Decision No. C24-0292

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21A-0141E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2021 ELECTRIC RESOURCE PLAN AND CLEAN ENERGY PLAN.

COMMISSION DECISION GRANTING MOTION FOR LEAVE TO RESPOND AND REQUEST FOR WAIVER OF RESPONSE TIME; GRANTING, IN PART, AND DENYING, IN PART, THE APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION OF COMMISSION DECISION NO. C24-0161; AND DISCUSSING RECENT FILINGS

Mailed Date: May 2, 2024
Adopted Date: April 24, 2024

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I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission grants, in part, and denies, in part, the Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0161 (Second-Round RRR) that Trial Staff of the Colorado Public Utilities Commission (Staff) filed on April 2, 2024. Also through this Decision, the Commission grants the Unopposed Motion for Leave to Respond and Request for Waiver of Response Time that Public Service Company of Colorado (Public Service or Company) filed on April 16, 2024.

2. In addition, and while no substantive decision beyond our ruling on Second-Round RRR is made or appropriate at this phase, we provide context for recent notice and reporting filings made in this proceeding, in anticipation of future proceedings and process directed through prior orders.

B. Background

3. We have previously detailed the background and procedural history of this case in Decision No. C24-0052, issued January 23, 2024, (Phase II Decision), and Decision No. C24-0161, issued March 13, 2024 (First RRR Decision). Here, we provide only that background and procedural history necessary for this Decision.

4. On October 20, 2023, Public Service put forth in its Response to Decision No. C23-0672 proposals for a cost to construct performance incentive mechanism (PIM) and an operational PIM. In this initial proposal, Public Service argued that any Company-owned project subject to the operational PIM (*i.e.*, levelized cost of energy (LEC) projects like wind and solar) should have cost recovery from the project's in service date (ISD) through an appropriate

adjustment clause.[1] Public Service argued that eligible energy resources have traditionally enjoyed such accelerated cost recovery via the electric commodity adjustment (ECA) or the Renewable Energy Standard Adjustment (RESA). In addition, Public Service asserted this approach avoids regulatory lag and is consistent with how independent power producer (IPP) contracting structures work, where the IPP is compensated from the date it begins producing energy for customer consumption. The Company further argued that without such accelerated recovery, the resulting regulatory lag will affect the ability to calculate an LEC in an accurate manner.[2]

5. In the Phase II Decision, we granted Public Service's request and directed that "all projects subject to the operational PIM in this Proceeding will receive cost recovery through the appropriate rider (RESA or ECA) from the ISD of the project until the project is rolled into base rates."[3]

6. In its First-Round RRR filed on February 12, 2024, Public Service requested that the Commission permit accelerated cost recovery for any utility-owned project (whether a LEC project or a levelized cost of capacity (LCC) project). The Company argued that both the operational PIM (which only applies to LEC projects) and the cost to construct PIM (which applies to both LEC and LCC projects) represent "a substantial change to treat Company-owned projects in ways closer to the risks imposed on IPP projects."[4] Public Service went on to argue that such timely cost recovery is consistent with power purchase agreement (PPA) projects, "where the IPP is compensated from the date it begins producing energy for customer consumption."[5] Public Service thus reasoned that this approach is consistent with the underlying objectives of the cost to

[1] Response to Decision No. C23-0672, p. 15.
[2] Response to Decision No. C23-0672, p. 15.
[3] Phase II Decision, ¶ 191.
[4] Public Service's RRR, p. 17.
[5] Public Service's RRR, p. 17.

construct PIM and the operational PIM. The Company also implied that establishing this approach in the Phase II process could simplify follow-on certificate of public convenience and necessity (CPCN) proceedings and avoid otherwise unnecessary rate case filings.

