

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24R-0306E

IN THE MATTER OF MODIFICATIONS TO THE COMMISSION'S ELECTRIC RULES TO
ADDRESS THE IDENTIFICATION AND PROTECTION OF SITES OF HISTORIC AND
CULTURAL SIGNIFICANCE TO FEDERALLY RECOGNIZED TRIBAL NATIONS.

NOTICE OF PROPOSED RULEMAKING

Mailed Date: July 11, 2024

Adopted Date: July 3, 2024

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I. BY THE COMMISSION

A. Statement

1. The Colorado Public Utilities Commission (“Commission”) issues this Notice of Proposed Rulemaking (“NOPR”) to amend the Commission’s Rules Regulating Electric Utilities, 3 *Code of Colorado Regulations* (“CCR”) 723-3 (“Electric Rules”). Through this rulemaking, the Commission intends to establish rules clarifying the process by which regulated electric utilities and wholesale generation and transmission cooperative associations (wholesale cooperatives) identify impacts to sites of historic and cultural significance to federally recognized Tribes, and present relevant information for consideration by the Commission in the context of certain resource planning and infrastructure decisions.

2. In the Public Service Company of Colorado Electric Resource Plan and Clean Energy Plan proceeding (Proceeding No. 21A-0141E), the Northern Cheyenne Tribe of Montana (“Northern Cheyenne Tribe”) requested that the Commission engage in rulemaking and other

actions to facilitate the preservation of the Sand Creek Massacre National Historic Site from the impacts of energy development. As we describe below, the Sand Creek Massacre National Historic Site has deep significance to the Northern Cheyenne Tribe, the Northern Arapaho Tribe of Wyoming (“Northern Arapaho Tribe”), and the Cheyenne and Arapaho Tribes of Oklahoma (“Cheyenne and Arapaho Tribes”). In recognition of the vital government-to-government relationship between federally recognized Tribes and the State of Colorado, we propose requirements for electric utilities and wholesale cooperatives to coordinate with federally recognized Tribes, to identify and consider how best to mitigate impacts to significant sites, and to present relevant information to the Commission for consideration, in the interests of robust participation. Through this structure, we strongly encourage electric utilities and wholesale cooperatives to engage early and thoughtfully with federally recognized Tribes.¹ We also see this rulemaking as an early step as the Commission develops appropriate Tribal consultation practices in pursuit of robust government-to-government relationships.

3. The proposed changes to the Electric Rules are set forth in legislative (*i.e.*, strikeout and underline) format (Attachment A) and final format (Attachment B).

4. We refer this matter to an Administrative Law Judge (“ALJ”) for a recommended decision. A public comment hearing on the proposed rules will be conducted in this matter on August 27, 2024, beginning at 11:00 a.m.

5. Through this NOPR, the Commission solicits comments on possible changes to the Electric Rules as described here and in Attachments A and B, schedules an initial public comment hearing, and directs Staff to schedule other activities to facilitate public participation. Interested

¹ EJATF Final Report at 37 (“In some circumstances, regulated entities should play a role in conducting community engagement and/or Tribal Consultation, particularly around proposals for new projects that must be considered by a regulatory agency”).

persons are encouraged to submit written comments before the hearing scheduled in this matter. Initial written comments are to be filed no later than August 9, 2024, and any written comments responsive to the initial comments are to be filed no later than August 16, 2024. The Commission welcomes the submission of alternative proposed rules and/or additional related rules, including both individual proposals and consensus proposals joined by multiple stakeholders. Participants are encouraged to provide redlined rules along with their written comments.

B. Background

1. Significance of the Sand Creek Massacre National Historic Site

6. On November 29, 1864, more than 230 Cheyenne and Arapaho villagers—many of them children, women, and elderly men—were killed by members of the Colorado U.S. Volunteer Cavalry in a surprise attack in the early morning hours. This importance of this tragic site was commemorated by the establishment of the Sand Creek Massacre National Historic Site, located in Kiowa County, Colorado. When Congress directed the Secretary of the Interior to establish that site, the Secretary was directed to manage the site “in a manner that preserves, as closely as practicable, the cultural landscape of the site as it appeared at the time of the Sand Creek Massacre.”²

7. As William Walksalong, Tribal Administrator of the Northern Cheyenne Tribe, stated before the Commission:

It’s very difficult to present the events of the massacre, but I will briefly summarize the massacre. It is our sacred obligation to do this, for outsiders and for the record. For example, we have interred human remains from the massacre that were held in the Smithsonian Institution, and were repatriated. We collaborated with History Colorado on the Sand Creek Massacre exhibit, there in Denver. [...]

² <https://www.congress.gov/bill/106th-congress/senate-bill/2950/text>

Today, the descendants regularly visit the site, to pay homage to the tragic events of the past and pray for our ancestors. We also carry out an annual Spiritual Healing Run, from the site to Denver. [...]

The tribal Sand Creek Massacre has been recognized by the Colorado governor in proclamations and a series of acts of Congress. Our people have suffered immeasurable levels of historical trauma, from this act of genocide against us. And we worked hard in the city, over the past decades, to establish and protect the site and the memory of the massacre.³

8. Accordingly, there is “not a place in Colorado more deserving of reverence, remembrance, and preservation of sanctity than the site of the Sand Creek Massacre.”⁴

2. State Activities and Relevant Commission Proceedings

a. Colorado Commission on Indian Affairs

9. The Colorado Commission of Indian Affairs (“CCIA”) serves as the official government-to-government liaison between the State of Colorado, the Southern Ute Indian Tribe, and the Ute Mountain Ute Tribe.⁵ CCIA is also committed to facilitating communication with the other 46 Historic Tribes of Colorado,⁶ American Indian/Alaska Native (“AI/AN”) organizations, state agencies, and affiliated groups. CCIA was created within the Office of the Lieutenant Governor in 1976, and the Lieutenant Governor serves as the statutory chair. Not only does CCIA facilitate communications, it also provides guidance to state agencies on appropriate State-Tribal consultation.⁷ While the Commission does not itself have a Tribal Liaison, staff of the Department of Regulatory Agencies (“DORA”) serve as the Tribal Liaison on behalf of DORA divisions more broadly.

³ Transcript of comments of William Walksalong, October 25, 2023, at 4, 6-7.

⁴ Proceeding No. 21A-0141E, Office of the Utility Consumer Advocate, Application for Rehearing, Reargument, or Reconsideration (February 12, 2024) at 3.

⁵ §§ 24-44-101 to 108, C.R.S.

⁶ *I.e.*, those Tribes with a history of occupation in Colorado. *See* CCIA, Historic Tribes of Colorado, available at <https://ccia.colorado.gov/tribes/historic-tribes-of-colorado> (last visited June 24, 2024).

⁷ *See*, e.g., State-Tribal Consultation Guide: An Introduction for Colorado State Agencies to Conducting Formal Consultations with Federally Recognized American Indian Tribes (July 2014), available at https://ccia.colorado.gov/sites/ccia/files/documents/CO%20State-Tribal%20Consultation%20Guide_0_0.pdf.

b. Proceeding No. 22M-0171ALL

10. In 2021, the General Assembly adopted SB 21-272, which requires the Commission to promulgate rules in which it considers “how best to provide equity, minimize impacts, and prioritize benefits to disproportionately impacted communities and address historical inequalities.”⁸ SB21-272 further directs that when making those rules, the Commission “shall identify disproportionately impacted communities,” and in so doing, “shall consider minority, low-income, Tribal, or Indigenous populations in the state that experience disproportionate environmental harm and risks [...]”⁹ Subsequently, House Bill (“HB”) 23-1233 created a statewide definition of disproportionately impacted communities, which specifically includes communities on the land of the Ute Mountain Ute Tribe and Southern Ute Indian Tribe.¹⁰ The Commission is in the process of gathering information to identify disproportionately impacted communities and promulgate rules to further implement SB21-272, and comments in Proceeding No. 22M-0171ALL suggest that the Commission take actions such as consulting with federally recognized Tribes as appropriate, hiring a Tribal Advisor and implementing a Tribal Consultation Policy, and thoughtfully engaging representatives of AI/AN communities, many of whom live in urban areas in Colorado.¹¹

c. Proceeding Nos. 21A-0096E and 21A-0141E

11. This rulemaking arises most directly from two applications filed by Public Service Company of Colorado (“Public Service”).

⁸ § 40-2-108(3)(b), C.R.S.

⁹ § 40-2-108(3)(c)(I), C.R.S.

¹⁰ § 24-4-109(2)(b)(II)(H), C.R.S.

¹¹ See, e.g., Comments of CEO, June 13, 2020, at 29-30; Comments of the EJ Coalition, June 13, 2020, at 15-16; Notes on Equity Framework Workshops, September 20, 2023, at 41.

12. By Decision Nos. C22-0270 and C22-0430¹² in Proceeding No. 21A-0096E, the Commission granted Public Service a Certificate of Public Convenience and Necessity (“CPCN”) for the Colorado Power Pathway (“CPP”), a multi-segment transmission project. Distinct from the Commission process, portions of the transmission route were modified upon discussion between Public Service, local siting authorities, and representatives of the Northern Cheyenne Tribe, Northern Arapaho Tribe, and Cheyenne and Arapaho Tribes.¹³

13. Public Service also filed for Commission approval an Electric Resource Plan (“ERP”) and Clean Energy Plan (“CEP”) in Proceeding No. 21A-0141E. On September 19, 2023, Public Service filed its 120-Day Report summarizing the results of the competitive solicitation and identified a preferred portfolio of resources. An analysis performed by Trial Staff suggested that a Company-owned wind project, Bid 1029, had the potential for approximately seven wind turbines to impact the viewshed of the Sand Creek Massacre National Historic Site.¹⁴ During the course of the proceeding, the Commission also heard government-to-government comments from the Northern Cheyenne Tribe regarding the significance of the site.¹⁵ By Decision No. C24-0052¹⁶ and as clarified by Decision No. C24-0161,¹⁷ the Commission recognized ongoing conversations between Public Service and federally recognized Tribes, approved a backup bid for Bid 1029, and encouraged the Company to continue working with stakeholders, including federally recognized

¹² Issued June 2, 2022, and July 22, 2022, respectively.

¹³ Kevin Simpson, As Xcel electrifies the Eastern Plains, how close is too close to the Sand Creek Massacre site?, The Colorado Sun (December 8, 2021), *available at* <https://coloradosun.com/2021/12/08/xcel-power-pathway-sand-creek-massacre-national-historic-site/>; Kevin Simpson, Xcel Energy will no longer route its massive Power Pathway project near the Sand Creek massacre site, The Colorado Sun (January 26, 2022), *available at* <https://coloradosun.com/2022/01/26/excel-revises-power-pathway-project-routes-to-preserve-the-cultural-character-of-historic-sand-creek-site/>.

¹⁴ Proceeding No. 21A-0141E, Staff’s Comments on Public Service Company of Colorado’s 120-Day Report (November 8, 2023) at 55-59.

¹⁵ Proceeding No. 21A-0141E, Transcript of comments of William Walksalong, October 25, 2023.

¹⁶ Issued January 23, 2024.

¹⁷ Issued March 13, 2024.

Tribes and local siting authorities, to address potential impacts to the site, and to pivot to the backup bid should mitigation efforts result in cost increases such that Bid 1029 is no longer economic. While the ERP proceeding itself has completed, we anticipate that the Company will file a CPCN for Bid 1029 in the future, or for the utility-owned backup bid if appropriate.

3. Overview of Pre-Rulemaking

14. At the October 25, 2023, weekly meeting, the Commission directed Staff to begin preparing this NOPR in response to the concerns raised by the Northern Cheyenne Nation. Commission leadership continued direct and robust conversations with representatives of the Northern Cheyenne Tribe, keeping CCIA apprised and seeking their guidance as appropriate. Staff also researched Tribal consultation policies, practices, and rules applied by public utility commissions in other states,¹⁸ and met with staff of the State Historic Preservation Office at History Colorado, which includes the Office of the State Archaeologist, and other expert organizations.

C. Discussion

15. We adopted this NOPR at our weekly meeting on July 3, 2024. Given the significance of the Sand Creek Massacre National Historic Site, the potential for future applications that could have impacts on the site or its viewshed, and the ongoing discussions regarding appropriate Tribal consultation practices, we seek to clarify expectations for electric utilities and wholesale cooperatives regarding appropriate treatment of significant sites when developing energy infrastructure. This NOPR does not encroach upon the primary role of local siting authorities in their decisions regarding infrastructure.¹⁹ However, many decisions can

¹⁸ See, e.g., Minnesota Public Utilities Commission Tribal Engagement/Consultation Policy, Minnesota Public Utilities Commission, *available at* https://mn.gov/puc/assets/Tribal%20Consultation_2023_Final_signed_tcm14-565579.pdf (last visited June 20, 2024).

¹⁹ § 40-5-101(1)(a) and (3), C.R.S.; § 29-20-108(2), C.R.S.

influence the overall economics of an energy infrastructure project, ranging from materials to property rights to environmental analyses or cultural resource surveys. To make decisions about risk and cost that impact ratepayers, the Commission must receive the information it needs to understand the full costs of the actions and alternatives advanced by electric utilities and wholesale cooperatives, and to ensure that costs associated with mitigation are planned and accounted for. The requirements proposed here thus become more specific as electric utilities and wholesale cooperatives transition from planning processes into concrete actions to develop generation, transmission, or distribution infrastructure.

16. Importantly, we view this NOPR as significantly driven by the concerns of, and conversations with, the Northern Cheyenne Tribe.²⁰ Commission staff were also involved in the development of the Final Report of the Environmental Justice Action Task Force, which concludes that state agencies “should engage in meaningful and effective relationship building with Tribal nations and American Indian and Alaska Native communities in Colorado to further understand the impact that policymaking at their agency has on the Indigenous population statewide.”²¹ We greatly appreciate the government-to-government comments made by Mr. William Walksalong and we view this NOPR as beginning the process of the Commission’s work to implement appropriate Tribal consultation practices, engage with American Indian and Alaska Native communities, and coordinate with agencies such as CCIA. Future actions, such as

²⁰ For example, the NOPR does not at this time address recommendations such as the use of Indigenous names for industrial facilities or the applicability of land acknowledgments. Final Report of the Environmental Justice Action Task Force (Nov. 14, 2022) 39, *available at*

<https://drive.google.com/drive/folders/1mOt94sVmWZVj3GKo8CXCndvc7JfODuk2>.

²¹ Final Report of the Environmental Justice Action Task Force (Nov. 14, 2022) 37, *available at* <https://drive.google.com/drive/folders/1mOt94sVmWZVj3GKo8CXCndvc7JfODuk2>.

additional rulemakings, may be taken based on the continuation of these critical conversations or through the implementation of broader procedural and other rules in response to SB21-272.²²

D. Opportunities to Participate

17. The Commission welcomes comments, written or verbal, and participation throughout this Proceeding, and sets initial direction for opportunities to participate.

a. Receiving Information About the Proceeding

18. Stakeholders can view, comment, and sign up for notifications of filings in this Proceeding through the Commission's Electronic Filings ("E-Filings") System. The E-Filings link for this Proceeding is:

https://www.dora.state.co.us/pls/efi/EFL.Show_Docket?p_session_id=&p_docket_id=24R-0306E

19. We also direct Staff to also maintain an email list for purposes of scheduling activities and announcing comment deadlines. Interested stakeholders should request to be added to the email list by filling out an online form.²³

b. Scheduling an Information Meeting and Public Hearing

20. To promote awareness about this Proceeding and about how to participate in Commission rulemakings more generally, we direct Staff to schedule and host an informational meeting in advance of the public comment hearing. The informational meeting will take the form of a webinar that provides information on the subject of this proceeding as well as upcoming dates and opportunities to participate. The informational meeting will be scheduled by Staff and noticed

²² Separate from this Proceeding, but in the spirit of SB21-272 implementation, Director Rebecca White has been incorporating lessons learned from this process into internal staff guidance regarding appropriate practices for ongoing Tribal consultation.

²³ Stakeholders can fill out this form to be added to the email list for this proceeding:
<https://docs.google.com/forms/d/e/1FAIpQLSfk7HTqEelht7U0kN-a9Et8LpNWcdKJTsQY8LrtC0qQQjGP9Q/viewform>

through E-Filings, the Commission's public calendar,²⁴ and by email to potentially interested stakeholders. The purpose of an informational meeting is not to take comments, but to provide neutral, educational information.

21. A public comment hearing on the proposed rules will be conducted in this matter on August 27, 2024, beginning at 11:00 a.m. The public hearing will be held virtually.

22. The Commission strives to accommodate all members of the public at its hearings and meetings by providing services for foreign language users and persons with disabilities upon receipt of a reasonable accommodation request. Requests for such accommodations should be made at least one week prior to the event by completing the Language Access Form. Requests can also be made directly by contacting Holly Bise at (303)894.2024 or by emailing holly.bise@state.co.us.

c. Submitting Public Comments

23. We welcome comments on the proposed rules and questions as presented in Section D and Attachments A and B. Public comments may be provided in this Proceeding at any time it is open. For purposes of preparing for comments to be considered at the public comment hearing, we set an initial deadline for written comments on the rules attached to this NOPR to be filed no later than August 9, 2024. Written comments responsive to those initial comments are requested to be filed no later than August 16, 2024.

24. Comments can be provided by:

- Submitting written comments through the Commission's Electronic Filing System ("E-Filings") at <https://www.dora.state.co.us/pls/efi/EFI.homepage>.

²⁴ Available at: <https://puc.colorado.gov/puccalendar>.

- Submitting written comments using the Commission’s online form²⁵ or through email at dora_puc_website@state.co.us. These comments will be posted in E-Filings for this Proceeding.
- Mailing comments to the Commission’s offices at: Colorado Public Utilities Commission, 1560 Broadway, Suite 250, Denver, CO 80202.
- Calling (303) 869-3490 to leave oral comments (English and Spanish options).

25. Please include **Proceeding No. 24R-0306E** in comments. The Commission prefers submission of comments through E-Filings or its online form.

26. For more information on how to participate in proceedings at the Commission, visit the “How to Participate” webpage: <https://puc.colorado.gov/how-to-participate>.

E. Proposed Amendments

27. This section addresses proposals to amend the Commission’s Electric Rules. Where rules are described as “current,” they refer to the currently effective rules prior to proposed amendments. “Proposed” rules refer to proposed changes, including new or reordered paragraphs, or revisions to language.

28. We provide notice that we may be issuing a rulemaking regarding Best Value Employment Metrics that will occur in addition to this rulemaking. Both will proceed at approximately the same time and the concurrent rulemaking may adopt similar rule numbering. Should that occur, it will be necessary to reconcile that duplication and renumber rules adopted in this proceeding. The Commission will provide timely notice should any renumbering of rules be required as a result of that concurrent rulemaking proceeding.

²⁵ Available at:
<https://docs.google.com/forms/d/e/1FAIpQLScIWDcNS2FCh0NdEijNU4igpUKqRZvTIYwZ8XSA2YYx3LF6qA/viewform>.

1. General Provisions

d. Rule 3001. Definitions.

29. We propose to add three definitions to Rule 3001: “cultural and historic resources,” “significant site,” and “Tribal Nations.”

30. Cultural and historic resources are defined as “cultural resources, human remains and associated funerary objects, viewsheds, and sacred objects.” We propose this term in recognition that there can be cultural resources associated with significant sites that are not located on those sites. For example, human remains have been discovered outside the boundaries of the Sand Creek Massacre National Historic Site, and others may be discovered.

31. The definition and treatment of cultural resources varies with land ownership. At the federal level, the Native American Graves Protection and Repatriation Act requires federal agencies and institutions that receive federal funds to take certain actions, including consulting with federally recognized Tribes, lineal descendants, and other entities, and planning for repatriating or transferring human remains or cultural items.²⁶ At the state level, regardless of whether land is public or private, § 24-80-401 *et seq* and § 24-80-1301 *et seq* define a process by which unmarked human burials will be reviewed by a coroner or medical examiner, who in turn will notify the state archaeologist if they are not of forensic value. If the state archaeologist then determines that the remains are over 100 years old and Native American, they are to notify CCIA and determine whether to disinter and repatriate those human remains. However, cultural resources on private lands that are not human remains are not subject to this process. Landowners can be subject to requirements to conduct cultural resources surveys or take other actions as part of local

²⁶ See, e.g., <https://www.nps.gov/subjects/nagpra/index.htm>.

government 1041 regulations, but the requirements may differ depending on the local siting authority.²⁷

32. Because of the varying legal requirements and definitions for what types of cultural resources are protected and under what circumstances, we have opted to keep the definition of cultural and historic resources more general at this time. In this regard, we also propose language in Rule 3620, discussed below, that would require utility filings to address which federal, state, and/or local legal requirements apply given the specific circumstances at issue in an ERP or CPCN application.

33. The term “significant site” is a short form for the Sand Creek Massacre National Historic Site and other historic sites. We believe it is appropriate to have a term that can be used in the rules and can be expanded over time. While we have initiated this Proceeding explicitly to address protections of the Sand Creek Massacre National Historic Site and its viewshed, we do not believe it is fitting to limit the requirements of this rule only to that site. We intend to create a framework that the Commission can build on as it collectively gains experience.

34. Accordingly, we propose two additional paths by which sites could be approved for treatment as significant sites. One path would incorporate sites that are registered within the Cultural Resources Database maintained by the Office of Archaeology and Historic Preservation within History Colorado.²⁸ We understand that History Colorado maintains this database of information about approximately 300,000 cultural resources sites across the state, and stakeholders have encouraged us to refer to this tool or a similar resource to avoid creating a new and duplicative designation. The second path would include, in addition to the Sand Creek Massacre National

²⁷ § 24-65.1-202(3), C.R.S.

²⁸ History Colorado, File Access, *available at* <https://www.historycolorado.org/file-access>.

Historic Site and sites within the Cultural Resources Database, other sites designated as significant sites by the Commission within a particular proceeding. This path could increase flexibility, however, it may be necessary to clarify what information should be provided to the Commission for it to make a determination.

35. “Tribal Nations” are federally recognized Tribes. This term is intended to be broad and inclusive of, but not limited to, those Tribal Nations that have a specific historical connection to the Sand Creek Massacre National Historic Site, such as the Northern Cheyenne Tribe, the Northern Arapaho Tribe, and the Cheyenne and Arapaho Tribes.

36. In addition to comments on the proposed redlines, we seek also seek comments in response to the following questions:

- Is the term “cultural and historic resources” appropriate, and is the definition sufficiently clear and comprehensive?
- What steps must a stakeholder—such as a utility or a developer—go through to understand whether a site may be impacted within the Cultural Resources Database? Are there restrictions to accessing information? Are there fees involved? Would stakeholders benefit from the Commission requesting a presentation from History Colorado on this tool?
- If the Commission were to allow other sites besides the Sand Creek Massacre National Historic Site or sites within the Cultural Resources Database to be presented for consideration as significant sites, is there particular information that proponents should provide to enable the Commission to make a determination?

e. Rule 3102. Certificate of Public Convenience and Necessity for Facilities.

37. Rule 3102 refers to applications by electric utilities seeking to construct and operate a facility or extension of a facility pursuant to § 40-5-101, C.R.S. Certificates of Public Convenience and Necessity (“CPCNs”) are not required for actions which are in the ordinary

course of business. For purposes of considering impacts to significant sites, we envision that relevant CPCNs may include large transmission projects or utility-owned generating units.

38. We propose to add a requirement under rule 3102(b) that relevant CPCN applications address any impacts to significant sites, and the actual or projected costs associated with avoiding or mitigating those impacts. Utilities would provide information related to new Rule 3620, as we describe below. We further propose that utilities be required to submit cultural resource surveys that are required by federal or state agencies, or local siting authorities.

39. In addition to comments on the proposed redlines, we seek also seek comments in response to the following questions:

- Under what circumstances are electric utilities, wholesale cooperatives, and independent power producers currently required to conduct cultural resource surveys? To what extent do requirements vary by federal, state, local, and private land ownership?
- If the utility is not otherwise required to perform a cultural resource survey, can and should the Commission require such a survey to be performed and filed with a CPCN application?
- If the Commission were to require a utility to perform and file a cultural resources survey, what level of due diligence should be required for that survey?
- Should the Commission consider implementing parallel rules for CPCNs for gas utilities?

f. Rule 3605. Cooperative Electric Generation and Transmission Association Requirements.

40. Rule 3605 specifically addresses electric resource plans (“ERPs”) conducted by cooperative electric generation and transmission associations. Tri-State Generation and Transmission Association, Inc. (“Tri-State”) is the only cooperative generation and transmission association existing in Colorado. We propose to add certain requirements in Rule 3605 for Tri-State that are intended to mirror those in Commission’s rules for investor-owned utilities.

First, we propose to add to Rule 3605(g)(II)(G) a requirement that RFPs should request information from bidders about impacts to significant sites, consistent with the information required by Rule 3620. Second, we propose that a Phase I decision under Rule 3605(g)(III) should address the sufficiency of the utility's consideration of significant sites and the cultural and historic resources thereof within any proposed RFP, model contracts, evaluation criteria, etc. Third, we propose a similar requirement for Phase II decisions under Rule 3605(h)(II), which should address the sufficiency of the utility's treatment of significant sites and the cultural and historic resources thereof, whether mitigations or alternative actions are viable and cost-effective, and how information presented by Tribal Nation(s) has been considered.

g. Rule 3613. Bid Evaluation and Selection.

41. Rule 3613 describes Phase II of the ERP process for investor-owned utilities, and specifically the timing for filing a Phase II report proposing a preferred portfolio based on the competitive solicitation. It also specifies the procedural steps for the Commission's consideration of that portfolio. We propose to supplement Rule 3613(h) by setting forth additional requirements for the Commission to address significant sites in its Phase II decision. Specifically, we propose that the Commission shall address the sufficiency of the utility's treatment of significant sites and the historic and cultural resources thereof, whether mitigation or alternative actions are reasonable and cost-effective, and how it has considered any information presented by Tribal Nation(s) in rendering its decision.

h. Rule 3616. Request(s) for Proposals.

42. We propose to add a requirement that requests for proposals ("RFPs") include a requirement for bidders to provide information on impacts to significant sites, consistent with

Rule 3620, which we describe below. This has similarities to the approach used for Best Value Employment Metrics, by which bidders are required to produce and be evaluated on certain information when they respond to RFPs.

43. In addition to comments on the proposed redlines, we seek also seek comments in response to the following questions:

- Should a utility reject a bid in an ERP if it fails to address whether there are impacts to significant sites?
- Are bidders in ERPs currently required to conduct and submit cultural resource surveys? If so, what kinds of information must be provided by bidders, and how is it reviewed and scored during the ERP process?

i. Rule 3617. Commission Review and Approval of Resource Plans.

44. Rule 3617 addresses the Commission's Phase I decision approving, modifying, or denying a utility's resource plan. We propose that in addition to considering specific items such as the utility's assessment of need for additional resources during the resource acquisition period, that a Phase I decision should also address the sufficiency of the utility's consideration of significant sites and the cultural and historic resources thereof, within the proposed RFP, model contracts, evaluation criteria, and other activities. Our proposal sets requirements for the Commission to articulate its findings in Phase I and Phase II decisions, but the Phase I decision recognizes that in the absence of specific bids, it may not be possible to know if there are any impacts, and thus the focus should be on how that information will be gathered.

j. Rule 3618. Reports.

45. Regulated utilities file annual reports providing updates to the Commission on the implementation of ERPs. We note that in the event there is an impact to a significant site that is identified through the ERP process, it may take time for the utility and/or independent power

producers to engage with Tribal Nations and identify opportunities for mitigation or other alternatives. Accordingly, we propose to add a requirement for the annual report that the utility provide updates on any ongoing discussion or consultation with Tribal Nations regarding impacts to significant sites that were identified during the ERP process.

k. Rule 3620. Significant Sites.

46. Proposed Rule 3620 addresses specific practices and filing requirements related to the treatment of significant sites.

47. Initially, we propose to add the following purpose to Rule 3620:

This rule establishes procedures for utilities to identify and mitigate impacts to significant sites in the context of electric resource plans filed pursuant to rule 3600 *et seq.*, certificates of public convenience and necessity filed pursuant to § 40-5-101, C.R.S., and in other proceedings as set forth by the Commission.

While situated within the Commission's ERP rules, Rule 3620 is intended to create a set of consistent filing requirements which can be referenced by other electric rules as warranted.

48. The first prescriptive requirement under paragraph (a) addresses how significant sites are identified and obligations of utilities to provide relevant information. Initially, subparagraph (I) clarifies that impacts to significant sites, and to the historic and cultural resources thereof, may be actual or they may be potential, recognizing that precise information about impacts may not always be perfectly available at the time a utility files an application. Subparagraph (III) also specifies that utilities shall provide information about impacts to significant sites as soon as practicable once those impacts are identified.

49. This provision recognizes that utilities may not be aware of relevant impacts at the time an application is initially filed—for example, we envision that a Phase I ERP application would include requirements for bidders to provide information about impacts to significant sites,

whereas the specific impacts may not be known until Phase II filings are made, at which point the utility should provide notice to affected Tribal Nation(s). Subparagraph (IV) sets this expectation that utilities notify affect Tribal Nation(s) of relevant applications or other filings when such impacts are identified.

50. We also set the expectation by subparagraph (II) that electric utilities collaborate with Tribal Nations and with the Office of Archaeology and Historic Preservation to identify potential impacts to significant sites and communicate promptly with affected Tribal Nations about those impacts. According to History Colorado, humans have lived in Eastern Colorado for thousands of years. However, much of Eastern Colorado includes private rather than state or federal land, and few cultural resource surveys may have been conducted. We thus encourage electric utilities and wholesale cooperatives, and independent power producers, to work proactively with Tribal Nations and with offices within the History of Colorado to identify potential impacts.

51. Paragraph (b) proposes the following filing requirements related to significant sites:
- (I) a description of the actual or potential impacts associated with the proposed action(s);
 - (II) how actual or potential negative impacts can be avoided or mitigated;
 - (III) an analysis of alternative actions, such as viable siting alternatives, if negative impacts cannot be avoided;
 - (IV) which Tribal Nation(s) is affected by the proposed action(s);
 - (V) a record of any communications between the utility and/or relevant third parties and Tribal Nation(s), including the positions, opinions, and concerns of Tribal Nation(s);
 - (VI) the process by which the utility and/or relevant third parties will engage in consultation or other appropriate communications with affected Tribal Nation(s) during the pendency of the proceeding; and
 - (VII) a description of federal, state, and local requirements relevant to the proposed action, including cultural resource surveys and requirements related to the identification and repatriation of cultural and historic resources.

These filing requirements are intended to be applied when actual or potential impacts to significant sites have been identified. Using again the example of an ERP application, we envision that a utility would draw on the filing requirements in rule 3620(b) to inform the development of information that bidders must provide in Phase I, as described by rule 3617(c). In contrast, in a Phase II filing, or in a CPCN application pursuant to rule 3102(b)(XI), the utility would provide information specifically responsive to rule 3620(b). Through these requirements we seek to understand what Tribal Nation(s) may be affected, whether utilities have engaged with representatives of those Tribal Nation(s), and what preexisting federal, state, or local requirements utilities are already required to follow. This information is designed to provide us a clearer picture both to the cost and risk associated with activities that could affect significant sites, as well as the state of ongoing discussions and how public participation is being supported.

52. We further propose a unique procedural modification under paragraph (c). In speaking with representatives of Tribal Nations and CCIA, we recognize that not all Tribal Nations may have the opportunity to be fully represented by legal counsel. Receiving party status pursuant to Rule 1401 conveys important rights, such as the opportunity to conduct discovery and participate in evidentiary hearings, which are not possible without party or pro se status. At the same time, the interaction between Tribal Nations and the Commission is a unique government-to-government relationship, and we do not wish to reinforce existing constraints on effective participation. Accordingly, subparagraph (c) proposes that Tribal Nations may intervene by right in applications that impact significant sites and need not be represented by an attorney.

53. To intervene by right, the Tribal Nation must notify the Commission during the initial intervention period for the application, or within 30 days of a utility filing if a filing

regarding impacts to a significant site occurs later in the proceeding. The notice of intervention by right should identify one or more representatives of the Tribal Nation who will participate. By the notice of intervention of right, a Tribal Nation may identify a site that meets the requirements of Rule 3001(mm) and request that it be treated as a significant site, according to paragraph (d). In the interests of procedural efficiency, the Commission would address requests to approve additional significant sites in a decision addressing interventions or may institute further process such as solicitation of comments.

54. Finally, we propose to add paragraph (e), which requires that utility filings addressing significant sites shall include appropriate protections for information about the location of the site. Sites that have cultural or historic resources can be subject to poaching, which can result in loss of cultural and historic items, as well as archaeological context. We have not referenced a specific data privacy or confidentiality rule, although a utility may seek particular protections under the Commission's rules. Instead, in the interests of mutual respect, we propose that utilities work with Tribal Nations to strike a balance between protecting significant sites from harm, but also providing sufficient information to the Commission and parties to understand what is being considered and potential opportunities to mitigate impacts.

55. In addition to the questions raised above, we welcome comment on the following further questions:

- What practices do electric utilities, wholesale cooperatives, and independent power producers currently use to engage with Tribal Nations, both generally and regarding specific projects?
- Have electric utilities or wholesale cooperatives been required by federal, state, or local laws to conduct cultural resource surveys for any generation, transmission, or distribution projects? If so, please provide examples from within the last five years.

- From the perspective of Tribal Nations, what has been the experience of communicating with electric utilities, wholesale cooperatives, or independent power producers about generation, transmission, or distribution projects? Have conversations been productive, or what could make them more effective?
- To what extent have entities involved in generation, transmission, or distribution projects communicated or collaborated with offices at History of Colorado or with the CCIA? Should there be a more defined role for these other agencies in ERP processes, and if so, what would that role be?

I. Rule 3627. Transmission Planning.

56. We encourage and support utilities and independent power producers taking early steps to identify, and potentially mitigate, impacts to significant sites based on engagement with Tribal Nations. Early and proactive consideration of significant sites can facilitate these discussions. Accordingly, we propose a requirement in the context of ten-year transmission planning, that utilities filing ten-year transmission reports should provide information about communications with Tribal Nations regarding significant sites, and should ensure that Tribal Nations have opportunities for meaningful participation in the planning process.

F. Conclusion

57. The statutory authority for the rules proposed here is found at: §§ 29-20-108, 40-2-108, 40-3-103, 40-3-101, and 40-6-109(1), C.R.S.

58. The proposed rules in legislative (*i.e.*, strikeout/underline) format (Attachment A) and final format (Attachment B) are available through the Commission's Electronic Filings (E-Filings) System at:

https://www.dora.state.co.us/pls/efi/EFI.ShowDocket?p_session_id=&p_docket_id=24R-0306E

59. The Commission encourages and invites public comment on all proposed rule amendments. We request that commenters propose any changes in legislative redline format.

60. The Commission refers this matter to an ALJ for the issuance of a recommended decision. A public comment hearing will be held on the proposed rules on August 27, 2024, beginning at 11:00 a.m. In addition to submitting written comments, participants will have an opportunity to present comments orally at the hearing, unless the ALJ deems oral presentations unnecessary. The Commission will consider all comments in this Proceeding, whether oral or written.

61. Initial written comments on the proposed rule changes are requested by August 9, 2024. Any person wishing to file comments responding to the initial comments is requested to file such comments by August 16, 2024. These deadlines are set so that comments and responses may be considered at the public hearing, nonetheless, persons may file written comments into this Proceeding at any time.

II. ORDER

A. The Commission Orders That:

1. This Notice of Proposed Rulemaking (including Attachment A and Attachment B) shall be filed with the Colorado Secretary of State for publication in the July 25, 2024, edition of *The Colorado Register*.

2. A virtual hearing on the proposed rules and related matters shall be held as follows:

DATE: August 27, 2024

TIME: 11:00 a.m. until not later than 5:00 p.m.

PLACE: By video conference using Zoom, with a link to be provided to participants after registration.

3. At the time set for hearing in this matter, interested persons may submit written comments and may present these orally unless the Administrative Law Judge deems oral comments unnecessary.

4. Those wishing to observe but not participate in the virtual public comment hearing may do so by observing the Commission's webcast for the assigned hearing room at:

<https://www.youtube.com/@COPublicUtilitiesCommission/featured>

5. Interested persons may file written comments in this matter. The Commission requests that initial pre-filed comments be submitted no later than August 9, 2024, and any pre-filed comments responsive to the initial comments be submitted no later than August 16, 2024. The Commission will consider all submissions, whether written or oral. The Commission prefers that comments be filed into this Proceeding using the Commission's E-Filings System at:

<https://www.dora.state.co.us/pls/efi/EFI.homepage>

6. This Decision is effective upon its Issued Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
July 3, 2024.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners