Decision No. C06-0305

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 05R-112E

IN THE MATTER OF THE PROPOSED RULES IMPLEMENTING RENEWABLE ENERGY STANDARDS 4 CCR 723-3.

ORDER GRANTING, IN PART, AND DENYING, IN PART, REHEARING, REARGUMENT AND RECONSIDERATION

Mailed Date: March 30, 2006
Adopted Date: March 30, 2006

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of applications for Rehearing, Reargument and Reconsideration (RRR) filed to Decision No. C06-0218 by

Public Service Company of Colorado (Public Service); and by Western Resource Advocates (WRA). Deliberations on the applications for RRR were held on March 30, 2006.

1. Rule 3655 – Resource Acquisition

2. WRA contends the Commission misinterpreted its prior RRR request regarding Rule 3655(m)(I). According to WRA, its prior pleading was concerned that the Commission scaled back consideration of the broader characteristics in two respects. First, the Commission allowed Qualifying Retail Utilities (QRU) to use discretion, and second, the Commission eliminated consideration of the broader characteristics from the bid solicitation and bid evaluation stage, and instead placed the consideration as part of the QRU's due diligence phase. WRA argues that just because the Commission removed the weighting requirement, it does not follow that the consideration of the broader considerations should be discretionary and not mandatory. WRA also asserts that if bids are evaluated and ranked solely based on price and certain bids are eliminated on that basis, it may be too late in the process for the underlying characteristics of the resources to be considered in the due diligence phase.

3. Our prior rulings regarding the resource acquisition intentionally provide the QRU more discretion for how the broader characteristics are incorporated into the resource acquisition process. We decline to make the consideration of the policy goals, which are contained in the Overview and Purpose rule[1], a mandatory aspect of these Rules or to require their incorporation into the bid solicitation and bid evaluation process as WRA advocates. We conclude that it is appropriate to allow QRU's management the discretion on how to incorporate the broader characteristics into the resource acquisition process, since ultimately the QRU will be held accountable as to whether it complied with the Standard. As stated in Decision

[1] *See* Rule 3651.

No. C06-0218, we found that all of the policy goals of Amendment 37 will be furthered by implementing percentage mandates under the statute.[2] We also noted that absent explicit legislative assignments for the other goals, we declined to assign arbitrary weighting factors to the broader characteristics. Lastly, we expressed concerns regarding the impossible situation of having to balance the goals' interests between each of the policy goals. Thus, we deny reconsideration on Rule 3655(m)(I).

2. Rule 3659 – Renewable Energy Credits

4. WRA maintains the Commission misconstrued its prior comments regarding environmental claims. WRA contends its argument was simple—a Renewable Energy Credit (REC) can only be used for a single purpose and if a customer lays claim to the environmental attributes associated with a renewable energy facility (when the REC has been transferred to a QRU) the customer is violating that single purpose rule. According to WRA, the crux of the issue is whether both a QRU and a customer can claim to own the same rights to the full set of non-energy attributes. It proposes a new rule 3659(f)(IV) be added to address the issue of a customer who wishes to publicize environmental or renewable claims relating to the RECs generated by the customer's on-site system. WRA asserts that its proposal is consistent with national standards on environmental claims for tradable RECs.

5. We find that Rule 3659(c), which requires all contracts between the QRU and an owner of a renewable resources to clearly specify the entity who shall own the REC associated with the energy generated by the facility, properly addresses WRA's concern. Furthermore, we find that it would be inappropriate for a QRU to police its customers to ensure that they are not laying claim to a REC that the customer contractually transferred to a QRU. As we stated in

[2] *See* paragraphs 12 and 13 on pages 5-6.

Decision No. C06-00218, there are constitutional and jurisdictional issues surrounding a customer's right to advertise their use of renewable energy.[3] Thus we deny this request for reconsideration.

3. Rule 3660 – Cost Recovery

6. WRA contends that the Commission's prior ruling did not address its comments regarding the potential impact of only showing costs of the rider without the corresponding benefits. According to WRA, requiring all costs of renewable energy used to comply with Amendment 37 to be recovered through a rider without taking into account the avoided costs and other savings associated with that renewable energy is not informing the customer about how much Amendment 37 is costing a customer.

7. As remedies for its concerns, WRA asks the Commission to reinstate the original language in 3660(a) which provides that costs can be moved into base rates, and suggests that the type of analysis which a QRU is required to perform under the annual retail rate impact Rule 3661(f) could be the best available source of information for disclosure to customers for a net cost analysis.

8. We deny WRA's request to reinstate the original language in 3660(a) because this issue was previously raised and ruled upon in Decision No. C06-0091.[4] We find the discussion in paragraph 106 of Decision No. C06-0091 also addresses the potential impact of our prior ruling that the Amendment 37 rider shows customers the costs of the program, but none of the related benefits. In that paragraph, the Commission states that the actual fuel savings created when a renewable energy resource (wind generation) displaces higher priced natural gas

[3] *See* paragraph 20 and 21 on page 8.

[4] *See* paragraphs 99 and 100 on pages 38-39.

generation are passed onto ratepayers through the QRU's fuel adjustment clause. Thus, the costs and benefits of Amendment 37 are captured through two different rate mechanisms. To net the two rate mechanisms together would require something akin to the "true net cost analysis" which WRA previously advocated. We rejected the "true net cost analysis" because it would be a burdensome data and labor intensive process, as well as an unwise use of the limited funds available under Amendment 37.

9. We find WRA's new request to use the net cost analysis under Rule 3661(f) is an inappropriate request for reconsideration since the Commission had previously denied WRA's request for a "true net cost analysis." WRA cannot now suggest an aspect from a different rule to achieve the net cost analysis it originally sought to obtain. Thus we deny reconsideration on this issue.

10. WRA contends the Commission has misinterpreted its comments regarding the differences that may arise between projected and actual retail rate impacts. WRA states that the situation it attempted to address occurs when the QRU fails to achieve the standard, and has spent the approved budget from the Compliance Plan, yet actual fuel prices subsequent to the filing of the Compliance Plan justify a larger budget. WRA believes the retail rate impact should not be set in stone by a budget based upon projections done some 18 months prior to the end of the compliance period. Rather, WRA advocates that the QRU should retain the obligation to revise its budget as necessary to ensure compliance with the statute. It suggests the Commission clarify that the retail rate impact limitation, which allows the QRU to avoid administrative penalties, is one based upon actual data for the Compliance Year and not one based solely upon projections.

11. We find that WRA's request has merit. The most compelling argument in favor of the concept of the "true-up" is consistency. When a QRU calculates whether it complied with the Standard for a given Compliance Year, it will use the actual MWH values in the Compliance Year, not the projected and approved values from its Compliance Plan. Therefore if a QRU is able to claim that the Retail Rate Impact cap prevented it from achieving compliance with the Standard, we conclude that the Retail Rate Impact cap should be recalculated to reflect the actual costs incurred by the QRU during the Compliance Year. We note that under the Rules, a QRU will have five months in which to determine whether it achieved compliance with the Standard and to perform the necessary recalculations. Depending upon those results, the QRU shall acquire additional RECs until either the additional funds have been spent from the recalculated Retail Rate Impact cap or it has achieved compliance with the Standard. Thus we grant reconsideration on this request. Rule 3662(a)(XI) now reads:

> The funds expended and the retail rate impact of the Eligible Renewable Energy acquired. The Retail Rate Impact cap shall be recalculated based on the actual Compliance Year values if the QRU developed the Retail Rate Impact cap pursuant to Rule 3661(f). To the extent the recalculation of the Retail Rate Impact cap demonstrates that additional funds are available based on actual Compliance Year values, the QRU shall use those additional funds to acquire RECs, to the extent necessary, to achieve the compliance levels set forth in Rules 3654(a) and (b) or until the additional funds have been spent if the QRU intends to claim that the Retail Rate Impact cap prevented it from achieving compliance with the Standard.

4. Rule 3661 – Retail Rate Impact

12. Public Service suggests that the phrase "that were constructed by the QRU or contracted for by the QRU after the effective date of these rules" be substituted for the current phrase "that were not commercially operational to the QRU at the time of performance of the two modeling scenarios by the QRU under Rule 3661(f)(I)" in Rule 3661(f)(II). According to Public Service, the on-going costs are not just the costs of resources that have not reached

commercial operation, but should include the costs of all contracts entered into as part of the Amendment 37 process.

13. We find the suggested language of Public Service an improvement over the existing language regarding the on-going cost concept. As a result, we grant reconsideration. Rule 3661(f)(II) now reads:

> The QRU shall use the comparison of the two model runs of the RES Planning Period along with any additional analysis needed to calculate the estimated annual net retail rate impact for the first Compliance Year of the RES Planning Period. The maximum retail rate impact shall not exceed one percent of the total retail bill annually for each customer. To the extent the RES Plan exceeds this maximum retail rate impact, the QRU shall modify the RES Plan to limit the acquisition of Eligible Renewable Energy so that the QRU Compliance Plan does not exceed the maximum retail rate impact for the first Compliance Year of the RES Planning Period. In calculating the annual net retail rate impact in each Compliance Plan for the first Compliance Year of the RES Planning Period, the QRU shall take into account the on-going annual costs of all Eligible Renewable Energy that the QRU has contracted to acquire under the Standard Rebate Offer under Rule 3658 and all Eligible Renewable Energy from resources that were constructed by the QRU or contracted for by the QRU after the effective date of these Rules.

14. WRA again insists that the plain language of the statute requires that all eligible renewable energy that is counted towards compliance must also be accounted for in the retail rate impact. We deny this request for reconsideration because this issue was previously raised and ruled upon in Decision No. C06-0091.[5]

5. Rule 3663 – Compliance Report Review

15. Public Service asks that the phrase "to the Retail Rate Impact limit" be put back into Rule 3663(b)(III) because it believes the Commission erred when it struck it from the rule.

16. Under the structure of this portion of the Rules, Rule 3663(b)(II) is intended to address the situation when a QRU claims that the Retail Rate Impact cap prevented it from

[5] See paragraphs 105 and 106 on pages 41-43.

achieving compliance with the Standard. In those instances, the QRU will have the burden of proof. We added this rule in the last round of RRR because § 40-2-124(i), C.R.S. specifically provides that a QRU must "demonstrate" that it could not achieve compliance with the Standard due to the Retail Rate Impact cap in order to avoid being assessed administrative penalties. In contrast, Rule 3663(b)(III) is intended to address the other situations where the proponent of an order (Staff, for example) would have the burden of proof in the compliance hearing.

17. The consequence of granting Public Service's request would be to create two conflicting rules regarding who maintains the burden of proof when the QRU claims the Retail Rate Impact cap prevented compliance. We find Rule 3663(b)(II) properly addresses the point raised by Public Service. Thus we deny reconsideration on Rule 3663(b)(III).

18. WRA believes the Commission's prior modification to Rule 3663(c)(I)(A) which added the phrase "all or part of" is contrary to the statute because this, in its opinion, effectively sets an upper bound for administrative penalties. As a solution, WRA suggests that the phrase "all or part of" be replaced with the phrase "a minimum of" in order to remain consistent with the statute.

19. We find that WRA has misconstrued the rule. Rule 3663 (c)(I)(A) currently reads:

> Determine for each component for which there was noncompliance the cost that would have been incurred by the QRU to fully comply with such component standard through the acquisition of RECs and assess all or part of this amount *as part of an administrative penalty*. (emphasis added).

20. We conclude that the current rule does not effectively set an upper bound for administrative penalties. As a result, we deny reconsideration on Rule 3663(c)(I)(A).

II. ORDER

A. The Commission Orders That:

1. The applications for Rehearing, Reargument and Reconsideration filed by Public Service Company of Colorado and Western Resource Advocates are granted, in part, and denied, in part, consistent with the above discussion.

2. The Commission adopts the changes to the Proposed Rules Implementing Renewable Energy Standards 4 CCR 723-3 attached to this Order as Attachment A, as those Rules were previously adopted pursuant to Decision No. C06-0218E.

3. The opinion of the Attorney General of the State of Colorado shall be obtained regarding the constitutionality and legality of the rules.

4. A copy of the rules adopted by the Order shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*. The rules shall be submitted to the appropriate committee of the Colorado General Assembly if the General Assembly is in session at the time this Order becomes effective, or to the committee on legal services, if the General Assembly is not in session, for an opinion as to whether the adopted rules conform with § 24-4-103, C.R.S.

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

6. This Order is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING March 30, 2006.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

GREGORY E. SOPKIN

POLLY PAGE

CARL MILLER

Commissioners

COMMISSIONER CARL MILLER
CONCURRING, IN PART,
DISSENTING, IN PART.

III. COMMISSIONER CARL MILLER CONCURRING, IN PART, AND DISSENTING, IN PART

A. Overview – Rule 3651

1. Recognizing the Commission's and Staff's goal to reduce, streamline, and simplify regulations, I see no need to include the legislative declaration as an overview for Rule 3651. The legislative declaration has no force of law and is therefore meaningless in this rulemaking proceeding. Including the legislative declaration may in fact cause confusion and a misinterpretation, thereby providing opportunity for unwarranted challenges and disputes.

2. I believe Senate Bill 05-143 captures the spirit and intent of Amendment 37 as expressed by the Colorado voters. It should be noted that no attempt was made by individuals, parties, or organizations to include the legislative declaration language in statute (*i.e.*, SB-05-143).

3. For the reasons stated, I oppose the inclusion of the legislative declaration as an overview statement to Rule 3651.

B. Annual Compliance Report – Rule 3662(a)(XI)

4. I dissent from the majority opinion for the following reason. Although I recognize the merits for a "true-up" and the argument for consistency, I prefer to address these and possibly other issues after experiencing a complete compliance cycle. Amendment 37 is a work-in-progress, a new endeavor for all parties. After the initial compliance cycle, I believe the information and data collected will provide all parties with a better understanding and allow for more accurate program changes and adjustment.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CARL MILLER

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Commissioner

RENEWABLE ENERGY STANDARD

[ONLY CHANGED PORTIONS OF THE RULES SHOWN]

3661. Retail Rate Impact

(a) The net rate impact of actions taken by a QRU to comply with the Renewable Energy Standard shall not exceed one percent of the total electric bill annually for each customer of that QRU.

(b) The net rate impact shall include the prudently incurred direct and indirect costs of all actions by a QRU to meet the Renewable Energy Standard, including, but not limited to, program administration, rebates and performance-based incentives, payments under Renewable Energy Supply Contracts, payments under Renewable Energy Credit Contracts, payments made for RECs purchased through brokers or exchanges, computer modeling and analysis time, and QRU investment in and return on investment for Eligible Renewable Energy Resources.

(c) The administrative costs of a QRU to implement these rules is capped at ten percent per year of the total annual collection. A QRU may include in its Compliance Plan a waiver request of this rule during the initial ramp-up stage of the QRU's program.

(d) For purposes of calculating the retail rate impact, the QRU shall use the same methodologies and assumptions it used in its most recently approved Least-Cost Planning case, unless otherwise approved by the Commission. Confidential information may be protected in accordance with Rules 1100 through1102 of the Commission's Rules of Practice and Procedure.

(e) In its Compliance Plan filed under Rule 3657, the QRU shall estimate the retail rate impact of its plan to comply with the Renewable Energy Standard over the upcoming Compliance Year and shall submit a report detailing the development of the retail rate impact estimate. The Compliance Plan shall identify the funds that need to be made available to the QRU to comply with the Renewable Energy Standard and the Retail Rate Impact rule. By approving the QRU's Compliance Plan, the Commission will be approving the QRU's budget for acquiring Eligible Renewable Energy over the Compliance Year. Once approved by the Commission, the QRU shall implement its Compliance Plan. Actions taken by a QRU in compliance with the filed and approved Compliance Plan shall be deemed prudent.

(f) The basic method for performing the estimate of the retail rate impact limit is as follows:

(I) The QRU shall determine all commercially available resources to the QRU, either through ownership or by contract, at the time of the beginning of the Compliance Year and for a minimum of the ten years thereafter (the "RES Planning Period"). The projected costs of these available resources shall be reflected in both of the scenarios analyzed by the QRU's computer planning models under this paragraph. The QRU shall determine the QRU's capacity and energy requirements over the RES Planning Period. The QRU shall develop two scenarios to estimate the resource composition of the QRU's future electric system and the cost of that system over the RES Planning Period. The first scenario, a Renewable Energy Standard Plan or "RES Plan" should reflect the QRU's plans and actions to acquire new Eligible Renewable Energy necessary to meet the Renewable Energy Standard reflecting a gradual ramp-up to the 10% level. The second scenario,

a "No RES Plan" should reflect the QRU's resource plan that meets the QRU's capacity and energy requirements over the RES Planning Period by replacing the new Eligible Renewable Energy Resources in the RES Plan with new nonrenewable resources reasonably available. For purposes of this rule, new Eligible Renewable Energy means Eligible Renewable Energy from resources which are not commercially operational at the time these two modeling scenarios are performed.

(II) The QRU shall use the comparison of the two model runs of the RES Planning Period along with any additional analysis needed to calculate the estimated annual net retail rate impact for the first Compliance Year of the RES Planning Period. The maximum retail rate impact shall not exceed one percent of the total retail bill annually for each customer. To the extent the RES Plan exceeds this maximum retail rate impact, the QRU shall modify the RES Plan to limit the acquisition of Eligible Renewable Energy so that the QRU Compliance Plan does not exceed the maximum retail rate impact for the first Compliance Year of the RES Planning Period. In calculating the annual net retail rate impact in each Compliance Plan for the first Compliance Year of the RES Planning Period, the QRU shall take into account the on-going annual costs of all Eligible Renewable Energy that the QRU has contracted to acquire under the Standard Rebate Offer under Rule 3658 and all Eligible Renewable Energy from resources that were constructed by the QRU or contracted for by the QRU after the effective date of these Rules.~~not commercially operational to the QRU at the time of performance of the two modeling scenarios by the QRU under Rule 3661(f)(I).~~

g) Any QRU with annual retail sales of less than five million megawatt-hours can use an alternate method to determine the estimate of the retail rate impact. The alternative method can be used for those RES Planning Period years when the only remaining portion of the Renewable Energy Standard with which the QRU needs to comply is the Eligible Renewable Energy that must be acquired from Solar Electric Generating Technologies.

(I) The retail rate impact will be determined by using the estimated costs of the proposed Solar Electric Generating Technologies less the estimated annual average costs of energy of existing resources that would be replaced with energy generated by the proposed Solar Electric Generating Technologies. The QRU shall also incorporate into this retail rate impact analysis other cost savings created by the deployment of the Solar Electric Generating Technologies and any other cost savings from the deployment of other non-solar renewable energy resources used to meet the Standard. These cost savings include, but are not limited to, the avoided or deferred costs of generation, transmission and distribution facilities.

(II) The QRU will then convert this net cost figure into a percent of total electric bill annually for each customer. In no event shall the percent of total electric bill annually exceed one percent for each customer. To the extent that the net cost figure results in the QRU exceeding the one percent for each customer threshold, the QRU shall modify its acquisition of Solar Electric Generating Technologies in order to not exceed the maximum retail rate impact.

3662. Annual Compliance Report

(a) Beginning in 2007, the QRU shall file an Annual Compliance Report on June 1 to report on the status of the QRU's compliance with the Renewable Energy Standard for the most recently completed Compliance Year. The Annual Compliance Report shall provide the following information for the most recently completed Compliance Year:

(I) The total megawatt-hours sold by the QRU to its retail customers in Colorado and the associated Eligible Renewable Energy required for compliance with each component of the Renewable Energy Standard;

(II) The total amount and source of Eligible Renewable Energy acquired by the QRU during the Compliance Year for each component of the Renewable Energy Standard. The QRU shall separately identify amounts of Eligible Renewable Energy by each type of resource;

(III) The total amount of Eligible Renewable Energy borrowed forward, pursuant to Rule 3654(f), in previous Compliance Years that was made up during the Compliance Year to achieve compliance with each component of the Renewable Energy Standard;

(IV) The total amount of Eligible Renewable Energy borrowed forward, pursuant to Rule 3654(f), from future Compliance Years to achieve compliance with each component of the Renewable Energy Standard in the Compliance Year;

(V) The total amount and source of Eligible Renewable Energy the QRU is carrying back from the year following the Compliance Year under Rule 3654(d)(I) to achieve compliance with each component of the Renewable Energy Standard in the Compliance Year;

(VI) The total amount of Eligible Renewable Energy the QRU has carried forward from prior calendar years under Rule 3654(d)(III) to apply in the Compliance Year for each component of the Renewable Energy Standard.

(VI) The total amount of Eligible Renewable Energy the QRU has acquired in the Compliance Year that the QRU proposes to carry forward under Rule 3654(d)(III) to future years for each component of the Renewable Energy Standard;

(VIII) The total amount of Eligible Renewable Energy the QRU has counted toward compliance with each component of the Renewable Energy Standard in the Compliance Year. The QRU shall separately identify amounts of Eligible Renewable Energy by each type of resource;

(IX) The total amount of Renewable Energy or RECs acquired by the QRU during the Compliance Year pursuant to the Standard Rebate Offer Program;

(X) Whether the QRU has invested in any Eligible Renewable Energy Resource and whether that resource is under construction or in operation; and

(XI) The funds expended and the retail rate impact of the Eligible Renewable Energy acquired. The Retail Rate Impact cap shall be recalculated based on the actual Compliance Year values if the QRU developed the Retail Rate Impact cap pursuant to Rule 3661(f). To the extent the recalculation of the Retail Rate Impact cap demonstrates that additional funds are available based on actual Compliance Year values, the QRU shall use those additional funds to acquire RECs, to the extent necessary, to achieve the compliance levels set forth in Rules 3654(a) and (b) or until the additional funds have been spent if the QRU intends to claim that the Retail Rate Impact cap prevented it from achieving compliance with the Standard.

(b) In the Annual Compliance Report, the QRU must explain whether it achieved compliance with each component of the Renewable Energy Standard during the most recently completed Compliance Year, or explain why the QRU had difficulty meeting the Renewable Energy Standard.

(c) If, in its Annual Compliance Report, the QRU did not comply with its Renewable Energy Standard for each of the RES components as a direct result of absolute limitations within a requirements contract from a wholesale electric supplier, then the QRU must explain whether it acquired a sufficient amount of either eligible RECs or documented and verified energy savings through energy efficiency and/or conservation programs, or both to rectify the noncompliance so as to excuse the QRU from any administrative fine or other administrative action.

(d) On the same date that the QRU files its Annual Compliance Report, the QRU shall post an electronic copy of its Annual Compliance Report excluding confidential material on its website to facilitate public access and review.

(e) On the same date that the QRU files its Annual Compliance Report, it shall provide the Commission with an electronic copy of its Annual Compliance Report excluding confidential material. The Commission may place the non-confidential portion of each QRU's Annual Compliance Report on the Commission's website in order to facilitate public review.