7. In the First RRR Decision, we granted Public Service's request to allow accelerated cost recovery for any project subject to either the cost to construct PIM or the operational PIM. The Commission noted that it saw no reason to permit LEC projects to have accelerated cost recovery but not LCC projects.[6]

8. We addressed multiple other issues in our First RRR Decision, concluding necessary issues addressed in Phase II.

C. Staff's Second-Round RRR and the Motion to Respond

9. No party, with the exception of Staff, files any further RRR to the First RRR Decision. In its Second-Round RRR, Staff requests that the Commission reverse this one decision point from the First RRR Decision and allow only LEC projects accelerated cost recovery, consistent with the Phase II Decision. Staff asserts that the primary consideration regarding accelerated cost recovery is whether a statute or rule supports the departure from traditional rate base recovery. Staff notes that Colorado statute contemplates accelerated cost recovery for eligible energy resources, which are renewables, but not LCC resources.[7] In contrast, Staff asserts that "allowing accelerated recovery for newly constructed LCC projects has no precedent in Commission proceedings or support in rule or statute."[8]

10. In addition, Staff argues that—contrary to Public Service's arguments in its First-Round RRR—allowing accelerated cost recovery for LCC projects does not treat them more

[6] First RRR Decision, ¶ 136.
[7] Staff's Second-Round RRR, p. 5 (citing § 40-2-124(1)(f)(IV), C.R.S.).
[8] Staff's Second-Round RRR, pp. 4-5.

similarly to PPA projects. Staff states that IPPs are paid based on the availability and performance of the LCC resource and that an "LCC IPP would not receive payment based on achieving commercial operation."[9] Moreover, Staff asserts that accelerated recovery of the full revenue requirement that Public Service would receive "is in no way similar to the $/kW-month payments which a similar LCC IPP would receive."[10] Thus, Staff asserts that authorizing accelerated recovery for Company-owned LCC projects actually provides the Company an advantage over IPPs, and Staff argues this is contrary to the Commission's intent.[11]

11. While no separate filings were provided, Staff represents that the Colorado Office of the Utility Consumer Advocate and the Colorado Energy Consumers support its Second-Round RRR.[12]

D. Motion to Respond

12. In its Motion to Respond, Public Service argues that response is warranted for three reasons. First, the Company argues that Staff's broad statement that "[a]llowing accelerated recovery for newly constructed LLC projects has no precedent in Commission proceedings or support in rule or statute"[13] is an error in law and an attempt to introduce facts not in evidence. Second, the Company claims that Staff's arguments do not accurately depict the payment structures for LCC projects that are owned by IPPs. Public Service states that these arguments constitute an incorrect statement or error of law. And third, the Company takes issue with Staff's assertion that the primary consideration in assessing a request for accelerated recovery is whether

[9] Staff's Second-Round RRR, p. 5.
[10] Staff's Second-Round RRR, p. 6.
[11] Staff's Second-Round RRR, pp. 5-6.
[12] Staff's Second-Round RRR, p. 1.
[13] Motion to Respond, p. 3.

statute or rule supports that departure from traditional rate base recovery. Public Service argues that this argument is both unsupported and an incorrect statement or error of law.[14]

13. Under Rule 1506(b), 4 *Code of Colorado Regulations* (CCR) 723-1, no response to RRR may be filed except upon motion. The response must demonstrate a "material misrepresentation of fact in the record; an incorrect statement or error of law; an attempt to introduce facts not in evidence; accident or surprise… or newly discovered facts…." We agree with the Company that Staff's suggestions regarding the Commission's discretion in rate recovery considerations, including accelerated cost recovery, are inaccurate. The Commission has rate making authority unless and until restricted by statute, and ratemaking is an art, not a science, where we consider a number of record and policy objectives. [15] We further agree with the Company that Staff's assertions regarding IPP payments for capacity payments also warrant response because these statements delve into facts not in evidence in this case.

14. Because the Motion to Respond demonstrates that Staff's Second-Round RRR contains incorrect statements of law and facts not in evidence, we waive the remaining response time and grant the Motion to Respond under Rule 1506(b).

15. Substantively, Public Service asserts that the Commission should deny Staff's Second-Round RRR, arguing that allowing LCC projects to begin recovering costs upon commercial operations is neither a departure from Commission practice nor unfairly advantageous to Company-owned LCC projects compared to IPP LCC projects. On the first point, Public Service points to the Company's purchase of the Valmont and Manchief gas units as approved in

[14] Motion to Respond, p. 4.

[15] *Colorado-Ute Electric Association, Inc. v. Public Utilities Commission*, 760 P.2d 627, 638-39 (Colo. 1988); *see also Integrated Network Services, Inc. v. Public Utilities Commission*, 875 P.2d 1373, 1377 (Colo. 1994) (the Commission "has broad constitutional and legislative authority to regulate public utilities in Colorado"). Once the General Assembly acts, the applicable statute governs the Commission's authority. *Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission*, 626 P.2d 159 (Colo. 1981).

Proceeding No. 16A-0396E and the follow on CPCN filing in Proceeding No. 19A-0409E as well as the treatment of the Rocky Mountain Energy Center and Blue Spruce Energy Center generators in Proceeding No. 10A-327E. The Company asserts that each of these projects received adjustment clause recovery until they were later rolled into rate base and, therefore, Staff's assertions that accelerated recovery is a departure from past practice is meritless.[16]

16. Public Service further argues that allowing accelerated cost recovery for LCC projects is neither unjust enrichment nor different than the treatment an IPP LCC project receives. Citing Staff's argument that "[a]n LCC IPP would not receive payment based on achieving commercial operation," Public Service argues that this is "misleading" and that IPP LCC projects are, in fact, eligible to be paid immediately upon achieving commercial operations.[17] Public Service argues that under Staff's preferred outcome, the Company would go without payment for LCC projects until a future rate case. The Company also characterizes as unsupported Staff's assertion that recovery of the full revenue requirement for a Company-owned LCC resource is dissimilar to the $/kW-month payments that an IPP would receive for an LCC project.[18]

E. Second-Round RRR Findings and Conclusions

17. Analyzing both Public Service's response and Staff's Second-Round RRR, the Commission grants, in part, and denies, in part, Staff's Second-Round RRR. Consistent with the Company's recognition that Staff's statements regarding statutory interpretation are inaccurate,[19] we find Staff's arguments regarding the statutory and regulatory support uncompelling to require that the Commission deny accelerated cost recovery for Company-owned LCC projects in every

[16] Motion to Respond, pp. 5-6.
[17] Motion to Respond, p. 7.
[18] Motion to Respond, p. 7.
[19] The Company states in part correctly "[t]he Commission has broad discretion under the Public Utilities Law and [statements from Staff are] not an appropriate standard, as Staff's lack of support for the purported position shows." (Motion to Respond, p. 6).

instance. Staff is correct that § 40-2-124(1)(f)(IV), C.R.S. contemplates accelerated cost recovery for eligible energy resources and that a similar statutory provision does not exist for capacity projects like gas resources. The Commission has broad authority in ratemaking determinations, [20] and we are not precluded from authorizing accelerated cost recovery for LCC projects subject to the cost to construct PIM if such a finding is supported.

18. The primary consideration in assessing whether LCC projects should be eligible for accelerated cost recovery is whether doing so is in the public interest, including with consideration of facts and evidence presented in a particular case. Consistent with the Company's response that highlights follow-on CPCN proceedings that ultimately supported similar cost recovery treatment,[21] in this instance we find that whether to approve accelerated cost recovery for Company-owned LCC projects is a consideration better left to the appropriate CPCN proceeding. Follow-on CPCN processes provide an opportunity to develop a robust record regarding countering positions and concerns.[22]

19. Resolving this issue in a future CPCN proceeding is particularly appropriate given the relevant filings from Staff and Public Service that contain seemingly contradictory assertions regarding the payment structure for LCC projects owned by IPPs. In its First-Round RRR, Public Service notes how the cost to construct and operational PIMs are intended to treat Company-owned projects more similarly to IPP projects and states that "timely cost recovery is consistent with how IPP contracting structures work, where the IPP is compensated from the date it begins producing

[20] *See, e.g.*, *Pub. Serv. Co. v. Trigen-Nations Energy Co.*, 982 P.2d 316, 322 (Colo. 1999).

[21] Motion to Respond, pp. 5-6 (noting the Valmont and Manchief gas acquisitions approved in the ERP Proceeding No. 16A-0396E, with follow on CPCN considerations brought in Proceeding No. 19A-0409E, as well as Proceeding No. 10A-327E).

[22] To be clear, simply because other CPCN proceedings reached settlements that could support accelerated cost recovery of Company-owned LCC projects does not require a similar result here. Rather, we find that evaluating this issue in a future CPCN proceeding is a more appropriate venue.

energy for customer consumption."[23] Staff seems to reach the opposite conclusion, however, asserting that an IPP would not receive compensation based on achieving commercial operation. Staff asserts that allowing accelerated recovery for Company-owned LCCs would be inconsistent with the Commission's efforts to treat IPP and Company-owned projects more similarly.[24] In its Motion to Respond, Public Service reiterates its arguments, and asserts that Staff's claims are "misleading." Neither Staff nor Public Service sufficiently support their arguments using record evidence.

20. Rather than resolving this dispute on the limited record in this Proceeding, the Commission will evaluate in the appropriate CPCN proceeding whether Company-owned LCC projects subject to the cost to construct PIM are eligible for accelerated cost recovery. In that future proceeding, interested parties will have opportunities to better explain their positions through testimony and cross examination, and there will be more refined information regarding both the Company-owned LCC projects and the final PPAs for IPP projects.

F. Other Filings Discussion

21. In addition to Staff's Second-Round RRR and the Motion to Respond, the Commission has recently received several other filings in this Proceeding. While we decline to act on these filings—which are comprised of public comments, reports, and notices—we discuss them briefly here for context given processes directed in prior orders.

22. On April 12, 2024, Public Service filed a Notice Regarding Updated List of Projects in the Approved Portfolio and Updated List of Backup Bids (Notice). The Notice provides an updated list of projects in the Approved Portfolio and an updated list of approved backup bids. The Notice also contains a request that the Commission expand the approved backup bid list by

[23] Public Service's RRR, p. 17.
[24] Staff's Second-Round RRR, pp. 5-6.

including eight additional supplemental bids. Public Service was required to file such a notice in the First RRR Decision.[25]

23. We acknowledge the Company's identification of eight additional backup bids, but do not approve or otherwise make findings regarding the Notice filing. The Phase II Decision and First RRR Decision establish a backup bid selection process.[26] Under this backup bid selection process, whenever the Company moves forward with a Company-owned backup bid, there will generally be additional process and explanation to show that the Company-owned backup bid (as opposed to an IPP backup bid) is the most prudent alternative.[27] Consistent with our Phase II Decision and First RRR Decision, we look forward to and anticipate fruitful next steps through the approved backup bid selection process.[28]

24. In addition, on March 29, 2024, Public Service filed its 2024 Annual Progress Report (2024 Report) as contemplated by Rule 3618(a) and various Commission directives. The Company's 2024 Report contains information regarding, among other things, the most recent loads and resources table along with updated energy demand forecasts, the Company's plan to pursue CPCNs for utility-owned generation and transmission, and information regarding the benefits of the Company's participation in the Southwest Power Pool's Western Energy Imbalance Services (WEIS) market.

[25] First RRR Decision, ¶ 95.
[26] First RRR Decision, ¶ 65; Phase II Decision ¶ 238.
[27] First RRR Decision, ¶¶ 66-67. Although we denied the Company's First-Round RRR request to modify the approved backup bid selection process, we invited the Company to provide a supported petition to waive the backup bid selection process if circumstances warrant doing so. (First RRR Decision, ¶ 70).
[28] We recognize that while our Phase II Decision and First RRR Decision contemplate additional process regarding Company-owned backup bids, consistent with these determinations, the Company may move forward quickly with IPP backups with limited process. Even though the majority of the eight supplemental backup bids are IPP bids, as we noted in the First RRR Decision, there is little risk of perverse incentive when the Company moves forward with an IPP backup bid without further express backup bid approval or Commission process. (First RRR Decision, ¶ 73).

25. In addition to these topics, consistent with the Commission's directives in the Phase I Decision, in the 2024 Report Public Service included enhanced reporting metrics for Pueblo Unit 3, including its planned overhauls with the associated capital expenditures and actual O&M expenditures. The Commission required, and the Company provided, similar information for Hayden 1 & 2 and Craig 2.

26. The Commission has also continued to receive various public comments. One public comment specifically references the Unit 3 data contained in the 2024 Report, asserting that there is a "large discrepancy" between the capital expenditure projections that Public Service provided in Phase I and the estimates set forth in the 2024 Report.

27. The Commission shares the concerns that intervenors and members of the public have raised throughout this Proceeding regarding the ongoing capital expenditures for Unit 3. Indeed, Decision No. C22-0549, issued August 3, 2022, (Phase I Decision), established enhanced reporting requirements to help address and provide transparency regarding these concerns.[29] In addition to requiring enhanced reporting, in the Phase I Decision the Commission directed the parties to craft PIMs addressing Unit 3's O&M expenses, capital costs, and availability factor and stated that "[t]he baseline for the capital costs and O&M expense would be the numbers used in the Phase II modeling."[30]

28. While the details of the Unit 3 PIMs will be addressed in an upcoming stakeholder PIM process,[31] throughout this Proceeding the Commission has strived to better align incentives, and we look forward to continuing to do so, including with regard to Unit 3. Consistent with the provisions of the Phase I Decision, we anticipate that the forthcoming Unit 3 PIMs will help protect

[29] Phase I Decision, ¶ 86.
[30] Phase I Decision, ¶ 393.
[31] Phase I Decision ¶¶ 384, 389.

ratepayers from cost overruns and incentivize the Company to make prudent financial decisions as Unit 3 "moves towards its retirement."[32]

29. Aside from the Unit 3 expenditures set forth in the 2024 Report, we also express concern regarding the projected capacity shortfall in 2028. Consistent with our Phase II directives, we request that the Company move swiftly to execute the backup bid selection process to help address this projected shortfall.[33]

30. Notwithstanding our concerns about the depicted capacity shortfalls, it appears that the Company assumes levels of sustained energy demand growth that are quite high relative to past demand growth.[34] To be clear, we are not requesting additional information in this Proceeding, but it is our expectation that this issue will be appropriately addressed in future Company filings.

31. And finally, we are encouraged that the 2024 Report indicates that Colorado is starting to realize some initial benefits from participation in regional markets such as WEIS. In particular, reporting indicates that participation in WEIS has resulted in potentially favorable reductions in renewable energy curtailments.

32. We appreciate the ongoing reporting and information provided, in addition to continued comments and participation from the public. Consistent with our Phase I and Phase II determinations, we look forward to future engagement and information through separate processes and proceedings going forward.

[32] Phase I Decision, ¶ 87.

[33] Given the potential capacity shortfalls depicted in the 2024 Report, it is our expectation that the Company is considering developing and permitting a combustion turbine (CT) asset that, if necessary, can be built quickly for reliability. The remaining CT contemplated in Bid 1000 appears to be a good candidate for this.

[34] *See* 2024 Report, p. 7.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration of Decision No. C24-0161 that Trial Staff of the Colorado Public Utilities Commission filed on April 2, 2024, is granted, in part, and denied, in part, consistent with the discussion above.

2. The Unopposed Motion for Leave to Respond and Request for Waiver of Response Time that Public Service Company of Colorado filed on April 16, 2024, is granted, consistent with the discussion above.

3. 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.

4. This Decision is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING April 24, 2024.

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners