal rules and policies when entering into contracts. In testimony submitted by Jeff Lyng in Docket No. 08R-424E he suggests to adopt the following language;

"No agreement between a QRU and a government entity shall require the government entity to violate the state constitution nor, state statute, rule, or regulation to participate in SREC and SoREC program offerings."

As is, PSCO's Solar*Rewards contracts include provisions that would require a government agency to be in violation of existing state statutes. Again, testimony by Jeff Lyng in Docket 08R-424E states that *"In essence, the State of Colorado has been placed at a competitive disadvantage with respect to deploying renewable distributed generation on public buildings due to the barriers that these two contractual obligations present."*

In order to comply with state law and eliminate the disadvantage to the state, the GEO's primary legal issues to address with respect to the Solar*Rewards contracts are:

1. **Annual appropriation**

- State law states that financial obligations payable in future fiscal years are contingent on annual appropriation of funds by the legislature. CRS §24-30-202(5.5).
- To this end, the state includes the following special provision in ALL expenditure contracts:

> FUND AVAILABILITY. CRS §24-30-202(5.5). Financial obligations of the state payable after the current fiscal year are contingent upon funds for that purpose being appropriated, budgeted, and otherwise made available.

Additionally, the state's model personal services contract contains the following provision:

> ***Available Funds-Contingency-Termination***
>
> *The state is prohibited by law from making commitments beyond the term of the state's current fiscal year. Therefore, Contractor's compensation beyond the state's current fiscal year is contingent upon the continuing availability of state appropriations as provided in the Colorado Special Provisions. If federal funds are used to fund this Contract, in whole or in part, the state's performance hereunder is contingent upon the continuing availability of such funds. Payments pursuant to this Contract shall be made only from available funds encumbered for this Contract and the state's liability for such payments shall be limited to the amount remaining of such encumbered funds. If state or federal funds are not*

appropriated, or otherwise become unavailable to fund this Contract, the state may terminate this Contract immediately, in whole or in part, without further liability in accordance with the provisions hereof.

2. **Indemnification** - The State of Colorado or an agency of the state is prohibited from indemnifying, defending or holding any party harmless. This is because the state is prohibited from promising to expend funds that are not yet appropriated. When the state promises to indemnify, it is promising to pay an undefined amount for which no appropriation exists.
3. **Insurance requirements** - The State of Colorado is self-insured and is unable to name PSCo as an additional insured on its self insurance certificate.
4. **Expenditure Contract.** Any contract that contains a promise to spend money, or a promise to potentially spend money, is considered an expenditure contract and is subject to C.R.S. 24-30-202, the state's fiscal rules, and review and approval by the state controller (or designee).

Q. DOES THE GEO HAVE RECOMMENDED CHANGES TO THE CONTRACT LANGUAGE?

A. Yes, PSCo requires customers to sign several contracts in order to participate in the Solar*Rewards program. Depending on the nature of the project, these contracts could include the following language:

1. **Solar*Rewards Contract**

The GEO understands this contract would be used for customer-owned PV systems between 0.5kW and 10kW in size. If a state agency were to consider this contract, these changes would need to be made:

- Any potential unfunded liability, such as Paragraph 4(j) on indemnification, would preclude a state agency from signing the contract.
- Any promise of payment beyond the current fiscal year would be subject to the state's annual appropriation clause and to state law in general.

2. **Solar*Rewards Rebate Contract (Customer Owned PV system)**

The GEO understands that this contract would be used for customer-owned PV systems larger than 10kW. If a state agency were to consider this contract, these changes would need to be made:

- Any potential unfunded liability, such as Paragraph 5(k) on indemnification, would preclude a state agency from signing the contract.
- Any promise of payment beyond the current fiscal year would be subject to the state's annual appropriation clause and to state law in general.

3. **Solar*Rewards Rebate Contract (For Third Party Developers)**

The GEO understands that this contract would be used in cases where the state would purchase power from a PV system owned by a third party developer. We also assume that "Customer" would refer to the state agency, and not to the "Developer." If a state agency were to consider this contract, these changes would need to be made:

- Any potential unfunded liability, such as Paragraph 5(k) on indemnification, would preclude state agencies from signing the contract.
- Any promise of payment beyond the current fiscal year would be subject to the state's annual appropriation clause and to state law in general.

4. Solar*Rewards SO-REC Purchase Contract (Customer Owned PV system)

The GEO understands that this contract would be used for customer-owned PV systems larger than 10kW. If a state agency were to consider this contract, these changes would need to be made:

- If this contract is indeed for customer-owned systems, we would expect the REC payment to be made to the Customer, not to the Developer. (paragraph 2)
- In paragraph 5(h), the 180 day period is not reflected in the Rebate contract. It is not clear to the GEO how this time period would affect the rebate and potential liability of the state to repay a rebate.
- Any potential unfunded liability, such as Paragraph 5(o) on indemnification would preclude state agencies from signing the contract.

- Any promise of payment beyond the current fiscal year would be subject to the state's annual appropriation clause and to state law in general.

