

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 09I-041E

IN THE MATTER OF AMENDMENTS TO THE ELECTRIC RESOURCE PLANNING
RULES, 4 CCR 723-3, Rules 3600-3615.

**NOTICE OF INQUIRY AND ORDER
ESTABLISHING INVESTIGATORY DOCKET**

Mailed Date: January 30, 2009
Adopted Date: January 28, 2009

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I. BY THE COMMISSION:

A. Overview

1. This matter comes before the Commission for consideration of possible changes to the Commission's Electric Resource Planning Rules, 4 Code of Colorado Regulations (CCR) 723-3, Rules 3600-3615 (ERP Rules).

2. The purpose of this Notice of Inquiry (NOI) is to request comments from interested persons on whether and how the Commission could amend its ERP Rules to treat the

resource plans of cooperative generation and transmission associations such as Tri-State Generation and Transmission Association (Tri-State).

3. The Commission seeks comments from interested persons on proposals discussed in this Notice and on questions contained in Attachment A to this Notice by March 16, 2009. Interested persons will be invited to file replies to comments of others by April 1, 2009. Interested persons are encouraged to provide any relevant comments in addition to those highlighted by our questions. After considering the comments of interested persons and after further deliberation, the Commission will determine whether to proceed with a formal rulemaking and whether to issue draft rules.

B. Background

4. On June 6, 2001 the Commission initiated an “Integrated Resource Plan” (IRP) investigation in Docket No. 01M-250E. The comments received in that docket led to the promulgation of rules in 2002 that proposed significant changes to the resource planning rules then in effect. The IRP rules then effect, codified as 4 CCR 723-21, required all utilities – including cooperative electric generation and transmission associations – to file specific resource planning information, subject to Commission review. Specifically, Rule 723-21-10.4 stated “The Commission may hold a hearing for the purpose of reviewing and rendering a decision regarding the contents of the utility’s IRP upon filing.”

5. On May 29, 2002, the Commission adopted Decision No. C02-0793 in Docket No. 02R-0137E, “In The Matter Of Proposed Amendments to the Electric Integrated Resource Planning Rules, 4 CCR 723-21.” In general, this Decision adopted the Commission’s Least-Cost Resource Planning (LCP) Rules, replacing its IRP rules then in effect. The LCP rules were codified under the new numbering scheme as 4 CCR 723-3-3600, et seq. In support of its new

rules, the Commission cited statutory authority as §§ 40-2-108, 40-2-123, 40-3-102, 40-3-111, and 40-4-101, C.R.S.

6. Two of the many issues confronted by the Commission in this 2002 rulemaking concerned how to treat cooperative generation and transmission associations such as Tri-State. The first question was whether to apply the rules' competitive bidding requirements to Tri-State; the second question was how to treat the quadrennial filing by Tri-State of its resource plan. After considering numerous comments from parties on these topics, the Commission concluded:

Most pertinently, the Commission lacks rate jurisdiction over Tri-State. We note that bidding is primarily a process aimed at acquiring resources at the lowest cost. Without rate authority, we conclude, it is inappropriate to subject Tri-State to the competitive resource acquisition requirements specified in the rules. Still, the Commission does exercise facilities jurisdiction over Tri-State through the CPCN requirement. Therefore, we require Tri-State to comply with certain reporting requirements regarding loads and resources information, and the assessment of need for additional resources. Because of the incentive structure of member-owned associations such as Tri-State, it is unnecessary for the Commission to approve Tri-State's assessment of need. We require electric generation and transmission associations to file the information as a report, without application for approval.¹

In short, the new LCP rules changed the requirements for electric generation and transmission cooperatives to require only the filing of reports, with no provision for subsequent Commission action or approval.

7. In its Decision on Rehearing, Reconsideration or Reargument in Docket No. 02R-137E, the Commission modified slightly the reporting requirements applied to Tri-State. The modification required cooperative generation and transmission associations to report their efforts to comply with the requirements of § 40-2-123, C.R.S. as part of their annual progress report required by Rule 3614. The Commission did not modify its decision to forego hearings or

¹ Decision No. C02-793, ¶ 14, adopted May 29, 2002, mailed July 22, 2002.

require approval of resource plans filed by cooperative generation and transmission associations and concluded (concerning the annual report about §40-2-123 C.R.S. compliance): “Parties can review the report, and may request a hearing through established complaint or show-cause procedures, if necessary.”²

8. The Commission revisited its Least Cost Planning Rules in 2007, adopting amendments in an emergency rule by Decision No. C07-0829 on September 19, 2007. On December 19, 2007 the Commission issued Decision No. C07-1101, which adopted permanent rules that were identical to the emergency rules. The emergency rules and the permanent rules made many changes to the then-existing LCP rules, especially with respect to the treatment of “Section 123” resources, the use of an independent evaluator to review the bidding and modeling process, and the creation of an abbreviated post-bid review of resources by the Commission. The rules were renamed again, to be the Electric Resource Planning or ERP rules. Relevant to the instant inquiry, the 2007 rule amendments did not modify the requirements applied to cooperative generation and transmission associations that had been adopted in 2002.

9. On October 31, 2007, Tri-State filed its resource plan with the Commission in Docket No. 07M-445E, as required by Rule 3605. The Commission received the report and did not initially set the matter for hearing.

10. At the Commission’s request, on August 13, 2008, executives of Tri-State made a presentation to the Commission on the resource planning activities of the association, pursuant to Decision No. C08-0608 issued in Docket No. 07M-445E. During the course of the presentation, Chairman Binz asked the representatives whether Tri-State would be willing to provide additional detail and backup information for some of the charts and graphs shown in the Tri-State

² Decision No. C02-0991, ¶ 6.(i).

presentation. At the hearing, counsel for Tri-State was non-committal concerning the association's willingness to provide the requested detail.

11. On September 10, 2008 the Commission issued Decision No. C08-0994 in Docket No. 07M-445E, which ordered Tri-State to provide certain additional information. In general, the requested information concerned the load and resource information underlying the August 13, 2008 presentation. The order also requested some details of the component demand forecasts of the member cooperatives used to construct the Tri-State load forecast.

12. On October 27, 2008, in a letter to Commission Director Doug Dean, Tri-State declined to provide the requested information to the Commission, citing the limits of Commission jurisdiction as expressed in the Commission's own rules. In relevant part, the letter from the Tri-State's General Counsel reads:

This letter is in response to the above referenced order. If the Commission has any jurisdiction at all over Tri-State's resource planning, that jurisdiction is limited by its own rules. Under the Commission's electric rules (Rule 3602) Tri-State is subject only to the reporting requirements specified in Rule 3605. Tri-State filed its 2007 Electric Resource Plan on October 31, 2007. The Commission has acknowledged that the plan was timely filed and that it contained the required information. (Decision No. C08-0994, Par.2) Further, when the Commission opened Docket No. 07M-445E for the purpose of accepting Tri-State's 2007 Electric Resource Plan, it stated that the docket would be opened "for the limited purpose of receiving" Tri-State's ERP (Decision No. C07-0981) and it stated further in that Order that the docket is now closed."

As you know, Tri-State agreed to appear at the Commission to answer certain questions about our filing, but we made it very clear that our appearance was voluntary and that the Commission could not order Tri-State to appear. (See my previous letter dated July 8, 2008).

The order expands the scope of that meeting and seeks to obtain more information from Tri-State, substantially beyond that required in the Commission's rules, and pertaining to electric resources over which the Commission has acknowledged it has no jurisdiction over Tri-State (DSM and out of state resources).

Tri-State has fully complied with all requirements in this docket. The docket has been closed. The Commission has no jurisdictional basis for its order requesting additional information from Tri-State.

C. Discussion

13. With substantial understatement, we note that the energy world has changed since 2002 when the Commission last reviewed its resource planning rules as they apply to cooperative generation and transmission associations. The technical, environmental and political landscape facing utilities, their customers and their regulators has been made-over since that time. Dominating this fundamental change is our understanding of the threat of global climate change. But close behind are other major drivers: uncertainty about future costs of traditional generation technology; the availability of new renewable resources; the potential to apply the tools of the internet to the electric grid (i.e., “smart grid”); the increased desire for national energy security; the growth of distributed generation; the demands of energy development in Colorado; and the need for additional transmission investment. Finally, it is clear that the current severe economic downturn is affecting everything utilities do.

14. Governor Ritter and the Colorado General Assembly have responded to the challenges facing Colorado in these areas. During 2007, the Governor championed, and the General Assembly passed, several important legislative measures designed to enable the “New Energy Economy” in Colorado. New legislation addressed a revised renewable energy standard, energy efficiency implementation, net metering policies, electric transmission investment, and new jobs in Colorado tied to renewable energy development. In November 2007, Governor Ritter announced the “Colorado Climate Action Plan,” committing Colorado to reducing its greenhouse gas emissions by 20% by 2020 and by 80% by 2050.³

³ Following the release of the Climate Action Plan, Executive Order D 004 08, dated April 22, 2008, asks the Commission “to seek from each utility within its jurisdiction an ERP that includes an analysis that shows how the utility could achieve a 20% reduction in its greenhouse gas emissions from 2005 levels by the year 2020.”

