

Decision No. C03-1174

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 02A-665E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVALS IN CONNECTION WITH THE THIRD AMENDMENT TO THE ON-SYSTEM POWER PURCHASE AGREEMENT BETWEEN THERMO POWER AND ELECTRIC, INC. AND PUBLIC SERVICE COMPANY OF COLORADO.

**DECISION DENYING APPLICATIONS FOR
REHEARING, REARGUMENT, OR RECONSIDERATION**

Mailed Date: October 16, 2003
Adopted Date: September 24, 2003

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the Applications for Rehearing, Reargument, or Reconsideration (RRR) by Commission Staff (Staff) and the Colorado Office of Consumer Counsel (OCC). Staff and the OCC request reconsideration of Decision No. C03-0988 (Mailed Date of August 28, 2003) (Decision). In the Decision we granted Exceptions to the Recommended Decision by Public Service Company of Colorado (Public Service or Company) and Thermo Power and Electric, Inc. (Thermo), and granted the Company's application for approval of its Third Amendment to the On-System Power Purchase Agreement between Thermo and the Company (Third Amendment). We concluded in the Decision that the Third Amendment was a permissible extension of the 1985 power purchase agreement between Thermo and the Company, rather than an entirely new contract as Staff contended.

2. Thermo has submitted its Reply to the Applications for RRR.¹ Now being duly advised in the matter, we deny the Applications for RRR.

B. Discussion

3. Staff contended throughout these proceedings that the Third Amendment modified the 1985 Agreement by changing the method for making capacity related payments to Thermo (for power produced at its cogeneration facility located on the campus of the University of Northern Colorado) from a \$/kwh to a \$/kw-month arrangement. According to Staff, this change to the capacity payment method was not authorized in the 1985 contract. Staff further argued that the change in payment method would harm ratepayers. For these reasons, Staff argued that the Third Amendment was a substantial change to the 1985 Agreement instead of a mere extension of the 1985 contract, and the Commission retained the authority to disapprove the Third Amendment.

4. In the Decision we concluded that, contrary to argument by the Company and Thermo, the change in method for paying for capacity from the Thermo facility was not contemplated in the 1985 Agreement. However, we still concluded that this change was not so "substantial" as to make the Third Amendment a new power purchase agreement. In response to Staff's arguments, we stated that the change to a \$/kw-month payment arrangement would "likely" not adversely affect ratepayers, and that ratepayers would "probably benefit" from the pricing change. Decision, paragraph 30. The Applications for RRR dispute these latter statements.

¹ We grant Thermo's Motion for Leave to Reply to the Applications for RRR and its Request for Waiver or Shortening of Response Time.

5. Staff argues in its Application for RRR that our statements, regarding the effect on ratepayers of the change in making capacity payments to Thermo, are not supported by the record. Staff asserts that these statements were critical to our conclusion that the Third Amendment did not substantially modify the 1985 Agreement. According to Staff, the record was not "fully developed" on this issue; for example, the testimony we relied upon in making these statements, witness Hyde's rebuttal, was not subjected to cross-examination. Because of the importance of this issue to our conclusion, Staff suggests, we should reopen the record and take further evidence on the issue.

6. Similarly, the OCC argues that the record is not sufficiently developed to determine whether ratepayers will be harmed by the change in payment methodology in the Third Amendment. The OCC states that it intended to cross-examine witness Hyde with respect to the above-referenced statements. Because Ms. Hyde's statements have not been substantiated or cross-examined, the OCC asserts, the Commission should not rely on those statements in our decision. Like Staff, the OCC suggests that we hold further evidentiary hearings to investigate the effect on ratepayers of the change to the Thermo power purchase agreement made in the Third Amendment. Alternatively, the OCC recommends that we order Public Service to negotiate with Thermo to attempt to modify the Third Amendment in a way that would be more advantageous to ratepayers.