5. **Solar*Rewards SO-REC Purchase Contract (For Third Party Developers)**

The GEO understands that this contract would be used in cases where the state would purchase power from a PV system owned by a third party developer. We also assume that "Customer" would refer to the state agency. If a state agency were to consider this contract, these changes would need to be made:

- In paragraph 5(h), the 180 day period is not reflected in the Rebate contract. The GEO seeks clarification on how this time period would affect the rebate and potential liability of the state to repay a rebate.
- Any promise to pay beyond the current fiscal year would be subject to the state's annual appropriation clause and to state law in general.
- This contract does not appear to contain an indemnification clause that would apply to the state.

6. **Interconnection agreement**

PSCo's Interconnection Agreement could be problematic if the state is the Customer. The GEO has several concerns with this agreement related to annual appropriations, self-insurance and indemnification. For example:

- If the state is required to purchase electricity through this contract, this could be considered an expenditure contract subject to the state fiscal rules and the contract would need to contain the state's special provisions related to annual appropriations.

- Section 18 – the GEO would want to see a "not-to-exceed" amount for PSCo's costs and any financial obligation to the state would be subject to appropriation.
- Any potential unfunded liability, such as Section 20 – the Indemnification clause, would preclude state agencies from signing the contract.
- Section 21 – any financial obligation to the state would be subject to appropriation, or this language should be deleted.
- Section 22 – As the state is self-insured, it is unable to name PSCo as an additional insured on its self insurance certificate.
- Section 24.8 - The state would not be responsible for a third party developer or its other subcontractors. The state could require them to provide insurance and indemnify the state and PSCo for their negligence.

7. Section 24.17 – The state cannot agree or submit to binding arbitration because it could result in a payment of funds which are not appropriated. In addition to any Solar*Rewards contracts between the state and PSCo, the state might also enter into a Power Purchase Agreement with a 3rd party project developer. In this case, the GEO would expect that some developers might be comfortable with the state's requirements around insurance, indemnification and appropriation as identified herein. However, some developers, or their investors and financiers, could be expected to have concerns with the state's indemnification, annual appropriation or insurance issues and this would make it difficult to enter into a mutually acceptable contract.

Q. DOES THE GEO HAVE ANY ADDITIONAL CONCERNS RELATED TO SOLAR*REWARDS CONTRACTS?

A. Yes. The specific concerns are highlighted below.

1. Indemnification – the state would prefer to see the indemnification paragraphs stricken in their entirety from each contract.
2. Ms. Newell's testimony indicated that PSCo is willing to be flexible on the indemnification provisions in the Solar*Rewards contracts because there are indemnification provisions contained in the Company's PUC Electric Tariff. The GEO would like to point out that the state cannot promise to indemnify any party, including third parties, so PSCO would need to exclude state agencies from all indemnification provisions, including any under this tariff.
3. Rebate repayment – in the case of customer-owned systems, state agencies may be willing to consider an arrangement, conditionally, where the rebate payment is split into twenty annual payments to limit the state's liability for repayment to a smaller dollar amount, subject to appropriation. However, if the state were to use a 3rd party developer and enter into a PPA, this arrangement may not be acceptable to the developer.

Furthermore, the future value of money needs to be taken into consideration when the rebate payment is split into annual payments over the twenty year contract period. Otherwise, if a state agency were due a $1 million rebate payment from PSCo through the Customer Rebate Program and opted to receive yearly installments rather than a one-time payment of the full amount, that agency would actually only get a percentage of the full rebate. This is because PSCo is not taking into account the future value of money. For example, if we assume a modest 5% discount rate each year over the twenty year period, that will give us a more accurate reflection of the amount in *real dollars* that the agency would actually receive. In this case, only $654,266 of the $1 million rebate due would be received by the agency. The GEO's suggestion to remedy this issue in PSCo's proposal is to identify an appropriate manner to amortize the payments that reflect an agreed upon interest rate. The GEO is flexible on what rate should be applied between, a prime rate, a treasury rate or a fixed rate of 5%.

Q. WOULD YOU PLEASE SUMMARIZE WHAT THE GEO IS ASKING THE COMMISSION TO CONSIDER?

A. The GEO is asking that the barriers preventing state agencies from participating in PSCo's Solar*Rewards program be eliminated. The GEO would like to point out that state agencies, despite requirements to adhere to the state constitution, are able to conduct business with other non-state agencies. Therefore, it's the GEO's position that it is possible to find a solution that gives PSCo the assurance they need to run a successful program and levels the playing field for state agencies. The GEO looks forward to working with PSCo to develop a mutually acceptable set of model contracts that could work for state agencies.

Q. DOES THIS CONCLUDE YOUR TESTIMONY?

A. Yes it does.

CERTIFICATE OF SERVICE

I hereby certify that on this, the 4th day of February. 2010, the original and seven copies of the foregoing **ANSWER TESTIMONY OF CARLY GILBERT ON BEHALF OF THE GOVERNOR'S ENERGY OFFICE** was served via interoffice mail on:

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