Decision No. C16-0747

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-0836E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR APPROVAL OF ITS 2014 RENEWABLE ENERGY STANDARD COMPLIANCE PLAN.

DECISION GRANTING APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: August 12, 2016
Adopted Date: June 29, 2016

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I. BY THE COMMISSION

A. Statement

1. This Decision addresses the Application for Rehearing, Reargument, or Reconsideration of Decision No. C16-0290 (Joint RRR) filed jointly by Public Service Company of Colorado (Public Service or Company); SunShare, LLC (SunShare); Clean Energy Collective (Clean Energy); and, Community Energy Solar (CES) and the separate Application for RRR of Decision No. C16-0290 filed by Public Service (Public Service RRR), each filed on April 26, 2016.

2. As discussed in more detail below, we approve the specific terms of the Settlement Agreement entered into by Public Service, SunShare, Clean Energy, and CES as requested in the Joint RRR, upon rehearing and reconsideration of Decision No. C16-0290. Public Service is authorized to modify the implementation of its 2015 Community Solar Garden (CSG) Request for Proposals (RFP) awards by allowing the winning bidders to elect, for each individual CSG project, to receive $0.03/kWh per Renewable Energy Credit (REC) generated by the CSG project, provided that, in order to make this election, any customers subscribed to the CSG project are required to have their bill credits calculated on a class-average basis. We further approve the application of the class-average bill credit to the customers subscribing to the CSGs awarded in the Company's 2016 CSG RFP.

3. We grant Public Service's RRR and restore the presumption of prudence for the Company's CSG acquisitions taken in accordance with its 2014-2016 Renewable Energy Standard (RES) Compliance Plan, as modified by our approval of the particular terms of the Settlement Agreement upon rehearing and reconsideration.

B. Discussion

4. On February 22, 2016, Public Service filed a Motion to Approve Settlement Agreement and for Variance from Commission Rule 3665(c)(1) (Motion for Settlement). Public Service, SunShare, Clean Energy, and CES (collectively, the Settling Parties[1]) entered into the Settlement Agreement to address certain issues that arose in the implementation of Public Service's 2015 RFP for CSGs.[2]

5. On April 6, 2016, we denied the Motion for Settlement.[3] We concluded that the Settling Parties had failed to demonstrate that the modifications to Public Service's 2014-2016 RES Plan as proposed in the Settlement Agreement were in the public interest. We denied the proposed bill credit calculation methodology as contrary to § 40-2-127(5)(b)(II), C.R.S. In denying Public Service a presumption of prudence at the time of cost recovery for contracts entered into as a result of its 2015 and 2016 competitive solicitations, we cited concerns about protecting ratepayers from the unknown cost impacts of changes to the bill credit and the $0.03/kWh REC price proposed in the Settlement Agreement.

[1] On May 27, 2016, we granted the Motion for Leave to Intervene filed by CES on May 18, 2016 and the Motion for Leave to Intervene filed by Clean Energy on May 20, 2016. *See* Decision No. C16-0446-I, issued May 27, 2016, Proceeding No. 13A-0836E. Commissioners Epel, Vaad, and Koncilja participated.

[2] A complete discussion of the procedural history for the Settlement Agreement is provided in Decision No. C16-0290, issued April 6, 2016, Proceeding No. 13A-0836E.

[3] Decision No. C16-0290, issued April 6, 2016, Proceeding No. 13A-0836E. Commissioners Epel and Vaad participated. Commissioner Koncilja did not participate.

6. On May 4, 2016, we granted the request for rehearing in the Joint RRR.[4] The Commission adopted the procedural schedule proposed by the Settling Parties and set June 1, 2016 as the date for a hearing to take new evidence. We also granted Public Service's RRR for the sole purpose of tolling the 30-day statutory period.

7. On June 1, 2016, we held an evidentiary hearing pursuant to Decision No. C16-0394-I. The testimony of witnesses offered by Public Service, Clean Energy, SunShare, Western Resource Advocates (WRA), and the Colorado Energy Office (CEO) was taken and entered into the record.

8. On June 10, 2016, the Settling Parties jointly filed a Statement of Position (SOP).[5] WRA, the Office of Consumer Counsel (OCC), and SunShare each filed separate SOPs. SunShare concurs with WRA's representation of "the impact of the current RFP and bill credit structure, the impacts on a customers' incentive to implement energy efficiency, the impacts of encouraging inefficient electricity usage and the impacts of such policies on the cost of the entire electric grid."[6]

C. Joint RRR

9. The Settling Parties request that the Commission reconsider its denial of the class average methodology for determining CSG customer bill credits, the related request for a variance from Rule 4 *Code of Colorado Regulations* (CCR) 723-3-3665(c)(I) of the Rules Regulating Electric Utilities, and the adjustment in the REC price to $0.03/kWh REC payment for developers who opt to use the class average bill credit methodology for CSGs installed

[4] Decision No. C16-0394-I, issued May 4, 2016, Proceeding No. 13A-0836E. Commissioners Epel, Vaad, and Koncilja participated.

[5] CEO joined in the SOP.

[6] SunShare SOP page 1.

pursuant to Public Service's 2015 RFP.[7] The Joint RRR does not seek reconsideration for the approval of any other provisions in the Settlement Agreement.

10. The Joint RRR acknowledges that the Settlement Agreement failed to address certain legal and factual issues, and as a result, failed to show that the proposed class average methodology for determining CSG customer bill credits is consistent with the statute and is in the public interest.[8] The Settling Parties also concede that the Settlement Agreement failed to present any legal argument that the relevant sections of § 40-2-127(5)(b)(II) C.R.S., could be read as ambiguous, which would have justified the Commission reinterpreting the statute.[9]

D. Public Service RRR

11. Public Service requests the Commission reconsider its denial of a presumption of prudence for CSGs acquired pursuant to the approved 2014-2016 RES Plan. The Company recognizes that the Settlement Agreement created an impression that the awards of the CSG projects pursuant to the 2015 RFP were contingent on the Commission approval of the Settlement Agreement.[10]

12. Public Service's RRR argues that the denial of a presumption of prudence has placed at unnecessary risk the "CSG contracts that were executed by the bidders in 2015 prior to the filing of the Motion [to Approve Settlement Agreement] and Settlement Agreement."[11] Public Service states that, despite appearances in the Settlement Agreement, the CSG contracts

[7] Joint RRR page 2.
[8] *Id.* page 3.
[9] *Id.* pages 3 and 4.
[10] *Id.* page 7.
[11] Public Service RRR page 2.

have proceeded at the original bid prices and that the bidders have taken steps to advance the associated projects.

13. Public Service takes the position that the Company has entered into contracts with winning bidders and that such actions carry a rebuttable presumption of prudence pursuant to § 40-2-124(I)(g)(IV)(B)(i), C.R.S., and Rule 4 CCR 723-3-3657(c). The Company further states that the denial of a presumption of prudence constitutes a material adverse change with respect to those executed contracts.

14. Public Service argues that notwithstanding the position advanced in the Joint RRR that there appears to be a conflict between the Commission's current interpretation of § 40-2-127(5)(b)(II) and § 40-2-127(1)(b), C.R.S., which may be inconsistent with the legislative intent. Public Service argues that had the Commission approved the Settlement Agreement, the existing SRC Producer Agreements would have required an amendment. The Company states that the effect of the Commission's denial of the Settlement Agreement, if not reversed on rehearing, is simply that the SCR Agreements will now not be amended. Public Service maintains that the Settlement Agreement is not necessary for the 29.5 MW of already awarded and contracted CSG projects to proceed."[12] With respect to the 2016 RFP, Public Service states that the Company may reissue its 2016 CSG RFP, absent the Settlement Agreement terms since they have not been approved by the Commission.

15. Public Service emphasizes that it is not requesting reconsideration of the entirety of Decision No. C16-0290, but is seeking reconsideration of the narrow issue of the presumption of prudence for CSG contracts acquired pursuant to the 2015 and 2016 RFPs. In support of this,

[12] *Id.* page 7.

the Company thought it would be helpful to put the Settlement Agreement in context and to provide additional information about the terms of the agreement.

16. The Company's RRR also addresses some of the evidentiary deficiencies of the Motion for Settlement. Public Service included with its RRR, the Affidavit of Alice K. Jackson. Ms. Jackson explains why it is reasonable and does not harm customers to allow CSG bidders to obtain a positive REC price when coupled with the proposed class average bill credit methodology for CSG customers with demand-based bill credits.

E. Hearing and Statements of Position

17. At the June 1, 2016 hearing, Public Service witness Alice Jackson conceded that some of the information that was provided for the initial motion to approve the settlement was lacking in detail, and that [the Company intended to] fill in some of the gaps. She stated that the Company's and Settling Parties' testimony needed to focus on, how the bill credit calculation was put together, and why Public Service thinks that there is imbalanced incentive for how the bill credit was calculated and why the Company wants to change the REC incentive cost that was associated with the 2015 settlement.[13]

18. Ms. Jackson testified that the $0.03/kWh REC price was needed to ensure that CSG developers that had been awarded capacity under the 2015 RFP, "were held essentially financially neutral" under the proposed change to the CSG customer bill credit.[14] In addition, Ms. Jackson represented that during the settlement discussions, Public Service sought to make sure that non-participating customers are not impacted negatively by the increase in the

[13] Hearing Transcript 17:7-17-11.
[14] *Id. 38:1-38:6.*

REC payment. She took the position that the REC price in the Settlement Agreement achieves this aim.[15]

19. Highly Confidential Hearing Exhibit No. 1418 depicts the analysis of the proposed changes to the REC price, which according to Public Service Attorney Mr. William Dudley, is a new analysis that was not provided with the Settlement Agreement.[16]

20. Ms. Jackson stated that Hearing Exhibit No. 1418 shows, the average bill credit, less the REC incentive is the compensation that that [CSG] subscriber is essentially being provided for each kilowatt-hour of consumption. The exhibit demonstrates the calculation of the compensation to a sample CSG customer under the existing bill credit and the REC price bid in response to the 2015 RFP. The exhibit compares the amount of that compensation to the compensation that the same CSG customer would receive under the bill credit and REC price proposed in the Settlement Agreement. According to Ms. Jackson, the exhibit shows that the REC price shown in the exhibit was derived as a result of the change in the bill credit to hold the developers "financially whole for the 2015 RFP.[17]

21. Hearing Exhibit No. 1418 demonstrates that the changes proposed in the Settlement Agreement result in a lower cost to the Renewable Energy Standard Adjustment (RESA) account and therefore is cost neutral or may even provide a slight benefit to customers, according to Ms. Jackson.[18]

22. SunShare witness David Amster-Olszweski affirmed that there had been an intensive stakeholder process leading to the Settlement Agreement, which had included research

[15] *Id.* 38:6.
[16] *Id.* 37:1-37:13.
[17] *Id.* 38:7-40:05.
[18] *Id.* 44:4-46:7. *See also* the Joint SOP page 12.

and analysis of the changes proposed in the agreement, but that the Settling Parties had "failed to include all the arguments" when they filed the Settlement Agreement.[19]

23. Mr. Amster-Olszweski explained that the Settling Parties did not submit all of the data around the proposed change in the REC price with the Motion for Settlement and therefore the Settling parties "didn't explain the balancing act that was going on between the bill credits coming down and the REC prices going up, which leads to it being neutral."[20]

24. SunShare sponsored Hearing Exhibit No. 1420, which Mr. Amster-Olszweski stated provides evidence in support of SunShare's position that the $0.03/kWh REC price is revenue neutral for Public Service as well as CSG developers awarded capacity pursuant to the 2015 RFP and is largely cost-neutral to ratepayers.

25. Clean Energy witness Thomas J. Hunt agreed with witnesses for Public Service and SunShare. He explained that the Settling Parties are proposing a change to the REC price for projects awarded under the 2015 RFP at a level that, "maintains a neutral overall revenue level for solar gardens customers and providers, to ensure that there is no harm to the general ratepayer."[21] Mr. Hunt also noted that Clean Energy's internal financial analysis unit concluded that the changes proposed in the Settlement Agreement would keep the company revenue neutral.[22]

26. Referring to the Company's RRR, Ms. Jackson clarified the history and status of the CSG contracts awarded to the winners of the 2015 RFP. Ms. Jackson stated that the Company awarded the CSG projects on September 11, 2015, and that it has continued to work

[19] *Id.* 97:11-97:22.
[20] *Id.* 118:14-119:6.
[21] *Id.* 83:1-83:3.
[22] *Id.* 83:21-83:25.

through the process in order for CSG developers to complete the gardens and to start subscribing customers.[23]

27. Ms. Jackson also stated that Public Service is completing the final interconnection studies with the solar garden vendors; however, the Company is withholding those studies pending the outcome of this proceeding.[24]

28. In the Joint SOP, the Settling Parties[25] acknowledge that substantial evidence was submitted into the record at the June 1 hearing. The Settling Parties argue that the CSG statute does not specifically define how billing credits for customers billed on a demand and energy rate are to be calculated. The Settling Parties contend that the specific details of the bill credit were left to the Commission to be determined when it adopted rules for CSG and that the Commission as such, has discretion to reinterpret the bill credit method.

29. The Settling Parties argue that experience with Public Service's CSG program provides evidence that the current billing credit calculation results in certain commercial customers with demand charges receiving higher than average bill credits as a result of the way that the customer's demand is factored into the individualized bill credit. The Settling Parties maintain that the existing methodology has contributed to CSG developers bidding negative REC prices in response to Public Service's RFPs for community solar gardens in order to achieve the lowest cost bid and thus gain market share. The Settling Parties conclude that the current bill credit methodology has created an incentive for CSG developers to seek out commercial customers for whom subscribing to a CSG is economic even at a negative REC price.

[23] *Id.* 20:14-20:21.

[24] *Id.* 47:8-47:24.

[25] The Joint SOP was joined by CEO, which was not a party to the Settlement Agreement.

The Settling Parties argue that to the extent that current bill credit methodology has encouraged negative REC prices, it has also discouraged developers from seeking out broad customer participation in CSGs that the statute intended.[26]

30. The Settling Parties conclude that average bill credit methodology proposed in the Settlement Agreement complies with the statute and Rule 3665(c)(I)(B) but eliminates the dramatic economic differential between the bill credits ascribed to certain commercial customers and residential customers and is having the unintended effect of preventing the legislative intent from being achieved.[27]

31. In the Joint SOP, the Settling Parties reiterate their position that the modification to the bill credits proposed in the Settlement Agreement would result in a change to the financial models that CSG developers used when submitting their bids in response to the 2015 CSG RFP. The Settling Parties evaluated the need for a change in the REC price that would be revenue-neutral to both the winning bidders and ratepayers and arrived at the $0.03.kWh REC price for CSG developers that opt to use the class average method.

32. The OCC takes no position in its SOP on the terms of the Settlement Agreement. However, the OCC states that it is concerned about any unintended consequences, including the higher than average bill credit, which the Settling Parties argue favors low-load, high demand commercial customers because of the way that Rule 3665(c)(I)(B) currently implements the statutory bill credit provision.[28]

[26] Joint SOP page 2.
[27] *Id.* page 10.
[28] OCC SOP page 1.

33. The OCC points out that prior to the filing of the RRRs no party had provided clear or convincing evidence that § 40-2-127(5)(b)(II), C.R.S., created unintended results.[29] The OCC notes that Public Service acknowledged in the Joint RRR that it did not provide sufficient factual evidence demonstrating the claimed unintended consequences that arise from calculating individual bill credits for high demand customers.[30] The June 1 hearing provided undisputed factual evidence showing that the Commission should re-evaluate its earlier findings regarding subsection 40-2-127(5)(b)(II), C.R.S.[31]

34. WRA represents that, contrary to the representation in the Settlement Agreement, the Settling Parties did confer with them prior to filing the agreement and that WRA did not oppose it.

35. WRA argues that the Commission's decision in Proceeding No. 10R-674E recognized that the interpretation of § 40-2-127(5)(b)(II), C.R.S., adopted therein was only one possible interpretation and that the statute is ambiguous and open to reinterpretation by the Commission. WRA further suggests that with the benefit of hindsight, it appears the current "interpretation of § 40-2-127(5)(b)(II) is inconsistent with this broader legislative intent to provide underserved populations, like small residential and agricultural customers, with a new opportunity to invest in solar."[32]

36. In reviewing the $0.03/kWh REC price, WRA suggests that the negative REC prices offered in response to the 2015 RFP were possible because CSG bidders were able to

[29] *Id.* page 3.
[30] *Id.* SOP page 3.
[31] *Id.* SOP page 4.
[32] WRA SOP page 15.

target customers with high, customized bill credits.[33] WRA agrees with the Setting Parties that the $0.03/kWh REC price proposed in the Settlement Agreement is intended to offset the reduction in bill credits when using a class average bill credit calculation instead of individual, customized bill credit calculations.[34] Currently high bill credits are available only to a subset of customers with very high demand charges.

F. Findings and Conclusions

37. The parties to this proceeding state that the language of § 40-2-127(5)(b)(II), C.R.S., is ambiguous since the language is capable of more than one reasonable interpretation. Although the Commission has interpreted § 40-2-127(5)(b)(II), C.R.S., as set forth in Rule 3665, the parties argue that the Commission has authority to amend its interpretation of the statute. This is possible, according to the parties, because the language of § 40-2-127(5)(b)(II), C.R.S., is ambiguous. The parties specifically point to the phrase "total aggregate retail rate as charged to the subscriber …" as being susceptible to two reasonable interpretations. WRA argues that the phrase at issue could be interpreted to require individually calculated bill credits for each customer,[35] or it could be interpreted as requiring the bill credit to be calculated based on the rate generally paid by that customer's rate class.

38. The primary legal arguments raised by the parties are that: (a) the language of § 40-2-127(5)(b)(II), C.R.S., is ambiguous; and, (b) the statute does not specifically address how billing credits are to be calculated for customers billed on separate demand and energy rates, which provides the Commission with the discretion necessary to interpret the statute to allow for

[33] *Id.* page 21.
[34] *Id* page 22.
[35] Decision No. R11-0784 in Proceeding No. 10R-674E issued July 25, 2011.

the proposed class average bill credit methodology as set forth in the terms of the Settlement Agreement.

39. As correctly pointed out by the parties, in reviewing the statutory language, the first step is to examine the statute's plain language. If the statute is clear and unambiguous on its face, then the reviewing tribunal needs to look no further. *People v. Luther*, 58 P.3d 1013, 1015 (Colo. 2002). If the statute is ambiguous, the reviewing tribunal looks to the statute's legislative history, the consequences of a given construction, and the overall goal of the statutory scheme to determine the proper interpretation of the statute. *People v. Cooper*, 27 P.3d 348, 354 (Colo. 2001).

40. We agree with WRA's statutory analysis that § 40-2-127(5)(b)(II), C.R.S., C.R.S., which states that a CSG subscriber's net metering credit is calculated by "multiplying the subscriber's share of the electricity production from the community solar garden *by the qualifying retail utility's total aggregate retail rate as charged to the subscriber*, minus a reasonable charge as determined by the commission to cover" transmission, distribution, and integration costs, can reasonably be interpreted at least two different ways. The phrase "total aggregate retail rate as charged to the subscriber" can be interpreted to require individually calculated bill credits for each customer. In addition, that phrase can also be interpreted to require the bill credit to be calculated based on the rate generally paid by that customer's class.

41. Both WRA and Public Service point out that in Proceeding No. 10R-674E, the Commission essentially recognized that § 40-2-127(5)(b)(II), C.R.S., was susceptible to more than one interpretation where the Commission upheld the ALJ's recommended rule language as

"a valid interpretation of § 40-2-127(5)(b)(II)."[36] We agree that nothing in the Commission's Decision indicated that this interpretation was the only valid interpretation. Further, we agree with the Settling Parties that the statute does not specifically address how billing credits are to be calculated for customers billed on separate demand and energy rates, but left it to the Commission to promulgate rules addressing billing credit methodologies.

42. Because the statutory language appears to be ambiguous, the Commission may look at the statute's legislative history, the consequences of a given construction, and the overall goal of the statutory scheme to determine the proper interpretation of the statute. Here, the practical effect of Rule 3665(c)(I)(B) is to potentially provide disproportionate payments to large demand customers, while providing a disincentive to market CSGs to residential, agricultural, and low-income customers.[37]

43. In enacting § 40-2-127, C.R.S., the Colorado Legislature saw fit to include a legislative declaration of its intent with regard to CSGs. Section 40-2-127(1)(b), C.R.S., specifically states:

> It is in the public interest that broader participation in solar electric generation by Colorado residents and commercial entities be encouraged by the development and deployment of distributed solar electric generating facilities known as community solar gardens, in order to:
>
> (I) Provide Colorado residents and commercial entities with the opportunity to participate in solar generation in addition to the opportunities available for rooftop solar generation on homes and businesses;
>
> (II) Allow renters, low-income utility customers, and agricultural producers to own interests in solar generation facilities[.]

[36] Proceeding No. 10R-674E, Decision No. C11-0991, at ¶ 29 issued September 14, 2011.

[37] The Commission acknowledges that the Settling Parties raised the issue of the equity of the bill credit structure.

44. The legislative intent of § 40-2-127, C.R.S., is clear. The statute was enacted in order to provide broader participation in CSG, which was to extend not only to commercial entities, but more importantly, to residential customers, including renters, low-income utility customers, and agricultural producers. This is how the overall statutory scheme should be interpreted and the statutory goals determined.

45. However, as the record evidence has shown, adherence to the requirements of Rule 3556(c)(I)(B), which codifies the calculation of the bill credit provisions contained in the statute, is inconsistent with the stated legislative intent. At the time Rule 3665 was promulgated, it was not known what the consequences would ultimately be. As expressed by the Commission in the rulemaking Proceeding No. 10R-674E, the codification of:

> HB 10-1342 represents an experiment designed to allow for the development of various forms of solar gardens that may expand the availability of solar resources to utility customers. We may learn from this experiment and later determine that changes to the rules we adopt by this Order will be appropriate in the future.[38]

46. The Commission also expected to review the rules, including Rule 3665 after the CSG concept was tested in the marketplace over a period of years. Consequently, it is reasonable to find that the Commission's initial interpretation of § 40-2-127(5)(b)(II), C.R.S., is inconsistent with the legislative intent to provide opportunities to invest in solar through CSGs to underserved populations such as residential, low-income, and agricultural customers.

47. Given all these issues taken together, it is within the confines of statutory construction principles for the Commission to reconsider the calculation requirements of Rule 3665(c)(I)(B) by waiving those requirements pursuant to Rule 4 CCR 723-1-1003(a) of the

[38] Proceeding No. 10R-674E, Decision No. C11-0991, ¶¶ 23-29, pp. 8-10, and C11-1172 issued November 1, 2011, ¶¶ 12-15, pp. 4-5.

Rules of Practice and Procedure, which in turn permits the Commission to grant waivers or variances from Commission rules and substantive requirements contained in Commission decisions.

48. Upon waiver of Rule 3665(c)(I)(B), the Commission may adopt the class-average bill credit approach as prescribed in the Settlement Agreement.

49. We agree with the parties that prior to the June 1 hearing, we did not have sufficient evidence of the impacts of the change in REC price proposed in the Settlement Agreement. Through the RRR process and at hearing, the Parties have shown that the optional $0.03/kWh REC price represents a balance of the interests of Public Service, CSG developers and subscribers, and non-participating customers.

50. WRA suggests that allowing CSG developers to adopt class average bill credits combined with a $0.03 REC payment for 2015 CSGs, will enable those developers to sell subscriptions to all classes of customers instead of targeting those customers whose bill credits can accommodate negative REC pricing. The effect of the change in bill credit and REC price remain to be seen, but the evidence presented at hearing shows that customers will not pay substantially more for CSG as a result of the increase in the REC price and that they may be benefited by lower costs to the program and greater opportunities for more classes to participate.

51. As a result, we authorize Public Service to modify the implementation of its 2015 RFP awards, by allowing the winning bidders to elect, for each individual CSG project, to receive $0.03/kWh per REC generated by the CSG project, provided that, in order to make this election, any customers subscribed to the CSG project is required to have their bill credits calculated on a class-average basis. We further permit the application of the class-average bill credit to the customers subscribing to the CSGs awarded in the Company's 2016 CSG RFP.

52. We also find good cause to grant the Public Service RRR and strike paragraphs 64 and 65 of Decision No. C16-0290. Public Service's action taken in accordance with its 2014-2016 RES Compliance Plan, as modified by our approval of the particular terms of the Settlement Agreement upon rehearing and reconsideration, shall have a presumption of prudence at the time of cost recovery. Public Service will not be required to file all contracts it enters into from the 2015 and 2016 RFPs in a new application proceeding and also will not be required to submit testimony or other additional support to show that the Company acted in a prudent manner in entering into the contracts.

53. We also modify our directive to the Staff of the Colorado Public Utilities Commission (Staff). The Settling Parties, CEO, and WRA have argued that the change to the bill credit calculation proposed in the Settlement Agreement will result in broader participation in CSGs acquired through competitive bidding. We continue to hold that the demonstration of successful, cost-effective CSGs operating in Public Service's service area is essential to the growth of the market and the furtherance of the intent of § 40-2-127, C.R.S. Therefore, we direct Staff to review data provided by Public Service regarding bid responses to the 2015 and 2016 RFP about the participation of customer classes in CSGs. In order to better evaluate and understand the effect of the changes approved here, Staff will provided that review in the context of CSG program participation from the program's inception. Staff's report shall, at a minimum, include: the total number of CSGs in operation and the amount of CSG capacity installed by CSG vintage (*i.e.,* annual acquisition prior to the 2015 RFP, acquired through the 2015 RFP, and acquired through the 2016 RFP); the average price for a REC by CSG vintage; the number of subscribers by customer class by vintage; the number of low-income CSG subscribers by vintage; the average customer bill credit paid by customer class by CSG vintage; and the

total annual costs of the CSG by vintage and the respective amounts recovered through the RESA and the Electric Commodity Adjustment.

54. To enable Staff to fulfill this directive, Public Service shall work with Staff prior to the Company's filing of its 2017 RES Compliance Report as required by Rule 4 CCR 723-3-3662 and shall provide the requisite data to Staff no later than June 1, 2018. Staff then shall provide its report at the time that it provides its annual review of the Company's 2017 RES Compliance Report.

G. Response to Koncilja Concurrence

55. Commissioner Koncilja was sworn into office on January 12, 2016.

56. The Motion for Settlement was filed on February 22, 2016, and we deliberated on that motion on March 16, 2016. Commissioner Koncilja did not exercise her prerogative to request additional time to review this settlement proposal at that time and abstained from participating in the issuance of Decision No. C16-0290.

57. Decision No. C16-0290 mailed on April 6, 2016. The applications for RRR addressed in this Decision were filed on April 26, 2016, after the full 20 day period provided by § 40-6-114, C.R.S. As discussed above, the Joint RRR substantially reduced the request for relief of the Settling Parties. Public Service also joined in the request that the Commission conduct an evidentiary hearing on May 31 or June 1, 2016 and in the request to file additional briefs nine or ten days later after that hearing. We further note that, as set forth in paragraph 10 above, the Settling Parties admitted that the February 22, 2016 filings lacked the information necessary for the Commission to determine that approval of the Settlement Agreement was in the public interest.

58. We addressed the Settling Parties' request for rehearing on May 4, 2016 in Decision No. C16-0394-I, scheduling the hearing for June 1, 2016, as requested. Commissioner Koncilja had the opportunity to persuade us that there was sufficient cause to grant the Public Service RRR at that time. She instead joined in Decision No. C16-0394-I that stated that the Commission would rule on the Public Service RRR after the 30-day deadline for a decision pursuant to § 40-6-114(1), C.R.S., due to the new evidence and argument that will result from the additional hearing.

59. It appears that only after the parties had provided such supplemental testimony to justify approval of the Settlement Agreement did Commissioner Koncilja reach the conclusion that the Commission could have approved the Settlement Agreement months earlier. Commissioner Koncilja could have educated us through discussion on her positions regarding the substance of the filings. Informing us of her *post hac* determinations through a written concurrence delayed the issuance of this Decision after its adoption on June 29, 2016 and its circulation for review beginning on July 15, 2016.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration filed by Public Service Company of Colorado (Public Service or Company); SunShare, LLC; Clean Energy Collective; and Community Energy Solar on April 26, 2016 is granted, consistent with the discussion above.

2. The specific provisions of the Settlement Agreement filed by Public Service on February 22, 2016 are granted consistent with the discussion above.

3. The Application for Rehearing, Reargument, or Reconsideration filed by Public Service on April 26, 2016 is granted, consistent with the discussion above.

4. Decision No. C16-0290 is amended and paragraphs 64 and 65 are removed.

5. Consistent with the discussion above, Staff of the Colorado Public Utilities Commission (Staff) shall submit a report to the Commission on customer participation in community solar gardens with its 2017 RES Compliance Report.

6. Public Service shall work with Staff regarding the Company's filing of its 2017 RES Compliance Report as required by Rule 4 *Code of Colorado Regulations* 723-3-3662 and shall provide the requisite data to Staff no later than June 1, 2018.

7. The 20-day time period provided pursuant to § 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.

8. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING June 29, 2016.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

Commissioners

COMMISSIONER FRANCES A. KONCILJA
CONCURRING IN PART AND
DISSENTING IN PART.

III. COMMISSIONER FRANCES A. KONCILJA CONCURRING IN PART AND DISSENTING IN PART

1. I agree with the decision of the Commissioners to grant the Rehearing, Reargument, or Reconsideration; however, I disagree with certain characterizations in the Decision as well as the unfounded blaming and shaming of the Settling Parties and therefore write this separate opinion.

A. Introduction

2. In its Decision Denying Motion to Approve Settlement, Clarifying Decision No. C14-1505, and Directing Staff of Commission to Review Contracts, adopted March 16, 2016 (**Original Decision**),[39] the Commission ignored facts presented by the Settling Parties, made incorrect assumptions, ignored factual and legal concerns raised in the rulemaking that adopted Rule 3665(C)(1)(b),[40] and then took the Draconian step of denying to Public Service Company of Colorado (**Public Service**) a "presumption of prudence" which placed the Community Solar Gardens (**CSG**) at risk. The Original Decision inaccurately accused Public Service of delay in developing CSG, improperly rebuked Public Service for raising the "same" issues that the Commission had rejected, and asserted that the Commission was taking these actions to "protect ratepayers." (*See* ¶ 4 of the Original Decision.) However, it was the small ratepayers who were suffering as the result of Rule 3665(C)(1)(b). It was the industrial and commercial customers with a high or peaky demand, but a total low usage who were getting the lion's share of the bill credits that made it economical for vendors to offer negative Renewable Energy Credit (**REC**) pricing in the first place. It was the individual bill credit methodology as opposed to using a class average that lead to this unintended consequence.

[39] I did not participate in the Original Decision, No. C16-0290, because the volume of the record was substantial. I had been recently appointed and had not had time to review that record. Since that time, I have reviewed the record and I believe the Commission should have granted the Motion to Approve the Settlement Agreement *in toto*.

[40] On September 30, 2010, the Commission opened Proceeding No. 10R-674E *In the Matter of Proposed Amendments to the Rules of the Colorado Public Utilities Commission Pursuant to (1) the Development of Solar Gardens as Required by HB10-1342, (2) Community-Based Projects that Qualify for Special Treatment Under HB10-1418 and (3) Use of Eligible Energy Resources to Offset Electrical Energy Consumption of the Division of Parks and Outdoor Recreation as per HB10-1349. (**Rulemaking**).*

3. At the same time, the Commission ignored the delay caused by its own inaction and refusal to decide the issue of negative REC pricing placed before it by the parties. If the Commissioners were interested in protecting ratepayers and expanding CSG, they could have taken the simple step of requesting information from the Settling Parties and/or setting the matter for a hearing. Instead, the Commissioners issued the Original Decision complete with inaccurate statements and full of pique. Unfortunately rather than admitting to its mistakes, the Commissioners ignore their mistakes and continue the improper tone of blaming and shaming in this Decision. The Chair, at the end of the adjudicatory hearing on June 29, 2016, then took the added step of lecturing the parties on these perceived deficiencies. These shaming statements have now been repeated in the press, which is unfortunate because, in my opinion, they were not based on facts. [41]

B. Delay

4. There has been delay in arriving at a final resolution of these matters. However, the Commission has been responsible for some of that delay and it is inappropriate to place the total blame and responsibility on the parties to the Settlement Agreement.

5. Public Service and the various stakeholders, some of whom are parties to the Settlement Agreement have been working on implementation of the CSG legislation since the Commission commenced the Rulemaking in 2010 and more recently in this proceeding which began on July 24, 2013 when Public Service filed its *Verified Application for Approval of*

[41] The Original Decision had the additional effect of harming low-income customers' participation in the benefits of CSG because the Settling Parties had agreed that Public Service could participate in ownership of up to 4 MW of CSG on the condition that it be made available to low-income participants. This public benefit was not even analyzed or considered in the Original Decision.

2014 Renewable Energy Standard Compliance Plan (**2014 RES Plan).**[42] As set forth below, it appears to me that Public Service and the stakeholders proceeded with diligence once the Decision was final, on or about March 1, 2015.

6. Public Service filed its *Verified Motion to Approve Settlement Agreement Regarding Public Service Company of Colorado's Implementation of its 2014-2016 Community Solar Gardens Program; and for Variance from Commission Rule 3665(C)(1)* on February 22, 2016 (**Verified Motion to Approve Settlement**). Public Service stated at paragraph 4 of its Verified Motion to Approve Settlement that it issued its Request for Proposals (**RFP**) on June 11, 2015, and approved applications from three developers on September 11, 2015. I could locate no evidence in the record, that this was an unreasonable amount of time to prepare the RFP, to solicit bids and to accept applications.

7. The Commissioners seem to have jumped to the conclusion that Public Service had not entered into any contracts in 2015. It is correct that Public Service did not specifically state how many CSG projects were advancing in 2015. However, there was information in the pleadings that indicates that contracts had been agreed to. If the Commissioners had a question about the number of contracts in 2015 and/or whether or not work had commenced, they could have and should have requested the information. Instead the Commission denied the Verified Motion to Approve Settlement and withdrew the presumption of prudence.

[42] On September 6, 2013, the Commissioners, in Decision No. C13-1102-I, referred the 2014 RES Plan to the Administrative Law Judge who issued his Recommended Decision on July 31, 2014. *See* Decision No. R14-0902. The Commission issued its decision, Decision No. C14-1505, approving the 2014 RES Plan and addressed exceptions on December 26, 2014. Public Service filed its Application for Rehearing Reargument or Reconsideration on January 12, 2015 because of ambiguities and inconsistencies in the Decision, which the Commission granted on February 9, 2015 when it entered Decision No. C15-0142 which was not a final decision for 20 days.

8. As set forth below, the Commission has also been responsible for the delay in this case because it has refused to issue any guidance on the issue of negative REC pricing.

C. Negative Pricing

9. The issue of negative REC pricing has been before the Commission in a number of motions and applications, most recently in this matter, but the Commission has refused to provide any guidance on this important issue.[43] On July 8, 2015, the Colorado Solar Energy Industries Association (**COSEIA**), the day before the bids were due, filed an emergency motion asking the Commission to hold an emergency meeting to determine if Public Service could accept negative price bids for RECs. Over four weeks later, on August 12, 2015, by Decision No. C15-0871, the Commission denied the motion because it was filed "too late"—one day before the bids were due. At that point, I believe that the Commission had ample information available to it to understand the problems with negative REC pricing and could have and should have provided guidance. On September 1, 2015, COSEIA filed its Request for Reconsideration of the matter and Western Resources Advocates (**WRA**) made a similar request.[44] The Commission again denied the request, again stating that the Emergency Motion was filed less than 24 hours before the RFPs were due.

10. With no guidance from the Commission, Public Service then entered into contracts whereby vendors had the option to enter into contracts to receive $0.03/kWh per REC.

[43] The real elephant in the room that the Commission has still not addressed is whether or not its insistence on competitive bids, with the requirement that Public Service accept the lowest price bid, contributes to a vendor being willing to submit a negative REC price. I assume that issue will be the subject of later proceedings and/or rulemaking.

[44] It is interesting to note that the Commission in its Original Decision was troubled that Public Service had not indicated if it had consulted with WRA as to its position on the Settlement Agreement. WRA was not a party to the Settlement Agreement. After ignoring the plea of WRA that the Commission deal with negative REC pricing, it is ironic that the Commission thought their position was critical to evaluating the Settlement Agreement. It is possible that WRA decided to conserve its resources and not file another pleading since the Commission turned a deaf ear to their request in September.

(*See* paragraph 13 of the Verified Motion to Approve Settlement.) In light of this history, I do not understand how the Commissioners could complain about and reject this portion of the Settlement Agreement. (*See* paragraphs 53 and 54 of the Original Decision.) It appears to me that Public Service and the vendors entered into a rational settlement that protected ratepayers because it was clear that the Commission would provide no guidance on this issue. As a result, I am completely befuddled by the accusations and complaints in the Original Decision.

D. Bill Credit Methodology

11. The Commission recognized in its Original Decision that there had been concerns raised about the effect of the bill credit methodology adopted in Rule 3665(C)(1)(B). Rather than reviewing the substantive issues by reading the filings in the Rulemaking on this issue (which I have done), the Commissioners appear to have developed "an attitude" that Public Service was challenging the authority of the Commission. (It is interesting to note that in this Decision, the Commission now realizes that the rules on CSG were described as an experiment that might need adjusting in the future.)

12. It is clear that there are two problems with an individual bill credit methodology—one of fairness in that only a small group of customers will receive the benefits of CSG and the credits and second, the burden to Public Service.

13. As to the issue of fairness, the Commission seems to have ignored the detailed explanation in the Verified Motion to Approve Settlement and the attached affidavit of Alice Jackson that it was the individual credit methodology that had the unintended consequence of unfairness and limiting access to CSG to primarily the commercial and industrial users. (*See* Paragraph 14 of the Verified Motion to Approve Settlement.) In fact, Ms. Jackson at paragraph 2 of her Affidavit explained, in a table, that the significant range of credits

from $.047 to $1.161 has incentivized CSG developers to target a select, and small, group of customers to participate in CSG. Thus the Settlement Agreement was and is in the public interest because it tried to expand the group of ratepayers who would receive bill credits.

14. The Commission stated in its Original Decision that Public Service has had the time to acquire software updates to allow for the calculation of the bill credits on an individual, as opposed to a class average basis. (*See* Paragraph 47 of Original Decision.) There was absolutely no evidence in the record that such "software updates" were technologically feasible and/or financially feasible. [45]

15. The Commissioners appear to be concerned that the parties to the Settlement Agreement failed to use the "magic language" that the statute was ambiguous, and that therefore the application of the rule could be waived. Almost all of the stakeholders, however, raised the ambiguity issue in various pleadings in the Rulemaking. The language that the Commission (and the administrative law judges) use in decisions as to the analysis of the statutes and case law to review ambiguity issues is boilerplate that we should all have memorized by now. (There is one statute and four or five cases.) It would have been a trivial matter for the Original Decision to have included that legal analysis or require a legal brief in the issue. Instead the Commissioners seemed to want to play a game of "gotcha" and rejected the complete Settlement Agreement. [46]

[45] There was also no discussion or recognition in the Original Decision or in this Decision that Public Service had the right under the rules to deduct from the credits its administrative costs and that Public Service had not done that—probably because it was too onerous. It is not easy to customize billing software for millions of customers.

[46] The irony of the Commission concluding that the statute was plain on its face as opposed to ambiguous is the counsel for Public Service, Paula Connelly, in the Rulemaking, anticipated these very problems and made the argument of ambiguity. I have no criticism of the Administrative Law Judge's decision to reject at that time Public Service's position. However, I do have a problem with the self-righteous tone of the Original Decision which carries over into this Decision.

E. Elements of Competent Regulation

16. If we apply Dean Weiser's Five Elements of Regulatory Competence and analyze the Original Decision and this Decision, we see once again, a failure.[47] Expertise—Commissioners should know what is in the files of matters they have decided. Determinacy—the Commissioners could have and should have decided the issue of negative REC pricing in August when it was presented to them. Neutrality—the Commission should have asked why are we insisting on individual bill credit calculations. Humility—this is a huge failure, in my opinion in both the Original Decision and this Decision. There are times when it is appropriate to shame a utility and/or its attorneys—*e.g.*, if they are trying to game the system and/or they are making frivolous arguments. In this case, there was and is no reason to publicly shame Public Service and the parties to the Settlement Agreement. In fact, I believe they should have been complimented.

17. In an attempt to justify its flawed and erroneous Original Decision, the Commissioners pin the tail on the litigants as opposed to taking any responsibility themselves.[48] I am not persuaded that Public Service, Community Energy Solar, Clean Energy Collective, or SunShare LLC (**SunShare**) made knowing admissions of fault in their Requests for Reconsideration. I review their statements in the context that the Original Decision took the CSG project and the presumption of prudence as hostages and extorted improper concessions and so called admissions from the Settling Parties. It appears to me that the Settling Parties

[47] *See* my concurrence and dissent in Proceeding No. 14M-0241EG, Decision No. C16-0707 issued August 2, 2016, in which I refer to and quote from the book *Digital Crossroads* (MIT Press, Second Edition 2013, pages 367 to 368.

[48] *See* in this Decision, ¶ 10 "acknowledges that the Settlement Agreement failed to address"; ¶ 11 "created an impression"; ¶ 16 "evidentiary deficiencies"; ¶ 17 "conceded"; and ¶ 22 "failed to include."

have been obsequious, almost to a fault, to try to avoid raising the unfounded ire of the Commissioners.

18. The Commissioners could have and should have complimented all of the Settling Parties on arriving at a settlement of the issues, with a particular acknowledgment that SunShare witness Mr. David Amster-Orlowski put his commitment to equal access to solar benefits above his own personal gain and was willing to step forward to discuss the corrosive effect of the use of the bulks of the credits by certain customers as opposed to a more democratic availability across income groups. I believe that Public Service should also have been complimented on its willingness to walk away from certain elements of the Settlement Agreement that were negotiated for and beneficial to Public Service, including but not limited to the co-location issue.[49]

F. Conclusion

19. I believe in robust, rational and efficient regulation, tempered with a bit of humility. Insisting on numerous proceedings, delaying decisions, forgetting or ignoring what is in the record in the numerous proceedings, and/or deciding important matters on the basis of personal pique is not competent regulatory behavior—especially in the arena of renewable energy, which is a new frontier for all participants. In this matter, Public Service, the Settling Parties, and WRA were harmed by spending time and probably tens of thousands of dollars on these filings, negotiations, settlements, and the hearing. Ultimately and more importantly, ratepayers and the CSG suffered.

[49] I include these pointed and sharp comments in this Opinion so that if there is more publicity about the Original Decision, this Decision or the Chair's public shaming, that there is a fact based counterpoint in the record.

20. It would have been so much easier and productive to have decided the negative REC pricing months earlier in September, to have waived what proved to be the unworkable requirements of Rule 3665(C)(1)(b), without insisting on the "magic language" that the statute was ambiguous and to have asked the parties how many contracts had been entered into and why WRA did not take a position as to the Settlement Agreement. For all of these reasons, I would have approved the Settlement Agreement as presented and, as an alternative, I agree to the limited relief in this Decision.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

_____

Commissioner

ATTEST: A TRUE COPY

Doug Dean,
Director