

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22V-0388E

IN THE MATTER OF THE PETITION OF PUBLIC SERVICE COMPANY OF COLORADO
FOR APPROVAL OF A VARIANCE FROM RULE 3615 RELATED TO MODIFYING
EXISTING AGREEMENTS TO ACQUIRE MORE THAN 30 MW OF CAPACITY OUTSIDE
OF AN APPROVED RESOURCE PLAN.

**COMMISSION DECISION GRANTING PETITION,
REQUIRING REPORTING ON PROJECTS
WITH MODIFIED AGREEMENTS AND REQUIRING
INFORMATION IN RESOURCE PLAN
ANNUAL PROGRESS REPORT**

Mailed Date: December 14, 2022
Adopted Date: November 30, 2022

I. BY THE COMMISSION

A. Statement

1. On September 2, 2022, Public Service Company of Colorado (Public Service or Company) filed a petition for partial variance or a waiver from subparagraph 3615(a)(VI) of the Commission's Electric Resource Planning (ERP) Rules, 4 *Code of Colorado Regulations* (CCR) 723-3 (Petition). The Company states the partial variance is necessary to enable the addition of more than 30 MW of nameplate solar capacity to two existing Power Purchase Agreements (PPAs) originally approved by the Commission as part of the Company's Colorado Energy Plan Portfolio (CEPP).

2. On November 14, 2022, Public Service filed a notice stating that Staff of the Colorado Public Utilities Commission (Staff) supports the granting of the Petition subject to the

provision of the additional information to be reported to the Commission by the Company or by Neptune Solar, LLC (Neptune) and Thunder Wolf Solar, LLC (Thunder Wolf),¹ the developers of the two solar projects subject to the Petition.

3. By this Decision, the Commission grants the petition. We also direct Public Service to file quarterly reports on the disposition of the solar panels and the current projected in-service dates for the two projects at issue in the Petition as well as on any issues that could potentially negatively impact the two projects. We further direct Public Service to provide information on the failed and delayed projects that prompted the filing of the petition in the Company's annual progress report to be submitted with the Commission in March 2023 in accordance with paragraph 3618(a) of the ERP Rules.

B. Discussion

1. Procedural Background

4. Through Decision No. Decision No. C22-0583-I, issued September 29, 2022, the Commission established parties to the Proceeding, including the Utility Consumer Advocates (UCA), Staff of the Colorado Public Utilities Commission (Staff), and Neptune and Thunder Wolf that filed jointly. Neptune and Thunder Wolf identify that they are the entities that renegotiated the PPAs that are subject of this Proceeding.

5. Through Decision No. C22-0635-I, issued October 21, 2022, the Commission adopted a procedural schedule in this matter, including scheduling an *en banc* hearing on November 18, 2022. In its decision, the Commission also raised concerns regarding details on the

¹ Through various pleadings, Neptune and Thunder Wolf title the companies "Neptune Energy Center, LLC" and "Thunder Wolf Energy Center, LLC." Consistent with Decision No. C22-0583-I, issued September 29, 2022, the Commission understands Neptune and Thunder Wolf to be the same companies identified and granted intervention in this proceeding.

construction status of the Neptune and Thunder Wolf projects and requested that, through subsequent briefing and pleadings, the parties address and expand on statements made in initial pleadings. The Commission specifically identified Trina Solar (U.S.), Inc. (Trina Solar) and stated that it is unclear whether the panels supplied by Trina Solar are in the United States, or if there is a firm plan and schedule for the panels to achieve entry into the United States and be ultimately delivered to Colorado given the stated concerns about the impacts of the Uyghur Forced Labor Prevention Act (UFLPA). The Commission also stated interest in whether there are liquidated damages surrounding in-service dates, and specifically if panel delays due to forced labor concerns under the UFLPA would exempt the project from liquidated damages, affect the PPAs, or cause other concerns.

6. Consistent with the approved timelines, parties to this proceeding filed briefs and associated attachments. Briefing and filings in this case include further information addressing the initial concerns raised in the Commission's Decision No. C22-0635-I.

7. In the notice filed on November 14, 2022, Public Service indicated that UCA remains opposed to the Petition but waives all cross at the scheduled November 18, 2022, hearing. The parties further represented that they each stipulate that attachments are admitted into the record.

8. Through Decision No. C22-0739-I, issued on November 17, 2022,² the Commission vacated the evidentiary hearing scheduled for November 18, 2022 and permitted the parties to file statements of position by November 21, 2022.

² Through Decision No. C22-0739-I, issued November 17, 2022, and Decision No. C22-0635-I, issued October 21, 2022, also include findings granting requests for designation of certain information as highly confidential.

9. On November 21, 2022, Public Service, Staff, Neptune, and Thunder Wolf filed a joint statement of position in favor of the Commission granting the petition (Joint SOP), and UCA filed a statement of position (UCA SOP) requesting that the Commission impose ratepayer protections suggested in UCA's previously filed brief and clarify that the amended agreements with Neptune and Thunder Wolf carry no presumption of prudence.

2. Petition, Responses, and Replies to Responses

10. Staff and UCA each filed responses to Public Service Petition on October 24, 2022.

11. Staff recommends the Commission grant the petition with conditions. Staff states that, based on additional information provided by Public Service in response to discovery and informal communications, granting the requested variance is in the public interest because the project expansion provides needed capacity in the near-term to partially replace capacity approved in the previous ERP that was ultimately not developed. Staff further argues that the project pricing appears to be cost competitive. Staff explains that it reviewed the amended PPAs and the Company's analysis of rate impacts associated with the expansion of the project, stating that the Company's modeling shows that the rate impact is modest. Staff includes, however, that while there is some publicly available information indicating that project pricing has been increasing, Staff recommends Public Service provide additional information to demonstrate the project pricing is cost competitive.

12. Staff's support for granting the petition is conditioned on the Company providing the following information: (1) information and support for current project pricing trends and demonstration that the project pricing is competitive; (2) an update regarding the status and cost of project transmission interconnection; (3) a detailed update on project development and construction, including current disposition of panels and batteries needed to complete each project;

(4) monthly or quarterly updates regarding project construction and delivery of key equipment including solar panels and batteries to be filed with the Commission; and (5) responses to the Commission's questions and requests for additional information as set forth in Decision No. C22-0635-I.

13. In its response to the Petition, UCA requests that the Commission order the Company to provide additional information necessary to complete the record. UCA also requests that if the Petition is granted, the Commission adopts certain ratepayer protections.

14. The UCA's suggested ratepayer protections include: (1) preventing Public Service from passing along to ratepayers "excess costs" associated with the amended PPAs as compared to initial bid prices, including any additional interconnection costs needed to accommodate the project expansions; (2) preventing Public Service from passing along to ratepayers any costs associated with delays or failures of these projects, as expanded; (3) attaching no presumption of prudence to the amended PPAs; (4) examining holistically the cost of the amended PPAs and the other actions the Company is taking to meet its near-term capacity needs, either in a future annual prudence review for the Company's Electric Commodity Adjustment or a separate proceeding; and (5) considering lowering the Public Service's authorized return on equity in the Company's forthcoming electric rate case to reflect the reduction in risk the Company faces as a result of an apparent option to modify terms of PPAs and pass the costs on to ratepayers.

15. UCA also argues that if independent power producers expect the Commission to allow amendments to projects when financial conditions change, they will seek that relief more frequently in the future and will submit lower than viable bids in upcoming resource solicitations in order to win contracts. UCA further contends that such actions will shift the risk of inflation, supply chain issues, and other economic conditions from developers onto ratepayers.

16. On November 7, 2022, Public Service filed its reply to the responses submitted by Staff and UCA.³

17. With respect to Staff's conditions, Public Service states that the pricing for the upsized projects remains extremely competitive. Public Service points to the recent "30-Day Report" filed in its Tri-State Generation and Transmission Association, Inc. in Proceeding No. 20A-0528E, concluding that Tri-State's bid pricing results show that the blended rates for the upsized Neptune and Thunder Wolf projects are competitive with current bid pricing trends in Colorado. Public Service further cites the Global Renewable Market Update of the Edison Energy and Altenex Energy showing that PPA prices in organized wholesale markets have been trending upward, with pricing for solar PPAs well above the prices for the upsized Neptune and Thunder Wolf projects. The Company further points to a similar recent analysis from PPA marketplace LevelTen Energy that also shows a similar rise in PPA prices to which the pricing for the upsized projects compares favorably.

18. Public Service states that the Company has completed all Large Generator Interconnection Procedures studies for the projects, executed Generator Interconnection Agreements for the expanded project capacities, and approved transmission delivery service for the projects' original capacity levels, with the results of its transmission delivery service studies for the additional project capacities expected in November 2022. Public service states that no additional interconnection costs were identified, and the Company commits to provide the Commission with the results of the transmission delivery service studies through a notice filing in this Proceeding once they are available.

³ Public Service coordinated its reply with Neptune's and Thunder Wolf's reply in that some of the information suggested by Staff as a condition for its support for the approval of the petition is provided by Neptune and Thunder Wolf instead of by the Company.

19. Public Service also agrees that periodic progress reports to keep the Commission apprised of project status is a reasonable measure and commits to quarterly reporting as a condition of granting its Petition.

20. In response to Decision No. C22-0635-I and the request for additional information on the contractual terms related to liquidated damages and other relief associated with panel delays, Public Service states that the amended and restated PPAs include provisions to address and mitigate the risk of further delay. Specifically, the modified PPAs incorporate liquidated delay damages for failure to meet the target commercial operation deadlines as well as additional liquidated damages in the event of termination for failure to cure any such delays. Each PPA also establishes a project-specific Security Fund from which the Company may draw amounts owed to it pursuant to the PPA (including liquidated damages). Public Service also provides several additional details about the applicable provisions for liquidated damages pursuant to the modified PPAs. Public Service further states that the Company would not exempt the project from any damages defined within the agreements for delays due to forced labor concerns under UFLPA and that if the projects were to claim force majeure to be exempt from liquidated damages arising from a delay in commercial operations, the Company would reject the claim on the basis that it does not meet the definition of force majeure under the modified PPAs.

21. In its reply to UCA's response to the Petition, Public Service argues that UCA's proposed ratepayer protections are designed to punish the Company for a resource adequacy issue the Company did not create and that the Thunder Wolf and Neptune projects help solve. Public Service argues that the financing structures for the Neptune and Thunder Wolf projects are no different than any other third-party bid project from a risk perspective and, by extension, there is no "shifting" of risk as UCA contends.

22. Public Service concedes, however, that UCA is correct that the integrity of the bidding process is important and, absent extenuating circumstances, pricing or project changes should generally not be entertained.

23. In their reply, Neptune and Thunder Wolf provide a project update in response to Staff's requests. For Neptune, they state that, as of October 27, 2022, 21 percent of the solar panels and 75 percent of the battery modules scheduled for installation have been delivered to the project site and 100 percent of posts and cables and 65 percent of the solar panel racking have been installed. For Thunder Wolf, as of the same date, 36 percent of the solar panels and 100 percent of the battery modules scheduled for installation at Thunder Wolf have been delivered to that project site, and 100 percent of posts and cables and 79 percent of the solar panel racking have been installed. Neptune and Thunder Wolf state that construction and energization of the project substation for each facility has been completed. They conclude that the development and construction of both projects is progressing smoothly and that they anticipate no issues with meeting the revised commercial operations dates.

24. Regarding Trina Solar, Neptune, and Thunder Wolf report that 100 percent of panel deliveries are scheduled to be completed at Thunder Wolf by January 31, 2023. At Neptune, they report that sufficient panels to achieve the commercial operation date for the initial 250 MW will be delivered by March 31, 2023, with the balance of the required deliveries complete by May 31, 2023.

3. Joint Position of Public Service, Staff, Neptune, and Thunder Wolf

25. In its notice filed on November 14, 2022, Public Service reported to the Commission that Staff fully supports the granting of the Petition after receiving additional information on the projects related to the issues Staff and the Commission had previously raised

and provided that Public Service satisfy certain reporting requirements. Public Service agreed to provide quarterly to the Commission, beginning on or about December 15, 2022, and with appropriate confidentiality designations, a report that provides: (1) the current disposition of the solar panels (*i.e.*, in Vietnam, in route to the United States, received on site, installed); (2) the current projected in-service date for the 248 MW of solar at Thunder Wolf; (3) the current projected in-service date for the initial 250 MW of solar at Neptune; (4) the projected in-service date for the remaining 75 MW of solar at the at Neptune; and (5) a statement of any issues identified by the Company that could potentially negatively impact the projected in-service dates for either of the two projects. The agreed upon reporting will continue until both projects achieve commercial operations.⁴

26. In their Joint SOP, Public Service, the developers of the PPA projects, and Staff explain that the underlying problem the Company is facing is that: (1) three other projects acquired pursuant to the recent ERP have failed, totaling 257/50 MW of clean energy/storage; and (2) one of the replacement projects is delayed, totaling 100/50 MW of clean energy/storage, is delayed now from 2023 to 2024. The problem creates an immediate capacity deficit for Public Service, with a corresponding near-term resource need to fill in 2023 and 2024. The Company argues that the resource adequacy situation, coupled with a tight Western capacity position and other market dynamics, creates a potential reliability problem in the next two years.⁵

27. The Joint SOP argues that the proposed expansion of the two PPA projects results solve part of that resource adequacy issue with cost-effective upsizing when viewed against the current state of the power market. The Joint SOP again states that the modified PPAs compare

⁴ Public Service Notice of Staff Support Redacted, filed November 14, 2022, pp. 3-4.

⁵ Joint SOP, filed November 21, 2022, p. 1.

favorably with the initial bid results from Tri-State’s recently closed solicitation and with published price surveys for projects elsewhere in the United States.⁶ The Joint SOP also again argues that the modified pricing for the two expanded PPAs result in minimal rate impacts: an increase in the net present value of project costs of \$22.4 million for the period 2023 through 2050 out of a \$57.5 billion net present value of total costs that translates into a levelized \$/MWh impact of \$0.00005/MWh.⁷

28. The Joint SOP explains that the modified terms of the restructured PPAs go beyond the price and amounts of capacity and energy sold to ensure there are robust and comprehensive incentives to bring the projects online in time to address the resource adequacy situation. The Joint SOP states that because the two initial PPAs require modification to both remain viable and contribute to filling the accredited capacity deficit created by the failures and delays of the other projects, a presumption of prudence under Rule 3617(d) should apply to the upsized PPAs.⁸

4. Position of UCA

29. The UCA SOP addresses the Petition from an entirely different perspective, arguing that the proposed PPA modifications amount to a “ratepayer-funded bailout” of Neptune and Thunder Wolf.⁹ UCA alleges that Neptune and Thunder Wolf used the Department of Commerce UFLPA investigation and the Company’s near-term capacity position as leverage to obtain above-market, above-bid pricing for the capacity added to the PPAs to the sole benefit of NextEra’s shareholders.¹⁰ UCA states that the record in this case contains no factual evidence that either

⁶ *Id.*, p. 2.

⁷ *Id.*, p. 3.

⁸ *Id.*, p. 5.

⁹ UCA SOP, filed November 21, 2022, pp. 1-2.

¹⁰ *Id.*, p. 3.

project was in financial jeopardy. UCA states that the parent company of Neptune and Thunder Wolf (*i.e.*, NextEra Energy Resources), remains in a strong financial position and that it was in a position to ensure the completion of the two PPA projects as initially bid after tariff exemptions had been granted to NextEra, thereby eliminating the reason for the bids' restructuring.¹¹

30. The UCA SOP argues that the use of the median bid price from Tri-State's recent resource solicitation is "inaccurate at best, and potentially misleading."¹² The UCA SOP also faults the Company's rate impact analysis for failing to compare the Solar Only Energy Payment Rates as originally bid to the rate pricing of the expanded projects, which the UCA SOP argues would show rate increases to customers.¹³

31. Finally, the UCA SOP states that contrary to Public Service's assertion, UCA is not suggesting "stripping" the modified PPAs of any presumption of prudence, because those contracts carried no such presumption in the first place.¹⁴ The UCA SOP argues that Rule 3617(d) does not apply because the Company is not amending its resource plan in this case. The UCA SOP further notes that Public Service did not ask for a presumption of prudence in its Petition and has not demonstrated that one is warranted.

C. Findings and Conclusions

32. We grant the Petition seeking limited waiver of waiver from subparagraph 3615(a)(VI) of the ERP Rules. The expanded projects are a critical and likely unreplaceable resource acquisitions necessary to maintain resource adequacy in 2023 and 2024. We therefore find good cause to grant the requested waiver from subparagraph 3615(a)(VI) of the ERP Rules

¹¹ *Id.*, p. 2.

¹² *Id.*, p. 4.

¹³ *Id.*, p. 5.

¹⁴ *Id.*, p. 5.

and approve Public Service's actions to address the changed circumstances causing the resource adequacy situation described by the Company.

33. The information provided by all of the parties support our conclusion that the pricing of the modified PPAs is reasonable. While we appreciate UCA's efforts to clarify for the record that this variance request will involve a price increase—the expansion of the solar generation to be paid a blended solar and storage rate clearly results in higher payments for solar as compared to the original stand-alone solar pricing—Public Service has demonstrated that the pricing for the modified PPAs is less than the increases solar prices shown in regional and national data. We further share UCA's skepticism about the validity of median and average bid pricing information; however, the publicly available results of the Tri-State solicitation show recent bid prices that are substantially higher as compared to bids secured from the PPA projects initially.

34. We disagree with the UCA's claim that there is no record evidence showing potential financial distress with the two PPA projects. The three failed projects from Public Service's recent competitive solicitations and the fourth project that has been delayed demonstrate the upheaval in the market and the difficulties of performing under the original bid terms. Contrary to UCA's arguments, the multiple changes in circumstances for the PPAs—both negative and later positive—were not reasonably foreseeable (*e.g.*, this view is generally supported by the commodity price data presented by Neptune and Thunder Wolf¹⁵).

35. Based on our review of the underlying provisions in the revised PPAs, including the credit support for these two solar projects, provisions for the payment of liquidated damages, and the definition of force majeure, we conclude that the going forward schedule and supply risks

¹⁵ See Neptune and Thunder Wolf Reply Brief, filed November 7, 2022, Highly Confidential Attachment B.

have been, in significant part, effectively shifted to the two project developers and that the modified terms of the contract are also commercially reasonable. Public Service earns no return from these modified PPA, nor does the Company have obviously perverse financial incentives regarding the modified pricing and contract terms. We conclude that it would be inappropriate and asymmetric to adopt the UCA suggestions, which could make Public Service worse off financially when there is no evidence of imprudent actions.

36. Because we find the pricing of the modified PPAs to be reasonable and are satisfied with the contractual terms of the contracts with respect to schedule and supply risks, we decline to adopt the ratepayer protections sought by UCA. Neptune and Thunder Wolf continued the construction of the projects while this Proceeding was pending. Based on their reply brief, NextEra Energy Resources has invested hundreds of millions of dollars to keep these projects on a revised schedule despite the pricing and regulatory uncertainty. Although we grant the petition without the conditions sought by UCA, we strongly share its view that the Commission must maintain a regulatory framework that both ensures fixed pricing at the time bids are received without being subsequently adjusted upwards and limits the number of failed bids.

37. We require Public Service to provide the reporting set forth in the notice filed on November 14, 2022 as advanced by Staff. Public Service shall submit on a quarterly basis in this Proceeding, beginning on or before December 30, 2022,¹⁶ and until both projects achieve commercial operations, a report that provides: (1) the current disposition of the solar panels; (2) the current projected in-service date for the 248 MW of solar at Thunder Wolf; (3) the current projected in-service date for the initial 250 MW of solar at Neptune; (4) the projected in-service

¹⁶ We understand the Company has agreed to reporting on or about December 15, 2022. Given the timing of this Decision, we permit an initial filing on or before December 30, 2022, with quarterly filings to follow.

date for the remaining 75 MW of solar at the at Neptune; and (5) a statement of any issues identified that could potentially negatively impact the projected in-service dates for either of the two projects. In the first report to be filed in December 2022, we direct Public Service to confirm with Neptune and Thunder Wolf that the panel deliveries expected for November 2022 have occurred according to expectation.

38. Regarding the Company's 2023 and 2024 resource adequacy situation, we direct Public Service to provide details about the developer consequences from the three failed projects and the fourth delayed project, including the actual payment of liquidated damages, early termination fees, and forfeited credit support. Public Service files a status report each year pursuant to Rule 3618(a), with annual filings now due each March 31.¹⁷ Details on the failed and delayed projects shall be submitted with the next annual report under appropriate confidentiality.

II. ORDER

A. The Commission Orders That:

1. The petition for partial variance or a waiver from subparagraph 3615(a)(VI) of the Commission's Electric Resource Planning (ERP) Rules, 4 *Code of Colorado Regulations* (CCR) 723-3 to enable the addition of more than 30 MW of nameplate solar capacity to two existing Power Purchase Agreements filed on September 2, 2022 by Public Service Company of Colorado (Public Service) is granted, consistent with the discussion above.

¹⁷ 2021 Electric Resource Plan & Clean Energy Plan Annual Progress Report filed by Public Service on March 31, 2022 in Proceeding No. 21A-0141E.

2. Public Service shall file in this Proceeding quarterly reports on the disposition of the solar panels and the current projected in-service dates for the projects as well as on any issues that could potentially negatively impact the two projects, consistent with the discussion above.

3. We also direct Public Service to provide information on the failed and delayed projects that prompted the filing of the petition in the Company's annual progress report to be submitted in accordance with paragraph 3618(a) of the ERP Rules, 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
November 30, 2022.**

(S E A L)



ATTEST: A TRUE COPY

G. Harris Adams,
Interim Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN M. GILMAN

Commissioners