

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18R-0492E

IN THE MATTER OF THE PROPOSED AMENDMENT TO RULES REGULATING
ELECTRIC UTILITIES IN RELATION TO QUALIFYING FACILITIES, 4 CODE OF
COLORADO REGULATIONS 723-3-3902(c).

DECISION ADOPTING RULE REVISION

Mailed Date: November 27, 2018
Adopted Date: October 31, 2018

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I. BY THE COMMISSION

A. Statement

1. The Colorado Public Utilities Commission issues this Decision to amend Rule 3902(c) of the Commission’s Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3 (Electric Rules). The proposed amendment eliminates a contradictory provision relating to Qualifying Facilities (QFs) in the Commission’s Electric Rules.

Specifically, we delete the second sentence of Rule 3902(c), which states that the “only” means by which a QF can obtain a legally enforceable obligation is through competitive bidding.

2. Concurrent with our determination to adopt this rule change, we affirm our commitment to examine other related rules in the Commission’s Electric Rules regarding QFs. This includes, without limitation, rule revisions that provide clearer direction on processes regarding obtaining legally enforceable obligations and on methods for establishing avoided costs to set the price for the purchase of energy and capacity from QFs. The QF Rules necessarily interrelate with multiple provisions the Commission’s Electric Rules regarding statewide policy objectives and practices implementing Colorado’s Renewable Energy Standard (RES), interconnection requirements, and the Electric Resource Planning (ERP) process. A comprehensive Notice of Proposed Rulemaking (NOPR) shall be considered for adoption, consistent with our discussion closing Proceeding No. 17M-0694E.¹

3. The forthcoming comprehensive rulemaking will analyze continued updates to Commission rules and processes for ongoing compliance with all state and federal obligations, including without limitation, Colorado’s ongoing compliance with applicable Public Utility Regulatory Act (PURPA) and Federal Energy Regulatory Commission (FERC) directives.

B. Background

4. On October 26, 2017, by Decision No. C17-0878, the Commission opened Proceeding No. 17M-0694E as a repository for stakeholder input on potential changes to the Commission’s Electric Rules in at least three areas: the rules implementing the RES, 4 CCR 723-3-3650 through 3668; provisions governing the ERP process, 4 CCR 723-3-3600-3619; and

¹ At its weekly meeting on October 31, 2018, the same meeting at which this Decision was adopted, the Commission closed Proceeding No. 17M-0694E by minute entry and orally directed Staff of the Commission to prepare the NOPR.

the rules governing energy and capacity purchases from QFs, which fall under Small Power Producers and Cogenerators, 4 CCR 723-3-3900-3928 (QF Rules). Through our decision, we directed the Staff of the Colorado Public Utilities Commission (Staff) to work with stakeholders and other interested participants to develop draft rule changes.

5. Notably, the Commission's QF Rules were last updated in 2005. Since that time, however, the Commission's resource planning rules transformed into the present ERP Rules.² The unmodified QF Rules, which allow for a QF to procure a legally enforceable obligation through competitive bidding, interact directly with the ERP Rules that require competitive bidding practices for resource acquisitions by the two investor-owned electric utilities serving Colorado, Public Service Company of Colorado (Public Service) or Black Hills Colorado Electric, Inc. (Black Hills).

6. The Commission also promulgated its RES Rules due to state statutory changes beginning in 2004. Specifically, the RES Rules implement state policies included within § 40-2-124, C.R.S, requiring the acquisition of renewable energy by the two investor-owned electric utilities and the other providers of retail electric service in Colorado.³ With the exception of certain co-generation, QFs are resources that produce renewable energy. Therefore, provisions in the RES Rules necessarily relate to the acquisition of renewable energy resources that apply to QFs.⁴

² See, e.g., Rules adopted in Proceeding No. 07R-419E, making permanent the emergency amendments to Rules 3600 through 3615, initially adopted in Proceeding No. 07R-368E regarding resource planning (effective March 1, 2008).

³ See, e.g., Rules implementing Colorado Amendment 37 regarding Renewable Energy Standards, Rules 3650 through 3665, 4 CCR 723-3, adopted in Proceeding No. 05R-112E (effective July 2, 2006); Amendments to Rules 3650 through 3664 in Proceeding No. 07R-166E (effective September 30, 2007).

⁴ Colorado utilities also may also acquire "recycled energy" for RES compliance, of which certain forms of QF co-generation may also be eligible.

7. While the Commission endeavored in 2008 and 2009 to improve the integration of its ERP and RES Rules, the QF Rules were not modified.⁵ Also, the RES Rules contain their own separate provisions for utility resource acquisitions in Rule 3656. While the ERP and RES Rules have been better integrated over time, we recognize that there are remaining contradictions and ambiguities, including contradictions and ambiguities related to energy and capacity purchases from QFs.

8. We intend to revise not only Rule 3902 but the QF Rules as a whole through the upcoming NOPR. We have made this intention clear through numerous recent decisions.⁶ However, because of the complexity of the QF Rules within the Electric Rules, to avoid inconsistencies and ensure the interrelated rules best meet Colorado's energy policies, we have been resolute to attempt rulemaking considerations in one, comprehensive, rulemaking.

9. As part of the pre-rulemaking process in Proceeding No. 17M-0694E, Staff hosted workshops with stakeholders to discuss possible changes to the Electric Rules. At the July 11, 2018, workshop, Staff focused on the rules as they pertained to QFs. Various stakeholders presented information about the history of QF projects developed in Colorado and about the small power producers that have been awarded contracts through competitive bidding. In response to the information provided by the stakeholders, Staff recognized that the current

⁵ See, e.g., Amendments to Rules 3652 through 3664, 4 CCR 723-3, adopted in Proceeding No. 09R-618E regarding the Renewable Energy Standard (effective September 1, 2009); Permanent rules amended in Proceeding No. 08R-424E regarding newly amended Renewable Energy Standard Rules (effective March 30, 2010); Amendments to Electric Resource Planning Rules adopted in Proceeding No. 10R-214E and amendments to Renewable Energy Standard Rules adopted in Proceeding No. 10R-243E (effective December 30, 2010); Amendments to Electric Resource Planning Rules adopted in Proceeding No. 11R-416E (effective October 30, 2011); Renewable Energy Standard Rules amended in Proceeding No. 13R-0901E (effective June 14, 2014); and Electric and Renewable Energy Standard Rules amended in Proceeding No. 15R-0699E (effective May 15, 2016).

⁶ Decision No. C17-0316, Proceeding No. 16A-0396E, at ¶¶ 170-75 (Public Service's Phase I Decision in its most recent ERP Proceeding); Decision No. C17-0878, Proceeding No. 17M-0694E, at ¶¶ 11-12, 22 (Decision opening miscellaneous proceeding to examine ERP, RES, and related Commission rules).

provisions addressing QFs in the Electric Rules could be made substantially clearer in relation to the ERP Rules and the RES Rules.

10. In particular, stakeholders noted that the second sentence of Rule 3902(c), providing that “[a] utility is obligated to purchase capacity or energy from a qualifying facility *only if* the qualifying facility is awarded a contract under the [ERP] process” (emphasis added), had not been updated since 2005. Participants cited Rule 3615(a), which exempts projects not more than 30 MW from the standard provisions requiring competitive bidding in the ERP Rules. The Commission also recognizes Rule 3656 regarding resource acquisition also allows for applications from a QF outside of an ERP. In addition, workshop participants discussed that independent power producers (IPPs) receive contracts (and therefore legally enforceable obligations) outside of the ERP, noting that some IPPs could qualify as QFs. Further still, the Commission’s rules regarding general electric application processes allow for filings from non-utilities. However, the rules do not explain any specific processes for applications in relation to other potentially contradictory rules. Consistent with all application proceedings, such filings would necessarily be fact specific.

11. Participant comments offered in Proceeding No. 17M-0694E affirmed that the second sentence in Rule 3902(c) fails to reflect the various alternative avenues for utility resource procurement in later-promulgated ERP Rules and RES Rules to present a contract or legally enforceable obligation with an investor-owned utility.

12. Through our NOPR issued in this proceeding,⁷ we adopted Staff’s recommendation to modify and improve the Electric Rules by deleting the second sentence of

⁷ Decision No. C18-0601, Proceeding No. 18R-0492E, issued July 25, 2018.

Rule 3902(c). The Commission scheduled a public comment hearing for September 14, 2018, and – particularly given the narrow scope of the rule revision – requested written comments in August and early September leading to that hearing date.

13. In opening this rulemaking proceeding, we emphasized that there are both ongoing and anticipated opportunities for stakeholders to propose improvements addressing the complex and interrelated provisions in the Electric Rules. Staff also continued comprehensive and robust workshop engagement in Proceeding No. 17M-0694E. However, we opined that the narrowly proposed revision to Rule 3902(c) – separate from the comprehensive rule considerations – could encourage efficiencies and appropriate filings, while at the same time avoiding obvious conflict between certain existing provisions in the rules.

14. Shortly after we opened this narrow rulemaking regarding only Rule 3902(c), sPower Development Co., LLC (sPower) filed 18 adjudications⁸ before this Commission claiming that it has legally enforceable obligations with either Public Service or Black Hills. Its filings were submitted pursuant to Rule 3002(a)(XIX) regarding application processes that generally permit a non-utility to file applications for relief before this Commission. The majority of these filings were consolidated, all of which relate to Public Service, and two proceedings are before an assigned Administrative Law Judge. The current statutory deadline for a decision on sPower applications is in April of 2019.⁹

⁸ See Proceeding Nos. 18A-0505E, 18A-0506E, 18A-0507E, 18A-0508E, 18A-0509E, 18A-0510E, 18A-0511E, 18A-0512E, 18A-0513E, 18A-0514E, 18A-0515E, 18A-0516E, 18A-0517E, 18A-0518E, 18A-0519E, 18A-0520E, and 18A-0521E, consolidated by Decision No. R18-0869-I, issued September 25, 2018 (regarding sPower's claims for legally enforceable obligations with Public Service); and Proceeding No. 18A-0524E (regarding sPower's claim for a legally enforceable obligation with Black Hills).

⁹ See § 40-6-109.5, C.R.S.; see also, Decision No. R18-0960-I, Proceeding Nos. 18A-0505E, *et al.*, issued October 26, 2018 (interim decision discussing procedural processes, including providing notice of hearing pursuant to § 40-6-109.5(4), C.R.S.).

15. The Commission received both written and oral comments in this rulemaking proceeding regarding whether to strike the second sentence of Rule 3902(c). Through written comments, several commenters, including the Colorado Energy Office, agree that the rule is in direct conflict with existing practices and rules.

16. There is concern, particularly from the utilities, but also from the Colorado Independent Energy Association (CIEA) and the Office of Consumer Counsel (OCC), that striking the rule has directly encouraged sPower's pleadings in 18 adjudication filings. The utilities oppose the rule revision and, in the alternative, request that the Commission: (1) clarify that the rule change is prospective only; and (2) state that the rule change is limited to direct conflicts with Rule 3615 only. Numerous participants in this rulemaking proceeding also provide differing comments and analysis regarding federal statutory obligations pursuant to PURPA as it relates to Colorado's implementation of the Electric Rules, generally, including the second sentence of the specific rule at issue here.

17. Throughout comments in this rulemaking proceeding, there is a common theme supporting the Commission's planned review of the QF Rules in the context of the larger NOPR revising the Electric Rules as a whole. The participants emphasize that the Commission affirm that the ERP competitive bidding process remains the principal means of electric resource acquisition. Certain participants, including CIEA and OCC, argue that PURPA compliance concerns are beyond the limited scope of this narrow rulemaking and should be addressed in the larger NOPR or in the sPower adjudications that were filed shortly after the NOPR issued as relevant to the facts presented in those cases. Within its comments supporting that the Commission strike the second sentence of Rule 3902(c), sPower provides advocacy regarding PURPA and requests Commission direction on whether and how to file "outside" of the ERP,

despite already having filed 18 adjudications before this Commission seeking legally enforceable obligations with regulated utilities.

C. Findings and Conclusion

18. The statutory authority for the rules proposed here is found at §§ 24-4-101 *et seq.*, 40-2-108, and 124, C.R.S.

19. We adopt the proposed rule revision striking the second sentence of Rule 3902(c). The sentence is in conflict with current Commission rules, including without limitation Rules 3615 and 3656. The Commission also agrees with participants that IPP contracting procurement adjudications are likely in contradiction with the rule as well. The limiting language requested by the utilities is therefore inaccurate. Consistent with any rule change adopted by this Commission, all revisions are prospective.

20. Regarding additional adjudications and avenues available in the current rules, Rule 3002 generally permits application filings from non-utilities. With 18 current adjudications pending, a determination on the request from sPower on adjudications under the rules is both beyond the limited scope of the instant rulemaking and inappropriate, as it implicates litigation strategies in ongoing and current proceedings.

21. While we adopt the rule revision to strike clearly contradictory language in the second sentence of Rule 3902(c), we are committed to revising the interrelated, and complex, ERP Rules, RES Rules, and QF Rules.¹⁰ We agree with participant comments, which make clear that a Commission rulemaking proceeding is the appropriate place to set out processes for determining legally enforceable obligations, avoided costs for purchases of energy and capacity

¹⁰ While not the focus of this rulemaking, we note that interconnection rules and other areas of the Electric Rules also interrelate with the QF Rules and will be included within proposed rule revisions in the forthcoming NOPR.

from QFs, and associated competitive bidding practices, as necessary. We also continue to be concerned with inconsistencies and needed improvements throughout the Electric Rules.

22. We further agree with the OCC and other commenters that this rulemaking proceeding, which focused on the second sentence of Rule 3902(c), is too narrow to review the full impacts of compliance with PURPA or other federal and state law obligations. State compliance with PURPA requires broad considerations of all practices and rules, including those included in the ERP and RES Rules. Our forthcoming comprehensive rulemaking will necessarily address full and continued compliance throughout the rules with state and federal law, including without limitation, considering recent FERC actions.

23. Striking the second sentence of Rule 3902(c) does not lessen our ongoing support of Colorado's robust competitive bidding processes set forth in the ERP Rules. Competitive bidding continues to be foundational to Colorado's ERP processes. However, Rule 3902(c) that includes that competitive bidding is the "only" means available is simply inaccurate. We adopt the limited rule change and affirm our commitment to further reform the QF Rules, and all Electric Rules.

II. **ORDER**

A. **The Commission Orders That:**

1. The revision to the Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3, contained in redlined and strikeout format attached to this Decision as Attachment A, and in final format attached as Attachment B, is adopted and is available in the Commission's Electronic Filing System at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=18R-0492E.

2. The second sentence of 4 CCR 723-3-3902(c) is stricken, consistent with the discussion above.

3. Subject to a filing of an application for rehearing, reargument, or reconsideration, the opinion of the Attorney General of the State of Colorado shall be obtained regarding constitutionality and legality of the rules as finally adopted. A copy of the final, adopted rules shall be filed with the Office of the Secretary of State. The rules shall be effective 20 days after publication in *The Colorado Register* by the Office of the Secretary of State.

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
October 31, 2018.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

WENDY M. MOSER

Commissioners

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 CODE OF COLORADO REGULATIONS (CCR) 723-3

PART 3 RULES REGULATING ELECTRIC UTILITIES

* * *

[indicates omission of unaffected rules]

SMALL POWER PRODUCERS AND COGENERATORS

3900. Scope and Applicability.

Rules 3900 through 3954 apply to utilities which purchase power from small power producers and cogenerators. These rules also apply to small power producers and cogenerators which sell power to utilities. However, for qualifying facilities with a nameplate rating of 10MW or less, to the extent that rules 3900 through 3954 are inconsistent with rule 3667, rule 3667 shall control.

3901. Definitions.

The following definitions apply to rules 3900 through 3954, except where a specific rule or statute provides otherwise. In addition to the definitions stated here, the definitions found in the Public Utilities Law, in the Public Utility Regulatory Policies Act of 1978, and in the federal regulations which are incorporated by reference apply to these rules. In the event of a conflict between these definitions and a statutory definition, the statutory definition shall apply.

- (a) "Avoided cost" means the incremental or marginal cost to an electrical utility of electrical energy or capacity, or both, which, but for the purchase of such energy and/or capacity from qualifying facility or qualifying facilities, the utility would generate itself or would purchase from another source.
- (b) "Qualifying facility" means any small power production facility or cogeneration facility which is a qualifying facility under federal law.
- (c) "Rate" means any price, rate, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electrical energy or capacity; any rule or practice respecting any such rate, charge, or classification; and any contract pertaining to the sale or purchase of electrical energy or capacity.

3902. Avoided Costs.

- (a) Each utility shall pay qualifying facilities a rate for energy and capacity purchases based on the utility's avoided costs.

- (b) Each electric utility shall file tariffs setting forth standard rates for purchases from qualifying facilities with a design capacity of 100 KW or less.
- (c) A utility shall use a bid or an auction or a combination procedure to establish its avoided costs for facilities with a design capacity of greater than 100 KW. ~~The utility is obligated to purchase capacity or energy from a qualifying facility only if the qualifying facility is awarded a contract under the bid or auction or combination process.~~
- (d) If a utility can demonstrate to the Commission that a qualifying facility should receive a different rate from that established by these rules, the Commission may authorize such. The burden of establishing such different rate shall be on the utility, and the rate shall be based on the utility's system wide costing principles and other appropriate load and cost data.
- (e) Nothing in this rule requires a utility to pay more than its avoided costs of energy and capacity, of energy, or of capacity for purchases from qualifying facilities.

* * *

[indicates omission of unaffected rules]

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 CODE OF COLORADO REGULATIONS (CCR) 723-3

PART 3 RULES REGULATING ELECTRIC UTILITIES

* * *

[indicates omission of unaffected rules]

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- (a) "Avoided cost" means the incremental or marginal cost to an electrical utility of electrical energy or capacity, or both, which, but for the purchase of such energy and/or capacity from qualifying facility or qualifying facilities, the utility would generate itself or would purchase from another source.
- (b) "Qualifying facility" means any small power production facility or cogeneration facility which is a qualifying facility under federal law.
- (c) "Rate" means any price, rate, charge, or classification made, demanded, observed, or received with respect to the sale or purchase of electrical energy or capacity; any rule or practice respecting any such rate, charge, or classification; and any contract pertaining to the sale or purchase of electrical energy or capacity.

3902. Avoided Costs.

- (a) Each utility shall pay qualifying facilities a rate for energy and capacity purchases based on the utility's avoided costs.

- (b) Each electric utility shall file tariffs setting forth standard rates for purchases from qualifying facilities with a design capacity of 100 KW or less.
- (c) A utility shall use a bid or an auction or a combination procedure to establish its avoided costs for facilities with a design capacity of greater than 100 KW.
- (d) If a utility can demonstrate to the Commission that a qualifying facility should receive a different rate from that established by these rules, the Commission may authorize such. The burden of establishing such different rate shall be on the utility, and the rate shall be based on the utility's system wide costing principles and other appropriate load and cost data.
- (e) Nothing in this rule requires a utility to pay more than its avoided costs of energy and capacity, of energy, or of capacity for purchases from qualifying facilities.

* * *

[indicates omission of unaffected rules]

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18R-0492E

IN THE MATTER OF THE PROPOSED AMENDMENT TO RULES REGULATING ELECTRIC UTILITIES IN RELATION TO QUALIFYING FACILITIES, 4 CODE OF COLORADO REGULATIONS 723-3-3902(C).

DECISION DENYING APPLICATIONS FOR REHEARING, REARGUMENT, OR RECONSIDERATION

Mailed Date: April 8, 2019
Adopted Date: March 20, 2019

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I. BY THE COMMISSION

A. Statement

1. Through Decision No. C18-1045, issued November 27, 2018, the Commission amended Rule 3902(c) of the Commission’s Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3 (Electric Rules) by eliminating a contradictory provision relating to Qualifying Facilities (QFs) in the Commission’s Electric Rules. Specifically, the

Commission deleted the second sentence of Rule 3902(c), which states that the “only” means by which a QF can obtain a legally enforceable obligation is by being awarded a contract pursuant to competitive bidding.

2. Requests for Rehearing, Reargument, or Reconsideration (RRR) regarding Decision No. C18-1045 were timely filed by the Colorado Independent Energy Association (CIEA), Public Service Company of Colorado (Public Service), and Black Hills Colorado Electric, Inc. (Black Hills). As discussed below, we deny the substantive requests for RRR¹ and uphold our decision striking the second sentence of Rule 3902(c).

B. Background

3. The Commission’s rules governing the purchase of capacity and energy from QF’s are set forth at 4 CCR 723-3-3900, *et seq.* (QF Rules), which were last updated in 2005. A number of proceedings starting in 2016² highlighted a need for the Commission to review, and potentially to update, its QF Rules in correlation with related rules for Electric Resource Planning and for implementing Colorado’s Renewable Energy Standard.³ For example, in its Phase I Decision addressing Public Service’s most recent electric resource plan,⁴ the Commission recognized that the QF Rules necessarily interrelate with multiple provisions in the Electric Rules regarding statewide policy objectives and practices.

¹ Through Decision No. C19-0059, Proceeding No. 18R-0492E, issued January 16, 2019, we granted applications for RRR for the sole purpose of tolling the statutory time limits set forth in § 40-6-114(1), C.R.S.

² *See, e.g.*, Proceeding No. 16A-0396E (Public Service’s most recent ERP proceeding); and Proceeding No. 16A-0436E (Black Hills’ most recent ERP proceeding).

³ As CIEA points out in its RRR, the Commission has frequently pursued rulemaking following its ERP proceedings. CIEA RRR, filed September 7, 2018, at 3 (arguing that the QF and ERP processes should continue to be joined through the resource planning process, which has “been successful for roughly two decades. [This success is] in part due to the fact that, as evidenced by rulemakings which have followed three of the last four ERP processes, the ERP rules are adaptable to considering the changing electric marketplace, as well as how to protect ratepayers and the environment through robust and transparent competitive bidding practices and system modeling.”).

⁴ Decision No. C17-0316, issued April 28, 2017, Proceeding No. 16A-0396E.

4. In 2017, the Commission opened a proceeding to explore potential changes to the Electric Rules, including the QF Rules.⁵ Through this proceeding, the Commission initiated significant stakeholder outreach to discuss potential rule revisions, to consider state and federal law, and to solicit input on how best to move forward with Colorado's energy policy goals. At a July 11, 2018, workshop and through written comments, stakeholders articulated that the QF Rules have internal inconsistencies and could be clarified to identify the processes for a QF to secure a legally enforceable obligation. Certain participants further argued that Rule 3902(c) inaccurately describes that the bidding process may be the "only" means for a QF to procure a legally enforceable obligation.

5. Shortly after the July 11, 2018 workshop, through Decision No. C18-0601, the Commission opened this focused rulemaking proceeding to examine the proposal to strike the second sentence of Rule 3902(c). The Commission requested public comments on the proposal and scheduled a public comment hearing for September 14, 2018. At the same time, the Commission continued its efforts to move forward with comprehensive Electric Rule revisions.⁶

6. Notwithstanding the Commission's rulemaking efforts, sPower Development Company, LLC (sPower or Company) sought to challenge the second sentence of current Rule 3902(c) in other venues. First before the Federal Energy Regulatory Commission (FERC)⁷ and subsequently, after receiving no determination from FERC, in Federal District Court.⁸ The

⁵ Decision No. C17-0878, issued October 26, 2017, Proceeding No. 17M-0694E.

⁶ Decision No. C18-0601, issued July 25, 2018, Proceeding No. 18R-0492E.

⁷ See Petition for Enforcement Pursuant to Section 210(h) of the Public Utility Regulatory Policies Act of 1978, sPower Development Company, LLC, filed December 30, 2016, Docket No. EL17-35-000.

⁸ *sPower Development Co., LLC v. Colo. Pub. Util' Comm'n*, Case No. 1:17-cv-00683-CMA-NYW. The Commission continues to inform the Court of ongoing efforts to update and revise its Electric Rules, including the QF Rules. See, e.g., *Id.*, *Defendant's Motion to Dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6)*, filed April 7, 2017 at fn 12 p. 8; see also, *Defendant's Motion to Dismiss Amended Complaint*, filed October 27, 2017, at pp. 8, 14-15.

Company alleges that the second sentence of Rule 3902(c) that includes rule language stating that a QF can “only” procure a legally enforceable obligation through a winning bid is noncompliant with Public Utility Regulatory Policies Act of 1978.

7. Beginning on July 30, 2018, sPower also filed a total of 18 applications with the Commission asserting it had attained legally enforceable obligations for over 1,400 MW of projects, some dating back to 2016, with either Public Service or Black Hills. Seventeen of these adjudications related to sPower’s claims with Public Service and were consolidated under the primary Proceeding No. 18A-0505E.⁹ The remaining application, docketed as Proceeding No. 18A-0524E, relates to sPower’s claim of a legally enforceable obligation with Black Hills. All 18 of the applications were noticed and referred to an Administrative Law Judge for adjudication.¹⁰

8. The Commission issued Decision No. C18-1045 on November 27, 2018, striking the second sentence of Rule 3902(c) after considering the written comments filed in this proceeding and after holding a public comment hearing on September 14, 2018. The Commission identified multiple rules and processes that contradicted the second sentence’s claim that competitive bidding remains the “only” means for a QF to procure a legally enforceable obligation. Striking the sentence that claims a QF can “only” obtain a legally enforceable obligation through competitive bidding, therefore, deletes a statement that is, quite simply, false.

⁹ Decision No. R18-0869-I, issued September 25, 2018, Proceeding No. 18A-0505E, *et seq.* (consolidating Proceeding Nos. 18A-0505E, 18A-0506E, 18A-0507E, 18A-0509E, 18A-0510E, 18A-0511E, 18A-0512E, 18A-0513E, 18A-0514E, 18A-0515E, 18A-0516E, 18A-0517E, 18A-0518E, 18A-0519E, 18A-0520E, and 18A-0521E).

¹⁰ The Federal Court litigation regarding Rule 3902(c) is currently administratively suspended. Order Granting Defendants’ Joint Request for Administrative Closure, issued November 15, 2018, *sPower v. PUC*, Case No. 1:17-cv-00683-CMA-NYW.

9. Further still, the Commission emphasized its commitment to examine related rules in the Commission's Electric Rules regarding QFs, including rule revisions to provide clearer direction on processes regarding obtaining legally enforceable obligations and on methods for establishing avoided costs to set the price for the purchase of energy and capacity from QFs.¹¹ While the inconsistency in Rule 3902(c) was identified and addressed in this focused rulemaking proceeding, the Commission will consider further revisions to the QF Rules in its pending comprehensive rulemaking to generally amend the Electric Rules.¹²

10. Through Decision No. C19-0059, issued January 16, 2019, the Commission granted applications for RRR in this rulemaking proceeding, but solely for the purpose of tolling the deadlines required in § 40-6-114(1), C.R.S., stating it would consider the substantive filings at a later date. Within that decision, the Commission determined that the RRR filings implicate and reference the sPower adjudications, making it reasonable, if possible, to align the procedural timelines to consider the RRR requests and the recommended decisions in Proceeding Nos. 18A-0505E, *et seq.*, and Proceeding No. 18A-0524E.¹³

C. Rehearing, Reargument, and Reconsideration

11. Public Service, Black Hills, and CIEA filed timely requests for RRR on the Commission's decision to strike the second sentence in Rule 3902(c). Consistent with their filed

¹¹ In fact, the Commission deliberated on December 6 and 10, 2018, and issued the NOPR with comprehensive proposed revisions to all Electric Rules, including clarifications on the QF Rules. *See*, Decision No. C19-0197, issued February 27, 2019, Proceeding No. 19R-0096E (NOPR issued subsequently on the broad and comprehensive Electric Rule NOPR).

¹² By Decision No. C19-0197, issued February 27, 2019, in Proceeding No. 19R-0096E, the Commission issued a Notice of Proposed Rulemaking to amend its Electric Rules, including the QF Rules. Public comment hearings are scheduled for April 23 through May 3, 2019.

¹³ Through separate decisions, this Commission also stayed Recommended Decision No. R18-1179, Proceeding No. 18A-0505E, *et seq.*, and Recommended Decision No. R18-1180, Proceeding No. 18A-0524E, both of which recommend this Commission dismiss sPower's numerous applications seeking legally enforceable obligations with Public Service and Black Hills, respectively.

written comments and oral presentations at the hearing, each participant requested that the Commission retain the second sentence of Rule 3902(c) without modification. CIEA and the utilities claim that striking the rule encourages QFs to file adjudications, as evidenced by sPower's 18 applications filed immediately after the Rule 3902(c) NOPR issued, and will upset the electric resource bidding processes that have proven beneficial to Colorado. Given these concerns, CIEA raises the possibility of the Commission pursuing a moratorium on QF filings, particularly if the second sentence of Rule 3902(c) is stricken. CIEA points out that Colorado imposed a similar moratorium in the 1980s.

12. As an alternative to striking the second sentence of Rule 3902(c), Public Service asks in its RRR that the Commission revise the rule language to include the specific rules that permit QF applications in addition to the processes permitted through ERP competitive bidding.

13. Black Hills claims that, in striking the sentence, the Commission "ignored" Black Hills' and other stakeholders' comments. Black Hills claims that such a determination is "arbitrary and capricious."

D. Findings and Conclusions

14. Contrary to Black Hills' statements in its RRR, the Commission did not ignore Black Hills or any other commenter in rendering the findings and conclusions in Decision No. C18-1045. The Commission thoughtfully considered all comments. It is neither arbitrary nor capricious for the Commission to find the second sentence of Rule 3902(c) should be stricken in this instance given the rule's inconsistencies with current Commission rules and practices.

15. We further decline to adopt Public Service's alternative to revise the language in Rule 3902(c) rather than striking the second sentence. The Commission has already identified multiple means outside of an ERP proceeding where QFs could potentially pursue legally

enforceable obligations: (1) Rule 3008 allows applications outside of an ERP proceeding from any party, including an independent power producer; (2) Rule 3615 allows QFs to apply for legally enforceable obligations and avoided cost calculations outside of an ERP proceeding; and (3) Rule 3656 also allows QF applications. Whether additional pathways for QF adjudications exist under current rules in addition to those identified is superfluous.

16. The Commission has recently opened a comprehensive rulemaking regarding the Electric Rules. Within that NOPR, the Commission proposes rule revisions that address the complexities of avoided costs and legally enforceable obligations.¹⁴ Substantive revisions to Rule 3902(c) in this proceeding either would be duplicative of those rule changes or would require even further evaluation. We therefore find it is neither efficient nor practical to make additional rule revisions here. Additional requests in RRR to revise the rule language in this limited proceeding are denied.

17. We are also unpersuaded by CIEA and the utilities' argument that striking the second sentence of Rule 3902(c) will lead to a deluge of QF applications. While recent ERP proceedings have revealed that renewable energy resources are now highly price competitive, consideration of a moratorium is well beyond the narrow focus of this rulemaking. Utilities are best situated to request a moratorium or other appropriate remedies from the Commission based on evidence that relief is warranted.

18. We therefore deny the requests for RRR and uphold our decision to strike the second sentence of Rule 3902(c). The rule language that proffers that a competitive bidding

¹⁴ Decision No. C19-0197, Proceeding No. 19R-0096E, issued February 27, 2019, at ¶¶ 246-284.

process is the “only” means to procure a legally enforceable obligation is inconsistent with other provisions in the Electric Rules.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration filed by the Colorado Independent Energy Association on December 17, 2018 is denied, consistent with the discussion above.

2. The Application for Rehearing, Reargument, or Reconsideration, filed by Public Service Company of Colorado on December 17, 2018 is denied, consistent with the discussion above.

3. The Application for Rehearing, Reargument, or Reconsideration filed by Black Hills Colorado Electric, Inc. on December 17, 2018 is denied, consistent with the discussion above.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 20, 2019.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners