

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.

**DECISION GRANTING EXCEPTIONS
AND ADOPTING RULES**

Mailed Date: February 3, 2016
Adopted Date: January 27, 2016

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

1. By this Decision, the Colorado Public Utilities Commission (Commission) adopts amendments to the Rules Regulating Electric Utilities in Colorado, contained in 4 *Code of Colorado Regulations* (CCR) 723-3, consistent with House Bill (HB) 13-1292 and § 40-2-129, C.R.S.

2. This Decision grants exceptions to Decision No. R15-1245 (Recommended Decision) filed by Tri-State Generation and Transmission, Inc. (Tri-State), consistent with the discussion below. We also adopt the remainder of the Recommended Decision and the rule amendments proposed therein.

B. Background

3. HB 13-1292 modifies § 40-2-129, C.R.S., by specifying that, when evaluating utility requests for a Certificate of Public Convenience and Necessity (CPCN) for the construction or expansion of generating facilities, “including pollution control and fuel conversion projects of existing coal-fired plants,” the Commission shall consider, on a qualitative basis, “best value employment metrics.” Under § 40-2-129, C.R.S., best value employment metrics include qualitative factors that affect employment and the long-term economic viability of Colorado communities.¹

¹ Section 40-2-129, C.R.S., states in part:

When evaluating electric resource acquisitions and requests for a certificate of convenience and necessity for construction or expansion of generating facilities, including but not limited to pollution control or fuel conversion upgrades and conversion of existing coal-fired plants to natural gas plants, the commission shall consider, on a qualitative basis, factors that affect employment and the long-term economic viability of Colorado communities.

4. On May 15, 2015, we issued a Notice of Proposed Rulemaking (NOPR) for Rules 3102 and 3205, 4 CCR 723-3, consistent with HB 13-1292 and the corresponding modifications to § 40-2-129, C.R.S.²

5. The NOPR proposed adding Rules 3102(e) and 3102(f), which set forth the specific best value employment metrics that utilities must evaluate and include in an application for a CPCN.³

6. We determined that further rule amendments to Rule 3205 might be necessary to implement HB 13-1292 because all pollution control projects are deemed to be constructed “in the ordinary course of business” under the current Rule 3205(b)(II) and are exempt from Commission approval in the form of a CPCN.⁴ We suggested four options to amend Rule 3205.⁵ Three of the options proposed different conditions for when pollution control projects would be considered in the ordinary course of business and exempt from CPCN requirements, while the fourth option required utilities to include pollution controls and fuel conversion projects in their annual filings made under Rule 3205(c). The NOPR requested interested participants to comment on whether, and under what circumstances, a CPCN should be required for pollution control projects.⁶

² Decision No. C15-0456, in Proceeding No. 15R-0325E.

³ *Id.*, ¶ 14.

⁴ *Id.*, ¶ 5.

⁵ *Id.*, ¶¶ 15-24.

⁶ *Id.*, ¶ 12.

7. The NOPR referred this proceeding to an Administrative Law Judge (ALJ) and set a date for a public hearing.

8. On July 31, 2015, Joint Comments were filed by Black Hills/Colorado Electric Utility Company, Colorado Building and Construction Trades Council and the Rocky Mountain Environmental Labor Coalition, Colorado Department of Public Health and Environment Air Pollution Control Division (CDPHE), Colorado Energy Consumers, Colorado Energy Office, Public Service Company of Colorado, Tri-State, and Western Resource Advocates (collectively, the Joint Commenters).

9. The Joint Commenters proposed amendments to Rules 3205(a) and (b) and stated that they support the Commission's proposed Rules 3102(e) and (f).

10. ALJ Mana Jennings-Fader conducted a hearing on August 13, 2015.

11. On November 25, 2015, the ALJ issued the Recommended Decision adopting rules.⁷

C. Recommended Decision

1. Proposed Rules 3102(e) and (f)

12. Proposed Rule 3102(e) describes the best value employment information that applicants must provide to the Commission in applications for CPCNs for pollution control projects.⁸ Proposed Rule 3102(f) describes how and when applicants must provide the best value employment information to the Commission if it is not available at the time the CPCN application is filed.⁹ The ALJ adopted the proposed rules, with minor changes.

⁷ Decision No. R15-01245, in Proceeding No. 15R-0325E (Recommended Decision).

⁸ *Id.*, ¶¶ 46-53.

⁹ *Id.*, ¶¶ 60-71.

2. Proposed Rules 3205(b)(II) and 3205(b)(III)

13. Under Rule 3205(b), a CPCN is not required for the construction or expansion of generation capacity that is considered “in the ordinary course of business.” Current Rule 3205(b)(II) designates all pollution control projects as “in the ordinary course of business,” and therefore exempt from CPCN requirements and from consideration of best value employment metrics under § 40-2-129, C.R.S. The Joint Commenters proposed amending Rule 3205(b)(II) and adding Rule 3205(b)(III).

14. The Recommended Decision adopts the revisions to Rule 3205(b)(II) as proposed by the Joint Commenters with minor changes. Proposed Rule 3205(b)(II) exempts only pollution control projects that are estimated to cost less than \$50 million.¹⁰ Based on suggestions from the Joint Commenters, Proposed Rule 3205(b)(II) also contains an annual inflation adjustment to the \$50 million threshold.¹¹

15. The Recommended Decision also adopts Rule 3205(b)(III) as proposed by the Joint Commenters with certain changes. The new provisions in Rule 3205(b)(III) provide that pollution control projects mandated by the CDPHE will enjoy a rebuttable presumption that the public convenience and necessity requires the construction of the project.¹²

¹⁰ *Id.*, ¶¶ 133-138.

¹¹ *Id.*, ¶¶ 139-143.

¹² *Id.*, ¶¶ 160-170. Although the Joint Commenters suggested that the presumption should be rebuttable by *clear and convincing evidence*—a heightened evidentiary standard—the ALJ determined that the presumption should be rebuttable by a *preponderance of the evidence*, 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.

3. Proposed Rule 3205(a)

16. Under Rule 3205, a utility cannot construct or expand generation facilities or projects without first applying for a CPCN or obtaining a Commission notification that a CPCN is not required.

17. The Joint Commenters proposed adding the following sentence at the end of Rule 3205(a):

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 3603¹³ and rate regulation under either Rule 3108¹⁴ or Rule 3109.¹⁵

18. According to the Joint Commenters, adding the proposed additional sentence to Rule 3205(a) would exempt Tri-State, a generation and transmission cooperative, from CPCN requirements for pollution control projects—and associated considerations of best value employment metrics—set forth in Rule 3205(b)(II).

19. The ALJ did not adopt the additional sentence finding that, in enacting HB 13-1292, the General Assembly did not intend to exempt a subset of electric utilities (Tri-State) from the requirement to consider best value employment metrics when constructing or installing pollution controls.¹⁶

D. Exceptions

20. On December 14, 2015, Tri-State filed exceptions to the Recommended Decision requesting that the Commission adopt the amendment to Rule 3205(a) proposed by the Joint Commenters.

¹³ Rule 3603 requires jurisdictional electric utilities to file Electric Resource Plans for approval of future construction or acquisition of generating capacity.

¹⁴ Rule 3108 requires utilities to file tariffs for Commission approval.

¹⁵ Rule 3109 requires utilities to file any new or changed tariffs for Commission approval.

¹⁶ Recommended Decision, ¶¶ 83-96.

21. Tri-State argues that—contrary to the ALJ’s findings—in amending § 40-2-129, C.R.S, the General Assembly did not intend for the Commission to begin requiring Tri-State to file CPCN applications when installing pollution controls.¹⁷

22. Tri-State also argues that the policy reasons for requiring CPCN applications do not support requiring CPCN applications for pollution controls for generation and transmission cooperatives. According to Tri-State, the purpose of requiring utilities to file CPCN applications is to: (1) ensure projects are built only when there is a public need for them; (2) prevent unnecessary duplication of facilities; (3) ensure that new facilities do not interfere with other utilities; and (4) ensure that utilities only make investments that provide a good value to ratepayers.¹⁸ Because pollution control projects are mandated by law and the CDPHE, Tri-State argues that most of the policy reasons behind CPCN requirements do not apply to pollution control projects. Additionally, “as a not-for-profit, cost-based, member-owned cooperative, Tri-State has an inherent incentive to comply with environmental regulatory obligations in the most cost-effective way possible.”¹⁹

23. No participant responded to Tri-State’s exceptions.

E. Findings and Conclusions

24. We find it reasonable to adopt the revisions to Rule 3205(a) as proposed by the Joint Commenters that will exempt Tri-State from CPCN requirements for pollution control projects. Tri-State’s policy arguments are persuasive. Pollution controls are mandated by law and required by CDPHE, and most of the policy reasons for requiring CPCN applications do not apply to Tri-State with respect to pollution controls.

¹⁷ Tri-State Exceptions at 3, 7.

¹⁸ *Id.* at 3.

¹⁹ *Id.* at 5.

25. We grant Tri-State's exceptions, and the following sentence will be added to Rule 3202(a):

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.

26. Our findings here are limited to the installation of pollution control projects. This Decision does not relinquish or limit the Commission's authority under § 40-5-101, C.R.S., to require generation and transmission cooperatives, including Tri-State, to file CPCN applications before constructing or expanding generating capacity.

27. We adopt the remainder of the Recommended Decision and Proposed Rules 3102(e), 3102(f), 3205(b)(II), and 3205(b)(III).

II. **ORDER**

A. **The Commission Orders That:**

1. The Exceptions to Decision No. R15-1245 filed by Tri-State Generation and Transmission Association, Inc., on December 14, 2015 are granted, consistent with the discussion above.

2. Rules 3102 and 3205 of the Commission's Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* 723-3, in redline and strikeout format attached to this Decision as Attachment A, and in final format attached as Attachment B, are adopted and are available through the Commission's Electronic Filings (E-Filings) system at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=15R-0325E.

3. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

4. Subject to a filing of an application for rehearing, reargument, or reconsideration, the opinion of the Attorney General of the State of Colorado shall be obtained regarding constitutionality and legality of the rules as finally adopted. A copy of the final, adopted rules shall be filed with the Office of the Secretary of State. The rules shall be effective 20 days after publication in the Colorado Register by the Office of the Secretary of State.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 27, 2016.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean

Doug Dean, Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

GLENN A. VAAD

FRANCES A. KONCILJA

Commissioners