

Decision No. C07-0735

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 07R-166E

IN THE MATTER OF THE PROPOSED RULES IMPLEMENTING RENEWABLE ENERGY
STANDARDS 4 CCR 723-3.

**ORDER ON APPLICATIONS FOR REHEARING,
REARGUMENT OR RECONSIDERATION**

Mailed Date: August 29, 2007

Adopted Date: August 28, 2007

I. BY THE COMMISSION

A. Statement, Findings and Conclusions

1. This matter comes before the Commission for consideration of applications for rehearing, reargument or reconsideration (RRR) filed by the Interwest Energy Alliance (Interwest) and Public Service Company of Colorado (Public Service) to Decision No. C07-0622 filed on August 6 and 13, 2007, respectively.

2. Interwest seeks reconsideration of a limited issue. It believes there is a potential conflict between Rules 3660(e), 3655(a) and 3655(b) with respect to competitive bidding. Interwest argues that Rule 3660(e) allows investor-owned Qualifying Retail Utilities (QRUs) to acquire renewable resources without being required to comply with the competitive bidding requirements in Rule 3655. It believes that Rules 3655(a) and (b) require competitive procurement for eligible resources effectively without exception. As a solution, it suggests that the phrase "Except as otherwise allowed by these rules" be added to the beginning of Rules 3655(a) and (b).

3. Rule 3655(a) states:

It is the Commission's policy that utilities should meet the renewable energy standard in the most cost-effective manner. To this end, the investor owned QRU shall use competitive bidding for acquiring renewable eligible energy from eligible energy resources using solar electric generation technologies with nameplate rating greater than 100 kW.

4. In the original proceeding¹ adopting the Renewable Energy Standard (RES) Rules, the Commission sought to ensure that QRUs used the monies collected under the Renewable Energy Standard Adjustments in the most cost-effective manner. Our longstanding policy encourages the use of competitive bidding because it provides an efficient and cost-effective means for acquiring resources. Rule 3655(a) simply reiterates that philosophy as it pertains to the acquisition of renewable eligible resources under the RES.

5. We deny Interwest's request for reconsideration with respect to Rule 3655(a). While Rule 3655(a) restates our policy concerning competitive bidding, we disagree with Interwest that Rule 3655(a) requires competitive acquisition effectively without exception. Moreover, Rules 3660(e)(I) and 3660(e)(II) include the phrase "without being required to comply with the competitive bidding requirements in rule 3655." We therefore find that Rule 3660 sufficiently addresses the exemption that Interwest seeks to clarify.

6. Interwest next argues that Rule 3655(b) should also be modified. This rule states, in part:

Competitive solicitations shall be conducted by each investor owned QRU to achieve the statutory policies contained in the legislative declaration of intent. Whenever a QRU acquires renewable eligible energy and/or RECs by competitive acquisition, to the extent possible, the solicitations and evaluations of proposals should be coordinated to avoid redundancy and to minimize the cost of acquiring such renewable energy and/or RECs. A QRU may conduct, in its discretion, separate solicitations or combined solicitations ...

¹ See, Docket No. 05R-112E.

7. We deny Interwest's request for reconsideration with respect to Rule 3655(b). As with Rule 3655(a), we disagree with Interwest that Rule 3655(b) requires competitive acquisition effectively without exception. We similarly find that Rule 3660 sufficiently addresses the exemption that Interwest seeks to clarify in Rule 3655(b).

8. Public Service seeks reconsideration of Rule 3660(e)(V). It argues that this newly proposed rule was not included as part of the Commission's Notice of Proposed Rulemaking (NOPR) issued in Decision No. C07-0386. Consequently, it contends that this is the first opportunity for parties to comment on the proposed rule. Public Service continues by suggesting that the rule is completely unnecessary. It maintains that this rule appears to borrow concepts from Rule 3655(l), which uses an independent auditor to provide the Commission a report in the situation where the utility or the affiliate of the utility is bidding against other bidders in a competitive solicitation. However, according to Public Service, that is a very different situation from the situation presented by Rule 3660(e)(V) and §40-2-124(1)(f)(I), C.R.S.

9. Public Service argues that §40-2-124(1)(f)(I) presents the same issues and regulatory judgment calls that are presented in a standard certificate of public convenience and necessity (CPCN) proceeding. It contends that there is no need to employ an independent evaluator because the utility is not in a "conflict of interest" situation where the utility is evaluating its (or its affiliate's) bid against competing bids. Public Service notes that within a CPCN proceeding a utility will need to present evidence as to how it believes that its proposed projects meet the statutory standard set by § 40-2-124(1)(f)(I). This section provides that, in order to be exempt from the competitive bidding process, the proposed project cost is reasonable compared to the cost of similar eligible energy resources available in the market. Public Service argues that all parties to the CPCN docket, including the Staff of the Commission, will have an

opportunity to present evidence addressing whether the utility's proposed project meets this statutory standard.

10. Public Service argues further that Rule 3660(e)(V) could be viewed as an unlawful delegation to the third party of the Commission's statutory responsibilities. Public Service contends that the independent evaluator would perform the Commission's role in determining whether the utility has met its burden of proof regarding the statutory standard. Public Service suggests that even if the independent evaluator's report would not be viewed as deciding the case, any party which disagrees with the independent evaluator's report would face an uphill battle. Public Service questions the value of the independent evaluator's report since the issue is one of regulatory judgment as to whether the utility's project costs are reasonable.

11. Public Service also proffers a series of legal questions for the Commission to consider regarding the independent evaluator. For example, would parties be able to conduct discovery of the independent evaluator? Would the independent evaluator be subject to cross-examination on their opinion? Lastly, Public Service asserts that there are limited funds available for the acquisition of eligible renewable resources and using an independent evaluator would likely be expensive and would reduce the available funds for renewable resource acquisition.

12. We note that the Colorado Independent Energy Association (CIEA) suggested in its initial comments that competitive bids from non-utility developers must be solicited and evaluated by an independent entity. Therefore, Public Service had the opportunity to respond to CIEA's suggestion as part of its reply comments. We agreed with CIEA's arguments for an independent entity and incorporated their concept into Rule 3660(e).

13. Public Service is correct that the situation created under Rule 3660(e)(V) is very different from the situation created under Rule 3655(l) in which an independent auditor addresses a potential conflict when the utility is both a bidder to a competitive solicitation and the evaluator of the bids. However, §40-2-124(1)(f)(I) requires us to determine whether, absent competitive bidding, a proposed utility rate-base investment in a new eligible energy resource can be constructed at a reasonable cost compared to similar resources available in the market. We conclude that such a complex cost comparison will differentiate an application filed under Rule 3660 from a more conventional CPCN application, and find that the independent evaluator will bring to the Commission, essential and unbiased information concerning national and regional construction costs for new renewable resources.

14. While the independent evaluator will result in additional cost to ratepayers, we expect that the money will be well spent. On one hand, we anticipate that Rule 3660(e)(V) will cause the utility to “sharpen its pencil” by controlling costs to the benefit of ratepayers. On the other hand, we expect that the total costs incurred to hire the independent evaluator will neither reduce detrimentally the monies that would otherwise be available for resource acquisition nor place undue pressure on the utility’s spending under the administrative cost cap in Rule 3661(d).

15. With respect to Public Service’s legal challenges, we reject the proposition that the independent evaluator represents an unlawful delegation of the Commission’s statutory responsibilities. The Commission, rather than the independent evaluator, will make the final determination through our own regulatory judgment calls whether the utility has met the requirements of § 40-2-124(1)(f)(I). We also clarify that the independent evaluator shall be subject to discovery and cross examination just like an expert consultant hired by the utility to sponsor testimony in any other CPCN application. We have delegated no Commission decision

making authority to the independent evaluator, nor do we intend to delegate such authority in the future.

16. Finally, we acknowledge that the presumptive strength of the independent evaluator's assessment will create an additional layer for a party disagreeing with the evaluator's conclusions. However, the utility and the intervenors will have an opportunity to challenge the independent evaluator's judgments and to recommend the weight we should give to the evaluator's assessment when making our final decision. In sum, we conclude that the independent evaluator will not be delegated any Commission authority and due process will be afforded to the utility under Rule 3660(e)(V).

17. We therefore deny Public Service's request for reconsideration of Rule 3660(e)(V). Commissioner Miller dissents and votes in favor of granting Public Service's application for RRR.

II. ORDER

A. The Commission Orders That:

1. The application for Rehearing, Reargument or Reconsideration filed by the Interwest Energy Alliance on August 6, 2007 to Decision No. C07-0622 is denied consistent with the discussion above.

2. The application for Rehearing, Reargument or Reconsideration filed by Public Service Company of Colorado on August 13, 2007 to Decision No. C07-0622 is denied consistent with the discussion above.²

² Commissioner Miller voted in favor of Public Service's request for reconsideration.

3. The Commission adopts the Proposed Rules Implementing Renewable Energy Standards 4 CCR 723-3, pursuant to HB 07-1281, as attached as Attachment A to Decision No. C07-0622.

4. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

5. A copy of the rules adopted by the Order shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or to the committee on legal services, if the General Assembly is not in session, for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

6. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 28, 2007.**

(SEAL)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RON BINZ

POLLY PAGE

CARL MILLER

Commissioners