Decision No. C14-1352

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13R-1151E

IN THE MATTER OF THE PROPOSED AMENDMENTS PURSUANT TO HOUSE BILL 13-1292 TO THE RULES REGULATING ELECTRIC UTILITIES 4 CODE OF COLORADO REGULATIONS 723-3.

DECISION DENYING EXCEPTIONS AND SETTING ASIDE RECOMMENDED DECISION

Mailed Date: November 12, 2014
Adopted Date: November 5, 2014

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I. BY THE COMMISSION

A. Statement

1. The Commission opened this proceeding and issued a Notice of Proposed Rulemaking (NOPR) by Decision No. C13-1361 issued November 12, 2013, to amend the rules regulating electric utilities contained in 4 *Code of Colorado Regulations* (CCR) 723-3, of the Commission's Rules Regulating Electric Utilities, consistent with House Bill (HB) 13-1292.[1]

[1] The 2013 General Assembly enacted HB13-1292, which was signed into law by Governor Hickenlooper on May 24, 2013.

Through this proceeding, participants raised considerations of whether the Commission should amend rules defining the circumstances in which pollution control projects constructed by electric utilities are within the utilities' ordinary course of business and are thus exempt from the Commission's requirements to obtain a certificate of public convenience and necessity (CPCN).

2. This Decision considers exceptions to Decision No. R14-1024 (Recommended Decision) August 25, 2014, filed by Tri-State Generation and Transmission Association, Inc. (Tri-State) on September 15, 2014, and Public Service Company of Colorado (Public Service) on September 15, 2014. Responses to the exceptions were filed on September 29, 2014, both by Tri-State and jointly by the Colorado Building and Construction Trades Council (CBCTC) and the Rocky Mountain Environmental Labor Coalition (RMELC) (collectively, the Labor Organizations).

3. We deny the exceptions consistent with the discussion below. In addition, we find that the record does not support changes proposed by the participants or included in the Recommended Decision, and we set aside the rules proposed in the Recommended Decision. The Commission shall issue a new NOPR to determine what pollution control projects are in the ordinary course of business.

B. Procedural Background

4. HB13-1292 modifies § 40-2-129, C.R.S., by specifying that, when evaluating utility requests for a CPCN for the construction or expansion of generating facilities, "including pollution control and fuel conversion projects of existing coal-fired plants," the Commission

shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities.[2]

5. In the NOPR, the Commission proposed changes to Rule 3102(e), scheduled an initial public comment for January 16, 2014, and referred the rulemaking to an Administrative Law Judge (ALJ). Proposed Rule 3102(e) said:

> (e) For an application for a certificate of public convenience and necessity for construction or expansion of generation facilities, including, but not limited to pollution controls or fuel conversion upgrades and conversion of existing coal-fired plants to natural gas plants, the applying utility shall provide the following information regarding best value employment metrics:
>
> (I) the availability of training programs, including training through apprenticeship programs registered with the United States Department of Labor, Office of Apprenticeship and Training;
>
> (II) the employment of Colorado workers as compared to importation of out-of-state workers;
>
> (III) long-term career opportunities; and
>
> (IV) industry-standard wages, health care, and pension benefits.

6. In its NOPR, the Commission recognized that, pursuant to existing Rule 3205(b)(II), pollution control projects are deemed to be in the normal course of business and, therefore, do not require applications for CPCNs pursuant to the current rules. The Commission did not propose revisions to Rule 3205(b)(II), but sought comment from interested persons on whether the new provisions of § 40-2-129, C.R.S., require changes to

[2] Section 40-2-129, C.R.S., states in part: "[w]hen evaluating electric resource acquisitions and requests for a certificate of convenience and necessity for construction or expansion of generating facilities, including but not limited to pollution control or fuel conversion upgrades and conversion of existing coal-fired plants to natural gas plants, the commission shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities."

Rule 3205(b)(II) that would remove the exemption of pollution control projects from CPCN requirements.[3]

7. Through the course of this rulemaking proceeding, Public Service, Black Hills/Colorado Electric Utility Company, LP, CBCTC, RMELC, and Western Resource Advocates developed and filed a consensus proposal to modify Rules 3102(e) and 3205(b)(II) (Consensus Proposal). The Consensus Proposal requests modification to Rule 3102(e) requiring that, within 45 days after a contract was awarded for the construction of a pollution control or fuel conversion project, the utility file a status report providing the best value employment metrics associated with the selected contractors.[4]

8. Regarding existing Rule 3205(b)(II), the Consensus Proposal continues to exempt certain pollution projects from a CPCN requirement, as long as the estimated total costs, including engineering, procurement, construction, and interrelated work, is less than $50 million. For projects with costs exceeding the $50 million threshold, pursuant to the Consensus Proposal, a CPCN would be required and the requirements of Rule 3102(e) would apply. The proponents of the Consensus Proposal argued that this approach allows the utilities to implement smaller pollution control projects in the "ordinary course of business" but does not require them to obtain CPCNs for higher value projects.[5]

9. The ALJ determined the revision in the Consensus Proposal to Rule 3102(e) meets the statutory requirements and legislative intent of HB13-1292. However, the ALJ rejected the proposed changes to Rule 3205(b)(II) in the Consensus Proposal, finding that

[3] Decision No. C13-1361, ¶ 6.
[4] Recommended Decision, ¶¶ 17-20.
[5] Recommended Decision, ¶¶ 21-23.

defining projects costing less than the $50 million figure was arbitrary and capricious, especially when contrasted to Rule 3205(c), which requires CPCNs for new construction or expansion of existing generation facilities of 10 megawatts or more, even though these projects may cost less than $50 million.

10. The ALJ instead adopted rule changes that replaced the $50 million threshold with two conditions such that a CPCN would not be required where: (a) the project could be completed while the plant remains in operation and otherwise would not reduce the availability of the plant beyond regularly scheduled maintenance outages; and (b) the economic feasibility of the project would require no extension to the expected useful life of the plant for depreciation or cost amortization purposes. The ALJ concluded that this alternative language would alleviate the arbitrary and capricious nature of the $50 million threshold and would be consistent with the legislative intent of HB13-1292.

C. Exceptions

11. Public Service requests that the Commission either: (a) adopt the Consensus Proposal for Rule 3205(b)(II) by establishing a $50 million benchmark below which a pollution control project would be deemed to be in the ordinary course of business; or (b) not make any modifications to Rule 3205(b)(II).[6]

12. Public Service argues the practical effect of the ALJ's proposed modifications is to eliminate the exemption in its entirety with respect to the installation of air pollution control systems, because it is not possible to install an air pollution control system without the generation plant being taken offline.[7] Public Service argues that the elimination of the

[6] Public Service Exceptions, at 9.
[7] Public Service Exceptions, at 5.

pollution control exemption is inconsistent with the General Assembly's intent in enacting HB13-1292. Concerning the $50 million benchmark, Public Service argues, in individual proceedings, the Commission has reviewed the expense of a project as a basis for concluding that the project was not in the ordinary course of business, notwithstanding the applicability of an apparent exemption.[8]

13. Tri-State also requests that the Commission not adopt the Recommended Decision's proposed modifications to Rule 3205(b)(II), and Tri-State requests that the Commission make no modifications to Rule 3205(b)(II).

14. Tri-State argues that the elimination or modification of the "ordinary course of business" CPCN exemption for pollution control projects is neither required by HB13-1292 nor necessary to give effect to the Colorado Legislature's intent. Tri-State also argues that there is insufficient evidence to support the specific formulation of the "ordinary course of business" exemption set forth in the Recommended Decision.[9] At a minimum, Tri-State recommends that the Commission exempt any pollution control project from needing a CPCN that is required as part of a negotiated settlement or an approved state or federal environmental compliance plan.[10] In the alternative, "in the absence of a fully developed record…," Tri-State proposes certain revisions to modified Rule 3205(b)(II) set forth in the Recommended Decision.

[8] Public Service Exceptions, at 7-8 (stating, "[f]or example, even with the availability of Rule 3205(b)(II) in its current form, which contains no dollar limit, the Commission in its Clean Air-Jobs Act ('CACJA') order required that the Company obtain CPCNs for two of the pollution control projects that were part of the Company's CACJA compliance plan. The Commission passed this determination in part on the fact that 'the costs of these projects are substantial.'").

[9] Tri-State Exceptions, at 6.

[10] Tri-State Exceptions, at 7.

15. In response, the Labor Organizations argue that the record includes sufficient evidence to support the Consensus Proposal for the $50 million threshold for CPCNs to be required for pollution control projects without additional proceedings, which was "forged in the spirit of compromise to reconcile the goals of [HB 13-1292] with the terms of Rule 3205(b)(II)."[11] They also argue that the proposal addresses the letter and spirit of § 40-2-129, C.R.S., without conflicting with § 40-5-101, C.R.S., which govern CPCNs for new utility facilities.[12]

16. According to the Labor Organizations, the General Assembly has made clear its intent that the Commission must consider best value employment metrics in its CPCN process.[13] In addition, the Labor Organizations argue that Tri-State's exceptions must be based upon specific citations to the record or the absence thereof. They fault Tri-State for failing to request and pay for a transcript as required by Commission rules.[14]

D. Conclusion and Findings

17. We decline to make findings specific to which pollution control projects do or do not require CPCNs without an adequate record. We agree with the ALJ that the record in this proceeding does not support adoption of the $50 million threshold suggested in the Consensus Proposal. To the extent exceptions request the Commission adopt the Consensus Proposal, we deny those exceptions. We also agree with Public Service and Tri-State that the rule revisions proposed by the ALJ are not supported in the record and we set aside the

[11] Labor Organization Response to Exceptions, at 4.
[12] Labor Organization Response to Exceptions, at 5.
[13] Labor Organization Response to Exceptions, at 5.
[14] Labor Organization Response to Exceptions, at 6-7.

Recommended Decision, including the proposed rule revisions.[15] Similarly, alternative proposals suggested on exceptions, including that of Tri-State, are not sufficiently supported and will not be adopted by this Decision.

18. Both Tri-State and Public Service request the Commission maintain the current Rule 3205(b)(II), and declare that the exemption for pollution control projects is consistent with § 40-2-129, C.R.S. Section 40-5-101(1)(a)(III), C.R.S., provides that a utility need not obtain a CPCN if the extension of any facility, plant, or a utility's overall system is "necessary in the ordinary course of business."[16] Because the record fails to indicate the circumstances under which a pollution control project would *not* be in the ordinary course of business pursuant to § 40-5-101(1)(a)(III), C.R.S., at this time we do not enter a determination of whether the statute requires a revision to Rule 3205(b)(II).

19. We agree with Labor Organizations that, pursuant to § 40-2-129, C.R.S., the Commission shall consider best value employment metrics *when* a CPCN is required. However, § 40-2-129, C.R.S., does not eliminate the "ordinary course of business" exemption for pollution control projects. As Tri-State claims in its exceptions, pollution control projects are required as part of approved state or federal environmental compliance plans, and our rules should account for these compliance plans and avoid any delays in implementation.

[15] We recognize Tri-State did not request and pay for transcripts, as required by Rule 1505(b) of the Commission's Rules of Practice and Procedure 4 CCR 723-1; however, upon independent review of the record, and pursuant to § 40-6-109(2), C.R.S., we find that the specific revisions proposed by the ALJ are not supported by participant filings, nor is the proposal explained, with the exception of the statement in the Recommended Decision, ¶ 36, that the arbitrary and capricious concern is alleviated "by not including a specific dollar figure." While this statement highlights his reasoning for why the $50 million threshold is rejected, it does not support the specific alternatives proposed in the Recommended Decision.

[16] Section 40-5-101(1)(a)(III), C.R.S., states that a corporation is not required to secure a CPCN for "[a]n extension within or to territory already served by the corporation, as is necessary in the ordinary course of its business."

20. We find that a new rulemaking proceeding is required to remedy the insufficiencies in the record and determine which pollution control projects are in the "ordinary course of business," and which are not. While it is apparent that many pollution control projects are in the ordinary course of business, it is unclear when a project would not be in the ordinary course of business based on the record in this proceeding. We maintain the current Rule 3205(b)(II) until the Commission has a record that supports revision to the rule. The Commission shall consider the positions advanced in this proceeding by the participants and the ALJ to propose and issue a new NOPR.

II. ORDER

A. The Commission Orders That:

1. The exceptions filed by Tri-State Generation and Transmission Association, Inc. on September 15, 2014, are denied, consistent with the discussion above.

2. The exceptions filed by Public Service Company of Colorado on September 15, 2014, are denied, consistent with the discussion above.

3. The rules proposed in Recommended Decision No. R14-1204, issued August 25, 2014, are set aside, and the Recommended Decision shall not become a decision of the Commission pursuant to § 40-6-109, C.R.S.

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 November 5, 2014.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

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Commissioners