Decision No. R14-0092

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 13R-0901E

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IN THE MATTER OF THE PROPOSED AMENDMENTS PURSUANT TO SENATE BILL 13-252 TO THE RULES IMPLEMENTING THE RENEWABLE ENERGY STANDARD 4 CODE OF COLORADO REGULATIONS 723-3.

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**RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ROBERT I. GARVEY AMENDING RULES**

Mailed Date: January 23, 2014

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## I. STATEMENT

1. On August 21, 2013, the Public Utilities Commission issued the Notice of Proposed Rulemaking (NOPR) that commenced this docket. See Decision No. C13-1036. The Commission referred the instant rulemaking proceeding to an administrative law judge (ALJ) and scheduled a hearing for October 21, 2013 and October 22, 2013. The purpose of this limited rulemaking is to revise and clarify the Renewable Energy Standard (RES) rules contained in 4 Code of Colorado Regulations (CCR) 723-3-3650, et seq., consistent with Senate Bill (SB) 13-252, which was enacted by the 2013 General Assembly and signed into law by Governor Hickenlooper on June 5, 2013.

2. In Decision No. C13-1036, the Commission requested that interested persons file Initial Comments no later than September 16, 2013. Public Service Company of Colorado (Public Service), The Colorado Rural Electric Association (CREA), Western Resource Advocates (WRA), Tri-State Generation and Transmission Association, Inc. (Tri-State), Black Hills/Colorado Electric Utility Company, LP (Black Hills), Intermountain Rural Electric Association (IREA), and The Interwest Energy Alliance (Interwest) all filed comments.

3. By that same decision the Commission requested comments responsive to initial comments (Reply Comments) be filed no later than September 30, 2013. Public Service, CREA, WRA, and Tri-State all filed Reply Comments. Public Service and WRA additionally filed Supplemental Comments to their respective responses.

4. The ALJ held the hearing on October 21, 2013. Black Hills, IREA, Tri-State, CREA, Interwest, WRA, and Public Service participated in the hearing. Based on written comments and the comments provided at the October hearing, the ALJ concluded that no further hearing is necessary.

5. At hearing, the ALJ informed the parties that any closing comments are due no later than November 5, 2013. IREA filed closing comments on November 5, 2013.

6. Being fully advised in this matter and consistent with the discussion below, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record and exhibits in this proceeding along with a written recommended decision.

## II. FINDING, DISCUSSION, AND CONCLUSION

7. In Decision No. C13-1036, the Commission described the nature and purpose of this limited rulemaking as addressing the changes to the rules required by the passage of SB-252. SB-252 introduces new forms of eligible energy resources that can be used to comply the RES, eliminates a requirement that eligible energy resources must be located in Colorado to be eligible for a multiplier, and amends the RES applicable to cooperative electric associations.

8. Not all modifications to the proposed rules are specifically addressed herein. Any changes incorporated into the redline version of the rules appended hereto are recommended for adoption.

9. The undersigned ALJ has reviewed the record in this proceeding to date, including written and oral comments.

10. The proposed rules attached to Decision No. C13-1036 in legislative (i.e., strikeout/underline) format and in final format, were made available through the Commission's Electronic Filings (E-Filings) system.

### A. Discussion of Comments

#### 1. Rule 3652: Definitions

11. By Decision No. C13-1036 and the attached Notice of Proposed Rulemaking, we introduced or redefined several terms including: coal mine methane, early eligible energy resources, eligible energy, eligible energy resources, greenhouse gas neutral electricity, and synthetic gas.

##### a. Early Eligible Energy Resources

12. The proposed definitions for early "eligible energy" and "early eligible energy resources" are intended to enable the tracking of the resources to which the 1.25 multiplier is applicable for purposes of compliance with the RES. (See Rule 3654(f)). Upon review, the term "early eligible energy" is not needed, so we do not include it in this final set of rules.

13. In its Initial Comments, CREA suggests different hypothetical situations and raises issues about whether projects in those situations would qualify for the 1.25 compliance multiplier. WRA, in its Reply Comments, proposes that the Commission adopt a rule where an eligible energy resource has a single date of "beginning operation" and purposes to define that in terms of the first day an eligible energy resource produces electricity for sale.

14. At hearing, both Public Service and CREA expressed concerns with the concept of using a date of first sale of electricity for the purpose of determining the date of a resource "beginning operation." CREA opined that the sale of energy is not an appropriate benchmark because it does not reflect the type of transaction that occurs for a utility owned resource. Public Service noted that certain eligible energy resources might provide electricity, so called test energy, prior to the resource being deemed operational, or beginning operation, by the company.

15. In the alternative, Public Service suggested defining "beginning operation" for an eligible energy resource in terms of it being commercially operational. Public Service offered that it considers a facility commercially operational when it is producing energy under the terms of its contract and when the utility has all the necessary legal and regulatory documentation.

16. At hearing WRA states that it accepts the use of "commercial operation" as the date that an eligible energy resource begins operation. Interwest Energy witness Ms. Hickey states that Interwest in general concurred with the approach. CREA agrees that commercial operation, as defined by Public Service, is an appropriate way to determine the date of beginning operation for an early eligible energy resource.

17. The consensus of the parties is acceptable and adopted.

**b. (p): Greenhouse gas neutral electricity**

18. In the NOPR attached to Decision No. C13-1036, we provide a definition of Greenhouse Gas Neutral electricity at Rule 3652(q). WRA[1] raises concern that the proffered definition may be inconsistent with the statutory definition at § 40-2-124(1)(a)(IV), C.R.S. WRA argues that the statutory definition requires comparing, for a five-year period, the volume of greenhouse gasses that would be emitted from the conversion of fuel to electricity to the volume of greenhouse gases that would be emitted had that fuel not been converted. WRA further states that the Commission's definition relies on a comparison of the volume of greenhouse gas emissions from the conversion of the fuel to electricity to the volume of GHG emissions from the facility if it had used a traditional fossil fuel. WRA further points out that the term "traditional fossil fuel" is not defined in the rules, which may lead to confusion on how to implement the rules.

[1] Comments of WRA at page 4-6 although, section is 24-4-124. (1)(a)(IV), C.R.S is cited.

19. In its Reply Comments, Public Service reiterates its position that the Commission should adopt the statutory language in this rule. Public Service also advocates that the Commission should not compare the greenhouse gases emitted from a coal mine methane or synthetic gas facility to the emissions from the electric generating unit using "a traditional fossil fuel."

20. At hearing Public Service, CREA, and Tri-State again request that the Commission adopt statutory language for this rule. Interwest did not oppose this request.

21. The Commission adopts the statutory definition of "greenhouse gas neutral electricity".

**c. (s): Pyrolysis**

22. The definition of the term pyrolysis in the NOPR suggests using the term "presence" in place of the statutory term "participation".

23. In its Initial Comments Pubic Service comments that incorporating statutory definitions eliminates potential confusion or conflict between Commission rules and statute. In its Initial Comments, WRA agrees with Public Service that using the term "participation" avoids the possibility of confusion or conflict between the statue and the rule.

24. In support of its position, Public Service states at hearing that while the process of pyrolysis does not include the participation of oxygen in the chemical reaction *per se*, it is possible that some oxygen could be present during parts of the process. Public Service opines that because of the possible presence of oxygen, the Commission's proposed definition may exclude pyrolysis projects that the company believes would meet the statutory definition.

25. No participants to this proceeding opposed this change.

26. The Commission adopts the definition contained in § 40-2-124(1)(a)(V), C.R.S.

### d. (y): Renewable Energy Credit (REC)

27. In its Initial Comments WRA suggests that it is unclear how a utility could use a recycled energy or greenhouse gas neutral electricity project to comply with its Renewable Energy Standard (RES) obligations under the current RES compliance framework. In its Supplemental Reply Comments, WRA notes that in the absence of a REC or REC-type tradable credit representing the non-energy attributes of a recycled energy or greenhouse gas neutral resource, there is no specific mechanism by which a utility that uses these non-renewable, but eligible, resources can demonstrate its compliance with the RES.

28. Through both its Comments and Supplemental Comments, WRA advocates amending the existing definition of REC to include the non-energy attributes of all eligible energy resources, not just renewable energy resources. Under this proposal all of the credits that come from eligible energy sources, including both renewable and non-renewable energy resource, would be counted in terms of RECs or in terms of subcategories of RECs that denote the different types of resources (e.g., R-RECs, for RECs derived from Recycled Energy projects).

29. In its Reply Comments, Public Service opposes WRA's suggested changes to the definition of RECs. However, in its Supplemental Reply Comments, Public Service states that it is comfortable with the proposed changes as clarified through WRA's Supplemental Reply Comments. At hearing Public Service reiterates its position that it no longer opposes WRA's proposal to change the definition of RECs to include types of credits for eligible, but non-renewable resources.

30. As we stated in Decision No. C13-1036, the intent of this NOPR is to implement the changes required by SB13-252. WRA's proposal to introduce different types of RECs goes beyond implementing changes required by statutory changes. In addition, Rule 3654(j) makes it clear that a QRU may count eligible energy or RECs for compliance. Further, Rule 3654(k) indicates that a QRU may substitute equivalent RECs for eligible energy implying that eligible energy can be counted by a QRU for the purpose of complying with its RES obligations. For these reasons the Commission declines to make any changes to the definition.

31. Finally, at hearing Tri-State supported WRA's proposal to introduce different types of RECs to ensure that Tri-State could take advantage of the different types of eligible energy resources and count them toward compliance with its RES obligations.

32. § 40-2-124(8) C.R.S. makes it clear that Commission rules adopted under subsections (1) through (7) of the statute do not apply directly to Tri-State. The definition of REC at question here is promulgated pursuant to those subsections. Therefore, Tri-State is not required to use the definition of REC in Commission rules.

**2. Rule 3668(d): Environmental Impact**

33. Rule 3668 (d) provides the approach the Commission will use to determine whether electricity generated from coal mine methane or from synthetic gas through pyrolysis at a municipal solid waste facility is greenhouse gas neutral.

34. WRA[2], Tri-State[3], CREA[4], and Public Service[5] all raise concerns with the Commission's proposed definition of "greenhouse gas neutral electricity" and with the method that the Commission proposes to use in making this determination in Rule 3668(d). As noted above, we adopt the statutory definition of "Greenhouse gas neutral electricity."

35. In its Comments, WRA suggests that the proposed approach may be inconsistent with the statutory language in § 40-2-124(1)(a)(IV) and that Rule 3668(d) should be revised to reflect the requirements in statute to compare the emissions from a facility using coal mine methane or synthetic gas to create electricity against the emissions that would have otherwise occurred from the coal mine or the municipal solid waste venting to the atmosphere.

36. At hearing CREA made a point similar to WRA. CREA states that the proposed rule is inconsistent with the statute because the statute requires comparing the volume of GHG emissions from a facility (based on the conversion of a fuel-stock to electricity) to the volume of GHG that would have been emitted if that fuel-stock was not converted to electricity at all while the proposed rule requires comparing GHG emission from one facility to the emissions from an alternative facility. CREA also argues that aside from any technical difficulties in assessing the comparison of emissions, the Commission's proposed rule would require that Commissions to develop some sort of reference facility using traditional fossil fuel each time a coal mine methane or pyrolysis MWS project is proposed.

[2] Comments of WRA at page 4-6.
[3] Initial Comment of Tri-State at page 4.
[4] Initial Comments of CREA at page 4.
[5] Reply Comment of Public Service at page 5-6

37. Finally, Public Service argues that the inclusion of a list of greenhouse gases makes Rule 3668(d) overly broad. The list of greenhouse gas included in this rule is a list of what are conventionally known to be greenhouse gases. Absent this list, the Commission and stakeholders would have to develop a list of greenhouse gases on a case-by-cases basis for each proposed greenhouse gas neutral project in order to decide if the proposed project is greenhouse gas neutral.

38. The Commission recognizes that not all projects will or are likely to emit all of the gases on the list. The inclusion of the list is not intended to require that each project assess all the impacts of all of the greenhouses gasses included in Rule 3668(d)(I). For a proposed project the Applicant need only state which gasses are relevant for purpose of determining the greenhouse gas neutrality of that particular project and to use those gases in calculating the emissions for that project.

39. The rule is amended to be consistent with § 40-2-124(1)(a)(IV) C.R.S.

## III. ORDER

### A. The Commission Orders That:

1. The Rules Implementing the Renewable Energy Standard, 4 *Code of Colorado Regulations* 723-3, contained in redline and strikeout format attached to this Recommended Decision as Attachment A are adopted, and are available through the Commission's Electronic Filings (E-Filings) system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=13R-0901E

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director