7. We deny the Applications for RRR. The Administrative Law Judge (ALJ) issued the Recommended Decision based upon motions for summary judgment by Staff and Thermo. At the time of oral argument on the motions, all parties had submitted their prefiled testimony in accordance with the procedures established by the ALJ. The Recommended Decision observed (paragraph 81) that at the oral argument no party could identify any issue of material fact that

would preclude the resolution of this case on the basis of the motions for summary judgment. Moreover, the ALJ noted (Recommended Decision, paragraph 81) that the parties had agreed that there were no material issues in dispute.

8. The Applications for RRR essentially request that we reopen the record in this case for the purpose of taking further evidence without stating any good cause for such a request. The parties had full opportunity before the ALJ to submit evidence in support of their positions. Apparently, no party objected to the ALJ's conclusion that a hearing would be unnecessary in this matter because no issue of material fact was in dispute. Given the full opportunity to present evidence and for hearing already afforded to the parties, it would be improper for the Commission to reopen the record.

9. We further note that our statements regarding the effect of the change in paying for capacity in the Third Amendment on ratepayers (*e.g.*, the discussion of Ms. Hyde's rebuttal) was not the dispositive point in the Decision. In fact, the statements disputed by Staff and the OCC only referred to the *likely* and *probable* effect of the change in the Third Amendment upon ratepayers. Our decision to approve the Third Amendment was primarily based upon our determination that the amendment was not a substantial change to the 1985 Agreement, a contract previously approved by the Commission pursuant to the Public Utility Regulatory Policy Act of 1978 (PURPA). And, as an extension of the 1985 Agreement envisioned in the original PURPA contract, the Commission had limited authority to review the Third Amendment. For example, the Decision (paragraphs 32 through 37) notes our inability to reset prices for the Company's purchase of power from Thermo under the contract. Therefore, it is unnecessary to take further evidence as suggested by Staff and the OCC even if good cause had been stated for reopening the record.

10. We also deny the OCC's suggestion to order the Company to renegotiate the contract with Thermo. Such an order, assuming it would be within the scope of this docket,² would require evidentiary support in the record, and, even without reference to witness Hyde's rebuttal, the OCC's suggestion lacks such support. We expressed our hope in the Decision (paragraph 37) that Public Service could "buy out" the Thermo contract in a way advantageous to ratepayers. That statement assumes that, in the future, Public Service will continue to assess the Thermo contract in light of then prevailing circumstances (*e.g.*, existing prices for power, the remaining term of the Thermo contract), and, if prudent, attempt to renegotiate that contract. This record justifies nothing beyond that statement.³

11. For these reasons, the Applications for RRR are denied.

II. ORDER

A. The Commission Orders That:

1. The Motion for Leave to Reply to the Application for Rehearing, Reargument, or Reconsideration and Request for Waiver or Shortening of Response Time by Thermo Power and Electric, Inc., is granted.

2. The Application for Rehearing, Reargument, or Reconsideration by Commission Staff is denied.

² As noted in this order and in the Decision, the primary issue in this case was whether the Third Amendment qualified as a permissible extension of the 1985 PURPA contract between the Company and Thermo. We agreed with the Company and Thermo that it did.

³ Contrary to the OCC's suggestion (page 6 of Application for RRR), directing the Company to conduct new negotiations with Thermo here is not comparable to our order in Public Service's 1999 Integrated Resource Plan (IRP) docket that directed the Company to negotiate to acquire the Lamar wind plant. First, the 1999 IRP case primarily concerned what resources the Company should acquire. Therefore, our order directing the Company to negotiate to acquire the Lamar plant was plainly within the scope of the proceeding. The OCC's suggestion here is ancillary to the primary issue in this case: whether the Third Amendment was a proper extension of the 1985 contract. Second, our order in the 1999 IRP concerning the Lamar facility was supported by the evidence in that case.

3. The Application for Rehearing, Reargument, or Reconsideration by the Colorado Office of Consumer Counsel is denied.

4. This Order is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 24, 2003.**

(S E A L)



ATTEST: A TRUE COPY

**Bruce N. Smith
Director**

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners