

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 22R-0249E

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE COMMISSION'S RULES REGULATING ELECTRIC UTILITIES TO IMPLEMENT THE PROVISIONS OF SB21-072 REGARDING TRANSMISSION UTILITY PARTICIPATION IN ORGANIZED WHOLESALE MARKETS, 4 CODE OF COLORADO REGULATIONS 723-3.

**RECOMMENDED DECISION
OF HEARING COMMISSIONER
ERIC BLANK
ADOPTING RULES**

Mailed Date: June 20, 2024

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 A. It Is Ordered That:47

I. STATEMENT

1. This Decision adopts amendments and additions to the Colorado Public Utilities Commission’s (Commission) Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations*, (CCR) 723-3. The amendments to Rules 300 and 3002 and the new Rules 3750 to 3759 relate to the participation of electric utilities in wholesale electricity markets and reporting on plans to participate in such markets, including Organized Wholesale Markets (OWMs), Regional

Transmission Organizations (RTOs), Independent System Operators (ISOs), Day-Ahead Markets (DAMs), and Energy Imbalance Markets (EIMs).¹

II. BACKGROUND

2. The Commission initiated this matter on June 28, 2022, by issuing a Notice of Proposed Rulemaking (NOPR) to specify filing requirements for utilities seeking approval to join wholesale electricity markets and reporting requirements regarding utilities' plans, commitments, and actual participation in these markets. The Commission stated that it seeks to ensure it is sufficiently informed of the impacts of potential market participation on a regulated electric utility's ability to adequately and reliably serve its Colorado customers, charge just and reasonable rates, meet applicable emission reduction requirements and clean energy targets, and remain responsive to State concerns and regulation.

A. Proceeding No. 19M-0495E: Investigation of Costs and Benefits of Market Participation Under the Colorado Transmission Coordination Act

3. As the NOPR discussed in additional detail, this rulemaking was opened subsequent to completion of the Commission's work under the requirements of § 40-2.3-102, C.R.S., the Colorado Transmission Coordination Act of 2019 (CTCA). The CTCA directed the Commission to investigate the costs and benefits resulting from electric utility participation in organized electricity markets.² To fulfill its statutory obligations, the Commission opened Proceeding No. 19M-0495E and conducted a two-year investigation including rounds of stakeholder comments, Commissioner Information Meetings (CIMs), the preparation of

¹ This Decision adopts new Rules or Rule changes not originally included in the Notice of Proposed Rulemaking (NOPR), but the Hearing Commissioner finds that such changes are reasonably within the scope of the NOPR because they relate to other proposed rules or rule changes in the NOPR. As a result, adopting these new Rules and Rule changes does not run afoul of § 24-4-103, C.R.S.

² § 40-2.3-102(1)-(4), C.R.S., referred to energy imbalance markets, regional transmission organizations, power pools and joint tariffs.

quantitative modeling and analysis (the Siemens Quantitative Study), and a report on the investigation.

4. By Decision No. C21-0755 in Proceeding No. 19M-0495E (CTCA Decision), the Commission concluded that utility participation in an organized electricity market is generally in the public interest.³ The Commission clarified that this general determination did not extend to participation in a specific market and that any analysis of the costs, benefits, and public interest associated with participation in a specific market would have to occur through a separate proceeding.⁴

5. The Commission based its general determination that participation in an organized electricity market is in the public interest in part, on the results of available studies of the question, including the results of the Siemens Quantitative Study. The results from the Siemens Quantitative Study demonstrated that markets can provide material savings through operating cost and infrastructure investment savings. In particular, the results showed that savings from participating in an Energy Imbalance Market (EIM) represent about one percent of the total State revenue requirement including fuel, operational costs, and return of and on capital. The study also indicated that expected savings from participating in a market with day-ahead unit commitment and reserve sharing could produce savings of as much as four to five percent of the total state revenue requirement or roughly \$300 million annually.⁵

6. The Siemens Quantitative Study also indicated that the footprint of the market had some impact on the total amount of benefits, but regardless of whether Colorado joined with other

³ See CTCA Decision at ¶ 38.

⁴ CTCA Decision at ¶ 41.

⁵ See Decision No. C21-0755 in Proceeding No. 19M-0495E, Attachment 1 Colorado Transmission Coordination Act: Investigation of Wholesale Market Alternatives for the State of Colorado (“CTCA Report”) at p. ii.

market participants in the east or the west, the benefits arose from enhanced regional coordination within a larger footprint, largely independent of the exact composition of that footprint.⁶

7. While the general benefits of participation in an organized electricity market were recognized, the Commission identified certain other concerns that required further examination. The Commission specifically listed the role of state Commissions in resource planning and acquisition activities, appropriate methods to account for greenhouse gas emissions, the processes surrounding transmission expansion, the management of generator interconnection, governance issues, and general rate concerns.⁷ The Commission noted that these concerns are heightened when considering participation in a fully integrated market such as an RTO or ISO that transfers effective control of utility-owned transmission assets to a third party operator, and conversely that EIMs and Day-Ahead Markets (DAMs) raise fewer concerns while still potentially providing significant benefits. For example, the Commission found that market governance is especially important when contemplating participation in an RTO or ISO, as compared to participation in a less integrated market such as an EIM that has fewer impacts on state planning processes.⁸ The Commission also highlighted its concern with the interconnection procedures in RTOs and ISOs, stating that the interconnection queue in Colorado appeared to currently be substantially more efficient than the interconnection process in a number of the large RTOs.⁹

8. In the CTCA Decision concluding Proceeding No. 19M-0495E, the Commission ordered the issuance of a NOPR to address filing requirements for utilities to join and participate in an organized electricity market. The Commission intended that the resulting rulemaking – this

⁶ CTCA Decision. at ¶¶ 18-19.

⁷ *Id.*, at ¶¶ 26-37.

⁸ *Id.* at ¶ 35.

⁹ *Id.* at ¶ 30.

rulemaking Proceeding – would result in appropriate processes to consider the costs, benefits, and public interest considerations associated with participation in a particular market, including, if appropriate, processes to address the Commission’s concerns with market participation.¹⁰

B. Senate Bill 21-072

9. As further explained in the NOPR opening this Proceeding, the Commission also intended this rulemaking’s scope to include the implementation of Senate Bill (SB) 21-072, which was signed into law on June 24, 2021, while Proceeding No. 19M-0495E was ongoing, and which was codified at § 40-5-108, C.R.S. Pursuant to the statute, Colorado Transmission Utilities¹¹ must join an OWM by January 1, 2030. The statute defines an OWM as an RTO or ISO that “is established for the purpose of coordinating and efficiently managing the dispatch and transmission of electricity among public utilities on a multistate or regional basis,” and which satisfies ten characteristics listed in § 40-5-108(1)(a), C.R.S. At the same time, however, transmission utilities may seek a delay or waiver of the requirement for a utility to join an OWM from the Commission, which the Commission may grant under certain conditions. Additionally, the statute allows a transmission utility that joins an OWM to request to retain a percentage of the net present value savings accruing to Colorado customers from participation in the OWM.

C. Regional Market Activities in the West

10. As set forth in detail in Decision No. R24-0121-I, issued February 27, 2024, in this Proceeding, utilities and stakeholders have recently been pursuing greater integration in the Western Interconnection. Currently, two energy imbalance markets operate in the West: the California Independent System Operator’s (CAISO) Western Energy Imbalance Market (WEIM),

¹⁰ See *Id.* at ¶ 43.

¹¹ A “Transmission Utility” is defined as a wholesale electricity supplier or transmitter that owns and operates transmission lines of 100 kV or greater and excludes municipal utilities. § 40-5-108(1)(b), C.R.S.

and Southwest Power Pool's (SPP) Western Energy Imbalance Services Market (WEIS). WEIS participants include two of Colorado's Transmission Utilities – Public Service Company of Colorado (Public Service) and Tri-State Generation and Transmission Association (Tri-State), which also participates in the WEIM for some of its footprint, mostly in Wyoming and New Mexico.

11. CAISO and SPP are also offering to administer day-ahead markets in the West. CAISO's Extended Day Ahead Market (EDAM) tariff was accepted by the Federal Energy Regulatory Commission (FERC) in December 2023, and SPP filed its Markets+ tariff for FERC acceptance on March 29, 2024, to establish a centralized day-ahead and real-time unit commitment and dispatch market. As of the date of this Decision's issuance, no Colorado utilities have committed to joining EDAM or Markets+, but participants in the development of Markets+ include Public Service, Tri-State, and Black Hills Colorado Electric (Black Hills). Additionally, an affiliation of western utilities called the Western Market Exploratory Group (Western MEG) performed a Western Day Ahead Market Production Cost Impact Study. The study and associated documents and results were filed in this proceeding by Public Service on March 19, 2024 and March 22, 2024.

12. Finally, SPP is also seeking to extend its full RTO services into the Western Interconnection, with an offering called SPP RTO West. Tri-State, Platte River Power Authority, Colorado Springs Utilities, and the Western Power Administration are considering placing all or some of their western facilities under the terms of the SPP Open Access Tariff. Tri-State explains that it intends to transition its footprint in the Western Area Colorado Missouri balancing area,

which includes portions of its footprint in Colorado, into SPP RTO West in April 2026.¹² SPP filed revisions to its Open Access Transmission Tariff (OATT) to support the establishment of SPP RTO West on June 4, 2024, requesting a decision from FERC by October 1, 2024, in order to move forward with the targeted implementation date of April 1, 2026.¹³

III. PROCEDURAL HISTORY

13. The Commission initiated this matter on June 28, 2022, by issuing the NOPR to add new rules governing wholesale electricity market participation. Specifically, the NOPR proposed that transmission utilities be required to seek approval from the Commission to join a DAM, an OWM, and an RTO or ISO that does not meet the statutory definition of an OWM, and the NOPR proposed filing requirements for such an application, reporting requirements concerning utilities' plans, commitments, and actual participation in wholesale electricity markets, and certain items to address in a filing seeking cost recovery. The proposed rules issued with the NOPR also included processes for a transmission utility to seek a waiver of the requirement to join an OWM and to seek shared savings of OWM participation. Additionally, the NOPR evidenced the deliberation decision of the Commission *en banc* to designate Chairman Eric Blank as the Hearing Commissioner for this rulemaking proceeding, pursuant to § 40-6-101(2)(a), C.R.S.

14. In this Proceeding, numerous written and oral comments were received during multiple rulemaking hearings, and based on these comments, this Decision highlights pertinent concepts in each respective rule section, and does not necessarily summarize comments overall or by participant.

¹² See Tri-State's Report Addressing Near-Term Organized Market Activities in Proceeding No. 23M-0195E, p. 3.

¹³ See RTO West Transmittal Letter, filed June 4, 2024 in FERC Docket No. ER24-2185.

1. Comments Received on NOPR

15. The NOPR encouraged interested persons to submit written comments before a public comment hearing scheduled for October 11, 2022. Sierra Club, Black Hills Colorado Electric, LLC (Black Hills), Public Service Company of Colorado (Public Service), Climax Molybdenum Company (Climax), Interwest Energy Alliance (Interwest), the Colorado Energy Consumers (CEC), Tri-State Generation and Transmission Association (Tri-State), the Office of the Utility Consumer Advocate (UCA), and the Clean Energy Buyers Association (CEBA) filed initial comments on the NOPR or before September 6, 2022. Initial comments were also timely filed by Western Resource Advocates, Western Grid Group, and Sustainable FERC (collectively, Public Interest Organizations) and Advanced Energy Economy, the Colorado Solar and Storage Association, and the Solar Energy Industries Association (collectively, Clean Energy Industry). Reply comments were filed by CEBA, CEC, Southwest Power Pool, Inc. (SPP), Interwest, Tri-State, Black Hills, Public Service, UCA, Sierra Club, the Public Interest Organizations, the Colorado Independent Energy Association (CIEA), and the Colorado Energy Office (CEO) on or before September 27, 2022.

16. Initial and reply comments regarding the NOPR's proposed rules encouraged the Hearing Commissioner to consider a declaratory order or similar process through which a transmission utility could request a determination on whether a particular RTO or ISO qualifies as an OWM. The comments also addressed other issues, including whether the rules should be narrowly focused on implementation of SB21-072, whether an application proceeding is an appropriate process to consider market participation issues, whether requiring utilities to seek approval to join a regional market is within the Commission's jurisdiction, interpretation of the statutory provision allowing a shared savings mechanism, and how to improve upon the proposed

rules filing and reporting requirements. On October 11, 2022, the Hearing Commissioner held the scheduled public comment hearing to explore the topics addressed in written comments, as well as others.

2. Process Framework

17. On January 12, 2023, supplemental comments regarding a Process Framework for Investigation and Analysis of OWM/RTO Options for Colorado (Process Framework) were filed by Advanced Energy United, CEBA, Climax, CEC, CEO, COSSA, Interwest, UCA, Signal Tech Coalition, SEIA, the Sustainable FERC Project, Western Grid Group, and Western Resource Advocates (collectively, Joint Commenters). The Process Framework reflected Joint Commenters' consensus on the goals and processes that should guide the Commission's rules for the investigation and the analysis of organized market options to comply with SB21-072. The three transmission utilities filed a response to the Process Framework proposal on January 31, 2023, stating that the proposal was lengthy and unduly burdensome. Additional public comment hearings were held on April 4, 2023,¹⁴ and September 12, 2023,¹⁵ to explore and better understand the gap between the two groups of stakeholders.

3. February 2024 Redlines

18. On February 27, 2024, the Hearing Commissioner issued Decision No. R24-0121-I, which proposed additional rule revisions for comment (February 2024 Redlines). Given the large gap in terms of starting assumptions, approach, process, timing, and stakeholder participation between the transmission utility comments on the one hand, and the Joint Commenters on the other, the Hearing Commissioner aimed to find a middle ground with the February 2024 Redlines.

¹⁴ See Decision No. R23-0189-I.

¹⁵ See Decision No. R23-0482-I.

19. More specifically, the February 2024 Redlines sought to lay out a middle ground between the transmission utilities' and Joint Commenters' approaches given distinctions based on the corporate structure of the transmission utility, the type of market the transmission utility seeks to join, the Commission findings needed to support a specific public interest determination, and the process required to make that determination. The February 2024 Redlines then laid out a series of diverse requirements among these distinctions and set a public comment hearing for March 5, 2024.

20. In response to the February 2024 Redlines, written initial comments were filed on or before April 5, 2024, by Tri-State, Public Service, Black Hills and SPP, as well as by Advanced Energy United, CEBS, Climax, CEC, COSSA, Interwest, Natural Resources Defense Council, UCA, and WRA (collectively the Joint Commenters). A public comment was also filed by the Colorado BlueGreen Alliance on April 6, 2024. Written reply comments were submitted by Tri-State, Public Service, and Black Hills (the Joint Transmission Utilities), the Joint Commenters, and CEO. A supplemental comment regarding a rule proposal to address seams between regional electricity markets was filed by the Joint Transmission Utilities on May 6, 2024.

21. The written comments received in response to the February 2024 Redlines addressed the proposals including market filing requirements, a process to request an order from the Commission, and public interest criteria. The transmission utilities were generally supportive of the proposed rules regarding filing requirements, although they continued to argue that certain provisions exceed the Commission's authority. The Joint Commenters also generally supported the February 2024 Redlines, and their proposals included a rearrangement of proposed Rule 3753

to set out specific rules by market type and a comparative market analysis as an additional public interest criterion.

22. Additional public comment hearings were held on March 5, 2024,¹⁶ and April 30, 2024,¹⁷ to receive oral comments in response to the February 2024 Redlines, as well as to explore any other topics presented by hearing participants.

4. Proceeding No. 23M-0195E

23. In addition to the activities undertaken in this Proceeding, the Commission opened Proceeding No. 23M-0195E on April 24, 2023, in recognition of Tri-State's intention to commit to participation in the western expansion of the SPP RTO prior to the issuance of final rules in this rulemaking Proceeding. Proceeding No. 23M-0195E was opened to receive information on Tri-State's approach for entering the SPP RTO West market and for addressing the Commission's concerns regarding market participation. Decision No. C23-0268 opening Proceeding No. 23M-0195E stated that at the close of Proceeding No. 23M-0195E, the report, comments, and Commission decisions issued in that proceeding shall become part of the record of this rulemaking Proceeding.

IV. DISCUSSION, FINDINGS, AND CONCLUSIONS

24. As indicated above, the Commission intended that filings made in Proceeding No. 23M-0195E would become part of the record of this Proceeding. Therefore, to ensure a complete record in this rulemaking, the Hearing Commissioner takes administrative notice of the filings made in Proceeding No. 23M-0195E as of the date of this decision's mail date.

¹⁶ See Decision No. R24-0121-I.

¹⁷ See Decision No. R24-0131-I.

25. In the NOPR, the Commission recognized the West's activities related to regional electricity markets have been somewhat limited in comparison to other regions of the country, and that these rules will gain importance as market constructs develop in the Western Interconnection and as statutory deadlines loom. The Hearing Commissioner agrees with comments filed by the Public Interest Organizations that these rules could become a model for rulemakings in other states, and recognizes the importance of assuring that the rules adequately address key areas including governance, compliance with state renewable and clean energy policies, promoting load flexibility and demand-side resources, and greenhouse gas (GHG) emissions reductions accounting and reporting, while providing utilities with the flexibility necessary to timely respond to and participate in beneficial market developments and market offerings.

26. The Commission promulgates rules under its legislative function that are necessary and proper for the proper administration and enforcement of the Public Utilities Law (*i.e.*, Articles 1 through 7 of Title 40 of the Colorado Revised Statutes) and within the Commission's broad Constitutional and statutory authority to regulate utilities. *See* Article XXV of the Colorado Constitution and § 40-2-108(1), C.R.S. In the regulation of public utilities, the Commission has broad authority unless and until the General Assembly expressly acts to restrict the Commission's authority.

27. Throughout this Proceeding there was an ongoing dispute over the Commission's authority, and the proper exercise of such authority, to promulgate rules addressing terms and concepts not expressly stated in SB21-072. Specifically, Black Hills argues the Commission cannot lawfully promulgate rules requiring approval to join EIMs, DAMs, OWMs, or other RTOs or ISOs because § 40-5-108, C.R.S., does not contemplate markets other than OWMs and because

it does not state that the Commission can require approval prior to a utility's participation in a regional market. Black Hills argues that the statute thereby restricts the Commission from requiring such prior approval, stating that "[o]nce the legislature acts, the scope of the Commission's authority is controlled by the applicable statute."¹⁸ Black Hills, Tri-State, and in certain filings Public Service also contend that the rules should narrowly implement only the express requirements set forth in § 40-5-108, C.R.S., rather than regulating market participation more generally.

28. While the respective rule sections below address these arguments in more detail where appropriate, some broadly applicable analysis is warranted. The Hearing Commissioner finds that the statutory interpretation conducted by Black Hills improperly constricts the authority granted to the Commission and is not in accordance with Colorado law. Under Article XXV of the Colorado Constitution and the Public Utilities Law, the Commission has broad authority to regulate public utilities and their facilities, service, and rates.¹⁹

29. The Colorado Supreme Court has consistently held since 1974 that the Commission has as much authority to regulate public utilities as the General Assembly possessed prior to the adoption of Article XXV in 1954, unless the General Assembly by a *specific* statutory provision restricts the legislative functions exercised by the Commission in regulating public utilities.²⁰

¹⁸ Black Hills Initial Comments at p. 16 (citing *Peoples Natural Gas Division of Northern Natural Gas Company v. Public Utilities Commission*, 626 P.2d 159 (Colo. 1981)).

¹⁹ See, e.g., § 40-3-102, C.R.S., (the Commission has authority and duty "to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of [Title 40] or in addition thereto, which are necessary or convenient in the exercise of such power....").

²⁰ *Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co.*, 816 P.2d 278, 283 (Colo. 1981); *Colorado-Ute Electric Ass'n, Inc. v. Public Util. Comm'n.*, 760 P.2d 627, 636-639 (Colo. 1981); *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n.*, 576 P.2d 544, 547-548 (Colo. 1978); and *Miller Brothers v. Public Util. Comm'n.*, 185 Colo. 414, 525 P.2d 443, 451 (1974); *c.f. Mountain States Tel. & Tel. Co. v. Public Util. Comm'n.*, 763 P.2d 1020, 1025-1026 (Colo. 1988) (the Commission's "authority under article XXV is not narrowly confined but extends to incidental powers which are necessary to enable it to regulate public utilities.").

Black Hills' argument concerning § 40-5-108, C.R.S., is unpersuasive, as the statute is silent on many of the processes and requirements proposed in this Proceeding, and does not specifically restrict the Commission's authority. Therefore, the Hearing Commissioner does not agree with Black Hills that these rules must be limited to the express statutory provisions allowing for waiver or delay applications and shared savings approach applications.

30. The Hearing Commissioner also disagrees with Public Service's argument that the Commission's ability to conduct after-the-fact cost recovery proceedings means it should decline to implement processes not expressly required by statute. In the CTCA Decision, the Commission identified several significant concerns with utility participation in regional electricity markets, and directed the preparation of the NOPR and its proposed rules to explore processes to address these concerns. While SB21-072's provisions are also properly within this rulemaking proceeding's scope, the statutory provisions only expressly require certain processes relating to OWMs. As regional market constructs have significant impacts on areas clearly within the Commission's purview, it is appropriate to require processes in addition to those expressly required by statute.

31. Additionally, as stated in decisions issued previously in this Proceeding, the Hearing Commissioner continues to find that treatment of cooperative electric transmission and generation associations under the rules should be different, with narrower requirements and more abbreviated processes, than treatment of the rate-regulated Investor-Owned Utilities which have retail customers.

32. In rendering this Decision, the Hearing Commissioner has carefully reviewed and considered all participant comments in this Proceeding, whether filed in writing or provided orally

at a public comment hearing, even if this Decision does not specifically address every comment made.

1. Structure of Adopted Rules

33. In the NOPR, the Commission set out requirements for the filing and timing of applications to join specific market types in proposed Rule 3753, specific requirements for the contents of market participation application filings including implementation and cost recovery considerations in proposed Rule 3754, reporting requirements in proposed Rule 3755, provisions governing waiver or delay requests in proposed Rule 3756, and requirements for shared savings applications in proposed Rule 3757. Initial and reply comments filed in response to the NOPR's proposed rules generally provided comments using this rule structure.

34. Due to the written and oral comments provided in response to the proposed rules issued with the NOPR, including comments regarding the Joint Commenters' Process Framework proposal, the Hearing Commissioner issued the February 2024 Redlines with a different rule structure. Specifically, requirements for the filing and timing of orders regarding market participation, criteria for the Commission to use in determining whether market participation is in the public interest, and provisions governing waiver or delay requests were set out in proposed Rule 3753. Detailed requirements for the content of market participation filings continued to be set out in proposed Rule 3754, and reporting requirements continued to be set out in proposed Rule 3755. Cost recovery provisions were moved to proposed Rule 3756. Requirements for shared savings applications remained in proposed Rule 3757.

35. In response to the February 2024 Redlines, the Joint Commenters proposed a rearrangement of the rules to simplify the complexity of the various requirements and market types

involved. The Joint Commenters explained the rearrangement modified the rule structure to separately address each of the five types of market proceedings while maintaining the public interest criteria proposed in the February 2024 Redlines.²¹ The Hearing Commissioner agrees with the Joint Commenters that the rearrangement results in rules that are easier to follow and includes this revised rule structure in the adopted rules. Therefore, the following structure for the regional electricity market participation rules is used:

- Rule 3750. Scope and Applicability
- Rule 3751. Overview and Purpose
- Rule 3752. Definitions
- Rule 3753. Transmission Utility Application to Participate in a Day-Ahead Market
- Rule 3754. Transmission Utility Application to Join an RTO or ISO
- Rule 3755. Content of Regional Market Participation Filings
- Rule 3756. Transmission Utility Application Seeking a Waiver or Delay
- Rule 3757. Reporting and Stakeholder Process Requirements
- Rule 3758. Cost Recovery
- Rule 3759. Application for Shared Savings from Statutory OWM Participation

36. Despite the change in structure, the content of the adopted rules is consistent with the subject matter set forth in the NOPR. The discussion below of the proposed rules, comments, participants' proposed redlines, and adopted rules is organized by rulemaking topics according to the adopted rule structure and identifies, where necessary, the relevant version of proposed rule.

2. Rule 3000 – Scope and Applicability

37. The NOPR's proposal is adopted, with the modification of applicable rule numbers to reflect the adopted rules that should be applicable to cooperative electric generation and transmission associations.

²¹ Joint Commenters' Initial Comments to February 2024 Redlines at p. 7.

3. Rule 3002 – Applications

38. The NOPR proposed a change to Rule 3002 to reflect the new requirement for Transmission Utilities to seek approval to join certain market types. As discussed below, the adopted rules include application requirements relating to participation in a Day-Ahead Market and in an RTO or ISO, including an OWM. The adopted rules also include application requirements relating to a waiver or delay of § 40-5-108(2)(a)(I), C.R.S., and a shared savings approach under § 40-5-108(3)(c), C.R.S. The Hearing Commissioner adopts changes to Rule 3002 reflecting these application types.

4. Rule 3750 – Scope and Applicability

39. In the NOPR, the Commission explained that proposed Rule 3750 applies to Colorado's jurisdictional electric utilities that own and operate transmission facilities, so that only transmission utilities under SB21-072 are subject to the rules governing regional electricity market participation. Proposed Rule 3750 exempted cooperative electric generation and transmission associations from certain provisions in the rules, recognizing that Tri-State would not be subject to certain provisions or eligible for certain statutory mechanisms due to the Commission's more limited regulation of Tri-State and Tri-State's lack of retail customers.

40. Adopted Rule 3750 excludes cooperative electric generation and transmission associations from provisions concerning cost recovery filings and applications for a shared savings approach under § 40-5-108(3)(c), C.R.S. In its comments, Tri-State states it should also not be subject to rules in the February 2024 Redlines labeled Rule 3754(f) and Rule 3755(c) (adopted Rules 3755(f) and 3757(d)), given the focus on retail costs in these rules.²² The Hearing Commissioner agrees with Tri-State and adopts rules that exempt Tri-State from the requirements

²² Tri-State Initial Comments on February 2024 Redlines at pp. 17-18.

involving retail rates. Additionally, certain items in the annual ongoing market participation impact report required by adopted Rule 3757(d) are not concerned with retail rates, customers, or impacts. Therefore, cooperative electric generation and transmission associations are not subject to adopted Rule 3755(f)(II) or adopted Rule 3757(d)(II), (III), and (V).

5. Rule 3751 – Overview and Purpose

41. The NOPR explained that proposed Rule 3751 establishes the purpose of setting forth filing requirements for various utility actions relating to regional markets. The Clean Energy Industry states the rule should include that a standard of review is established. In the February 2024 Redlines, this rule was modified to reflect the inclusion of public interest criteria and findings in the regional electricity market participation rules. The adopted rules include the change from the February 2024 Redlines.

6. Rule 3752 – Definitions

42. The Hearing Commissioner greatly appreciates the efforts of the Joint Commenters to harmonize comments filed in response to the February 2024 Redlines into a single blueline of the rules.²³ Most of the proposed changes have been included in the definitions for the adopted Rules. Certain definitions that warrant clarification are addressed below.

43. *Day Ahead Market.* In the NOPR's proposed rules and in the February 2024 Redlines, the definition of Day Ahead Market included that the market dispatches units. The Joint Commenters proposed to remove "dispatch" from the definition, while the Joint Transmission Utilities state that there is a dispatch component in these markets. The Hearing Commissioner agrees with the Joint Transmission Utilities, and the adopted Rule retains the dispatch component.

²³ See Joint Commenters Reply Comments, Attachment A, Proposed Edits to Rules in Legislative Format, filed April 19, 2024.

44. Additionally, Joint Commenters proposed to add the following to the definition: “In the context of these rules a DAM is a market run by an ISO or RTO that includes transmission utilities that are not members of the ISO or RTO operating the market.” The Joint Commenters propose this to clarify the distinction between participating in a DAM run by an RTO or ISO market as a nonmember versus joining the full RTO or ISO. They propose a parallel addition to the definition of an EIM. The Transmission Utilities oppose these additions, stating they are unnecessary, potentially inaccurate, and confusing and noting that Tri-State’s system in the Eastern Interconnection is currently within the SPP RTO.

45. The Hearing Commissioner agrees with the Joint Transmission Utilities with respect to this definition and the definition of an EIM. The Hearing Commissioner recognizes the possible complexity and overlap surrounding various market offerings and utilities’ participation in these markets. However, for the purposes of these rules, the Hearing Commissioner finds that the definitions of Day Ahead Market and Energy Imbalance Market are sufficiently clear without the Joint Commenters’ additions.

46. *GHG Tracking and Accounting Mechanism.* The Joint Transmission Utilities explain that a protocol that enables the tracking, accounting, and reporting of GHGs may not be located in a market’s tariff, and propose a slight word change from the definition in the NOPR. The Hearing Commissioner agrees.

47. *Regional Transmission Organization or RTO or Independent System Operator or ISO.* The definition proposed in the NOPR set forth typical characteristics of RTOs and ISOs. Various participants commented that the definition should refer to the definition and requirements

established by FERC in Order 2000. The Hearing Commissioner agrees, but broadens the proposal to FERC's orders and regulations more generally to allow for future controlling FERC decisions.

7. Rule 3753 – Transmission Utility Participation in a Day Ahead Market

a. NOPR Proposal

48. In the NOPR, proposed Rule 3753(c) required that transmission utilities file an application to join a DAM at least 12 months before the utility commences market operations. The NOPR did not include the criteria the Commission would consider when deciding an application to join a DAM.

49. Participants provided numerous proposals relating to this requirement. In initial comments to the NOPR, participants proposed both shorter filing timelines to provide utilities with necessary flexibility and agility in responding to market developments, and longer timelines to account for additional Commission and stakeholder input and understanding. Some commenters advocated for an abbreviated and less formal process. Others agreed with the proposed rule and maintained that a full application proceeding is necessary for participation in a DAM, stating that utilities may seek to join a DAM as a steppingstone to an RTO, ISO, or OWM.²⁴ Some participant comments included that the rules should include a process or standard of review through which the Commission would evaluate market participation applications.²⁵

50. Black Hills and Tri-State argue that Commission regulation of participation in DAMs would exceed the Commission's authority.²⁶ They state that the General Assembly has acted regarding the Commission's authority over regulated utility participation in regional market

²⁴ *E.g.*, UCA Initial Comments at p. 2.

²⁵ Clean Energy Industry Initial Comments at p. 5.

²⁶ Black Hills Initial Comments at pp. 9, 16.

entities, thereby restricting the Commission's authority in this area, and that the General Assembly did not require approval to join a DAM. Public Service argues that expanding the Commission's authority to require approval for participation in a DAM is unnecessary, as the Commission already has broad authority over a utility's cost recovery for expenses incurred through market participation.²⁷ The transmission utilities also contend that because FERC has generally expressed a preference for regional coordination and the Commission has found market participation generally in the public interest, the Commission should not now impose barriers to participation in markets that will bring customer benefits.

51. Other participants disagree with the Transmission Utilities that requiring approval prior to joining an organized market, including a DAM, is either beyond the scope of the Commission's authority or is unnecessary.²⁸ For example, Sierra Club points to the Commission's broad authority under the Colorado Constitution and the Public Utilities Law, stating "the Commission was created by Article XXV of the Colorado Constitution, which authorizes the PUC to regulate the facilities, service and rates and charges therefor of public utilities in Colorado,"²⁹ and that under § 40-3-102, C.R.S., the General Assembly "has further granted the PUC broad authority to do all things, whether specifically designated in articles 1 to 7 of [Title 40] or in addition thereto, which are necessary or convenient in the exercise of such power."³⁰

52. UCA contends that approval prior to DAM participation is necessary in part because it is unclear whether there will be a qualifying OWM for Transmission Utilities to join by 2030, meaning that much of the Commission's work may be in processing waiver applications and

²⁷ Public Service Initial Comments at pp. 3-4.

²⁸ Interwest Initial Comments at p. 3.

²⁹ Sierra Club Reply Comments at pp. 5-6 (internal citations omitted) (citing *Danks v. Colo. Pub. Utils. Comm'n*, 512 P.3d 692, 698, reh'g denied (Colo. 2022)).

³⁰ Sierra Club Reply Comments at pp. 5-6.

understanding the potential for utilities to join other market constructs, including DAMs. UCA maintains that while prudence reviews associated with post-participation cost recovery proceedings may be appropriate for looking at operational decisions, they are not appropriate for major, consequential changes to how a utility operates its system and interacts with its neighbors.³¹

b. February 2024 Redlines Proposal

53. In the decision issuing the February 2024 Redlines, the Hearing Commissioner requested responses to a process that would not necessarily be an application proceeding, whereby utilities could request an order from the Commission finding that the regional market a utility seeks to join satisfies certain requirements. Under Rule 3753(d) in the February 2024 Redlines, the Commission, with any input from parties, would establish the proceeding's procedures after a filing requesting an order is made. Rule 3753(a)(I) in the February 2024 Redlines also set forth Commission findings that would be required for a determination that DAM participation is in the public interest. At a high level, these findings were: (1) the DAM implements a satisfactory GHG Tracking and Accounting System; and (2) the DAM has sufficient analytical support showing the expected benefits of participation are likely to exceed the expected costs.

54. While the transmission utilities maintained their earlier objections to the NOPR's proposal to require approval to participate in a DAM, Tri-State and Public Service stated their appreciation for the less rigid process to obtain a Commission order which was proposed in the February 2024 Redlines. On the other hand, Black Hills encouraged the Commission to provide clear direction on the process for a market participation proceeding, stating that rules should prevent a "case within a case" on the nature, scope or type of proceeding.³²

³¹ UCA Reply Comments at pp. 11-12.

³² Black Hills Initial Comments in Response to February 2024 Redlines at p. 10.

55. The Joint Commenters agreed with the February 2024 Redlines that the level of process appropriate for approval of DAM participation may be less than the process required to join an RTO or ISO, but the Joint Commenters expressed concern with the rules' lack of procedural detail and the possibility that the process would not lead to a complete record. The Joint Commenters proposed a process that would be adjudicatory and that would allow for discovery, and which would allow the Commission flexibility to set additional procedures similar to processes contained in Commission Rules 3605(a)(I) and 4552(b)(II). The Joint Commenters and CEO also advocate that a comparative analysis of alternative markets should be added as an additional criterion that joining a particular DAM is in the public interest.

c. Adopted Rule 3753

56. The Hearing Commissioner agrees with participants in this Proceeding that the Commission has the authority, and should exercise this authority in a limited manner, to require approval prior to a utility joining and participating in a DAM. As explained by commenters including Sierra Club, Interwest, and UCA, the Commission has broad authority to regulate public utilities in Colorado under the Colorado Constitution and the Public Utilities Law, including regulation relating to utilities' emission reduction requirements under § 25-7-102, C.R.S. and § 40-2-125.5, C.R.S., and the authority to "generally supervise and regulate" public utilities "and to do all things, whether specifically designated in [the Public Utilities Law] or in addition thereto, which are necessary or convenient in the exercise of such power..." under § 40-3-102, C.R.S. While the General Assembly may restrict the Commission's broad authority through specific statutory limitations, § 40-5-108, C.R.S., does not specifically restrict the Commission's authority relating to DAMs or prior approval. Participation in DAMs will impact public utilities' service,

rates, resource adequacy activities, and efforts to reach emission reduction goals, and regulation relating to DAM participation is within the Commission's jurisdiction. Additionally, the Hearing Commissioner also agrees with commenters such as UCA that DAMs may, in fact, be the ultimate market constructs that some transmission utilities join, depending on the availability of OWMs and whether participation in an available OWM is in the public interest. The Hearing Commissioner also agrees with commenters that after-the-fact prudence reviews and cost recovery proceedings are inadequate to fully consider the broad implications and any necessary safeguards associated with DAM participation. Therefore, the Commission should exercise its authority in a constrained and limited way to regulate utilities' participation in DAMs.

57. Given the responses to the NOPR's proposed rules and the February 2024 Redlines, the Hearing Commissioner adopts rules that require transmission utilities to seek approval to participate in a DAM through an abbreviated application process, with different public interest criteria applicable to IOUs and generation and transmission cooperatives.

58. Adopted Rule 3753(a) sets forth the findings needed for an IOU's participation in a DAM to be deemed in the public interest, similar to interpretative characteristics set forth in adopted Rule 3754(a)(I)-(VII). Adopted Rule 3753(a)(I) requires a finding that the DAM has in place protocols that will implement a fair and timely GHG Tracking and Accounting system, while Rule 3753(a)(III) requires IOUs to make a showing that the expected benefits of joining the DAM are likely to exceed the costs. Based on comments received from both the Transmission Utilities and Joint Commenters, an additional finding has been added in Rule 3753(a)(II) requiring IOU transmission utilities to show that there are plans to put in place policies and operational practices to address any seams issues between different market constructs. This aspect of the rule could be

particularly relevant in the situation where an IOU joins the DAM, while a Colorado generation and transmission cooperative participates in a full RTO.

59. For generation and transmission cooperatives seeking to join a DAM, adopted Rule 3753(c)(I) puts in place similar requirements for GHG tracking and accounting showings, while Rule 3753(c)(II) requires an identical plan to develop policies and operational practices to deal with market seams issues. At the same time, however, given that generation and transmission cooperatives are generally subject to more limited regulation by the Commission and do not involve retail rate concerns, the proposed rules do not require a cost-effectiveness analysis showing that the benefits of DAM participation are likely to exceed the costs.

60. The Hearing Commissioner finds that an abbreviated application process is appropriate to consider DAM participation as the process may be best suited to produce a sufficient record to support a Commission decision regarding participation. Therefore, adopted Rule 3753(b), applicable to IOUs, and Rule 3753(d), applicable to generation and transmission cooperatives, set forth abbreviated application processes with limited and pre-determined public interest criteria that provide the Commission flexibility in establishing appropriate procedures, including if necessary, an evidentiary hearing, and which result in a Commission decision within 150 days of the application filing. Rule 3753(b) and (d) contain certain critical notice, evidentiary, and due process protections and limited discovery rights for parties, but also recognize the need of the transmission utilities to have an efficient and timely approval process, based on pre-determined and limited public interest findings, particularly given prior Commission analyses finding that DAM participation raises fewer concerns than participation in a full RTO. Upon receiving an application under these rules, the Commission's actions may include setting a shortened notice

and intervention period; setting shortened response time to intervention motions and discovery response times; and setting short timelines for initial and responsive comments, and, if appropriate, statements of position. Additionally, the Hearing Commissioner anticipates that stakeholder processes provided for in adopted Rule 3757 will mitigate the need for a longer adjudicated process, and that the stakeholder process will assist parties in proposing appropriate procedures when applications are filed under adopted Rule 3753(b) or (d).

61. Due to the differences in the Commission's regulation of IOUs and cooperatives and the fact that fewer public interest criteria are applicable to generation and transmission cooperative DAM applications, adopted Rule 3753(d) requires the filing of such an application nine months ahead of planned market operations, compared to the twelve months required by adopted Rule 3753(b).

62. The Joint Commenters also request that the Commission require all transmission utilities to conduct a comparative market analysis before determining that participation in a particular DAM is in the public interest. The Joint Commenters assert that "to date, no Colorado transmission utility has undertaken a comparative analysis of the net benefits of participating in the two available DAMs." The Joint Commenters go on to argue that "the only comparative analysis of EDAM and Markets+ in which the Colorado utilities have participated is the study Energy + Environmental Economics (E3) performed for the Western MEG. However, in all the footprints studied," the Joint Commenters claim that "the Colorado utilities were assumed to participate in Markets+."³³

³³ Joint Commenters Initial Comments in Response to February 2024 Redlines at p. 19.

63. The Hearing Commissioner, however, finds that this claim is not factually accurate. Rather, in the WMEG Study Results summary³⁴ the E3 analysis does examine an EDAM bookend case that has all the Colorado utilities participating in EDAM. The resulting study findings suggest that participation in the EDAM Bookend case would raise production costs in Colorado compared to the Business-as-Usual scenario, while participation in M+ will lower production costs.³⁵

64. This result appears to be further supported by the initial findings on the benefits of the WEIS market showing production cost, curtailment, and emission reduction gains. These initial energy imbalance market results tend to confirm the common-sense expectation that getting all the Colorado transmission utilities into the same (or as similar as possible) market dispatch, optimization, and unit commitment scheme is likely to be better for Colorado than having our transmission utilities participate in two separate DAM or RTO structures. Finally, the Hearing Commissioner is sympathetic to transmission utility concerns about the efficiency and timeliness of the Commission review process.

65. When these issues are coupled with the prior Commission findings that DAMs raise less significantly fewer concerns than full RTOs, the Hearing Commissioner declines to adopt the recommendation of the Joint Commenters to require a comparative analysis. As such, the cost effectiveness criterion in Rule 3753(a)(III) is focused on a finding that the transmission utility participation in a specific DAM will bring expected benefits that likely exceed the costs. Given the legislative and Commission findings that enhanced regional coordination is a good outcome, the Hearing Commissioner believes that this criterion, without a comparative analysis, is sufficient.

³⁴ See WMEG Study Summary Results at pp. 11-12.

³⁵ *Id.*

8. Rule 3754 – Transmission Utility Application to Join a Regional Transmission Organization or Independent System Operator

a. NOPR Proposal

66. In the NOPR, proposed Rule 3753(a) and (b) required a transmission utility to file an application seeking approval to join an OWM or a non-qualifying RTO or ISO at least 18 months before the utility commences market operations. The NOPR did not include criteria the Commission would consider when deciding an application to join an OWM or non-qualifying RTO or ISO.

67. Participants provided numerous proposals relating to this requirement, much in the same vein as comments regarding approval of DAM participation. Participants proposed both shorter and longer filing timelines, and some commenters advocated for an abbreviated process to consider such filings or the option to pursue an expedited process. Others agreed with the proposed rule and maintained that an application proceeding is necessary for participation in an OWM, RTO or ISO, stating that an application for approval that considers the particular circumstances of a utility joining a particular market appears to provide the Commission with the best vehicle to consider the public interest benefits.³⁶ Some participant comments included that the rules should include a standard of review through which the Commission would evaluate market participation applications.³⁷

68. As discussed above, Black Hills argues that because SB21-072 does not set out a requirement to obtain Commission approval prior to participation, the Commission cannot require that a transmission utility seek approval before joining an OWM, RTO or ISO.³⁸ Public Service argues that expanding the Commission's authority to require approval for participation in an

³⁶ Public Interest Organizations Initial Comments at p. 13.

³⁷ Clean Energy Industry Initial Comments at p. 5.

³⁸ Black Hills Initial Comments at pp. 9, 16.

OWM, RTO or ISO is unnecessary, as the Commission already has broad authority over a utility's cost recovery for expenses incurred through market participation.³⁹ Tri-State contends that the General Assembly placed the obligation to comply with SB21-072 directly on the affected utilities, expressed a preference for regional coordination through the requirement to join an OWM, and specified a narrow role for the Commission with respect to such participation. Tri-State argues that burdensome processes would frustrate the legislative intent of SB21-072 and Colorado's overall public policy.

69. Further, the transmission utilities highlight that FERC has exclusive jurisdiction over wholesale electricity markets, and that requiring an application to approve market participation, including participation in OWMs, RTOs, and ISO, gives rise to jurisdictional questions as to the boundaries of state and FERC regulatory jurisdiction. Tri-State explains that under 16 U.S.C. § 824a-1(a)(2), FERC may override state regulations that prohibit or prevent the voluntary coordination of electric utilities, subject to certain exceptions.⁴⁰

70. As discussed above, other participants disagree with the transmission utilities' argument that requiring approval prior to joining an organized market, including an OWM, RTO or ISO, is either beyond the scope of the Commission's authority or is unnecessary.⁴¹ For example, as discussed with regard to Rule 3753, Sierra Club points to the Commission's broad authority under the Colorado Constitution and the Public Utilities Law.⁴² The Public Interest Organizations and the Clean Energy Industry argue SB21-072 does provide the Commission with the relevant

³⁹ Public Service Initial Comments at pp. 3-4.

⁴⁰ FERC may not override state law under this authority if it finds that the provision of State law "(1) is required by any authority of Federal law, or (2) is designed to protect public health, safety, or welfare, or the environment or conserve energy or is designed to mitigate the effects of emergencies resulting from fuel shortages. 16 U.S.C. § 824a-1(a)(2).

⁴¹ Interwest Initial Commenters at p. 3.

⁴² Sierra Club Reply Comments at pp. 5-6.

authority, and that reading the statute's express references to applications in two instances as barring the Commission from requiring applications for OWM participation approval would render the obligation to join an OWM unenforceable. Other commenters point to the provision in SB19-236 that stated the Commission should direct electric utilities to take appropriate actions and conduct such proceedings as the commission deems appropriate to pursue market participation.⁴³

71. Further, the Clean Energy Industries argue that an application requirement is a reasonable way to exercise the Commission's existing jurisdiction and pursue its oversight role over responsible resource planning and electric transmission planning consistent with state-mandated emission reduction goals. UCA maintains that prudence reviews associated with post-participation cost recovery proceedings may be appropriate for looking at operational decisions, but are not appropriate for major, consequential changes to how a utility operates its system and interacts with its neighbors.⁴⁴

72. In response to the transmission utilities' argument that FERC has exclusive jurisdiction over wholesale electricity markets and which entities join such markets, Sierra Club points to FERC Order 2000's statement that "[FERC] continue[s] to believe that states have important roles to play in RTO matters. For example, most states must approve a utility joining an RTO..."⁴⁵ Sierra Club also highlights that other states have rules similar to the NOPR's proposed Rules 3753 and 3754,⁴⁶ and the Public Interest Organizations state that while FERC may have jurisdiction over the wholesale market, the Commission has the duty to assure that any RTO or ISO a transmission utility joins complies with Colorado law.⁴⁷

⁴³ *E.g.*, CEI Reply Comments at p. 3-5.

⁴⁴ UCA Reply Comments at pp. 11-12.

⁴⁵ Sierra Club Reply Comments at pp. 7-8 (citing 65 Fed. Reg. 810, 938 (Jan. 6, 2000)).

⁴⁶ *Id.* at p. 11.

⁴⁷ Public Interest Organizations Reply Comments at p. 15.

b. Process Framework and Declaratory Order Proposal

73. On January 12, 2023, the Joint Commenters filed a proposed “Process Framework” reflecting their consensus on the goals and processes that should guide the Commission’s rules for the investigation and the analysis of organized market options to comply with SB21-072. Recognizing the Transmission Utilities’ comments that burdensome processes may prevent or hinder beneficial participation in regional markets, the Process Framework generally set out three sequential steps. The first step would include CIMs, stakeholder meetings, technical conferences, and other types of informal processes. The second step would involve declaratory order proceedings in which the Commission would evaluate whether specific RTO markets satisfy the statutory criteria. The third step would entail the filing of an application by each transmission utility for authorization to join a particular RTO previously addressed by a declaratory order. The application filing would lead to a full adjudicatory proceeding. In a response filed on January 31, 2023, the three Transmission Utilities concluded that the Joint Commenters’ proposal is lengthy and unduly burdensome.

74. As is further discussed in Decision No. R24-0121-I, at the public comment hearing conducted on September 12, 2023, the transmission utilities presented an outline of an alternative process in which a utility would request a declaratory order from the Commission on whether a particular market meets the ten statutory criteria of an OWM, followed by a notice of participation or applications for cost recovery, shared savings, or a waiver or delay, depending on the transmission utility and the circumstances of market participation. The Joint Commenters responded to the utilities’ proposal at the September 12, 2023 hearing, and again stressed the need for public participation and transparency as well as adjudications in which the Commission would decide whether joining an OWM is in the public interest and results in just and reasonable rates.

c. February 2024 Redlines Proposal

75. In an effort to fully explore the Process Framework and related declaratory order process proposals, the February 2024 Redlines proposed a process whereby utilities could request an order from the Commission finding the regional market a utility seeks to join satisfies certain requirements, and the Commission, with input from parties, would establish applicable procedures once the request for a Commission order was filed.

76. Rule 3753(a)(II) and (III) in the February 2024 Redlines set forth Commission findings that would be required for a determination that participation in a regional market, including an OWM, RTO, or ISO, is in the public interest. At a high level, findings applicable to a transmission utility that is an IOU were that the market: (1) satisfies the statutory requirements to be an OWM; (2) implements a satisfactory GHG Tracking and Accounting System; (3) has generator interconnection procedures that enable implementation of Colorado's electric resource planning processes and ensure resource adequacy; (4) ensures just and reasonable rates for the utility's customers; (5) provides a timely path for building new transmission; (6) and has sufficient analytical support showing the expected benefits of participation are likely to exceed the expected costs. Findings applicable to cooperative electric generation and transmission associations were that the market: (1) is an OWM; (2) implements a satisfactory GHG Tracking and Accounting System; and (3) has generator interconnection procedures that enable implementation of Colorado's electric resource planning processes and ensure resource adequacy.

77. While transmission utilities maintained their earlier objections to the NOPR's proposal to require prior approval of market participation, the Transmission Utilities stated that the proposed process properly balanced the Commission's need for adequate procedures and the utilities' need for efficiency and flexibility. Black Hills encouraged the Commission to provide

clear direction on the process for a market participation proceeding, stating that rules should prevent a “case within a case” on the nature, scope or type of proceeding.⁴⁸ Black Hills also sought clarification on whether the findings required under Rule 3753(a)(II) and (III) in the February 2024 Redlines were meant to provide detail on the OWM characteristics set out in statute, or were meant to be additive to those requirements, stating that the Commission should not add requirements for a Statutory OWM beyond those defined in statute.⁴⁹

78. The Joint Commenters disagreed with the February 2024 Redlines that a non-adjudicated proceeding could potentially be used to determine whether a market is an OWM and whether it is in the public interest for the utility to join the market. They recommended that a filing to join an RTO or ISO be brought forward as an application, stating “[s]imply put, Joint Commenters are not aware of any other instance in which this Commission has issued significant, utility-specific public interest determinations based on anything less than an adjudicated proceeding.”⁵⁰ Recognizing that previous rounds of comment had discussed a Process Framework that would segment the statutory OWM finding into a declaratory order proceeding and the public interest finding into an application proceeding, the Joint Commenters contend it is critical that the Commission decide each necessary element based on the record of an adjudicatory proceeding. And, just as with DAM participation, the Joint Commenters and CEO advocate that a comparative analysis of alternative markets should be added as an additional criterion that joining a particular RTO or ISO is in the public interest.

⁴⁸ Black Hills Initial Comments in Response to February 2024 Redlines at p. 10.

⁴⁹ *Id.*, at p. 10.

⁵⁰ Joint Commenters Initial Comments in Response to February 2024 Redlines at pp.21-22.

d. Adopted Rule 3754

79. The Hearing Commissioner agrees with the Joint Commenters and other participants in this Proceeding that the Commission has authority to require approval prior to a utility joining and participating in an RTO or ISO, including an OWM. The Commission has broad authority to regulate public utilities in Colorado under Article XXV of the Colorado Constitution and the Public Utilities Law.⁵¹ In determining whether a legislative enactment has limited the Commission's broad regulatory powers, the Colorado Supreme Court has examined the relevant statutes in search of any specific statutory restriction on the Commission's authority. If there is a specific statutory restriction, the Commission's power to regulate is controlled by that specific statutory limitation. When the General Assembly has not specifically restricted the Commission's authority to regulate in a particular manner, however, the Commission has all the authority previously held by the General Assembly to regulate public utilities, as defined in § 40-1-103, C.R.S.⁵²

80. The Hearing Commissioner agrees with commenters including Sierra Club, Interwest, and UCA that § 40-5-108, C.R.S., does not specifically restrict the Commission's broad regulatory authority, and that the Commission may properly promulgate rules requiring approval

⁵¹ *E.g.*, § 40-3-102, C.R.S., (the Commission has authority and duty "to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of [Title 40] or in addition thereto, which are necessary or convenient in the exercise of such power[.]" subject to restrictions that are not relevant to this proceeding); *Integrated Network Services, Inc. v. Public Utilities Comm'n.*, 875 P.2d 1373, 1377 (Colo. 1994) (the Commission "has broad constitutional and legislative authority to regulate public utilities in Colorado").

⁵² *See, e.g.*, *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n.*, 576 P.2d 547-548 (§ 40-3-102, C.R.S., does not specifically restrict the Commission's regulatory authority to award attorney's fees and legal costs.); *Colorado Municipal League v. Public Util. Comm'n.*, 591 P.2d 577, 584 (Colo. 1979) (the file and suspend procedure for setting utility rates, found in § 40-6-111, C.R.S., does not specifically restrict the Commission's regulatory authority to establish interim rates); *cf. Mountain States Legal Foundation v. Public Util. Comm'n.*, 590 P.2d 495 (Colo. 1979) ("[i]t is clear...the PUC's authority to order preferential utility rates to effect social policy has, in fact, been restricted by the legislature's enactment of section 40-3-106(1), C.R.S. [which prohibits public utilities from granting preferential rates to any person] and section 40-3-102, C.R.S. [which requires the PUC to prevent unjust discriminatory rates]).

prior to market participation, in addition to application processes expressly set forth in the statute. Participation in RTOs and ISOs will significantly impact the services provided by public utilities, including rates, resource adequacy activities, efforts to reach emission reduction goals, and transmission planning and building. The Hearing Commissioner finds that the Commission should exercise its authority in this area in a nuanced and thoughtful manner depending on the type of transmission utility seeking such approval.

81. Given the comments provided in this Proceeding, the Hearing Commissioner adopts rules requiring transmission utilities that are IOUs to seek approval to join an RTO or ISO, including an OWM, through a fulsome application proceeding that is not significantly abbreviated by these rules. In contrast, transmission utilities that are generation and transmission cooperatives are required to seek approval through an abbreviated application process similar to the process set forth in adopted Rule 3753, in recognition of the Commission's more limited regulation of such cooperatives and that certain analyses relating to retail impacts will be inapplicable.

82. Adopted Rule 3754 sets out the criteria needed to support a determination that a transmission utility's decision to join an RTO or ISO, including an OWM, is in the public interest. The Hearing Commissioner clarifies that the public interest criteria previously identified in Rules 3753(b)(II)-(VI) of the February 2024 Redlines and included in adopted Rule 3754(a)(I)-(VII) and (d)(I)-(III), are interpretive of the ten characteristics set forth in the definition of an OWM in § 40-5-108(1)(a), C.R.S. While these criteria are also responsive to the Commission's previously identified concerns with market participation and are within the Commission's authority to require for any RTO or ISO participation, as was discussed in Decision No. R24-0121-I, these criteria are

necessary to ensure the RTO or ISO will actually implement and deliver the required OWM characteristics.

83. For example, the criterion set forth in adopted Rule 3754(a)(I) and (d)(I), requiring “a GHG Tracking and Accounting System that enables the fair and timely tracking, reporting, and accounting of GHG emissions sufficient to ensure compliance with the emission reduction requirements in §§ 25-7-102 and 40-2-125.5, C.R.S.,” is necessary to ensure that an RTO or ISO will provide emission-reduction benefits without impairing utilities’ actions taken to meet state emission reduction goals, in accordance with § 40-5-108(1)(a)(VII), C.R.S. The criteria in subparts (a)(II) and (d)(II) of the rule, requiring FERC-approved interconnection procedures that “enable the timely implementation of Colorado’s electric resource planning processes and ensure resource adequacy,” also interpret the statutory characteristics, including § 40-5-108(1)(a)(VII) and (X), C.R.S. Colorado’s electric resource planning processes are central to utilities’ ability to meet state emissions reduction goals, and “comparable and nondiscriminatory transmission access” properly includes comparable ability to interconnect to the transmission system.

84. Similarly, Rule 3754(a)(III) regarding just and reasonable rates will ensure characteristics such as § 40-5-108(1)(a)(III) and (V) are satisfied, as well as (1)(a) generally, and subpart (a)(IV) regarding a resource adequacy construct strengthens a market’s ability to satisfy § 40-5-108(1)(a)(IV). Rule 3754(a)(V) is necessary to ensure characteristics including § 40-5-108(1)(a)(X) are satisfied. Subparts (a)(VI) and (d)(III) also ensure the satisfaction of characteristics including § 40-5-108(1)(a)(X), as well as (1)(a) generally. Rule 3754(a)(VII) will allow the Commission to ensure the statutory characteristics including those set forth at § 40-5-108(1)(a)(V), (VII), and (X), will actually be delivered to Colorado customers.

85. Adopted Rule 3754(b) and (e) apply to RTOs and ISOs that do not meet all of the statutory characteristics of an OWM. Under the rule, the Commission will consider the OWM characteristics set forth in Rule 3754(a)(I)-(VII) for IOUs and characteristics set forth in (d)(I)-(III) for generation and transmission cooperatives, when determining whether a decision to join an RTO or ISO that is not a Statutory OWM is in the public interest.

86. In terms of process, the Hearing Commissioner agrees with the Joint Commenters that a process which does not afford all the protections and the robust record of a full adjudicatory proceeding is inadequate to consider the information required to find that a specific IOU's participation in an RTO or ISO is in the public interest. Given the significantly greater concerns associated with an IOU joining a full RTO or ISO as compared to a DAM, the Hearing Commissioner adopts Rule 3754(c), which requires an application filing 18 months ahead of commencing operations in the ISO or RTO. The rule also requires a fully litigated adjudicatory process for the IOU application with the normal expectation of having pre-filed testimony, discovery, and cross-examination at hearing.

87. For a generation and transmission cooperative's decision to join an RTO or ISO, the requirements for obtaining a public interest finding are once again more modest as compared to the IOUs, given the differences in how the Commission typically regulates such cooperatives. As such, Rule 3754(d) also requires that the market the cooperative will join satisfies the ten statutory OWM criteria, but it sets forth a more limited set of standards interpreting § 40-5-108(1)(a), C.R.S., and addressing the Commission's market participation concerns to ensure the RTO or ISO delivers the required characteristics. The process outlined in adopted Rule 3754(e) is also significantly less demanding than the IOU approach, with a shorter filing deadline

and provisions for an expedited application proceeding similar to the process set forth in Rule 3753.

88. Regarding the Joint Commenters' contention that adopted rules should require all transmission utilities to conduct a comparative market analysis before determining that participation in a particular RTO or ISO is in the public interest, the Hearing Commissioner disagrees. Similar to the analysis provided in the section for Rule 3753, a comparative analysis is not necessary to satisfy the statutory OWM criteria, and the Hearing Commissioner declines to impose this burdensome requirement on the utilities. Adopted Rule 3754 requires significant substantiation that participation in an RTO or ISO satisfies statutory requirements and provides customer benefits, and that the market has policies to handle seams issues. This is sufficient to support a public interest determination.

89. The Hearing Commissioner acknowledges that participants' proposals and the February 2024 Redlines explored processes for joining an RTO or ISO that potentially would be less rigid than standard application proceedings. The Hearing Commissioner appreciates the participants' willingness to explore other procedural options to provide utilities with additional flexibility to make market participation decisions more quickly and possibly in advance of tariff filings at FERC. However, given the significance of a decision to join an RTO or ISO, and given the Commission's procedural boundaries set forth in statute and Colorado law addressing adjudicatory processes more generally, the Hearing Commissioner believes that a determination relating to a utility joining an RTO or ISO is best made through an adjudicatory proceeding, although for generation and transmission cooperatives these proceedings should be significantly abbreviated. Despite the examination in this Proceeding of whether a declaratory order or similar

proceeding could provide efficiencies, application proceedings are the most natural forum and likely provide more appropriate burdens of proof, evidentiary standards, and due process protections to support such determinations. Stakeholders are reminded that they are not restricted from filing a declaratory order petition under the Commission's existing rules, and that the Commission may consider issues properly raised in such a petition.

9. Rule 3755 – Contents of Regional Market Participation Filings

90. In the NOPR, the proposed rule equivalent to adopted Rule 3755 set forth the required content for a transmission utility's application seeking approval to join a Day Ahead Market, or an RTO or ISO. The NOPR explained the requirements would apply to both markets types, and if a particular requirement is not applicable to a specific market, the utility applicant would state it is not applicable. Additionally, the NOPR stated the requirements were intended to elicit sufficient information so that the Commission could meaningfully consider a market participation application.

91. Throughout this proceeding, participants filed numerous comments on the proposed requirements, but generally agreed with the required content. Certain commenters raised concerns with duplicative requirements, particularly between requirements in this rule and in adopted Rules 3753, 3754, and 3758.⁵³ The Hearing Commissioner does not agree with concerns that the rules are duplicative. Adopted Rule 3755 sets out filing requirements, while adopted Rule 3753 and 3754 set out findings the Commission must make to deem market participation in the public interest. Rule 3755 reflects the type and scope of information the Commission requires in order to make the determinations specified in Rules 3753 and 3754. The Hearing Commissioner expects that the specific, detailed requirements in adopted Rule 3755, including the filing of workpapers

⁵³ *E.g.*, Black Hills Initial Comments in Response to February 2024 Redlines at p. 9.

with an application and the emission reduction and retail rate impact forecasts, will lead to additional efficiencies and shorter timelines, particularly if discovery is somewhat streamlined and steps such as supplemental direct requests are limited. Additionally, the scope of information required under adopted Rule 3755 is appropriate given that utilities will likely need to file very few market participation applications, that the Commission's interaction with regional markets has thus far been relatively limited, and that joining a DAM or RTO or ISO will have significant impacts on the utility and the filings they make in numerous types of Commission proceedings.

92. Adopted Rule 3755 is largely unchanged from Rule 3754 in the February 2024 redlines, and is similar in content to the NOPR's proposed rule. Based on participant comments, changes from the NOPR's proposed rule include requirements in Rule 3755(a)(IV)(G) for additional detail regarding certain clean energy policies, capacity accreditation, and demand-side flexibility and resources and a change to required information in Rule 3755(e)(I) concerning market rules and processes regarding resource adequacy timeframes.

93. The transmission utilities opposed the requirement in (a)(III) for a market overview to include a description of GHG emission or clean energy policies applicable to both Colorado and non-Colorado participants, first proposed in the February 2024 redlines. The utilities claim this is overly burdensome, as a utility does not have the information concerning policies applicable to participants in other jurisdictions, and cannot be expected to know every policy that every other market participant is subject to. The Hearing Commissioner is sympathetic to the concern and has qualified the requirement so that it applies to the extent reasonably practicable, but generally finds that utilities joining a regional market can be expected to know the other market participants and to make inquiries or conduct general research in order to provide the information required by

adopted Rule 3754(a)(III). In this Proceeding and in Proceeding No. 19M-0495E, the Commission and participants recognize that the cost and emission reduction benefits provided by a market may depend on the other entities participating and the emission reduction and clean energy policies to which those entities are subject. Therefore this information will assist the Commission in making the determinations set out in these rules.

10. Rule 3756 – Application Seeking a Waiver or Delay of Requirement to Join an Organized Wholesale Market

94. Adopted Rule 3756 is designed to comply with the waiver and delay provisions set forth in § 40-5-108(2)(a)(I), C.R.S., and tracks the statutory structure but adds filing criteria that will assist the Commission in deciding a request for a waiver or delay. Additionally, the rule specifies that applications for a waiver or delay should not be filed earlier than June 1, 2027, with the reservation of flexibility for the Commission to determine otherwise.

95. Black Hills contends that the requirements in Rule 3756 should depend on whether waiver or delay is sought because there is no available OWM, or because participation in an available OWM is not in the public interest. Black Hills states that fewer requirements in rule are necessary because the utility applicant should have the burden to show why joining is not in the public interest, rather than showing the required multi-factor analysis. The Hearing Commissioner disagrees. The information required by rule will assist the Commission in determining the waiver or delay request.

11. Rule 3757 – Reporting and Stakeholder Process Requirements

96. In the NOPR, the Commission explained that reporting requirements were intended to encourage compliance with the requirement in SB21-072 that transmission utilities join an

OWM by 2030 or receive a waiver or delay of this requirement, and to keep the Commission apprised of utilities' market activities.

97. Comments on the proposed rule and the similar rule proposed in the February 2024 Redlines included that the annual progress reporting should sunset at a certain point, given the statutory deadline of January 1, 2030 to join an OWM. This recommendation is included in the adopted rule.

98. Additionally, Joint Commenters proposed that the reporting rules require one or more stakeholder meetings and CIMs to discuss and explore market participation issues, following the filing of annual progress reports. In response, Tri-State commented that there are similar stakeholder meetings held in FERC forums, and that the Joint Commenters' proposal may result in duplicative meetings or meetings where all stakeholders are not represented.

99. Adopted Rule 3757 is largely unchanged from the NOPR's proposed rule and the equivalent rule proposed in the February 2024 Redlines. The Hearing Commissioner is persuaded that the Joint Commenters' proposal will facilitate a collaborative exchange of information among transmission utilities and stakeholders and will narrow disagreements and minimize contested issues in later proceedings. To the extent meetings are duplicative or there is uneven attendance between these meetings and meetings sponsored by FERC or other national or regional entities, the utilities and stakeholders can work to combine or distribute information as appropriate.

12. Rule 3758 – Cost Recovery

100. Adopted Rule 3758 is largely unchanged from the NOPR's proposal on this matter (Rule 3754(1)) and the proposed rule contained in the February 2024 Redlines. Public Service contends that a transmission utility should have the opportunity to track and defer costs associated

with the development of a market participation filing and annual reporting, and that the costs should be afforded a rebuttable presumption of prudence. The adopted Rule does not incorporate this change, as the Hearing Commissioner is not convinced that this treatment is necessary, or that a rule is required instead of regular Commission processes, to permit a utility to track and defer these costs.

13. Rule 3759 – Application for Shared Savings from Participation in a Statutory Organized Wholesale Market

101. In the NOPR, the Commission explained that proposed Rule 3757 sets forth the procedures applicable to the shared savings program contemplated by § 40-5-108(3), C.R.S., including that the Commission may allow a transmission utility participating in an OWM to retain up to 35 percent of the demonstrated net present value savings in years one and two, up to 25 percent in year three, and up to 20 percent in years four and five. § 40-5-108(3)(b), C.R.S. The NOPR also stated that in conformity with § 40-5-108(3)(c), C.R.S., the proposed rule imposes an end date of July 21, 2033, for any shared savings period.

102. Comments in response to the NOPR included that the rules should provide guidance on how the Commission will determine the actual percentage of retained shared savings. Comments also revealed a dispute in how the statute’s use of the word “demonstrated” should be interpreted, and a dispute regarding the time period over which a utility may retain a percentage of shared savings. For example, UCA asserts that the legislature uses the past tense in the phrase “demonstrated net present value savings” to indicate that the utility must actually demonstrate that the savings have occurred, as opposed to speculation they may occur in the future.⁵⁴ Black Hills and Public Service disagree, stating that to determine net present value, forecasted future cash

⁵⁴ UCA Initial Comments at p. 8.

flows are discounted to present value using a discount rate. They assert the General Assembly should be presumed to know this common definition, particularly in light of the clear intent to create an incentive for transmission utilities to join an OWM.⁵⁵

103. Public Service takes issue with the proposed rule's interpretation of relevant timelines and deadlines in § 40-5-108(3), C.R.S.⁵⁶ Public Service contends that the amount of the eligible shared savings is addressed in § 40-5-108(3)(c), which refers to a period during which net present value saving accrue, beginning on the date the transmission utility commences operation with the OWM and ending on July 31, 2033. Public Service continues that § 40-5-108(3)(b) governs how the shared savings are allocated, and indicates that transmission utilities shall be allowed to retain a certain percentage of the demonstrated net present value savings for a period of five years beginning on the date the transmission utility commences operation. Public Service contends that the General Assembly intended to incent utilities to take early action to join OWMs, instead of waiting until the January 1, 2030 deadline.

104. Regarding whether the savings must be "demonstrated" after the fact, the Hearing Commissioner agrees that forecasting these types of savings is commonly understood. However, the Hearing Commissioner is also persuaded by the Joint Commenters that a true-up mechanism is appropriate. The adopted Rule reflects this, as well as Public Service's proposal to remove the end date of July 21, 2033 from the period in which a utility may retain a percentage shared savings.

⁵⁵ Black Hills Reply Comments at p. 13.

⁵⁶ Public Service Initial Comments at pp. 14-16.

V. CONCLUSION

105. The statutory authority for the rules adopted by this Decision is found at: §§ 24-4-101 et seq.; 40-2-108; 40-2.3-102; 40-3-101, 102, 103, and 110; 40-4-101; and 40-5-108, C.R.S.

106. In recent years, the Commission's growing experience and expertise relating to the impact of regional markets in Colorado includes a multi-year set of Commission public processes and analyses as supported by a diverse range of stakeholder participation as well as multiple state statutory requirements. More specifically, this experience and expertise includes and draws from the Commission's CTCA report and modelling, the Commission's FERC comments on interconnection and other issues, the emission reduction requirements embedded in state statute, the diverse statutory and Commission goals of the Colorado electric resource planning process, the speed with which Colorado transmission utilities can currently get approval for and build new transmission under Commission approaches, the initial results associated with the Colorado utilities participation in SPP's WEIS, and involvement in discussions concerning the development of market constructs in the West. As such, these rules have been developed to address the Commission's market participation concerns given this experience and expertise, and to identify certain required public interest findings that help interpret and give content to the ten statutory OWM requirements in a narrow and focused manner depending on the organizational structure of the transmission utility, the nature of the market, and the type of concern that the rules seek to address.

107. This Proceeding has explored various avenues to address the concerns of stakeholders and the Commission relating to organized electricity market participation. The Hearing Commissioner applauds the efforts of the participants to reach consensus and

compromise where possible. Nonetheless, participants remained far apart on certain significant issues. This Recommended Decision and the adopted rules attempt to balance stakeholders' competing interests while providing processes to satisfy statutory requirements and address the Commission's concerns with market participation and safeguarding and serving the public interest.

108. For the reasons discussed, the Hearing Commissioner adopts Rules consistent with the above, as set forth in legislative format (Attachment A) and final format (Attachment B) attached to this Decision.

109. Being fully advised in this matter and consistent with the above discussion, in accordance with § 40-6-109, C.R.S., the Hearing Commissioner now transmits to the Commission the record in this proceeding along with this Recommended Decision and attachments.

VI. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, the Hearing Commissioner takes administrative notice of filings in Proceeding No. 23M-0195E as of this Decision's mail date.

2. The Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* 723-3, attached to this Recommended Decision as Attachments A and B are adopted.

3. The rules in redline and final format (Attachments A and B), are available through the Commission's E-Filings system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=22R-0249E

4. This Recommended Decision will 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.

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

6. 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 will become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

7. 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 Hearing Commissioner and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

8. If exceptions to this Recommended Decision are filed, they may 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

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Hearing Commissioner

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director