

Decision No. C14-1372-I

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

PROCEEDING NO. 14D-1013E

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IN THE MATTER OF THE VERIFIED PETITION OF COGENTRIX OF ALAMOSA, LLC  
FOR DECLARATORY ORDER AND FORMAL COMPLAINT AGAINST SAN LUIS  
VALLEY RURAL ELECTRIC COOPERATIVE.

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**INTERIM DECISION ACCEPTING PETITION  
FOR DECLARATORY ORDER AND ORDERING  
COGENTRIX OF ALAMOSA, LLC TO ADD  
XCEL ENERGY D/B/A PUBLIC SERVICE  
COMPANY OF COLORADO AS A PARTY**

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Mailed Date: November 14, 2014  
Adopted Date: November 12, 2014

TO THE PARTIES IN THIS MATTER AND ALL INTERESTED PERSONS, FIRMS, OR  
CORPORATIONS:

**I. BY THE COMMISSION**

**A. Statement**

1. This matter comes before the Commission for consideration of a petition for declaratory order and formal complaint against San Luis Valley Rural Electric Cooperative (San Luis Valley or SLV) filed on October 14, 2014, by Cogentrix of Alamosa, LLC (Cogentrix).

2. The following allegations are taken from the petition and formal complaint. Cogentrix owns a 30 MW solar field in Alamosa County, which is within San Luis Valley's certificated retail service territory. Cogentrix sells electricity generated by the solar field to Xcel Energy, doing business as Public Service Company of Colorado (PSCo) pursuant to a Solar Energy Purchase Agreement. At times, the solar field generates sufficient electricity to supply its own power to operate the solar field. When the solar field is not generating sufficient electricity to satisfy its own power needs, however, the solar field receives power from PSCo using the

same electric lines and equipment that deliver power generated by the solar field to PSCo. Cogentrix refers to this power supplied to the solar field as “back feed electricity.”

3. Cogentrix contends that its Solar Power Purchase Agreement with PSCo permits or requires PSCo to supply back feed power and then pay Cogentrix based on the net amount of power supplied to PSCo. However, Cogentrix alleges it became aware in 2012 that PSCo was not deducting the back feed power supplied to the solar field from the solar power delivered to PSCo. When informed of this fact by Cogentrix, PSCo allegedly instructed Cogentrix to enter into an agreement with SLV to supply the power needs of the solar field.

4. To date, Cogentrix and SLV have not entered into such an agreement. Cogentrix alleges that SLV wants Cogentrix to pay for the back feed power pursuant to an existing rate sheet. Cogentrix has declined to do so, contending that the rate does not reflect SLV's cost of supplying back feed electricity to the solar field.

5. Cogentrix’s petition and formal complaint alleges three claims. The first claim requests the Commission to issue a declaratory order that Cogentrix's Solar Energy Purchase Agreement with PSCo “is a wholesale electric sales contract subject to the jurisdiction of the Federal Energy Regulatory Commission,” and therefore “that the back feed electricity currently provided by PSCo to Cogentrix is not a sale of electricity subject to Commission regulation under Colorado law.”<sup>1</sup>

6. Cogentrix requests this Commission to enter this declaratory order, even though PSCo – the other party to the agreement and relationship that is the subject of the requested order – is not a party to this proceeding.

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<sup>1</sup> Petition and Formal Complaint at ¶¶ 37, 41.

**B. Conclusion and Findings**

7. The Commission accepts the petition for declaratory order, but, for the first claim for a declaratory order to proceed, Cogentrix must add PSCo as a party within ten days of this Decision.

8. Colorado Rule of Civil Procedure (C.R.C.P.) 57(j) and § 13-51-115, C.R.S., state that “[w]hen declaratory relief is sought, all persons *shall* be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.” (emphasis added). As the Colorado Supreme Court has held, “[t]he indispensable and necessary parties in any declaratory judgment action are those who have conflicting legal interests in the controversy to be adjudicated and whose rights will be affected thereby.”<sup>2</sup>

9. Similarly, C.R.C.P. 19(a) states:

A person who is properly subject to service of process in the action *shall* be joined as a party in the action if: . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may: (A) As a practical matter impair or impede his ability to protect that interest[.]

(emphasis added).

10. Here, PSCo has an “interest which would be affected by the declaration” sought by Cogentrix,<sup>3</sup> the “disposition of [which] in [PSCo’s] absence may . . . [a]s a practical matter impair or impede [PSCo’s] ability to protect that interest.”<sup>4</sup> As noted above, Cogentrix seeks a declaration from the Commission that the Purchase Power Agreement between Cogentrix and

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<sup>2</sup> *People ex rel. Inter-Church Temperance Movement v. Baker*, 133 Colo. 398, 408 (Colo. 1956). See also *Constitution Assocs. v. New Hampshire Ins. Co.*, 930 P.2d 556, 561 (Colo. 1996) (“a court should not render a declaratory judgment unless it will fully and finally resolve the uncertainty and controversy as to all parties with a substantial interest in the matter that could be affected by the judgment.”).

<sup>3</sup> C.R.C.P. 57(j) and § 13-51-115, C.R.S.

<sup>4</sup> C.R.C.P. 19(a).

PSCo and the back feed power provided by PSCo to Cogentrix are not subject to Commission regulation under Colorado law.<sup>5</sup> The answer to that question may determine whether PSCo's back feed service infringes upon SLV's rights to provide service to Cogentrix, as well as other state and federal rights and obligations. Accordingly, if the Commission is to proceed on the declaratory judgment claim, PSCo must be added as a party to this proceeding.

**II. ORDER**

**A. It Is Ordered That:**

1. Consistent with the findings and conclusions above, the petition for declaratory order filed by Cogentrix of Alamosa, LLC (Cogentrix) is accepted.
2. Commission proceedings on the First Claim for Relief for Declaratory Order require Cogentrix to add Xcel Energy, doing business as Public Service Company of Colorado as a party to this proceeding within ten days of the effective date of this Decision.
3. This Decision is effective upon its Mailed Date.

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<sup>5</sup> Petition and Formal Complaint at ¶¶ 37, 41.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING  
November 12, 2014.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

JOSHUA B. EPEL

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PAMELA J. PATTON

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GLENN A. VAAD

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Commissioners