

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 19V-0513E

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IN THE MATTER OF THE PETITION ON BEHALF OF COLORADO STORAGE ASSOCIATION FOR WAIVERS AND VARIANCES OF THE LOCATION REQUIREMENT IN RULE 3665(A)(I)(C) CONSISTENT WITH HOUSE BILL 19-1003 AND REQUEST FOR SHORTENED NOTICE PERIOD.

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**DECISION DISMISSING  
PETITION WITH CLARIFICATIONS**

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Mailed Date: October 22, 2019

Adopted Date: October 16, 2019

**I. BY THE COMMISSION**

**A. Statement**

1. On September 24, 2019, pursuant to Public Utilities Commission (Commission or PUC) Rule 1304(h), 4 *Code of Colorado Regulations* (CCR) 723-1304, the Colorado Solar and Storage Association (COSSA) filed a Petition for Waivers and Variances (Petition). COSSA requests a waiver of the subscriber location requirements in Rule 3665(a)(I)(C) of the Rules Regulating Electric Utilities, 4 CCR 723-3, pending updated rules, such that the language does not contradict a portion of House Bill (HB) 19-1003.

2. As discussed below, we dismiss the Petition. HB19-1003 was effective as of October 1, 2019; stakeholders and this Commission must comply with its requirements, and immediate implementation of the statutory changes are in no way complicated or impaired absent an immediate corresponding change to the Commission's rules. The blanket and indefinite "waiver" of the rule requested in the Petition is thus unnecessary and procedurally inappropriate. In this instance, immediate relief, if any is in fact required, can be achieved through appropriate

filings within an ongoing adjudicated proceeding, and the necessary rule changes will be achieved through already-initiated rulemaking processes consistent with the Colorado Administrative Procedure Act (APA).

**B. Discussion, Findings, and Conclusions**

3. COSSA requests the Commission “waive” implementation of the requirement in Rule 3665(a)(I)(C) that a Community Solar Garden (CSG) subscriber must be located “within the same county as, or county adjacent to, the CSG”<sup>1</sup> for Public Service Company of Colorado (Public Service). COSSA requests the waiver be in effect until the Commission issues final rules implementing removal of the county adjacency requirement in accordance with HB 19-1003.

4. In support of its request, COSSA states that a waiver of Rule 3665(a)(I)(C) is necessary because it claims rapid implementation of the updated location requirement is “essential to enable timely access to CSG subscriptions”<sup>2</sup> to take advantage of federal investment tax credits. COSSA includes that it understands HB 19-1003 will be comprehensively implemented in rulemaking, but requests “quick action” of the Commission to provide “needed market certainty to the CSG community.”<sup>3</sup>

5. HB 19-1003 became effective on October 1, 2019<sup>4</sup> and generally amends §§ 40-2-127 and 128, C.R.S., in three ways: (1) increasing the maximum size of a CSG from 2 MW to 5 MW, with the option for the PUC to authorize construction of up to 10 MW beginning in 2023; (2) removing the requirement that a CSG subscriber’s identified physical location be “in the same county as, or a county adjacent to,” that of the CSG, but retaining that it

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<sup>1</sup> COSSA Petition at p. 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.* at pp. 2-3.

<sup>4</sup> While the change in law was effective October 1, 2019, just days after the petition was filed, stakeholders were aware that HB 19-1003 would become effective when it was signed into law earlier this summer.

will be within the service territory of the same investor owned utility; and (3) requiring all photovoltaic electrical work on a CSG greater than 2 MW to be supervised by a licensed professional.

6. Current Rule 3665(a)(I)(C) provides in part that:
  - (I) Requirements for CSG subscribers, CSG subscriptions, and CSG subscriber organizations. ...
  - (C) The premise to which a subscription is attributed by a CSG subscriber shall be served by the investor owned QRU and shall be within the same county as, or a county adjacent to, the CSG. The CSG subscriber may change from time to time the premise to which the CSG subscription shall be attributed, so long as the premise is served by the investor owned QRU and is within the same county as, or a county adjacent to, the CSG.<sup>5</sup>

7. COSSA takes issue with the emphasized rule language above and states that these locational constraints have “in effect been overturned by HB 19-1003.”<sup>6</sup> It therefore requests a variance to enable a more permissive locational constraint going forward, including such that Public Service can amend, modify, or waive the locational requirement in Producer Agreements currently in effect.

8. At this time through the Petition, COSSA does not request or take issue with other statutory revisions caused by HB 19-1003. It recognizes that rule changes regarding HB 19-1003 and other significant changes made in Title 40 by the 2019 General Assembly are being considered through ongoing rulemakings.<sup>7</sup>

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<sup>5</sup> Emphasis added.

<sup>6</sup> COSSA Petition at p. 4.

<sup>7</sup> COSSA cites Proceeding No. 19R-0096E in which the Commission is considering broad revisions to its Electric Rules, 4 CCR 723-3, including numerous statutory provisions updated by the 2019 General Assembly. At the September 25, 2019, Commissioners’ Weekly Meeting, the Commission approved issuance of a focused Notice of Proposed Rulemaking regarding changes caused by HB 19-1003 and related CSG rules.

9. COSSA states that a number of stakeholders, including Public Service, do not oppose the relief requested. It further states it provided a copy of the pleading in Proceeding No. 19A-0369E – Public Service’s ongoing renewable energy standard (RES) compliance plan proceeding.<sup>8</sup> Through the petition, COSSA requests an expedited notice and intervention period to implement the change quickly.

10. Statutory changes occur with frequency. It is well settled that when a law underlying a judgment awarding prospective relief changes, that relief is no longer enforceable to the extent it is inconsistent with the new law. *Miller v. French*, 102 S. Ct. 2246, 2258 (U.S. 2000) (“The provision of prospective relief is subject to the continuing supervisory jurisdiction of the court, and therefore may be altered according to subsequent changes in law.”). *See, e.g., Id.*

11. In addition, the agencies and this Commission are subject to the APA. Rules that are generally applicable must go through appropriate rulemaking processes, as required by the APA. §§ 24-4-102(2), (10), and (15); *OCC v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278 (Colo. 1991); *Home Builders Ass’n of Metro. Denver v. PUC*, 720 P.2d 552 (Colo 1986) (agency proceedings which affect a specific party and resolve particular issues of disputed fact by applying previously determined rules or policies to circumstances of a case are deemed adjudicatory proceedings; agency proceedings that primarily seek to or in effect determine policies or standards of general applicability are deemed rulemaking proceedings). The Commission must follow these processes, even when statutory changes occur, and cannot use processes outside of rulemaking to inadvertently create rules of general applicability. *See, Home Builders Ass’n*, 720 P. 2d 552, at 560-61.

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<sup>8</sup> In Proceeding No. 19A-0369E, Administrative Law Judge Mirbaba recently extended the 2017-2019 RES compliance plan.

12. An “emergency or temporary” rule may be adopted without compliance with the full procedures prescribed in the APA “if the agency finds that immediate adoption of the rule is imperatively necessary to comply with a state or federal law or federal regulation or for the preservation of public health, safety, or welfare and compliance with the requirements [of the APA] would be contrary to the public interest...” § 24-4-102(6)(a). The Commission, on its own motion, has used this provision of the APA sparingly when statutes change, particularly because it must find a rule change that does not include full APA processes is “imperatively necessary.”<sup>9</sup>

13. COSSA’s request seeks a waiver of certain provisions of Rule 3665 until new rules are effective. The Commission has found that a broad and indefinite waiver of a rule would create rules of general applicability, inappropriately circumventing the required APA processes.<sup>10</sup> Waiving a rule by finding it is inconsistent with statutes that apply to all utilities would similarly be a generally applicable finding. Rulemaking outside of appropriate proceedings is prohibited. The Commission must, and is, following appropriate rulemaking processes to revise its rules for generally applicable practices, including without limitation, implementing HB 19-1003. Granting the requested waiver and in effect changing the rule through this petition process is inappropriate.

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<sup>9</sup> See Decision No. C14-0893, Proceeding No. 14R-0804T, issued July 28, 2014 (due to significant changes in telecommunications law through Article 15, Title 40 finding temporary rules imperatively necessary to ensure 9-1-1 basic emergency service while permanent rules were considered); Decision No. C14-0773, Proceeding No. 14R-0737TR, issued July 8, 2014 (due to changes in Title 40 regarding new law on Transportation Network Companies finding certain driver safety rules imperatively necessary while permanent rulemaking was ongoing); Decision No. C16-0829, Proceeding No. 16R-0674R, issued September 7, 2016 (while not a statutory change, the Commission found it imperatively necessary to institute minimum safety requirements at highway-rail crossings to avoid future fatalities and required updates in concert with Colorado Department of Transportation actions).

<sup>10</sup> See, e.g., Decision No. C16-1156-I, Proceeding No. 16A-0396E, issued December 19, 2016, at ¶ 16 (finding requested waiver of rules for an indefinite period and setting methodologies amount to rules of general applicability).

14. Similar to a temporary rule change, the pleading requests the rule change due to a statutory revision until final rules are updated by the Commission. Participants, including COSSA, were invited by the Commissioners to file requests for temporary or emergency rule changes, if any were seen as imperatively necessary, given the significant changes in 2019 to Title 40.<sup>11</sup> No requests for temporary rule changes were filed. We do not construe the pleading on our own motion as a request for a temporary rule change. Here, COSSA does not make the necessary showing for us to find a temporary rule change is “imperatively necessary.”<sup>12</sup>

15. COSSA’s filing also highlights that a temporary rule change may not be required given ongoing adjudication. To the extent COSSA’s intended relief is focused solely on prospective and revised contracts with Public Service, fact-specific adjudications applicable to a particular set of parties can address specific relief.<sup>13</sup> COSSA identified ongoing Proceeding No. 19A-0369E as addressing Public Service’s current and continued RES compliance plans. Stipulations, joint waiver requests, or settlements that address party agreement on case-specific implementation of effective statutes going forward, can be provided within the context of fact-specific adjudications. This consideration avoids the potential for improper rulemaking and allows for Commission consideration of the effective statute within the context of all relevant facts pertaining to affected, specific parties.

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<sup>11</sup> Proceeding No. 19R-0096E, Transcript Hearing 05-02, p. 122 ln 9-12 (discussing a potential temporary rule request with a COSSA representative).

<sup>12</sup> In addition to the adjudication avenue discussed below that implies a rule change for the purposes discussed is not “imperatively necessary,” COSSA does not include any public health, welfare, or safety concerns that could cause the Commission to grant this extraordinary relief.

<sup>13</sup> For example, when significant changes to Article 15 of Title 40 occurred, telecom providers sought waiver rules through stipulation applicable to specific parties. No broad requests for rule waivers or variances were filed. *See, e.g.*, Decision No. C14-0462, Proceeding No. 14V-0332T, issued May 2, 2014. Here, the request seeks a broad determination and, while COSSA represents Public Service does not oppose the relief, the pleading is not stipulated to by any other party or provided with specificity of particular Commission action, like application to Commission approval of a utility’s ongoing or future RES compliance plan.

16. As discussed above, we find the Petition requests that the Commission consider taking action that could constitute improper rulemaking.<sup>14</sup> Inadvertently creating a rule of general applicability outside of a rulemaking is inappropriate. To notice and move forward with a waiver request as pled will unnecessarily take time and result in an inefficient use of stakeholder and Commission resources. Other, more appropriate and expeditious<sup>15</sup> avenues exist for the COSSA.

17. The Petition is dismissed. Dismissal of the instant petition is not an impediment to stakeholders and this Commission implementing the provisions of HB 19-1003. We encourage stakeholders to make appropriate pleadings, as necessary, and to participate in the rulemaking process. We find that dismissing the Petition with this clarity creates efficiencies and saves Commission and stakeholder time.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The Petition for Waivers and Variances filed on September 24, 2019, by the Colorado Solar and Storage Association is dismissed, consistent with the discussion above.

2. 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.

3. This Decision is effective upon its Mailed Date.

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<sup>14</sup> In addition to being inconsistent with required rulemaking processes, we note that petitions requesting a broad rule waiver due to statutory changes, if pursued with regularity, would cause absurd results. This Commission would frequently entertain petitions for broad waivers to find its rules unenforceable, despite or in addition to temporary rule requests and rulemaking efforts. This construct creates duplicative proceedings, in addition to circumventing the APA and Commission practice.

<sup>15</sup> While potential filing(s) in ongoing adjudication may be a path forward for COSSA regarding specific relief with Public Service, we also note that a well-supported temporary rule request would have been more expeditious. Temporary rules, if found imperatively necessary as required by the APA, may take immediate effect.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
October 16, 2019.**

( S E A L )



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

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FRANCES A. KONCILJA

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JOHN GAVAN

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Commissioners