

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0226E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER EXTENDING THE APPROVED REGULATORY TREATMENT OF MARGINS EARNED FROM CERTAIN TYPES OF RENEWABLE ENERGY CREDIT AND ENERGY TRANSACTIONS.

**COMMISSION DECISION GRANTING
UNOPPOSED MOTION TO SUPPLEMENT
THE ADMINISTRATIVE RECORD AND GRANTING,
IN PART, AND DENYING, IN PART EXCEPTIONS TO
RECOMMENDED DECISION NO. R21-0033**

Mailed Date: March 18, 2021
Adopted Date: March 10, 2021

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I. BY THE COMMISSION

A. Statement

1. Through this Decision, we address exceptions and related filings to Recommended

Decision No. R21-0033, issued January 15, 2021, by Administrative Law Judge (ALJ) Robert I.

Garvey (Recommended Decision). The Recommended Decision grants the Verified Application (Application) that Public Service Company of Colorado (Public Service or the Company) filed on May 28, 2020, for an extension of the current approved margin sharing percentages in connection with certain types of transactions involving the sale of Renewable Energy Credits (RECs).

2. Consistent with the discussion below, we deny exceptions filed by Staff of the Colorado Public Utilities Commission (Staff) on January 29, 2021. We also grant, in part, and deny, in part, the exceptions that Western Resource Advocates (WRA) filed to the Recommended Decision on February 4, 2021, and grant the Unopposed Motion to Supplement the Administrative Record (Unopposed Motion) filed by WRA concurrently with its exceptions.

B. Background

3. On May 28, 2020, Public Service filed the Application in which it requests a Commission order extending the current margin sharing percentages in connection with certain types of transactions involving RECs. Pursuant to § 40-2-124, C.R.S., and Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-3-3654, investor-owned qualifying retail utilities, such as Public Service, must generate certain percentages of “eligible energy.” Commission Rules contemplate that qualifying retail utilities may sell or trade excess RECs and—if approved by the Commission—may retain a portion of the earnings from such REC transactions.¹

4. For purposes of sharing REC margins, RECs are categorized differently based on how they are produced and the type of electricity, if any, that is bundled with the REC. For instance, RECs produced by Company-owned or contracted renewable generation resources that are not bundled with electricity are Stand-Alone RECs. RECs generated from Company-owned or contracted renewable generation resources that are bundled with the sale of electricity that the

¹ See Rule 3659(n), 4 *Code of Colorado Regulations* (CCR) 723-3.

Company’s system produces are Gen-Gen RECs. When a Company-generated REC is bundled with proprietary energy (*i.e.*, electricity that the Company’s system does not produce) a Hybrid REC is formed.² Public Service has been selling RECs since 2009.³ In recent years, however, most of the Company’s REC sales have been Hybrid RECs sold into California.⁴

5. The currently approved REC margins are as follows:

Stand-Alone RECs	90% Customers, 10% Company
Gen-Gen- RECs	90% Customers, 10% Company
Hybrid RECs	80% Customers, 20% Company (first \$20 million in sales) 90% Customers, 10% Company (sales in excess of \$20 million)

6. The Commission first approved the current margins for Hybrid RECs in 2012 with Decision No. C12-0081. The currently approved 90/10 margins for Gen-Gen RECs was set in 2012 with Decision No. C12-0494. And finally, the currently approved 90/10 margins for Stand-Alone RECs went into effect in 2014 via Decision No. R11-0380.⁵ In Decision No. R14-1151, Proceeding No. 14A-0580E, and again in Decision No. C17-0959, Proceeding No. 17A-0650E, the Commission approved extensions of these REC margins. The latest approval the REC margins set forth in Decision No. C17-0959 expired on December 31, 2020.

7. In its Application, Public Service requests the Commission extend the current margin sharing percentages for three more years through December 31, 2023.⁶ Public Service argues, *inter alia*, that extending the current margin sharing percentages is appropriate “because

² Application, pp. 2-3.

³ Hrg. Ex. 101 (Schneider Direct Testimony), p. 13.

⁴ Hrg. Ex. 102 (Schneider Rebuttal Testimony), Attachment BWS-2.

⁵ Decision No. R11-0380, issued in 2011, established a schedule in which Public Service’s share of margins for Stand-Alone RECs automatically decreased. In 2011, Public Service was permitted to keep 20 percent of the margins but by 2014 this percentage dropped to its current level of 10 percent. Decision No. R11-0380, p. 21.

⁶ Application, p. 4.

the circumstances of the Company's REC trades have not changed."⁷ The matter was referred to an ALJ, and intervening parties include WRA; the City and County of Denver; Denver Colorado (Denver); Staff; and the Office of Consumer Counsel (OCC).

8. After the evidentiary hearing, the ALJ issued the Recommended Decision granting Public Service's Application and approving the current REC margin sharing percentages. ALJ Garvey rejected arguments from intervenors WRA and Denver, and directed the current margins be extended for an additional three years as Public Service requested. ALJ Garvey further declined Staff's and the OCC's invitation to partially waive Rule 3659(n).⁸ ALJ Garvey noted that determining whether the margins attributable to ratepayers should be credited to the Electric Commodity Adjustment (ECA) instead of the Renewable Energy Standard Adjustment (RESA) is more appropriately decided in the context of rulemaking.

C. Exceptions

9. Staff and WRA timely filed exceptions to the Recommended Decision. In conjunction with its Exceptions, WRA also filed the Unopposed Motion.

1. Staff's Exceptions

10. Before the ALJ, Staff argued that the Commission should approve the Company's trading margins, but should grant partial waiver of Rule 3569(n) so that ratepayers share of the proceeds of that trading can be credited through the ECA rather than being deposited into the RESA deferred account. The Recommended Decision denies Staff's request for partial waiver and notes that the Commission has current, ongoing rulemaking efforts considering RESA and ECA structure.⁹

⁷ *Id.* at 3.

⁸ Recommended Decision, at pp. 14-15.

⁹ *Id.* at 14.

11. Through its Exceptions, Staff does not seek to reverse the ALJ's decision, but asks that the Commission clarify that any rule change regarding how REC margins are returned will apply to the REC trading plan approved in this proceeding, rather than waiting until the end of 2023 when the trading plan is set to expire.¹⁰ Specifically, Staff requests that "any rule change issued between now and the end of 2023 relating to the manner in which ratepayers' share of REC trading margins are returned will apply to the REC trading plan at issue in this Proceeding, and that the parties to this Proceeding will be required to comply with such rule changes within 30 days of the date on which they are enacted."¹¹

12. No party filed a response to Staff's Exceptions.

13. We find it speculative for the Commission to insert into this proceeding provisions that address a future rule change, which may not even occur. Under § 24-4-103(10), C.R.S., "no rule may be relied upon or cited" against any party unless it has been published and adopted. We therefore agree with the ALJ that considerations that comprehensively consider, and possibly revise, the RESA structure are best left to a different proceeding.¹²

14. We therefore deny Staff's exceptions.

2. WRA's Unopposed Motion

15. In its Unopposed Motion, WRA states that after the Recommended Decision issued on January 15, 2021, and the record in this proceeding was transmitted to the full Commission for consideration, on January 22, 2021, the Air Quality Control Commission (AQCC) submitted a

¹⁰ Staff's Exceptions, pp. 2-3. Staff notes that on September 15, 2020, the Commission severed the RES Rules and Net Metering Rules from Proceeding No. 19R-0096E and stated that revision to these rules will be addressed through a separate rulemaking.

¹¹ *Id.* at 4.

¹² RES Rule considerations are currently split off from Proceeding No. 19R-0096E and stakeholders are currently engaged in workshop processes.

series of resolutions that recognized the efforts that will be made in filing Clean Energy Plans with the Commission.¹³ WRA asserts that AQCC “recognizes the relationship between verification of greenhouse gas reduction efforts - like Clean Energy Plans - and treatment of [RECs].”¹⁴ WRA argues that this is evidenced by AQCC’s statement that the PUC is the appropriate entity to interpret § 40-2-125.5(3)(a)(III), C.R.S., which pertains to whether and how RECs are “retired the year they are generated.”¹⁵

16. WRA argues the recognition is relevant because WRA’s position is that REC sales have an impact on greenhouse gas reduction efforts, while other parties claim that REC sales do not affect these determinations.¹⁶ WRA represents that AQCC’s statement shows that the REC considerations do affect emissions profiles of renewable energy resources.

17. Ultimately, WRA requests the Commission take administrative notice of the AQCC’s Resolution to Support Air Pollution Control Division Clean Energy Plan Guidance, included as Attachment A to the Unopposed Motion, and to replace page 28 of WRA’s Exceptions with a replacement page included as Attachment B to the Unopposed Motion. This replacement page discusses the AQCC’s Resolution in the context of WRA’s Exceptions.¹⁷

18. WRA avers it “conferred with the parties to this Proceeding and is authorized to state no party opposes the Motion.”¹⁸

19. We grant WRA’s Unopposed Motion and take administrative notice of the AQCC’s Resolution to Support Air Pollution Control Division Clean Energy Plan Guidance, included as

¹³ Unopposed Motion, p. 2.

¹⁴ *Id.* at 2-3.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 3-4.

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 1.

Attachment A to the Unopposed Motion. We further deem page 28 of WRA's Exceptions as replaced with Attachment B to the Unopposed Motion.¹⁹

3. WRA Exceptions

20. Substantively, through its Exceptions, WRA argues that the margins Public Service keeps from REC sales should be eliminated or substantially reduced given the maturity of the market, the limited value the Company adds to these transactions, the low risk of the REC sales, and because REC sales conflict with Colorado's broader policy goals.²⁰ If the Commission allows Public Service to keep some portion of the REC margins, WRA argues that the Company's share of Hybrid RECs should be set at no more than 10 percent. WRA reasons that the Company's weighted average cost of capital is 6.97 percent and thus, "even limiting the Company's margin share to 10 [percent] for Hybrid REC transactions would still make REC sales more financially remunerative to the Company than the Company's regulated operations."²¹

21. WRA puts forth several arguments to support its position that the Public Service's REC margins should be eliminated or dramatically reduced. Within its arguments, WRA asserts that the ALJ improperly placed the burden of proof on intervenors, that the market for Hybrid RECs has matured, that Public Service adds little value to REC sales, that there is relatively low risk associated with REC transactions, and that changes to Colorado's environmental policy landscape justify reducing the financial incentive Public Service receives from REC sales.

¹⁹ Through this proceeding, we do not make any determinations regarding the issue of when RECs must be retired to comply with clean energy goals. This issue is more appropriately addressed in a proceeding with adequate record support and legal briefing.

²⁰ WRA's Exceptions, pp. 30-31.

²¹ *Id.* at 30.

22. The Company's response argues that WRA takes the ALJ's statements regarding the burden of proof out of context, and otherwise rejects WRA's arguments, claiming that its REC margin percentages should remain unchanged.

23. We grant, in part, and deny, in part, WRA's request to eliminate or substantially reduce the margins Public Service keeps from REC sales. We are unconvinced by WRA's arguments that the Company's REC margin percentage for RECs should be eliminated. We are also unconvinced with its argument that 10 percent for Hybrid RECs is appropriate.²² However, considering the arguments and record in this proceeding, we find it appropriate to reduce Hybrid REC sales margins from 20 percent to 15 percent on the first \$20 million in sales. On sales in excess of \$20 million, Public Service will retain 10 percent of the margins. The margin sharing percentages for Stand Alone RECS and Gen-Gen RECs will remain unchanged.

24. Starting with the value that Public Service adds to REC sales, the Commission finds it significant that Public Service has not needed to engage in the certification process for additional RECs since 2014. Indeed, in Discovery Request CCD2-4, Public Service states that "the Company is not pursuing or planning to pursue the CEC certification of other renewable energy generation units."²³ When the Commission lowered the Hybrid REC sales margins in 2012, one of its reasons for doing so was that "the certification process for Gen Book RECs is largely complete and will require less effort going forward."²⁴ Because the certification process is now entirely complete, the value that Public Service adds to REC sales is somewhat less than what it was in 2012.

²² Commissioner John Gavin dissents from the majority opinion to reduce the Hybrid REC margin percentage to 15 percent, and would have instead granted WRA's request to reduce the Company's margin percentage for Hybrid RECs to 10 percent.

²³ Attachment JR-1, pp. 7-8.

²⁴ WRA's Exceptions, p. 12 (quoting Proceeding No. 11A-510E, Decision No. C12-0081, at ¶ 36).

25. However, the Commission does not dispute that Public Service continues to add value to REC transactions, as noted in the Recommended Decision and the testimony of Company witness Mr. Schneider. We find that REC transactions, and especially those involving Hybrid RECs, remain complex and require Public Service to expend considerable effort.²⁵ This cuts against WRA's request to eliminate or dramatically reduce the REC sales margins that Public Service can keep.²⁶

26. Accordingly, the value that Public Service adds to REC transactions supports reducing the margins from Hybrid RECs to 15 percent while maintaining the same margins for the other types of RECs. This reflects the fact that Public Service is no longer certifying additional renewable energy sources while also acknowledging that REC transactions remain complex and require additional effort.

27. As for the level of risk that REC sales pose, the Commission finds that this is an appropriate consideration when determining the margins that Public Service may retain. While not listed in Rule 3659(n), we may consider additional factors on a case-by-case basis and Public Service only passes the benefits of REC trading to its customers.²⁷

28. In addition, the Commission finds the evidence that Public Service put forth regarding the inherent risk of REC transactions to be compelling in our considerations. Given the complex nature of REC transactions, we find persuasive Public Service's argument that a lack of

²⁵ See Hrg. Ex. 101 (Schneider Direct), pp. 14-17.

²⁶ Given the time that has passed since Public Service and its counterparties began trading RECs, however, the amount effort needed to gain familiarity with the relevant state rules and the process of trading RECs has likely decreased.

²⁷ See Public Service's Exceptions, p. 9; Proceeding No. 11A-510E, Decision No. C12-0081, p. 14 (noting that "if annual net margins are less than zero, Public Service will bear the loss such that no net negative annual margins will be recovered from customers").

negative outcomes does not equate to a lack of risk. Rather, the lack of negative outcomes goes to Public Service's success in managing the inherent risks.

29. Company witness Mr. Schneider testified about the various types of risk that REC transactions pose and how the risks associated with Hybrid REC transactions in California have increased over time.²⁸ WRA's arguments that various contract provisions essentially eliminate this risk fail to effectively rebut Mr. Schneider's testimony.²⁹ For instance, WRA fails to recognize the effort necessary to negotiate and draft such contracts, the fact that a counterparty might still choose to breach a contract, and the effort and risks associated with enforcing such contracts. Accordingly, we find the evidence Public Service admitted regarding the risks involved in REC transactions weighs against WRA's position to eliminate or substantially reduce the REC margins.

30. In contrast, WRA's arguments regarding the changes to Colorado's broader environmental policies help convince us that the percentage of margins Public Service retains from Hybrid RECs should be reduced, albeit not by as much as WRA requests. Although the funds in the RESA account are still important, adding additional funds is less urgent. Moreover, we acknowledge WRA's position that an increasing number of Public Service's customers value RECs for their environmental attributes rather than just the monetary value that is gained by selling them out of state. These considerations ameliorate the risk that the reduced margin share for Hybrid RECs might cause Public Service to sell fewer RECs.

31. That said, the evidence that Public Service put forth convinces us that granting WRA's request to eliminate or reduce the margins from Hybrid RECs to 10 percent is not in the public interest. As the Company notes, selling RECs between 2021 and 2023—the period

²⁸ Hrg. Ex. 101 (Schneider Direct) pp. 21-22; Hrg. Ex. 102 (Schneider Rebuttal) pp. 11-12.

²⁹ We have also examined WRA's confidential arguments in support of its position that Public Service overstates the risks posed by REC transactions and find them to be unpersuasive.

applicable to this Decision—will not impact Colorado’s 2030 clean energy target. Moreover, selling RECs and the associated revenues allocated to the RESA creates value for all of Public Service’s customers—those with and without clean energy targets.³⁰ Given the effort and risks associated with REC transactions, we find the margins proposed by WRA would not properly incent Public Service to continue selling RECs and the associated revenues allocated to the RESA could dry up. Thus, we find that reducing the margins Public Service can retain from Hybrid RECs to 15 percent properly incents Public Service to continue selling RECs while also accounting for the changes to Colorado’s environmental policies.

32. We also note that we are unpersuaded by WRA’s arguments that the ALJ improperly applied the burden of proof in this case. On this point, the Commission agrees with Public Service that, reading Recommended Decision as a whole, the ALJ properly placed the burden of proof on Public Service. Public Service admitted ample evidence into the record, which the ALJ relied upon in making his determinations. While we partly disagree with the ultimate conclusions the ALJ reached, we find no fault in his application of the burden of proof.

33. We also find WRA’s arguments regarding the maturity of the REC market to be unconvincing.³¹ While the ALJ could have addressed the evidence of the lower prices for RECs, the Commission agrees with Public Service that WRA uses flawed logic. In Decision No. C12-0081, the Commission previously found that increased competition yields lower margins.³²

³⁰ Even for customers with clean energy targets, the vast majority of revenues from REC sales will be allocated to the RESA, which “will likely provide a key tool” in helping fund the Clean Energy Plan. *See* Public Service’s Response, pp. 5-6.

³¹ While we disagree with WRA’s argument tying the decrease in REC prices to the maturity of the REC market, we find it likely that Public Service has gained experience since the Commission first approved the current Hybrid REC margins in 2012 and that this experience makes REC transactions somewhat easier. On the other hand, as Mr. Schneider testified, the risks associated with Hybrid REC transactions in California have increased over time. Our decision to reduce the Hybrid REC margins to 15 percent strikes an appropriate balance between these countervailing factors.

³² Proceeding No. 11A-510E, Decision No. C12-0081, p. 12.

The Commission did not find that increased competition yields lower-cost RECs or that a decrease in the cost of RECs means there is more competition.³³ Simply put, based on considerations in this proceeding, the decreased price of RECs does not equate to a corresponding increase in market maturation.

34. In sum, we find WRA’s Exceptions to be meritorious in that the value that Public Service adds to REC transactions since 2012 has decreased somewhat and changes to Colorado’s environmental policies support a lower incentive to sell RECs. However, we also find that the Company has put forth substantial evidence showing that reducing the margins associated with Hybrid RECs to 10 percent or below is not appropriate this time. Accordingly, we grant, in part, and deny, in part, WRA’s Exceptions. Public Service’s Application is granted but margin sharing percentages are modified to the following:

Stand-Alone RECs	90% Customers, 10% Company
Gen-Gen- RECs	90% Customers, 10% Company
Hybrid RECs	85% Customers, 15% Company (first \$20 million in sales) 90% Customers, 10% Company (sales in excess of \$20 million)

II. ORDER

A. It is Ordered That:

1. The Exceptions to Recommended Decision No. R21-0033 (Recommended Decision) that Staff of the Colorado Public Utilities Commission filed on January 29, 2021, are denied, consistent with the discussion above.

³³ *Id.*

2. The Unopposed Motion to Supplement the Administrative Record that Western Resource Advocates (WRA) filed on February 4, 2021, is granted, consistent with the discussion above.

3. The Exceptions to the Recommended Decision that WRA filed on February 4, 2021, are granted, in part, and denied, in part, such that the margin sharing percentages associated with Renewable Energy Credit transactions are modified, consistent with the above discussion.

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

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 10, 2021.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

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Commissioners