

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 15R-0325E

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES REGULATING
ELECTRIC UTILITIES 4 CODE OF COLORADO REGULATIONS 723-3 CONCERNING
COMMISSION CONSIDERATION OF BEST VALUE EMPLOYMENT METRICS IN
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY APPLICATION
PROCEEDINGS FOR ELECTRIC GENERATION POLLUTION CONTROL AND FUEL
CONVERSION PROJECTS.

NOTICE OF PROPOSED RULEMAKING

Mailed Date: May 15, 2015
Adopted Date: May 6, 2015

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I. BY THE COMMISSION**A. Statement**

1. The Colorado Public Utilities Commission (Commission) issues this Notice of Proposed Rulemaking (NOPR) to amend the rules regulating electric utilities contained in 4 *Code of Colorado Regulations* (CCR) 723-3, consistent with House Bill (HB) 13-1292 and Commission Decision No. C14-1352 in Proceeding No. 13R-1151E.

2. HB13-1292 modifies § 40-2-129, C.R.S., by specifying that, when evaluating utility requests for a Certificate of Public Convenience and Necessity (CPCN) for the construction or expansion of generating facilities, “including pollution control and fuel conversion projects of existing coal-fired plants,” the Commission shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities.¹

B. Background

3. On November 12, 2013, the Commission opened a rulemaking proceeding with the intention to amend its Rules Regulating Electric Utilities consistent with HB 13-1292.²

4. In that rulemaking, the Commission proposed changes to Rule 3102, which sets forth the filing requirements for applications for CPCNs for the construction or expansion of electric utility facilities. The proposed changes added Rule 3102(e) by requiring applications for a CPCN for the construction or extension of generation facilities, pollution controls, or fuel conversion projects of existing coal-fired generation to include “best value” employment metrics,

¹ Section 40-2-129, C.R.S., states in part: “[w]hen evaluating electric resource acquisitions and requests for a certificate of convenience and necessity for construction or expansion of generating facilities, including but not limited to pollution control or fuel conversion upgrades and conversion of existing coal-fired plants to natural gas plants, the commission shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities.”

² Decision No. C13-1361 in Proceeding No. 13R-1151E.

including: (1) the availability of training programs, including trading through apprenticeship programs registered with the United States Department of Labor, Office of Apprenticeship and Training; (2) the employment of Colorado workers as compared to importation of out-of-state workers; (3) long-term career opportunities; and (4) industry-standard wages, health care, and pension benefits. *See* § 40-2-129, C.R.S. (defining “best value” employment metrics for electric resource acquisitions and CPCNs).

5. The Commission also recognized that, pursuant to existing Rule 3205(b)(II), pollution control projects are deemed to be in the ordinary course of business and, therefore, do not require applications for CPCNs. The Commission did not propose any specific revisions to Rule 3205(b)(II), but instead sought comment from interested persons on whether § 40-2-129, C.R.S., requires changes to Rule 3205(b)(II) that would remove the exemption of pollution control projects from CPCN requirements.

6. Public Service Company of Colorado (Public Service); Black Hills/Colorado Electric Utility Company, LP (Black Hills); the Colorado Building and Construction Trades Council and the Rocky Mountain Environmental Labor Coalition; and Western Resource Advocates jointly developed and filed in Proceeding No. 13R-1551E a consensus proposal to add Rule 3102(e) and modify Rule 3205(b)(II) (Consensus Proposal).

7. Concerning Rule 3102(e), the Consensus Proposal would have required that, within 45 days after a contract was awarded for the construction of a pollution control or fuel conversion project, the utility file a status report providing the best value employment metrics associated with the selected contractors.

8. Concerning Rule 3205(b)(II), the Consensus Proposal would have exempted a pollution project from the CPCN requirement if the estimated total costs of the project,

including engineering, procurement, construction, and interrelated work, are less than \$50 million. A CPCN would be required for a project with costs exceeding the \$50 million threshold and Rule 3102(e) would apply.

9. On August 25, 2014, Administrative Law Judge (ALJ) Paul C. Gomez issued his Recommended Decision,³ which adopted the Consensus Proposal for Rule 3102(e) but rejected the Consensus Proposal for Rule 3205(b)(II). The Recommended Decision proposed a different version of Rule 3205(b)(II) that requires a CPCN for pollution control projects that either substantially reduce the availability of a plant during construction or require an extension to the useful life of the plant for depreciation or cost amortization purposes.⁴

10. On November 12, 2014, the Commission addressed exceptions to the Recommended Decision and declined to make findings specific to which pollution control projects do or do not require CPCNs citing an inadequate record.⁵ The Commission agreed with the ALJ that the record did not support the adoption of the \$50 million threshold suggested in the Consensus Proposal. However, the Commission also agreed with Public Service and Tri-State Generation and Transmission Association, Inc. (Tri-State) that the rule revisions proposed by the Recommended Decision were also not supported in the record. The Commission therefore set aside the Recommended Decision in its entirety and stated that it would issue a new rulemaking proceeding to resolve the questions surrounding necessary changes to Rule 3205(b)(II).⁶

³ Decision No. R14-1024.

⁴ *Id.*, ¶ 35

⁵ Decision No. C14-1352.

⁶ *Id.*, ¶¶ 17-20.

C. Discussion

11. The primary purpose of this rulemaking is to examine whether § 40-2-129, C.R.S., requires modifications to Rule 3205(b)(II), which exempts pollution control projects from CPCN obligations because they are deemed to be completed in an electric utility's ordinary course of business.

12. We also invite comment from the Colorado Department of Health and Environment or the United States Environmental Protection Agency as to whether an emissions control project requires a CPCN.

13. Our proposed rule changes are set forth in Attachment A to this NOPR.

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

14. With respect to Rule 3102, we propose to adopt Rule 3102(e), which is set forth in the Consensus Proposal and recommended for promulgation by the ALJ in Proceeding No. 13R-1151E. We agree with the Recommended Decision that this proposed rule solves the logistical issues surrounding how best value employment metrics are provided to the Commission for consideration as required by § 40-2-129, C.R.S. In conjunction, we propose to adopt Rule 3102(f), which clarifies procedures when information about best value employment metrics is not available at the time a CPCN application is filed.

E. Rule 3205 Construction or Expansion of Generating Capacity

15. To facilitate substantive discussions of when a pollution control project would be completed in the ordinary course of business, we set forth below four options for potential revisions to Rule 3205. Interested persons are also welcome to suggest other formulations to Rule 3205 consistent with § 40-2-129, C.R.S.

1. Option 1

16. Option 1 contains a version of Rule 3205(b)(II) based on the rule language the ALJ proposed in his Recommended Decision. In this version, a CPCN would be required for pollution control projects that either substantially reduce the availability of a plant during construction or require an extension to the useful life of the plant for depreciation or cost amortization purposes.

17. For the purpose of eliciting comments, we suggest that reductions in plant availability help identify pollution control projects that would change, albeit temporarily, the normal dispatch of the utility's system resources during the construction period and potentially affect the cost of providing electric service.

18. Enlargement of the expected useful life of the plant helps to identify projects that are economically substantial and will affect the dispatch of the utility's system resources in the future in ways not previously examined in an electric resource plan.

19. We rely on the emission reduction plans filed by Public Service and Black Hills pursuant to the Clean Air Clean Jobs Act in Proceeding Nos. 10M-245E⁷ and 10M-254E⁸, respectively, as the basis of this option.

20. Potential rule language corresponding to this first option is as follows (Option 1 in Attachment A to this NOPR):

⁷ Public Service stated in its initial emission reduction plan filing in Proceeding No. 10M-245E that the installation of all pollution equipment at its Pawnee generation station should be completed while the unit remained in operation and all tie-ins should be completed during a regularly scheduled 6-8 week maintenance outage. (Public Service Clean Air Clean Jobs Act Emission Reduction Plan, p. 31.) Public Service also determined that, given the age of its coal units such as Pawnee, a 15 year extension to their useful lives was an appropriate accounting adjustment. (Public Service Clean Air Clean Jobs Act Emission Reduction Plan, p. 142.)

⁸ Black Hills stated that the installation of pollution controls at its Clark Station would require the relocation and construction of a new exhaust stack. (Black Hills Clean Air Clean Jobs Act Emission Reduction Plan, Appendix A.) Black Hills assumed a maximum remaining useful life of ten years if pollution controls were installed at its Clark Station. (Black Hills Clean Air Clean Jobs Act Emission Reduction Plan, p. 16.)

3205. Construction or Expansion of Generating Capacity.

- (a) No utility may commence new construction or an expansion of generation facilities or projects until either the Commission notifies the utility that such facilities or projects do not require a certificate of public convenience and necessity or the Commission issues a certificate of public convenience and necessity for the facility or project. Rural electric cooperatives do not need a certificate of public convenience and necessity for new construction or an expansion of generation facilities provided that such construction or expansion is contained entirely within the cooperative's certificated area.
- (b) The following shall be deemed to occur in the ordinary course of business and shall not require a certificate of public convenience and necessity:
 - (I) New construction or expansion of existing generation, which will result in an increase in generating capacity of less than ten megawatts.
 - (II) A generating plant remodel, or installation of any equipment or building space, required for pollution control systems where the project can be completed without substantially altering the availability of the generation facilities during construction and the economic feasibility of the project requires no extension to the expected useful life of the generation facilities for depreciation or cost amortization purposes.
- (c) For each new construction or expansion of existing generation that will result in an increase in generating capacity of ten megawatts or more, the electric utility shall submit to the Commission, no later than April 30 of each year, a filing for a determination of which of the utility's proposed new construction or expansions for the next three calendar years, commencing with the year following the filing, are necessary in the ordinary course of business and which require a certificate of public convenience and necessity prior to construction. For each project, the filing shall contain the following:
 - (I) The name, proposed location, and function or purpose of the project.
 - (II) The estimated cost of the project and the manner in which it is expected to be financed.
 - (III) The projected date for the start of construction, the estimated date of completion, and the estimated date of commencement of operation.
- (d) The Commission will give notice of each filing made pursuant to paragraph (c) of this rule to all those who it believes may be interested. Any interested person may file comments regarding the projects by May 15.
- (e) The Staff shall review the filing and any comments received and shall make recommendations in accordance with the following schedule:
 - (I) For any new construction or expansion project which is scheduled to begin in the year of the filing or the next calendar year and which will result in an increase in generating capacity of ten megawatts or more, the Staff shall make its recommendations by May 31 of the year in which the filing is made.
 - (II) For any new construction or expansion project which is scheduled to begin in the second or third calendar year following the year in which the filing is made and which will result in an increase in generating capacity of ten megawatts or more, the Staff shall make its recommendations by August 31 of the year in which the filing is made.

- (f) The Commission shall issue its decision in accordance with the following schedule:
- (I) For any new construction or expansion project which is scheduled to begin in the calendar year of the filing or in the next calendar year and which will result in an increase in generating capacity of ten megawatts or more, the decision designating each project that requires a certificate of public convenience and necessity will be issued by June 30 of the year in which the filing is made.
 - (II) For any new construction or expansion project which is scheduled to begin in the second or third calendar year following the year in which the filing is made and which will result in an increase in generating capacity of ten megawatts or more, the decision designating each project that requires a certificate of public convenience and necessity will be issued by October 31 of the year in which the filing is made.

2. Option 2

21. Option 2 is based on the Consensus Proposal for Rule 3205(b)(II) from Proceeding No. 13R-1151E. Interested persons, including those who proposed the Consensus Proposal, are encouraged to demonstrate how the \$50 million threshold reasonably identifies projects not completed in the ordinary course of business.

22. Potential rule language corresponding to this second option is as follows (Option 2 in Attachment A to this NOPR):

3205. Construction or Expansion of Generating Capacity.

- (a) No utility may commence new construction or an expansion of generation facilities or projects until either the Commission notifies the utility that such facilities or projects do not require a certificate of public convenience and necessity or the Commission issues a certificate of public convenience and necessity for the facility or project. Rural electric cooperatives do not need a certificate of public convenience and necessity for new construction or an expansion of generation facilities provided that such construction or expansion is contained entirely within the cooperative's certificated area.
- (b) The following ~~shall~~ be deemed to occur in the ordinary course of business and shall not require a certificate of public convenience and necessity:
 - (I) New construction or expansion of existing generation, which will result in an increase in generating capacity of less than ten megawatts.
 - (II) A generating plant remodel, or installation of any equipment or building space, required for pollution control systems where the estimated total cost including, but not limited to, engineering procurement, construction, and interrelated work for such project is reasonably expected to be less than \$50 million.

- (c) For each new construction or expansion of existing generation that will result in an increase in generating capacity of ten megawatts or more, the electric utility shall submit to the Commission, no later than April 30 of each year, a filing for a determination of which of the utility's proposed new construction or expansions for the next three calendar years, commencing with the year following the filing, are necessary in the ordinary course of business and which require a certificate of public convenience and necessity prior to construction. For each project, the filing shall contain the following:
 - (I) The name, proposed location, and function or purpose of the project.
 - (II) The estimated cost of the project and the manner in which it is expected to be financed.
 - (III) The projected date for the start of construction, the estimated date of completion, and the estimated date of commencement of operation.
- (d) The Commission will give notice of each filing made pursuant to paragraph (c) of this rule to all those who it believes may be interested. Any interested person may file comments regarding the projects by May 15.
- (e) The Staff shall review the filing and any comments received and shall make recommendations in accordance with the following schedule:
 - (I) For any new construction or expansion project which is scheduled to begin in the year of the filing or the next calendar year and which will result in an increase in generating capacity of ten megawatts or more, the Staff shall make its recommendations by May 31 of the year in which the filing is made.
 - (II) For any new construction or expansion project which is scheduled to begin in the second or third calendar year following the year in which the filing is made and which will result in an increase in generating capacity of ten megawatts or more, the Staff shall make its recommendations by August 31 of the year in which the filing is made.
- (f) The Commission shall issue its decision in accordance with the following schedule:
 - (I) For any new construction or expansion project which is scheduled to begin in the calendar year of the filing or in the next calendar year and which will result in an increase in generating capacity of ten megawatts or more, the decision designating each project that requires a certificate of public convenience and necessity will be issued by June 30 of the year in which the filing is made.
 - (II) For any new construction or expansion project which is scheduled to begin in the second or third calendar year following the year in which the filing is made and which will result in an increase in generating capacity of ten megawatts or more, the decision designating each project that requires a certificate of public convenience and necessity will be issued by October 31 of the year in which the filing is made.

3. Option 3

23. Option 3 requires utilities to include pollution controls and fuel conversion projects in their annual filings made under Rule 3205(c). The Commission then would

determine, on a case-by-case basis, whether the projects would be completed in the ordinary course of business or whether they would require a CPCN prior to construction. Potential rule language corresponding to this third option is as follows (Option 3 in Attachment A to this NOPR):

3205. Construction or Expansion of Generating Capacity.

- (a) No utility may commence new construction or an expansion of generation facilities, pollution control or projects, or fuel conversion of existing coal-fired facilities to natural gas until either the Commission notifies the utility that such facilities or projects do not require a certificate of public convenience and necessity or the Commission issues a certificate of public convenience and necessity for the facility or project. Rural electric cooperatives do not need a certificate of public convenience and necessity for new construction or an expansion of generation facilities provided that such construction or expansion is contained entirely within the cooperative's certificated area.
- (b) New construction or expansion of existing generation, which will result in an increase in generating capacity of less than ten megawatts~~The following~~ shall be deemed to occur in the ordinary course of business and shall not require a certificate of public convenience and necessity:
 - ~~(I) New construction or expansion of existing generation, which will result in an increase in generating capacity of less than ten megawatts.~~
 - ~~(II) A generating plant remodel, or installation of any equipment or building space, required for pollution control systems.~~
- (c) For each new construction or expansion of existing generation that will result in an increase in generating capacity of ten megawatts or more, for each pollution control project, and for each fuel conversion upgrade and conversion of an existing coal-fired plant to a natural gas plant, the electric utility shall submit to the Commission, no later than April 30 of each year, a filing for a determination of which of the utility's proposed ~~new construction or expansions~~ projects for the next three calendar years, commencing with the year following the filing, are necessary in the ordinary course of business and which require a certificate of public convenience and necessity prior to construction. For each project, the filing shall contain the following:
 - (I) The name, proposed location, and function or purpose of the project.
 - (II) The estimated cost of the project and the manner in which it is expected to be financed.
 - (III) The projected date for the start of construction, the estimated date of completion, and the estimated date of commencement of operation.
- (d) The Commission will give notice of each filing made pursuant to paragraph (c) of this rule to all those who it believes may be interested. Any interested person may file comments regarding the projects by May 15.
- (e) The Staff shall review the filing and any comments received and shall make recommendations in accordance with the following schedule:

- (I) For any ~~new construction or expansion~~ project which is scheduled to begin in the year of the filing or the next calendar year ~~and which will result in an increase in generating capacity of ten megawatts or more~~, the Staff shall make its recommendations by May 31 of the year in which the filing is made.
 - (II) For any ~~new construction or expansion~~ project which is scheduled to begin in the second or third calendar year following the year in which the filing is made ~~and which will result in an increase in generating capacity of ten megawatts or more~~, the Staff shall make its recommendations by August 31 of the year in which the filing is made.
- (f) The Commission shall issue its decision in accordance with the following schedule:
- (I) For any ~~new construction or expansion~~ project which is scheduled to begin in the calendar year of the filing or in the next calendar year ~~and which will result in an increase in generating capacity of ten megawatts or more~~, the decision designating each project that requires a certificate of public convenience and necessity will be issued by June 30 of the year in which the filing is made.
 - (II) For any ~~new construction or expansion~~ project which is scheduled to begin in the second or third calendar year following the year in which the filing is made ~~and which will result in an increase in generating capacity of ten megawatts or more~~, the decision designating each project that requires a certificate of public convenience and necessity will be issued by October 31 of the year in which the filing is made.

4. Option 4

24. Option 4 contains no changes to Rule 3205. In Proceeding No. 13R-1151E, Tri-State argued that, because the existing pollution control exemption was well established and known by the General Assembly when it enacted HB13-1292, the statute applies only to projects where CPCNs are required, and a rule change is not necessary.

F. Conclusion

25. The statutory authority for the rules proposed here is found at §§ 24-4-101, *et seq.*, 40-1-101, *et seq.*, 40-2-108, 40-3-102, 40-3-103, 40-4-101, and 40-4-108, C.R.S.

26. The proposed rules in legislative (*i.e.*, ~~strikeout~~/underline) format (Attachment A) are available through the Commission's Electronic Filings (E-Filings) system at: https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=15R-0325E.

27. This matter is referred to an Administrative Law Judge (ALJ) for the issuance of a recommended decision.

28. The ALJ will conduct a hearing on the proposed rules and related issues on August 13, 2015. Interested persons may submit written comments on the rules and present these orally at hearing, unless the ALJ deems oral presentations unnecessary.

29. The Commission encourages interested persons to submit written comments before the hearing scheduled in this matter. In the event interested persons wish to file comments before the hearing, the Commission requests that initial comments be filed no later than June 25, 2015. The Commission further requests that comments responsive to the initial comments be filed no later than July 24, 2015. The Commission prefers that comments be filed using its E-Filing System at <http://www.dora.state.co.us/pls/efi/EFI.homepage>.

II. ORDER

A. The Commission Orders That:

1. This Notice of Proposed Rulemaking, and Attachment A attached hereto, shall be filed with the Colorado Secretary of State for publication in the May 25, 2015, edition of *The Colorado Register*.

2. This matter is referred to an Administrative Law Judge for the issuance of a recommended decision.

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

DATE August 13, 2015

TIME: 9:00 a.m. until not later than 5:00 p.m.

PLACE: Commission Hearing Room
1560 Broadway, Suite 250
Denver, Colorado

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

4. Interested persons may file written comments in this matter before hearing. The Commission requests that initial pre-filed comments be submitted no later than June 25, 2015, and that any pre-filed comments responsive to the initial comments be submitted no later than July 24, 2015. The Commission will consider all submissions, whether oral or written.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 6, 2015.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners