

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22A-0315EG

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS COMBINED ELECTRIC AND NATURAL GAS DEMAND-SIDE MANAGEMENT AND BENEFICIAL ELECTRIFICATION PLAN FOR CALENDAR YEAR 2023.

**COMMISSION DECISION ADDRESSING MOTION OF
PUBLIC SERVICE COMPANY TO ADDRESS ELECTRIC
ENERGY EFFICIENCY BUDGETARY PRESSURES FOR
CALENDAR YEAR 2024, AND REQUEST FOR WAIVER
OR VARIANCE AS NECESSARY; PETITION
DECLARATORY ORDER; AND MOTION FOR
PRELIMINARY INJUNCTION OF THE ENERGY
EFFICIENCY BUSINESS COALITION AND THE
SOUTHWEST ENERGY EFFICIENCY PROJECT**

Issued Date: September 10, 2024

Adopted Date: September 4, 2024

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I. BY THE COMMISSION**A. Statement**

1. Through this Decision, the Commission denies the Motion to Address Electric Energy Efficiency Budgetary Pressures For Calendar Year 2024, and Request for Waiver or Variance as Necessary (“Budget Motion”) filed by on August 12, 2024 filed by Public Service Company of Colorado (“Public Service” or the “Company”).

2. Also through this Decision, the Commission declines to accept the Petition for Declaratory Order and Motion for Preliminary Injunction filed on August 5, 2024 by Energy Efficiency Business Coalition (“EEBC”) and the Southwest Energy Efficiency Project (“SWEEP”), jointly. As such, the Commission also denies the Motion for Preliminary Injunction filed on August 5, 2024, by SWEEP and EEBC.

3. The Commission also indicates its intention to address the concerns raised through these filings in the ongoing combined electric and natural gas 2024-2026 Demand-Side Management (“DSM”) and Beneficial Electrification (“BE”) Plan (“DSM and BE Plan” or the “Plan”) docketed in Proceeding No. 23A-0589EG.

B. Background

4. Through Decision No. C23-0381, the Commission addressed the Application for Approval of its 2023 Electric and Natural Gas Demand-Side Management (“DSM”) and Beneficial Electrification (“BE”) Plan (“2023 DSM & BE Plan” or “Plan”), filed by Public Service on July 1, 2022.¹

¹ The Decision provides full procedural background from the initial Application filing through the issuance of the Decision on June 22, 2023.

5. By Decision No. R24-0086-I, in Proceeding No. 23A-0589EG, the Commission granted Public Service an extension of the 2023 DSM & BE Plan until the conclusion of Proceeding No. 23A-0589EG, its 2024-2026 DSM & BE Plan.

6. On July 31, 2024, the Company filed a “Notice of Success” in this Proceeding. Within its Notice, it states that for the calendar year through June 30, 2024, the Company has spent approximately \$70 million on electric energy efficiency (“EE”), with estimated savings of 401 GWh. With the Company’s current forecasted electric EE trajectory, it could spend approximately \$115.6 million, with estimated savings of 593.5 GWh. However, because this would exceed the Commission’s authorized budget amount by approximately \$22 million, the Company has taken steps to cease expenditures. Per the Notice of Success, those steps include pausing further spending on EE programs for the remainder of 2024. On July 31, 2024, the Company sent an email to DSM contractors telling them to submit invoices by the end of the day on August 15, 2024, for all work completed through August 2, 2024, and that no work should be started during this pause.

7. On August 5, 2024, EEBC and SWEEP filed a joint “Response and Petition for Declaratory Order and Motion for Preliminary Injunction.”

8. On August 12, 2024, the Company filed its Budget Motion. In its Motion, Public Service puts forth three proposals to address this issue. The Company’s preferred option is to increase the approved budget for the Company’s electric EE offerings to add an additional \$34.1 million to the 2023 electric EE Plan budget of \$92.9 million as applied to calendar year 2024. The two alternative options the Company presents for Commission consideration involve either approving a smaller increase in budget for 2024 or directing the Company to endeavor to manage the electric EE program without a budget increase through Company flexibility to pay out

current or future rebate applications no earlier than January 1, 2025. To the extent necessary, the Company requests waivers and variances such that it may implement one of the three proposed alternatives.