15. The Commission has also responded to these challenges in several ways. First, we quickly revised our resource planning rules to reflect the requirements of the numerous legislative changes enacted in 2007. We further revised our “Least Cost Planning” rules to fully implement the requirements of § 40-2-123, C.R.S., to recognize the role of new renewable technologies in the resource plans of investor-owned utilities. Second, and most importantly, the Commission held hearings and issued major decisions in several significant dockets for investor-owned utilities. These decisions addressed resource planning, gas and electric demand-side management plans, and generation and transmission cases. The largest of these dockets, the ERP plan of Public Service Company of Colorado (Docket No. 07A-447E), addresses that company’s resource needs for the next eight years, approves the utility’s request to close two coal-fired power plants, incorporates a realistic estimate of the future costs of carbon emissions in planning assumptions, and approves the acquisition of large amounts of utility-scale solar generation as Section 123 resources.

16. With this background, it is reasonable for the Commission to review the status of cooperative generation and transmission associations under our resource planning rules. Simply put, the logic that led the Commission in 2002 to decline to actively examine Tri-State’s resource planning process may be less compelling now.

17. The Commission has clear authority to issue Certificates of Public Convenience and Necessity (CPCNs) to Tri-State for the construction of major generation and transmission facilities in Colorado. Tri-State is engaged in some large transmission projects now, and we expect that the association may propose to build a generation facility in Colorado to meet future needs. Because of these activities, it makes sense to examine whether our resource planning

rules complement our duty and authority to make determinations regarding the need for such facilities.

18. Under the current rules, the Commission will make findings of “public convenience” and “necessity” only upon application of the utility for certification of a specific facility. For cooperative generation and transmission associations, this would likely be at a point in time when it may be infeasible to compare alternatives. This is in contrast to the treatment of investor-owned utilities that must also submit to a resource planning inquiry in which the regulators gather information earlier and take a longer and broader look at resource planning.

This point was acknowledged by the Commission in the 2002 rulemaking:

Finally, the parties argue that the LCP rules violate SB 01-144 [40-2-123, C.R.S.] because, under the rules, the Commission will not review the resource plans of cooperative electric generation and transmission associations (G&T). The parties argue that SB01-144 applies to cooperative G&Ts such as Tri-State. And, the parties contend, Commission review of these companies' resource plans in CPCN proceedings is insufficient, because the Commission would have before it only the resource that is the subject of the proceeding. In addition, the parties point out that energy efficiency and renewable resources are small scale, and would not be the subject of any CPCN process. The parties request that a cooperative G&T be required to present its plan for how it intends to integrate these resources in its resource planning process. The parties suggest that the Commission allow public review and comment, and a hearing if necessary on the plan.

Decision No. C02-0991 ¶ 6.(g)

19. As discussed, there appear to be several valid reasons to consider changing the manner in which our ERP Rules apply to cooperative generation and transmission associations. On the other hand, there are undoubtedly valid arguments why our ERP rules should be different for cooperative generation and transmission associations. The economics, geography and energy use in the areas served by rural cooperatives is, in general, different than those of Colorado's investor-owned utilities. Financing of generation, transmission and distribution facilities is

sometimes done differently for rural cooperative associations, and the associations are non-profit. Regulation by this Commission must take those differences into account.

20. While cooperative generation and transmission associations are different in some respects from investor-owned utilities, they face the same threat of climate change, the same uncertain future for costs of building and operating power plants, share the same transmission system as the rest of Colorado, and serve residents of the same state served by Colorado's investor-owned utilities.

21. In the case of Tri-State, the association operates in four state regulatory jurisdictions, posing a potential challenge for coordinating regulation among states that assert jurisdiction over Tri-State's facilities or its planning. But this situation need not pose an insurmountable challenge: there are examples (e.g., PacifiCorp in Washington, Oregon, California, Utah, Wyoming and Idaho) in which an integrated multi-state utility files for approval of resource plans in several states. The Commission seeks comments on how this consideration should affect our analysis.

D. Policy Options

22. The purpose of this Notice of Inquiry is not to decide these issues now, but rather to solicit comments from interested persons about options the Commission might consider. We now identify three different general approaches the Commission might take in this matter. We seek comment on these three options, in addition to any other approaches set forth in the comments.

23. Option A is a modification of the business-as-usual course under the current ERP Rules, in which cooperative generation and transmission associations would continue to file quadrennial resource plans with annual updates. This option would also require that a

cooperative generation and transmission association present its resource plan in a formal presentation to the Commission and provide any additional information required by the Commission. Under Option A, the Commission would receive the cooperative generation and transmission association's plan, but not approve, deny or modify the plan. This approach would essentially remove any rule-based objections of the sort raised by Tri-State in its October 27, 2008 letter declining to respond to the Commission's request for additional information.

24. Under Option B the Commission would require quadrennial filings by cooperative generation and transmission associations that would be subject to hearing. After examining the utility's proposed resource plan, the Commission would issue an order with findings on the utility's assessment of need and would identify a preferred resource plan, which might be the utility's proposed plan, or contain modifications to the utility's proposed plan. Under this option, the Commission's findings in the resource planning case would be considered when the utility subsequently seeks a CPCN to construct major generation or transmission facilities. If the facility proposed for a CPCN is consistent with the Commission's finding in the resource planning decision, the application would receive streamlined consideration and be approved absent a showing by a party that the Commission's preferred resource plan is no longer appropriate. If the proposed facility is not consistent with the Commission's preferred resource plan, additional scrutiny would be required before the Commission acts to grant or deny the CPCN. Option B would not require the cooperative generation and transmission association to employ competitive bidding in its resource acquisition efforts and would not require a Phase II ERP proceeding or the use of an Independent Evaluator.

25. Option C would apply the same rules to the cooperative generation and transmission association as now apply to investor-owned utilities such as Public Service

Company of Colorado and Black Hills/Colorado Electric Utility Company, LP. All electric utilities would be subject to competitive bidding rules and would be required to propose resource plans incorporating High, Medium, and Low “Section 123” resources in addition to the utility’s preferred plan. The Commission would approve a needs forecast and a resource plan, as in the case of investor-owned utilities. Utility-owned resources would be included in the approved plan if the utility’s bid was superior to the proposals of independent power producers, considering cost and other relevant factors. Under this option, a utility-owned generation resource included in the Commission-approved plan would carry the presumption of approval for a subsequent CPCN, while a proposed utility-owned resource not in the Commission-approved resource plan would carry the opposite presumption.

26. In addition to these three options, the Commission seeks comments on two other options: 1) retaining the status quo in our rules; and 2) eliminating the rule requirement that cooperative generation and transmission associations file a quadrennial resource plan. We ask commenters who support retaining the status quo to explain how the Commission might better use the information in the quadrennial filings now being made by cooperative generation and transmission associations.

27. In addition to comments on the options discussed above, the Commission solicits additional comments and legal argument on the questions included in Attachment A to this Order.

28. Finally, we do not intend that the filed materials will be the sole means of conducting our inquiry. Since this is an investigatory docket, we may engage in direct discussions about the issues with the participants as the investigation proceeds. Specifically, we intend to use a communications process, similar to that used in federal agencies and established by this Commission in Docket No. 08I-113EG, called “permit-but-disclose.”

Similar to the process established for Docket No. 08I-113EG, we establish procedural guidelines in this Order respecting its use. Eventually, the Commission intends to set out the permit-but-disclose communications process in our Rules of Practice and Procedure.

E. The Permit-but-Disclose Process

29. During the 2008 legislative session, the General Assembly passed, and the Governor signed, House Bill 08-1227 (HB 08-1227). HB 08-1227, among other things, modified the requirements applicable to the Commission concerning ex parte contacts with interested persons in non-adjudicatory proceedings. In a recent emergency rulemaking docket, the Commission modified its Rules of Practice and Procedure 4 CCR 723-1, to conform to the new statute. See Decision No. C08-0622, in Docket No. 08R-243ALL, mailed June 19, 2008 and Decision No. C09-0054 in Docket No. 09R-027ALL, mailed January 21, 2009. The Commission also determined that investigatory dockets such as the instant docket are not adjudicatory proceedings and, therefore, ex parte communications are permissible within the purview of that statute. *Id.*, at ¶ 7, fn. 1. Consistent with the Commission's determination that the instant docket is not an adjudicatory proceeding, all Staff will be available to assist the Commission in this proceeding.

30. As of the mailed date of this Order, any person may make an ex parte presentation to a Commissioner in a meeting that may include Staff. Any such ex parte contacts must relate to matters being investigated in this docket and cannot concern any matter pending before the Commission in any other docket.

31. Within two business days following a permitted ex parte presentation, the person requesting the meeting shall file with the Commission in this docket a letter disclosing the contact. The disclosure letter shall state the time, date, and place of the meeting, list the

individuals attending, and shall contain a summary description of the presentation, and a statement that the subject matter of the communication did not relate to any pending adjudicatory proceeding before the Commission. If any materials were provided to the Commissioner during the meeting, those shall be identified in the letter and attached. For filing purposes, the disclosure and any attachments shall include an original and three copies. In addition, one electronic copy of the disclosure letter and any other materials should be filed with the Commission. The disclosure letter and any other material must provide other interested persons with sufficient information to allow them to decide whether they wish to hold ex parte meetings to share their views on the subject. Interested persons should not simply file a disclosure that indicates they discussed the docket, but should also include the specific topics covered (for example, discussion of specific options presented in this decision, jurisdictional limitations, other resource planning options for cooperative generation and transmission associations, etc.).

32. The disclosure letter and any attached materials will become part of the official record in this case. Further, the disclosure letter and other provided material will be promptly scanned and posted to the Commission's website in connection with other documents and orders in this docket. Since this is not an adjudicatory proceeding, and because the disclosure letters will be promptly posted to the Commission's website, interested persons are not required to serve any other interested persons with a copy of the disclosure or attachments. Any materials asserted to be confidential will be treated in the same manner as confidential material provided in comments in a rulemaking today.

33. For our part, the Commissioners will attempt to accommodate all reasonable requests for ex parte meetings, subject to the schedule and availability of each Commissioner. We may give preference in scheduling to a party that has not made a prior ex parte presentation

in this docket, in contrast to a party wishing to make an additional presentation. Finally, it may be worth noting that there is no requirement that a party make the same presentation to each of the three Commissioners. In other words, parties may elect to meet (in separate meetings) with one, two, or all three Commissioners. However, in such situations, copies of all the presentations, with letter(s) disclosing the separate contacts and presentations, must be filed with the Commission in this docket.

34. To schedule an ex parte presentation with a Commissioner, the interested party should contact either Ms. Donna Acierno, Assistant to the Commissioners, or Mr. Bob Bergman, the lead member of Staff in this case. When contacting either Ms. Acierno or Mr. Bergman, the interested party should identify that the presentation is associated with this case.

II. ORDER

A. The Commission Orders That:

1. This docket is established for the purpose of considering possible changes to the Commission's Electric Resource Planning Rules, 4 Code of Colorado Regulations (CCR) 3600-3615, with respect to cooperative generation and transmission associations, consistent with the above discussion.

2. This Notice of Inquiry is issued to solicit comments from interested persons with respect to the issues identified by the Commission in this Order, to solicit answers to questions posed in Appendix A to this Order and to invite comment on any other related matters.

3. Interested persons shall file by March 16, 2009 Initial Comments on the matters identified in this Notice of Inquiry.

4. Replies to comments of others shall be filed by April 1, 2009.

5. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING,
January 28, 2009.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

RONALD J. BINZ

JAMES K. TARPEY

MATT BAKER

Commissioners

ATTACHMENT A

Commission Questions Regarding Resource Planning for Cooperative Generation
and Transmission Associations

1. Are the *legal* standards for issuing a CPCN for a major generation or transmission facility in Colorado different as between an investor-owned utility (*e.g.*, Public Service Company of Colorado) and a not-for-profit generation or transmission facility owned by rural electric cooperative associations (*e.g.*, Tri-State)?
2. Should the *policy* standards for issuing a CPCN for a major generation or transmission facility in Colorado be different as between an investor-owned utility (*e.g.*, Public Service Company of Colorado) and a cooperative generation and transmission association (*e.g.*, Tri-State)?
3. Can the Commission legally require a utility to have an approved ERP plan as a condition precedent to approving an application for a CPCN for a major generation facility?
4. What is the practice in other states with comparable authority to the Colorado PUC with respect to CPCN applications from entities over which the state commission has limited authority?
5. Under Options B and C outlined in this Order, the Commission contemplates possible hearings on the proposed resource plan for a cooperative generation and transmission association. What steps can the Commission take to ensure that the hearing process is as streamlined and efficient as possible in each case?
6. In addition to the options described in this Order, what other options are available to the Commission to exercise appropriate oversight for the resource planning activities of cooperative generation and transmission associations?