

(Decision No. C93-494)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF PUBLIC SERVICE COMPANY)	
OF COLORADO, 1225 - 17TH STREET,)	DOCKET NO. 93A-099EG
DENVER, COLORADO 80202, FOR AUTHORITY TO)	
IMPLEMENT DEMAND SIDE MANAGEMENT)	ORDER GRANTING
PROGRAMS DEVELOPED BY THE DEMAND SIDE)	APPLICATION
MANAGEMENT COLLABORATIVE PROCESS.)	

Mailed Date: May 12, 1993
Adopted Date: May 5, 1993

STATEMENT

BY THE COMMISSION:

The Public Utilities Commission of the State of Colorado ("PUC" or "Commission") makes the following findings of fact and conclusions of law concerning the Milestone IV Program Applications ("Applications") filed on or about February 16, 1993.

I. BACKGROUND

1. On April 16, 1993, the Commission conducted a hearing on the applications, took testimony from witnesses, received exhibits into evidence and heard the statements and arguments by counsel for interested parties.

2. The applications were the product of a Collaborative Process ("CP") involving numerous participants. Those participants included Public Service Company of Colorado ("PSCo" or "Company"), the Land and Water Fund of the Rockies (the "Fund"), the Colorado Office of Consumer Counsel ("OCC"), the Staff of the Public Utilities Commission ("Staff"), the Office of Energy Conservation ("OEC"), the Colorado Business Alliance Against Unfair Utility Practices ("Alliance"), trade allies, customer class representatives, and other interested parties. A full list of the CP participants is attached hereto as Exhibit A (Please, see attached) and incorporated herein by this reference.

3. The CP was designed to consider and recommend to this Commission certain demand side management programs ("DSM programs") for the Company. The Dsm programs were intended to be clearly cost-effective, to have acceptable impact upon ratepayers and rates, and to have the potential to save large amounts of electricity. The CP set forth its Guiding Principles for DSM programs in a workplan submitted to this Commission on or about October 1, 1991 ("Workplan"), which workplan was the subject of special open meetings before this Commission on October 15 and 31, 1991, and of an interim order, Decision No. C91-1549-I, mailed on November 27, 1991.

4. The workplan and the CP arose from Revised Settlement agreement II ("Agreement") in Docket No. 91S-091EG and Docket No. 90F-226E, which Agreement was approved by the Commission on July 17, 1991, in Decision No. C91-918.

II. FINDINGS OF FACT

5. Throughout the CP the participants have filed monthly reports advising the Commission of the status of the process. The Commission has conducted hearings and entered decisions involving the CP, as part of its statutory authority to adopt all necessary rates, charges, and regulations, to generally supervise and regulate every public utility in this state, and to do all things necessary or convenient in the exercise of such power over every public utility in the State of Colorado.

6. Briefly, the seven DSM programs submitted to the Commission for approval are as follows:¹

a. Residential New Construction Program

The objective of this program is to reduce electrical energy consumption in new homes by upgrading standard construction practices for energy-efficient lighting and increasing builder and consumer knowledge about and acceptance of energy-efficient lighting. As proposed, the program will provide rebates and cooperative advertising to home builders to encourage them to upgrade kitchen lighting to T-8 fixtures. Rebates are expected to average about \$20 per fixture. PSCo will work directly with builders that install program measures in new construction sites.

¹ Complete details for each DSM program, including program descriptions, eligibility requirements, rebates, target markets, administration, quality control, estimated participation and impacts, promotional strategies, monitoring, evaluation methodology, staffing, policy issues, budget requirements, and program milestones are set forth in the Public Service Company of Colorado Collaborative Process Final Report dated February 16, 1993.

Initially, the primary target market will be production builders. However, the program will be available to any builder in PSCo's service territory that meets the program's eligibility requirements.

b. The Residential Equipment Replacement Program

The objective of this program is to reduce electric demand and energy by encouraging the purchase and installation of high-efficiency equipment. As proposed, the program will target two specific electric measures: (1) compact fluorescent lamps as a replacement for incandescent lamps; and (2) gas clothes dryers as a replacement for electric dryers.

The program will offer cash rebates to electric residential customers who purchase compact fluorescent lamps and gas clothes dryers.

The compact fluorescent lamp program will offer cash rebates of \$8-\$12, depending on the wattage and prices of the lamps. The program will provide incentives for customers through a mail-order offer and a retail rebate. PSCo will work with local retailers to promote the retail rebate.

The gas clothes dryer program will offer an estimated rebate of \$100, which will be delivered through a mail-back rebate or a retail buy-down. PSCo will work with local retailers and installers in promoting this program. PSCo will work with local trade allies to maintain supplies of eligible products.

All existing PSCo residential electric customers will be eligible for this program.

c. Residential Direct Installation Program

The objective of this program is to reduce electric demand and energy by encouraging the installation of energy-efficient measures in homes that use electricity as their primary heating source. As proposed, the program will provide an initial free energy survey to participants, who will also

the program will provide an initial free energy survey to participants, who will also have the opportunity to purchase the cost-effective measures identified in the survey and to have them installed at subsidized rates. Rebates will be set at 75 percent of the installed costs of the measures. A pricing schedule for measure installation will be created. The program will be open to any existing residential customer residing in a one to four-unit dwelling whose primary space-heating source is electricity.

d. Nonresidential New Construction/Major Renovation Program

The objective of this program is to capture "lost opportunities" to reduce electric demand and energy in new or extensively remodeled commercial and industrial facilities by providing electric customers with design assistance and rebates for the construction of energy-efficient buildings. As proposed, the program will provide architectural and engineering technical evaluation assistance and direct rebates to developers or owners to encourage them to upgrade their systems and equipment to a higher level of energy efficiency during building design. The target market will be new PSCo nonresidential customers making energy-related choices during building design.

e. Nonresidential Equipment Replacement/Remodel Program

The objective of this program is to encourage nonresidential electric customers to install energy-efficient equipment at the time they are replacing their old or worn out equipment or are remodeling their interior spaces. As proposed, the program will provide direct rebates to PSCo account holders that upgrade their equipment so as to employ energy-efficient equipment and lighting options. The program will be divided into prescriptive and custom components. To be eligible for the program, equipment must be installed in the PSCo electric service territory. Participants in the custom component of the program must have an average monthly demand of at least 250 kW or PSCo must deter-

mine that they are capable of achieving more than a 10 kW reduction.

f. Industrial Process Efficiency Program

The objective of this program is to encourage industrial customers to install energy-efficient equipment and processes in their plants. As proposed, the program will provide direct rebates to PSCo industrial account holders to encourage them to upgrade their process equipment to a higher level of energy efficiency. The rebate will be based on a two-year simple payback period for process equipment found to be worthwhile. To be eligible for the program, equipment must be installed in the PSCo electric service territory. Interruptible customers will be eligible for this program.

g. Multi Program Monitoring and Evaluation

This component of the applications covers the costs of two functions that apply to all DSM programs described above. The functions are:

(1) the development and administration of a common database for monitoring DSM program implementation and evaluation data; and

(2) an independent review of PSCo evaluation plans and draft results.

PSCo will explore the possibility of coordinating its database development with other utilities in Colorado. In addition, the CP will undertake oversight of the DSM programs in order to ensure that the programs and evaluation processes proceed appropriately and to communicate the progress of the programs and evaluations to interested parties and the Commission.

7. The workplan identified ten Guiding Principles designed to assist and to inform the CP. Those principles were the subject of an interim order in Docket No. 91A-481EG mailed on November 27, 1991. It is useful to review those Guiding Principles at this time. The principles are:

a. One of the goals of the CP will be to develop for early implementation by PSCo, a number of DSM programs which are agreed to be

clearly cost-effective, to have an acceptable rate impact, and to have the potential to save large amounts of electricity;

b. The CP's early focus will be on programs developed by other utilities which, with modification, would be applicable to PSCo's system. Lessons learned from other utility programs as well as PSCo's pilot programs will be incorporated;

c. The CP will develop monitoring and evaluation plans for each DSM program;

d. The analysis and detailed program design will be done by PSCo with ongoing participation and review by the nonutility parties;

e. The CP believes that DSM programs will be developed for all customer classes of PSCo including industrial, commercial, residential, and low-income users. The CP believes it is important that excessive costs are not imposed on any one customer class. As a general matter, cost-recovery issues will be addressed in other dockets.² All PSCo-sponsored DSM programs will be reviewed and evaluated by the CP;

f. The CP will focus on programs that include direct investment in DSM by PSCo as well as other types of PSCo-sponsored activities (as opposed to programs that rely completely on customer responses to price signals);

g. Fuel switching between PSCo customers will not be ruled out by the CP. Gas DSM may also be considered in the design of DSM programs within the CP;

h. To effectively participate, the nonutility parties will need technical assistance in reviewing the DSM programs developed by PSCo. In most situations, this assistance can be best rendered by outside consultants with experience in DSM program design;

i. To effectively develop DSM programs and participate in the CP, PSCo may need technical assistance through increased staffing or consultants;

² In fact we approved a Demand Side Management Cost Adjust Clause for these programs in Decision No. C93-36.

j. It is imperative that the Commission be kept timely informed of the progress of the CP.

8. In its interim order of November 27, 1991, the Commission expressly stated that it agreed with each principle set forth above, with the exception of the first Guiding Principle. With respect to that principle, the Commission responded with a series of questions regarding the criteria to determine cost-effectiveness, the relationship of the DSM programs to the residential sector, the development of residential gas DSM programs, and other issues. Having now reviewed all proposed DSM programs, taken evidence, and heard the statements and arguments of counsel for interested parties, the Commission agrees with the first Guiding Principle. Further, the Commission finds that the criteria for determination of cost-effectiveness, and those other issues identified in the interim order of November 27, 1991, have been answered to the Commission's satisfaction.

9. The CP was expressly designed to operate on a consensual basis and in a non-adversarial forum which sought a shared vision of appropriate design, selection, and evaluation criteria. Decisions were made by the CP by consensus, consensus meaning that no parties were in disagreement. Silence was assumed to be agreement. The evidence establishes that the applications were developed according to consensus design and that no party to the CP disagreed with the package of DSM programs.

10. The DSM programs frequently use the phrase "trade allies." Trade allies are nonutility participants in the energy-efficiency market including suppliers, auditors, energy service companies, engineers, architects, designers, and plumbing, heating, cooling, sheet metal, refrigeration, air conditioning, electrical, and mechanical contractors.

11. The Commission finds and determines that, for these programs it is generally more cost-effective and efficient to utilize trade allies for sales and service delivery aspects of DSM. The Company will use the competitive resource acquisition process to acquire such trade ally products and services where it is practical and economical to do so. In those cases where competitive resource acquisition processes are not used, the Company will explain why it did not use such competitive procedures.

12. The Commission has stated in another docket that integrated resource planning ("IRP") is a well-established and valuable concept by which plans intended to minimize cost of electric service to the people in the State of Colorado, while preserving the reliability of electric utility service, can be accomplished. Statement of Adoption, Docket No. 91R-642E, dated December 30, 1992. In the Statement of Adoption, the Commission noted that promulgating rules concerning IRP would be consistent

with the National Energy Policy Act of 1992 ("NEPA"), specifically that portion of the Act entitled "Encouragement of Investments in Conservation and Energy Efficiency by Electric Utilities."

13. The Commission finds that the adoption of those DSM programs is consistent with NEPA and consistent with the Commission's obligation and authority to consider any factors which influence an adequate supply of energy and encourage energy conservation. See § 40-3-111, C.R.S.

14. DSM programs should be developed for all customer classes of the company, and excessive costs should not be imposed on any one customer class. In reviewing the programs submitted by the CP, the Commission reaffirms its intent to review costs and other price-related issues as part of its normal regulatory authority.

15. The Commission commends the CP participants for the way they have conducted their work and for the DSM programs developed through the CP. The Commission has benefited by the regular reports submitted by the CP and acknowledges that the workplan and various reports represent a very positive approach to a difficult and complicated series of interrelated issues.

III. CONCLUSIONS OF LAW

16. The Commission has been given broad constitutional and statutory authority to regulate public utilities in Colorado, Colo. Const. art. XXV; §§ 40-3-102 and 40-3-111, C.R.S. The Commission's power in this area is both legislative and judicial in nature Colorado-Ute Electric Ass'n v. Public Util. Comm'n, 602 P.2d 861 (19779). It includes the power to do whatever the Commission deems necessary or convenient to accomplish the legislative functions delegated to it, City of Montrose v. Public Util. Comm'n, 629 P.2d 619 (Colo. 1981).

17. In discharging its role to regulate public utilities in Colorado, the Commission has equally broad authority to make determinations regarding the reasonableness and sufficiency of rates and fares charged or collected by any public utility for any service, product, or commodity, § 40-3-111, C.R.S. In determining utility rates, the Commission may consider any factor which affects the sufficiency of rates and "may consider any factors which influence an adequate supply of energy and any factors which encourage energy conservation.", § 40-3-111, C.R.S.

18. The DSM programs and the CP related to such programs are innovative approaches to public participation in utility regulation and program development. The DSM programs under review by this Commission, and subject to this order, present a variety of legal issues, including the justness and reasonableness of rates, anti-trust concerns, access to proprietary data, conflicts of interests among CP participants, and other issues.

19. In reviewing the antitrust implications of the DSM programs and the CP, the Commission has been fully briefed on the so-called "state action immunity doctrine," first announced by the United States Supreme Court in Parker v. Brown, 317 U.S. 341, (1943), and elaborated upon in subsequent decisions, including California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), Patrick v. Burget, 486 U.S. 94, (1988), and F.T.C. v. Ticor Title Insurance Co., __, U.S. __, 112 S. Ct. 2169 (1992).

20. Generally, the state action immunity doctrine provides that those who engaged in otherwise unlawful anti-competitive conduct are exempt from federal antitrust liability when a two-prong test is satisfied. First, the State must articulate a clear and affirmative policy to allow the challenged conduct. Second, the State must actively supervise the anti-competitive conduct of private actors. F.T.C. v. Ticor, *supra*; Town of Hallie, *supra*; Alright Colorado, Inc. v. City and County of Denver, 937 F.2d 1502 (10th Cir. 1991). For the reasons that follow, the Commission finds that the state action doctrine operates to immunize from federal antitrust liability conduct that has occurred in the CP and conduct which may foreseeably take place in the future as the proposed DSM programs are implemented. For related reasons, the Commission also finds that there will be no state antitrust liability for conduct which has occurred, or may in the future occur, in connection with the proposed DSM programs and the CP.

21. As noted above, the first prong of the Parker doctrine requires a clearly articulated and affirmatively expressed state policy. Express authorization of the allegedly anti-competitive acts is not required. Town of Hallie, 471 U.S. at 42. The Colorado Constitution and §§ 40-3-102 and 40-3-111, C.R.S., clearly articulate a state policy of entrusting regulatory authority over utilities to the Commission and of vesting the Commission with legislative authority in the area.

The Commission has expressly, and by implication, articulated its intent with respect to DSM programs and the CP. By its interim order of November 17, 1991, the Commission expressly agreed with the Guiding Principles (pages 3 through 7) and the consensus-based decision-making process of the CP (page 9): "The Commission views the CP as an appropriate way to increase the deployment of DSM resources in PSCo's portfolio. The Commission directs the CP to present recommendations for the continuation or discontinuation of the CP at least 60 days prior to October 1, 1992." The Commission further commended the workplan as a "very positive approach" for the design of DSM programs, interim order, page 10.

22. There can be no doubt that the Commission has broad authority to review and approve DSM programs. The DSM programs under consideration, when implemented, should serve to encourage the efficient use of energy by all classes of customers. The adop-

production facilities. This, in turn, would be beneficial to rate-payers by operating to control costs and rates.

The State of Colorado has clearly articulated and affirmatively expressed a policy directing the Commission to consider energy conservation programs, § 40-3-111, C.R.S. The Commission, in its legislative capacity, has encouraged PSCo and other Colorado utilities to develop and operate rebate and DSM programs.

23. The rebate and DSM programs may affect competition in the markets for heating and lighting equipment, for new residential construction, for gas clothes dryers, for commercial and industrial building design, for industrial process equipment, for energy-efficient measures installation, and for the other markets implicated by the particulars of the DSM programs. In reviewing the DSM programs submitted in this docket, the Commission has evaluated and considered the competitive impact the programs may have. The Commission, nevertheless, finds and determines that energy conservation and the efficient utilization of energy are sufficiently important considerations to permit the anti-competitive effects that might occur. In addition, in many cases the proposed DSM programs may have pro-competitive effects by increasing demand for energy efficient goods and services.

24. The second prong of the Parker doctrine, the active supervision requirement, is satisfied when a state regulatory program with authority to regulate the challenged conduct exists and such authority is actually employed. Patrick v. Burget, supra. Colo. Const. art. XXV and, §§ 40-3-102 and 40-3-111, C.R.S., vest the Commission with the authority to regulate utilities in Colorado, to establish rates charged by the utilities, and to determine the rules, regulations, practices, or contracts that affect such rates. The existence of a comprehensive regulatory program with oversight authority by the Commission over DSM programs and the CP cannot be questioned. Moreover, the record in this docket and in related dockets establishes that the Commission has employed its regulatory authority.

25. The Commission has promulgated rules regarding Electric Integrated Resources Planning, Docket No. 91R-642E. The rules apply to all electric utilities in Colorado required to obtain certificates of public convenience and necessity, or subject to the Commission's authority pursuant to § 40-3-101, C.R.S., except cooperative electric associations as defined in § 40-9.5-102, C.R.S. The rules require every utility to file an IRP with the Commission and require that the IRP include a demand-side resource assessment. The rules spell out in detail the considerations and tests that a utility must employ in making its demand-side resource assessment. Each utility must accompany its IRP filing with an application requesting Commission approval.

26. Through rulemakings, investigations, and adjudications, like this docket, the Commission has exercised its authority over the CP and DSM programs. The Commission has specifically approved the development of the proposed DSM programs, will actively supervise implementation of those programs, and will continue to review pricing, incentive, rebate, and decoupling issues in other dockets. Furthermore, the Commission will continue to monitor the impact of DSM programs approved in this docket, and to refine those programs as needed to further state policies regarding the efficient use of energy in Colorado.

27. In summary, the Commission concludes that both prongs of the state action doctrine have been satisfied and that participants in the CP and approved DSM programs should be immune from federal antitrust liability.

28. The reasons that establish immunity from federal antitrust liability also establish immunity from antitrust liability under Colorado law, § 6-4-119, C.R.S., provides:

It is the intent of the general assembly that in construing this article, the courts shall use as a guide interpretations given by the federal court to comparable federal antitrust laws.

Moreover, § 6-4-108(4), C.R.S., provides, in relevant part:

Any person, activity, or conduct exempt or immune under the laws of this state or exempt or immune from the provisions of the federal antitrust always shall be exempt or immune from the provisions of this article . . .

It is clearly the intent of the Colorado Legislature to harmonize the application of state antitrust law with the application of federal antitrust law. Because the state action doctrine immunizes conduct associated with the CP and with PUC-approved DSM programs from liability under the federal antitrust laws, no sound reason exists to impose liability under state antitrust law upon the DSM program or CP participants.

IV. CONCLUSIONS

The DSM programs submitted by the applications are clearly cost-effective, have an acceptable rate impact, and have the potential to save large amounts of electricity. The DSM programs are just, reasonable, and in the public interest. The Commission approves the seven DSM programs and directs PSCo to begin implementation of the programs.

THEREFORE THE COMMISSION ORDERS THAT:

1. The joint application for approval of the above-referenced demand side management program is granted consistent with the above discussion.

2. The 20-day time period provided for by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration begins on the first day after the mailing or serving of this Decision and Order.

This Order is effective on its Mailed Date.

ADOPTED IN OPEN MEETING May 5, 1993.



ATTEST: A TRUE COPY

Bruce N. Smith
Bruce N. Smith
Executive Secretary

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT E. TEMMER

CHRISTINE E. M. ALVAREZ

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FIX:srs

PARTICIPANTS LIST

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