

Decision No. R22-0676-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22F-0365E

SUNSHARE, LLC,

COMPLAINANT,

V.

PUBLIC SERVICE COMPANY OF COLORADO,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
DENYING MOTION TO
DISMISS**

Mailed Date: October 31, 2022

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I. STATEMENT

A. Procedural History

1. On August 17, 2022, SunShare, LLC (Complainant or SunShare) filed a Formal Complaint (Complaint) against Public Service Company of Colorado (Public Service). In the Complaint, SunShare requests the Commission direct Public Service to reform its bid prices for Renewable Energy Credits (RECs) for SunShare’s two bid awards in the 2020 Solar*Rewards Community (S*RC) Community Solar Garden (CSG) Request for Proposals (RFP). SunShare requests an adjustment of the REC bid price per kWh generated (a REC adjustment) to \$0.00/kWh to maintain the viability of its CSG projects in light of increased costs due to alleged utility-caused unreasonable delays in interconnection and in allowing site moves, for 16 months. In addition, SunShare requests resolution of the uncertainty surrounding incremental costs for network upgrades at its new sites by approving a cap on its interconnection costs with the difference to be paid by Public Service’s distribution system investments or by its shareholders. Finally, SunShare requests a one-time extension of the Target Completion Date in its 2021 Producer Agreements for its two projects to be in-service 30 months from the date of this Complaint to accommodate the delays allegedly caused by Public Service.

2. By Decision No. C22-0503-I, issued August 24, 2022, the Commission referred the matter to an Administrative Law Judge (ALJ).

3. On August 25, 2022, the Commission entered its Order to Satisfy or Answer and issued an Order Setting Hearing and Notice of Hearing. Public Service was served the Orders

and Notice (including a copy of the Complaint) and was ordered to satisfy the matters in the Complaint or answer the Complaint in writing within 20 days from service of the Orders and Notice. An evidentiary hearing was set for November 30, 2022.

4. On September 14, 2022, Public Service Company of Colorado's Motion to Dismiss SunShare, LLC's Formal Complaint with Prejudice was filed. That motion tolls the time within which Public Service must file an answer. If the Motion to Dismiss is denied, Public Service has 14 days from the date of the Interim Decision denying the Motion to Dismiss within which to file its answer to the Complaint. Rule 1308(e), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure.

5. On September 21, 2022, Trial Staff of the Colorado Public Utilities Commission (Trial Staff), filed its Notice of Intervention as of Right by Trial Staff of the Commission, Entry of Appearance, and Notice Pursuant to Rule 1007(a) and Rule 1401.

6. On September 28, 2022, the Response of SunShare, LLC in Opposition to Public Service Company of Colorado's Motion to Dismiss was filed.

II. COMPLAINT ALLEGATIONS

7. The Complaint is verified by David Amster-Olszewski, Chief Executive Officer of SunShare and supported by his affidavit. It is further supported by the Affidavit of Jacob R. Bobrow, Director of Development for SunShare.

8. SunShare is a commercial CSG developer and bidder in Public Service's 2020 CSG RFP.

9. Public Service Company is a Colorado public utility.

10. On December 16, 2020, Public Service awarded SunShare two bids in its 2020 CSG RFP (Lincoln Solar and Gerry Solar). The 2020 CSG RFP required developers to submit

documents and payment for the Small Generator Interconnection Process (SGIP) within 90 days of a bid award. The costs to construct network upgrades are memorialized in an Interconnection Agreement, which stated the agreed upon Construction Milestones would be completed by July 31, 2021.

11. SunShare alleges that Public Service unilaterally determined it would additionally apply the Interconnection Viability criteria to site moves without Commission approval to do so.

A. Lincoln Solar

12. After entering into the Producer Agreement for Lincoln Solar, and after submitting its SGIP application documents, SunShare learned that there was significant risk of substantial network upgrades for the project caused by other projects awarded in the CSG RFP. As a result, the Minimum Daily Load (MDL) Standard went from a positive to a negative measurement because Public Service awarded three projects interconnecting at the same substation and a 90-day special SGIP study because a transmission system not owned by Xcel was now affected.

13. On March 30, 2021, SunShare initiated a site move for the Lincoln Solar project to its backup Uintah Site, located near Fruita, Colorado. Like its Cobb Lake pre-application data reports (PADR), the Uintah PADR met the Interconnection Viability criteria.

14. On April 2, 2021, Public Service provided a second PADR for the Uintah Site to correct previous errors made by Public Service. The second PADR demonstrated significant risk of substantial network upgrades and that the Uintah Site would not meet the MDL Standard measurement. Despite the showing, Public Service approved the site move to the Uintah Site; however, unforeseeable material cost increases anticipated after review of the second PADR made the Uintah substation unviable.

15. On April 6, 2021, SunShare requested a site move to Platteville, Colorado, for which the PADR, like Uintah, did not meet the MDL Standard.

16. Public Service denied the site move request because it would require a waiver and did not begin the SGIP interconnection study process as requested by SunShare. The waiver was denied because it was not consistent with the Commission-approved scoring criteria.

17. On March 8, 2022, a third site move and SGIP request was made to a site in Ault, Colorado. On March 18, 2022, the request was denied because the full capacity at the proposed site did not meet the Interconnection Viability requirement of the 2020 RFP awarded bid. Public Service did not initiate the SGIP study process, as requested by SunShare as interconnection customer.

B. Gerry Solar

18. Regarding the Gerry Solar bid, Public Service awarded the full 20 points for Interconnection Viability in the 2020 CSG RFP. The project's selected substation, Greeley, was a targeted substation on the SRC Website. Gerry Solar submitted its SGIP request on March 10, 2020, after SunShare made payment on its required project deposit and escrows.

19. During a Level II Study Customer Options Meeting on May 18, 2021, it became clear to SunShare that that the Gerry Solar interconnection would not be viable because Public Service had awarded another project on the feeder interconnecting at the same Greeley substation. Responding to the SGIP request, Public Service referenced language on Q/A Tracker which stated that Public Service would only perform a cluster study where all affected developers so approved. The other developer not agreeing to a cluster study that was likely to increase its interconnection costs and study time, Public Service effectively forced SunShare to bear the cost of the incremental network upgrades to interconnect both bids.

20. On August 13, 2021, SunShare presented a site move request for Gerry Solar to interconnect to the Cloverly substation and initiated the SGIP process. After initially refusing, Public Service provided PADR in August 2021.

21. Based upon information provided by Public Service on May 27, 2021, SunShare determined that Cloverly substation now met the MDL Standard and requested the site move to interconnect at Cloverly.

22. On August 24, 2021, Public Service improperly denied the site move request because it did not meet the required Interconnection Viability the bid received in the 2020 RFP. Public Service did not initiate the SGIP study process, as requested by SunShare as interconnection customer.

23. Based upon the facts alleged, SunShare claims that Public Service violated the Commission's RES Plan decisions in Proceeding No. 19A-0369E; the SGIP Rules by denying valid interconnection study requests and exercising its option to perform cluster studies and then abdicating that decision in a manner that ensures cluster studies would never occur; and § 40-2-127 C.R.S. by hindering the 2020 CSG Projects, and specifically hindering the successful financing and operation of the SunShare 2020 CSG projects.

24. SunShare contends the allegations of the complaint "implicate" factors considered in the assessment of civil penalties, Rule 1302(b) and recognizes that the Commission has authority to impose a civil penalty, when provided by law.

25. Complainant alleges that Public Service failed to comply with applicable state statutes, Commission decisions, and Commission rules. Those actions caused harm to SunShare regarding their 2020 CSG projects. Public Service cause SunShare to implement site moves for

its 2020 CSG Projects and then improperly denied requests to move, violating Colorado law and Commission rules and decisions.

III. MOTION TO DISMISS

26. Public Service argues that the Commission should dismiss the Complaint filed by Complainant due to a lack of subject matter jurisdiction and in the alternative, because the Complaint failed to state a claim upon which relief can be granted.

27. Public Service cites Colorado statutes, case law, and Commission rules in support of its arguments. Public Service also argues the Commission cannot grant the relief requested by SunShare.

28. Public Service states that the allegations of the Complaint allege a contractual dispute beyond the Commission's jurisdiction and that the remedy sought likewise exceeds the Commission's jurisdiction.

29. Public Service further denies specific allegations and argues that the Complaint attempts to blame the Company for any setbacks occurring and does not state a claim for relief that the Commission can grant.

IV. REBUTTAL TO MOTION TO DISMISS

30. The Complainant responds to the Motion to Dismiss by arguing that Public Service violated the Commission's RES Plan Decisions, violated the SGIP Rules, and violated the Colorado CSG Act and relief should be granted based thereupon.

31. Complainant addresses the jurisdictional arguments of Public Service by arguing that the Complaint presents a *prima facie* showing that Public Service violated Colorado law, Commission rules, and Commission decisions.

V. LEGAL STANDARD

32. The Commission is authorized to address complaints as provided in §40-6-108

C.R.S.:

Complaint may be made...in writing, setting forth any act or thing done or omitted to be done by any public utility, including any rule, regulation, or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the commission.

33. Administrative Law Judge Garvey stated the legal standard for deciding a motion to dismiss for lack of subject matter jurisdiction:

Subject matter jurisdiction concerns a tribunal's authority to deal with the type of claim at hand. *See Dev. Recovery Co., LLC v. Pub. Serv. Co. of Colorado*, 2017 COA 86, ¶ 27. To determine whether it has subject matter jurisdiction, a tribunal must consider the facts alleged and the relief requested to determine the substance of the claim and then determine whether it has authority to entertain that class of case. *See City of Boulder v. Pub. Serv. Co. of Colorado*, 2018 CO 59, ¶ 14.

The Commission's subject matter jurisdiction may be challenged through a motion to dismiss. *See* 4 CCR 723-1-1308(e) of the Commission's Rules of Practice and Procedure. When considering such a motion, we turn to the Colorado Rules of Civil Procedure (C.R.C.P.) for guidance. *See* 4 CCR 723-1-1001 of the Commission's Rules of Practice and Procedure. C.R.C.P. 12(b)(1) governs motions to dismiss for lack of subject matter jurisdiction.

"Subject matter jurisdiction concerns the authority of the [Commission] to decide a particular matter." *In re Marriage of Haddad*, 93 P.3d 617, 619 (Colo. App. 2004). When considering a motion to dismiss based on lack of subject matter jurisdiction, the below principles apply.

Once subject matter jurisdiction is raised, the complainant bears the burden of proving the existence of the Commission's jurisdiction to decide the case or claim. *Medina v. Colorado*, 35 P.3d 443, 452 (Colo. 2001); *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App. 2000). A complainant may meet this burden by a *prima facie* showing of threshold jurisdiction. *Pioneer Astro Industries, Inc. v. District Court*, 566 P.2d 1067, 1068 (Colo. 1977).

The complaint's "allegations have no presumptive truthfulness[.]" *Medina*, 35 P.3d at 452 (internal quotation marks and citation omitted).

If necessary to resolve a motion, the Commission may consider evidence outside the complaint. *Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996). The Commission may weigh the evidence, whether adduced at a hearing or provided in writing, to “satisfy itself as to the existence of its power to hear the case.” *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993).

Finally, if a complainant fails to establish that the Commission has subject matter jurisdiction, the Commission must dismiss the complaint or claim. *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999); *see also* CRCP 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall dismiss* the action” (emphasis supplied)).

Decision No. R21-0189, issued March 29, 2021 at 4-6.¹

34. Administrative Law Judge Farley similarly stated the legal standard for deciding a motion to dismiss for failure to state a claim:

Colorado Rule of Civil Procedure (C.R.C.P.) 12(b)(5) allows a respondent to file a motion seeking to dismiss a complaint for “failure to state a claim upon which relied can be granted.” In ruling on such a motion, the Complainant’s allegations of material fact must be accepted as true. However, this tenet is inapplicable to legal conclusions.² The Commission “may consider only matters stated in the complaint and must not go beyond the confines of the pleadings,”³ except for documents that are referenced in, and central to, the complaint.⁴ The ALJ may also consider documents that are subject to administrative notice.⁵

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to “state a claim to relief that is plausible on its face.”⁶ A claim has facial plausibility when the complainant pleads factual content that allows the court to draw the reasonable inference that the respondent is liable for the misconduct alleged.⁷ The plausibility standard is not akin to a “probability requirement.” Indeed, it asks for more than a

¹ Decision No. R21-0189, was published with an issue date of March 29, 2020. However, Commission systems reflect the issue date was March 29, 2021.

² *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (adopting the standard for review of motions to dismiss for failure to state a claim enunciated by the U.S. Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

³ *Ashton Props., Ltd. v. Overton*, 107 P.3d 1014, 1018 (Colo. App. 2004).

⁴ *Prospect Dev. Co. v. Holland & Knight*, 433 P.3d 146, 149 (Colo. App. 2018).

⁵ *Walker v. Van Laningham*, 148 P.3d 391, 397-398 (Colo. App. 2006).

⁶ *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016).

⁷ *Twombly*, 550 U.S. at 556 (2007).

sheer possibility that a respondent has acted unlawfully.⁸ Where a complaint pleads facts that are “merely consistent with” a respondent’s liability, it “stops short of the line between possibility and plausibility of ‘entitlement to relief.’”⁹ Put differently, a complaint that alleges facts that are equally consistent with both legal and illegal conduct has not alleged a plausible claim and must be dismissed.¹⁰

“The chief function of a complaint is to give notice to the defendant of the transaction or occurrence that is the subject of plaintiff’s claims.”¹¹ As a result, motions to dismiss “are viewed with disfavor.”¹² Nevertheless, “only a complaint that states a plausible claim for relief will survive a motion to dismiss.”¹³

Decision No. R22-0444-I issued July 29, 2022 at 7-8.

A. Renewable Energy Standard

35. Administrative Law Judge Mirbaba summarized the Commission’s subject matter jurisdiction over public utilities as applied to renewable energy standard compliance plans:

[T]he Commission has authority to regulate public utilities, and jurisdiction to enforce statutes affecting public utilities. Colo. Const. art. XXV; and §§ 40-3-102, 40-7-101, C.R.S. (2019). And, the Commission has specific authority to decide an application seeking approval of a qualified retail utility’s renewable energy standard compliance plan under § 40-2-124(1), C.R.S., and Rule 3657(c).

Decision No. R20-0099 at 7.

36. Public Service is required to file and obtain Commission approval of a RES compliance plan detailing how it will comply with Commission rules during the corresponding resource acquisition period. The Company may apply to the Commission at any time for approval of amendments to an approved RES compliance plan. Rule 3657, 4 CCR 723-3.

⁸ *Id.*

⁹ *Id.* at 557.

¹⁰ *See Warne*, 373 P.3d at 596-597 (citing *Twombly* and *Iqbal*).

¹¹ *Rosenthal v. Dean Witter Reynolds*, 908 P.2d 1095, 1099-1100 (Colo. 1995). (Internal citations omitted)

¹² *Hirsch Trust v. Ireson*, 399 P.3d 777, 779 (Colo. App. 2017)

¹³ *Warne*, 373 P.3d at 591 (quoting *Iqbal*, 556 U.S. at 679).

37. By Decision No. R20-0099, issued February 14, 2020, the ALJ recommended approval of the 2020-2021 RES Plan, including the Company's proposed bid evaluation criteria and model contracts.

38. By Decision No. C20-0289, issued April 28, 2020, the Commission addressed exceptions to the recommended decision and required stakeholder engagement. The Commission affirmed the Recommended Decision's approval of the Company's proposed bid evaluation criteria for purposes of this RES Plan, with the exception of the following language:

[W]e respond to and clarify a point raised by Public Service's witness Klemm. Ms. Klemm testified that the Company reserves the right to change the CSG bid evaluation criteria if the Commission issues new rules that impact the Solar*Rewards Community program, or in the event of other unforeseen conditions. The Company commits to making an informational filing that contains the modified criteria at least 15 days prior to releasing the RFP. We are concerned that the Company could make unilateral changes to something as significant as its evaluation criteria without Commission approval. This RE Plan is approved based on the rules now in effect. We appreciate the Company's commitment to make an informational filing regarding modified criteria but clarify that the Company should make a more substantive filing and that the filing should be made sooner than 15 days prior to its RFP, allowing sufficient time for Commission review. The Company shall either file a request to amend its RE Plan based on the rule change or explain why such amendment is not appropriate.

Decision No. C20-0289 at ¶35.

39. By Decision No. C20-0708, issued October 6, 2020, Decision No. C21-0602, issued September 24, 2021, and Decision No. C22-0218, issued April 8, 2022, the Commission addressed modifications to the approved Solar*Rewards Community Bid Evaluation Criteria.

VI. DISCUSSION

40. The substance of SunShare's allegations is that Public Service violated Commission rules and decisions in connection with the 2020 S*RC RFP as part of the Company's 2020-21 Renewable Energy Compliance Plan. The actions leading to these

violations materially harmed SunShare's 2020 CSG Projects by creating an unreasonable delay and making the projects economically untenable. SunShare seeks not to be burdened with additional costs imposed as a result and seeks extension of the deadline within which the subject projects must be completed.

41. Public Service denies many of the allegations in the Complaint. However, SunShare has demonstrated that the Commission has subject matter jurisdiction over the dispute to enforce Colorado law as well as Commission rules and decisions at issue, including without limitation, approval of the Company's RES compliance plan detailing how it will comply with the rules as well as RFPs stemming from the RES plan.

42. Looking to the Complaint and taking the Complainant's allegations of material fact as true, a claim for relief that is plausible on its face has been shown. SunShare claims alleged misconduct and delay caused by the Company affecting the viability of its RFP awarded contracts and is seeking specific relief given those allegations.

43. The fact that SunShare and Public Service have entered into contractual agreements does not confine the Commission to a specific remedy as a matter of contract law. Public Service disputing SunShare's requested relief need not be decided here as it is not controlling as to whether or not the Complaint states a claim for relief. The Commission has broad discretion to fashion a remedy within the scope of Commission jurisdiction:

[A]rticle XXV effectuates a broad delegation of legislative power to the PUC, vesting the commission with as much authority as the general assembly had prior to the adoption of article XXV in 1954. *Miller Brothers, Inc. v. Public Util. Comm'n*, 185 Colo. 414, 431, 525 P.2d 443, 451 (1974) [T]he PUC's authority under article XXV is not narrowly confined but extends to incidental powers which are necessary to enable it to regulate public utilities.

Mountain States Tel. & Tel. Co. v. Public Utilities Comm'n., 763 P.2d 1020, 1025 (Colo. 1988)

44. It is found that SunShare has stated a plausible claim within the scope of the Commission's jurisdiction as to compliance with Colorado law or an order or rule of the Commission. Based thereupon the motion to dismiss will be denied.

VII. ORDER

A. It Is Ordered That:

1. Public Service Company of Colorado's Motion to Dismiss SunShare, LLC's Formal Complaint with Prejudice, filed on September 14, 2022, is denied.

2. This Decision shall be effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director