9. Through Decision No. C24-0593, issued on August 15, 2024, the Commission shortened the response time to the Budget Motion and ordered Public Service to file supplemental responses to its Budget Motion no later than August 19, 2024. On August 19, 2024, the Company filed “Verified Supplement” to the Budget Motion which included responses to the questions posed by the Commission through Decision No. C24-0593 (“First Supplement”).

10. On August 19, 2024, the Commission received responses from Colorado Energy Consumers’ (“CEC”); the Colorado Office of the Utility Consumer Advocate (“UCA”); Climax Molybdenum Company (“Climax”); SWEEP, EEBC, and Western Resource Advocates (“WRA”), collectively; Public Service; the Colorado Energy Office (“CEO”); and Trial Staff of the Colorado Public Utilities Commission (“Trial Staff”). On August 20, 2024, the City and County of Denver (“Denver”) also filed a response.

11. The Company’s First Supplement includes additional record support² to assist the Commission in adjudicating the Budget Motion, including additional information on the scope of work completed, in review, and in the pipeline, as well as which program categories drove this budgetary issue, and what outreach and program modifications occurred to address this concern already.

12. Through Decision No. C24-0610, issued on August 21, 2024, the Commission ordered Public Service to file additional information. Public Service did so on August 28, 2024

² The First and Secon Supplements each included an attestation from Mr. Brian G. Doyle, Director, Product Strategy and Development that the information is true and accurate.

(“Second Supplement”). Also on August 28, 2024, the Commission received additional responses from UCA, Climax, EEBC/SWEEP, and CEC.

13. At the September 4, 2024, Commissioners’ Weekly Meeting the Commission deliberated on this Proceeding as well as Proceeding No. 23A-0589EG.

C. Discussion and Findings and Conclusions

1. Budget Motion

a. Filings

14. On August 12, 2024, the Company filed its Budget Motion. In its Motion, Public Service puts forth three proposals to address this issue. The Company’s preferred option is to increase the approved budget for the Company’s electric EE offerings to add an additional \$34.1 million to the 2023 electric EE Plan budget of \$92.9 million as applied to the 2024 calendar year. The Company states that it reasonably expects that this preferred option would allow the Company to continue providing all of its cost-effective electric EE offerings to customers through the remainder of 2024. The two alternative options the Company presents for Commission consideration involve either approving a smaller increase in budget for 2024 or directing the Company to endeavor to manage the electric EE program without a budget increase through Company flexibility to pay out current or future rebate applications no earlier than January 1, 2025. To the extent necessary, the Company requests waivers and variances such that it may implement one of the three proposed alternatives.

15. In its First Supplement, the Company indicated that the Company had spent a total of \$74.2 million as of July 31, 2024, on electric EE programs, out of a total approved budget, including flexibility of \$92.9 million. The Company indicated the total expenditure, if the

programs are not paused, is likely to require an incremental \$34.1 million to the budget, or \$127 million for 2024.³

16. The Company states that increased participation in measures supporting indoor agricultural lighting were a driver of the increased spending in 2024. As such, on April 16, 2024, the Company removed indoor agricultural lighting from the SEM program, effective June 15, 2024.⁴ As of August 16, 2024, the Company has received 6,201 applications for 2024 electric EE business rebates, including those completed, in review, or in the pipeline.

17. The Commission received responses in support of the Company's Budget Motion from Denver; CEO; EEBC, SWEEP and WRA (collectively). Each supports the Company's preferred solution of an additional \$34.1 million in EE budget presumption of prudence.

18. WRA, SWEEP, and EEBC highlight that the programs driving the 2024 success are among the most-cost effective business electric EE offerings. They state that the mTRC values are between 3.4 and 3.8 for the Business Energy Assessment, Strategic Energy Management and Lighting Efficiency offerings.⁵ SWEEP, EEBC, and WRA ask the Commission to promptly approve the Company's Preferred Solution, with certain modifications, to "avoid irreparable harm to the DSM industry." First, the Commission should make explicit that none of the incremental budget approved by the Commission should contribute toward either the goal achievement or incremental net benefits that are included in the Company performance incentive mechanism calculation. The Company states that it does not intend that any of this incremental budget will contribute or count toward achievement of its 2024 financial incentive, and the Commission should make that explicit. Second, the Commission should make it clear that any rebates and savings

³ Verified First Supplement, p. 4.

⁴ Verified First Supplement, p. 2.

⁵ WRA, SWEEP, and EEBC Response, p. 3.

deferred until 2025 will also not count toward the Company's 2025 performance incentive mechanism. Third, the Commission should clarify that all under-recovery on the Company's DSMCA mechanism in 2024 do not earn any interest through a carrying charge. Together, these three additions will ensure that the Company does not profit from the additional funds approved by the Commission, and that \$34.1 million is the maximum amount that customers will need to pay now and in the future.⁶ EEBC/SWEEP still request that the Commission accept the Petition for Declaratory Order to provide guidance on the use of the 60/90-day process in instances like this.

19. WRA, SWEEP and EEBC note that “one EEBC member has over \$120,000 of rebates submitted to the Company that await payment, and this member planned to submit over \$55,000 of additional rebates to the Company. Another EEBC member relies on payments from the Company's direct pay programs to cover business operating costs including salaries for the employees performing the services covered by these programs. Waiting until 2025 for rebate payment will mean waiting approximately 140 days—this is an enormous financial burden for EEBC members and the DSM industry.”⁷

20. CEO contends that the Commission has long-supported DSM as a cost-effective resource and directed the Company to “aggressively pursue all cost-effective DSM.”⁸ CEO states that it strongly supports the Company's intention that programs for Income Qualified and residential customers continue without interruption, which could best be achieved under the level of additional budget Public Service proposes in the Preferred Solution. CEO offers the following for Commission consideration as modifications to the Company's Budget Motion: (1) direct the

⁶ WRA, SWEEP, and EEBC Response, pp. 6-8.

⁷ WRA, SWEEP, and EEBC Response, p. 3.

⁸ CEO Response, p. 3.

Company to halt or limit any unscheduled or promotional bonus incentives it provided in the second quarter, especially in the Business Program; (2) direct the Company to reevaluate the net-to-gross ratio of any products that are currently over budget and to file for any adjustments through the 60-Day Notice process; (3) clarify the total budget for 2024 and specific additional budget amount that has a presumption of prudence; and (4) direct Public Service to remain attentive to program participation and spending in 2025 and 2026, to ensure this circumstance does not materialize again and result in program disruption.⁹

21. Denver similarly supports the Company's preferred solution in the Budget Motion. Denver highlights the risk of customer and vendor confusion and the negative impacts that could have on the electric EE marketplace. While Denver recommends a larger budget be approved through this Motion--however, Denver asserts that this is not a permanent solution and that Public Service should strive to stay within approved budgets in future years. Denver also sees potential to mitigate overrun in electric EE business expenditures by reducing incentive levels. Finally, Denver points out the increased interest it anticipates in electric EE offerings going forward, in part because of its updated building code ordinances.

22. The Commission received responses in opposition to the Company's Budget Motion from CEC, UCA, Staff, and Climax.

23. Staff suggests it does not consider Public Service's questionable management of those programs to be a compelling reason justifying the imposition of additional costs onto ratepayers. Staff is concerned that authorizing any DSM budget increase outside the traditional structure of Strategic Issues and DSM Plan proceedings could damage the certainty and stability which the structure currently provides as the "outcomes of these proceedings always represent a

⁹ CEO Response, p. 12.

complicated balance of considerations, such as the relative merits of different programs, the tradeoffs between program goals and customer bill impacts, and specific questions of program design. Modifying the DSM budget outside of the traditional DSM processes undermines the delicate balance of considerations the Commission weighed when it approved the current budget and will create future uncertainty as to whether Commission-approved DSM budgets are hard or soft.”¹⁰

24. UCA argues this problem was caused solely by Public Service due to the Company’s mismanagement of these programs. UCA states that “[i]f the Commission authorizes any additional funds, those funds should be charged to the Company’s shareholders alone. Ratepayers must be held harmless.”¹¹ UCA notes that this issue of overage was recently ruled upon by the Commission in Decision No. C24-0448 in Proceeding No. 24AL-0153E where the Commission ruled that “Public Service cannot assume it is entitled to recover costs outside of established budget requirements through the normal operation of the DSMCA.”¹² UCA also argues that EEBC’s and SWEEP’s Petition for Declaratory Order is in violation of their obligations under the Proceeding No. 22A-0315EG settlement.

25. Climax also points to “settlement integrity” as grounds to dismiss Public Service’s request for more funds. If allowed, Climax argues that this tactic by the Company has significant implications for parties to negotiate settlements in good faith in all other cases, including the pending settlement of the 2024-2026 DSM/BE Plan.

26. CEC opposes any additional spending for electric EE and poses that the Budget Motion tests the Commission’s “commitment to ratepayers, to upholding its Orders, to promoting

¹⁰ Staff Response, p. 3.

¹¹ UCA Response, p. 2.

¹² UCA Response, p. 3-4, quoting Decision No. C24-0448, ¶ 7.

reliable negotiated settlements, and ultimately to achieving this ambitious energy transition in a balanced and sustainable manner.”¹³ CEC argues that is reversal on cost containment proposed by the budget would require the Commission to inappropriately contravene its prior decision without supporting evidence, unravel the approved Comprehensive Settlement Agreement in resolution of the 2023 DSM Plan, undermine settlements generally, and raise serious questions about the justness and reasonableness of our rates. CEC argues that the Commission should approve Alternative 2 and deny any presumption of prudence for additional funding beyond the \$92.9 million authorized for PSCo’s 2023 DSM Plan. CEC raises that there is no evidence to support the request for additional funds and that prudency determinations are made based on what was reasonably known or knowable at the time decisions were being made, not in hindsight. CEC supports option 2.

27. In response to Decision No. C24-0610, the Company provided a Second Supplemental Response on August 28, 2024. In the Second Supplemental Response, the Company further described the steps taken prior to filing its Notice of Success and additional context on program interest so far this year and anticipated for the remainder of the year.

28. The Commission also received additional responses from Climax, UCA, EEBC/SWEEP, and CEC on August 30, 2024.

b. Findings and Conclusions

29. We find good cause to deny the Company’s Budget Motion. The Commission finds that the ongoing Proceeding No. 23A-0589EG provides the Commission with an opportunity to address the budget shortfall for the remainder of the calendar year through a more appropriate forum.

¹³ CEC Response, p. 1.

30. In addressing the Budget Motion, we are faced with balancing two important, but in some ways conflicting, policy goals. The Commission agrees with EEBC/SWEEP, CEO, Denver, and others in the importance of continuity of DSM program offerings. We recognize that interruptions in rebate administration add uncertainty to the market and could make achieving future DSM goals more difficult. That said, CEC, Staff, UCA, and others raise another important point that stakeholders must be able to rely on the finality of the Commission's decisions absent additional process. We also echo UCA, Climax, and CEC's point that settlement agreements approved by the Commission should generally remain in force. We are also generally moved by Staff's argument that DSM planning involves a complicated balance of considerations, and that changing the overall budget in isolation in some ways usurps the careful balance reached earlier in this Proceeding.

31. We find that addressing the Company's EE budget shortfall for the remainder of the calendar year is better done through Proceeding No. 23A-0589EG, the Company's 2024-2026 DSM and BE Plan. We find that this is a more appropriate forum because the settlement in this underlying Proceeding was approved by the Commission well over two years ago and was intended for 2023 only; it was only continued into 2024 as a stopgap measure while Proceeding No. 23A-0589EG proceeded before the Commission. The Company's 2024-2026 DSM and BE Plan is still in active litigation, and parties to that proposed settlement agreement do not yet rely on the Commission's approval of its terms. Further, the Company's 2024-2026 DSM and BE Plan has a more fulsome and current record on which to adjudicate a potential solution to the EE budget problem for the remainder of this year.

32. For these reasons, we decline to address the substance of the potential solutions posed in the Company's Budget Motion and will address the merits of any additional EE budget or any other appropriate solution for 2024 in Proceeding No. 23A-0589EG.

33. However, we highlight our continued interest in the Company getting its EE rebate administration back up and running as quickly as possible. We agree with EEBC/SWEEP and others that the ongoing market disruption is an increasingly large problem and an unsatisfactory situation for the DSM market overall. We do not want to harm the ecosystem that can deliver cost-effective energy savings going forward and want to ensure that the goals set for future years are still attainable because a healthy, functioning EE market remains in Colorado. We reiterate our desire for the Company to get rebate administration restarted on the nearest possible timeframe. While we find that the Company's Budget Motion does not present the best path for addressing the issue, nothing is stopping the Company from continuing spending on EE rebates while the Commission addresses the budget elsewhere.

2. Petition for Declaratory Order and Motion for Preliminary Injunction

a. Filing

34. EEBC/SWEEP request the Commission grant its Petition for Declaratory Order pursuant to Rule 1304(i)(1), 4 *Code of Colorado Regulation* 723-1 of the Commission's Practice and Procedure Rules. In order to accept a Petition for Declaratory Order, the Commission must consider whether there is a legal controversy to terminate. EEBC and SWEEP state that they received a notice on July 31, 2024, that went to DSM contractors (included as Attachment A to its filing) that told DSM providers to stop working on all projects that would require an invoice to be sent to the Company. EEBC/SWEEP argue that this unilateral move is bad for customers, the DSM

industry in Colorado, and worse for the continued success of the DSM programs that need increased contractor and customer engagement to be successful. EEBC/SWEEP argue that there is no “imminent crisis” because the DSM budget is not a “hard cap” but only the budget to which a presumption of prudence applies. EEBC/SWEEP argue that the Commission has “the authority to enforce its orders and do all things necessary to effectuate the public interest,” including order that the Company implement changes to its DSM and BE offerings through the 60/90-day Notice process, a DSM Plan amendment, or other relief that may be applicable by motion or application to the Commission.¹⁴

35. EEBC/SWEEP argue that a legal controversy exists—namely whether the Company needs to use the 60/90-day Notice process to stop awarding rebates and incentives as the Company has done. The Petition argues that the Commission has ordered the use of the 60/90-day process since at least 2009 and continues to approve its continuation at least through the 2024-2026 DSM Plan Proceeding. They argue that stopping awarding rebates and incentives constitutes an unprecedented and significant mid-year modification of the 2023 DSM Plan, which represents reduced (or eliminated) rebate levels, and reduced eligibility for customers, “[t]hus, a proposal to modify the DSM Plan by stopping all non-IQ products and services is a modification that requires the appropriate 60 or 90-day Notice process.”¹⁵

36. In addition, EEBC/SWEEP request the Commission issue a preliminary injunction in accordance with Colorado Rule of Civil Procedure 65.¹⁶ EEBC/SWEEP state that they have

¹⁴ EEBC/SWEEP Petition, p. 11.

¹⁵ EEBC/SWEEP Petition, p. 13.

¹⁶ In considering a motion for a preliminary injunction, pursuant to C.R.C.P. 65, the trial court must find that the moving party has demonstrated the following:

- (1) a reasonable probability of success on the merits;
- (2) a danger of real, immediate, and irreparable injury which may be prevented by injunctive relief;
- (3) lack of a plain, speedy, and adequate remedy at law;
- (4) no disservice to the public interest;

shown a “reasonable probability of success on the merits” of its Petition for Declaratory Order because Public Service has not shown anything that contradicts the need for the use of the 60/90-day process here. EEBC state that there is a risk of immediate, and irreparable injury without an injunction because of the investments EEBC member-businesses have made and the work orders in place based upon rebates from the Company. They also argue that the public interest and the balance of the equities favor the injunction. There is no risk to Public Service other than having to possibly request a prudence determination if it is to overspend the authorized DSM budget. The only downside is the continued success of the DSM program this year. On the other hand, the Company risks the trust and participation of the DSM business community, and the backlash of hundreds of customers that may find no program awaits them even after they have made the decision to invest in DSM products or equipment. Finally, they argue that the injunction would preserve the status quo while the Commission weighs the merits of ongoing filings.

37. EEBC/SWEEP also note the other options the Company has, all of which are less drastic than the route it has taken, including removing bonus rebates in place for certain products, cutting back on marketing, or moving budget dollars from products that are under-spent to products with more interest.

b. Findings and Conclusions

38. The Commission has broad discretion regarding whether to accept or deny a petition for declaratory order pursuant to Commission Rule 1304. Pursuant to the Commission’s rules, in its discretion, it can dismiss or otherwise not accept any petition seeking a declaratory order. A petition for declaratory order is appropriate when the Commission seeks to “terminate a

(5) balance of equities in favor of the injunction; and
(6) preservation by the injunction of the status quo pending a trial on the merits.

controversy or to remove an uncertainty affecting a petitioner with regard to any tariff, statutory provision, or Commission rule, regulation, or order.” Here, the question EEBC/SWEEP present for the Commission to determine is whether the Company had to use the 60/90-day process to change its offerings (*i.e.*, eliminate EE incentives for the rest of the year) before implementing the change.

39. We decline to accept EEBC/SWEEP’s Petition for Declaratory Order. While we appreciate EEBC/SWEEP raising this issue to our attention and further developing the Commission’s understanding of the effects on the EE industry, we find that more appropriate means to address the ongoing situation exist. Due to the timeframe of a petition for declaratory order proceeding, and its limitation to the proceeding at hand, we find that addressing the ongoing EE DSM issues is better handled in the 23A-0589EG proceeding. Further, addressing only the legal question before us would leave open questions on cost recovery and prudence of spending for the remainder of the year that are better addressed elsewhere. We therefore exercise our discretion to decline to accept the EEBC/SWEEP Petition for Declaratory Order.

40. We similarly deny the Motion for Preliminary Injunction. We need not address Public Service’s arguments regarding the Commission’s authority to issue enjoin its actions because the Motion for Preliminary Injunction is mooted by the Commission’s decision to not accept the EEBC/SWEEP Petition for Declaratory Order. Pursuant to C.R.C.P. 65, a movant must show “a reasonable probability of success on the merits” of the underlying action. Here, there is no underlying action and thus a preliminary injunction cannot be ordered. We therefore find good cause to deny the Motion for Preliminary Injunction.

II. ORDER

A. The Commission Orders That:

1. The Motion to Address Electric Energy Efficiency Budgetary Pressures For Calendar Year 2024, and Request for Waiver or Variance as Necessary filed on August 12, 2024, by Public Service Company of Colorado is denied, consistent with the discussion above.

2. The Petition for Declaratory Order filed on August 5, 2024, by Energy Efficiency Business Coalition (“EEBC”) and the Southwest Energy Efficiency Project (“SWEEP”), jointly, is denied, consistent with the discussion above.

3. The Motion for Preliminary Injunction filed on August 5, 2024, by EEBC and SWEEP, jointly, is denied, consistent with the discussion above.

4. This Decision is effective immediately.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 4, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT
