Decision No. C20-0406

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20D-0148E

IN THE MATTER OF THE PETITION OF THE COLORADO SOLAR AND STORAGE ASSOCIATION FOR AN EXPEDITED DECLARATORY RULING THAT THE CO-LOCATION RESTRICTIONS SET OUT IN THE NON-UNANIMOUS COMPREHENSIVE SETTLEMENT AGREEMENT IN PROCEEDING NO. 16A-0139E APPLY TO THE CURRENT STATUTORY DEFINITION OF A COMMUNITY SOLAR GARDEN.

COMMISSION DECISION GRANTING PETITION AND ISSUING DECLARATORY ORDER

Mailed Date: May 29, 2020
Adopted Date: May 27, 2020

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission grants the Petition for Declaratory Order (Petition) filed by the Colorado Solar and Storage Association (COSSA) on April 2, 2020,[1] and issues a declaratory order resolving controversy and uncertainty regarding interpretation of the co-location restrictions for community solar gardens (CSGs) set forth in the Non-Unanimous Comprehensive Settlement Agreement (Settlement) approved by the Commission through Decision No. C16-1075, issued November 23, 2016, in Proceeding No. 16A-0139E.

2. The Settlement applies to CSG projects awarded pursuant to Public Service Company of Colorado's (Public Service) 2017-19 Renewable Energy Plan (RE Plan). The Settlement provides that bidders in each 2017-19 RE Plan year's request for proposal (RFP) may not bid co-located projects exceeding 2 MW in aggregate capacity within a half mile of one another. In the Petition, COSSA asks the Commission to interpret Decision No. C16-1075 approving the Settlement under current law that defines the maximum CSG size as 5 MW. Specifically, COSSA requests the Commission interpret the effect of the recent statutory amendment that increases the maximum size of a CSG from 2 MW to 5 MW, through the CSG Modernization Act, House Bill 10-1003, effective August 2, 2019. COSSA stipulates that it does not seek to alter any individual developer's awarded capacity for the 2017-19 RE Plan or the size of awards awarded to any individual developer in prior competitive solicitations. COSSA states that it requests only that developers with multiple awards for the 2017-19 RE Plan, now needing to relocate certain awards by direction of Public Service, be permitted to co-locate multiple awards up to the maximum CSG size permitted in current law.

[1] The Commission accepted the Petition by Decision No. C20-0272-I, issued April 17, 2020, and established a 30-day intervention and response period.

3. In the unusual and limited circumstance presented in the Petition, we will grant COSSA's request and find that, for CSGs subject to Public Service's 2017-19 RE Plan, current law allows commonly-owned projects to co-locate up to 5 MW in total aggregate capacity. As a result, we find and declare that the Settlement as approved by Decision No. C16-1075 does not prohibit a developer from relocating a project by co-locating multiple 2017-19 RE Plan awards at the same site up to 5 MW in total aggregate capacity.

B. Petition

4. In the Petition, COSSA argues the purpose of the co-location restrictions in the Settlement was to "deter end-runs around the statutory capacity limit."[2] The relevant provision of the Settlement provides as follows:[3]

> CSGs are defined in Colorado statute and Commission Rules as facilities limited to 2 MW in size. To give effect to this size restriction in the RFP process, the Settling Parties agree to the clarifications contained in this section. In response to a single annual Request for Proposal issued by the Company, the location of CSGs may not result in more than 2 MWs of commonly owned total capacity of CSGs energized within a 0.5 mile distance as measured from point of interconnection to point of interconnection for rural CSGs. In urban areas the distance between points of interconnection between commonly owned CSG[s] will be maintained at 0.5 miles; however, the capacity allowed within this distance will be increased to 4.0 MW. Furthermore, each awarded CSG must be contained on its own legal parcel of land.

