Decision No. R15-1245

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.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MANA L. JENNINGS-FADER ADOPTING AMENDMENTS TO RULE 4 CCR 723-3-3102 AND TO RULE 4 CCR 723-3-3205

Mailed Date: November 25, 2015

TABLE OF CONTENTS

I. STATEMENT

1. On May 15, 2015, the Commission issued Decision No. C15-0456. That Decision is a Notice of Proposed Rulemaking (NOPR), commenced this Proceeding, and assigned this Proceeding to an Administrative Law Judge (ALJ).

2. In the NOPR, the Commission proposed to amend Rules 4 *Code of Colorado Regulations* (CCR) 723-3-3102(e), 723-3-3102(f), and 723-3-3205[1] [2] (proposed amendments). The proposed amendments in legislative drafting (*i.e.*, red-lined) format were appended to Decision No. C15-0456 as Attachment A. The proposed amendments as they would be published if adopted were appended to Decision No. C15-0456 as Attachment B.

[1] These Rules are found in the Rules Regulating Electric Utilities, Part 3 of 4 *Code of Colorado Regulations* 723.

[2] As discussed in Decision No. C15-0456 at ¶¶ 15-24, the Commission proposed four options with respect to amending Rule 4 CCR 723-3-3205 and invited interested persons to propose other formulations to make the Rule consistent with § 40-2-129, C.R.S.

3. In the NOPR, the Commission scheduled an August 13, 2015 public hearing on the proposed rules.

4. Notice of this rule-making Proceeding and of the August 13, 2015 rule-making hearing was published on May 25, 2015 in *The Colorado Register*.

5. On May 15, 2015 and in accordance with § 24-4-103(2.5)(a), C.R.S., the Commission submitted a draft of the proposed amendments to the Office of the Executive Director of the Department of Regulatory Agencies.

6. No one requested, pursuant to § 24-4-103(2.5)(a), C.R.S., that the Commission prepare a benefit-cost analysis of the proposed amendments. The Commission did not prepare a benefit-cost analysis of the proposed amendments.

7. No one requested, pursuant to § 24-4-103(4.5)(a), C.R.S., that the Commission issue a regulatory analysis of the proposed amendments. The Commission did not prepare a regulatory analysis of the proposed amendments.

8. In the NOPR, the Commission established a schedule for the filing of comments and replies. The filing schedule was subsequently amended.

9. Pursuant to the amended filing schedule, initial comments were to be filed not later than July 31, 2015; and response comments were to be filed not later than August 10, 2015.

10. On July 31, 2015, Joint Comments were filed by Black Hills/Colorado Electric Utility Company (Black Hills); Colorado Building and Construction Trades Council and the Rocky Mountain Environmental Labor Coalition (CBCTC/RMELC); Colorado Department of Public Health and Environment Air Pollution Control Division (CDPHE); Colorado Energy

Consumers (CEC);[3] Colorado Energy Office (CEO); Public Service Company of Colorado (PSCo); Tri-State Generation and Transmission Association, Inc. (Tri-State); and Western Resource Advocates (WRA) (collectively, the Joint Commenters). Appendix A to the Joint Comments contains consensus proposed amendments to Rule 4 CCR 723-3-3205 (Consensus Proposal). The Joint Comments are the only initial comments filed in this Proceeding.

11. On August 10, 2015, CBCTC/RMELC filed a Notice of Filing of Affidavit and the Affidavit of Howard L. Arnold (Arnold Affidavit)[4] in support of the Joint Comments.

12. On August 10, 2015, Tri-State filed Response Comments in Support of Consensus Proposal (Tri-State Response). No other response comments were filed in this Proceeding.

13. At the time and place noticed, the ALJ called the rule-making hearing to order.[5] The Joint Commenters[6] were present, were represented by legal counsel, and participated in the rule-making hearing.

14. The ALJ heard oral comments from, and asked questions of, the Participants on each proposed Rule.

15. In addition, in their oral comments, Messrs. Howard L. Arnold and Barry Ingold[7] provided factual information to assist the Commission in its consideration of the Joint Commenters' proposed Rule 4 CCR 723-3-3205(b)(II). The information they provided is discussed *infra*.

[3] In this Proceeding, eight companies and an association participated under the umbrella of CEC.

[4] This Affidavit is in the rule-making record in this Proceeding.

[5] No transcript for this rule-making hearing has been filed in this Proceeding.

[6] Unless the context indicates otherwise, reference in this Decision to the Participants is to the Joint Commenters.

[7] Neither of these individuals was placed under oath.

16. Further, in his oral comments Mr. Chris Colclasure[8] provided factual information to assist the Commission in its consideration of the Joint Commenters' proposed Rule 4 CCR 723-3-3205(b)(III). The information he provided is discussed *infra*.

17. Finally, the ALJ admitted Exhibit No. 1 into the rule-making record.

18. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this Proceeding along with a written recommended decision.

II. FINDINGS AND DISCUSSION

19. In arriving at her decision in this Proceeding, the ALJ reviewed the entire record; considered all written comments filed; considered all oral comments made during the rule-making hearing; considered the factual information provided by the Parties; and considered the language of § 40-2-129, C.R.S., as amended.

20. The ALJ's failure to address in this Decision a Party's argument is not, and should not be taken as, an indication that the ALJ did not consider the argument. If a Party's argument is not addressed in this Decision, the ALJ considered the argument and found it to be unpersuasive.

21. The ALJ's findings are blended into, and are found throughout, the following discussion.

A. Background.

22. In 2010, the General Assembly added § 40-2-129, C.R.S. That section read:

> When *evaluating electric resource acquisitions*, the commission shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities. To this end, the *commission shall require utilities to request the following information regarding "best value" employment metrics*: The availability of training programs, including training

[8] This individual was not placed under oath.

> through apprenticeship programs registered with the United States department of labor, office of apprenticeship and training; employment of Colorado workers as compared to importation of out-of-state workers; long-term career opportunities; and industry-standard wages, health care, and pension benefits. *When a utility proposes to construct new facilities, the utility shall supply similar information to the commission*.

(Emphasis supplied.)

23. To implement the statute, the Commission adopted Rules 4 CCR 723-3-3611(h) and 3616(c) in the Electric Resource Planning Rules.[9] In addition, to implement the statute, the Commission adopted Rule 4 CCR 723-3-3656(c) in the Renewable Energy Standard Rules.[10] These rules implement § 40-2-129, C.R.S., in the context of electric resource acquisitions and are not at issue in this Proceeding.

24. In 2013, the General Assembly amended § 40-2-129, C.R.S. As amended, that section now reads:

> When evaluating electric resource acquisitions and requests for a certificate of public 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 facilities, the commission shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities. To this end, the commission shall require utilities to request the following information regarding "best value" employment metrics: The availability of training programs, including training through apprenticeship programs registered with the United States department of labor, office of apprenticeship and training; employment of Colorado workers as compared to importation of out-of-state workers; long-term career opportunities; and industry-standard wages, health care, and pension benefits. When a utility proposes to construct new facilities, the utility shall supply similar information to the commission.

[9] The Commission adopted these Rules in Decision No. C10-0958, issued on August 31, 2010 in Proceeding No. 10R-214E, *In the Matter of the Proposed Revisions to the Commission's Electric Resource Planning Rules, 4 CCR 723-3600 through 3618*, at ¶¶ 42-45.

[10] The Commission adopted this Rule in Decision No. C10-0952, issued on August 30, 2010 in Proceeding No. 10R-243E, *In the Matter of the Proposed Amendments to the Rules Implementing the Renewable Energy Standard Pursuant to Statutory Changes Resulting from the Passage of House Bill 10-1001*, at ¶ 74.

(Underlining supplied.) The underlined language is the language added in 2013; the remainder of § 40-2-129, C.R.S., is identical to the statutory provision as enacted in 2010.

25. As amended, § 40-2-129, C.R.S., is clear: it applies to a request for issuance of a Certificate of Public Convenience and Necessity (CPCN) "for construction or expansion of generating facilities[.]" This includes, *but is not limited to*: (a) pollution control devices; (b) fuel conversion upgrades; and (c) conversion of existing generating coal-fired electric generating facilities to natural gas-fired electric generating facilities.

26. The purpose of the instant rule-making is to issue rules to implement § 40-2-129, C.R.S, as amended, in the context of applications for CPCNs for the expansion or construction of electric generating facilities of all types.

27. This is the second rule-making that the Commission has undertaken to accomplish this goal.

28. The first rule-making was Proceeding No. 13R-1151E, *In the Matter of the Proposed Amendments Pursuant to House Bill 13-1292 to the Rules Regulating Electric Utilities, 4 Code of Colorado Regulations 723-3*. In that Proceeding, ALJ Paul C. Gomez issued Decision No. R14-1024[11] in which he recommended adoption of an amended Rule 4 CCR 723-3-3102(e) and an amended Rule 4 CCR 723-3-3205(b)(II). Three participants in that Proceeding filed exceptions to Decision No. R14-1024.

29. The Commission denied the exceptions and, for the reasons stated in Decision No. C14-1352,[12] set aside Decision No. R14-1024 (including the proposed rule revisions), and

[11] That Decision was issued on August 25, 2014 in Proceeding No. 13R-1151E.

[12] That Decision was issued on November 12, 2014 in Proceeding No. 13R-1151E.

closed that rule-making Proceeding. The rule-making in Proceeding No. 13R-1151E was terminated on November 12, 2014.

30. The Commission commenced the instant rule-making Proceeding on May 15, 2015. In doing so, the Commission stated:

> The primary purpose of this rulemaking is to examine whether § 40-2-129, C.R.S., requires modifications to Rule [4 CCR 723-3-3205(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.
>
> We also invite comments 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.

Decision No. C15-0456 at ¶¶ 11-12.

B. Legal Principles, Considerations, and Commission Guidance.

31. Rule-making is a quasi-legislative function. Rule-makings encompass a range of administrative agency determinations: at one end of the continuum are regulations based principally on policy considerations, and at the other end of the continuum are regulations the need for which, or the language of which, turns upon proof of discrete facts. *Citizens for Free Enterprise v. Department of Revenue*, 649 P.2d 1054 (Colo. 1982). In this rule-making, proposed Rule 4 CCR 723-3-3205(b)(II) falls toward the fact-based end of the continuum; the remaining proposed Rules fall toward the policy end of the continuum.

32. In this Proceeding, the Participants proffered consensus language for proposed Rules 4 CCR 723-3-3205(a), 3205(b)(II), and 3205(b)(III). The ALJ recognizes that the Commission encourages participants and parties to reach agreement (by stipulation[13] or by

[13] Rule 4 CCR 723-1-1407 pertains to stipulations. This Rule is found in the Rules of Practice and Procedure, Part 1 of 4 *Code of Colorado Regulations* 723.

settlement agreement[14]) with respect to facts or matters of substance or procedure that are at issue in a proceeding.

33. The ALJ also recognizes that the proposed Rules in this Proceeding are matters of public interest. The Commission has an independent duty to determine matters that are within the public interest. *Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984). As a result, the Commission is not bound by the Participants' proposals. The Commission may do what the Commission deems necessary to assure that the final result is just, is reasonable, and is in the public interest *provided* the record supports the result *and provided* the reasons for the choices made (*e.g.*, policy decisions) are stated.

34. Finally, when it terminated Proceeding No. 13R-1151E, the Commission provided this guidance concerning the reasons it set Decision No. R14-1024 aside and decided to commence another rule-making proceeding:

> We decline to make findings specific to which pollution control projects do or do not require CPCNs without an adequate record. We agree with the ALJ that the record in this proceeding does not support adoption of the $50 million threshold suggested in the [2014] Consensus Proposal. To the extent exceptions request the Commission adopt the [2014] Consensus Proposal, we deny those exceptions. We also agree with Public Service and Tri-State that the rule revisions proposed by the ALJ are not supported in the record and we set aside the Recommended Decision, including the proposed rule revisions.[Note 15] Similarly, alternative proposals suggested on exceptions, including that of Tri-State, are not sufficiently supported and will not be adopted by this Decision.
>
> Both Tri-State and Public Service request the Commission maintain the current [Rule 4 CCR 723-3-3205(b)(II)], and declare that the exemption for pollution control projects is consistent with § 40-2-129, C.R.S. Section 40-5-101(1)(a)(III), C.R.S., provides that a utility need not obtain a CPCN if the extension of any facility, plant, or a utility's overall system is "necessary in the ordinary course of business."[Note 16] Because the record fails to indicate the circumstances under which a pollution control project would *not* be in the ordinary course of business pursuant to § 40-5-101(1)(a)(III), C.R.S., at this time

[14] Rule 4 CCR 723-1-1408 pertains to settlement agreements.

> we do not enter a determination of whether the statute requires a revision to [Rule 4 CCR 723-3-3205(b)(II)].
>
> We agree with Labor Organizations that, pursuant to § 40-2-129, C.R.S., the Commission shall consider best value employment metrics *when* a CPCN is required. However, § 40-2-129, C.R.S., does not eliminate the "ordinary course of business" exemption for pollution control projects. As Tri-State claims in its exceptions, pollution control projects are required as part of approved state or federal environmental compliance plans, and our rules should account for these compliance plans and avoid any delays in implementation.
>
> We find that a new rulemaking proceeding is required to remedy the insufficiencies in the record and [to] determine which pollution control projects are in the "ordinary course of business," and which are not. While it is apparent that many pollution control projects are in the ordinary course of business, it is unclear when a project would not be in the ordinary course of business based on the record in this proceeding. We maintain the current [Rule 4 CCR 723-3-3205(b)(II)] until the Commission has a record that supports revision to the rule. The Commission shall consider the positions advanced in this proceeding by the participants and the ALJ to propose and issue a new NOPR.
>
> Note 15 states: We recognize Tri-State did not request and pay for transcripts, as required by [Rule 4 CCR 723-1-1505(b)]; however, upon independent review of the record, and pursuant to § 40-6-109(2), C.R.S., we find that the specific revisions proposed by the ALJ are not supported by participant filings, nor is the proposal explained, with the exception of the statement in the Recommended Decision, ¶ 36, that the arbitrary and capricious concern is alleviated "by not including a specific dollar figure." While this statement highlights his reasoning for why the $50 million threshold is rejected, it does not support the specific alternatives proposed in the Recommended Decision.
>
> Note 16 states: Section 40-5-101(1)(a)(III), C.R.S., states that a corporation is not required to secure a CPCN for "[a]n extension within or to territory already served by the corporation, as is necessary in the ordinary course of its business."

Decision No. R14-1024 at ¶¶ 17-20 (italics in original).

35. In making her rulings in this Proceeding, the ALJ applied these principles; took these considerations into account; and took the Commission's guidance into account.

C. Meaning of "on a Qualitative Basis" as used in § 40-2-129, C.R.S.

36. Section 40-2-129, C.R.S., requires that, when evaluating an electric utility's CPCN for construction or expansion of generation facilities, "the Commission *shall consider, on a qualitative basis*, factors that affect employment and long-term economic viability of Colorado communities." (Emphasis supplied.) The phrase "on a qualitative basis" is not defined.

37. During the rule-making hearing, Tri-State stated its opinion that the phrase "on a qualitative basis" differentiates qualitative information, which is information that is broadly focused and policy-oriented, from quantitative information, which is information that is more narrowly focused and number-oriented. Tri-State opined that examining or considering something (here, best value employment metrics) "on a qualitative basis" allows the Commission to consider less definitive information, to the extent that information is available. In Tri-State's opinion, the phrase "on a qualitative basis" is a strong indication that the General Assembly views both employment and the long-term economic viability of communities as important issues and that the Commission should consider, to the extent it is available, best value employment metrics information when evaluating whether to grant a CPCN. The other Participants generally agreed with Tri-State on this point.

38. The ALJ agrees with Tri-State. In addition, the ALJ reads the phrase "on a qualitative basis" as an indication that the Commission need not, and should not, delay its evaluation of a CPCN application pending receipt of final or firm best value employment metrics information. As is the case with other types of information that may not be final or firm when an application is filed (*e.g.*, project costs), the Commission may, and should, conduct its evaluation of the application for authority to construct and to operate a facility or extension of an existing facility using the best available information.

39. The ALJ adopts this discussion of the meaning and purpose of the phrase "on a qualitative basis" in § 40-2-129, C.R.S., in arriving at the rulings in this Decision.

D. Proposed New Rule 3102(e).

40. Rule 4 CCR 723-3-3102 pertains to CPCNs. Rule 4 CCR 723-3-3102(a) requires a utility to file an application for authority to construct and to operate a facility or extension of an existing facility, other than a facility or facility extension that "is in the ordinary course of business." Rule 4 CCR 723-3-3102(b) specifies the content of an application for a CPCN to construct and to operate a facility or an extension of a facility. Rules 4 CCR 723-3-3102(c) and 3102(d) pertain to CPCNs for transmission facilities.

41. At present, there is no Rule 4 CCR 723-3-3102(e).

42. In Decision No. C15-0456, the Commission proposed in the instant rule-making

> to adopt Rule [4 CCR 723-3-3102(e)], which is ... recommended for promulgation by the ALJ in Proceeding No. 13R-1151E. We agree with [Decision No. R14-1024] 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 [4 CCR 723-3-3102(f)], which clarifies procedures when information about best value employment metrics is not available at the time a CPCN application is filed.

Id. at ¶ 14 (emphasis supplied). This discussion makes clear that proposed Rules 4 CCR 723-3-3102(e) and 3102(f) are to be read together.

43. As set out in Attachment A to the NOPR, the Commission proposed this language, shown in legislative drafting format, for Rule 4 CCR 723-3-3102(e):

> (e) An application for a certificate of public convenience and necessity for construction or expansion of generation facilities, including but not limited to pollution controls or fuel conversion upgrades and conversion of existing coal-fired plants to natural gas plants, must contain the following information regarding "best value" employment metrics:

(I) the availability of training programs, including training through apprenticeship programs registered with the United States Department of Labor, Office of Apprenticeship and Training;

(II) employment of Colorado workers as compared to importation of out-of-state workers;

(III) long-term career opportunities; and

(IV) industry-standard wages, health care, and pension benefits.

Decision No. C15-0456 at Attachment A at 2-3.

1. Positions of Participants.

44. The Joint Commenters support the addition to Rule 4 CCR 723-3-3102(e).

45. No one filed a comment or made a comment opposing the addition of Rule 4 CCR 723-3-3102(e).

2. Discussion and Conclusion.

46. For the following reasons, the ALJ will modify the proposed new Rule 4 CCR 723-3-3102(e) and will adopt the modified new Rule.

47. Section 40-2-129, C.R.S., requires the Commission, on a qualitative basis, to consider best value employment metrics when evaluating an electric utility's resource acquisitions. Rules 4 CCR 723-3-3611(h) and 3616(c) in the Electric Resource Planning Rules and Rule 4 CCR 723-3-3656(c) in the Renewable Energy Standard Rules implement that requirement.

48. Section 40-2-129, C.R.S., also requires the Commission, on a qualitative basis, to consider best value employment metrics when evaluating an electric utility's application for a CPCN for construction or expansion of generation facilities. Rule 4 CCR 723-3-3102(e) is consistent with Rules 4 CCR 723-3-3611(h), 723-3-3616(c), and 723-3-3656(c).

This is appropriate as the four Rules implement the same statutory language addressing consideration of the best value employment metrics.

49. In addition, Rule 4 CCR 723-3-3102(e) serves the important purpose of providing transparency with respect to best value employment metrics pertaining to the project[15] that is the subject of the CPCN application. These data are important to the Commission, to interested persons, and to the utility's ratepayers because the data may help to inform examination of the overall cost of the project that is the subject of the CPCN application. This examination of the costs may occur in the application proceeding, in a proceeding in which the utility seeks cost recovery, or in both types of proceedings.

50. Finally, as proposed, Rule 4 CCR 723-3-3102(e) does not state that, to the extent some or all of the information is available or can be estimated, the electric utility must provide that best value employment metrics information when the application is filed. At the rule-making hearing, several Participants suggested that this obligation should be included in the Rule. The ALJ agrees and will modify the proposed language to rectify the omission. A clarifying modification will assure that the Commission has an opportunity to consider, on a qualitative basis, the available best value employment metrics information when it considers a CPCN to which § 40-2-129, C.R.S., applies.

51. The decision to modify Rule 4 CCR 723-3-3102(e) principally rests on these reasons. First, the statute and, therefore, the Rule must be written to encompass all situations. Second, there may be instances in which the electric utility itself plans to undertake the project that is the subject of the CPCN application or already has taken steps to procure a contractor for

[15] Unless the context indicates otherwise, in this Decision the terms project and proposed project refer to the construction or expansion of generation facilities.

the project that is the subject of the CPCN application. In that event, the utility may have some or all of the best value employment metrics information available at the time the application is filed. The utility should provide the available information in the CPCN application so that the Commission can consider that information as it evaluates the application. Third, this is the same concept that underpins Rule 4 CCR 723-3-3611(h). Fourth, during the rule-making hearing, the Participants stated that they envision a utility providing the best value employment metrics information to the Commission in a two-step process: (a) the utility provides the information available at the time the application is filed; and (b) the utility supplements that information after contracts are let and final information is available. The modification makes this two-step process clearer. Fifth, the modification will reduce confusion with respect to the point in time at which an electric utility must make best value employment metrics information known to the Commission.

52. The ALJ will modify Rule 4 CCR 723-3-3102(e) to read (the ALJ's modification is shown in double underling):

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

53. The ALJ finds that proposed Rule 4 CCR 723-3-3102(e) should be modified as set out above. The ALJ finds that Rule 4 CCR 723-3-3102(e), as modified and as set out in the Attachments to this Decision, should be adopted.

E. Proposed New Rule 3102(f).

54. Rule 4 CCR 723-3-3102 pertains to CPCNs. Rule 4 CCR 723-3-3102(a) requires a utility to file an application for authority to construct and to operate a facility or extension of an existing facility, other than a facility or facility extension that "is in the ordinary course of business." Rule 4 CCR 723-3-3102(b) specifies the content of an application for a CPCN to construct and to operate a facility or an extension of a facility. Rules 4 CCR 723-3-3102(c) and 3102(d) pertain to CPCNs for transmission facilities.

55. At present, there is no Rule 4 CCR 723-3-3102(f).

56. In Decision No. C15-0456, the Commission proposed in this rule-making

> to adopt Rule [4 CCR 723-3-3102(e)], which is ... recommended for promulgation by the ALJ in Proceeding No. 13R-1151E. We agree with [Decision No. R14-1024] 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 [4 CCR 723-3-3102(f)], which clarifies procedures when information about best value employment metrics is not available at the time a CPCN application is filed.

Id. at ¶ 14 (emphasis supplied). This discussion makes clear that proposed Rules 4 CCR 723-3-3102(e) and 3102(f) are to be read together.

57. As set out in Attachment A to the NOPR, the Commission proposed this language, shown in legislative drafting format, for Rule 4 CCR 723-3-3102(f):

> (f) If information regarding best employment value metrics is not known at the time an application for a certificate of public convenience and necessity is filed because an applicant has not yet entered into contracts for the construction of a proposed project, the applicant shall state that it will obtain information regarding best value employment metrics from potential contractors through

> whatever means it uses to select contractors for project construction. In such case, within 45 days after the contract is awarded, the applicant will file a status report with the information gathered from selected contractors regarding how the contractors meet best value employment metrics. Any party may file comments on said status report within 15 days of the filing of the status report with the Commission. The utility may file any information regarding a bidder's wages on a highly confidential basis.

Decision No. C15-0456 at Attachment A at 3.

1. Positions of Participants.

58. The Joint Commenters support the addition to Rule 4 CCR 723-3-3102(f).

59. No one filed a comment or made a comment opposing the addition of Rule 4 CCR 723-3-3102(f).

2. Discussion and Conclusion.

60. For the following reasons, the ALJ will modify the proposed new Rule 4 CCR 723-3-3102(f) and will adopt the modified new Rule.

61. Section 40-2-129, C.R.S., requires the Commission, on a qualitative basis, to consider best value employment metrics when evaluating an electric utility's resource acquisitions. Rules 4 CCR 723-3-3611(h) and 3616(c) in the Electric Resource Planning Rules and Rule 4 CCR 723-3-3656(c) in the Renewable Energy Standard Rules implement that requirement.

62. Section 40-2-129, C.R.S., also requires the Commission, on a qualitative basis, to consider best value employment metrics when evaluating an electric utility's application for a CPCN for construction or expansion of generation facilities. Rule 4 CCR 723-3-3102(f) is consistent with Rules 4 CCR 723-3-3611(h), 723-3-3616(c), and 723-3-3656(c). This is appropriate as the four Rules implement the same statutory language addressing consideration of the best value employment metrics.

63. In addition, § 40-2-129, C.R.S., provides: "the commission shall require utilities to request the following [listed] information regarding 'best value' employment metrics[.]"[16] Rule 4 CCR 723-3-3102(f) implements this statutory provision by requiring a utility applying for a CPCN for generating facilities or for expansion of generating facilities to obtain best value employment information from persons submitting bids on the project that is the subject of the CPCN application.

64. Moreover, Rule 4 CCR 723-3-3102(f) serves the important purpose of providing transparency with respect to best value employment metrics pertaining to the project that is the subject of the CPCN application. These data are important to the Commission, to interested persons, and to the utility's ratepayers because the data may help to inform examination of the overall cost of the project that is the subject of the CPCN application. This examination of the costs may occur in the application proceeding, in a proceeding in which the utility seeks cost recovery, or in both types of proceedings.

65. Further, § 40-2-129, C.R.S., creates a timing issue when a utility plans to use contractors for construction of a project. The timing issue arises thusly: (a) because it plans to use contractors, the utility does not have final or firm best value employment metrics information available for the proposed project; (b) contractors are the best source of the best value employment metrics information for the proposed project; (c) contractors are reluctant to bid for, and to provide best value employment metrics information about, the proposed project unless and until there is assurance that the project will go forward; (d) a CPCN provides a level of certainty that the project will go forward; (e) best value employment metrics information is a factor that the Commission must consider, on a qualitative basis, when evaluating a CPCN

[16] Rule 4 CCR 723-3-3102(e) contains the information listed in § 40-2-129, C.R.S.

application to which § 40-2-129, C.R.S., applies; and (f) for the reasons discussed, at the time it files a CPCN application, the utility does not have final or firm best value employment metrics information for the proposed project. As the Commission observed in Decision No. R15-0456 at ¶ 14, Rule 4 CCR 723-3-3102(f) resolves the dilemma created by this Catch-22 situation.

66. In conjunction with Rule 4 CCR 723-3-3102(e), Rule 4 CCR 723-3-3102(f) permits the evaluation of the CPCN application to proceed based on the available information. Rule 4 CCR 723-3-3102(f) allows the utility to file a status report that contains the final or firm best value employment metrics information about the project. Thus, after it issues a CPCN for the project, the Commission receives final or firm best value employment metrics information based on the contracts that were let as a result of the CPCN. This permits the Commission to monitor the project's actual best value employment metrics information and to have that information available for later proceedings about the project (for example, a proceeding to recover the project's costs).

67. Finally, Rule 4 CCR 723-3-3102(f) allows a party to file comments on the utility's status report. The comments are informational filings that, absent action by the Commission,[17] neither delay nor reopen the CPCN application proceeding in which they are filed. There is no automatic reopening of the CPCN application proceeding because, at the point in time that the status report is filed, the utility has let contracts and taken other actions in reliance on the CPCN awarded for the project. Allowing an automatic reopening of the CPCN application proceeding would create uncertainty for the utility and its contractors.

[17] The Commission has the right to reopen a proceeding. Section 40-6-112, C.R.S.

68. As discussed during the rule-making hearing, the Participants view the opportunity to file comments on the status report as important. Among other things, the comments inform the Commission, the utility, and interested persons of the filing party's views on the sufficiency of the best value employment metrics information filed by the utility. For example, the commenting party can point out where, in the filing party's view, the status report was deficient. This provides an opportunity for the utility to obtain (and to file) better or more complete information in the next CPCN application. The ALJ agrees that comments on the status report may provide useful information and should be permitted.

69. As proposed, Rule 4 CCR 723-3-3102(f) leaves open the effect that filing comments may have on the application proceeding. The ALJ will modify the proposed language to address this issue and to make the Rules clearer.

70. The ALJ will modify Rule 4 CCR 723-3-3102(f) to read (the ALJ's modification is shown in double underling):

> (f) If the information regarding best employment value metrics specified in paragraph 3102(e) is not known at the time an application for a certificate of public convenience and necessity is filed because the applicant has not yet entered into contracts for construction or expansion of the generation facilities for which a CPCN is sought (proposed project), then in the application the applicant shall state that, for the proposed project, it will obtain the information regarding best value employment metrics specified in paragraph 3102(e) from potential contractors through whatever means the applicant uses to select contractors for project construction. If one or more contracts are awarded for the proposed project, then, within 45 days after the last contract is awarded, the applicant shall file in the application proceeding a status report that contains for each contract the information obtained from the contractor with which the utility has entered into a contract (selected contractor) regarding how the selected contractor meets best value employment metrics. Any party may file in the application proceeding comments on this status report within 15 days of the filing of the status report with the Commission. The status report and comments are informational and, absent a Commission order, do not reopen the application proceeding. The utility may file any information regarding a selected contractor's wages on a highly confidential basis.

71. For the reasons discussed and based on the entire record in this Proceeding, the ALJ finds that proposed Rule 4 CCR 723-3-3102(f) should be modified as set out above. Based on the entire record in this Proceeding, the ALJ finds that Rule 4 CCR 723-3-3102(f), as modified and as set out in the Attachments to this Decision, should be adopted.

F. Proposed Amended Rule 3205(a).

72. Rule 4 CCR 723-3-3205 pertains to construction or expansion of generating capacity. Rule 4 CCR 723-3-3205(a) prohibits a utility from commencing "new construction or an expansion of generating facilities or projects" without either a CPCN or a Commission notification that no CPCN is required.

73. As set out in Attachment A to the NOPR, the Commission proposed no change to Rule 4 CCR 723-3-3205(a).

74. The Joint Commenters propose this amendment, shown in legislative drafting format, to Rule 4 CCR 723-3-3205(a):

> (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. <u>The certificate of public convenience and necessity requirement under subparagraph (b)(II) of this rule applies only to jurisdictional electric utilities subject to resource regulation under Rule 3603 and rate regulation under either Rule 3108 or Rule 3109.</u>

Joint Comments at Appendix A at 1.

75. For the reasons discussed below, the ALJ will not adopt this proposal.

1. Positions of Participants.

76. The Joint Commenters propose the amendment to Rule 4 CCR 723-3-3205(a) for these reasons: (a) § 40-2-129, C.R.S., "did not modify or otherwise affect the Commission's existing jurisdiction over electric utilities, including generation and transmission cooperatives" (Joint Comments at 4); (b) at present, "the Commission does not ... exercise jurisdiction over the rates or resources" of generation and transmission cooperatives (*id.*); and (c) Rule 4 CCR 723-3-3205(a) should be amended to make it clear that "the CPCN requirements of [Rule 4 CCR 723-3-3205(b)(II)] apply only to jurisdictional electric utilities subject to resource regulation under [Rule 4 CCR 723-3-3603] and rate regulation under either [Rule 4 CCR 723-3-3108] or [Rule 4 CCR 723-3-3109]" (*id.*).

77. Rule 4 CCR 723-3-3205(b)(II) addresses one of the circumstances in which a utility does not need a CPCN: the proposed "generating plant remodel, or installation of any equipment or building space, required for pollution control systems" is deemed to be in the ordinary course of business. The CPCN requirements referenced by the Joint Commenters are found in the proposed amendment to Rule 4 CCR 723-3-3205(b)(II), which deems a proposed project to be in the ordinary course of business if "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" (Decision No. C15-0456 at Attachment A at 5).

78. As articulated during the rule-making hearing, by proposing amended Rule 4 CCR 723-3-3205(a), the Joint Commenters intend to exempt only generation and transmission cooperatives (*i.e.*, Tri-State) from the requirement to obtain a CPCN for pollution control investments in existing generating facilities. In proposing amended Rule 4 CCR 723-3-3205(a), the Joint Commenters intent to avoid the question of whether generation and transmission

cooperatives (*i.e.*, Tri-State) are subject to § 40-5-101, C.R.S., requirement to obtain a CPCN for generating facilities.

79. In its Response at 2-9, Tri-State supports the proposed amendment to Rule 4 CCR 723-3-3205(a) that would exempt Tri-State, as a generation and transmission cooperative, from Rule 4 CCR 723-3-3201(b)(II) for so long as Tri-State meets the two requirements of the exemption contained in Rule 4 CCR 723-3-3205(a).

80. Tri-State offers this argument in support of the proposed amendment:[18] Section 40-5-101, C.R.S., requires a public utility to obtain a CPCN for construction of new facilities and for the construction of an extension of existing facilities. The CPCN requirement in § 40-5-101, C.R.S., advances four important monopoly regulation-related functions, which are: (a) ensuring "that projects are built only when there is a public need" (Tri-State Response at 5); (b) preventing "the unnecessary duplication of facilities" (*id*.); (c) ensuring "that facilities are not built in such a way as to interfere with other utilities" (*id*.); and (d) acting as "a check on the incentive that utilities may otherwise have to make investments that do not provide good value to ratepayers" (*id*.). A generation and transmission cooperative does not need a CPCN for a pollution control project because, with respect to a pollution control project, to the functions served by a CPCN are met by other means: (a) the public need function is fulfilled because "the utility is proposing to undertake the pollution control project in compliance with a legitimate environmental regulatory obligation" (Tri-State Response at 6); (b) the prevention of duplication of facilities function is fulfilled because pollution control projects that are mandated by environmental regulators "are implemented on a source-by-source basis[] and do not create a risk

[18] In restating Tri-State's argument in this paragraph, the ALJ does not endorse, and does not intend to endorse, any portion of the argument. The ALJ's ruling on, and supporting rationale for the ruling on, the Joint Commenters' proposed amendment to Rule 4 CCR 723-3-3205(a) are set out *infra*.

of duplicating the facilities of another utility" (*id*.); (c) the prevention of interference with the facilities of another utility function is fulfilled because "pollution control projects affect only the plant at which they are installed and do not create a risk of interference with other utilities' facilities" (*id*. at 7); and (d) the protecting the ratepayers and assuring they are receiving good value function is fulfilled because, as a "not-for-profit, cost-based, member-owned [generation and transmission] cooperative, Tri-State has an inherent incentive to comply with environmental regulatory obligations in the most cost-effective way possible" (*id*.). Finally, as amended, § 40-2-129, C.R.S., does not "alter the Commission's jurisdiction but only specifie[s] what information that Commission must consider *when it exercises that jurisdiction*." Tri-State Response at 9 (emphasis supplied). The proposed amendment to Rule 4 CCR 723-3-3205(a) is consistent with the statute because, by promulgating that amended Rule, the Commission creates a circumstance in which § 40-2-129, C.R.S., does not apply because the generation and transmission cooperative is exempted from filing a CPCN application.

81. In sum, Tri-State asserts that because Tri-State is "a member-owned and member-governed cooperative" (Tri-State Response at 7), the Commission does not apply the same level of regulatory oversight to Tri-State that the Commission applies to investor-owned utilities. More specifically, "the Commission does not currently exercise jurisdiction over the rates or resources of Colorado generation and transmission cooperatives." Tri-State Response at 8. For the reasons outlined above, Tri-State concludes that, until the Commission changes the *status quo*, no legal or persuasive policy reason exists to subject Tri-State to the requirement that it obtain a CPCN for a pollution control system project in accordance with proposed Rule 4 CCR 723-3-3205(b)(II).

82. No one filed a comment or made a comment opposing the Joint Commenters' amendment of Rule 4 CCR 723-3-3205(a).

2. Discussion and Conclusion.

83. For the following reasons, the ALJ will not adopt the Joint Commenters' proposed amendment to Rule 4 CCR 723-3-3205(a).

84. At present, Rule 4 CCR 723-3-3205(b)(II) contains the Commission determination that any "generating plant remodel, or installation of any equipment or building space, required for pollution control systems" is deemed to be in the ordinary course of business and, thus, that no CPCN is required. The proposed amendment to Rule 4 CCR 723-3-3205(b)(II) eliminates that determination for those types of projects if the project's "estimated total cost ... is reasonably expected to be" $ 50 million or more.

85. This change led to the Joint Commenters' concern that, if the proposed amendment of Rule 4 CCR 723-3-3205(b)(II) is adopted, a generation and transmission cooperative (*e.g.,* Tri-State) will need to seek a CPCN for a project that is a "generating plant remodel, or installation of any equipment or building space, required for pollution control systems" where the project's estimated total costs are $ 50 million or greater. To preserve the *status quo* with respect to when a generation and transmission cooperative must file an application for a CPCN, the Joint Commenters proposed to amend Rule 4 CCR 723-3-3205(a) to exempt a generation and transmission cooperative from complying with proposed amended

Rule 4 CCR 723-3-3205(b)(II) for so long as that cooperative meets the two requirements of the exemption contained in Rule 4 CCR 723-3-3205(a).[19]

86. The ALJ is not persuaded by the Joint Commenters' proffered reasons in support of the proposed amendment to Rule 4 CCR 723-3-3205(a). Based on the record in this Proceeding, the ALJ will not adopt the Joint Commenters' proposed amendment Rule 4 CCR 723-3-3205(a).

87. First, § 40-2-129, C.R.S., applies to all applications for CPCNs for generating facilities and mandates that, when it evaluates such a CPCN application, the Commission "consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities." In this regard, Tri-State states:

> While, as a practical matter, Tri-State believes that pollution control projects are part of the "ordinary course of business" for all electric utilities in the country as they respond to comprehensive federal and state environmental regulations, Tri-State also recognizes that this reality should be balanced against the legislature's intent, as expressed in [§ 40-2-129, C.R.S.], that the Commission consider [Best Value Employment Metrics] when approving certain projects.

Tri-State Response at 9. In light of the acknowledged legislative intent and absent strong policy reasons, the Commission should not grant an exemption from the statutory mandate for a subset of electric utilities (in this case, generation and transmission cooperatives).

88. Neither the Joint Commenters nor Tri-State provided strong policy reasons for the proposed exemption contained in Rule 4 CCR 723-3-3205(a). None of the arguments supporting the proposed exemption persuasively addresses why it is inappropriate, inadvisable, or bad policy for the Commission to "consider, on a qualitative basis," the two statutory factors when

[19] The two requirements are: (a) the generation and transmission cooperative is not subject to Commission resource regulation pursuant to Rule 4 CCR 723-3-3603; *and* (b) the generation and transmission cooperative is not subject to Commission rate regulation pursuant to either Rule 4 CCR 723-3-3108 or Rule 4 CCR 723-3-3109. Both requirements must be met for the exemption not to apply.

evaluating an application for a CPCN filed by a generation and transmission cooperative or, more particularly, when evaluating an application for a CPCN for a pollution control project filed by a generation and transmission cooperative.

89. Second, when it amended § 40-2-129, C.R.S., the General Assembly mandated that the Commission consider the two statutory factors when evaluating a "request[] for a [CPCN] for construction or expansion of generating facilities, including ... pollution controls[.]" In its Response at 9, Tri-State acknowledges "the legislature's intent, as expressed in [§ 40-2-129, C.R.S.], that the Commission consider [Best Value Employment Metrics] when approving certain projects."

90. When General Assembly amended § 40-2-129, C.R.S., it did so "with full knowledge of all existing law dealing with the same subject." *In Re Questions Submitted by the United States District Court for the District of Colorado*, 179 Colo. 270, 275, 499 P.2d 1169, 275 (1972) (internal quotations and citation omitted). Thus, the General Assembly is presumed to have been aware of the Commission Rules in effect in 2013, including those that address CPCNs. The Rules in effect in 2013 include Rule 4 CCR 723-3-3000(c), which provided in 2013 and provides today, that the following Rules apply to transmission and generation cooperatives: (a) Rule 4 CCR 723-3-3102, which governs applications for CPCNs for facilities; (b) Rule 4 CCR 723-3-3103, which governs applications for amendments to CPCNs for facilities; (c) Rule 4 CCR 723-3-3205, which governs construction or expansion of generating facilities; and (d) Rules 4 CCR 723-3-3602, 723-3-3605, and 723-3-3614(a), which pertain to least-cost resource planning.

91. When General Assembly amended § 40-2-129, C.R.S., Rule 4 CCR 723-3-3205(b)(II) was in effect. The Rule language in 2013 was identical to the current Rule

language: "[a] generating plant remodel, or installation of any equipment or building space, required for pollution control systems" does not need a CPCN because it occurs in the ordinary course of business. The Rule grants the exemption to all electric utilities; that is, it provides the same treatment to all electric utilities. The General Assembly is presumed to have been aware of this equal treatment when it amended § 40-2-129, C.R.S., in 2013.

92. Despite its presumed knowledge of the regulatory requirement that a generation and transmission cooperative must obtain a CPCN for new generating facilities and for expansion of existing generating facilities (*see* Rules cited above), the General Assembly did not exempt transmission and generation cooperatives from § 40-2-129, C.R.S. Despite its presumed knowledge that an exemption for pollution control projects existed for all electric utilities, the General Assembly mandated that the Commission must consider specified factors when evaluating a request for a CPCN for new generating facilities and for expansion of existing generating facilities, including pollution controls.

93. Nothing in amended § 40-2-129, C.R.S., suggests that the General Assembly intended to change the Commission's policies that a generation and transmission cooperatives must obtain CPCNs for generating facilities and that the ordinary course of business exemptions apply equally to all electric utilities that must obtain CPCNs. The ALJ can discern no persuasive policy reason to exempt generation and transmission cooperatives from Rule 4 CCR 723-3-3205(b)(II), which is intended to implement § 40-2-129, C.R.S., which applies to all CPCN applications and which specifically mentions CPCN applications for pollution controls.

94. Third, the Commission requires utilities that file applications for CPCNs to provide specified information in the application. Rules 4 CCR 723-3-3002(b), 723-3-3102, 723-3-3103. In addition, the Commission often requires utilities to file reports as conditions of

granting a CPCN. Pursuant to new Rules 4 CCR 723-3-3102(e) and 723-3-3102(f) (discussed above), a utility will provide the information on the "factors that affect employment and the long-term economic viability of Colorado communities" for the Commission's consideration, "on a qualitative basis" (§ 40-2-129, C.R.S.), in the CPCN application or in compliance reports (or both). Providing this information increases, to some extent, the burden or cost of applying for a CPCN. There is no indication that the burden or cost of providing that information is greater for generation and transmission cooperatives than for investor-owned electric utilities.

95. Fourth, the practical effect of adopting the Joint Commenters' amendment is to continue -- but only for generation and transmission cooperatives -- the Rule 4 CCR 723-3-3205(b)(II) determination that a "generating plant remodel, or installation of any equipment or building space, required for pollution control systems" is deemed to be in the ordinary course of business and, thus, to require no CPCN. The record, taken as a whole, does not support this special treatment for generation and transmission cooperatives such as Tri-State.

96. For the reasons discussed and based on the entire record in this Proceeding, the ALJ finds that the Joint Commenters' proposed amendment to Rule 4 CCR 723-3-3205(a) should not be adopted.

G. Proposed Amended Rule 3205(b)(II).

97. Rule 4 CCR 723-3-3205 pertains to construction or expansion of generating capacity. Rule 4 CCR 723-3-3205(b) specifies that a CPCN is not required in two specific situations or circumstances because each is deemed to be in the ordinary course of business.

98. Rule 4 CCR 723-3-3205(b)(I) contains the first situation or circumstance: "New construction or expansion of existing generation, which will result in an increase in generating capacity of less than ten megawatts[.]" No change to this Rule is proposed in this Proceeding.

99. Rule 4 CCR 723-3-3205(b)(II) contains the second situation or circumstance: "A generating plant remodel, or installation of any equipment or building space, required for pollution control systems." This Rule is at issue in this Proceeding.

100. In Decision No. C15-0456, the Commission proposed four options for potential revisions to Rule 4 CCR 723-3-3205 but invited interested persons to suggest other revisions to implement § 40-2-129, C.R.S. The Commission's purpose was "to facilitate substantive discussions of when a pollution control project would be completed in the ordinary course of business[.]" *Id*. at ¶ 15. The Commission discusses the four options in Decision No. C15-0456 at ¶¶ 16-24; *see also* the NOPR at Attachment A at 3-7 (four options are set out).

101. The Joint Commenters used as the basis of their proposed language the Commission's Option 2.

102. As contained in Attachment A to the NOPR, the Commission proposed this language, shown in legislative drafting format, for Option 2 for Rule 4 CCR 723-3-3205(b)(II):

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

Decision No. C15-0456 at Attachment A at 5.

103. The Joint Commenters propose this language, shown in legislative drafting format,[20] to Rule 4 CCR 723-3-3205(b)(II):

[20] Double underlining indicates Joint Commenters' proposed language. Single underlining indicates the Commission's proposed language.

> (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:
>
> * * *
>
> (II) A generating plant remodel, or installation of any equipment or building space, required for pollution control systems where the estimated total cost in nominal dollars including, but not limited to, engineering, procurement, construction, and interrelated work for such project is reasonably expected to be less than $50 million. The total estimated project cost below which a project is considered to be in the ordinary course of business shall be reviewed and adjusted annually, as necessary, to account for inflation. Within fourteen days after the appropriate information is available, the executive director of the Commission shall annually determine and publish the amount of such adjustment based on the percentage change in the United States Bureau of Labor Statistics Consumer Price Index for Denver-Boulder, all items, all urban consumers, or its successor index.

Joint Comments at Appendix A at 1. Thus, the Joint Commenters agree with the proposed $ 50 million threshold (stated in nominal dollars) and propose to add an annual inflation adjustment.

104. For the reasons discussed below, the ALJ will modify and, as modified, will adopt the Joint Commenters' language for amended Rule 4 CCR 723-3-3205(b)(II).

1. Positions of Participants.

105. No one filed a comment or made a comment opposing the amendment of Rule 4 CCR 723-3-3205(b)(II).

a. Selection of Option 2 as Starting Point.

106. Under Option 2, a CPCN would be required if the project's estimated total cost does not exceed $ 50 million. The Joint Commenters recommend using Option 2 as the starting point for amending Rule 4 CCR 723-3-3205(b)(II). Option 2 is based on the Consensus Proposal for Rule 4 CCR 723-3-3205(b)(II) presented in Proceeding No. 13R-1151E. In the Joint Commenters' opinion, Option 2 best fits and meets the Commission's objective of "determin[ing] which pollution control projects are in the 'ordinary course of business,' and which are not" (Decision No. C14-1352 at ¶ 20 (stating reasons for terminating Proceeding

No. 13R-1151E and for decision to open another rule-making)). The Joint Commenters believe that using Option 2 as the starting point implements the spirit of § 40-2-129, C.R.S., and, at the same time, appropriately recognizes that smaller pollution control projects are in the ordinary course of business and, thus, do not require a CPCN.

107. Under Option 1, "a CPCN would be required for pollution control projects that either substantially reduce the availability of a plant during construction or require an extension of the useful life of the plant for depreciation or cost amortization purposes[.]" Decision No. C15-0456 at ¶ 16. The Joint Commenters do not recommend using Option 1 as the starting point for amending Rule 4 CCR 723-3-3205(b)(II). The Joint Commenters observe that "nearly all pollution control projects have the potential to substantially reduce the availability of the plant during construction," and, as a practical matter, Option 1 requires a CPCN for virtually all pollution control projects. Joint Comments at 3.

108. Under Option 3, Rule 4 CCR 723-3-3205(b)(II) would be deleted. The Joint Commenters do not recommend using Option 3 as the starting point for amending Rule 4 CCR 723-3-3205(b)(II). By removing the exemption for pollution control projects, Option 3 requires a case-by-case determination as to whether a pollution control project requires a CPCN or is in the ordinary course of business. The Joint Commenters observe that this approach: (a) increases the Commission's workload and the utilities' costs; and (b) creates uncertainty for the utilities.

109. Under Option 4, Rule 4 CCR 723-3-3205(b)(II) would not be changed. The Joint Commenters do not recommend adoption of Option 4. Some Participants view Option 4 as legally defensible and consistent with the amended § 40-2-129, C.R.S. Some Participants view retaining the present Rule 4 CCR 723-3-3205(b)(II) as contrary to the legislative intent, expressed in amended § 40-2-129, C.R.S., that the Commission consider specific information in

CPCN proceedings for pollution control projects. To reach the Consensus Proposal, the Joint Commenters agreed not to recommend adoption of Option 4.

110. All Joint Commenters agree that nothing in § 40-2-129, C.R.S., precludes amending Rule 4 CCR 723-3-3205(b)(II) if the Commission concludes that, as a matter of policy, an amendment is warranted.

b. $ 50 Million Threshold.

111. Option 2 states that a pollution control project is in the ordinary course of business, and thus does not require a CPCN, if "the estimated total cost [of the project] ... is reasonably expected to be *less than* $50 million." Decision No. C15-0456 at ¶ 22 (underlining omitted and italics supplied). This language sets the threshold for the need to obtain a CPCN for a pollution control project at $ 50 million.

112. The Joint Commenters support the proposed $50 million threshold.

113. First, the Joint Commenters reviewed 10 years of data about pollution control projects implemented by electric utilities in Colorado and outside Colorado. Based on their review of that information, the Joint Commenters observed that, on average, the pollution control projects the cost of which was at least $ 50 million were the projects that had the greater potential to "affect employment and the long-term economic viability of Colorado communities[,]" which are the factors that § 40-2-129, C.R.S., instructs the Commission to consider when evaluating a request for a CPCN. This observation is based on the number of workers needed, and the number of man-hours required, to complete the projects.

114. Second, the Joint Commenters recognize that filing an application for a CPCN for a pollution control project, including the § 40-2-129, C.R.S., data, can be an expensive and time-consuming process for utilities. The Joint Commenters believe that the $ 50 million

threshold assures the appropriate level of Commission oversight, keeping in mind the cost to the utilities.

115. Third, the

> Joint Commenters believe that the $50 million threshold is a relatively easy to administer bright line test that strikes an appropriate balance which captures significant pollution control projects and subjects them to the Best Value Employment Metric considerations of [§ 40-2-129, C.R.S.], while maintaining the existing exemption for smaller projects that are truly in the ordinary course of business.

Joint Comments at 5-6.

116. In support of the $ 50 million threshold, Tri-State presents information "concerning the costs of pollution control projects[] and the number of jobs and total number of man-hours typically associated with each type of project." Tri-State Response at 10. This information is based on Tri-State's own experience with pollution control projects and on Tri-State's "consultation with a national engineering company with expertise implementing [pollution control] projects for numerous electric utilities[.]" *Id.*

117. Exhibit No. 1 and the Tri-State Response at 11 (the documents contain identical information) show six technologies typically used to meet air quality requirements for generating units with capacities in the range of 200-400 MW. For each technology, the documents show: (a) project cost, stated in millions of dollars; (b) construction labor, stated in headcount; and (c) construction labor, stated in 1,000 man-hours).

118. Exhibit No. 1 and the Tri-State Response at 11 show a clear pattern. Projects that use two of the pollution control technologies typically: (a) cost under $ 15 million dollars; (b) employ fewer than 45 workers; and (c) take no more than 50,000 man-hours to complete. In contrast, projects that use the remaining four technologies typically: (a) cost between

$ 40 million and $ 280 million; (b) employ over 200 workers; and (c) take between 75,000 and 1,000,000 man-hours to complete. Based on this information that demonstrates a close correlation between the pollution control project's cost and the number of workers and the total number of hours to complete to project, Tri-State opines that "estimated project cost can serve as a reasonable 'surrogate' for other relevant aspects of pollution control projects for purposes of the intent of" § 40-2-129, C.R.S. Tri-State Response at 11.

119. The Arnold Affidavit provides additional support for the $ 50 million threshold. The affiant Howard Arnold is the Business/Financial Secretary of the Denver Pipefitters Local 208, is the President of the CBCTC, and is a member of the RMELC. In his affidavit, Mr. Arnold refers to the CBCTC and RMELC as the Labor Organizations.

120. In his affidavit, Mr. Arnold states:

> On behalf of the Labor Organization, we support the position set forth in the Joint Comments as to the modification of [Rule 4 CCR 723-3-3205(b)(II)] and the CPCN requirements for pollution control systems where the total cost equals or exceeds $50 million. The Labor Organizations believe that the $50 million threshold for pollution control projects is appropriate because at that cost threshold the implications of such projects for Colorado labor are significant enough to necessitate Commission consideration of Best Value Employment Metrics through the CPCN process consistent with [§ 40-2-129, C.R.S.].
>
> * * *
>
> ... [The proposed] $50 million threshold for the filing of CPCNs strikes the right balance by capturing those pollution control projects with significant labor impacts for consideration of Best Value Employment Metrics by the Commission consistent with [§ 40-2-129, C.R.S.,] while exempting smaller pollution control projects from the CPCN process.

Arnold Affidavit at ¶¶ 4, 7. In comments made during the rule-making hearing, Mr. Arnold made it clear that his comments include all Colorado labor, both union and non-union.

121. At the rule-making hearing, the ALJ also heard the comments of Mr. Gary Ingold. Mr. Ingold is the Senior Vice President of Generation for Tri-State and is responsible for

implementing pollution control projects at Tri-State's generation facilities. Based on Tri-State's experience with pollution control projects, Mr. Ingold supports the $ 50 million threshold because it is consistent with the practical reality that it does not make sense to spend the resources necessary for the utility to collect, and for the Commission to consider, Best Value Employment Metrics information in the context of the easily-accomplished, lower-cost pollution control projects. In Mr. Ingold's opinion, the utilities and the Commission are better served when they focus on the pollution control projects that require more money, more workers, and more time to complete. In his opinion, this approach implements the intent of § 40-2-129, C.R.S.

122. Appended to the Arnold Affidavit as Exhibit 1 is the Affidavit of James R. Vader, Director, Regional Capital Projects of Public Service (Vader Affidavit); the Vader Affidavit was filed in Proceeding No. 13R-1151E. In that affidavit, Mr. Vader supports the $ 50 million threshold and provides cost data for four of Public Service's pollution control projects. In supporting the $50 million threshold, Mr. Vader stated that, in Public Service's opinion, "a pollution control project having an estimated cost of above $50 million was likely of sufficient magnitude that it would make sense to have the assurance of having a CPCN before proceeding with" the project. Vader Affidavit at ¶ 3.

123. Mr. Vader's statement is consistent with the information provided by Black Hills during the rule-making hearing: at present and as a matter of internal policy, Black Hills files an application for a CPCN for a pollution control project that is estimated to cost $ 50 million or more because a CPCN provides a level of assurance that Black Hills will recover its reasonable investment in the project.

c. Annual Inflation Adjustment.

124. The Joint Commenters propose an annual inflation adjustment

> to track inflation so that [the $50 million] threshold will continue to serve as a reasonable measure of which [pollution control] projects should be considered in "the ordinary course of business" and which should not. The [proposed] inflation adjustment provision ... is similar to [inflation adjustment] mechanisms employed by other Colorado agencies.

Joint Comments at 6. As made clear during the rule-making hearing, the Joint Commenters believe that this refinement is consistent with the intent of § 40-2-129, C.R.S.

125. Tri-State supports the inflation adjustment and supplements the Joint Comments on this issue: An annual adjustment to the threshold

> is appropriate given that the number of jobs and man-hours associated with a given pollution control project will not vary from year-to-year even though inflation may raise the cost of that project above the $50,000,000 threshold. By incorporating an inflation adjustment provision, the modified rule ensures that the underlying rationale for the "ordinary course of business" approach remains valid year-to-year. The specific language included in modified Rule [4 CCR 723-3-3205(b)(II)], as set forth in the consensus proposal, is consistent with inflation adjustment provisions employed in other contexts under Colorado law. *See, e.g.*, Colo. Const., Art. 18, § 15 (minimum wage annual adjustment for inflation), § 13-21-102.5 (inflation adjustment for limitations on noneconomic damages), § 12-36-123.5 (inflation adjustment for payments required for medical licensure as established annually by Colorado Medical Board), § 33-60-104 (inflation adjustment for distribution of net lottery proceeds as determined annually by state treasurer).

Tri-State Response at 12.

126. At the rule-making hearing, the Joint Commenters stated that they chose to base the proposed inflation adjustment on existing, established, and well-accepted adjustment methods to assure that the underlying mechanics of the adjustment's operation were understood. The Joint Commenters emphasized that the proposed inflation adjustment is necessary to ensure that the same pollution control projects captured today using the $ 50 million threshold will be captured in the future irrespective of how inflation, by itself, may change the cost of the projects.

2. Discussion and Conclusion.

127. For the following reasons, the ALJ will modify and, as modified, will adopt the Joint Commenters' proposed Rule 4 CCR 723-3-3205(b)(II).

a. Selection of Option 2 as Starting Point.

128. The ALJ agrees with the selection of Option 2 as the starting point for amending Rule 4 CCR 723-3-3205(b)(II).

129. First, the ALJ finds persuasive the Joint Commenters' arguments in support of using Option 2 as the starting point for amending Rule 4 CCR 723-3-3205(b)(II).

130. Second, in § 40-2-129, C.R.S., as relevant here, the General Assembly emphasized "requests for a [CPCN] for construction or expansion of generating facilities, including but not limited to pollution control[.]" This indicates that the General Assembly judged a CPCN for a pollution control project to be of sufficient importance to warrant imposing the mandate that the Commission "consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities" when the Commission evaluates a utility's request for such a CPCN. Rule 4 CCR 723-3-32015(b)(II) should reflect and implement the legislature's judgment on this point. This requires, as a matter of policy, the amendment of Rule 4 CCR 723-3-32015(b)(II).

131. Third, Exhibit No. 1 and the Tri-State Response at 11 show a clear correlation between the total cost of a pollution control project and both the number of workers needed for the project and the number of man-hours necessary to complete the project. As discussed above, both the rule-making record and policy considerations support using a dollar-based threshold because it is a reasonable proxy for both the number of workers required and the length of time required to complete a pollution control project.

132. At present, pursuant to Rule 4 CCR 723-3-3205(b)(II), all pollution control projects are in the ordinary course of business. The decision to amend Rule 4 CCR 723-3-3205(b)(II) based on Option 2 narrows the ordinary course of business exemption for pollution control projects.

b. $ 50 Million Threshold.

133. The Commission's Option 2 states that a pollution control project is in the ordinary course of business, and thus does not require a CPCN, if "the estimated total cost [of the project] ... is reasonably expected to be *less than* $50 million." Decision No. C15-0456 at ¶ 22 (underlining omitted and italics supplied). This language sets the threshold for the need to obtain a CPCN for a pollution control project at $ 50 million (that is, a pollution control project that is reasonably expected to cost $ 50 million or more will require a CPCN).

134. The ALJ will adopt the proposed $ 50 million threshold.

135. In its totality, the information in this Proceeding supports setting a $ 50 million threshold because that threshold is reasonable; is appropriate; and is consistent with, and implements the intent of, § 40-2-129, C.R.S.

136. The record shows that pollution control projects that cost less than $ 50 million are completed relatively quickly and employ a small number of workers. These pollution control projects are unlikely to "affect employment and the long-term economic viability of Colorado communities[,]" which are the focus of § 40-2-129, C.R.S. Requiring utilities to collect, and to provide to the Commission for consideration in a CPCN application proceeding, the best value employment metrics information for these projects would not advance the purpose of § 40-2-129, C.R.S.

137. The $ 50 million threshold separates the pollution control projects that have little or no impact on employment or the economic viability of communities from the pollution control projects that § 40-2-129, C.R.S., was intended to capture: projects that are high-cost, take longer to complete, and employ a larger number of workers; in other words, projects that are more likely to "affect employment and the long-term economic viability of Colorado communities." In addition, the information presented in this Proceeding demonstrates that $ 50 million reasonably represents the pollution control technology-based bright line that exists at present and that can be used in the future to identify the pollution control projects for which the Commission must consider the employment and economic factors as required by § 40-2-129, C.R.S.

138. The information presented in this rule-making also shows that the proposed $ 50 million threshold is consistent with the practice of at least one investor-owned electric utility to seek a CPCN for construction of a pollution control project if the estimated cost reaches or is expected to exceed $ 50 million.

c. Annual Inflation Adjustment.

139. The ALJ will adopt, with modification, the Joint Commenters' proposed annual inflation adjustment.

140. First, the ALJ is persuaded by, and adopts, the Joint Commenters' rationales supporting the proposed annual inflation adjustment.

141. Second, the proposed inflation adjustment process is well-described and can be implemented each year with relative ease.

142. Third, the ALJ notes that the Joint Commenters' proposal refers to "the executive director of the Commission" Joint Comments at Appendix A). The Commission has a director, not an executive director. The ALJ will modify the proposal to delete the word "executive."

In addition, the ALJ will modify the proposed amendments to Rule 4 CCR 723-3-3205(b)(II) for clarity.

143. For the reasons discussed and based on the entire record in this Proceeding, the ALJ will modify the proposed amendments to Rule 4 CCR 723-3-3205(b)(II). The ALJ finds that proposed Rule 4 CCR 723-3-3205(b)(II), as modified and as set out in the Attachments to this Decision, should be adopted.

H. Proposed New Rule 3205(b)(III).

144. Rule 4 CCR 723-3-3205 pertains to construction or expansion of generating capacity. Rule 4 CCR 723-3-3205(b) specifies that a CPCN is not required in two situations or circumstances because each is deemed to be in the ordinary course of business.

145. At present, there is no Rule 4 CCR 723-3-3205(b)(III).

146. In the NOPR, the Commission does not propose to add a Rule 4 CCR 723-3-3205(b)(III).

147. The Joint Commenters propose to add the following new Rule 4 CCR 723-3-3205(b)(III), shown in legislative drafting format:

> (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:
>
> * * *
>
> (III) When a certificate of public convenience and necessity is sought for a pollution control system required by a determination of the Colorado Department of Public Health and Environment or an identified law, regulation, or administrative or judicial order, there is a presumption, rebuttable by clear and convincing evidence, that the public convenience and necessity require such pollution control system. This presumption does not alter or diminish the Commission's duty and authority, including its consideration:
>
> (A) in a CPCN proceeding, of the utility's cost estimate for the proposed pollution control project, and whether the utility should pursue plant

retirement (with or without an associated plant replacement) or fuel switching as alternatives to the project; and

(B) in a subsequent rate proceeding, the prudence, justness, and reasonableness of costs associated with the pollution control project.

Joint Comments at Appendix A at 1 (original reformatted to conform to the Commission's rule format).

148. For the reasons discussed below, the ALJ will modify the proposed language and, as modified, will adopt Rule 4 CCR 723-3-3205(b)(III).

1. Positions of Participants.

149. The Joint Commenters state that, in the case of pollution control projects, there are two Colorado agencies that have authority, albeit in different areas: (a) the Colorado Department of Public Health and Environment (CDPHE); and (b) the Commission.

150. Mr. Chris Colclasure is the Director of the Planning and Policy Group in the Air Pollution Control Division within the CDPHE. At the rule-making hearing, he provided this information: (a) the Air Pollution Control Division has the authority to implement, and does implement, regulations adopted by the state's Air Quality Control Commission and, in some circumstances, regulations adopted by the U.S. Environmental Protection Agency; (b) as pertinent here, within its authority and area of expertise, the Air Pollution Control Division establishes emission limits, and in some instances requires specific pollution control technologies, for individual generating facilities or for categories of generating facilities;[21] (c) the CDPHE, the Air Quality Control Commission, and the Air Pollution Control Division require the

[21] The emissions limits may be established by regulation or by permit. Generally speaking, emissions limits or emissions rates are established by a regulation; in the case of a regulation, the utility chooses how to comply with the regulation. Generally speaking, the requirement to install a specific pollution control technology is contained in the permit issued for a particular generating facility; in the case of a permit, the utility must install the specified technology in order to operate the facility in compliance with the terms of the permit.

pollution control devices to be installed in order to protect the public and, as a result, wish to avoid situations that may foster utility uncertainty or may delay the installation of pollution control devices; and (d) at the same time, the CDPHE, the Air Quality Control Commission, and the Air Pollution Control Division recognize that the Commission has the authority and expertise in the area of authorizing the utility to construct a pollution control project.

151. Mr. Colclasure supports the new Rule 4 CCR 723-3-3205(b)(III) because the Rule recognizes and accommodates the areas of authority and expertise of the Commission and those of the CDPHE, the Air Quality Control Commission, and the Air Pollution Control Division.

152. The Joint Commenters support the concept of a rebuttable presumption because: (a) each of the identified state agencies has a specific area of expertise and authority; (b) in amending § 40-2-129, C.R.S., the General Assembly did not modify the authority of the Commission or the CDPHE; (c) "in the interests of comity between these agencies, ... any changes to the existing exemption for pollution control systems under [Rule 4 CCR 723-3-3205(b)(II)] should not collaterally attack or disrupt the results of CDPHE's regulatory processes and the laws it enforces" (Joint Comments at 6) or "alter[] an air pollution control measure required by the CDPHE" (*id*. at 7); and (e) a rebuttable presumption "that the public convenience and necessity requires installation of pollution controls as determined by CDPHE or an identified law, regulation, or administrative or judicial order" (*id*. at 7) balances these interests. At the rule-making hearing, the Joint Commenters stated that, for the presumption to apply, the administrative order must be final.

153. The Joint Commenters state:

> This rebuttable presumption does not alter or diminish the Commission's duty and authority to consider cost estimates for the proposed pollution control project during the CPCN process, or its ability to consider the prudence, justness and

> reasonableness of costs associated with the pollution control project in a subsequent rate proceeding. In addition, the rebuttable presumption does not deprive the Commission of authority to consider plant retirement or fuel-switching as alternatives to installation of the required pollution control system. The suggested changes creating [Rule 4 CCR 723-3-3205(b)(III)] are intended to be a restatement of the authority that the Commission has, in particular over the CPCN and ratemaking processes, with a qualification that the Commission should respect the CDPHE's statutory charge to administer the air pollution control program in Colorado.

Joint Comments at 7.

154. At the rule-making hearing, the Joint Commenters explained how the presumption would work in a proceeding for issuance of a CPCN for a pollution control project.

155. First, the scope of the presumption differs depending on what the CDPHE has ordered: (a) if the CDPHE has a regulation or issues a permit that limits the emissions rates for a generating facility, the presumption is that the utility must do something at the facility in order to reach the prescribed limit and that the utility has the discretion to decide how best to meet the restriction or limit; and (b) if the CDPHE has a regulation or issues a permit that specifies the pollution control technology that the utility must install at a generating facility, the presumption is that the utility must install that specific pollution control technology.

156. Second, in the CPCN proceeding, the Commission may consider the best value employment metrics information; may consider the proposed costs of the project to ensure that the utility's proposed management of the project is reasonable;[22] and may consider alternative approaches -- such as fuel-switching and closing the facility -- that are outside the pollution control issues considered by the Air Quality Control Commission and the Air Pollution Control Division. At the rule-making hearing, CDPHE stated that its determinations are made in the

[22] This provides information to the Commission and interested persons that serves to inform the prudence review of the utility's implementation of the CPCN (that is, the construction of the project) that the Commission conducts at the time the utility seeks to recover the costs of the pollution control project.

context of the need for pollution controls and assume that a generating facility will continue to operate and will continue to use the same fuel. The CDPHE agreed that the presumption allows the Commission to order a utility to close a generating facility or to switch a generating facility from coal-fired to gas-fired.

157. Tri-State supports the proposed new Rule:

> the Commission should presume that the **need** for a pollution control project has been determined through the relevant federal or state environmental regulatory process. That is, the utility is proposing to undertake the pollution control project in compliance with a legitimate environmental regulatory obligation. If the Commission were, for example, to deny a CPCN for a pollution control project required by a federal or state law, regulation, administrative or judicial order on the grounds that the project was not needed, it would subject the utility to adverse action by the environmental regulator. This outcome is avoided by presuming that pollution control projects that are required by law also serve a public need. This is true whether the utility in question is investor-owned or a cooperative like Tri-State.

Tri-State Response at 6 (bolding and underlining in original).

158. The Joint Commenters propose this evidentiary standard: a party must rebut the presumption by clear and convincing evidence. They recognize that this is a stringent standard and propose it to assure that, as a matter of comity to a sister agency and as a matter of policy, a CDPHE decision with respect to the need for pollution control devices is not disturbed easily. At the rule-making hearing, the CDPHE requested a stringent standard to avoid the delay inherent in relitigating issues already decided in a CDPHE process or, at least, to limit reconsideration of the CDPHE determinations to extraordinary circumstances.

159. No one filed a comment or made a comment opposing the addition of Rule 4 CCR 723-3-3205(b)(III).

2. Discussion and Conclusion.

160. For the following reasons, the ALJ will modify proposed new Rule 4 CCR 723-3-3205(b)(III) and, as modified, will adopt the new Rule.

161. First, for purposes of this rule-making, the record establishes the authority and the expertise of the CDPHE, the Air Quality Control Commission, and the Air Pollution Control Division in the areas of pollution control requirements and pollution control devices. The record also demonstrates the need to address the effect (if any) that an existing CDPHE determination that a generating facility needs pollution control devices will have in a Commission proceeding for issuance of a CPCN for that facility.

162. Second, the ALJ finds persuasive, and adopts, the rationales presented by the Joint Commenters in support of the presumption contained in proposed new Rule 4 CCR 723-3-3205(b)(III).

163. Third, in Decision No. C15-1024, the Commission observed that its rules "should account for [approved state or federal environmental compliance plans] and avoid any delays in implementation" of those plans. Decision No. C15-1024 at ¶ 19. The presumption accomplishes that goal.

164. Fourth, the ALJ will adopt the proof by a preponderance of the evidence (not the proposed proof by clear and convincing evidence) as the standard to rebut the presumption created by Rule 4 CCR 723-3-3205(b)(III). This is consistent with the Colorado case law that

> [p]resumptions are rules of convenience, based on experience or public policy, so certain in their character that when they are established by the presentation of certain underlying facts the effect is to create a prima facie case upon which judgment may be rendered in the absence of contrary evidence.

Schenck v. Minolta Office Systems, Inc., 802 P.2d 1131, 1133 (Colo. App. 1990). It is also consistent with the case law that, "unless otherwise specified, the accepted burden of persuasion

in the civil context is proof by a preponderance of the evidence." *Mile High Cab, Inc. v. Colorado Public Utilities Commission*, 302 P.3d 241, 246 (Colo. 2013) (*Mile High Cab, Inc.*) (internal quotations and citations omitted). One typically overcomes a rebuttable presumption by a preponderance of the evidence.

165. Adopting the preponderance of the evidence standard is consistent with § 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; and Rule 4 CCR 723-1-1500, each of which places on the proponent of a decision the burden to prove its advocacy by a preponderance of the evidence.

166. The clear and convincing standard typically applies to "particular findings of great importance ... [and is a] heightened" burden of proof. *Mile High Cab, Inc.*, 302 P.3d at 246. Based on the rule-making record, the ALJ is not persuaded that the Commission must, or should, adopt this heightened standard in this rule-making.

167. The ALJ finds that creating the Rule 4 CCR 723-3-3205(b)(III) presumption *and* adopting the more stringent evidentiary standard for overcoming that presumption in one proceeding is too great a change. The ALJ will adopt the preponderance of the evidence standard in this rule-making and will modify the Joint Commenters' proposed Rule accordingly. If experience shows that this evidentiary standard is not sufficient to meet the policy and comity reasons underpinning the Rule 4 CCR 723-3-3205(b)(III) presumption, the Commission may revisit this issue at a later time.

168. The ALJ also will make clarifying modifications to the proposed Rule.

169. Consistent with the foregoing discussion, the ALJ will modify the Joint Commenters' proposed new Rule 4 CCR 723-3-3205(b)(III) to read (the ALJ's modification is shown in double underling):

(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:

* * *

(III) When a certificate of public convenience and necessity is sought for a pollution control system required by a determination of the Colorado Department of Public Health and Environment or an identified law, regulation, or administrative or judicial order, there is a presumption, rebuttable by a preponderance of the evidence, that the public convenience and necessity require such pollution control system. This presumption does not alter or diminish the Commission's duty and authority, including its consideration:

(A) in a CPCN proceeding, of the utility's cost estimate for the proposed pollution control project, and whether the utility should pursue plant retirement (with or without an associated plant replacement) or fuel switching as alternatives to the pollution control project; and

(B) in a subsequent rate proceeding, of the prudence, justness, and reasonableness of costs associated with the pollution control project.

170. For the reasons discussed and based on the entire record in this Proceeding, the ALJ finds that the new Rule 4 CCR 723-3-3205(b)(III) proposed by the Joint Commenters should be modified. Based on the entire record in this Proceeding, the ALJ finds that new Rule 4 CCR 723-3-3205(b)(III), as modified and set out in the Attachments to this Decision, should be adopted.

I. Additional Findings.

171. The statutory authority for the amended Rules adopted by this Decision is found in §§ 24-4-103, 40-2-108(1), 40-3-102, 40-4-101(2), and 40-4-108, C.R.S.

172. The amended Rules adopted by this Decision contain, as required by § 24-4-104(4)(c), a "written concise general statement of their basis, specific statutory authority, and purpose."

173. The Commission has the necessary and proper authority to issue Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are appended to this Decision at Attachment A and Attachment B.

174. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are appended to this Decision at Attachment A and Attachment B, are consistent with the subject matter of this Proceeding as established in Decision No. C15-0456, which initiated this Proceeding.

175. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are appended to this Decision at Attachment A and Attachment B, are consistent with the subject matter of this Proceeding as established in the Notice of Rule-making published in *The Colorado Register* of May 25, 2015.

176. The record of this rule-making demonstrates the need for, and supports the promulgation of, Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are appended to this Decision at Attachment A and Attachment B.

177. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are which are appended to this Decision at Attachment A and Attachment B, are reasonable.

178. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are which are appended to this Decision at Attachment A and Attachment B, provide guidance to, and provide guidelines for, jurisdictional public utilities, customers of those utilities, and other persons.

179. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are which are appended to this Decision at Attachment A and

Attachment B, are clearly and simply stated; and their meaning can be understood by any person required to comply with them.

180. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are which are appended to this Decision at Attachment A and Attachment B, do not conflict with any provision of law.

181. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are which are appended to this Decision at Attachment A and Attachment B, do not duplicate any other rule.

182. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III), which are which are appended to this Decision at Attachment A and Attachment B, do not overlap any other rule.

III. CONCLUSIONS

183. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III) appended to this Decision at Attachment A and Attachment B are reasonable.

184. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III) appended to this Decision at Attachment A and Attachment B are necessary.

185. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III) appended to this Decision at Attachment A and Attachment B meet the statutory requirements.

186. Rules 4 CCR 723-3-3102(e), 723-3-3102(f), 723-3-3205(b)(II), and 723-3-3205(b)(III) appended to this Decision at Attachment A and Attachment B should be adopted in their entirety.

187. Pursuant to § 40-6-109(2), C.R.S., the Administrative Law Judge recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, Rule 4 *Code of Colorado Regulations* 723-3-3102(e), as contained in Attachment A and Attachment B to this Decision, is adopted.

2. Consistent with the discussion above, Rule 4 *Code of Colorado Regulations* 723-3-3102(f), as contained in Attachment A and Attachment B to this Decision, is adopted.

3. Consistent with the discussion above, Rule 4 *Code of Colorado Regulations* 723-3-3205(b)(II), as contained in Attachment A and Attachment B to this Decision, is adopted.

4. Consistent with the discussion above, Rule 4 *Code of Colorado Regulations* 723-3-3205(b)(III), as contained in Attachment A and Attachment B to this Decision, is adopted.

5. In accordance with § 24-4-103(8), C.R.S., the rules adopted by this Decision shall be submitted to the Attorney General of the State of Colorado to obtain an opinion regarding the constitutionality and legality of the rules adopted by this Decision.

6. In accordance with § 24-4-103(8), C.R.S., the rules adopted by this Decision shall be submitted to the Office of Legislative Legal Services for review.

7. In accordance with §§ 24-4-103(11) and 103(12), C.R.S., a copy of the rules adopted by this Decision, together with a copy of the opinion of the Attorney General of the State of Colorado on the rules adopted by this Decision, shall be filed with the Office of the Secretary of State for publication in *The Colorado Register*.

8. The rules adopted by this Decision shall be effective 20 days after publication in *The Colorado Register* by the Office of the Secretary of State.

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

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

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

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

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

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MANA L. JENNINGS-FADER

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director