Decision No. C16-0362

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16D-0168E

IN THE MATTER OF STAFF OF THE PUBLIC UTILITIES COMMISSION'S PETITION FOR DECLARATORY ORDER TO REMOVE AN UNCERTAINTY WITH REGARD TO THE INTERPRETATION OF C.R.S. SECTION 40-2-124(1)(f)(I) AND COMMISSION RULE 3660(h).

DECISION DETERMINING CALCULATIONS PURSUANT TO § 40-2-124(1)(f)(I), C.R.S., AND RULE 3660(h) AND GRANTING INTERVENTIONS

Mailed Date: April 26, 2016
Adopted Date: April 15, 2016

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I. BY THE COMMISSION

A. Statement

1. This Decision grants the requests for intervention filed in this Proceeding. Further, this Decision adopts an interpretation of the relevant statutory and Commission rule language that the percentage of the total new eligible energy resources a Qualifying Retail Utility (QRU) is allowed to acquire and develop after March 27, 2007, is based on **all** new eligible energy acquired after that date.

B. Discussion

2. On March 11, 2016, the Staff of the Colorado Public Utilities Commission (Staff) filed a Petition for Declaratory Order (Petition) requesting that the Commission determine the amount of new eligible energy resources an investor-owned utility shall be allowed to develop and own as utility rate-based property, without being required to comply with certain competitive bidding requirements, under Rule 3660(h) of the Commission's Renewable Energy Standard (RES) Rules, 4 *Code of Colorado Regulations* (CCR) 723-3-3650, et seq.

3. Rule 3660(h) implements § 40-2-124(1)(f)(I), C.R.S., which in turn, requires the Commission to provide incentives to investor-owned utilities:

> to develop and own as utility rate-based property up to twenty-five percent of the total new eligible energy resources the utility acquires from entering into power purchase agreements and from developing and owning resources after March 27, 2007, if the new eligible energy resources proposed to be developed and owned by the utility can be constructed at reasonable cost compared to the cost of similar eligible energy resources available in the market. The qualifying retail utility shall be allowed to develop and own as utility rate-based property more than twenty-five percent but not more than fifty percent of total new eligible energy resources acquired after March 27, 2007, if the qualifying retail utility shows that its proposal would provide significant economic development, employment, energy security, or other benefits to the state of Colorado. The qualifying retail utility may develop and own these resources either by itself or jointly with other owners, and, if owned jointly, the entire jointly owned resource shall count toward the percentage limitations in this subparagraph (I). For the resources

> addressed in this subparagraph (I), the qualifying retail utility shall not be required to comply with the competitive bidding requirements of the commission's rules; except that nothing in this subparagraph (I) shall preclude the qualifying retail utility from bidding to own a greater percentage of new eligible energy resources than permitted by this subparagraph (I). In addition, nothing in this subparagraph (I) shall prevent the commission from waiving, repealing, or revising any commission rule in a manner otherwise consistent with applicable law.

4. Rule 3660(h) provides that the utility: "may propose to develop and own, in whole or in part, a new eligible energy resource by filing an application with the Commission. The Commission may set the matter for hearing, if appropriate, under the Commission's Rules of Practice and Procedure."

5. In its Petition, Staff states that Public Service Company of Colorado (Public Service or Company) has indicated that it intends to make an application under Rule 3660(h) for ownership of new renewable resources concurrent with its next Electric Resource Plan (ERP).

6. Staff takes the position that, because this will be the first instance in which Public Service intends to invoke its rights under Rule 3660(h), "it is critical to understand precisely what rights the Company can invoke."[1] The main issue, according to Staff, is determining the proper methodology to calculate the 25 percent and 50 percent limits described in Rule 3660(h) with respect to utility ownership without competitive bidding.

7. Staff provides two sets of examples of calculations of the amounts of new eligible energy resources Public Service may be allowed to develop and own based on alternative interpretations of Rule 3660(h). In the first set of example calculations,

[1] Staff Petition at 3.

Staff assumes approximately 2,250 megawatts (MW) of resources corresponding to the "total new eligible energy resources acquired after March 27, 2007." Staff argues that these calculations illustrate how Public Service "could use the Rule to preclude any competitive bids for renewable purchase power projects and to essentially put a halt to any further investment in renewable resources by the Independent Power Producers (IPPs) not only in the 2016 ERP, but for the foreseeable future."[2] The second set of example calculations is based on an alternative interpretation of the rule that assumes the Company was to propose to acquire 800 MW of wind resources in its forthcoming ERP such that Public Service would be allowed to own less eligible energy resources without competitive bidding.

8. Staff urges that a Commission determination of this threshold question should not be deferred until Public Service's expected Rule 3660(h) application and ERP proceedings. Staff suggests that a declaratory ruling would provide the Company and interested parties advance notice and certainty, and would help to preserve opportunities for the Company and perhaps IPPs to take advantage of the federal production tax credits by the end of 2016.

9. On March 17, 2016, we accepted the Petition and established an intervention period and briefing schedule.[3] We also established Staff as a party in this matter.

C. Interventions

1. Interventions as of Right

10. Staff of the Colorado Public Utilities Commission (Staff) and the Colorado Energy Office (CEO) each filed notices of intervention by right. Staff filed its intervention

[2] Staff Petition at 4.

[3] Decision No. C16-0223-I, issued March 17, 2016, Proceeding No. 16D-0168E.

pursuant to Ordering Paragraph No. 2 of Commission Decision No. C16-0223-I in order to specify the members of Staff assigned to serve in the Proceeding as Trial Staff.

11. CEO states that it intervenes in this Proceeding because the Commission's interpretation of Rule 3660(h) will have significant impacts on the amounts of new eligible energy resources Public Service is allowed to acquire under the process outlined in Rule 3660(h)(I) and (II). In addition, CEO states that the Commission's interpretation will determine the process that Public Service must comply with in order to acquire eligible energy resources in 2016 and beyond. CEO believes that these interpretations have the potential to impact the overall amount of renewable energy resources that are developed by Public Service in Colorado.

12. Staff and CEO are each intervenors as of right and are each a party to this Proceeding.

2. Permissive Interventions

13. Several additional interested persons filed requests for permissive intervention, including: Public Service, Solar Energy Industries Association (SEIA), Invenergy, LLC (Invenergy), the Interwest Energy Alliance (Interwest), the Colorado Independent Energy Association (CIEA), Colorado Energy Consumers (CEC), Black Hills/Colorado Electric Utility Company, LP (Black Hills), and Western Resource Advocates (WRA). The Rocky Mountain Environmental Labor Coalition (RMELC) and Colorado Building and Constructions Trade Council, AFL-CIO (CBCTC) jointly filed a motion to intervene (jointly RMELC/CBCTC).

14. Public Service is a public utility in the State of Colorado and is subject to the jurisdiction of, and is regulated by, the Commission. As relevant here, Public Service is an investor-owned QRU subject to the RES codified at § 40-2-124, C.R.S., and the Commission's RES Rules.

15. Public Service argues in its motion for intervention that the interpretation of § 40-2-124(1)(f)(I), C.R.S., and Rule 3660(h) is the foundation of the Company's forthcoming application to develop 600 MW of wind resources. Public Service claims that this Proceeding will substantially affect the Company's pecuniary or tangible interests as the outcome could potentially limit or preclude the Company's ability to move forward with its application.

16. Public Service believes that the meaning of the statute is plain and unambiguous that in applying the percentage test to determine whether it may acquire a proposed resource, the MW rating of the proposed resource must be divided by the sum of the proposed resource, plus those Power Purchase Agreements (PPAs) and utility-owned resources that are new within the meaning of the statute (those acquired or entered into after March 27, 2007). Public Service expresses concern that the alternative reading of the statute offered in the Petition limits the inventory and ultimate denominator in any calculation to only the resources proposed for acquisition or needed at a fixed point in time instead of contemplating an ongoing inventory dating back to March 27, 2007, as set forth in the statute.

17. WRA is a nonprofit conservation organization "dedicated to protecting the land, air and water of the West." WRA seeks leave to intervene, because effective implementation of the RES, including its financial incentives encouraging utilities to develop and own eligible energy resources, is critical to reducing the detrimental environmental impact of

electricity production in the West. WRA represents that this Proceeding will directly impact its substantial, tangible interest in reducing the environmental impact from electricity generation.

18. SEIA is the registered 501(c) non-profit trade association of the United States (U.S.) solar energy industry. SEIA is concerned that, depending upon the interpretation of Rule 3660(h), the Company could use the Rule to preclude competitive bids for renewable PPA projects. SEIA represents its members do and will bid into competitive solicitations and programs arising under both the ERP and RES Compliance Plan proceedings. Therefore, SEIA claims a substantial and direct interest in this Proceeding.

19. CEC is an unincorporated association of corporations duly authorized and in good standing to transact business within Colorado. All of CEC's members operate facilities within the service territory of Public Service and purchase electricity and related energy services from Public Service. CEC represents that the interpretation of the statute and rule will impact CEC's interest, the electric services CEC members receive, and the charges paid by CEC's members for electricity. CEC argues that it has a tangible and pecuniary interest in the outcome of this Proceeding.

20. Interwest is a Colorado nonprofit trade association of wind, utility-scale solar, and other renewable energy project developers and equipment manufacturers working with the non-governmental conservation community to promote renewable energy in Colorado and other Western states. Interwest states that its members bid in competitive procurements, and that engineering, procurement, and construction contracts could be considered for projects approved under a Rule 3660(h) Proceeding. As such, Interwest argues that it has a tangible and pecuniary interest in this Proceeding.

21. Invenergy and its affiliates develop, own, and operate power generation and energy storage facilities in the U.S., including Colorado. Invenergy states that it has been a winning IPP bidder in competitive solicitations in Colorado for both Black Hills and Public Service. Invenergy represents that it has maintained and advanced development projects in Colorado in reliance on the express language of the statute and Rule 3660(h), including that it has spent risk dollars in Colorado over the past several years, even though Public Service was in compliance with the minimum RES, in anticipation of Public Service using the statute and rule to bring more wind to the system. Invenergy argues that, because of its significant investment in eligible energy resource development projects in Colorado, it has a substantial interest in the resolution of this Proceeding.

22. The RMELC is a Colorado nonprofit corporation representing workers and unions regarding environmental and energy issues. CBCTC is comprised of 23 Craft Local Unions, which make up approximately 30,000 skilled working men and women in Colorado. Both organizations state that they intend to participate in future ERP proceedings to advocate for the interests of labor and the environment, and those future proceedings will be governed by the decision in this Proceeding. Therefore, RMELC and CBCTC both indicate that they have a tangible, pecuniary, and substantial interest in the outcome of this Proceeding.

23. CIEA is a Colorado nonprofit trade association. CIEA's members are IPPs, which currently operate or seek to operate electric generating resources in Colorado. CIEA, states that it has a specific interest in advocating for Commission decisions and rules that safeguard, not impair, competitive bidding of renewable resources and market participation by IPPs. CIEA states that its members are IPPs which currently operate or seek to operate electric generating resources in Colorado, including eligible energy resources under the RES.

The tangible and pecuniary interests of CIEA's IPP members may therefore directly be substantially impacted by the decision in this Proceeding.

24. Black Hills is a public utility in the State of Colorado and is subject to the jurisdiction of, and is regulated by, the Commission. Black Hills has exercised its rights under the provisions subject to the Petition in the past. Black Hills argues that the outcome of this proceeding will substantially affect its pecuniary or tangible interests, and its interests will not be otherwise adequately represented.

1. Permissive Intervention Conclusion and Findings

25. Rule 4 CCR 723-1-1401(c) of the Commission's Rules of Practice and Procedure states in relevant part:

> A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene.

Pursuant to Rule 1500, the person seeking leave to intervene by permission bears the burden of proof with respect to the relief sought.

26. We find good cause to grant all requests to intervene. Each of the entities seeking to intervene has demonstrated that this proceeding may substantially affect its pecuniary or tangible interests pursuant to Rule 1401(c). Each also has demonstrated that its interests would not otherwise be adequately represented.

27. No responses to the requests for intervention were filed by any party. In accordance with Rule 1400(d), the "Commission may deem a failure to file a response as a confession of the motion." Because no party objected to the requests for permissive intervention, we find good cause to grant each request.

28. SEIA, CEC, Interwest, Invenergy, RMELC/CBCTC, Black Hills, CIEA, and Public Service are parties in this matter.

D. Positions of the Parties

29. Public Service, Invenergy, Interwest, Black Hills, WRA, CEO,[4] and RMELC/CBCTC argue that the calculations pursuant to the statute and rule mean that the "twenty-five [or fifty] percent of total new eligible energy" is a cumulative percentage of all eligible energy resources acquired after March 27, 2007. SIEA, CIEA, and CEC, on the other hand, argue that the percentage must be calculated incrementally for each proposal after March 27, 2007.

30. Parties arguing for the cumulative approach maintain that the plain language of § 40-2-124(1)(f)(I), C.R.S., and Rule 3660(h) provides incentives for utility ownership based on the total of eligible resources acquired after March 27, 2007.[5] These parties argue that the alternative "incremental" approach requires placing additional words in the statute that currently do not exist. According to these parties, the statute simply does not provide that the total must be "in a particular application" or "as part of an ERP."[6]

[4] WRA and CEO filed a joint brief to the Petition.

[5] *See*, WRA and CEO, Joint Brief, at pp. 5-7; Public Service Brief at pp. 8-11.

[6] *See*, WRA and CEO, Joint Brief, at p. 7.

31. The parties arguing for the cumulative approach point out that this interpretation is consistent with prior Commission Decisions. For example, the parties note that in adopting Rule 3660(h) in Proceeding No. 08R-424E to implement House Bill 07-1281 (2008 Rulemaking), which added § 40-2-124(1)(f), C.R.S., the Commission required an inventory of all eligible energy resources acquired after March 27, 2007. WRA and CEO contend that "[t]he only reason such an inventory of all eligible energy resources would be necessary is if the percentages in §40-2-124(1)(f)(I) refer to *all* such resources acquired since 2007."[7] The cumulative approach parties also point to Proceeding No. 10A-930E, in which Black Hills brought forward a 29.04 MW wind resource under Rule 3660(h) and proposed to own half of the resource.[8]

32. On the other hand, SIEA, CIEA, and CEC argue that the critical language is not the term "total," rather, it is the term "new."[9] CEC claims that, although the rule references March 27, 2007, "it would be an illogical and absurd result were everything coming after this date to be considered 'new' in perpetuity."[10] While CEC includes statutory interpretation considerations supporting its views, these "incremental" parties express concern that a cumulative interpretation would essentially swallow the general rule, which requires competitive bidding.

[7] *See*, WRA and CEO, Joint Brief, at 9-10; *See also*, PSCo 11-12.
[8] PSCo, at 13.
[9] CEC, at 4; SIEA, at 2.
[10] CEC, at 4.

33. CEC maintains that Public Service's interpretation would impermissibly "… render any words or phrases superfluous or would lead to illogical results."[11] Primarily, CEC claims that the word "new" could be stricken and Public Service's preferred interpretation would not be altered. CEC goes on to argue that, where a utility is in compliance with the RES, it must acquire eligible energy resources through the ERP and competitive bidding, and may not use Rule 3660(h) to propose utility-owned resources. CEC argues that § 40-2-124(1)(f), C.R.S., provides that it is intended to implement "these policies." CEC claims that the § 40-2-124(1)(f), C.R.S., reference to "these policies" necessarily means RES compliance. If a utility has met its RES requirement, CEC argues that the RES-specific incentives do not apply.[12]

34. CEC further argues that, without an ERP or other transparent processes, Public Service simply cannot show "the new eligible energy resources proposed to be developed and owned by the utility can be constructed at reasonable cost compared to the cost of similar eligible energy resources available in the market."[13]

35. In response, Staff states that, while the briefs show that the industry has at least two interpretations of the statute and rule, Staff is not a proponent of either interpretation. In light of the 2008 Rulemaking decision, Staff maintains that a reasonable approach may be to resolve the issue by adopting the cumulative approach and states that "[i]t is understandable that the Company relied on the cumulative interpretation of the Statute…."[14] Staff recognizes that,

[11] *Id.* at 5 (citation omitted).
[12] *Id.*, at 6.
[13] *Id.*, at 7-8.
[14] Staff Response, at 5.

if the Commission finds the statutory language ambiguous, the Commission could give an interpretation that furthers the legislative intent.[15]

36. Staff notes that the Commission could "utilize its rule-making authority to further delineate the administration of the incentives as set forth in C.R.S. 40-2-124 going forward." Therefore, Staff suggests the Commission: (1) find that the Company's interpretation of the statute is justified; and (2) find that the Commission is not precluded from exercising its general rulemaking authority to dictate the manner in which the statute is implemented.

37. The remaining responses to the initial briefs from Public Service, WRA, RMELC/CBCTC, and Invenergy generally take positions contrary to CEC's statutory interpretation that the term "new" is ambiguous with the statute.

E. Conclusion and Findings

38. The primary purpose of statutory interpretation is to effectuate the Colorado Legislature's intent. The first consideration is the plain language of the statute. Only if the language is ambiguous is it necessary to turn to the canons of statutory interpretation. In interpreting a statute, it is imperative to harmonize potentially conflicting provisions and avoid interpretations that "would render any words or phrases superfluous or would lead to illogical results." *People v. Null*, 233 P.3d 670, 679 (Colo. 2010).

39. While the Commission has broad legislative authority to regulate public utilities, that authority is restricted by statute. *Mountain States v. Pub. Utils. Comm'n*, 590 P.2d 495, 497 (Colo. 1979). An agency's interpretation of its own organic statutes and regulations is generally entitled to deference; however, "such deference is not required when the construction

[15] Staff Response, at 3.

of the statute by the agency has not been uniform or the statutory language clearly compels a contrary result." *Ball Corp. v. Fisher*, 51 P.3d 1053, 1056-57 (Colo. App. 2001).