COSSA argues that these co-location restrictions were based on the premise that "'CSGs are defined in Colorado statute and Commission Rules as facilities limited to 2 MW in size'" and the intent of the co-location restrictions was "'to give effect to this [2 MW] size restriction.'"[4]

5. COSSA argues the Commission's approval of the Settlement hinged on this same reasoning. COSSA cites the Commission's conclusion, ""We agree…that § 40-2-127, C.R.S.,

[2] Petition p. 9.
[3] Settlement p. 63 (Attachment A to the Petition) (Footnotes omitted).
[4] Petition p. 5 (quoting Settlement p. 63).

limits the size of CSGs to 2 MW. The 'co-location' terms in the Settlement are not inconsistent with § 40-2-127, C.R.S., or other statutory provisions."[5]

6. COSSA reasons, by amending the definition of a CSG, the Colorado Legislature (Legislature) intended for all CSGs to be subject to the increased 5 MW size limit. COSSA states that a CSG is now defined as having a nameplate rating of 5 MW or less; except the Commission may in rule approve CSGs up to 10 MW after July 1, 2023. COSSA contrasts the broad definition against the specific exception permitting an increase to 10 MW after July 2023. COSSA contends the Legislature declined to grandfather CSGs awarded or in development before the amendment and the Commission should, for its part, infer no exceptions.

7. COSSA contends the Commission must interpret Decision No. C16-1075 approving the Settlement consistent with current law and policy. COSSA contends the "defunct" 2 MW CSG size limit "cannot properly control current or future CSG siting and construction."[6] COSSA claims that state law reflects current state policy and thus statute trumps the conflicting Commission order.[7]

8. COSSA explains that some developers awarded location-specific projects pursuant to Public Service's 2017-19 RE Plan have since been issued Notices of Feeder Maximum Capacity Reached (No Capacity Notices) and have been directed by Public Service to relocate planned CSGs to new sites without capacity constraints.[8] COSSA suggests that allowing co-location of relocated projects with other projects under development is "[o]ne viable option" to address the increased need for developers to relocate projects at new locations with sufficient

[5] Petition p. 10 (quoting Proceeding No. 16A-0139E, Decision No. C16-1075 ¶ 77 (issued November 23, 2016).

[6] Petition p. 12.

[7] Petition p. 12 (citing *Colorado State Board of Pub. Welfare v. Champion*, 348 P.2d 256, 258 (1960)).

[8] Petition p. 4 (citing Attachments B and D to the Petition).

capacity.[9] COSSA concludes that granting the Petition will facilitate and ensure timely implementation of the approved CSG capacity under the 2017-19 RE Plan by removing a substantial barrier to development and ensure uniformity of siting requirements. COSSA argues that inferring an exception for CSG projects awarded or still in development before the statutory change would waste valuable hosting sites with precious interconnection resources.

9. COSSA argues it is not retroactive to apply the 5 MW size limit to CSGs approved but not yet built. COSSA states that "retroactivity" is a change that takes away or impairs vested rights acquired under existing laws or creates a new obligation. COSSA reasons that applying the current 5 MW definition will not impact any vested right of a developer to develop its project or cause a new obligation of Public Service to purchase additional output. COSSA argues, even if the Commission deems projects awarded prior to the amendment as pre-existing, current law must apply to current project siting and buildout.

10. COSSA also raises the point that granting the Petition will promote State policy prioritizing clean energy development. COSSA points to House Bill 19-1261, which declares the State must reduce greenhouse gas pollution, and Senate Bill 19-236, which finds it a matter of statewide importance to promote development of cost-effective clean energy.[10] COSSA cites the legislative declaration in § 40-2-127(1), C.R.S., finding CSGs benefit the state by facilitating participation in distributed generation and enabling economies of scale. COSSA urges that allowing developers to find new locations for relocated projects will achieve these State policy objectives.

[9] Petition p. 4.

[10] Petition pp. 13-14 (citing House Bill 19-1261, codified at § 25-7-102(2)(c), C.R.S.; Senate Bill 19-236, codified at § 40-2-125.5(1)(a), C.R.S.).

11. Finally, COSSA argues that parties to the Settlement had constructive notice that changes in law were possible during the multi-year implementation of Public Service's 2017-19 RE Plan. COSSA suggests, had the law changed to require developers to pay a new siting or interconnection fee, then even developers with awards would be expected pay that fee upon the act of siting or interconnection. COSSA reasons the change in CSG size is no different.

C. Public Service Intervention and Response

12. On May 18, 2020, Public Service filed a motion to intervene in this Proceeding. Public Service states the Petition seeks determinations concerning its 2017-19 RE Plan and the solicitations and agreements pursuant to that plan. Public Service states if the Commission were to determine the 5 MW statutory amendment applies to vintage CSG awards, that determination would impact Public Service's RFP process, interconnection guidelines, and awarded projects. We grant Public Service's motion to intervene. Public Service is a party to this Proceeding.

13. In its response, Public Service concludes it will not advocate a position in this Proceeding. Public Service states the terms of the Settlement plainly state the capacity limit is 2 MW and do not memorialize any terms that would allow for a material term to alter with a legislative change. Public Service states it has been hesitant to amend the Settlement because, when it sought a variance in October 2019 of another term, parties to the Settlement responded that attempting to amend the Settlement could potentially unravel it altogether. Public Service further explains it took the stance that applying the 5 MW amendment to transactions and obligations secured within the Settlement and prior RFPs would amount to retroactive application by relying on established legal precedent prohibiting retroactive legislation and rules. However, Public Service goes on to conclude that the No Capacity Notices it issued, coupled

with the timing of the statutory change, have created unique and unprecedented circumstances for some developers. Public Service states it is committed to sustaining a robust CSG program and doing so will help facilitate its goals that align with the State's renewable energy roadmap. Public Service concludes that, given these considerations, it is not advocating a position in this Proceeding and, if the Commission were to find the 5 MW amendment applies to 2017-19 RE Plan awards, it will fully abide by the Commission's order.

D. CEO Intervention and Response

14. On May 18, 2020, the Colorado Energy Office (CEO) filed a notice of intervention of right. CEO's notice of intervention is acknowledged. CEO is a party to this Proceeding.

15. In its response, CEO reviews the circumstances set forth in the Petition that multiple CSGs awarded in Public Service's 2017-19 RE Plan proposed locations that interconnect at substations Public Service now states are at their capacity limits. CEO explains that Public Service has informed these developers that they must relocate their bids. CEO states that granting the requested clarification would permit impacted developers to relocate their awarded capacity by co-locating with other awards up to the 5 MW limit under current law.

16. CEO concludes that applying the amended statute to unconstructed projects is a retroactive, but permissible, application of the statutory amendment. CEO relies on the three-factor analysis established by the Colorado Supreme Court for allowing retroactive application of a law in limited circumstances.[11] CEO concludes that a retroactive application is permissible in this circumstance because co-location of the 2017-19 vintage CSGs will advance the public interest, give effect to the reasonable expectations of the parties, and will not surprise

[11] CEO Response pp. 10-15 (citing *In re Estate of DeWitt,* 54 P.3d 849, 854 (Colo. 2002)).

the parties who relied on the previous statutory language based on State policy. CEO also outlines additional policy considerations that favor granting the Petition.

E. Request for Hearing

17. Consistent with the parties' positions, we find a hearing is not necessary and will therefore decide the matter on the briefs.

F. Findings and Conclusions

18. This is a highly unusual circumstance for several reasons. First, after the parties negotiated, and the Commission approved the Settlement, the Legislature amended the statute upon which a material term was premised when it increased the maximum CSG size from 2 MW to 5 MW. Second, after awarding bids for location-specific projects in the RFPs conducted pursuant to its 2017-19 RE Plan, Public Service determined that capacity constraints at certain substations made it necessary for developers to relocate planned CSGs to new sites. Third, the parties seem unable to come to agreement to amend the terms of the Settlement, so COSSA has requested that the Commission clarify its order approving the Settlement. And finally, COSSA urges that speedy resolution is needed to ensure that developers can meet their contractual timelines and take advantage of federal tax credits.

19. We agree with COSSA that the 2 MW co-location restriction in the Settlement is tied to the then-existing 2 MW CSG size limit and should therefore be construed as 5 MW consistent with current law. It is evident from the language of the Settlement and the Commission's Decision No. C16-1075 that the intent and purpose of the 2 MW co-location restriction was to give effect to the 2 MW maximum size limit prescribed by statute. The Settlement specifies that, "[t]o give effect to this" 2 MW size limit in the statute, the parties "agree to the clarifications" imposing co-location restrictions on commonly-owned projects.

Similarly, in Decision No. C16-1075, the Commission denied a request to eliminate the co-location restrictions in the Settlement agreeing, instead, with other parties that § 40-2-127, C.R.S., limits the size of CSGs to 2 MW.[12] Thus restricting co-location of 2017-19 RE Plan projects to 5 MW (rather than 2 MW) fulfills the original intent and purpose of giving effect to the maximum CSG size limit prescribed by statute.

20. And we agree with COSSA that it is legally permissible for the increased 5 MW aggregate size limit to apply to the prospective relocation of 2017-19 awarded projects for which Public Service has identified capacity constraints. These projects can be relocated by co-locating them with other awarded bids provided that the combined bids do not exceed the 5 MW statutory limit. We find that applying the amended size limit to relocation of projects would not take away any vested right or create any new obligation. As specified in the Petition, COSSA does not seek to alter any developer's actual awarded capacity under the 2017-19 RE Plan or any prior competitive solicitations. Instead, the request is to permit co-location of awarded projects consistent with the maximum CSG size permitted by law. We note that Public Service has conceded that this unusual circumstance where developers must relocate awarded projects is a result of its own actions.[13]

21. COSSA has placed the Commission in an unusual position by asking the Commission to resolve this dispute by means of clarifying the Commission's order approving the Settlement. However, the parties appear to be at an impasse and COSSA has requested Commission assistance in resolving this time-sensitive dispute. We find significant that, at this

[12] Proceeding No. 16A-0139E, Decision No. C16-1075 ¶ 77 (November 23, 2016).

[13] *See* Public Service's Intervention and Response p. 9 (Public Service stating that it "recognizes that the No Capacity Notices, coupled with the timing of the up to 5 MW change in law, have created unique and unprecedented circumstances for some CSG developers").

point, Public Service's objections appear to be more a matter of principle than substance. In its response, Public Service states it has been holding to the 2 MW restriction in the Settlement "resting on well-settled law" that the words of a contract should be given their plain meaning.[14] And Public Service states it has resisted amending the Settlement because parties opposed its prior request for a variance on grounds that re-opening negotiations would risk unraveling the Settlement altogether.

22. Given these considerations, we find good cause to grant the Petition and expeditiously resolve the controversy that has arisen regarding interpretation of the co-location restrictions. We find that, for CSGs developed pursuant to Public Service's 2017-19 RE Plan, current law allows commonly-owned projects to co-locate up to 5 MW in total aggregate capacity. As a result, we clarify the co-location restrictions in the Settlement as approved by Decision No. C16-1075 apply only to commonly-owned projects that exceed 5 MW of total aggregate capacity of projects awarded in bids during the 2017-19 bidding years. Impacted developers may relocate planned CSGs for which Public Service has issued No Capacity Notices to new sites by co-locating those relocated projects with other awarded 2017-19 bids up to 5 MW in total aggregate capacity.

II. ORDER

A. The Commission Orders That:

1. The Petition for Declaratory Order filed by the Colorado Solar and Storage Association (COSSA) on April 2, 2020, is granted, consistent with the discussion above.

2. The Motion to Intervene in this Proceeding filed by Public Service Company of Colorado (Public Service) on May 18, 2020, is granted.

[14] Public Service Intervention and Response p. 5.

3. The parties in this Proceeding include COSSA, Public Service, and the Colorado Energy Office.

4. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails this Decision.

5. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING May 27, 2020.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners