Decision No. R14-1024

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.

RECOMMENDED DECISION
OF ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
ADOPTING RULES

Mailed Date: August 25, 2014

TABLE OF CONTENTS

I. STATEMENT

A. Background

1. The Colorado Public Utilities Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) on November 12, 2013 by Decision No. C13-1361, 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.

HB 13-1292 was enacted by the 2013 General Assembly and signed into law by Governor Hickenlooper on May 24, 2013.

2. HB 13-1292 modifies § 40-2-129, C.R.S., by specifying that, when evaluating utility requests for a Certificate of Public Convenience and Necessity (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.

3. As a result of the modification of § 40-2-129, the Commission proposed the following amendment to its Rule 4 CCR 723-3-3205 by incorporating subsection (e) as follows:

> (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 comparted to importation of out-of-state workers;
>
> (III) long-term career opportunities; and
>
> (IV) industry-standard wages, health care, and pension benefits.

4. The NOPR, with the attached proposed rule, scheduled an initial public comment hearing on the proposed rules for January 16, 2014. The Commission referred the rulemaking to an Administrative Law Judge (ALJ). The matter was subsequently assigned to the undersigned ALJ.

II. FINDINGS

5. Written comments to the proposed rules were filed by the Colorado Building and Construction Trades Council (CBCTC) and the Rocky Mountain Environmental Labor Coalition (RMELC) (collectively, the Labor Organizations); Public Service Company of Colorado (Public Service); and Western Resource Advocates (WRA). Black Hills/Colorado Electric Utility Company, LP (Black Hills) filed a Notice of Participation.

6. At the scheduled date and time, the rulemaking public hearing was held. Comments were provided at the hearing by Public Service, Black Hills, CBCTC and RMELC, and WRA.

7. The Labor Organizations provided written comments as well as comments during the rulemaking hearing. The Labor Organizations state that they support proposed Rule 3102(e) as proposed by the Commission as it is in the spirit of the legislative intent behind the Keep Jobs in Colorado Act (KJCO). The Labor Organizations support the rule as providing specific best value employment metrics to the Commission for qualitative evaluation as part of the utilities' CPCN application process.

8. Public Service, in its comments takes issue with proposed Rule 3102(e). According to Public Service, the proposed rule fails to take into account that a utility at the CPCN application stage does not yet have complete information regarding a project. Public Service comments that it can project or estimate how the best value employment metrics might apply to a project addressed by a CPCN, but it will not know with certainty how the metrics will apply until after it contracts for the construction of the project.

9. In order to remedy this, Public Service proposes the first paragraph of proposed Rule 3102(e) be amended as follows (with Public Service's proposed changes in underline format):

> (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 to the extent known. If information is not known with certainty at the time an application for a certificate of public convenience and necessity is filed, for a proposed project an applicant should provide information regarding how the best value employment metrics are to be addressed during the contracting phase for the project.

10. The commenting parties generally agreed that the proposed rule as provided in the Commission's NOPR and the proposed Public Service amendments address the intent of the legislature. However, the Labor Organizations went on to comment that the amended statutory language now conflicts with Commission Rule 4 CCR 723-3-3205(b)(II), which provides that "[a] generating plant remodel, or installation of any equipment or building space, required for pollution control systems," are in the ordinary course of business. As a result, the Labor Organizations proposed striking a portion of Rule 3205(b)(II) in order to remove the exemption of pollution control projects from the Commission's CPCN requirements to ensure that the rules are consistent with the KJCO Act.

11. The Labor Organizations argue that the legislature's intent was to require CPCN applications for pollution control projects to allow for the Commission's consideration of best value employment metrics with regard to the installation of pollution control projects.

12. WRA, in its written comments and comments provided by legal counsel at the rulemaking hearing, opposes the proposed deletion of Rule 3205(b)(II) as proposed by the Labor

Organizations. WRA maintains that the Labor Organizations' proposal creates an unnecessary conflict with § 40-5-101(1), C.R.S. That statutory provision 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." § 40-5-101(1)(a)(III), C.R.S. WRA comments that the amended language of § 40-2-129 merely modifies the way in which the Commission evaluates applications for CPCNs, not whether a CPCN must be sought. WRA further argues that § 40-2-129 does not amend or delete the "ordinary course of business" exemption found in § 40-5-101(1)(a)(III), but instead provides that when a utility seeks a CPCN for the installation of pollution controls that are outside the ordinary course of business, the Commission must evaluate best value employment metrics.

13. Public Service and Black Hills are in agreement that the new statutory language of § 40-2-129 was not intended to change the requirements of when a CPCN is required. Public Service urges that should the Commission be inclined to amend Rule 3205(b)(II), it do so in a separate rulemaking proceeding. In addition, Public Service notes (as does WRA in its written comments) that Rule 3205(b) was in effect at the time the General Assembly enacted HB 13-1292, and it can be assumed that it understood that not all pollution control projects required CPCNs. Additionally, Public Service reiterates WRA's point that there is no affirmative requirement in the statutes that CPCNs always be obtained for such projects.

14. As part of the discussion by the parties, the ALJ was informed that the parties were in discussions as to whether consensus was possible regarding certain amendments to the Commission's proposed rules. The parties were encouraged to file additional comments on any agreed to language within 45 days of the rulemaking hearing.

15. On March 3, 2014, Public Service filed a Status Report and Request for Hearing, in which it stated that the parties had reached a consensus proposal and requested that a new hearing date be set to present those results to the ALJ.

16. By Interim Decision No. R14-0358-I, issued on April 4, 2014, good cause was found to set an additional hearing in this matter to take additional comments on the parties' proposed amendments to the Commission's rules. In addition, that Interim Decision served as a Supplemental Notice of Proposed Rulemaking setting a hearing date of May 15, 2014 to take additional comments from the parties regarding the Commission's proposed rules.

17. On April 22, 2014, Public Service, the Labor Organizations, Black Hills, and WRA filed joint comments. In that filing, the parties presented a consensus proposal to modify both Rule 3102(e) and existing Rule 3205(b)(II).

18. The consensus Rule 3102(e) proposed by the parties provides that within 45 days after a contract award for a project, utilities would be required to file a status report with the Commission providing information selected contractors have provided regarding how they meet best value employment metrics. The parties further propose that any wage information be provided to the Commission on a highly confidential basis. The parties also propose that any party may file comments to the status report within 15 days.

19. According to the parties, the proposed language solves the timing issue Public Service and Black Hills previously noted, but also provides procedural mechanisms for utilities to report back to the Commission, and for parties to comment on those filings. The parties are satisfied that their proposed amendments to Rule 3102(e) satisfy the requirements of HB 13-1292, despite the fact that information regarding how bidders will satisfy the best value employment metrics criteria will be obtained after the grant of a CPCN.

20. The parties' proposed Rule 3102(e) is as follows (with the parties' proposals in underline format):

> (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. If information regarding best employment value metrics is not known at the time an application for a certificate of public convenience and necessity is filed because an applicant has not yet entered into contracts for the construction of a proposed project, an applicant shall state that it will obtain information regarding best value employment metrics from potential contractors through whatever means it uses to select contractors for project construction. In such case, an applicant will file a status report with the Commission forty-five (45) days after the contract award that provides to the Commission information selected contractors have provided regarding how they meet best value employment metrics. Any party may file comments with the Commission on said status report within fifteen (15) days of the filing of the status report with the Commission. The utility may file any information regarding a bidder's wages on a highly confidential basis.

21. Regarding existing Rule 3205(b)(II), the parties present what they identify as a "middle ground" approach as suggested by WRA, wherein the exemption will continue to apply for projects where the estimated total cost of the project, including engineering, procurement, construction, and interrelated work, is expected to be less than $50 million. For projects that exceed that threshold, a CPCN will be required and the requirements of Rule 3102(e) will apply.

22. The parties represent that this proposed amendment to Rule 3205(b)(II) will enable utilities to treat smaller pollution control projects as ordinary course of business, but will require them to obtain CPCNs for higher value projects. The parties further represent that such a change is not inconsistent with the requirements of § 40-2-129.

23. The parties' proposed amendment to Rule 3205(b)(II) is as follows (with the parties' proposals in underline format):

> (II) A generation plant remodel, or installation of any equipment or building space, required for pollution control systems, <u>where the estimated total cost including, but not limited to, engineering procurement, construction, and interrelated work for such project is expected to be less than $50 million.</u>

24. The parties provided comment at the hearing in support of the two proposed rule changes.

25. In addition, the Labor Organizations provided additional comment and information to help support the $50 million threshold. The Labor Organizations maintain that the $50 million threshold is appropriate based on the conclusion that pollution control projects costing more than $50 million are significant enough to require CPCNs. Exhibit 1 to the Labor Organizations' comments provides data regarding large scale pollution control construction projects for various generation facilities in Colorado. Exhibit 2 provides data of minor pollution control projects under $50 million for other generation facilities in Colorado. For comparison, Exhibit 3 provides examples of routine facility shutdowns where pollution control equipment is adjusted, calibrated, or replaced in part of the ordinary course of business, which are typically in the $1 million to $10 million range.

26. Tri-State Generation and Transmission Association, Inc. (Tri-State) provided written comments and comments at the May 15, 2014 public comment hearing.

27. Tri-State indicated that it is in general agreement with the initial comments provided by Public Service and WRA. Tri-State further commented that it was not a part of the negotiations between the above parties regarding the proposed amendments to Rules 3102(e) and 3205(b)(II).

28. It is Tri-State's position that it faces the same possible undertakings as Public Service and Black Hills of having to undertake various pollution control projects to comply with federal and state environmental regulations. Tri-State comments that the elimination of the ordinary course of business exception for pollution control projects creates a risk of delaying those projects and injects uncertainty into project schedules which may result in Tri-State's inability to meet required deadlines. Tri-State points out that this risk and uncertainty is not required by amended § 40-2-129 and can be avoided by a proper application of the statute consistent with existing Colorado law.

29. Tri-State reiterates that it is in agreement with Public Service's and WRA's initial positions regarding the proposed rule changes. However, Tri-State takes issue with the parties' proposed rule changes as subsequently submitted. As Public Service and WRA initially commented, Tri-State comments that the plain language of Section 16 of HB 13-1292 does not require the deletion of the existing CPCN exemption for pollution control projects that are in the ordinary course of business. Tri-State reiterates that the amended language of § 40-2-129 makes no mention of § 40-5-101 which governs utility CPCNs.

30. Tri-State goes on to comment that there is no basis in HB13-1292 for the proposed $50 million cut-off for pollution control projects that would still be able to claim the ordinary course of business exception. Tri-State states that while the joint commenters may believe that this is a reasonable compromise, there is no statutory basis for this dollar value, nor does the statute reflect the General Assembly's intent that the Commission create such a cut-off through rulemaking. Tri-State points out that it is possible to harmonize the plain language of amended § 40-2-129 with existing CPCN laws and Commission rules as Public Service and WRA noted in their original comments. Tri-State concludes that the only logical reading of

§ 40-2-129 is that best value employment metrics must be considered for pollution control projects **if** such projects require a CPCN. According to Tri-State, any other reading would be contrary to law.

III. FINDINGS AND CONCLUSIONS

31. The comments and proposed rule amendments provided by all the parties are greatly appreciated. After a review of the comments and the statutory language, it is found to be appropriate to make several modifications to the proposed rules. Therefore, the rules provided pursuant to the Commission issued NOPR will be modified as follows.

32. Regarding proposed Rule 3102(e), it is found that the proposed rule submitted by Public Service, Black Hills, the Labor Organizations, and WRA is appropriate and meets the statutory requirements and legislative intent of HB 13-1292. As the utilities indicated at the public comment hearings, it would be difficult, if not nearly impossible, at the time of a CPCN application to provide best value employment metrics information since that information most probably would not be known at the time a utility files for a CPCN. Indeed, it is readily apparent that such information could not be obtained until contract negotiations between the utility and the contractor are well under way or completed. Therefore, the language proposed by the parties as indicated above in Paragraph No. 20 will be adopted.

33. Regarding the proposed amendment to existing Commission Rule 3205(b)(II) as proposed by the parties, despite the written comments provided by the parties and the comments received at the May 15, 2014 public comment hearing, the parties have not provided persuasive or compelling arguments which would lead to adoption of a $50 million threshold in order to determine when a project is in the ordinary course of business.

34. The concern remains that the $50 million figure remains somewhat arbitrary and capricious, especially when contrasted to Rule 3205(c) which places a threshold for the new construction or expansion of existing generation facilities at an increase of 10 megawatts or more. The associated cost of a less than 10 megawatt generation facility would most likely be significantly less than $50 million. The incongruity of the two thresholds is simply untenable and is itself the very definition of arbitrary and capricious.

35. Therefore, Rule 3205(b)(II) will be amended as follows (with the adopted changes depicted in underline format):

3205. Construction or Expansion of Generating Capacity.

(a) No utility may commence new construction or an expansion of generation facilities or projects until either the Commission notifies the utility that such facilities or projects do not require a certificate of public convenience and necessity or the Commission issues a certificate of public convenience and necessity for the facility or project. Rural electric cooperatives do not need a certificate of public convenience and necessity for new construction or an expansion of generation facilities provided that such construction or expansion is contained entirely within the cooperative's certificated area.

(b) The following shall be deemed to occur in the ordinary course of business and shall not require a certificate of public convenience and necessity:

(I) New construction or expansion of existing generation, which will result in an increase in generating capacity of less than ten megawatts.

(II) A generating plant remodel, or installation of any equipment or building space, required for pollution control systems <u>where (1) the project can be completed while the plant remains in operation and otherwise does not reduce the availability of the plant beyond regularly scheduled maintenance outages and (2) the economic feasibility of the project requires no extension to the expected useful life of the plant for depreciation or cost amortization purposes.</u>

36. It is found that this amendment to Rule 3205(b)(II), by not including a specific dollar figure, alleviates the arbitrary and capricious concern raised by the parties' $50 million threshold proposal. Further, the adopted language is in keeping with the legislative intent of HB 13-1292 and provides no conflict with the statutory language of § 40-5-101.

37. The two adopted measures provide a more accurate and congruent determination of whether a pollution control project would be outside the normal course of business. Further, it is found that these concepts are more applicable to the Commission's Electric Rules. The Commission and the public may monitor these factors so the provisions would in essence be self-enforcing for utilities such as Tri-State.

38. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Commission Rules pursuant to 4 *Code of Colorado Regulations* 723-3-3102(e) and 3205(b0(II) contained in Attachment A to this Decision are adopted consistent with the discussion above.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its

own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director