40. There appears to be no disagreement among the parties regarding the standard for statutory review. Rather, the parties' positions diverge regarding the interpretation of the phrase "total new eligible energy resources … after March 27, 2007," which appears both in statute and our rules. The narrow issue for determination here is what ownership percentages should apply based on the language of § 40-2-124(1)(f)(I), C.R.S., and Rule 3660(h).

41. We find compelling, the arguments that the plain meaning of the statute is that the "twenty-five percent of the total new eligible energy" should be calculated as a cumulative percentage of eligible energy resources the QRU acquires after March 27, 2007. We find this interpretation consistent with prior Commission decisions addressing the statute and rule.

42. Based on the plain language of the statute taken as a whole, "total new eligible energy" means all energy acquired from PPAs or developed after March 27, 2007. We are not persuaded by the argument that the term "new" means "not existing before." We disagree that it is illogical or absurd to consider everything after March 27, 2007 as new. Rather, we are persuaded by the line of reasoning that the term "new" must have some meaning within the statute, and that the resources are new as of March 27, 2007, rather than the meaning ascribed by CEC that the resources are continuously new as incrementally presented.[16]

[16] This interpretation finds support in other statutory language, as the General Assembly has used "new" to mean "new as of the date the statute was enacted" within the RES statutes. For example, the definition of "eligible energy resource" in § 40-2-124(a), C.R.S., which includes "new hydroelectricity with a nameplate rating of 10 MW or less, and hydroelectricity in existence on January 1, 2005, with a nameplate rating of 30 MW or less, defines "new" as resources not in existence on January 1, 2005.

43. We find the interpretation advanced by the "cumulative parties" provides a logical, plain meaning to the terms "total" and "new" contained in the statute, and to the explicit use of the date the statute was enacted on March 27, 2007. Therefore, we find that the plain meaning of the § 40-2-124(1)(f)(I), C.R.S., and Rule 3660(h) is that the "twenty-five percent of the total new eligible energy resources" as of "March 27, 2007" means the cumulative of all eligible energy resources that were not in existence prior to March 27, 2007, and should therefore be calculated as a cumulative percentage of eligible energy resources the utility acquires after March 27, 2007.

II. ORDER

A. The Commission Orders That:

1. The Petition for Declaratory Order filed on March 11, 2016, by Staff of the Colorado Public Utilities Commission, requesting the Commission remove an uncertainty with regard to the interpretation of § 40-2-124(1)(f)(I), C.R.S., and Commission Rule 4 *Code of Colorado Regulations* 723-3-3660(h) is granted. Section 40-2-124(1)(f)(I), C.R.S., and Rule 3660(h) are declared to have the meaning that the "twenty-five percent of the total new eligible energy resources" as of "March 27, 2007" means the cumulative of all eligible energy resources that were not in existence prior to March 27, 2007, and should therefore be calculated as a cumulative percentage of eligible energy resources the utility acquires after March 27, 2007.

2. The Petition for Leave to Intervene filed by Western Resource Advocates (WRA) on April 4, 2016 is granted.

3. The Petition for Leave to Intervene filed by the Solar Energy Industries Association (SEIA) on April 4, 2016 is granted.

4. The Motion to Intervene filed by the Colorado Energy Consumers Group (CEC) on April 4, 2016 is granted.

5. The Petition to Intervene filed by Interwest Energy Alliance (Interwest) on April 4, 2016 is granted.

6. The Petition to Intervene filed by Invenergy LLC (Invenergy) on April 4, 2016 is granted.

7. The Joint Petition for Leave to Intervene filed by the Rocky Mountain Environmental Labor Coalition and the Colorado Building and Construction Trades Council, AFL-CIO (jointly RMELC/CBCTC) on April 4, 2016 is granted.

8. The Motion to Intervene filed by Black Hills/Colorado Electric Utility Company LP (Black Hills) on April 4, 2016 is granted.

9. The Motion to Intervene filed by the Colorado Independent Energy Association (CIEA) on April 4, 2016 is granted.

10. The Motion to Intervene filed by Public Service Company of Colorado (Public Service) on April 4, 2016 is granted.

11. Staff of the Colorado Public Utilities Commission, the Colorado Energy Office, SEIA, CEC, Interwest, Invenergy, RMELC/CBCTC, Black Hills, CIEA, and Public Service are parties in this matter.

12. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

13. This Decision is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING April 15, 2016.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

FRANCES A. KONCILJA

Commissioners

ATTEST: A TRUE COPY

Doug Dean, Director