

Decision No. R24-0821-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24R-0306E

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

**INTERIM DECISION SCHEDULING CONTINUED
PUBLIC COMMENT HEARING,
IDENTIFYING ISSUES FOR PUBLIC COMMENT
AND ESTABLISHING DEADLINES**

Issued Date: November 13, 2024

I. STATEMENT, SUMMARY, AND PROCEDURAL HISTORY

A. Statement and Summary

1. This Decision memorializes the continuation of the October 29, 2024 public comment hearing to December 16, 2024, at 11:00 a.m.; identifies items for additional public comment; establishes deadlines for public comment; and provides information on how to provide public comment and participate in the continued public comment hearing.

B. Procedural History¹

2. On July 11, 2024, the Colorado Public Utilities Commission (“Commission”) initiated this matter by issuing a Notice of Proposed Rulemaking (“NOPR”) to amend the Commission’s Rules Regulating Electric Utilities, 3 *Code of Colorado Regulations* (“CCR”) 723-3 (“Electric Rules”).² The proposed Rules are intended to clarify the process by which regulated

¹ Only the procedural history necessary to understand this Decision is included.

² Decision No. C24-0494 (issued July 11, 2024) (“NOPR”).

electric utilities and wholesale generation and transmission cooperative associations (collectively, “utilities” or “utility”) identify and address impacts that their infrastructure projects may have on historic and cultural significant sites and Tribal governments,³ and to present relevant information in the context of certain Commission resource planning and infrastructure proceedings.⁴ The NOPR includes the proposed Rules as Attachments A and B thereto; established initial deadlines to file public comment; and scheduled a public comment hearing, for August 27, 2024, at 11:00 a.m.⁵ At the same time, the Commission referred this Proceeding to an Administrative Law Judge (“ALJ”) for disposition. The matter was assigned to ALJ Alenka Han, then later reassigned to the undersigned ALJ.

3. ALJ Han convened the public comment hearing as scheduled on August 27, 2024. Numerous interested persons participated in the hearing. At the end of the August 27, 2024 public comment hearing, ALJ Han announced that the public comment hearing would be continued to October 29, 2024 at 11:00 a.m. This ruling was memorialized in Decision No. R24-0631-I.⁶

4. The undersigned ALJ held the public comment hearing on October 29, 2024 as noticed. Members of the public participated in the hearing. This Decision memorializes what happened during the hearing, among other matters.

II. FINDINGS AND CONCLUSIONS

A. Continued Public Comment Hearing

5. As discussed during the October 29, 2024 public comment hearing, public comments raise numerous questions or concerns about the proposed Rules, warranting an additional public comment hearing and public comment. As a result, during the October 29, 2024

³ This Decision uses the terms “Tribal governments” to refer to tribal nations and governments.

⁴ NOPR at 1.

⁵ *Id.* at 24-25. See Attachments A and B to NOPR.

⁶ Decision No. R24-0631-I (issued September 4, 2024).

public comment hearing, the ALJ continued the hearing to December 16, 2024 at 11:00 a.m., which will be held remotely using the web-hosted videoconferencing service, Zoom.

6. During the October 29, 2024 public comment hearing, the ALJ also explained that she would memorialize the questions and concerns relating to the proposed Rules in a written decision and establish deadlines for initial and responsive comments. These items are addressed below.

1. Observing the Public Comment Hearing

7. Consistent with Commission practice, the public comment hearing will be webcast on the Commission's website. Persons wishing to observe, but not provide comments may do so by observing the webcast of the hearing and need not register through Zoom. To observe the hearing by webcast, enter this link in the web browser <https://puc.colorado.gov/webcasts> and select the audio or video option for the assigned hearing room. The assigned hearing room will be identified on the Commission's public calendar for the date and time of the hearing, at the following link: <https://puc.colorado.gov/pucalendar>.

2. Participating in the Public Comment Hearing

8. Members of the public who wish to participate in the public comment hearing should not appear in person at the Commission's offices but should instead appear remotely via Zoom. Those interested in providing public comment during the hearing must register in advance using a link posted on the calendar of events on the Commission's website at <https://puc.colorado.gov/pucalendar>. Registrants will receive an email with a link to provide comment during the Zoom session. Interested persons who have difficulty obtaining the link and registering can contact the Commission for assistance at (303) 894-2000.

9. Those registered to provide comment during the hearing are strongly encouraged to prepare in advance and familiarize themselves with how to use the Zoom meeting platform. Attachment A to this Decision provides step-by-step technical instructions and requirements to participate by videoconference using a computer. This is intended to ensure that the remote hearing proceeds efficiently. Hence, it is important that registered video conference participants carefully review and follow all requirements in this Decision and Attachment A.

10. For those who wish to provide comments during the hearing, videoconference participation is preferred and encouraged because it allows for the hearing to be held in a manner most similar to in-person hearings. Nevertheless, interested persons have the option to participate by telephone.

11. The Commission strives to accommodate all members of the public at its hearings by providing services for foreign language users and persons with disabilities upon receipt of a reasonable accommodation request. Registrants requesting an interpreter during the public comment hearing should complete the Language Access Form available at: <https://puc.colorado.gov/how-to-participate> under the “How to Make Comments” tab at least one week prior to the hearing. Requests for accommodation can also be made directly by contacting Holly Bise at (303) 894-2024 or holly.bise@state.co.us.

3. Methods to Submit Public Comment

12. Interested persons wishing to provide public comment need not participate in the public comment hearing to do so. Interested persons may submit written comments by (a) mailing comments to the Commission; (b) filing comments with the Commission’s Electronic Filing System at <https://www.dora.state.co.us/pls/efi/EFI.homepage> in this Proceeding; (c) selecting the “FILE A COMMENT OR COMPLAINT” option on Commission’s website at

<https://puc.colorado.gov/>; and (d) emailing the Commission. All comments must include a reference to this Proceeding number (Proceeding No. 24R-0306E).⁷ Failure to do so may result in the written comments not being placed in the record in this Proceeding.

13. Interested persons may also submit verbal comments via a voice mail message at (303) 869-3490 or from registered commenters offering public comment during the scheduled public comment hearing. Those leaving voice mail public comments must state and spell their name, and include this Proceeding number (Proceeding No. 24R-0306E) in their message. Failure to do so may result in the voice mail comments not being placed in the record in this Proceeding.⁸

14. Although the Commission prefers written comments over verbal comments, it will equally consider public comments, regardless of the format in which they are submitted.

B. Issues to Address in Public Comments

15. Public comments raise numerous concerns about the proposed Rules, including the breadth of the significant sites' definition and proposed requirements concerning interactions between state agencies, regulated utilities, and Tribal governments. In addition, the following four issues raise significant concerns that warrant additional public comment: (1) legal limits on the Commission's siting authority; (2) practical issues surrounding the timing of applications (or other filings) and resulting Commission decisions as compared to utility and contractor ground work and decisions as to infrastructure siting and routing; (3) questions as to how the Commission will assess the sufficiency of a utility's treatment of significant sites and cultural and historic resources, how the Commission will determine whether utility impact mitigation is viable and cost-effective, whether the Commission can reasonably assess and decide these issues at the time of an electric

⁷ The Commission's mailing and email addresses are on the Commission's website (at the link provided above).

⁸ Voice mail messages will be transcribed and placed in the record of this Proceeding.

resource plan (“ERP”) or certificate of public convenience and necessity (“CPCN”) decisions, and which entity or entities are best-positioned to determine these issues; and (4) legal and practical questions about the extent to which the proposed Rules duplicate or conflict with existing federal, state, local, or Tribal government requirements around cultural resource surveys and the like.

1. Statutory Limit on the Commission’s Authority to Consider Land Use Rights and Siting Issues

16. Section 40-5-101(1)(a), C.R.S., provides the Commission authority to issue a CPCN for utilities to construct facilities or infrastructure outside the ordinary course of business. In so doing, the Commission must determine that the public convenience and necessity require the additional facilities or infrastructure.⁹ Under the plain language of § 40-5-101(1)(a), C.R.S., the present or future public convenience and necessity does not include considering “land use rights or siting issues related to the location or alignment of the proposed electric transmission lines or associated facilities, which are under the jurisdiction of a local government’s land use regulation.” Section 40-5-101(3), C.R.S., confirms local governments’ authority over land use regulation and siting by prohibiting a utility from constructing or installing facilities and infrastructure within a local government’s jurisdiction unless it complies with the local government’s zoning rules, resolutions, and ordinances. But the Commission may decide a public utility’s appeal of a local government’s decision denying a permit or application relating to the location, construction, or improvement of major electrical or natural gas facilities, or a local government’s decision granting a permit or application if its decision imposes conditions on a permit or application that unreasonably impairs the public utility’s ability to provide safe, reliable, and economical service to the public.¹⁰

⁹ § 40-5-101(1)(a), C.R.S.

¹⁰ §§ 29-20-108,(5)(a), 40-4-102(1), C.R.S.

17. Tri-State Generation and Transmission Association, Inc., (“Tri-State”) submits that the Commission’s authority under § 29-20-108(5), C.R.S., to hear appeals of local governments’ siting decisions further illustrates that the Commission is not empowered to make similar siting decisions as part of the CPCN process.¹¹ Tri-State also submits that the proposed Rules conflict with the General Assembly’s restriction of the Commission’s authority over siting issues through § 40-5-101, C.R.S.¹² Public Service Company of Colorado (“Public Service”) raises similar concerns, asserting that the Commission should consider its jurisdictional limits and the potential for the proposed Rules to have unintended consequences.¹³

18. Although the Commission has broad statutory and constitutional authority over public utilities, the ALJ finds some merit in the above arguments, particularly given the plain language of § 40-5-101(1)(a), C.R.S., that the Commission does not consider land use rights or siting issues when determining whether the public convenience and necessity require the construction project for which the CPCN is sought. The ALJ invites public comment addressing these issues.

2. Practical Issues About the Timing of Routing and Siting Activities

19. As noted, public comments also highlight practical concerns with the proposed Rules. For example, Tri-State explains that transmission project sites and routes are often not known or selected when the utility seeks a CPCN.¹⁴ It explains that the proposed Rules would require siting, advanced engineering, and other studies to be performed substantially before filing a CPCN application, thereby creating costly administrative and operational inefficiencies.¹⁵ This

¹¹ Tri-State’s comments filed August 9, 2024 (“Tri-State’s 8/9/24 Comments”) at 3-4.

¹² See Tri-State’s 8/9/24 Comments at 4.

¹³ Public Service’s comments filed August 9, 2024 (“Public Service’s 8/9/24 Comments”) at 4.

¹⁴ Tri-State’s 8/9/24 Comments at 4.

¹⁵ *Id.*

would result in significant incurred costs before the Commission has determined that the public convenience and necessity require the construction project.¹⁶

20. Public Service raises similar concerns. It explains that CPCN and ERP proceedings are time-consuming, resource-intensive, and often heavily litigated, which means that Public Service does not ordinarily have enough regulatory certainty to move forward with finalizing a transmission line's route, siting a generation facility, or securing the necessary permits.¹⁷ When it files a CPCN application, Public Service generally only knows the project study area, which can be geographically expansive, spanning hundreds of square miles.¹⁸

21. Public Service encourages the Commission to consider when siting activities can practically and efficiently move forward for investments that are not yet approved, and the critical function and authority of local governments and state and federal agencies in siting and permitting to avoid duplicative or conflicting processes.¹⁹ To this end, Public Service outlines an example of the routing, siting activities, and related outreach that it performs when constructing a transmission line and related substation.²⁰ Once the Commission has granted a CPCN, Public Service performs a siting and routing study, which typically includes the following four steps:

- Step 1: Public Service gathers land use and environmental resource data within the study area and organizes that data into a geographic information system ("GIS") database that is used to inform the next steps. As relevant here, this includes data on land use, environmental resources, prime farmland, wildlife habitats, threatened and endangered species, water resources, visual or aesthetic concerns, cultural resources, including architectural and archaeological sites, and Tribal resources.²¹
- Step 2: Public Service analyzes the collected data to identify a particular resource's sensitivity to the introduction of a new transmission line or substation. This includes

¹⁶ *Id.*

¹⁷ Public Service's 8/9/24 Comments at 4.

¹⁸ *Id.* at 5-6. A CPCN application includes the boundaries of the study area to identify potentially feasible transmission line routes and substation site alternatives that would meet the project's objectives. *Id.* at 6.

¹⁹ *Id.* at 3-4.

²⁰ *Id.* at 5-9.

²¹ *Id.* at 7.

determining potential adverse responses to direct and indirect effects associated with construction, operation, and maintenance of the new facility. Public Service generally designates cultural resources as having a high sensitivity.²²

- Step 3: Building on the results of the above analyses, combined with aerial photo imagery, environmental resource data, field reconnaissance visits, Public Service develops a network of route alternatives and analyzes each alternative's mileage.²³
- Step 4: To narrow down the transmission line route or siting alternatives, Public Service compares alternatives to determine which are the most compatible with existing land uses, meets its needs, and have the least impact on the community. During this process, Public Service evaluates options using criteria developed in consultation with potentially impacted communities and stakeholders. It also confirms that the preferred route meets applicable utility engineering standards, including supply adequacy, system reliability, and public safety standards.²⁴

22. Public Service explains that it engages in significant public outreach alongside the above-described study.²⁵ It also holds project coordination meetings and pre-permitting application meetings with impacted local governments to proactively address and provide resolution for comments, questions, and requests for additional information before filing a permit application with a local government.²⁶ Public Service explains that local permitting processes require utilities to provide detailed information and analyses about potential environmental, land-use, cultural, and historic impacts.²⁷ When federal permitting is required, Public Service complies with federal outreach and analyses requirements (in addition to state and local permitting). For example, new generation projects may require federal permitting, which triggers a Section 106 National Historic Preservation Act²⁸ (“NHPA”) review, a process that requires consultation with state and Tribal historic preservation officers, similar to the engagement that the proposed Rules contemplate.²⁹ After it has submitted an application, it is not uncommon for permitting authorities to require

²² *Id.* at 7.

²³ *Id.*

²⁴ *Id.* at 7-8.

²⁵ *Id.* at 8.

²⁶ *Id.*

²⁷ *See id.* at 9.

²⁸ *See* 54 U.S.C. § 306101 *et. seq.*; 54 U.S.C. § 306108.

²⁹ Public Service's 8/9/24 Comments at 9.

Public Service to provide multiple rounds of additional information or revisions to the application.³⁰ Once the permitting authority deems the application complete, a public hearing process typically follows, which creates another opportunity to address concerns and hear from the public.³¹

23. Similarly, in response to proposed Rule 3616(d), Black Hills Colorado Electric, doing business as Black Hills Energy, (“Black Hills”) states that utilities cannot know at the time of an ERP filing the location of generation or associated transmission in bids, as such bids are not submitted until Phase II of ERP proceedings.³² It adds that bidders also cannot know if their proposed locations are at or near a significant site if the Commission can designate a geographic area as a significant site after the bid is submitted.³³

24. These comments raise reasonable practical concerns with the proposed Rules, particularly as it relates to the proposed Rules’ impact on when regulated entities and bidders perform activities to identify and potentially seek permits for the specific geographic routing and siting locations for CPCN and ERP projects. The ALJ invites public comments addressing these issues about the timing and coordination of routing and siting as compared to the timing of related activities contemplated in the proposed Rules.

3. Issues Relating to Sufficiency of Utilities’ Treatment of Significant Sites and Viability and Cost-Effectiveness of Mitigation Efforts

25. Comments raise questions as to how the Commission will assess the sufficiency of a utility’s treatment of significant sites and cultural and historic resources; how the Commission will determine whether utility impact mitigation is viable and cost-effective; whether the

³⁰ Public Service’s 8/9/24 Comments at 9.

³¹ Public Service’s 8/9/24 Comments at 9.

³² Black Hills’ comments filed August 9, 2024 at 4-5.

³³ *Id.*

Commission can reasonably assess and decide these issues at the time of an ERP and CPCN proceeding, and which entity or entities are best positioned to determine these issues. For example, in response to proposed Rule 3605(h)(ii)(F), History Colorado’s Office of Archaeology and Historic Preservation (“History Colorado”) highlights that the proposed Rule does not identify how the Commission will determine the sufficiency of a utility’s treatment of a significant site or the criteria that the Commission will use to determine whether an impact mitigation is “viable and cost-effective.”³⁴ Other comments suggest that identifying impacts, determining whether a utility’s treatment of a significant site and related resources is sufficient, and deciding appropriate mitigation may require specialized expertise that the Commission and public utilities lack.³⁵ This raises questions as to which entity or entities are best positioned to identify impacts and determine mitigation viability (among others).³⁶ What is more, given the issues discussed above surrounding the timing of relevant applications (or other filings) and resulting Commission decisions as they relate to utility and contractor ground work and decisions on infrastructure siting and routing, it is unclear whether the Commission can reasonably assess the sufficiency of a utility’s treatment of a significant site and proposed mitigation cost-effectiveness and viability at the time of an ERP or CPCN proceeding. The ALJ invites public comments addressing these issues.

³⁴ History Colorado’s comments filed August 9, 2024 (“History Colorado’s 8/9/24 Comments”) at 9.

³⁵ *See e.g.*, Ute Mountain Ute Tribe’s comments filed August 12, 2024 (“Ute Mountain Ute Tribe’s 8/12/24 Comments”) at 6-7; History Colorado’s 8/9/24 Comments at 9.

³⁶ Indeed, the Ute Mountain Ute Tribe suggests that the Commission defer such decisions to History Colorado, which has relevant experience and expertise. Ute Mountain Ute Tribe’s comments filed August 23, 2024 at 3-4. This raises questions as to who is best suited to determine what is a significant site, which ties into the proposed definition of those terms. *See e.g.*, Ute Mountain Ute Tribe’s 8/12/24 Comments at 13.

4. Potential Duplication of or Conflicts with Requirements Imposed by Other Governmental Entities

26. As already noted, local governments have authority over zoning and siting. The federal government may also have permitting or other relevant authority in some situations.³⁷ For example, a plethora of federal laws may require cultural resource surveys or studies in some situations.³⁸ Tribal governments play an important role in all of this, and may have their own requirements, particularly where their land is implicated. Varying requirements based on land ownership, funding source, and other factors create questions about whether the proposed Rules may unintentionally result in requiring utilities or bidders to take action that duplicates, substantially overlaps, or conflicts with actions that other governmental entities require or take.³⁹ It also raises questions as to whether there are viable approaches to narrow or clarify the proposed Rules in ways that more effectively recognize jurisdictional variations and existing requirements. The ALJ seeks comments on these issues.

27. Initial comments on the above issue are due on November 27, 2024; responses to initial comments are due on December 11, 2024.

III. ORDER

A. It Is Ordered That:

1. The public comment hearing in Proceeding No. 24R-0306E is continued as set forth below.

2. The continued fully remote public comment hearing in this matter is scheduled as follows:

³⁷ See e.g., 16 U.S.C. § 470f; 54 U.S.C. §§ 306101 and 306108; 25 U.S.C. § 3001; 36 C.F.R. Part 800.

³⁸ See e.g., 16 U.S.C. § 470f; 54 U.S.C. §§ 306101 and 306108; 25 U.S.C. § 3001; 36 C.F.R. Part 800. See Ute Mountain Ute Tribe's 8/12/24 Comments at 14 (stating that under Section 106 of the NHPA, a review of cultural and historic resources can be triggered among "another slew of twenty-five other federal laws," also citing 16 U.S.C. § 470(f), 25 U.S.C. § 3001, *et seq.*)

³⁹ See e.g., Public Service's 8/9/24 Comments at 3-4.

DATE: December 16, 2024

TIME: 11:00 a.m.

PLACE: By videoconference using a Zoom link emailed to those who register for the hearing through the registration link on the Commission's calendar of events at <https://puc.colorado.gov/puccalendar>

3. All those who wish to provide comments in the public comment hearing must register for the hearing to receive the Zoom information to join the public comment hearing. Interested persons must register to participate in the public comment hearing by clicking on a link available on the Commission's calendar of events on its website for the date and time(s) of the hearing at <https://puc.colorado.gov/puccalendar>, and following the requirements in Attachment A hereto, which is incorporated as if fully set forth herein.

4. Those wishing to observe but not provide comment in the above public comment hearing may do so by observing the Commission's webcast for the assigned hearing room at: <https://puc.colorado.gov/webcasts>.

5. Members of the public who wish to provide written or oral comments outside of the public comment hearing may do so by following the instructions in this Decision.

6. The Administrative Law Judge may schedule additional public comment hearings if necessary.

7. The public is invited to comment on the matters identified in this Decision. Initial comments responding to the issues identified in this Decision must be filed by the close of business on **November 27, 2024**. Comments responding to such initial comments must be filed by the close of business on **December 11, 2024**.

8. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director