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August 16, 2010

Mr. Fred Joseph, Commissioner
Colorado Division of Securities
1560 Broadway, Suite 900
Denver, CO 80202

BY US MAIL

Re: Colorado Community Solar Gardens

Dear Commissioner Joseph:



Pursuant to our brief telephone conversation of July 22, 2010, I am at your suggestion submitting the following request for an interpretive opinion pursuant to Colo. Rev. Stat., § 11-51-705.

During its last session the Colorado legislature passed, and Governor Ritter recently signed into law, House Bill 10-1342 (the "Act"), amending Colo. Rev. Stat., § 40-2-127 so as to authorize the creation in Colorado of so-called community solar gardens ("CSGs"). A copy of the full Act is attached and incorporated herein.

Set forth below are highlights of the Act relevant to the interpretive request to follow.

Highlights of the Act

CSGs. The Act in part defines a CSG as:

a solar electric generation facility ... located near a community served by a qualifying retail utility where the beneficial use of the electricity generated by the facility belongs to the subscribers to the community solar garden. There shall be at least ten subscribers. The owner of the community solar garden may be the qualifying retail utility or any other for-profit or nonprofit entity or organization, including a subscriber organization organized under this section, that contracts to sell the output from the [CSG] to the qualifying retail utility.¹

¹ For purposes of this request and your response, a qualifying retail utility (hereafter, from time to time, "QRU") means a provider of retail electric service in the state of Colorado (with the exception of cooperative electric associations that have voted to exempt themselves from PUC jurisdiction pursuant to Colo. Rev. Stat., § 40-9.5-104, and municipally owned utilities) with a legal obligation to acquire statutorily prescribed amounts of electricity produced from defined renewable energy resources, one form of which is solar electricity. *See* Colo. Rev. Stat., § 40-2-124(1). The only two Colorado QRUs subject to

Colo. Rev. Stat., § 40-2-127(2)(a)(I)(A). Although a CSG need not be located on the premises of any CSG subscriber, the Act deems a CSG to be “located on the site of customer facilities” and to constitute “retail distributed generation.” Colo. Rev. Stat., § 40-2-127(2)(b)(1)(A) and (B). The quoted terms are from section 40-2-124(1)(a)(V), a part of Colorado’s renewable portfolio standard legislation dealing with customer-owned renewable electric power generation that is both located on a customer’s premises and sized primarily to meet the same customer’s personal electric needs at such premises. Thus, even though not required to be located on a customer’s premises, both CSGs and individual subscriber interests in CSG are legally treated like customer on-site (rooftop) solar for purposes of Colorado’s renewable energy portfolio standard.

Subscribers. A “subscriber” under the Act is defined as

a retail customer of a qualifying retail utility who owns a subscription [in a CSG] and who has identified one or more physical locations to which the subscription shall be attributed.² Such physical locations shall be within either the same municipality or the same county as the [CSG]; except that, if the subscriber lives in a county with a population of less than twenty thousand . . . , such physical location may be in another county, also with a population of less than twenty thousand, within the service territory of the qualifying retail utility and also adjacent to that of the [CSG]. The subscriber may change from time to time the premises to which the [CSG] electricity generation shall be attributed ***

Colo. Rev. Stat., § 40-2-127(2)(a)(II).³

Subscriptions. A “subscription” under the Act is defined as

a proportional interest in solar electric generation facilities installed at a community solar garden, together with the renewable energy credits⁴ associated with or attributable to such facilities under section 40-2-124.

the Act are Xcel Energy, Inc., dba Public Service Company of Colorado, and Black Hills/Colorado Electric Utility Company, L.P., d/b/a Black Hills Energy.

² At each such location, the customer must purchase electricity at retail from the QRU.

³ Under the Act, a subscriber is not subject to regulation by the PUC as a public utility by virtue of the subscriber’s interest in a CSG. Colo. Rev. Stat., § 40-2-127(4).

⁴ For purposes of this request and your response, a renewable energy credit (hereafter, “REC”) may be assumed to have the definition in Rule 3652(n) of the Rules Regulating Electric Utilities, 4 *Colorado Code of Regulations* 723-3, of the Colorado Public Utilities Commission (“PUC”) [“Renewable energy credit’ or ‘REC’ means a contractual right to the 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. One REC results from one megawatt-hour of electric energy generated from an eligible energy resource.”]

Each subscription shall be sized to represent at least one kilowatt of the [CSG]'s generating capacity and to supply no more than one hundred twenty percent of the average annual consumption of electricity by each subscriber at the premises to which the subscription is attributed with a deduction for the amount of any existing solar facilities at such premises. Subscriptions in a [CSG] may be transferred or assigned to a subscriber organization or to any person or entity who qualifies to be a subscriber under this section.

Colo. Rev. Stat., § 40-2-127(2)(a)(III). The Act also makes subscriptions “portable.”

If a subscriber ceases to be a customer at the premises on which the subscription is based but, within a reasonable period as determined by the [PUC], becomes a customer at another premises in the service territory of the [QRU] and within the geographic area served by the community solar garden, the subscription shall continue in effect but the bill credit [as to which, see “QRU purchase of CSG electricity and RECs,” below] and other features of the subscription shall be adjusted as necessary to reflect any differences between the new and previous premises' customer classification and average annual consumption of electricity.

Colo. Rev. Stat., § 40-2-127(3)(c).

Subscriber organizations. As noted above, a CSG may be owned by a QRU or any other for-profit or nonprofit entity or organization, including a “subscriber organization.”⁵ A subscriber organization's

sole purpose shall be beneficially owning and operating a [CSG]. The subscriber organization may be any for-profit or nonprofit entity permitted by Colorado law. The [CSG] may also be built, owned and operated by a third party under contract with the subscriber organization.

Colo. Rev. Stat., § 40-2-127(3)(a). In addition, the Act requires the PUC to adopt rules and regulations that facilitate the financing of subscriber organizations, including rules authorizing subscriber organizations to enter into leases, sale-and-leaseback transactions, operating agreements, and other ownership arrangements with third parties.⁶ Colo. Rev. Stat., § 40-2-127(3)(b)(III). This is important because the financing of CSGs promises to be challenging. Sale-and-leaseback and other arrangements between CSG subscriber organizations and solar developers or investors may be necessary to monetize the generous federal tax benefits available both to commercial solar project developers and to

⁵ Like a subscriber, under the Act the owner of a CSG is not subject to regulation by the PUC as a public utility by virtue of the subscriber's interest in a CSG. Colo. Rev. Stat., § 40-2-127(4).

⁶ The PUC is required under the Act to begin a rulemaking proceeding by October 1, 2010. Colo. Rev. Stat., § 40-2-127(3)(b). At this writing, such rulemaking has not commenced.

homeowners with on-site solar, but *not* currently available to homeowners or others with subscription interests in off-site CSG solar.

QRU purchase of CSG electricity and RECs. Section 40-2-127(5) of the Act requires that the QRU serving the geographic area where the CSG is located purchase both the electricity and the RECs generated from a CSG. For the first three years that the Act is in effect, this section also limits the total amount of electricity and RECs a QRU may purchase *in toto* from CSGs per year. During these first three years, the QRU must offer to purchase half of its total allowed annual CSG purchase from smaller (500 kilowatts or less) CSGs and half from larger (up to 2 megawatts) CSGs. Purchases from the smaller CSGs are required to be made through QRU standard offers at prices “comparable” to the prices in QRU standard offers for on-site solar generation. Purchases from the larger CSGs are anticipated to be made through a competitive bidding process conducted by the QRU. Colo. Rev. Stat., § 40-2-127(5)(a). Finally, in making decisions about which CSGs to purchase from, a QRU may give preference to CSGs that include low-income⁷ customers as subscribers. Colo. Rev. Stat., § 40-2-127(5)(e).

Purchase price for CSG electricity and RECs. The purchase by the QRU of the electricity generated by the CSG “shall take the form of a net metering credit against the qualifying retail utility’s electric bill to each community solar garden subscriber at the premises set forth in the subscriber’s subscription.” Colo. Rev. Stat., § 40-2-127(5)(b)(II). The QRU and the owner of the community solar garden shall agree on whether the purchase of the renewable energy credits from subscribers will be accomplished through a credit on each subscriber’s electricity bill or by a payment to the owner of the CSG. *Id.* If a CSG produces electricity and renewable energy credits in excess of what its subscribers have subscribed to, the QRU shall purchase this excess directly from the CSG at a predetermined rate. Colo. Rev. Stat., § 40-2-127(5)(d).

Public interest factors. The Act declares it to be in the public interest to promote broader participation in solar electric generation by means of the development and deployment of CSGs in order to provide:

- Opportunities for Colorado residents and commercial entities to participate in solar generation in addition to rooftop solar generation on homes and businesses;
- Opportunities for renters, low-income and agricultural utility customers to own interests in solar generation facilities; and,
- Leveraging of Colorado’s solar generating capacity through economies of scale.

Colo. Rev. Stat., § 40-2-127(1)(b).

Purpose and Limitation of Request

⁷ The statutory definition of low-income utility customer applicable under this provision of the Act appears in section 40-3-106(d)(II).

The purpose of this interpretive request is to obtain as much general guidance from the Division as the Division is able to give at this time as to whether, and under what circumstances, the issuance, offer to sell, sale, purchase or transfer of a subscription interest in a CSG is likely to be (or not be) considered by the Division to be the offer or sale of a security under the Colorado Securities Act, such that the subscription interest itself is likely to (or not to) be required to be registered, or person(s) engaged in issuing, offering or selling subscription interest are likely to (or not to) be required to become licensed. It is hoped that such general guidance may assist persons interested in owning CSGs or subscriptions in CSGs, and in forming subscriber organizations, as they plan both to participate in the PUC rulemaking, noted above, that is required by the Act to commence by October 1, 2010, and, later, as they seek to form CSGs to sell electricity and RECs to QRUs.

The principal limitation on this interpretive request is that it does not seek guidance as to the legal implications of any specific business model for CSG formation, ownership and operation under the Act, let alone any actual planned CSG.⁸ Such specific guidance may in the future be sought by persons engaged in the formation, ownership and operation of actual CSGs.

Interpretive Request

The Division is respectfully requested to articulate any general principles or guidelines that will be or are likely to be taken into account by the Division in deciding whether to treat the issuance, offer to sell, sale, purchase or transfer *by particular persons* of a subscription interest in a CSG as the offer or sale of a security under the Colorado Securities Act, or that the Division believes would be helpful to CSG developers and subscribers. If possible, in the course of articulating such principles or guidelines, the Division is requested to address the importance to a decision that a CSG subscription interest (or person offering, etc., such interest for sale) is or is not jurisdictional under the Colorado Securities Act of factors such as (but not limited to) the following:

- A voluntary restriction by a CSG or subscriber organization on the number of subscribers allowed to participate in the CSG, e.g., less than 25 subscribers.
- The possible voluntary imposition by the CSG or subscriber organization of a par value for each kilowatt of CSG electrical capacity used to allocate subscription interests in the CSG facility. The par value would remain fixed for the life of the CSG and would apply to the sale and transfer of all subscriptions.

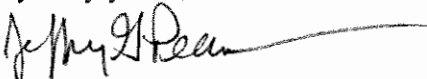
⁸ As I mentioned in my telephone conversation with you on July 22, as outside counsel for the City of Boulder, I was involved in the drafting of the Act, which was sponsored by Rep. Claire Levy of Boulder, and which the City of Boulder vigorously supported. The cities of Boulder and Aurora, Xcel Energy and a number of other public and private entities and individuals are now conducting periodic stakeholder meetings to address common questions and concerns. The City of Boulder has been helping to coordinate these meetings, and has authorized me to file this interpretive request. This should not be construed to mean that the City of Boulder either is or is not itself interested in developing a CSG.

- The fact that subscribers to a particular CSG must be customers of the same QRU, and in most cases must all take service from the QRU at homes or business located in the same municipality or county.
- The fact that the only way for a CSG subscriber to dispose of a subscription interest in a CSG is to transfer it to another customer of the same QRU in the same community (e.g., a person buying the original subscriber's home or business) or to transfer it back to the CSG.
- The fact that the Act limits the size of the share that a single CSG subscriber may own in a CSG to an amount of kilowatts no greater than that which, if installed on-site at the subscriber's home or business, would supply 120% of the subscriber's home or business annual kilowatt-hour electrical needs.
- The fact that CSG subscribers are "paid" by the QRU for their respective shares of the monthly electrical output (kilowatt-hours of electricity produced each month) of the CSG through net metering bill credits, which offset kilowatt-hours on the subscriber's home or business retail electric bill from the QRU.
- The fact that the business of a CSG (production and marketing of electricity and RECs) is carried on primarily for the mutual benefit of the CSG's subscribers, not for profit, and whether for that reason a CSG should be treated like a non-profit cooperative association regardless of the actual business entity in which it is organized.
- The recognition in the Act of the need to facilitate the financing of subscriber-owned CSGs in order to make them viable.
- The legislative declaration that the development of CSGs in Colorado is in the public interest and intended to broaden participation in utility customer ownership of small solar generation.

I wish to thank you and your staff in advance for your attention to this matter. I would also like to invite you and/or appropriate members of your staff to attend the next meeting (August 24, 2010) of the ad hoc group of public and private stakeholders mentioned above. Under separate cover, you will receive location and agenda information.

Finally, I am enclosing the required \$100 interpretive opinion request fee.

Very truly yours,


Jeffrey G. Pearson

cc: City of Boulder
Stakeholder group representatives via City of Boulder
Gerald Rome, Deputy Securities Commissioner (email to gerald.rome@dora.state.co.us)