

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0226E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER EXTENDING THE APPROVED REGULATORY TREATMENT OF MARGINS EARNED FROM CERTAIN TYPES OF RENEWABLE ENERGY CREDIT AND ENERGY TRANSACTIONS.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
GRANTING APPLICATION**

Mailed Date: January 15, 2021

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I. STATEMENT

1. On May 28, 2020, Public Service Company of Colorado (Public Service or the Company) filed a Verified Application (Application) for an order granting an extension of the current approved margin sharing percentages in connection with certain types of transactions involving the sale of Renewable Energy Credits.

2. On June 29, 2020, the City and County of Denver, Colorado (Denver) filed its Motion to Intervene. In its Motion to Intervene, Denver states it is a legally and regularly created, established, organized, and existing home rule city and county, municipal corporation, and political subdivision under the provisions of Article XX of the Constitution of the State of Colorado and the Home Rule Charter of Denver. Denver has a franchise agreement with Public Service relating to the provision of electricity within the City and County of Denver.

3. On June 29, 2020, the Colorado Public Utilities Commission Trial Staff (Staff) filed a Notice of Intervention as of Right, Entry of Appearance, Notice Pursuant to Rule 1007(a), and Request for Hearing.

4. On June 29, 2020, Western Resource Advocates (WRA) filed its Motion for Leave to Intervene and Request for Hearing. In its Motion for Leave to Intervene, WRA states it is a non-profit conservation organization dedicated to protecting the land, air, and water of the West. WRA states it has a tangible interest in protecting the environment and that this proceeding will directly impact this interest. WRA also states that no other party will represent WRA's interests in this proceeding.

5. During its weekly meeting on July 15, 2020, the Commission referred this matter to an Administrative Law Judge (ALJ).

6. On July 31, 2020, the Colorado Office of Consumer Counsel (OCC) filed its Unopposed Motion for Late-filed Intervention, Its Intervention and Entry of Appearance and Request for Waive of Response Time. The OCC listed a series of issues it wishes to investigate.

7. On August 5, 2020, by Decision No. R20-0570-I, all interventions were granted, and a prehearing conference was scheduled for August 25, 2020.

8. On August 18, 2020, by Decision No. R20-0607-I, the prehearing conference was vacated and a procedural schedule was adopted, which included an evidentiary hearing to be held on December 7 and 8, 2020.

9. On December 7, 2020, the above-captioned proceeding was called via video conferencing at 9:00 a.m.¹

10. At the start of the hearing, exhibits were admitted by stipulation of the parties.

11. Public Service offered the testimony of Bryce Schneider. At the conclusion of the evidence, the record was closed. The matter was then taken under advisement.

12. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this proceeding.

II. FINDINGS OF FACT

13. The concept of renewable energy credits (RECs) merits some background explanation. When renewable energy resources produce electricity, a REC is created for each megawatt-hour (MWh) generated. Commission rules define a REC as “a contractual right to the

¹ The hearing was held via video conferencing due to the Covid-19 pandemic.

full set of non-energy attributes, including any and all credits, benefits, emissions reductions, offsets, and allowances, howsoever entitled, directly attributable to a specific amount of electric energy generated from a renewable energy resource.”²

14. Public Service trades the following types of RECs:

- a) Stand-alone RECs produced by Public Service owned or contract renewable resources (Generation Book or Gen Book RECs)
- b) Gen Book RECs bundled with Generation Book energy (Gen/Gen);
- c) Gen Book RECs bundled with Proprietary Book energy (Hybrid RECs);
- d) RECs not produced by Public Service owned or contract renewable resources (Proprietary Book or Prop Book RECs); and
- e) Proprietary Book RECs purchased and sold on a bundled basis with Proprietary Book energy (Prop/Prop).

15. In Decision No. C10-0267 issued in Proceeding No. 09A-602E on March 23, 2010, the Commission approved a settlement that authorized the sharing of margins resulting from the sales of Hybrid RECs.

16. The current margin sharing percentages are as follows:

| | |
|------------------|--|
| Stand-Alone Recs | 90% Customers, 10% Company |
| Gen=n-Gen- Recs | 90% Customers, 10% Company |
| Hybrid RECs | 80% Customers, 20% Company (first 20M in sales) 90% Customers, 10% Company (sales in excess of 20M) |

III. ISSUES

17. Should margins for REC sales be continued at the same percentages?

² Rule 3652(y), 4 *Code of Colorado Regulations* (CCR) 723-3.

18. Should ratepayer proceeds from REC sales continue to flow back to ratepayers through the Renewable Energy Standard Adjustment (RESA) or should the proceeds be returned via the Electric Commodity Adjustment (ECA)?

IV. APPLICABLE LAW

19. As the proponent of a Commission order, Public Service has the burden of persuasion in this proceeding pursuant to Rule 1500, 4 CCR 723-1, of the Commission’s Rules of Practice and Procedure.

20. The evidence must be “substantial evidence,” which is defined by the Colorado Supreme Court 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.” *City of Boulder v. Colorado Public Utilities Commission*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Public Utilities Commission*, 949 P.2d 577, 585 (Colo. 1997)). The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985). A party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

21. The Commission has an independent duty to determine matters that are within the public interest. *See Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984).

22. Commission rules specify that qualifying retail utilities (QRUs) may sell or trade excess RECs and, with Commission approval, retain a portion of the earnings from such REC transactions. Specifically, Rule 3659(n) provides the following:

The investor owned QRU shall have the discretion to sell or trade RECs at any time as long as the investor owned QRU obtains and retires sufficient levels of RECs to comply with the RES under rule 3654 and the requirements for renewable distributed generation under rule 3655. Proceeds from the sales of RECs shall be credited to the account associated with the RESA. The investor owned QRU may seek approval in an annual compliance plan filing under rule 3657 or by separate application to retain as earnings a percentage of the funds from REC sales that the investor owned QRU expects to have available to acquire eligible energy and RECs under the retail rate impact in rule 3661 for the compliance year. In considering the percentage of funds to be retained as earnings by the investor owned QRU, the Commission shall take into account the development of the REC market and the expected value added by the investor owned QRU in marketing and trading the RECs.

V. ARGUMENTS OF THE PARTIES

A. Public Service

23. Public Service argues that the margins should be extended because of the proven benefits to the ratepayers. Public Service states that REC margin sharing has delivered retail customers \$34.6 million in margins, over \$43.3 million in gross margins, during the period 2015 through 2019.³

24. Public Service projects, with Commission approval of its Application, that it may be able to produce additional financial benefit of approximately \$18 million for its customers through 2023.⁴

25. Public Service believes that the current percentages balance the interests of the ratepayers and the Company. Public Service argues that it must compete against other providers and must perform extensive work to capture the most value for customers.⁵

³ Public Service Statement of Position, p. 9.

⁴ *Id.*

⁵ *Id.* at p.13.

26. The Company also argues that these percentages are appropriate due to the risks that it incurs in credit, delivery and curtailment.

27. Finally, Public Service believes that the Commission should approve an extension of the current treatment of depositing customer shares of REC sale margins into the RESA deferred account, consistent with Commission Rule 3659(n).⁶

B. Staff

28. Staff agrees with Public Service that the margin percentages should be granted another extension.

29. Staff states that the Commission found these percentages to be in the public interest for the first time in 2012 and has repeatedly found them to be in the public interest since that time. Staff believes that these margins result in a substantial benefit to ratepayers and balance the interests of both Public Service and the ratepayers.⁷

30. Staff's only objection to the Application concerns where the ratepayers proceeds from the REC sales shall be deposited. Staff notes that ratepayers' share of REC margins build on the annual RESA surplus. To date, the Company has not returned REC margins to ratepayers either through bill credits or downward revision to the existing 2-percent RESA rider. Staff believes that the proceeds should be credited through the ECA rather than the RESA.

31. Staff argues that due to the large amount of money already in the RESA account, its positive balance trend, and the fact that the RESA is scheduled to expire at the end of 2022, the

⁶ *Id.* at p. 16

⁷ Staff Statement of Position, p. 3.

funds should be returned to the ECA. Staff also states that this would help ratepayers in financial distress due to the ongoing Covid-19 pandemic.

32. Staff urges the Commission to grant a limited waiver of Rule 3659(n) to allow ratepayer recovery through the ECA.

C. OCC

33. The OCC also supports the Application with the same exception as Staff. The OCC supports returning the money to customers through the ECA since that would make it consistent with the way Public Service treats revenues and expenses from other trading activities. The OCC believes this change can make these amounts more easily audited and still ensure the proceeds benefit ratepayers by offsetting other energy costs.

34. The OCC also supports a limited waiver of Rule 3659(n) to allow ratepayer recovery through the ECA instead of the RESA.

D. City of Denver

35. Denver urges the Commission to reduce the margin retained by Public Service. Denver believes that since the Hybrid REC market has developed over the past decade, Public Service has gained experience and its risk has been reduced. Likewise, Denver argues that the Commission should mimic a competitive market in which profits decline as the market develops.⁸

36. Denver also asserts that, unlike a utility-owned asset, shareholders have not invested any capital to create the RECs but that customers “pay for all of the renewable energy

⁸ Denver Statement of Position, p. 4.

which creates the RECs . . . through a combination of the ECA and the RESA riders.”⁹ Denver argues that because the value that the Company adds to trading RECs pales in comparison to the value added by customers, customers should receive the vast majority of the margins.¹⁰

37. Most of Denver’s argument revolves around a decreased risk on the part of Public Service in the market. Denver argues that the lack of risk or complexity does not justify the proposed sales margins sharing percentage and recommends a sales margin sharing percentage of 95% Customers, 5% Company.¹¹

38. Denver believes that since REC sales contribute to revenues in the RESA, which are used to pay for the incremental costs of Eligible Energy Resources, ratepayers deposits from REC sales should be credited to the RESA.

39. Denver argues that REC sales to third parties reduces the total renewable energy “delivered” to retail customers including Denver. Denver states that the Company has a financial incentive to sell its newest RECs, which reduces the total renewable energy “delivered” to retail customers. Therefore, according to Denver, the Company has a financial incentive to reduce the total renewable energy “delivered” to retail customers.

⁹ *Id.* at 4-5.

¹⁰ *Id.*

¹¹ *Id.* at p. 9.

E. WRA

40. WRA argues that Public Service should be directed to return all sales margins to ratepayers.¹² WRA states that risks have been reduced and the market has matured and that these factors require an elimination of Public Service's retention of any sales margin.

41. In the alternative, WRA recommends that if the Public Service is allowed to retain a portion of the sales margins from REC sales, the Company's share be reduced to between 5-10 percent.¹³ WRA asserts that the maturity of the REC market, the limited value the Company adds, the low risk of REC sales, and the conflict between REC sales and Colorado's policy goals all justify reducing the Company's share to between 5-10 percent.¹⁴

42. WRA makes other arguments that are beyond the limited scope of this proceeding, including that all sales of RECs are no longer necessary and contrary to the public interest.

43. Like Denver, WRA argues that proceeds from any future REC sales should be returned to ratepayers through the RESA.¹⁵

VI. DISCUSSION

A. The Current Approved Margin Sharing Percentages Should be Extended

44. The extension of the margin sharing percentages are supported by both Staff and the OCC.

¹² WRA Statement of Position, p. 27.

¹³ *Id.* at 27-28.

¹⁴ *Id.* at 28.

¹⁵ *Id.*

45. Staff argues that these margins have been repeatedly approved by the Commission and found to balance the interests of the ratepayers and Public Service. Staff sees no reason to upset this balance by tinkering with a system that has provided a benefit to the ratepayers.

46. The OCC also supports the continuation of the approved margins. The OCC states that the sale of RECs has resulted in sale of \$156.6 million in ratepayers' share of REC margins and carbon offset funds since 2009 which have been credited to the RESA.¹⁶

47. Denver and WRA argue that Public Service's share of the margins should be reduced. Denver argues that Public Service's margins should be reduced so that the Company can only retain 5 percent of margins.¹⁷ WRA argues that Public Service should not retain any funds from REC sales but, in the alternative, also argues that the Company's share be reduced to between 5-10 percent.¹⁸

48. Denver bases this lower percentage on the reduced risk that Public Service bears in these transactions, the maturing of the REC market, and the alleged lack of value that shareholders and the Company contributes to REC sales. WRA relies on many of the same arguments as Denver but also veers off into areas far beyond the scope of this proceeding.¹⁹

49. At the outset, it is worth noting that the interventions of Denver and WRA were granted but limited based upon their own filings to intervene. Denver was limited to "how the Application, if granted, will substantially affect Denver's renewable electricity content of the

¹⁶ OCC Statement of Position, p. 2.

¹⁷ Denver Statement of Position, p. 9.

¹⁸ WRA Statement of Position, p. at 27-28.

¹⁹ These arguments are irrelevant here and beyond the scope of this proceeding and shall not be addressed. These arguments are likely more suited to a rule making proceeding.

delivered grid mix.”²⁰ WRA’s intervention was limited to “how the Application, if granted, will substantially affect protection of the environment.”²¹ While Denver did acknowledge this limitation, the reasons given to decrease Public Service’s margins did not.²²

50. Denver and WRA make unsupported statements about a reduced risk. They simply state that the risk is reduced, based primarily on the passage of time or the ability of Public Service to so far, avoid risk. At no time is this claimed reduction in risk quantified in any way. At no time is this claimed reduced risk tied to any reduction in margin percentage. At no time is there a showing that through the passage of time the margins have resulted in a windfall for Public Service. At no time do either of the intervenors explain why the passage of time now justifies reducing the Company’s margins but did not affect these margins the first two times that the margin percentages were extended. These are simply arguments without any support.

51. Conversely, the ALJ is persuaded by evidence Public Service put forth regarding the inherent risks in trading RECs.²³ The fact that the Company has so far successfully managed these inherent risks does not support the proposition that these risks no longer exist or that the margin percentages that Public Service receives should be reduced. Moreover, as Mr. Schneider testified, some risks have in fact *increased* overtime. Specifically, extreme heat events and the policy of deenergizing transmission lines at certain times to reduce fire risk both increase delivery

²⁰Decision No. R20-0570-I, paragraph 23.

²¹ *Id.* at paragraph 24.

²² For its part, WRA failed to acknowledge this limitation.

²³ See Public Service Statement of Position at pp. 13-15.

and curtailment risk.²⁴ Thus, the record shows that trading RECs still entails considerable risk, contrary to the arguments of Denver and WRA.

52. The ALJ also finds unpersuasive the arguments from Denver and WRA that reduction or elimination of Public Service's REC margins is warranted based on the maturity of the REC market or the relative value that the Company and its shareholders add to REC sales. While the REC market has some elements of a mature market, the record shows that market remains incipient in other respects. For instance, Public Service notes that it still cannot sell RECs on an exchange but must form bilateral contracts.²⁵ Public Service further notes that the market price for RECs lacks transparency.²⁶ Likewise, the REC market is tied to various state-specific compliance rules.²⁷ Given the challenges that such a market poses, the ALJ finds the arguments regarding the maturity of the REC market to be misplaced. The arguments regarding the value that the Company and its shareholders adds to REC transactions are similarly misplaced. As discussed above, REC transactions require the Company to put forth additional effort and incur additional risk. Moreover, the current margin percentages already award customers the vast majority of the proceeds.

53. The arguments of Public Service, Staff, and the OCC clearly show that the sale of RECs has benefited both Public Service and ratepayers. Their arguments also point out that the Commission has on more than one occasion found these percentages to be just and reasonable.

²⁴ *Id.* at 14.

²⁵ *Id.* at 15.

²⁶ *Id.* at 13.

²⁷ *Id.*

54. In Proceeding Nos. 10A-542E, 11AL-947E, and 11A-501E, the Commission initially set the margins on a sliding scale which resulted in the 90/10 margin by 2014. The sliding scale was set up to take into account the reduced risk over time. The Commission found that these percentages were just and reasonable and in the public interest.²⁸

55. In Proceeding No. 14A-580E, ALJ Jennings-Fader found that continuing these margins was just, reasonable and in the public interest.²⁹ In Proceeding No. 17A-0650E, these margins were once again found to be just and reasonable and in the public interest.³⁰

56. No evidence has been presented in the development of the REC market or the expected value to Public Service to counter the findings of these Commission decisions. The approved margins shall be extended for an additional three years.

B. Ratepayer Recovery

57. Staff and the OCC request a partial waiver of Rule 3659(n) to allow ratepayer recovery of proceeds from REC sales through the ECA.

58. As the OCC points out in its Statement of Position, this issue is currently before the Commission in Proceeding No. 19R-0096E. The undersigned ALJ believes that while there could be merit in this request, like other issues brought up by other intervenors, this determination is best left to be decided in Proceeding No. 19R-0096E.

²⁸ See Decision Nos. R11-0380, C12-0494, and C12-0081.

²⁹ Decision No. R14-1151, paragraph 26.

³⁰ Decision No. C17-0959, paragraph 24.

59. The ALJ reminds parties that additional changes to RECs and the RESA will be further developed in a new Notice of Proposed Rulemaking after severing the RES and Net Metering rules from Proceeding No. 19R-0096E.

VII. ORDER

A. It Is Ordered That:

1. The Verified Application for an order granting an extension of the current approved margin sharing percentages in connection with certain types of transactions involving the sale of Renewable Energy Credits filed by Public Service Company of Colorado on May 28, 2020, is granted.

2. 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.

3. 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, 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.

4. 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.

5. Response time to exceptions shall be shortened to seven days.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director