Decision No. C11-0139

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 10A-124E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO FOR AN ORDER APPROVING A SMARTGRIDCITY CPCN.

ORDER ON EXCEPTIONS

Mailed Date: February 8, 2011
Adopted Date: January 5, 2011

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I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of exceptions filed on November 16, 2010 by the Colorado Office of Consumer Counsel (OCC); Climax Molybdenum Company and CF&I Steel, L.P. (Climax and CF&I); and Ms. Leslie Glustrom to Recommended Decision No. R10-1158 (Recommended Decision). Public Service Company of Colorado (Public Service or Company) filed a response to the exceptions on November 30, 2010. Being fully advised in the matter and consistent with the discussion below, we deny the exceptions, but modify the Recommended Decision on our own motion.

B. Procedural History

2. On March 10, 2010, Public Service filed an application for a Certificate of Public Convenience and Necessity (CPCN) for its SmartGridCity™ (SGC) project in Boulder, Colorado (Application).

3. The Commission noticed the Application on March 12, 2010.

4. The Commission deemed the Application complete and referred the matter to an administrative law judge (ALJ) for disposition with directions, Decision No. C10-0401, mailed April 28, 2010.

5. The following parties timely intervened by right or by permission in this matter: the Colorado Governor's Energy Office (GEO); the OCC; Staff of the Colorado Public Utilities Commission (Staff); Arapahope Community Team; Ms. Glustrom; the City of Boulder (Boulder); and Climax and CF&I.

6. Public Service, Staff, and GEO (Settling Parties) filed a Settlement Agreement on August 27, 2010 (Hearing Exhibit 10) along with a Motion to Approve Settlement Agreement.

7. The ALJ commenced a hearing in this docket on August 30, 2010. Following the hearing, Public Service, Climax and CF&I, the OCC, Staff, and Ms. Glustrom filed statements of position.[1]

8. The ALJ issued the Recommended Decision on October 27, 2010. In summary, the ALJ approved a CPCN for the SGC project in Boulder subject to the conditions involving customer usage information and its confidentiality as well as intellectual property and patent rights stemming from the project. The ALJ also approved the Settlement Agreement filed by the Settling Parties.

9. The OCC, Climax and CF&I, and Ms. Glustrom timely filed exceptions to the Recommended Decision. Public Service timely filed a response to the exceptions.

C. Legal Sufficiency of Findings of Fact

10. In their exceptions, the OCC and Ms. Glustrom generally argue the ALJ failed to make certain findings of fact necessary upon which to base a reasoned Commission decision and did not address all of the arguments presented. Ms. Glustrom further argues certain paragraphs in the Recommended Decision are unsupported by reference to law, rule, or evidentiary facts and therefore should be stricken.

11. The findings of fact of the Commission need not be presented in any particular form and they may even be implied, so long as these findings are discernable to the reviewing court. *See, e.g., Caldwell v. Pub. Utils. Comm'n*, 613 P.2d 328, 332 (Colo. 1980). We find that the findings of fact made by the ALJ are sufficient upon which to base a reasoned Commission decision and address all of the arguments made by the parties. We find that the Recommended Decision is legally sufficient; however, we will clarify certain arguments made by the parties on

[1] Ms. Glustrom filed her statement of position late and the ALJ accepted that statement of position.

exceptions, as appropriate. Finally, Ms. Glustrom has not cited to any legal requirement that Commission decisions contain citations in the manner desired by Ms. Glustrom. We deny the exceptions filed by the OCC and Ms. Glustrom on this ground.

D. Cost Recovery

1. Positions of the Parties

12. The OCC, Climax and CF&I, and Ms. Glustrom all argue that the Recommended Decision and the Settlement Agreement should be reversed on the issue of cost recovery. The Settlement Agreement sets a cap on recoverable investment at $44.5 million ($300,000 less than what Public Service requested when it filed the Application) and provides that those costs are deemed prudent. The Company is presently recovering operational and maintenance expenses, as well as capital related costs (subject to a potential refund) based on the outcome of Docket No. 09AL-299E. The Settlement Agreement memorialized that Public Service would recover the capital expenditures of $42 million for SGC in those rates.

13. The OCC maintains that cost recovery should be limited to $27.9 million. The OCC argues that this amount represents the expected budget of SGC just before Public Service decided to complete the original project scope. The OCC asserts that the prudent action at that point would have been to scale back the project and to accomplish it with the $27.9 million in capital investment, the amount requested by Public Service in its direct case in Docket No. 09AL-299E. The OCC argues the Commission should find that Public Service did not act reasonably in pursuing the project after that point was not prudent due to escalating costs.

14. Climax and CF&I argue that cost recovery from ratepayers should be denied for SGC. Climax and CF&I assert that SGC is a research and development (R&D) project and as such should not be accorded recovery from Public Service's customers. Climax and CF&I assert

that the lessons learned from SGC will be available to all of Xcel Energy's customers, not just those in Colorado, therefore it is unfair to assess all cost recovery on Colorado ratepayers.

15. Ms. Glustrom opposes virtually any cost recovery for SGC except for a small amount associated with the substation aspects of the project. She argues Public Service did not handle the budget and technical aspects of the project in a prudent manner. Ms. Glustrom also concurs with Climax and CF&I that the project is R&D and therefore is ineligible for recovery from the ratepayers.

2. Discussion

16. We deny the exceptions filed by the OCC, Climax and CF&I, and Ms. Glustrom on the issue of cost recovery. Public Service apparently experienced difficulties with the planning and budgeting of the project, and the costs associated with the project quickly escalated from March 2008 to the filing of the Application in this docket. However, standing alone, that does not mean necessarily that the Company acted imprudently.

17. That said, we are concerned whether SGC is today slated to achieve enough of its potential to justify its higher-than-anticipated costs. We are concerned whether SGC will become an integral part of the distribution system on a going-forward basis. We believe that, in a very real sense, the project is still in the development stage and that Public Service has not yet fully evaluated the capabilities of SGC nor has the Company assured us that those capabilities will likely be realized.

18. The Settlement Agreement requires Public Service to report on the value propositions of SGC to the Commission within 60 days of completion.[2] However, it

[2] Settlement Agreement, Section 6, August 27, 2010.

does not explicitly require Public Service to finish its analysis of the value propositions and report the same to the Commission. Neither does the settlement speak to the scope, quality, completeness, or the application of the analysis.

19. We are also concerned with the relative lack of details regarding the planned use of the project going forward. We recognize the merits of both the value proposition analysis and the pricing pilot, but we believe additional information is necessary regarding the project. We believe it is important for the SGC project to achieve benefits in a cost-effective manner. In short, we want to see the Company articulate and defend a strategic plan for the use of SGC investment. We want to see the credible promise of consumer and utility benefits sufficient to justify the cost overruns. We want to know more about the ability of customers to make practical use of SGC on their side of the meter through in-home devices, and we want to know more about the interconnect ability of SGC with those customer devices.

20. We will cap the recoverable investment at $27.9 million unless and until the Company demonstrates to our satisfaction that it has completed the unfinished aspects of the SGC project.

21. We find that the record evidence about the future use of SGC is sparse. The most tangible portion of that information addresses the pricing pilot and the planned report to the Commission on the value propositions. This approximates the modified scope of the project when it was considered in March 2009. At that time the capital cost of the project was $27.9 million and we therefore deem that level of investment to be prudent at this time.

22. To assist in developing a robust strategic plan for SGC and in identifying a suite of future applications, Public Service should use such techniques as an advisory group of academics, researchers, and customers. The Company should also avail itself of

Commission Information Meetings to keep the Commission informed of its progress and to solicit ideas for future applications of the SGC technologies.

23. In sum, this Commission believes that the Company needs to "re-boot" the SGC project and restore some of the promise this concept originally held. If the Company demonstrates in a future application[3] that the SGC project has a coherent and valuable future, we may allow the Company to recover the balance of the investment disallowed in this case.

E. Other Exceptions Filed by the OCC

24. The OCC argues that the final cost estimate of $44.8 million provided by Public Service (as well as the $44.5 million provided for in the Settlement Agreement) are based on the 20/20 hindsight since that amount represents actual costs instead of pre-construction estimates.[4] The OCC argues that the Company's request that $44.8 million (and the $44.5 million provided for in the Settlement Agreement) be deemed prudent was not consistent with the earlier rulings of the Commission that the prudency of the decision to undertake the project should be evaluated on "whether the action (or lack of action) of a utility was reasonable in light of the information known, or should have been known, at the time of the action. . ."[5] The OCC argues that the ALJ in fact used 20/20 hindsight to evaluate the Application.

25. In response, Public Service argues that the flaw in the OCC's argument is that it focuses only on the initial planning stage, and excludes the implementation stage. Further, the Company points out that the Commission has made clear that the prudence of SGC at both stages is relevant. *See* Decision No. C10-0729, mailed July 14, 2010, at ¶ 40.

[3] Such future application should at a minimum, summarize how advisory groups are being engaged, identify smart grid investments and how such investments (or the Knowledge gained) will benefit customers and grid operations.

[4] Hearing Exhibit 9, Rebuttal Testimony of Mr. Scott Wilensky, p.16, line 15.

[5] Decision No. R10-0546-I, p.7, ¶17.

Public Service asserts that its costs did not simply escalate with no oversight, but were closely monitored and managed at all levels of management.

26. The OCC also argues that the Recommended Decision failed to address its claim that the Company's decision to go forward with the full scale SGC project in March 2009 was imprudent. The OCC concludes the Commission should limit recovery for the project to $27.9 million.

27. Company witness Mr. Wilensky, who was a participant in this decision in March 2009 to go forward with the project at its original decision, explained why the Company made that decision. He explained that the management of Public Service concluded that the costs of continuing forward with project completion under the initial scope were less than the potential benefits that could be determined if there was a broader pilot. Public Service argues that if it had switched to the modified scope, as the OCC now seems to advocate for, the number of customers that would be enabled with SGC information capability would have been cut in half from 42,800 to 21,000.

28. The OCC also believes that Staff's support of the Settlement Agreement lacks adequate rationale. The OCC claims that Staff attempted to justify its finding of prudence as to the $44.5 million agreed to in the Settlement Agreement because Staff found the project to be "used and useful." The OCC argues that "used and useful" is a regulatory standard used by the Commission in rate cases to determine whether the utility is entitled to earn on this investment. The OCC further argues that determining whether a project is "used and useful" has nothing to do with whether or not the individual line item costs for that project were prudently incurred.

29. In response, Public Service argues that the OCC appears to complain that the finding of prudence in the Recommended Decision was based on the determination that the

project was "used and useful." This argument, according to Public Service, misreads the Recommended Decision. Public Service argues that the ALJ's observation regarding the "usefulness" of the project does not mean that he based his determination regarding prudence on the fact that the project is operational.

30. The OCC also argues that although Staff signed the Settlement Agreement stating that $44.5 million was prudent, its testimony was inconsistent on this point. The OCC points to the testimony of Staff witness DiDomenico, who stated in his Answer Testimony, prior to joining the Settlement Agreement, that because Staff lacked certain documentation, it was unable to "fully examine the prudency of this project." Furthermore, the OCC claims nothing in the direct oral testimony of Mr. Camp, Staff's witness in support of the Settlement Agreement, indicated that Staff ever got the documents it needed or that it was otherwise able to conduct such a prudence review.

31. In response, the Company states that Staff simply reexamined the information presented in this case when the Company provided more cost documentation and information regarding the cost controls that it had in place during the project. Public Service argues that the OCC paints a rather one dimensional picture of Staff's case and its basis for supporting the settlement according to the Company.

32. The OCC also argues that the Order is not clear as to why the $44.5 million in costs are prudent, in violation of § 40-6-109, C.R.S. The Company responded, stating there are numerous findings in the Recommended Decision to support the conclusion that the settlement amount of $44.5 million is prudent, including the following conclusions:

- Notwithstanding that Public Service expended more for the project than originally projected, there were appropriate controls over the project.

- The Company modified the project in light of the experienced cost increases.
- The project was sized and scoped appropriately.
- The $44.5 million settlement amount is less than the anticipated costs to complete the project.

33. The OCC argues the Commission should clarify the Recommended Decision on the issue of the tracker mechanism for intellectual property and patents that may arise from the SGC project. The OCC argues that the Company should be required, as a condition of obtaining a CPCN for the project, to track the free or discounted use of intellectual property (IP) by other utilities within Xcel Energy and that Public Service's ratepayers should receive some compensation for the use of that intellectual property. The OCC believes that evidence in the record to show that customers outside of Public Service's territory could benefit from the IP arrangements between Public Service and its partners in the SGC project, even if the Company does not hold any patents or IP rights. The OCC argues that the Commission should modify the Recommended Decision to require that use of IP stemming from SGC outside of the Company's territory be tracked and clear guidelines should be set for the tracking mechanism.

34. In response, Public Service states that the OCC's confusion on this issue stems from a misunderstanding of the Company's arrangements with the SmartGridCity partners. While Public Service negotiated arrangements with its partners whereby other Xcel Energy utilities would have access to any intellectual property that SmartGridCity partners developed through the project, that does not mean that those utilities would get to use such intellectual property for free.

35. We have reviewed the exceptions filed by the OCC and deny them except with respect to the arguments regarding the tracking of intellectual property rights.

These arguments generally do not persuade us to reconsider the rulings made by the ALJ in the Recommended Decision. Each of the issues raised by the OCC in its exceptions is already adequately addressed in the Recommended Decision and we are not persuaded that a reversal is warranted.

36. We agree with Public Service that the Commission directed a determination of prudence to include both the initial planning and implementation stages of the SGC project. We also find that the Recommended Decision provides an adequate explanation of why the $44.5 million in costs listed in Attachment 1 to the Settlement Agreement are prudent. We generally find the ALJ has provided an adequate basis for the recommendations given.

37. Regarding the use of a tracking mechanism for intellectual property, we direct the Company and the OCC (as well as Staff if it chooses to do so) to develop guidelines for the use of a tracking mechanism for intellectual property and patents that arise out of the SGC project. These guidelines are to be filed with the Commission by March 31, 2011.

F. Other Exceptions of Climax and CF&I

38. Climax and CF&I generally argue that the grant of the CPCN and the associated recovery of project costs should be reversed. Climax and CF&I state that the SGC project is a research and development project that should not be recovered through ratepayer funds. They further argue that at the time of the implementation of the project, the Commission would not likely have granted a CPCN because Boulder, Colorado already had an adequate and functioning distribution system. Climax and CF&I also criticize the Company for not performing a benefit-cost analysis at the onset of the project.

39. Climax and CF&I argue that the ALJ did not follow the Commission directions in Decision No. C10-0729 to evaluate the project at its time of planning and implementation for a

prudency judgment. They also argue that the record demonstrates that the project was marred by poor planning and budgeting, the improper selection of Boulder as the location, and the lack of in-home devices (making the benefit calculation hard to quantify). Climax and CF&I point out that the project, as it stands now in Phase IV, does not include the planned scope, with only 500 in-home devices planned for deployment and some smart meters uninstalled. Climax and CF&I conclude that SGC was a research and development project, not a demonstration project, and thus should be excluded from rates.

40. In response, Public Service argues that budgets and costs during any project can change and the issue of prudency requires an examination of the oversight and controls that the Company utilized in its projects. The Company asserts that the project was properly designed and the unique nature of the project led to a changing scope of the work.

41. We deny the exceptions filed by Climax and CF&I. The record evidence in this case demonstrates that Public Service utilized appropriate oversight during the planning stage and the so-far completed implementation. We also reject the argument that SGC is a research and development project, and as such should be excluded from rate recovery. Instead, we find that SGC is a pilot that uses existing technologies but joins them together into a smart grid framework. The Commission also notes that Climax and CF&I presented no legal argument supporting the proposition that research and development projects are *per se,* not eligible for rate recovery.

G. Other Exceptions of Ms. Glustrom

42. First, Ms. Glustrom asks that the Commission undertake a review of the prudence of the SGC project and address the issues that the Recommended Decision allegedly failed to explain. She also asks that the Commission undertake a discussion of the Colorado law and rules

that apply to the decisions of whether to grant a CPCN for the project and whether to charge all ratepayers for the expenditures made by Public Service.

43. We deny the exceptions filed by Ms. Glustrom on this ground. These exceptions ask the Commission to perform what has already been accomplished by the ALJ. Parties have presented their evidence and argument in this case on these issues and the ALJ's decision has considered these topics. The Recommended Decision has considered the myriad issues raised by the intervenors and Public Service in this docket. Nothing in Ms. Glustrom's exceptions on this matter suggests we need to revise the Recommended Decision.

44. Second, Ms. Glustrom asks that the full Commission should hear oral argument from Ms. Glustrom on her exceptions. We decline to accept her request for oral argument. We believe that Ms. Glustrom's case in this docket speaks for itself, and her filed exceptions were clearly understood by the Commission.

45. Ms. Glustrom asks that the Commission waive Rule 1505(b), which requires that a transcript be ordered. She states that a transcript of the proceeding is available and all of the documents in the docket are available on the Commission's website as well as in paper form in the Commission's offices. We deny the exceptions on this ground as moot and point out that a transcript is already publicly available.

46. Ms. Glustrom requests that we review the information in the hearing record on the imprudence in the planning and implementation of the Smart Grid City project and perform the Commission's fundamental duty to establish rates that are just and reasonable and remove any

abuses in rates.[6] We have discussed the issue of prudency earlier in this Order and will not repeat this discussion here.

47. Ms. Glustrom asks that the Commission correct the sections of the Recommended Decision that contain factual errors. We recognize that there are some mistakes in the text of the Order, but we agree with Public Service that these are inconsequential to the overall decision of the ALJ. However, we acknowledge that ¶ 59 of the order should contain the name "Gogel" as opposed to "Carlson"; ¶ 35 should contain the name "Senger" rather than "Singer"; and ¶¶ 61 and 62 should recognize that Mr. Huston joined the **project**, not the **Company,** in March of 2008. We reject the issues raised by Ms. Glustrom regarding ¶¶ 63 and 64 and agree with Public Service that Ms. Glustrom is not correct regarding the record of these issues in the case.

II. ORDER

A. The Commission Orders That:

1. The exceptions to Recommended Decision No. R10-1158 (Recommended Decision) filed by the Colorado Office of Consumer Counsel on November 16, 2010 are denied, consistent with the discussion above.

2. The exceptions to the Recommended Decision filed by CF&I Steel, L.P., and Climax Molybdenum Company on November 16, 2010 are denied, consistent with the discussion above.

3. The exceptions to the Recommended Decision filed by Ms. Leslie Glustrom on November 16, 2010 are denied, consistent with the discussion above.

[6] Under §§ 40-3-101 and 40-3-102, C.R.S.

4. Consistent with the discussion above, Public Service Company of Colorado shall file a General Rate Schedule Adjustment for its electric rate schedule that removes $16.5 million of capital expenditure from the current recovery of investments attributable to SmartGridCity. That filing shall be made within 60 days of the effective date of this Order.

5. 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 Order.

6. This Order is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING January 5, 2011.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners