

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0494E

IN THE MATTER OF PUBLIC SERVICE COMPANY'S APPLICATION FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE FORM ENERGY
LONG DURATION BATTERY PROJECT AT COMANCHE GENERATING STATION.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
GRANTING UNOPPOSED JOINT MOTION TO APPROVE
UNOPPOSED COMPREHENSIVE SETTLEMENT
AGREEMENT, GRANTING APPLICATION AS MODIFIED
BY COMPREHENSIVE SETTLEMENT AGREEMENT,
AND CLOSING PROCEEDING**

Mailed Date: May 10, 2024

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A. The Commission Orders That:16

I. STATEMENT

A. Procedural Background

1. On October 4, 2023, Public Service Company of Colorado (Public Service) filed the Verified Application (Application) described above and a Motion for Extraordinary Protection. With the Application, Public Service filed the testimonies of Justin M. Tomljanovic (Hearing Exhibit 101), Jack W. Ihle (Hearing Exhibit 102), and Steven T. Christensen (Hearing Exhibit 103).

2. On October 5, 2023, the Commission issued a notice of the Application.

3. On October 10, 2023 and November 6, 2023, Holy Cross Electric Association (Holy Cross) and Colorado Energy Consumers (CEC) filed Motions to Permissively Intervene, respectively.

4. On November 1, 2023, the Colorado Solar and Storage Association (COSSA) and the Solar Energy Industries Association (SEIA) filed a Joint Motion to Intervene.

5. On November 3, 2023 and November 13, 2023, the Office of the Utility Consumer Advocate (UCA) and Trial Staff (Staff) of the Commission filed Notices of Intervention by Right, respectively.

6. On November 21, 2023, the Application was automatically deemed complete pursuant to Rule 1303I(IV).¹

¹ 4 Code of Colorado Regulations (CCR) 723-1.

7. On November 22, 2023, the Commission referred the proceeding to an Administrative Law Judge (ALJ) by minute entry. The proceeding was subsequently assigned to the undersigned ALJ.

8. On December 19, 2023, the ALJ issued Decision No. R23-0845-I that scheduled a remote prehearing conference for January 5, 2024, and required the parties to confer about a procedural schedule and Public Service to file a report of the conferral by January 3, 2024.

9. On January 2, 2024, Public Service filed the Conferral Report.

10. On January 9, 2024, the ALJ issued Decision No. R24-0013-I that extended the statutory deadline to July 28, 2024, and established the following schedule:

<u>Event</u>	<u>Deadline</u>
Answer Testimony	February 9, 2024
Rebuttal/Cross-Answer Testimony	March 8, 2024
Prehearing Motions	March 13, 2024
Responses to Prehearing Motions	March 18, 2024
Corrections to Pre-Filed Testimony & Exhibits	March 20, 2024
Settlement Agreement(s) Stipulations	March 22, 2024
Settlement Testimony Cross-Examination Matrix Notice of Parties'/Witnesses' Remote or In-Person Participation	March 27, 2024
Hearing	April 3-4, 2024
Statements of Position	April 25, 2024

11. On February 9, 2024, Staff and UCA filed the testimony of Seina Soufiani (Hearing Exhibit 200) and Leslie Henry-Sermos (Hearing Exhibit 300).

12. On March 7, 2024, Public Service filed a Notice of Unopposed Comprehensive Settlement in Principle and Unopposed Motion to Vacate Deadline for Rebuttal/Cross-Answer Testimony and Request for Waiver of Response Time (Unopposed Motion).

13. On March 11, 2024, the ALJ issued Decision No. R24-0159-I granting the Unopposed Motion.

14. On March 20, 2024, Public Service, Staff, UCA, COSSA, SEIA, and Holy Cross (Settling Parties) filed an Unopposed Joint Motion to Approve Unopposed Comprehensive Settlement Agreement (Unopposed Joint Motion) in which they requested that the Commission approve the attached Comprehensive Settlement Agreement (Settlement Agreement), vacate the hearing, and waive response time.

15. On March 27, 2024, Public Service and Staff filed the testimony of Jack W. Ihle and Seina Soufiani in support of the settlement agreement.

16. On March 29, 2024, the ALJ sent an email to counsel for the parties informing them that the hearing was vacated.

II. BACKGROUND OF APPLICATION

17. Since 2018, Public Service has had the goal of providing its electricity customers 80 percent carbon-free electricity by 2030, and 100 percent carbon-free electricity by 2050. In 2023, Senate Bill 23-016 amended § 25-7-102, C.R.S. to establish the goal of achieving, at a minimum, a 50 percent reduction in statewide greenhouse gas pollution by 2030, a 75 percent reduction by 2040, a 90 percent reduction by 2045, and a 100 percent reduction by

2050.² All of these goals are measured relative to 2005 statewide greenhouse gas pollutions levels.³

III. APPLICATION

18. In the Application, Public Service asserts that, to achieve these goals, it “must employ new and innovative technologies, including long-duration storage.”⁴ The Application seeks approval of a CPCN to deploy “cutting edge iron-air battery storage technology” offered by Form Energy, Inc. (Form Energy) at the site of the Comanche Generating Station in Pueblo, Colorado. The “Form Battery Project,” as the Application refers to it, is a proposed 10MW/1,000 MWh long-duration energy-storage project (along with associated infrastructure) designed to interconnect the energy storage system with the transmission system. Public Service expects that Form Energy’s iron-air battery will be charged using surplus renewable energy that would otherwise be curtailed and then discharge electricity for up to 100 hours, which is far longer than the existing alternative battery technologies.⁵ According to Public Service, “the iron-air battery system uses a modular design, is made of abundantly available materials—iron and air—and is scalable.”⁶

19. Form Energy is a start-up that formed in 2017 and does not have a track record of success as a business or in commercializing this new type of technology. In addition, Form Energy’s iron-air technology is new, has not been deployed by any utility or at utility-sized scale, and thus has not been tested in real-world circumstances similar to Public Service’s planned deployment. One utility – Great River Energy, which is a generation and transmission

² § 25-7-102(2)(g)(I), C.R.S.

³ § 25-7-102(2)(g)(II), C.R.S.

⁴ Application at 3.

⁵ *Id.* at 1, 3.

⁶ *Id.* at 4.

cooperative based in Minnesota – has contracted with Form Energy for a 1.5MW/150 MWh project to be located in Cambridge, Minnesota. That project is planned to come into service in December 2024,⁷ approximately two years before the planned completion of the Application’s project in the fourth quarter of 2026.⁸ A subsidiary of Xcel Energy (Public Service’s parent company) has contracted with Form Energy for another battery project that will be located at Becker, Minnesota, but the timing of that project is unclear. However, it appears that if the Becker project is deployed before the project at issue in this Application, it will not happen before the Application in this proceeding is decided. Public Service concedes that Form Energy’s status as a startup and the novelty of its battery technology creates risk.

20. Public Service contends, however, that it these risks have been mitigated in five ways. First, Public Service contends that Form Energy “is a particularly promising startup that is well-positioned to deliver on its promises.”⁹ As support, Public Service points to Form Energy’s leadership team that “includes engineers from other battery suppliers, Ph.Ds. with doctoral work in batteries, and individuals who have experience with commercializing energy storage technology, including by overseeing the construction and startup of large-scale battery production facilities.”¹⁰ In addition, Form Energy is “well-financed having raised over \$800 million from leading firms including Breakthrough Energy Ventures . . . , Coatue Management, NGP Energy Technology Partners III, ArcelorMittal, Temasek, Energy Impact Partners, Prelude Ventures, MIT’s The Engine, Capricorn Investment Group, Eni Next, and Macquarie Capital.”¹¹ Public Service’s belief in Form Energy is corroborated by the fact that Xcel Energy (Public

⁷ Hearing Exhibit 101 at 22:5-16 (Direct Testimony of Tomljanovic).

⁸ *Id.* at 32:1-2 (Table JMT-D-1).

⁹ *Id.* at 23: 11-12.

¹⁰ Application at 8 (¶ 9).

¹¹ Hearing Exhibit 101 at 24:8-15 (Direct Testimony of Tomljanovic).

Service's parent company) is an investor in the venture capital firm Energy Impact Partners (EIP)¹² and EIP is an investor in Form Energy.¹³

21. Second, third-party assessments of Form Energy's battery technology "including substantial testing carried out at facilities in Massachusetts and California, indicate that Form Energy's systems should perform as anticipated."¹⁴

22. Third, Public Service has entered a contract with Form Energy with "commercially appropriate terms" that mitigate Public Service's risk. Most of those contractual terms are highly confidential. Public Service proposes to provide reports to the Commission every six months during the period between approval of the CPCN and the Project coming into service with certain specified information, including construction and schedule updates and information regarding expenses incurred during the period.

23. Fourth, Public Service has reduced the financial risk by obtaining third-party funding.

They are (1) Investment Tax Credits ("ITCs") available pursuant to the Inflation Reduction Act ("IRA"), which includes a 30% credit plus a 10% bonus for projects located in an energy community such as Comanche with the possibility of an additional 10% bonus for the use of domestic content, (2) a contingent \$10 million Breakthrough Energy Catalyst Grant, and (3) up to approximately \$35 million grant from the United States Department of Energy enabled by the Infrastructure Investment and Jobs Act [], more commonly known as the Bipartisan Infrastructure Law.¹⁵

24. Fifth, Public Service has mitigated the risk of unforeseen costs by siting the project at the Comanche Generating Station in Pueblo. As a result, Public Service already owns the land for the Project, the water rights necessary to replace water in the batteries lost to evaporation, and the water systems that will be used to demineralize the necessary water.

¹² *Id.* at 19:15-17.

¹³ Hearing Exhibit 200 at 19:9 (Answer Testimony of Soufiani).

¹⁴ *Id.* at 24:17-19.

¹⁵ Application at 9 (¶ 10(b)).

Additionally, the site is located near existing transmission infrastructure, and unused Public Service-owned land is available for the potential expansion of the battery system in the future. The Project also includes the infrastructure necessary to interconnect with the transmission system, which would also be sited on Public Service-owned property. The interconnection will exceed what the Project's battery system will need, and the additional capacity could be used for future expansion and/or for other resources, as appropriate. By using its own land, the Company can keep costs low and take advantage of existing infrastructure.¹⁶

25. Public Service states that the other key benefit of the proposed project is that it will allow Public Service to evaluate new technology on a limited scale to determine its workability and application on the grid before extending significant capital to adopt the new battery technology on a larger scale. Public Service expects to dispatch and monitor the iron-air batteries in a variety of scenarios with other system resources to obtain the information necessary to evaluate the role of storage technology during extended renewable droughts and in: (a) mitigating transmission congestion; (b) providing emergency power supplies during outages; (c) reducing curtailment of renewable energy generators; (d) reducing peak power costs; and (e) reducing carbon emissions by facilitating the efficient integration of new renewables. Public Service expects that the knowledge it acquires from this project will benefit its customers and the industry.¹⁷

26. The cost of the Form Battery Project is substantial and highly confidential. Public Service proposes a "soft cap" on the total capital cost of the project amounting to the highly confidential estimate in the Application "plus the accumulated AFUDC" unless Public Service

¹⁶ Application at 9-10.

¹⁷ *Id.* at 10.

can establish that any additional costs above that amount “are reasonable, prudent, and beyond [Public Service’s] control.”¹⁸ Public Service also proposed in the Application recovery of the project costs in three phases:

Timeframe 1: From the commencement of construction until [commercial operation date (COD)] (estimated to occur in the first quarter 2026), the Company will forego cost recovery and a current return on the [Construction Work in Progress (CWIP)] until the Project is in commercial operation. The Company will instead accrue interest at the [allowance for funds used in construction (AFUDC)] rate.

Timeframe 2: From COD until the time costs are effective from the new rates from the first rate case filed after COD, costs will be recovered through the [Electric Commodity Adjustment (ECA)] based upon a forecast and will be true-up on an annual basis. A final true-up will occur prior to the asset being moved into base rates.

Timeframe 3: Costs are then included in the new base rates going forward.¹⁹

Public Service expects that the “retail revenue requirement of the Project” in 2027 (the year following the in-service date) will be \$3.5 million, “which then will gradually decrease as the Project is depreciated.”²⁰ The average monthly bill impacts are as follows:

<u>Customer Class</u>	<u>Average Increase in Monthly Bill</u>	<u>Average Percentage Increase in Monthly Bill</u>
Residential	\$0.07	0.08%
Small Commercial	\$0.11	0.08%
Secondary General	\$2.54	0.11%
Primary General	\$54.61	0.13%
Transmission General	\$752.53	0.14%

¹⁸ Hearing Exhibit 102 at 18:10-18 (Direct Testimony of Ihle).

¹⁹ *Id.* at 19:12-20.

²⁰ *Id.* at 20:10-13.

27. Public Service expects the “energy storage resource [resulting from the Form Battery Project] will remain a part of [its] system for 10 years.”²¹ After the Project comes into service, the Company is required to make annual reports for ten years containing certain operational performance data and an update on the parallel Form Energy project in Becker, Minnesota.²²

IV. INTERVENORS’ PRE-SETTLEMENT AGREEMENT POSITIONS

A. Staff

28. In its Answer Testimony, Staff recommended that the Commission find that the Form Battery Project is in the public interest and approve the CPCN, but with four modifications. First, Staff recommended that the Commission direct Public Service to pursue and make all reasonable efforts to obtain all available federal investment tax credits, and any other available grants and incentives, to reduce the Project’s costs. Second, Staff recommended that Public Service’s proposal to recover the costs of the Project through the ECA be denied. Third, Staff requested that the Project’s costs be reviewed in the first electric rate case (after the COD) and then recovered in base rates. Finally, Staff recommended that the Commission require Public Service to present a proposal by which any future financial gains received by Public Service that are derived from the growth and development of Form Energy’s technology as validated in this Form Battery Project would be allocated and passed on to Public Service’s customers.²³

29. Staff’s pre-settlement final recommendation was driven by Xcel Energy’s indirect investment relationship with Form Energy. As a result, Xcel Energy potentially could receive

²¹ *Id.* at 15:11-12.

²² Hearing Exhibit 102 at 25:1-26:2 (Direct Testimony of Ihle).

²³ Hearing Exhibit 201 at 6:8-7:5 (Settlement Testimony of Soufiani).

financial gains from the success of Form Energy. Staff believed that ratepayers should receive some of Xcel Energy's reward if Form Energy becomes a success that matches the risk ratepayers took on.²⁴

B. UCA

30. Like Staff, UCA recommended the Commission approve the Application with three modifications: (a) reject Public Service's proposed cost recovery through the ECA for the period of time between the Form Battery Project's in-service date and the Company's first rate case following the beginning of the Form Battery Project's operations; (b) require Public Service to track, record, and defer all Project costs that are not covered by grants or incentives in a non-interest bearing account, until they are presented for review and recovery through base rates in the Company's first rate case following the beginning of Project operations; and (c) require Public Service to provide additional information in its proposed reporting obligations, including construction costs, operating expenses, community engagement, and the number of jobs directly attributable to the Project.²⁵

V. SETTLEMENT AGREEMENT

31. As noted above, the Settling Parties are Public Service, Staff, UCA, COSSA, SEIA, and Holy Cross. CEC is not a party to the Settlement Agreement, but does not oppose the Unopposed Motion. The Settling Parties attached the Settlement Agreement to the Unopposed Joint Motion.

32. In the Settlement Agreement, the Settling Parties recommend approval of the Application with three primary modifications. First, the Settling Parties agreed that Public

²⁴ Hearing Exhibit 200 at 19:1-22:3 (Answer Testimony of Soufiani).

²⁵ Hearing Exhibit 300 at 6:1-28 (Answer Testimony of Henry-Sermos).

Service “shall make commercially reasonable efforts to obtain appropriate grant funding to reduce the costs of the Project”²⁶ and “to obtain appropriate federal investment tax credits to reduce the costs of the Project.”²⁷ If Public Service cannot obtain federal investment tax credits for the Form Battery Project, it is required to inform the Commission.²⁸

33. Second, Public Service withdrew its proposal to recover cost of the Form Battery Project through the ECA rider prior to when the Project is added into rate base in a rate case.²⁹

34. Third, the parties agreed that Public Service will create a regulatory asset to accumulate the depreciation expense and cost to carry the asset (at a rate equivalent to what would have been recorded if AFUDC continued to accrue for the Form Battery Project) “[f]or the period following the placement of the Project into service and until the effective date of rates from the first rate case in which the Project costs are included in rate base[.]”³⁰ Public Service will then propose an appropriate amortization for the amounts in the regulatory asset in the rate case in which the Project is included in base rates.³¹

35. In return, Staff agreed to withdraw its recommendation that Public Service allocate future financial gains derived from the growth and development of Form Energy’s technology as validated in the Form Battery Project to Public Service’s customers.³² The Settlement Agreement states that that EIP “has made a relatively small investment in Form Energy.”³³ The exact size of the investment is highly confidential, but Staff states that its

²⁶ Settlement Agreement at 4-5 (¶ 7).

²⁷ *Id.* at 7 (¶ 14).

²⁸ *Id.*

²⁹ *Id.* at 4 (¶ 5).

³⁰ *Id.* at 4 (¶ 6).

³¹ *Id.*

³² Hearing Exhibit 201 at 8:14-9:5 (Settlement Testimony of Soufiani).

³³ Settlement Agreement at 7 (¶ 15).

characterization in the Settlement Agreement is “reasonable and appropriate.”³⁴ Given the size of the investment and the fact that it is indirect, Staff withdrew its recommendation for sharing any financial gain resulting from the investment.³⁵

36. Otherwise, the Settling Parties agree that: (a) eventual large-scale deployment of long-duration energy storage is important for achieving Colorado’s 2050 decarbonization goal (and thus the requested CPCN) both because of the value of the Form Battery Project itself and to further the development and eventual widespread deployment of long-duration energy storage;³⁶ (b) deployment of new technology at scale carries certain inherent risks, but those risks have been appropriately mitigated and managed up to the approval of the Application, including through contractual terms and through reductions in the cost of the Project resulting from the use of grant funding and seeking investment tax credits;³⁷ (c) that the highly confidential estimated cost of the Form Battery Project stated in in the Settlement Agreement and Direct Testimony, “is in the public interest” and “Public Service should have assurance that it will recover all costs that it reasonably and prudently incurs to construct the Project, as specified [in the Settlement Agreement], as well as to operate and maintain the Project on an ongoing basis.”³⁸

37. The Settling Parties agree that it is in the public interest to approve the Application as modified by the Settlement Agreement.

³⁴ Hearing Exhibit 201 at 8:17-9:1 (Settlement Testimony of Soufiani).

³⁵ *Id.* at 9:1-5.

³⁶ Settlement Agreement at 3 (¶ 2).

³⁷ *Id.* at 3-4 (¶ 4).

³⁸ *Id.* at 5 (¶ 9).

VI. ANALYSIS

A. Analytical Approach

38. In rendering this Decision, the ALJ has carefully reviewed and considered all the evidence even if this Decision does not specifically address all of the evidence presented, or every nuance of each party's position on each issue.

B. Burden of Proof

39. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order."³⁹ As the parties to the Settlement Agreement, Settling Parties bear the burden of proof.⁴⁰ As a result, Settling Parties must establish by a preponderance of the evidence that the Settlement Agreement is just and reasonable and in the public interest. The evidence must be "substantial evidence," which is defined as "such relevant evidence as a reasonable person's mind might accept as adequate to support a conclusion ... it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury."⁴¹ A party has satisfied its burden under this standard when the evidence, on the whole, tips in favor of that party. The Commission has an independent duty to determine matters that are within the public interest.⁴²

C. Modified Procedure

40. The Application, as modified by the Settlement Agreement, is uncontested. Moreover, the parties agree that a hearing is unnecessary. Finally, the Application and

³⁹ § 24-4-105(7), C.R.S.

⁴⁰ Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1.

⁴¹ *City of Boulder v. PUC*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. PUC*, 949 P.2d 577, 585 (Colo. 1997)).

⁴² See *Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984).

Settlement Agreement are supported by sworn testimony and attachments that verify sufficient facts to support the Application and Settlement Agreement. Accordingly, pursuant to § 40-6-109(5), C.R.S. and Commission Rule 1403,⁴³ the Application, as modified by the Settlement Agreement, will be considered under the modified procedure, without a formal hearing.

D. Findings and Conclusions

41. Based upon substantial evidence in the record as a whole, the ALJ concludes that Public Service and the Settling Parties have satisfied their burden of establishing that the Settlement Agreement is just and reasonable and is in the public interest. Specifically, Public Service and Staff have satisfied their burden of proving that the Settlement Agreement balances the short-term, medium-term, and long-term interests of ratepayers and Public Service. The ALJ understands and accepts that, given the novelty of the technology that is the subject of this proceeding, there are risks involved with this type of CPCN. However, the parties have done a reasonable job of mitigating those risks within reason.

42. In addition, the ALJ has reviewed the Battery Supply Agreement. The most important parts of the agreement are highly confidential, and thus cannot be referred to here with any degree of particularity. However, the ALJ has reviewed the agreement in its entirety and finds and concludes that it adequately and fairly protects the interests of Public Service and its ratepayers.

43. Accordingly, based on the foregoing, the ALJ will recommend that the Commission approve the Application as modified by the Settlement Agreement.

⁴³ 4 CCR 723-1.

VII. ORDER**A. The Commission Orders That:**

1. The Unopposed Joint Motion to Approve Unopposed Comprehensive Settlement Agreement filed on March 20, 2024, by Public Service Company of Colorado, Trial Staff of the Commission, the Office of the Utility Consumer Advocate, the Colorado Solar and Storage Association, the Solar Energy Industries Association, and Holy Cross Electric Association (Unopposed Joint Motion) is granted, consistent with the discussion above.

2. Consistent with the findings, discussion, and conclusions in this Decision, the Unopposed Comprehensive Settlement Agreement (Settlement Agreement) filed as Attachment A to the Unopposed Joint Motion, is approved without modification. The public version of the approved confidential Settlement Agreement is attached to this Decision as Appendix A.

3. The request to waive response time to the Unopposed Joint Motion is denied as moot.

4. The Application for a Certificate of Public Convenience and Necessity for the Form Energy Long Duration Battery Project at Comanche Generating Station filed on October 4, 2023, as modified by the Settlement Agreement, is granted consistent with the discussion above.

5. Proceeding No. 23A-0494E is closed.

6. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

7. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

- a. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion within 20 days after service, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.
 - b. If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.
8. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law JudgeRebecca E. White,
Director