

Decision No. C24-0170

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0315EG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS COMBINED ELECTRIC AND NATURAL GAS DEMAND-SIDE MANAGEMENT AND BENEFICIAL ELECTRIFICATION PLAN FOR CALENDAR YEAR 2023.

**COMMISSION DECISION GRANTING, IN PART, AND
DENYING, IN PART, MOTION FOR CLARIFICATION
AND DIRECTING TRIAL STAFF TO ADDRESS
THE NEED FOR A SHOW CAUSE PROCEEDING**

Mailed Date: March 19, 2024

Adopted Date: March 13, 2024

I. BY THE COMMISSION

A. Statement

1. On February 15, 2024, Iconergy, LTD (Iconergy) filed a Motion for Clarification of Decision No. C23-0381 (Motion for Clarification), requesting that the Commission clarify certain of the language in ¶ 78 of Decision No. C23-0381, issued in this Proceeding on June 8, 2023, which states: “We also require that Public Service afford bidders a mechanism to appeal the Company’s determination as to their qualifications to the Commission or its staff.”

2. By this Decision, the Commission grants, in part, and denies, in part the Motion for Clarification. Based on Iconergy’s pleading and the response from Public Service Company of Colorado (Public Service or the Company), we conclude that, at this point, the Commission’s existing process for formal complaints appears to provide the most appropriate, available adjudication process for Iconergy to challenge the determination by Public Service not to award

Iconergy's bid to provide services for Public Service's Strategic Energy Management (SEM) program as part of the Company's most recent solicitation. However, we also direct the Trial Staff of the Colorado Public Utilities Commission (Trial Staff) to address at a future Commissioners' Weekly Meeting whether it is appropriate to initiate a show cause in light of the information revealed in filings related to the Motion for Clarification.

B. Background

3. Through Decision No. C23-0381, the Commission addressed the Application for Approval of its 2023 Electric and Natural Gas Demand-Side Management and Beneficial Electrification Plan (2023 DSM/BE Plan), filed by Public Service on July 1, 2022.

4. Iconergy intervened in this Proceeding, raising, among others, concerns that Public Service inappropriately uses ratepayer funds to provide free or discounted DSM services to its customers in an unregulated market, that Public Service's programs are suboptimal because they are limited to few implementers, and that Public Service does not open these programs to other potential implementers on a regular basis in a transparent fashion. Iconergy suggested several process changes to increase competition for DSM services. Iconergy did not join the settlement agreement reached by the other parties.

5. In defending the terms of the settlement, Public Service maintained the negotiated agreement addressed Iconergy's identified process concerns. Public Service further questioned whether Iconergy had shown that its proposals would benefit utility customers, such as through realized cost savings. Public Service pointed out it already committed in the settlement to: (1) communicate requests for proposals (RFPs) from potential program vendors during its DSM quarterly roundtables; (2) post information about upcoming RFPs on its website as well as providing links with the relevant information about participating in the RFPs; and (3) notify

interested parties of RFPs through its DSM distribution e-mail list when an RFP opens. Public Service stated it further agreed to identify the criteria on which participants will be evaluated for each RFP.

6. During the course of the proceeding, Public Service had opposed opening programs to all interested vendors on grounds that limiting the number of trade partners allowed to submit rebates ensured that only reputable vendors provide services and reduced the amount of needed administrative resources to manage vendors and evaluate their work. Public Service also asserted that it was important for the Company to retain flexibility to balance the demands of conducting solicitations and managing vendors against the costs and demands placed on its internal teams, in order to maximize value to all customers, including non-participants.

7. By Decision No. C23-0381, issued June 8, 2023, the Commission found the comprehensive settlement agreement filed among Public Service and the other parties, except for Iconergy, was in the public interest and should be approved without modification. In addition, responding to Iconergy's concerns, the Commission issued certain directives to Public Service, which were designed to increase competition for DSM services. The Commission concluded, although it was persuaded that improvements can be made to how these programs are delivered to ensure that qualified vendors can participate without artificial barriers, the Commission was also mindful that Public Service is ultimately responsible for delivering the DSM programs, thus warranting some guardrails around this process. Given these considerations, the Commission directed Public Service to take the following actions:¹

- Provide blind evaluation (or third-party oversight) of bids to determine qualification

¹ Proceeding No. 22A-0315EG, Decision No. C23-0381 at ¶¶ 77-80 (issued June 8, 2023).

- Afford bidders a mechanism to appeal the Company's determination as to their qualifications to the Commission or Commission staff
- Create a publicly accessible website through which procurements of third-party services are managed, third parties are notified of open opportunities, the schedule and requirements are clearly communicated, and evaluation criteria for submitted bids are provided, and
- Issue an RFP to increase the role of third-party partnerships in implementing its business programs at least once per year

8. By Decision No. C23-0490, issued July 26, 2023, the Commission granted, in part, and denied, in part, the Application for Rehearing, Reargument, or Reconsideration (RRR) of Decision No. C23-0381, filed by Iconergy on June 28, 2023. The Commission granted Iconergy's RRR to the extent that it requested the Commission require Public Service to issue RFPs on an annual basis but denied the RRR to the extent that it requested the Commission require Public Service to contract with a specific minimum number of providers and to accept all qualified participants on a rolling basis, for all rebate-eligible upstream services.²

C. Discussion

9. In its Motion for Clarification, Iconergy objects to Public Service's determination that it is not qualified to participate in the Company's SEM program. Iconergy maintains it should be qualified, having provided SEM services to customers outside of Colorado and to the few customers in Colorado willing to forgo rebates by choosing Iconergy, their preferred vendor. Iconergy states it seeks to appeal Public Service's determination and, to that end, requests clarification of the Commission's directive in ¶ 78 of Decision No. C23-0381 for Public Service to "afford bidders a mechanism to appeal the Company's determination as to their qualifications to the Commission or its staff." Iconergy states it is not clear what this appeal process entails. Iconergy states it understands that the Commission did not desire a litigated process such as the

² Proceeding No. 22A-0315EG, Decision No. C23-0490 at ¶ 15 (issued July 26, 2023).

filing of a formal complaint and that, while such a proceeding would provide impartiality and rigor, such a process would be time consuming and not allow Iconergy to participate in the Company's 2023 program and receive rebates for its clients in a timely fashion.

10. On February 26, 2024, Public Service timely filed a response, opposing the Motion for Clarification.³ Public Service states it stands by the decision not to accept Iconergy as a vendor for its SEM program but, as discussed below, agrees that certain clarification of ¶ 78 of Decision No. C23-0381 could be helpful.

11. As to vendor selection, Public Service states its decision to not accept Iconergy was made based on a fair review and evaluation process of the proposals received. Public Service states it received eight bids, denied six of the bids, and awarded bids to two separate entities to provide SEM services. Public Service reports, of the two awarded bids, one entity was awarded a right to support commercial SEM services, and a second separate entity was awarded a right to support industrial SEM services. Public Service states, "The Company does not currently allow more than one vendor in SEM to support the designated customer class of commercial or industrial, which is largely driven by reasons identified in the Company's rebuttal testimony filed in the instant proceeding."⁴ Public Service states it denied the six bids largely based on the fact that it received more competitive bids from the winning vendors.

12. Public Service states it has contracted with an Independent Evaluator (IE) to assist in the DSM RFP processes, consistent with the Commission's directive at ¶ 78 of Decision No. C23-0381, as a way to promote process improvements and transparency for its RFP process. Public Service states the IE is still reviewing its practices and providing feedback.

³ See Proceeding No. 22A-0315EG, Decision No. C24-0111 (issued Feb. 21, 2024) (shortening response time to Feb. 26, 2024).

⁴ Public Service Response to Motion to Clarification, filed February 26, 2024, pp. 2-3.

13. Public Service states that Iconergy conferred with it on February 15, 2024, regarding the Motion for Clarification, but rather than grant the Company's request for time to collaborate on a reasonable process going forward, Iconergy filed its motion with the Commission that same day.

14. As to the requested clarification, Public Service states, in particular, it does not understand whether the reference to "staff" refers to Trial Staff or Advisory Staff. Public Service states, after this clarification, it would be helpful for the Commission to provide additional details regarding the process staff should use to make a final decision on the appeal. Public Service asks, for example, should staff submit its findings in writing through a filing in the most-recently resolved DSM Plan proceeding? Likewise, under what timelines should this staff review occur? Also, what level of confidentiality should be afforded? And finally, would such staff determination be final and binding on all entities, or would there be an opportunity for further appeal or complaint to the Commission itself? Public Service notes, outside of the Commission's established complaint process, it is unaware of any existing process that would address these circumstances. Public Service adds these issues may be further complicated by the fact that its 2024-2026 DSM & BE Plan is pending before the Commission, with Trial Staff, Public Service, and Iconergy all active parties to that ongoing proceeding.

15. Public Service does not believe it is necessary for the Commission to develop any new processes simply to afford an appeal mechanism to bidders rejected from DSM RFPs. Public Service maintains the Commission's existing formal complaint process provides a reasonable and appropriate process through which an aggrieved vendor can appeal a determination. Public Service reasons, while Iconergy may not prefer the possibility of a litigated process at the Commission to resolve its appeal, such a process is already clearly defined, while ensuring due

process to both the Company and the aggrieved vendor. Public Service points out there could be disputed facts and evidence in an appeal that would benefit from a formal adjudication.

16. Public Service allows that it would be conceptually open to an appeal process that involves Commission staff. Public Service notes the issues raised in its response would need to be addressed (*i.e.*, who is “staff,” what process should staff use, what timeline applies, what level of confidentiality applies, and would the staff determination be binding). Public Service acknowledges that whether staff ultimately decides to work with the Company in developing such a process is a decision for staff, not the Company. That said, Public Service envisions a process whereby it could provide designated staff the information it relied upon in making its vendor selection decisions, as well as any existing conclusions or findings provided by the IE, and then staff could consider that information in light of an appeal submitted by a vendor. Public Service suggests, based on the available information, staff then could submit its appeal findings on whether Public Service erred in denying the vendor a contract.

D. Findings and Conclusions

17. Although we were encouraged at the time that we issued the directive in ¶ 78 of Decision No. C23-0381 that Public Service would be able to build into its process a mechanism for bidders to appeal a negative determination to the Commission or its staff, we recognize that has not happened for myriad reasons including the language we used in our directive and the lack of collaboration between Public Service and Iconergy regarding the instant dispute. Public Service did not build any such mechanism into its process proactively, and once Iconergy received its negative determination, rather than collaborate with Public Service to come up with a process, Iconergy came directly to the Commission to come up with this process. At this time, there is simply no such appeal process at the Commission, and the Commission, at this juncture, cannot

devise an alternative process that would be better than simply using the Commission's existing formal complaint procedures.

18. Accordingly, we grant Iconergy's Motion for Clarification, in part, and deny it, in part. We conclude that, at this point, the Commission's existing process for formal complaints appears to provide the most appropriate, available adjudication process for Iconergy to challenge the determination by Public Service not to award Iconergy's bid to provide services for its SEM program as part of the Company's most recent RFP solicitation. The formal complaint process is set forth in Rule 1302 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1. The rule states any person may file a formal complaint, setting forth sufficient facts and information to advise the respondent and Commission of the relief sought and, if known, how any statute, rule, tariff, price list, time schedule, decision, or agreement memorialized, accepted, or approved by Commission decision is alleged to have been violated.

19. Although we see the formal complaint process as the only workable means to resolve Iconergy's specific grievance as to non-selection for this RFP solicitation, we are concerned by Public Service's statement in its response that it does not currently allow more than one vendor in SEM to support a designated customer class.⁵ As stated above, Public Service reports that it awarded bids to two separate entities to provide SEM services for commercial and industrial customers. Of the two awarded bids, only one entity was awarded a right to support commercial SEM services exclusively and only one other entity was awarded a right to support industrial SEM services. Public Service further admits it denied opportunities to the other SEM program bidders largely based on the fact that the two winning vendors' bids were more competitive.

⁵ Public Service Response to Motion for Clarification, pp. 2-3.

20. Public Service appears to have disregarded the determination in our decisions in this Proceeding that the Company's practice of using single vendors to implement DSM programs such as the SEM program was an artificial barrier to vendor participation that must be removed. Our decisions made clear that we sought to eliminate this practice as an improvement to Public Service's DSM program delivery, based on Iconergy's advocacy throughout this Proceeding. At ¶ 80 of Decision No. C23-0381, we directed Public Service to issue an RFP, prior to the filing of any application for approval of a multi-year DSM or BE plan (*i.e.*, prior the anticipated filing of its 2024-2026 DSM/BE plan pursuant to the directives in our decisions in Proceeding No. 23A-0309EG) that would increase the role of third-party partnerships in implementing its business program. We expressly said the intent of this RFP requirement, specifically timed for implementation pursuant to this 2023 DSM/BE Plan, was to substantially expand the number of third-parties eligible to provide rebate-eligible upstream services such as engineering and energy modeling. We reiterated this concern in ¶ 13 of our RRR decision, Decision No. C23-0490. There, we amended prior ¶ 80 to more specifically direct Public Service to issue an RFP to increase the role of third-party partnerships in implementing its business programs at least once per year, with the intent of expanding the number of third parties eligible to provide rebate-eligible DSM services for commercial entities – other than those serving vulnerable low-income housing needs, which we recognized require greater oversight.

21. Based on the description in Public Service's response of its approach to sourcing SEM program vendors, we are frustrated that Public Service is not complying with the Commission's directive to expand the number of third parties eligible to provide DSM service in its DSM programs such as the SEM program. Accordingly, we direct Trial Staff to bring to a future Commissioners' Weekly Meeting either a show cause or a presentation why no show cause is

needed regarding the Company's apparent continuing practice of "sole sourcing" vendors for its SEM program.

II. ORDER

A. The Commission Orders That:

1. The Motion for Clarification of Decision No. C23-0381, filed on February 15, 2024, by Iconergy, LTD, is granted, in part, and denied, in part, consistent with the discussion above.

2. This Decision is effective on its Mailed Date.

B. **ADOPTED IN COMMISSIONERS' WEEKLY MEETING March 13, 2024.**

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ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners