Decision No. R25-0515

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24R-0306E

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

RECOMMENDED DECISION DECLINING TO AMEND RULES AND CLOSING PROCEEDING

Issued Date: July 15, 2025

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I. STATEMENT AND SUMMARY

1. For the reasons discussed, this Decision declines to adopt amendments to the Commission's Rules Regulating Electric Utilities, 3 *Code of Colorado Regulations* ("CCR") 723-3 ("Electric Rules") and identifies potential approaches to help the Commission achieve this Proceeding's goals.[1] The Administrative Law Judge ("ALJ") does not reach this Decision lightly. Indeed, this Proceeding raises important issues worthy of further study, examination, and continued efforts. Unfortunately, rather than addressing the issues the proposed Rules intended to resolve, the proposed Rules create numerous new issues for which the record does not present workable solutions.

II. PROCEDURAL HISTORY AND BACKGROUND

A. Procedural History[2]

2. On July 11, 2024, the Colorado Public Utilities Commission ("Commission") initiated this matter by issuing a Notice of Proposed Rulemaking ("NOPR") to amend the Electric Rules, 3 CCR 723-3, with the proposed Rules as Attachments A and B thereto.[3] At the same time,

[1] This Decision considers the proposed Rules together and includes findings, analysis, and conclusions for all Rules near the end of the Decision, instead of doing so individually for each proposed Rule. This is necessary because most proposed Rules build upon each other such that a fulsome evaluation requires considering how each proposed Rule interacts with and impacts other proposed Rules. In reaching this Decision, the Administrative Law Judge has considered the entire record in this Proceeding, including all aspects of the proposed Rules, the relevant law, and all public comments, even those discussed briefly or not at all. Any arguments not specifically addressed have been considered and are rejected. Throughout this Decision, headers, sub headers, and the like are for ease of reference only.

[2] Only the procedural history necessary to understand this Decision is included.

[3] Decision No. C24-0494 (issued July 11, 2024) ("NOPR").

the Commission referred this Proceeding to an ALJ for disposition.[4] The matter was initially assigned to ALJ Alenka Han and later reassigned to the undersigned.

3. The proposed Rules are intended to clarify the process by which regulated electric utilities and wholesale generation and transmission cooperative associations (collectively, "utilities" or "utility") identify and address impacts that their infrastructure projects may have on significant sites, the historic and cultural resources thereof, and Tribal Governments,[5] and to present information in the context of certain Commission resource planning and infrastructure proceedings.[6]

4. On November 13, 2024, based on public comments on the proposed Rules, the ALJ identified numerous issues and significant concerns, and invited comments on the same.[7] Specifically, the ALJ invited comment on the below items:

- legal limits on the Commission's siting and land use authority;[8]
- practical issues surrounding the timing of applications (or other filings) and resulting Commission decisions as compared to utility and contractor groundwork and decisions on energy infrastructure siting and routing;[9]
- legal and practical questions about the extent to which the proposed Rules duplicate or conflict with existing federal, state, local, or Tribal Governments' requirements around land use and siting, including cultural resource surveys and the like;[10] and
- how the Commission should assess the sufficiency of a utility's treatment of significant sites and cultural and historic resources; how the Commission should determine whether proposed impact mitigation is viable and cost-effective; whether the Commission can reasonably assess and decide these issues at the time of electric resource plan ("ERP") or certificate of public convenience and necessity ("CPCN") decisions; and which entity or entities are best-positioned to determine these issues.[11]

[4] *Id*. at 24-25.
[5] This Decision's references to Tribal Governments are to federally recognized Tribal Nations.
[6] NOPR at 1.
[7] Decision No. R24-0821-I at 5-13 (issued November 13, 2024).
[8] *Id.* at 5-7.
[9] *Id.* at 7-10.
[10] *Id.* at 5-12.
[11] *Id.* at 10-11.

5. On March 6, 2025, the ALJ took administrative notice of numerous governmental policies relating to government-to-government consultation between the federal government, other state governments, and Tribal Governments, and the Colorado Commission on Indian Affairs' ("CCIA")'s Tribal Consultation Guide.[12] At the same time, the ALJ invited public comment on the administratively-noticed documents.[13]

6. Since this Proceeding was initiated, four public comment hearings were held, the most recent on March 25, 2025.[14]

7. Members of the public have submitted comments throughout this Proceeding, both during public comment hearings and in writing.

B. Background

8. The Commission explained that the NOPR is significantly driven by the concerns of, and conversations with, the Northern Cheyenne Tribe of Montana ("Northern Cheyenne Tribe").[15] The Northern Cheyenne Tribe requested that the Commission engage in rulemaking and other actions to facilitate preserving the Sand Creek Massacre National Historic Site (located in Kiowa County, Colorado) from impacts of energy development in Public Service Company of Colorado's ("Public Service") last ERP and Clean Energy Plan Proceeding, No. 21A-0141E ("Public Service's last ERP").[16] The Commission explained that the Sand Creek Massacre National Historic Site has deep significance to the Northern Cheyenne Tribe, the Northern Arapaho Tribe of Wyoming, and the Cheyenne and Arapaho Tribes of Oklahoma.[17] The NOPR explains that in

[12] Decision No. R25-0159-I at 3-5 (issued March 6, 2025). *See* Attachments A to E to Decision No. R25-0159-I.
[13] *Id.* at 5.
[14] *See* NOPR at 24; Decision No. R24-0631-I at 2 and 6 (issued September 4, 2024); Decision No. R24-0821-I at 13; and Decision No. R24-0923-I at 6 (issued December 17, 2024).
[15] NOPR at 9.
[16] *Id.* at 2-3.
[17] *Id.* at 3.

the early morning hours on November 29, 1864, members of the Colorado U.S. Volunteer Cavalry killed more than 230 Cheyenne and Arapaho villagers in a surprise attack, many of them children, women, and elderly persons.[18] The Commission explained that Congress recognized the importance of this tragic site by requiring the Secretary of the Interior to establish it as a national historic site, and that Congress also directed the Secretary of the Interior to manage the site "in a manner that preserves, as closely as practicable, the cultural landscape of the site as it appeared at the time of the Sand Creek Massacre."[19]

9. In recognition of the vital government-to-government relationships between Tribal Governments and Colorado, the NOPR proposes requirements for electric utilities and wholesale cooperatives to coordinate with Tribal Governments; identify and consider how best to mitigate impacts to significant sites; and present relevant information to the Commission.[20] The Commission noted that the proposed Rules' structure is intended to strongly encourage electric utilities and wholesale cooperatives to engage early and thoughtfully with Tribal Governments.[21] Notably, the Commission also stated that this Proceeding is an early step as it develops appropriate Tribal Government consultation practices in pursuit of robust government-to-government relationships.[22] The Commission explained that many decisions can influence the overall economics of an energy infrastructure project, ranging from materials to property rights to environmental analyses or cultural resource surveys.[23] The Commission stated that for it to make decisions about risk and costs impacts on ratepayers, it must receive information necessary to

[18] *Id.* at 4.
[19] *Id.*, citing https://www.congress.gov/bill/106th-congress/senate-bill/2950/text.
[20] *Id.* at 3.
[21] *Id.*
[22] *Id.*
[23] *Id.* at 8-9.

understand the full costs of the actions and alternatives that electric utilities and wholesale cooperatives propose, including those necessary to mitigate impacts to significant sites.[24]

III. PROPOSED RULES AND COMMENTS THEREON

A. Proposed Rule 3001 - Definitions

10. Proposed Rule 3001(i) defines cultural and historic resources to mean "cultural resources, human remains and associated funerary objects, viewsheds, and sacred objects."[25]

11. Proposed Rule 3001(mm) defines "significant site" as:

> (I) the Sand Creek Massacre National Historic Site located in Kiowa County, Colorado, that commemorates the November 29, 1864, attack on a village of Southern Cheyenne and Arapaho people along Sand Creek by the Colorado Volunteer (U.S.) Cavalry;
> (II) a site that is registered within the Cultural Resources Database maintained by the Office of Archaeology and Historic Preservation within History Colorado and is listed or eligible for listing on a local, state, or national register of historic places; or
> (III) a site designated by the Commission as a significant site within a particular proceeding.[26]

12. Proposed Rule 3001(ss) defines "Tribal Nations" as "federally recognized Tribes."[27]

13. The Southern Ute Indian Tribe, the Northern Cheyenne Tribe, and the Ute Mountain Ute Tribe, (collectively, "Joint Tribe Commenters") suggest that the Commission amend proposed Rule 3001(i) to define "cultural and historic resources" as:

> cultural resources and ceremonial sites, both physical and intangible, with historical, traditional, spiritual, religious, or cultural significance, ancestral remains and associated funerary objects, objects of cultural patrimony, viewsheds, and sacred objects.[28]

[24] *Id.* at 9.
[25] Attachment A to NOPR at 2.
[26] *Id.* at 4.
[27] *Id.*
[28] Joint Tribe Commenters' comments filed April 8, 2025 at 2 ("Joint Tribe Commenters' 4/8/25 Comments").

14. They also suggest that proposed Rule 3001(mm)'s definition of significant site be expanded to include the Meeker Battle Site and the Milk Creek Battlefield Park (both in Rio Blanco County); sites nominated in History Colorado's Office of Archaeology and Historic Preservation's ("History Colorado"[29]) Cultural Resources Database ("History Colorado's database"); sites nominated for listing on a local, state, or national register of historic places; and sites that are "registered, listed, eligible, or nominated with a Tribal Historic Preservation Office or Cultural Protection/Rights Departmental database maintained by a Tribal Nation."[30] The Joint Tribe Commenters also suggest that Rule 3001(ss) be modified to refer to "Tribal Governments," and to insert "Indian" before "Tribes."[31] The Ute Mountain Ute Tribe explains that not all Tribes use the term "Nation" to reflect the name of their sovereign governmental entity.[32]

15. The Ute Mountain Ute Tribe emphasizes that "viewsheds" should be maintained in proposed Rule 3001(i), explaining that a viewshed may be self-evident but may also vary depending on "the cultural orientation" of the viewer.[33] It submits that viewsheds are places that influence or have been influenced by humans and that landscapes where viewsheds are important may be associated with a person, event, historic activity or cultural practice.[34] Viewsheds may also implicate intangible elements, such as works of art, texts, narratives, and regional identity expressions. As a result, it asserts that viewsheds are not specific to Indigenous cultures.[35]

[29] This Decision's references to History Colorado encompass its divisions, offices, or departments, including its Office of Archaeology and Historic Preservation.

[30] Joint Tribe Commenters' 4/8/25 Comments at 2.

[31] *Id.*

[32] Ute Mountain Ute Tribe's comments filed August 12, 2024 at 5-6 ("Ute Mountain Ute Tribe's 8/12/24 Comments").

[33] *See* Ute Mountain Ute Tribe's comments filed August 23, 2024 at 10-11 ("Ute Mountain Ute Tribe's 8/23/24 Comments").

[34] *Id.* at 10-11.

[35] *Id.* at 11.

16. The Ute Mountain Ute Tribe explains that viewsheds that are important to Indigenous cultures may not register in the same way to a Eurocentric mindset (*e.g.*, a single butte that aligns with a solar solstice or equinox from a particular vantage point may have cultural or religious significance to an Indigenous culture).[36] The concept of "site impacts" may be very different to a Tribal Government as compared to the dominant Western culture's perspective; impacts can extend beyond the aesthetic.[37] It states that sightlines are not the only sensory experiences that are culturally significant and worth preserving, explaining that soundscapes, locations of tactile importance, or olfactory stimuli also have importance that may not be readily apparent to a casual observer in the dominant culture.[38] For example, at a location in the Ute Mountain Ute Tribal Park hundreds of feet above the Macos River, a visitor standing in a certain spot can hear the rush of water in volumes similar to that experienced by someone standing in the middle of the stream.[39] It submits that to the Eurocentric mind, the location may be an interesting combination of distance and local geology, while to "a traditional mindset," the location may be imbued with cultural, ceremonial, or spiritual meaning.[40] Either way, such a site demands preservation, despite the fact that its uniqueness is unrelated to visual perception.[41] In another example, the Ute Mountain Ute Tribe explains that Tribal cultures always consider spiritual impacts to a significant site, and that in some Tribal cultures, the sunrise and sunset orientation of a given site has important significance from a religious and astronomical perspective.[42] For all these reasons, the Ute Mountain Ute Tribe submits that when possible, impacts to a significant site

[36] *Id.* at 11-12.
[37] Ute Mountain Ute Tribe's 8/12/24 Comments at 6.
[38] Ute Mountain Ute Tribe's 8/23/24 Comments at 13.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] Ute Mountain Ute Tribe's 8/12/24 Comments at 6.

should be evaluated from a Tribal perspective, and not necessarily from an "on the ground," physical impact perspective.[43]

17. Relatedly, the Ute Mountain Ute Tribe provides a high-level background explaining some complexities associated with significant sites and meaningful Tribal consultation.[44] As an initial matter, it asserts that it is important to acknowledge where Indigenous knowledge is held.[45] The Ute Mountain Ute Tribe states that History Colorado's database does not include all sites significant to Indigenous cultures, given (at least in part) that adding more sites to the database is a resource-intensive and difficult process.[46] Tribal Governments have the "intellectual property of sacred and sometimes non-sharable Indigenous Knowledge."[47] As a result, certain Indigenous knowledge may only be available through a Tribal Government (*i.e.*, its historic preservation department or office).[48] Matters get more complex from there. For example, "Traditional Ecological Knowledge" is often held in trust by a Tribal Government's environmental department, whereas other kinds of Indigenous knowledge may be reserved for inside the Tribal Government's Elders Council (or the like), as is the case with the Ute Mountain Ute Tribe.[49] The Ute Mountain Ute Tribe also highlights that the federal government has made clear that Indigenous knowledge must be treated as expert knowledge, nothing less.[50] It emphasizes that only the relevant Tribal Government can ultimately decide whether a site is significant to it.[51]

[43] *See id.*
[44] *Id.* at 9.
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*, citing whitehouse.gov/wp-content/uploads/2022/12/OSTP-CEQ-IK-Guidance.pdf.
[51] *Id.* at 13.

For example, old trading post and boarding school sites, (which may not have existing physical structures), are places of strong significance to Tribal Governments.[52]

18. The Ute Mountain Ute Tribe explains that forced displacement across modern geo-political boundaries means that a Tribal Government's traditional territory and culturally significant sites may not correspond to the state in which a federally recognized Tribal Government is registered.[53] For its part, the Ute Mountain Ute Tribe seeks to consult in all states where the Ute People were involved both historically and archaeologically.[54] In short, many other "Tribes, Nations, and Pueblos may assert the existence of significant sites in Colorado."[55]

19. The Ute Mountain Ute Tribe emphasizes that the Commission's Rules must address five essential and interrelated elements: Tribal resources, cultural resources, historical resources, significant sites, and significant landscapes.[56] These concepts are connected and represent aspects of the Indigenous experience.[57]

20. The Northern Cheyenne Tribe generally supports the proposed Rules, noting that it has ancestral lands in much of Colorado, including lands associated with the Sand Creek Massacre.[58]

21. The Sand Creek Massacre Foundation ("Foundation") strongly supports proposed Rule 3001(i) and (mm).[59] It emphasizes that the Sand Creek Massacre National Historic Site is not just historic but it is a living part of and an open wound in the Cheyenne and Arapaho Peoples'

[52] *Id.,* citing for example, *Federal Indian Schools in Colorado*, 1880-1920, (June 30, 2023), historycolorado.org/sites/default/files/media/document/2023/FEDERAL%20INDIAN%20BOARDING%20SCHOOLS% 20IN%20COLORADO_%201880-1920_August%202023.pdf.

[53] *Id.* at 9-10.

[54] *Id.* at 10.

[55] *Id.*

[56] Ute Mountain Ute Tribe's 8/23/24 Comments at 14.

[57] *Id.*

[58] Northern Cheyenne Tribe's comments filed August 8, 2024 at 1 ("Northern Cheyenne Tribe's 8/8/24 Comments").

[59] Foundation's comments filed August 27, 2024 at 1 ("Foundation's 8/27/24 Comments").

lives to this day.[60] The Foundation states that Congress entrusted the National Park Service with preserving the Sand Creek Massacre National Historic Site's cultural landscape as closely as possible to the way it appeared at the time of the massacre.[61] It highlights that the National Park Service identified the Site's fundamental resources and values, foremost of which are the "'topographic features of the ethnographic landscape" including extensive viewsheds to the north, east, south, and "'intangible spiritual qualities of the landscape.'"[62]

22. The National Parks Conservation Association ("Conservation Association") suggests the Commission approach the definition of significant site in proposed Rule 3001(mm) as a framework, which may include cultural resource databases that Tribal Governments maintain.[63] It encourages the Commission to work in partnership with Tribal Governments to consider landscape-level areas of cultural or historical importance as part of this definition and to maintain significant site locations confidential to avoid looting.[64]

23. Western Resources Advocates ("WRA") states that the location of many sites sacred to Tribal Governments may not be publicly available and that proposed Rule 3001(mm) should be expanded to include any site registered, listed, eligible, or nominated within Tribal Governments' cultural resource databases or the like.[65] WRA also agrees with other comments that proposed Rule 3001(mm) should identify additional specific sites.[66] WRA encourages the Commission to consider the need to maintain significant sites' location confidential, and other

[60] Foundation's 8/27/24 Comments at 2.
[61] *Id.* at 1.
[62] *Id.*, quoting National Park Service, 2014: 17.
[63] Conservation Association's comments filed August 27, 2024 at 2-3 ("Conservation Association's 8/27/24 Comments").
[64] *Id.*
[65] WRA's comments filed August 9, 2024 at 4 ("WRA's 8/9/24 Comments"); WRA's comments filed August 22, 2024 at 3 ("WRA's 8/22/24 Comments").
[66] WRA's 8/22/24 Comments at 3.

sensitivities associated with such sites, such as instances where a Tribal Government cannot fully share why a site is significant or the precise location of a significant site, when evaluating other commenters' proposed alternatives to identifying significant sites.[67]

24. History Colorado suggests that the definitions in proposed Rule 3001 conform to definitions in other state and federal statutes.[68] It highlights the definitions of numerous relevant terms from several sources for the Commission to consider.[69] It provides the following definitions from 8 CCR 1504-7:

> 'Archaeological resources' means all sites, deposits, structures, or objects which are at least 100 years of age and which provide information pertaining to the historical or prehistorical culture of people within the boundaries of the state of Colorado;
>
> 'Artifacts' are portable items made, used, or transported by humans;
>
> 'Funerary objects' means objects that, as part of the death rite or ceremony of a culture, are reasonably believed to have been placed with individual human remains either at the time of death or later.
>
> 'Historical' means older than 50 years of age and during the period that written records have been used to document events in Colorado.
>
> 'Historical resources' means all sites, deposits, structures, buildings, or objects which provide information pertaining to the culture of people during the historical period;
>
> 'Prehistorical' means before the period that written records were used to document events in Colorado. Prehistorical resources may be archaeological or paleontological;[.][70]

25. History Colorado also provides the following definitions from the Colorado Register of Historic Places:

> 'Historical significance' means having importance in the history, architecture, archaeology, or culture of this state or any political subdivision thereof or of the United States, as determined by the society.

[67] *Id.* at 4, citing Public Service's comments filed August 9, 2024 at 10 ("Public Service's 8/9/24 Comments").
[68] History Colorado's comments filed August 9, 2024 at 1 ("History Colorado's 8/9/24 Comments").
[69] *Id.*, citing https://www.nps.gov/dscw/cr-nrhp.htm.
[70] *Id.* at 1-2.

> 'Society' means the state historical society (commonly referred to as History Colorado)
>
> 'Properties' means the resources, including buildings, structures, objects, sites, districts, or areas, that are of historical significance.[71]

26. Relevant to proposed Rule 3001(i), History Colorado explains that state regulations describe "cultural resources" as a "non-legal term that is used to encompass all resources of historic and prehistoric significance."[72] History Colorado states that cultural resources and funerary objects are not the same thing, are covered by different laws, and the latter should be defined separately in the Commission's proposed Rules.[73] It explains that the state recognizes human remains as qualitatively different from other historical and prehistorical artifacts or properties and treats them separately from other cultural resources in both practice and law.[74] History Colorado suggests that the Commission work with its Office of Archaeology and Historic Preservation, as the long-standing authority on cultural resources in Colorado through established processes and over 50 years of precedent from the National Historic Preservation Act ("NHPA") (54 USC §§ 300101 to 320303)[75] and the Colorado Historical, Prehistorical, and Archaeological Resources Act ("Colorado Resources Act") (§§ 24-80-401 to 411, C.R.S.).[76]

27. History Colorado asserts that proposed Rule 3001(mm)(I)'s definition of significant site is poor given that the Sand Creek Massacre National Historic Site is only one example of a significant site, and that the definition of this term must either meet the federal definition in the NHPA, or be determined by the Colorado Historical Society for sites within Colorado, per statute.[77] It also notes that Tribal Governments may hold sites as significant that are

[71] *Id.* at 2.
[72] *Id.* at 1.
[73] *Id.* at 2 and 8, citing §§ 24-80-1301 to 1305, C.R.S. (speaking to unmarked human graves).
[74] *Id.* at 2.
[75] Before December 19, 2014, the NHPA was cited as 16 USC § 470-1.
[76] History Colorado's 8/9/24 Comments at 5.
[77] *See id.* at 3. History Colorado cites "CRS 24-80-1," but there is no such statute. *Id.*

not covered under the proposed Rule.[78] Relevant to proposed Rule 3001(mm)(II), History Colorado explains that cultural resource management ("CRM") professionals are required to meet the Secretary of the Interior's standards for archaeology to access information in its database due to the sensitive nature of many resources.[79] History Colorado recommends that utilities employ or contract with CRM professionals or companies "to understand the process as well as the data once it is accessed," adding that there are over 120 CRM companies authorized to conduct cultural resource survey work in Colorado.[80] History Colorado recommends that the Commission not adopt proposed Rule 3001(mm)(III) because it presumes that the Commission does not have sufficient subject matter expertise to designate significant sites, and the Colorado Historical Society is statutorily responsible to determine historic significance and provide technical assistance to state agencies such as the Commission.[81] It notes that it has had over 75 electric utility projects subject to federal, state, and local laws since January 1, 2020.[82] History Colorado also criticizes proposed Rule 3001(mm)(III) because it is vague, noting that the Commission could declare any place or site as significant given that the proposed Rule does not explain why, how, when, or by what criteria the Commission might undertake such an activity.[83]

28. History Colorado recommends that proposed Rule 3001(ss) not be adopted and that the Commission instead defer to the CCIA's definitions of "Tribal Nations."[84]

29. History Colorado describes the Commission's discussion in paragraph 31 of the NOPR about state and federal treatment of cultural resources as "an incredibly incomplete

[78] *Id.* at 8.
[79] *Id.* at 4-5.
[80] *Id.*
[81] *See id.* at 3.
[82] *Id.* at 8.
[83] *Id.* at 9.
[84] *See id.* at 3.

understanding of when there is a federal vs. state nexus."[85] It explains that the Native American Graves Protection and Repatriation Act ("NAGPRA") (25 USC § 3001 *et. seq*.) is not the only federal law that applies to cultural resources' consideration and treatment, and that NAGPRA has a narrow scope that makes it mostly irrelevant to the proposed Rules.[86]

30. The Colorado Solar and Storage Association ("COSSA") and the Solar Energy Industries Association ("SEIA") submit that proposed Rule 3001(i)'s definition of cultural and historic resources is unclear.[87] For example, they question what kind of "viewshed" is a cultural or historic resource under the proposed Rule; whether there is a definition of viewshed in federal laws or regulations; and whether "viewshed" should be a "state or federally protected viewshed associated with a cultural resource" or whether the proposed Rule allows a viewshed to be protected separate from a cultural resource.[88] Of particular note, they ask whether the proposed Rule is intended to only cover resources associated with Indigenous Peoples.[89]

31. COSSA and SEIA submit that the definition of "significant sites" in proposed Rule 3001(mm) matters tremendously from an implementation perspective and that the proposed definition is not clear.[90] They explain that not all cultural resources in History Colorado's database may qualify as a significant site, and not all significant sites may require the same level of protection to mitigate impacts.[91] For example, architectural information for public buildings may be in History Colorado's database, but may not be a significant site that the proposed Rules intend to protect.[92] COSSA and SEIA assert that different types of significant sites may require different

[85] *See id.* at 2.
[86] *See id.*
[87] COSSA and SEIA's comments filed August 9, 2024 at 5 ("COSSA and SEIA's 8/9/24 Comments").
[88] *Id.*
[89] *Id.*
[90] *Id.* at 3.
[91] *Id.*
[92] *Id.* at 3-4.

protection of a surrounding viewshed, depending on their type, and that proposed Rule 3001(mm)'s definition does not contemplate these differences or provide needed flexibility to treat different resources differently.[93]

32. COSSA and SEIA confirm that History Colorado's database is not publicly accessible and that users have to meet the Secretary of the Interior's professional standards for archaeology or apply for a waiver to access the information.[94] Based on information it obtained from the State Archaeologist, COSSA and SEIA submit that listing or eligibility for listing in History Colorado's database, or in a local, state, or national register of historic places does not alone determine whether the site is significant, or whether proposed development will impact the characteristics of the site.[95] If proposed Rule 3001(mm)(II) is maintained, COSSA and SEIA suggest that it be limited to sites in History Colorado's database that meet the definition of significant in the NHPA.[96] While COSSA and SEIA believe that proposed Rule 3001(mm)(III) may provide a more transparent process around identifying significant sites, it suggests that the proposed Rule be modified to clarify the types of proceedings in which significant sites may be designated; when in an ERP or CPCN this should occur; and the standard on which this determination will be based.[97]

33. Similar to the Ute Mountain Ute Tribe's comments, GRID states that western perspectives on landscape and culture are different from Indigenous perspectives, and can be very dissonant with each other.[98] Based on this, (among other reasons), in its earlier comments, GRID

[93] *Id.*
[94] *Id.* at 6.
[95] *Id.*
[96] *Id.* at 6-7.
[97] *Id.* at 7.
[98] GRID's comments filed August 22, 2024 at 9 ("GRID's 8/22/24 Comments").

suggested numerous changes to the definitions in proposed Rule 3001.[99] It submits that if this Rulemaking process had been more deliberate, the Commission could have more relevant information, such as more detail on costs associated with cultural resource surveys and how the proposed Rule definitions may inherently raise costs associated with CPCN projects.[100] In its most recently-filed comments, GRID asserts that at minimum, the Commission should convert issues surrounding the definition of significant site to a separate follow-on rulemaking so that it may compile definitions from interested parties and Tribal Governments that reflect other state, federal, and Tribal Governments' statutes.[101]

34. The Board of Commissioners for Kiowa County ("Kiowa") notes that the Sand Creek Massacre National Historic Site is in Kiowa County, and that Kiowa County has supported and strived to protect and preserve the history of the tragedy that occurred there.[102] Although it does not diminish the importance of preserving this history, Kiowa states that the County is also responsible for protecting the rights of all residents whose ancestors settled there, most of whom have no connection to the devastating event at the Sand Creek Massacre National Historic Site.[103] To this end, Kiowa objects to proposed Rule 3001(i) as it would require that the Sand Creek Massacre National Historic Site's viewshed be preserved so that nothing can be seen from the Site that was not there in 1864.[104] Kiowa states that it understands that the Site was allotted a viewshed from the Site boundaries in federal legislation that provided for its formation, and that anything beyond that is a taking of landowner rights.[105] It asks that the Commission carefully consider how

[99] *See e.g.*, *id.* at 3-4, 8; GRID's comments filed August 9, 2024 at 4, 9 ("GRID's 8/9/24 Comments").
[100] GRID's 8/22/24 Comments at 8.
[101] GRID's comments filed December 11, 2024 at 3 ("GRID's 12/11/24 Comments").
[102] Kiowa's comments filed August 8, 2024 at 1 ("Kiowa's 8/8/24 Comments").
[103] *Id.*
[104] *See id.* at 1-2.
[105] *See id.*

its decisions will affect all of the people involved and Kiowa County's future as a whole, noting there is a very fine line between protecting history and taking rights from property owners.[106]

35. Interwest Energy Alliance ("Interwest") recommends that the definition of cultural and historic resources in proposed Rule 3001(i) be stricken in favor of referencing already established state or federal definitions of this term to avoid duplicative definitions and confusion about the Rule's scope.[107] Alternatively, Interwest suggests that proposed Rule 3001(i) be amended to be a definition of "cultural and historic resources of significance to Tribal Nations" to reduce the potential for unintended consequences.[108] It is also concerned that including "viewsheds" in proposed Rule 3001(i) creates uncertainty, noting that if this language remains, it anticipates repeated litigation on the meaning of this term.[109] It adds that a property taking can occur through regulation.[110] Interwest acknowledges that the issue of land ownership as it relates to Tribal Governments is replete with historic injustice, but does not believe that the Commission is the appropriate forum to litigate these issues.[111] If the Commission adopts proposed Rule 3001(i), Interwest suggests that "viewsheds" be removed from the definition. If "viewsheds" remain, Interwest submits that the Commission must identify an objective and understandable methodology to define and quantify viewshed and viewshed impact, which must be discernable from the earliest development phase.[112] Similarly, Interwest asserts that if the Commission does not strike proposed Rule 3001(i), it is necessary to define "actual impacts," "potential impacts,"

[106] *See id.*
[107] Interwest's comments filed August 9, 2024 at 3 ("Interwest's 8/9/24 Comments"), citing, for example, definitions adopted by the National Park Service and the Colorado Office of Archeology and Historic Preservation within History Colorado, among other things.
[108] *Id.*
[109] *See id.*
[110] *Id.* at 4.
[111] *Id.* at 3-4.
[112] *Id.* at 4.

and how cultural and historic resources work within the context of significant sites, as the interplay of these unknown terms is critical for developers to understand at the earliest development phases.[113]

36. Interwest is concerned that proposed Rule 3001(mm)(III) creates uncertainty by allowing the Commission to designate a significant site in a proceeding and asserts that the Commission is not the appropriate state agency to designate culturally significant sites.[114] It explains that there are already significant local and federal regulations and requirements that limit development and protect culturally significant features and areas, and that allowing the Commission to designate a site within a Commission proceeding may create new or duplicative designations.[115] It suggests that proposed Rule 3001(mm)(III) not be adopted and that the Rule be limited to the definition in proposed Rule 3001(mm)(II).[116] Interwest explains that it is critical for developers to be able to rely on History Colorado's database.[117] Access to History Colorado's database is generally restricted to archeologists meeting specific criteria; those employed with permanent status under the Federal Job Series 193; those employed as an archeologist for a registered non-profit historic preservation organization; those who teach archaeological classes at a college or university; or graduate students with written justification for access from a qualifying facility.[118] Interwest explains that History Colorado charges a $30 fee per section accessed, and that while this may seem nominal, because access is restricted to qualified individuals, it can be significantly costly to hire qualified individuals (*i.e.*, experts) to perform an inventory for a

[113] *Id.* at 3.
[114] *See id.* at 4-5.
[115] *Id.* at 5.
[116] *See id.*
[117] *Id.* at 13.
[118] *Id.* at 8-9.

project.[119] For example, the costs can typically range from $10,000 to $100,000 for an initial inventory and field reconnaissance for a typical utility-scale renewable energy project.[120] At best, such increased costs would be reflected in pricing for projects, and at worst, significant cost increases may reduce renewable energy developers' ability to finance projects in Colorado.[121]

37. Interwest suggests that the definition of "Tribal Nations" in proposed Rule 3001(ss) be amended to mean "federal recognized Tribes with historical ties to Colorado as determined by" the CCIA so that the definition has a connection to Colorado.[122]

38. Public Service suggests that the Commission exclude viewsheds from proposed Rule 3001(i).[123] It asserts that although viewsheds should be considered when analyzing impacts to a cultural or historic resource, viewsheds are distinct from the underlying resource.[124] Public Service elaborates that identifying a viewshed associated with a cultural or historic resource requires an individualized analysis that considers the nature and cultural significance of the resource.[125] For example, siting energy infrastructure within the viewshed of the historic Brown Palace Hotel in Denver carries fundamentally different cultural impacts and considerations than siting energy infrastructure within the Sand Creek Massacre National Historic Site's viewshed.[126]

39. Based on breadth concerns, Public Service suggests eliminating proposed Rule 3001(mm)(II).[127] In support, Public Service highlights that History Colorado's database

[119] *Id.* at 9.
[120] *Id.*
[121] *Id.*
[122] *Id.* at 5-6.
[123] Public Service's 8/9/24 Comments at 11.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *See id.* at 9-10; Attachment 1 to Public Service's 8/9/24 Comments at 4.

includes information on over 220,000 archaeological, historical, and paleontological sites, many of which could have been designated for reasons unrelated to the concerns that gave rise to this Proceeding.[128] For example, History Colorado's database may include the first post office or school house in a town or a historic hotel.[129] Proposed Rule 3001(mm)(II) would encompass such locations as it includes all sites registered within History Colorado's database. Public Service notes that it and stakeholders would have to hire consultants to access History Colorado's restricted database, which raises concerns about public transparency and equitable access to information necessary to participate in Commission proceedings.[130] In addition to access restrictions, Public Service understands that History Colorado also restricts how the accessed data may be used.[131] Public Service states that the ability to conduct surveys or obtain related information is often restricted to entities with established land rights.[132] It is also concerned that proposed Rule 3001(mm)(II) includes sites that are "eligible for listing" on a local, state, or national register of historic places.[133] Public Service explains that neither it nor the Commission are in a position to determine or identify in advance that a given site is eligible for listing, as that is a determination uniquely within these other entities' purview.[134] As such, it suggests that the Commission work with Tribal Governments, History Colorado, and others to identify and map appropriate significant sites in the state (through a rulemaking proceeding), which could ensure that information on significant sites is transparent and readily accessible to the public and stakeholders.[135] That said,

[128] Public Service's 8/9/24 Comments at 9-10.
[129] *Id.*
[130] *Id.* at 10.
[131] *Id.*
[132] *Id.* at 15.
[133] *Id.* at 10.
[134] *Id.*
[135] *Id.*

Public Service acknowledges that this poses certain risks associated with potential duplication of efforts and inconsistency.[136]

40. Tri-State Generation and Transmission Association, Inc., ("Tri-State") asserts that proposed Rule 3001(i)'s definition of "cultural and historic resources" is circular since it includes "cultural resources."[137] It suggests that this language be removed and replaced with a definition that adds clarity and reduces ambiguity.[138] Tri-State opposes including viewsheds in the definition, explaining that including viewsheds may result in an overly burdensome number of sites that would have to be assessed, and that as a practical matter, utilities typically lack site-specific route data at the time of a CPCN application.[139] For example, Tri-State points to a cultural resource survey for a visual area of potential effects that it recently completed for a defined transmission line that is approximately 3.65 miles long.[140] This survey resulted in 316 properties, over 600 potential sites, and a 700-page report (excluding appendices).[141] Tri-State submits that the potential scope of survey results under the proposed Rules for an unknown route of a longer length may be unmanageable and overly burdensome, particularly considering that the majority of the sites may not be accessed without permission from private landowners.[142] It argues that this will significantly limit surveys' usefulness.[143] Tri-State agrees with Public Service that viewsheds relate to impact analysis and are not cultural or historic resources in and of themselves.[144] Including viewsheds in proposed Rule 3001(i) may result in covering very large geographic areas well beyond the projects

[136] *Id.* at 11.
[137] Tri-State's comments filed August 9, 2024 at 11 ("Tri-State's 8/9/24 Comments").
[138] *Id.*
[139] *Id.* at 11-12.
[140] *Id.* at 11.
[141] *Id.*
[142] *Id.* at 11-12.
[143] *Id.* at 12.
[144] Tr-State's comments filed August 22, 2024 at 3 ("Tri-State's 8/22/24 Comments").

under Commission review, which could lead to private landowner concerns and challenges if the Commission deemed large areas a cultural resource.[145]

41. In response to other comments, Tri-State notes that while modifying proposed Rule 3001(i) to match existing federal definitions would add clarity, the federal definition would still be overbroad for purposes of the proposed Rules.[146] For example, the NHPA's definition of historic property includes resources like historic districts, buildings, and structures that may not be relevant or significant to Tribal Governments.[147]

42. Tri-State submits that proposed Rule 3001(mm)(II)'s definition is overly broad and encompasses a potentially enormous number of sites because it includes all sites listed in History Colorado's database.[148] It suggests that the definition be refined to include only sites relevant to Tribal Governments and to eliminate sites that are eligible for listing in local, state, and national registers.[149] Tri-State explains that eligible sites are only accessible by archaeological professionals, and that determining eligibility requires additional extensive analyses and field studies, including review by the State Historic Preservation Office, the National Register Review Board, the National Park Service, and final review by the Keeper of the National Register.[150] It expects the volume of eligible sites is orders of magnitude greater than listed sites.[151] Tri-State asserts that it is unclear how additional sites would be designated under proposed Rule 3001(mm)(III), including the metrics that the Commission will use to designate

[145] *Id.*
[146] *Id.* at 4.
[147] *Id.*
[148] Tri-State's 8/9/24 Comments at 12.
[149] *Id.*
[150] *Id.*
[151] *Id.*

proceeding-specific sites.[152] It also notes that the proposed Rule does not indicate the point at which the Commission will make a significant site designation in an ongoing proceeding.[153]

43. Black Hills Colorado Electric, doing business as Black Hills Energy, ("Black Hills") is concerned that proposed Rule 3001(i) lacks clarity because the terms "cultural resources," "sacred objects," and "viewshed" are ambiguous.[154] Without clarity on what those terms mean, utilities cannot identify impacts to them, propose mitigation, or describe requirements related to identifying and repatriating cultural and historic resources as contemplated by other proposed Rules.[155]

44. Black Hills is concerned that proposed Rule 3001(mm)(II) includes sites registered in History Colorado's database, which is not accessible to the public.[156] It is unclear whether utilities will have access to information necessary to comply with the proposed Rules' obligation to determine whether a geographic area constitutes a significant site under proposed Rule 3001(mm)(II).[157] Black Hills notes that even though there is a process to request access to History Colorado's database, History Colorado gives no guarantees as to what information will be made available and when information will be provided.[158] In support, Black Hills highlights History Colorado's policy that only qualified users have access to "restricted information."[159] Black Hills points to other notable History Colorado restrictions, including that: the type and extent of available data is determined on a case-by-case basis; restricted sites' location information will be provided only in "rare cases;" and that the State Archaeologist or other commensurate

[152] *Id.*
[153] Tri-State's 8/22/24 Comments at 5.
[154] Black Hills' comments filed August 9, 2024 at 2 ("Black Hills' 8/9/24 Comments").
[155] *See id.* at 2-3.
[156] *Id.* at 3.
[157] *Id.* at 4.
[158] *Id.* at 3.
[159] *Id.* at 3-4.

professional must conduct a manual review of each data request.[160] It argues that these restrictions may limit or prevent utilities and ERP project bidders from identifying whether a potential site is registered or otherwise protected.[161] Black Hills also objects to including "eligible for listing" on a local state, or national register of historic places in proposed Rule 3001(mm)(II) as it is uncertain whether these entities have publicly accessible and searchable databases.[162]

45. As to proposed Rule 3001(mm)(III), Black Hills asserts that it is unclear how the Commission would go about determining that a site is significant.[163] It asks the Commission to clarify the decision-making criteria it will apply to determine whether a site is significant; how it will exercise its authority under the proposed Rule; and how utilities can be heard in that process.[164]

46. Black Hills asserts that without any criteria to determine what is or is not a significant site, it will be impossible to comply with proposed Rule 3620(a)(IV)'s requirement that utilities provide notice of applications that may impact a significant site to relevant Tribal Governments and History Colorado.[165] Similarly, it is not possible for ERP bidders to adequately respond to a utility request that bidders provide information on significant site impacts as required by proposed Rule 3616(d) because when they make an ERP filing, utilities cannot know the location of generation or associated transmission in bids because such bids are not submitted until an ERP's Phase II.[166] Bidders also cannot know if their proposed location is at or near significant sites if the Commission is able to designate a geographic area as a significant site after the bid is submitted.[167]

[160] *Id.* at 4.
[161] *Id.*
[162] *Id.*
[163] *Id.* at 5.
[164] *Id.*
[165] *Id.* at 4.
[166] *Id.* at 4-5.
[167] *Id.* at 5.

47. The Colorado Independent Energy Association ("CIEA") asserts that the definition of cultural and historic resources in proposed Rule 3001(i) is unmoored from federal guidelines that tread the same ground, and includes viewshed, which has no metric or standard and is separate from a significant site itself.[168] CIEA submits that federal and state agencies' definitions of historic and cultural resources do not include viewshed.[169] It asserts that because such agencies' definitions of those terms do not include viewsheds, the proposed definition's inclusion of viewshed will materially alter the current paradigms for defining cultural resources.[170] CIEA agrees with Interwest that proposed Rule 3001(i) should be entirely stricken in favor of referencing already established state or federal definitions to avoid duplicative, overlapping, and potentially conflicting definitions and confusion about the Rule's scope.[171] Alternatively, it asks that viewsheds be excluded, as the Commission lacks authority to regulate private property proposed for resource siting that might be in a significant site's viewshed.[172] CIEA adds that including viewsheds is further complicated given that there is no clarity on what a viewshed entails, citing, for example, areas in the eastern plains where wind farms can be seen from many miles away.[173]

48. CIEA asserts that proposed Rule 3001(mm)'s significant site definition and process creates a host of concerning potential outcomes; is unlimited scope and breadth; is untethered from project development timing; and has no proposed standards or metrics by which utilities, project developers, or the Commission could make initial determinations.[174]

[168] *See* CIEA's comments filed August 22, 2024 at 16 ("CIEA's 8/22/24 Comments").

[169] *Id.* at 14-15, citing for example, the National Park Service's online Cultural Resource Management Guideline (NPS-28), Section B (Types of Cultural Resources), part 2 and its Sand Creek Massacre National Historic Site Resource Stewardship Strategy, and the Colorado 2020 State Preservation Plan.

[170] *Id.* at 15.

[171] *See id.* at 16. CIEA notes that comments suggest that the definition of cultural and historic resources in proposed Rule 3001(i) muddies and possibly conflicts with federal statutes and agency guidelines and should be aligned with the definition of historic property under the NHPA. *Id.* at 14-15.

[172] *Id.* at 16.

[173] *Id.*

[174] *Id.* at 14.

49. Overall, while CIEA supports the proposed Rules' intent and Tribal Governments' sovereignty, it recommends that this Proceeding be converted to a miscellaneous or investigatory proceeding to enable more meaningful exchange between utilities, Tribal Governments, project developers, key stakeholders that have not been engaged, and to welcome input from subject matter experts, some of whom were referenced in the NOPR but have not provided input and should have a seat at the table (*e.g.*, scholars at the University of Colorado or the Native American Rights Fund).[175] It explains that this approach is more appropriate given ambiguities in proposed Rule 3001's definitions; process ambiguity in other proposed Rules; other stakeholders' comments; and the need to address certain key items before promulgating rules.[176] Specifically, CIEA submits that comments indicate that before Rules can be promulgated, there should be: (1) a common baseline understanding of the scope of action needed; (2) the Commission's jurisdiction and role; (3) the current steps for cultural resource evaluation required to develop energy projects; (4) timing to identify significant sites to impact resource acquisition with minimal delay or litigation; and (5) protocols under which developers and utilities would meet standards to identify significant sites and actions to mitigate or avoid impacts.[177] The proposed Rules do not directly address these questions.[178] CIEA adds that it is unclear whether the Commission has engaged with Colorado counties regarding the "1041 Statute" land use review processes (§§ 24-65.1-101 to –501, C.R.S.), the Ute Mountain Ute and Southern Ute Indian Tribes, the

[175] *Id.* at 1-2; 5.

[176] *See id.* at 4. CIEA notes that a range of comments support this. For example, it highlights that comments: question whether the Commission is acting within its authority or expertise; assert that proposed definitions and processes include substantial ambiguity, including inviting late-stage litigation over new resources or transmission; submit that proposed Rules allow the Commission to designate significant sites without standards for such determinations; raise practical questions about access to information relevant to significant sites; and that the proposed Rules may strain Commission, utility, Tribal Governments and other stakeholders' resources by allowing such issues to be litigated in the context of Commission proceedings. *See id.* at 3-4.

[177] *Id.* at 4.

[178] *Id.*

federal government (*e.g.*, the National Park Service, the Department of the Interior Bureau of Indian Affairs), and with Colorado agencies.[179] CIEA observes that comments express an unprecedented level of uncertainty and ambiguity as to the proposed Rules and that it is particularly disconcerting that commenters do not understand the scope of the proposed Rules; the proposed definitions as compared to existing guidelines and definitions; how the Commission would evaluate compliance with proposed Rules; or whether the proposed Rules can work within Commission proceedings' timelines or related county-level project reviews.[180]

B. Proposed Rule 3102 – Certificate of Public Convenience and Necessity for Facilities

50. Proposed Rule 3102(b)(XI) would require utilities to include "[i]mpacts to significant sites as detailed in rule 3620 and actual or projected costs associated with avoidance or mitigation of impacts," and any cultural resource surveys or analyses required by federal, state, or local agencies in CPCN applications to construct and operate facilities or to extend a facility.[181]

51. Relevant to proposed Rule 3102, the Ute Mountain Ute Tribe explains that whether a cultural resource survey is necessary depends largely on funding sources and which federal, state, or local laws apply to the project.[182] For example, federally funded projects mandatorily require a review of known cultural resources or a complete cultural resources survey.[183] It explains that NHPA's Section 106 and a cultural and historic resources review may be triggered, among a slew of 25 other federal laws.[184] NHPA's Section 110 requires a project proponent to survey and establish a Tribal historic preservation program to identify, manage, and protect historic properties

[179] *Id.* at 4-5.
[180] *Id.* at 6. *See also id.* at 9-16 *(*CIEA's summary of relevant comments).
[181] Attachment A to NOPR at 6.
[182] Ute Mountain Ute Tribe's 8/12/24 Comments at 14.
[183] *Id.*
[184] *Id.* at 15.

in the event they cannot be avoided.[185] Other laws may be implicated, depending on whether known or recorded cultural or historic resources exist at a site.[186] For example, NAGPRA (25 USC §§ 3001 *et seq.*) may be triggered when ancestral remains are directly or indirectly in the proposed project area.[187] The American Indian Religious Freedom Act ("AIRFA") (42 USC § 1996) and the Archaeological Resources Protection Act ("ARPA") (16 USC §§ 470aa, *et seq*.) may also be implicated, especially for significant ceremonial, religious, and sacred sites.[188] Colorado law may also include additional requirements. For example, the Colorado Burial Laws (§ 25-2-111, C.R.S.) require project developers, to record and report any burials on private property, regardless of Tribal, cultural, historic, or archaeological affiliations.[189]

52. Interwest submits that proposed Rule 3102 is unnecessarily duplicative and should be limited to requiring a utility to submit cultural resource surveys or analyses that federal, state, or local agencies require.[190]

53. History Colorado asserts that cultural resource surveys should be submitted to it for review, not to the Commission, and that the Commission should solicit advice from it on the survey's appropriateness and meaning.[191] It explains that energy developers must perform a cultural resource survey if they intersect with a variety of federal and state laws, including the NHPA, National Environmental Policy Act ("NEPA"), the Endangered Species Act ("ESA") (16 USC §§ 1531 *et seq*.), the Colorado Resources Act (§§ 24-80-401 to 411, C.R.S.), the Colorado

[185] *Id.* at 14, citing 16 USC § 470.
[186] *Id.* at 14-15, citing 36 CFR § 800.16.
[187] *Id.* at 14, citing 25 USC §§ 3001 *et seq*.
[188] *Id.* at 15, citing 42 USC § 1996 and 6 USC §§ 470(aa)-470(mm).
[189] *Id.*, citing § 25-2-111, C.R.S.
[190] Interwest's 8/9/24 Comments at 6.
[191] History Colorado's 8/9/24 Comments at 6.

State Register Act (§§ 24-80.1-101 *et seq*.), and the "1041" laws (§§ 24-65.1-101 to –501, C.R.S.).[192]

54. COSSA and SEIA do not oppose submitting cultural resource surveys, but note that these may be premature at the CPCN phase.[193] For example, they explain that a transmission line's exact routing is not determined at the CPCN phase, so all cultural resource surveys may not be available when a CPCN application is filed.[194] The associated "1041 county permits" for a transmission line also do not issue until after the CPCN phase.[195] Since federal, state, and local agencies may require cultural resource surveys, but not at the CPCN phase, utilities will have difficulty complying with proposed Rule 3102's requirement.[196]

55. As explained in more detail later, Tri-State argues that proposed Rule 3102 directly conflicts with § 40-5-101, C.R.S.[197] Similar to other comments, Tri-State explains that when it seeks a CPCN for a transmission facility, it generally does not have detailed siting or routing information.[198] It determines siting, routing, and alternative routing when it executes and implements an approved CPCN.[199] As a result, Tri-State submits that it would be speculative and difficult to evaluate impacts to significant sites, including providing "actual or projected costs associated with avoidance or mitigation of impacts" as required under the proposed Rule.[200] Indeed, Tri-State would have to either develop detailed siting and routing plans before filing its CPCN application, which could result in substantially delaying necessary projects, or it would

[192] *See id.*
[193] COSSA and SEIA's 8/9/24 Comments at 7.
[194] *Id.*
[195] *Id.*
[196] *See id.*
[197] *See* Tri-State's 8/9/24 Comments at 13.
[198] *Id.*
[199] *Id.*
[200] *Id.*

have to submit information on potential impacts based on an overly broad geographic area that includes all possible routing alternatives.[201] Both options are problematic.[202]

56. Public Service suggests that this proposed Rule be amended to only required the information if it is available when a CPCN application is filed.[203] Public Service often does not perform siting, surveys, and related activities until after the Commission has issued a CPCN, and it may not always be possible for utilities to identify all potential impacts to significant sites in advance.[204]

57. Black Hills explains that governmental agencies or private historical preservation associations perform cultural resource surveys when determining a site's protected status, and that utilities are generally not required to do this.[205] It submits that the Commission should not require utilities to take on such responsibilities, (which comes with added expense), before a site's designation or registration, or in response to the Commission's designation under proposed Rule 3001(mm)(III).[206] Moreover, utilities, including Black Hills, lack the expertise to assess potential impacts to significant sites.[207] As a practical matter, due to the breadth and uncertainties associated with "potential impacts" to significant sites and the potentially large geographic areas at issue, utilities may have to directly engage with Tribal Governments about impacts before each CPCN filing.[208] It suggests that it would be more streamlined to require notice to Colorado Tribal

[201] *Id.*
[202] *Id.* at 13-14.
[203] Public Service's 8/9/24 Comments at 11.
[204] *Id.*
[205] Black Hills' 8/9/24 Comments at 6.
[206] *Id.*
[207] Black Hills' comments filed November 26, 2024 at 4-5 ("Black Hills' 11/26/24 Comments").
[208] *See id.*

Governments during an ERP's Phase I, which would invite their engagement should a potentially impacted site be worthy of their further review and consideration in that initial phase.[209]

C. Proposed Rule 3605 – Cooperative Electric Generation and Transmission Association Requirements

58. Proposed Rule 3605(g)(II)(G)(iv) would require a utility's request for proposals ("RFP") in its Phase I ERP to "request from bidders information regarding impacts to significant sites and the historic and cultural resources thereof, as detailed in rule 3620."[210]

59. Proposed Rule 3605(g)(III)(C)(v) states that in its Phase I ERP decision, "[t]he Commission shall address the sufficiency of the utility's consideration of significant sites and the cultural and historic resources thereof, within the proposed RFP, model contracts, evaluation criteria, and other relevant activities."[211]

60. Proposed Rule 3605(h)(II)(F) would require the Commission in a Phase II ERP decision to, "consider the sufficiency of the regulated utility's treatment of significant sites and the cultural and historic resources thereof, and if relevant, whether mitigations or alternative actions are viable and cost-effective. In so doing, the Commission shall address how it has considered information presented by Tribal Nation(s) in rendering its decision."[212]

61. The Southern Ute Indian Tribe objects to proposed Rule 3605 because it allows the Commission to make determinations on whether a utility adequately considered significant sites, noting that this "determination should be made in consultation with the respective Tribe or Tribes," and that "any determination relating to the adequacy of their consideration should be left to the

[209] *Id.* at 5.
[210] Attachment A to NOPR at 8.
[211] *Id.* at 9.
[212] *Id.* at 11.

Tribes."[213] It suggests that the Commission use guidance that the White House issued in December 2022 for federal departments and agencies on recognizing and including Indigenous knowledge in federal research, policy, and decision-making.[214]

62. The Ute Mountain Ute Tribe objects to proposed Rule 3605(h)(II)(F)'s requirement that the Commission consider whether mitigation or alternative actions are cost-effective.[215] It submits that cost-effectiveness cannot be a "dollars and cents" proposition in the Tribal, historical, and cultural preservation context, and that cost-effectiveness should have an equitable aspect.[216] It explains that its experience incorporating expenses cuts against the protection of sacred and significant sites.[217] The Ute Mountain Ute Tribe also "remind[s] the Commission and utilities of the full cost of active and meaningful Tribal consultation, which includes deference to the Tribe on the appropriate consultation measures."[218]

63. Interwest suggests that proposed Rule 3605(g)(III)(C)(v) be modified to require the Commission to consider the sufficiency of the utility's informational requirements for significant sites and cultural and historic resources, in lieu of the proposed language.[219] It submits that a utility should be able to reject a bid based on its failure to address impacts to significant sites only when the bidder is unable to demonstrate that it has performed outreach and due diligence to understand potential impacts.[220] When a bidder has made reasonable and appropriate efforts to do so, but has not received necessary information from third parties (such as Tribal Governments or state

[213] Southern Ute Indian Tribe's comments filed August 7, 2024 at 3 ("Southern Ute Indian Tribe's 8/7/24 Comments").
[214] Southern Ute Indian Tribe's 8/7/24 Comments at 3, citing *Memorandum Re: Guidance for Federal Departments and Agencies on Indigenous Knowledge*, Executive Office of the President, Office of Science and Technology Policy, Arati Prabhakar, November 30, 2022.
[215] *See* Ute Mountain Ute Tribe's 8/12/24 Comments at 6-7.
[216] *Id.* at 7.
[217] *Id.*
[218] *Id.*
[219] Interwest's 8/9/24 Comments at 6-7.
[220] *Id.* at 12.

agencies), it should be allowed to submit documentation of its attempted outreach.[221] Interwest asserts that developers must not be held to providing information or mitigation on sites that are unidentified and unknown when the bid is submitted and that utilities must not be responsible for enforcing requirements relating to unidentified and unknown sites.[222]

64. Tri-State supports Interwest's suggestion that documentation of outreach attempts should sufficiently establish that a bidder has complied with proposed Rule 3605(g)(III)(C)(v) when it is unable to access the necessary information from third parties[223]

65. History Colorado highlights that proposed Rule 3605(h)(II)(F) does not identify what will guide the Commission in its decision-making, including what criteria it will apply to determine whether mitigation is "viable and cost effective."[224] It also states that under proposed Rule 3102(b)(IX), the Commission is only required to have the information that the utility provides, which may "result in a conflict of interest."[225]

66. COSSA and SEIA are concerned that proposed Rule 3605(g)(III)(C)(v)(and the proposed Rules' framework) makes the utility the arbiter of how a significant site should be protected, and that utilities may not be equipped or qualified to make such decisions.[226] They are also concerned that allowing the utility to be the initial arbiter of this issue may tip the scales in favor of utility-owned projects over independent power producer projects.[227] COSSA and SEIA offer these same comments as to proposed Rule 3617(c), which are not repeated below.[228]

[221] *Id.*
[222] *Id.* at 13.
[223] Tri-State's 8/22/24 Comments at 6.
[224] History Colorado's 8/9/24 Comments at 9.
[225] *Id.*
[226] *See* COSSA and SEIA's 8/9/24 Comments at 8-9.
[227] *Id.* at 9.
[228] *Id.* at 8-9.

67. WRA asserts that proposed Rule 3605(g)(III)(C)(v) and 3605(h)(II)(F) be modified to require the Commission to make a finding on the sufficiency of the utility's treatment of a significant site.[229] It also suggests that the Commission modify proposed Rule 3605(h)(II)(F) to clarify what makes mitigation or alternative action "viable and cost-effective," as the proposed Rule does not identify metrics the Commission will use to assess cost-effectiveness.[230] WRA makes similar comments as to proposed Rules 3617(c) and 3613(h), which are not repeated below.[231]

D. Proposed Rules 3613, 3616, 3617, and 3618

68. Proposed Rule 3613(h), concerning bid evaluation and selection, includes the same language as in proposed Rule 3605(h)(II)(F) outlined above, and is not repeated here.[232] Similarly, proposed Rule 3616(d), concerning RFPs, includes the same language as in proposed Rule 3605(g)(II)(G)(iv) outlined above, and is not repeated here.[233] Likewise, proposed Rule 3617(c), concerning requirements for a Commission ERP decision, includes the same language as in proposed Rule 3605(g)(III)(C)(v) outlined above, and is not repeated here.[234]

69. Proposed Rule 3618(a)(VI) would require a utility's annual progress report under an approved ERP (for a running ten-year period) to include "a description of any ongoing discussion and/or consultation with Tribal Nations regarding impacts to significant sites that were identified in the most recent resource planning proceeding."[235]

[229] WRA's 8/9/24 Comments at 14-15.
[230] *Id.* at 15-16.
[231] *Id.* at 14-16.
[232] Attachment A to NOPR at 11 and 13. *See supra*, ¶ 60.
[233] Attachment A to NOPR at 8 and 14. *See supra,* ¶ 58.
[234] Attachment A to NOPR at 9 and 15. *See supra*, ¶ 59.
[235] Attachment A to NOPR at 16.

70. For the same reasons it objects to Proposed Rule 3605, the Southern Ute Indian Tribe objects to proposed Rule 3616.[236]

71. Interwest suggests that proposed Rule 3613(h) be removed or rewritten to conform with its suggested changes to proposed Rule 3001.[237]

72. GRID supports changes to proposed Rule 3616 to require a utility to reject a bid in an ERP if it fails to demonstrate that the bidder consulted with proper agencies and groups to identify and evaluate impacts on significant sites.[238]

73. COSSA and SEIA submit that it is not clear how proposed Rule 3613(h) meets the goals stated in the NOPR.[239] To this point, they raise the following questions:

- As this review will occur after the fact, how will the Commission ensure deficiencies are resolved by the utility?
- How will the Commission determine whether mitigations or alternative actions are 'viable'?
- If mitigation is not 'viable', how will the Commission cure the deficiency and ensure the cultural and historic resources are sufficiently protected?
- Does the Commission intend to assess cost-effectiveness of mitigation or alternative actions separately from the total cost of the resource? Does this provision sufficiently encourage utilities to present all cost-effective resources, inclusive of mitigation costs?[240]

74. COSSA and SEIA are concerned that proposed Rule 3616(d) would require bidders to share information they obtain about significant sites, even though some information may be confidential. This raises questions as to whether they can share such information without violating federal and state confidentiality laws or requirements.[241] They note that those accessing History

[236] Southern Ute Indian Tribe's 8/7/24 Comments at 3. *See supra*, ¶ 61.
[237] Interwest's 8/9/24 Comments at 7.
[238] GRID's 8/9/24 Comments at 5.
[239] COSSA and SEIA's 8/9/24 Comments at 12.
[240] *Id.*
[241] *Id.* at 10.

Colorado's database must agree to maintain the confidentiality of sensitive information within that database, and the proposed Rule's required disclosure could violate this or other similar archaeological professional standards.[242]

75. WRA suggests that Rules 3613(h) and 3617(c) be modified to specify that in both Phase I and II, the consultation and engagement process with Tribal Governments should inform the required evaluations.[243] It recommends that the Commission require utilities to have a Tribal liaison tasked with engaging Tribal Governments.[244] WRA suggests that proposed Rule 3616 be modified to clarify that utilities have an on-going obligation to request information from bidders, including after bids are submitted.[245]

76. History Colorado has the same concerns with proposed Rule 3613(h) as it does with proposed Rule 3605(h)(II)(F), which are not repeated.[246] It notes that proposed Rule 3616 may have the unintended consequence of multiple developers doing unnecessary and simultaneous cultural resource surveys before submitting a bid, and that the Commission should instead require that developers' bids include a budget for cultural resource surveys after a project permit has been granted.[247] As to proposed Rule 3618, History Colorado asserts that it is problematic to expect utilities to be in "ongoing discussions" with Tribal Governments without paired involvement of a federal agency, the State Archaeologist, or the Commission itself.[248]

77. Tri-State opposes changes to proposed Rule 3616 that would require that bids be rejected for failing to address impacts to significant sites, because, among other reasons, this is a

[242] *Id.*
[243] *See* WRA's 8/22/24 Comments at 6-7.
[244] *Id.* at 7.
[245] WRA's 8/9/24 Comments at 16-17.
[246] History Colorado's 8/9/24 Comments at 9.
[247] *See id.* at 7.
[248] *Id.* at 9.

bid evaluation criteria unrelated to price.[249] It explains that requiring bidders to include an impact statement in a bid does not mean that those impacts are positive or negative and Tri-State lacks the expertise to assess the accuracy or extent of such impacts.[250] As such, rejecting a bid for failing to provide an impact statement or statement relating to communications with those impacted would be too subjective in the context of overall bid assessment.[251]

78. As to proposed Rule 3618, Tri-State suggests changes intended to focus annual reporting on resources anticipated to be commercially operational that have known sites for which impacts could be assessed.[252] It explains that the proposed Rule's required information is not available for generic resources presented in an ERP and is not relevant for resource bids that were considered but not selected in a final ERP.[253] For these reasons, it suggests that the proposed Rule be modified to replace "most recent resource planning proceeding" with "approved preferred plan bids from the most recent Phase II resource planning proceeding."[254]

79. Relevant to proposed Rule 3618, WRA notes that the Commission should carefully consider using "consultation" within the Rules because it is associated with the phrase "Tribal consultation," which often refers to formal, government-to-government dialogue.[255]

80. Public Service suggests that proposed Rule 3613(h) be modified to clarify that it is the Commission's ultimate responsibility to consider potential impacts to significant sites and determine whether mitigation or alternatives are viable and cost-effective; and that the Commission will consider potential impacts to known cultural and historic resources of significant

[249] Tri-State's 8/9/24 Comments at 10.
[250] *Id.*
[251] *Id.*
[252] *Id.* at 15.
[253] *Id.*
[254] *Id.* at 14-15.
[255] *See* WRA's 8/9/24 Comments at 7. WRA's comments here are also relevant to other proposed Rules using "consultation," such as proposed Rule 3620.

sites.[256] In support, Public Service explains that the current language implies that the utility is the initial arbiter of these determinations, and that utilities typically do not have access to significant sites to undertake independent cultural resource surveys, requiring them to rely on publicly available information.[257]

81. Public Service recommends that proposed Rule 3616(d) be modified to require information on the location of projects relative to significant sites and information on potential impacts that it is publicly available.[258] It explains that this would more accurately reflect the information that is reasonably expected to be available to developers when they are preparing their bids for an ERP.[259] Although bidders are likely able to provide the general location of proposed generation resources and their proximity to specifically identified sites, it is significantly less likely that bidders would be able to provide a detailed analysis of potential impacts with their bid.[260]

82. Public Service suggests that proposed Rule 3617(c) be modified to clarify that the Commission will evaluate the sufficiency of the utility's proposed RFP through an ERP's Phase I decision, rather than considering potential impacts to significant sites.[261] It explains that the Commission cannot consider potential impacts to significant sites without information generated through the RFP, which does not happen until an ERP's Phase II.[262]

83. Black Hills shares Public Service's concerns that proposed Rule 3613(h) implies that the utility must initially determine whether mitigations or alternative actions are viable and cost-effective.[263] It also agrees with Public Service and other commenters that utilities are not

[256] Public Service's 8/9/24 Comments at 12.
[257] *Id.*
[258] *Id.* at 13.
[259] *Id.* at 12-13.
[260] *Id.* at 13.
[261] *Id.*
[262] *Id.*
[263] *See* Black Hills' 11/26/24 Comments at 2, citing Public Service's 8/9/24 Comments at 12.

positioned, both in terms of personnel capacity and expertise, to determine before a project has been approved that a site should be or currently is identified as significant.[264]

84. Black Hills raises numerous concerns with proposed Rule 3616(d).[265] As a practical matter, when utilities make their ERP Phase I filing, they cannot know the specific location of generation or associated transmission that will be in bids that are submitted during an ERP's Phase II.[266] And, Bidders cannot know if their proposed locations are at or near a significant site if the Commission can designate a significant site after a bid is submitted (*e.g.*, under proposed Rules 3001(mm)(III) and 3620(c) and (d)).[267] Black Hills is also concerned that commercial bidders may lack the expertise in cultural resource management and evaluation and that requiring bidders to identify impacts may increase the costs of submitting a bid, which may dissuade them from bidding.[268] As such, Black Hills objects to changes that would require a utility to reject bids that do not address impacts to significant sites, particularly when such impacts may only be "potential." Black Hills suggests that the Commission could instead allow for public comment during an ERP's Phase II, after bids have been submitted, which can include identifying significant sites.[269] If one is identified, the bidder could be allowed to supplement its bid to address mitigating impacts, and the utility can incorporate this into its review and evaluation process, similar to the Best Value Employment Metrics framework.[270]

[264] *Id.* at 3, citing Public Service's 8/9/24 Comments at 11.
[265] Black Hills' 8/9/24 Comments at 7.
[266] *See id.* at 4-5.
[267] *See id.*
[268] *Id.* at 7.
[269] *Id.*
[270] *Id.*

E. Proposed Rule 3620 – Significant Sites

85. Proposed Rule 3620 provides:

> This rule establishes procedures for utilities to identify and mitigate impacts to significant sites in the context of electric resource plans filed pursuant to rules 3600 through 3618, certificates of public convenience and necessity filed pursuant to § 40-5-101, C.R.S., and in other proceedings as set forth by the Commission.
>
> (a) Identification of impacts to significant sites.
> - (I) Impacts to significant sites may be actual or potential.
> - (II) Utilities shall work diligently with Tribal Nations and the Office of Archaeology and Historic Preservation to identify impacts to significant sites and the cultural and historic resources thereof and shall notify and initiate consultation with affected Tribal Nation(s) as soon as reasonably practicable where such impacts are identified.
> - (III) Utilities shall include information regarding impacts to significant sites, and the cultural and historic resources thereof, in relevant applications. If the impacts are not known at the time of the application filing, the utility shall file relevant information as soon as practicable once impacts are identified.
> - (IV) Upon filing an application that addresses impacts to significant sites and the cultural and historic resources thereof, a utility shall provide notice of the filing to affected Tribal Nation(s) and the Office of Archaeology and Historic Preservation.
>
> (b) Information regarding significant sites. A utility shall file the following information related to significant sites in applications as directed by these rules:
> - (I) a description of the actual or potential impacts associated with the proposed action(s);
> - (II) how actual or potential negative impacts can be avoided or mitigated;
> - (III) an analysis of alternative actions, such as viable siting alternatives, if negative impacts cannot be avoided;
> - (IV) which Tribal Nation(s) is affected by the proposed action(s);
> - (IV) a record of any communications between the utility and/or relevant third parties and Tribal Nation(s), including the positions, opinions, and concerns of Tribal Nation(s);
> - (VI) the process by which the utility and/or relevant third parties will engage in consultation or other appropriate communications with affected Tribal Nation(s) during the pendency of the proceeding; and
> - (VII) a description of federal, state, and local requirements relevant to the proposed action, including cultural resource surveys and

requirements related to the identification and repatriation of cultural and historic resources.

(c) A Tribal Nation may intervene by right in any relevant application that affects a significant site. The Tribal Nation must notify the Commission of its intervention of right either during the initial intervention period or within 30 days of the utility's filing pursuant to subparagraph 3620(a)(III) if that filing occurs after the initial application filing. The notice of intervention by right shall identify one or more representatives who will participate on behalf of the Tribal Nation. A designated representative of a Tribal Nation need not be a licensed attorney.

(d) As part of an intervention filing, a Tribal Nation may request that the Commission treat a site as a significant site for purposes of the proceeding. The Tribal Nation shall provide information explaining why the site should be treated as a significant site, if it does not already meet the definition set forth under rule 3001. The Commission shall address requests for treatment of additional significant sites in a decision addressing interventions, or may seek responsive comments to the request where appropriate.

(e) Utility filings addressing significant sites shall include appropriate protections for information about the location of the site.[271]

86. The Southern Ute Indian Tribe notes that it has historic preservation responsibilities on its Reservation and maintains a database of traditionally and culturally significant sites and resources.[272] It suggests that proposed Rule 3620(a)(II) be modified to reflect this, and to require that utilities be responsible for all costs associated with the Tribal consultation process, including costs of site visits and surveys.[273] The Southern Ute Indian Tribe suggests that proposed Rule 3620(c) be modified to give Tribal Governments 60 days to intervene, noting that it receives more than 500 consultation requests each year.[274] It also suggests that proposed Rule 3620(d) be modified to allow Tribal Governments to intervene to object to a utility's proposals to avoid or mitigate actual or potential negative impacts to significant sites.[275] As to proposed Rule 3620(e), the Southern Ute Indian Tribe is concerned that the terms "appropriate protections" is ambiguous,

[271] Attachment A to NOPR at 17-18.
[272] Southern Ute Indian Tribe's 8/7/24 Comments at 3-4.
[273] *Id.*
[274] *Id.* at 4.
[275] *Id.*

and suggests aligning the proposed Rule with "the protections and procedural safeguards contained in Section 304 of the National Historic Preservation Act in consultation with the Tribe."[276] The Southern Ute Indian Tribe separately suggests that Commission members be required to take a mandatory cultural sensitivity training course approved by it to ensure a minimum level of competency and familiarity.[277]

87. The Ute Mountain Ute Tribe asks that (overall), the proposed Rules be modified to affirm or declare a policy of prioritizing avoiding impacts to significant sites and their cultural and historic resources.[278] It also suggests that when avoidance is not possible, the Commission mimic an "internationally-used" practice known as "Declaration of Non-Avoidance."[279] It suggests numerous changes to proposed Rule 3620 (and other proposed Rules) to effectuate this.[280] Relevant to proposed Rule 3620(a) and (c), the Ute Mountain Ute Tribe highlights complexities associated with the concept of "impacts" on significant sites and landscapes.[281] It explains that actual or potential impacts are wide-ranging; not necessarily a "'black and white' determination;" and that at the federal level, includes the notion of cumulative and secondary impacts, such as upstream-downstream relations.[282]

88. The Ute Mountain Ute Tribe is concerned that proposed Rule 3620(d) would require Tribal Governments to explain why a site should be afforded significant site treatment when the site does not already meet the definition of a significant site under proposed

[276] *Id.*
[277] *Id.* at 4-5.
[278] Ute Mountain Ute Tribe's 8/12/24 Comments at 3-5.
[279] *Id*. at 4.
[280] Attachment A to Ute Mountain Ute Tribe's 8/12/24 Comments at 17. *See id*. at 6 (proposed Rule 3102((b)(XI); 8 (proposed Rule 3605(g)(II)(G)(iv); 9 (proposed Rule 3605(g)(III)(C)(v); 14 (proposed Rule 3616(d));15 (proposed Rule 3617(c)).
[281] *See* Ute Mountain Ute Tribe's 8/23/24 Comments at 8.
[282] *See id.* at 8-9.

Rule 3001(mm).[283] It explains that there may be instances where a Tribal Government cannot disclose the reasons a site should be treated as significant based upon Tribal, cultural, and historical reasons.[284] For example, some Tribal cultures and religions have strict rules against sharing certain information with outsiders, or even with persons outside individual clans or societies.[285] The Ute Mountain Ute Tribe suggests that the proposed Rule be modified to permit Tribal Governments to provide a declaration of significance without further explanation other than to define the extent of the landscape or other assets at issue.[286]

89. WRA notes that proposed Rule 3620 does not specify whether it applies to an ERP's Phase I, II, or both; does not identify the timeframe in subsection (a)(II) to "work diligently" with Tribal Governments and History Colorado; and does not define the terms "work diligently."[287] WRA suggests that proposed Rule 3620(c) be modified to allow Tribal Governments to intervene at any point in the proceeding to address significant sites,[288] and that proposed Rule 3620(d) be expanded to allow a Tribal Government to request a site be treated as significant "by filing a motion at any stage in the proceeding."[289] In support, WRA notes that it is possible that a Tribal Government may need to intervene where the utility did not identify a significant site in its initiating filing.[290] Indeed, WRA agrees with other comments that Tribal Governments may not become aware that a significant site is at issue until later in a proceeding, such as an ERP's Phase

[283] Ute Mountain Ute Tribe's 8/12/24 Comments at 7.
[284] *Id.*
[285] *Id.* at 7-8
[286] *Id.* at 8.
[287] WRA's 8/9/24 Comments at 9.
[288] *Id.* at 11-12.
[289] WRA's 8/22/24 Comments at 4.
[290] WRA's 8/9/24 Comments at 12.

II, after bids are submitted.[291] WRA also supports the Ute Mountain Ute Tribe's suggestion that the Commission adopt the concept of a "Declaration of Non-Avoidance."[292]

90. GRID suggests that proposed Rule 3620(c) be amended to allow Tribal Governments to intervene at any time, noting that Tribal Governments are not active participants in the regulatory arena.[293]

91. History Colorado suggests that proposed Rule 3620(a) be modified to recognize that "impacts" may include indirect impacts, such as visual, auditory, and other effects that go beyond physically altering a site.[294] It asserts that proposed Rule 3620(c) "completely fails to recognize" that many Tribal Governments have subject matter experts whose job it is to review and comment on development projects that impact cultural resources, and that by creating "a new and unique process," the Commission "is all but guaranteeing that they will be adding confusion to an already well established process among cultural resource professionals."[295] History Colorado also criticizes the proposed Rule because it puts "the burden of identifying and understanding the impacts of a development project on Tribal Nations."[296] It notes that there is no clearly stated process outlining the manner in which a utility will notify Tribal Governments about potential projects and the information that a utility will provide as a part of this notice.[297] History Colorado asserts that the proposed Rule fails to "identify how the tribal nations want to consult with the Commission, and simply notifying 'the Tribal Nation' is too vague."[298] It argues that the

[291] *See* WRA's 8/22/24 Comments at 3-4.
[292] *Id.* at 5-6.
[293] GRID's 8/9/24 Comments at 5-6.
[294] *See* History Colorado's 8/9/24 Comments at 9.
[295] *See id.* at 7.
[296] *Id.*
[297] *Id.*
[298] *Id.*

Commission should allow at least 45 to 60 days for Tribal Governments to comment.[299] As to proposed Rule 3620(e), History Colorado asserts that utilities "must have on staff or hire cultural resource professionals who can access, interpret, and explain this data to non CRM professionals."[300]

92. History Colorado adds that it has a well-defined process for entities involved in energy projects and that it prefers that permitting agencies take the lead in final decision-making as to impacts to cultural resources and mitigation to ensure consistency and integrity across agency processes.[301]

93. The Conservation Association agrees that the Commission should explicitly define or explain the meaning of "diligently" and "as soon as reasonably practicable" in proposed Rule 3620(a)(II).[302] Similarly, it suggests that the Commission address and seek solutions to potential barriers to Tribal Government engagement in Commission proceedings, including time, resources, and engagement preferences.[303]

94. Interwest suggests that proposed Rule 3620 be amended to conform with its suggested changes to proposed Rule 3001.[304]

95. COSSA and SEIA submit that the meaning of "impact" in proposed Rule 3620(a) is unclear and ask whether the definition of "impact" depends on the type of significant site at issue.[305] They note that it may be challenging to identify impacts to significant sites in pending or closed proceedings.[306] For example, they explain that impacts to a significant site may not be

[299] *Id.*
[300] *Id.*
[301] *Id.* at 8.
[302] *See* Conservation Association's 8/27/24 Comments at 3.
[303] *Id.*
[304] Interwest's 8/9/24 Comments at 7.
[305] COSSA and SEIA's 8/9/24 Comments at 13.
[306] *Id.*

known until the transmission siting process, which happens after the CPCN proceeding is closed.[307] In such a situation, there may not be an open forum in which the utility can alert the Commission to potential impacts, and it is not clear whether the Commission would have to initiate a new proceeding to consider potential impacts, and how the new proceeding may effect prior Commission decisions and approvals.[308] As to proposed Rule 3620(b), COSSA and SEIA note that there is not a complete overlap between "cultural resources" and Tribal resources but the proposed Rule appears to treat all resources as Tribal resources.[309] They suggest that the proposed Rule clarify this issue.[310]

96. COSSA and SEIA also ask that proposed Rule 3620(b)(IV) to (VII) be modified to reflect "the responsibility of utilities and relevant third parties to engage Tribal governments," explaining that utilities and relevant third parties are not equipped to speak on behalf of Tribal Governments or share such Governments' positions, opinions, and concerns, and that the proposed Rule should recognize this reality.[311] They again note that reviewing cultural resources is often folded into the "1041" local permitting process, and that they have significant concerns about requiring this process to take place at the bid stage.[312] As to proposed Rule 3620(d), COSSA and SEIA submit that it is unclear how the Commission will determine whether to grant a Tribal Government's request to treat a site as significant and how the Commission will manage this issue when a significant site is not identified until an ERP's Phase II.[313] Although COSSA and SEIA do not object to proposed Rule 3620(e), they ask that the Commission not require bidders or their

[307] *Id.*
[308] *Id.*
[309] *Id.* at 14.
[310] *Id.*
[311] *Id.*
[312] *Id.*
[313] *Id.* at 15.

consultants to improperly reveal significant site information to a utility if doing so conflicts with state or federal law.[314]

97. For the reasons discussed later, Tri-State asserts that proposed Rule 3620 conflicts with § 40-5-101, C.R.S.[315] Tri-State submits that the Commission could instead require utilities to analyze cultural and historic resources as routes develop, and to confer with relevant entities based on the facts discovered, but that any such requirements cannot be part of the CPCN process.[316] Indeed, Tri-State highlights that the information likely will only be available after concluding the CPCN process. Tri-State clarifies that it is concerned with project development timing and does not intend to undermine the importance of considering impacts to cultural and historic resources.[317] Considering these issues at the ERP and CPCN stages is premature and will lead to unnecessary resource expenditures (for everyone involved), including Tribal Governments, particularly where such issues become irrelevant based on the specific project site or route that is later selected.[318]

98. Tri-State recommends deleting proposed Rule 3620(a)(I)'s requirements to include "potential" impacts, as this is too broad and speculative to result in meaningful analyses, and that the Rule should instead focus on known impacts.[319] Tri-State notes that other comments reinforce that utilities and Tribal Governments would have to review a large volume of information if the Commission does not adequately address the overly broad scope of the proposed Rules.[320] It is also concerned that the intervention procedures in proposed Rule 3620(c) and (d) are overly broad.[321] It explains that because a utility is unlikely to identify impacts at the time it files an application,

[314] *Id.*
[315] Tri-State's 8/9/24 Comments at 15, quoting § 40-5-101, C.R.S.
[316] *Id.* at 15-16.
[317] *See id.* at 16.
[318] Tri-State's 8/22/24 Comments at 8-9.
[319] Tri-State's 8/9/24 Comments at 17.
[320] Tri-State's 8/22/24 Comments at 8.
[321] Tri-State's 8/9/24 Comments at 17.

proposed Rule 3620(c) creates the risk that interventions will be filed much later, resulting in procedural inefficiencies.[322] While proposed Rules 3620(d) and 3001(mm)(III) allow the Commission to designate significant sites, neither specify the method by which the Commission will make this determination, including the metrics it will use to determine that a site is significant, or how disputes will be resolved.[323] It recommends that the Commission provide this detail in a revised draft rule, noting that the Commission's approach may differ from the existing federal site eligibility and listing protocols.[324] On this point, Tri-State explains that it objects to the Commission designating significant sites in a manner that does not meet federal criteria for eligibility and significance, and that the Commission should ensure that its approach mirrors the federal government's.[325] Tri-State disagrees with suggestions that Tribal Governments be permitted to request a site be designated as significant at any point during an application process because this risks significant procedural inefficiencies and project delay, which could also ultimately risk electric system reliability.[326] It is also concerned that its due process rights may be infringed when new information on significant site impacts is introduced in the late stages of a CPCN or after one is issued.[327]

99. Public Service suggests that proposed Rule 3620 be modified to implicate only sites significant to Tribal Governments, which means deleting language referencing History Colorado in proposed Rule 3620(a) to eliminate the assumption that significant sites span all 220,000 archaeological, historical, and paleontological sites in History Colorado's database.[328] It also

[322] *Id.* at 17-18.
[323] *Id.* at 18.
[324] *Id.*
[325] *Id.*
[326] Tri-State's 8/22/24 Comments at 5.
[327] *Id.* at 9.
[328] *See* Public Service's 8/9/24 Comments at 13-14; Attachment 1 to Public Service's 8/9/24 Comments at 17.

suggests that "consultation" be replaced with "outreach" because "consultation" is a term of art that uniquely applies between governments.[329]

100. As to proposed Rule 3620(a), Black Hills is concerned that it will be difficult for utilities to identify significant sites due to access limitations, particularly where there may only be a potential impact.[330] Certain applications such as ERP and CPCN filings may involve large geographic areas, thereby requiring utilities to initiate communication with Tribal Governments before filing such applications.[331] It is uncertain whether the Commission intended this result, but it if did not, Black Hills suggests that the Commissions modify the proposed Rule accordingly.[332]

101. Black Hills objects to proposed Rule 3620(b)(VI)'s requirement to file records of communications with Tribal Governments.[333] It is concerned that this may lead to less productive discussions due to confidentiality and privacy concerns and that a narrative description of such communications may be more appropriate.[334] Black Hills also generally notes the difficulty with complying with this proposed Rule based on other issues it raised. Black Hills is concerned that proposed Rule 3620(d) would allow the Commission to designate significant sites without hearing from the affected parties, even though such a designation could impact the Commission's decisions based on other proposed Rules (*e.g.*, proposed Rules 3617(c), 3102(b)(XI), 3613(h) and 3620(b)).[335] It suggests that proposed Rule 3620(d) be modified consistent with basic due process notions by allowing responses to Tribal Government's interventions rather than leaving this discretionary.[336] Black Hills is also concerned with proposed Rule 3620(e)'s requirement that

[329] Public Service's 8/9/24 Comments at 14.
[330] Black Hills' 8/9/24 Comments at 7.
[331] *Id.*
[332] *Id.*
[333] *Id.* at 8.
[334] *Id.*
[335] *Id.* at 5.
[336] *Id.* at 8.

utility filings addressing significant sites include protections for information about sites' location because it may not be known or apparent at the time the filing is made whether the site's location is confidential.[337]

F. Proposed Rule 3627 – Transmission Planning

102. Proposed Rule 3627(c)(XIV) would require that ten-year transmission plans include information that identifies "communications with Tribal Nations regarding significant sites."[338]

103. Proposed Rule 3627(g)(I) adds language specifying that the government agencies who must have an opportunity for meaningful participation in transmission planning process "may include Tribal Nations that are affected by impacts to significant sites."[339]

104. COSSA and SEIA explain that transmission planning is undergoing wholesale changes in Colorado, and that it is doubtful that impacts to significant sites from transmission planning will be known, given the lack of granularity surrounding this process as it is currently conducted.[340] They do not believe that including significant site requirements in Rule 3627 planning will better protect significant sites from impacts.[341]

105. Tri-State agrees with COSSA and SEIA that transmission planning in Colorado does not include a level of granularity that allows for significant sites to be considered as proposed Rule 3627 contemplates.[342]

[337] *See id.* at 8-9.
[338] Attachment A to NOPR at 19.
[339] *Id.* at 20.
[340] COSSA and SEIA's 8/9/24 Comments at 16.
[341] *Id.*
[342] Tri-State's 8/22/24 Comments at 10.

IV. ISSUES IDENTIFIED FOR COMMENT

106. As noted, based on public comments on the proposed Rules, the ALJ identified numerous issues and significant concerns, and invited comment on the same.[343] Relevant comments are summarized below.

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

107. Tri-State submits that the proposed Rules directly conflict with § 40-5-101(1)(a), C.R.S., because it would involve the Commission in considering land use and siting issues in the context of whether to approve a CPCN application.[344] Tri-State highlights that § 40-5-101(1)(a), C.R.S., expressly states that the present or future public convenience and necessity "does not include the consideration of land use rights or siting issues related to the location or alignment of the proposed electric transmission lines or associated facilities, which issues are under the jurisdiction of a local government's land use regulation."[345] It explains that proposed Rule 3102(b)(XI)'s requirement that utilities provide information with their CPCN application on "impacts" to significant sites, directly inserts the Commission into the siting process.[346] Likewise, Tri-State asserts that proposed Rule 3620 similarly oversteps the Commission's authority, arguing that the plain language of § 40-5-101, C.R.S., establishes that siting and routing issues should be addressed during the local land use permitting process, not the CPCN stage.[347]

[343] Decision No. R24-0821-I at 5-13.

[344] Tri-State's comments filed November 27, 2024 at 3 ("Tri-State's 11/27/24 Comments"). Tri-State notes that the Commission has repeatedly acknowledged its lack of jurisdiction over land-use and siting issues, pointing to several Commission decisions. Tri-State's 8/9/24 Comments at 3-4, citing Decision No. R20-0549 (issued July 29, 2020) in Proceeding No. 20F-0077G; Decision No. C11-0288 (issued March 23, 2011) in Consolidated Proceeding Nos. 09A-324E and 325E; Decision No. C01-0746 (issued July 25, 2001) in Proceeding No. 6396. *See* Tri-State's 11/27/24 Comments at 2-3.

[345] Tri-State's 8/9/24 Comments at 15, quoting § 40-5-101, C.R.S. *See* Tri-State's 11/27/24 Comments at 2.

[346] *See* Tri-State's 8/9/24 Comments at 13.

[347] *Id.* at 15.

108. Black Hills agrees that the proposed Rules conflict with § 40-5-101(1)(a), C.R.S.[348] Public Service essentially agrees, noting that permitting authorities make these determinations, and that they reflect impacted communities' interests.[349] However, Public Service submits that the Commission retains authority to determine whether a CPCN should be granted and can evaluate other policy implications as part of a "holistic consideration of the public interest."[350] It notes that the Commission should balance the potential for a project to impact cultural, historic, or other sensitive with the broader question of need.[351]

109. Tri-State explains that in Colorado, transmission siting is primarily regulated at the local level and there is no statutorily designated state siting authority that reviews generation and transmission project siting in the first instance.[352] Tri-State argues that the Commission's authority under § 29-20-108(5), C.R.S., to hear appeals of local governments' siting decisions further illustrates that the Commission is not empowered to make siting decisions as part of the CPCN process.[353] Likewise, Black Hills highlights that § 29-20-108(5)(a), C.R.S., gives the Commission jurisdiction "only for adjudicative review" of permitting decisions.[354]

110. Similarly, Interwest asserts that the Commission does not have authority to consider and incorporate substantive requirements to identify and mitigate land use rights or siting issues when determining whether the public convenience and necessity requires a project or when considering a resource plan, based on the plain language of § 40-5-101(1)(a), C.R.S.[355] It notes that

[348] Black Hills' 11/26/24 Comments at 2.
[349] *See* Public Service's comments filed November 25, 2024 at 2, citing§ 40-5-101(3), C.R.S. (Public Service's 11/25/24 Comments").
[350] *Id.*
[351] *Id.*
[352] Tri-State's 11/27/24 Comments at 3.
[353] Tri-State's 8/9/24 Comments at 3-4.
[354] Black Hills' 11/26/24 Comments at 2.
[355] *See* Interwest's comments filed November 27, 2024 at 2-3 ("Interwest's 11/27/24 Comments").

§§ 40-5-101 to -103, C.R.S., acknowledge local governments' authority over siting transmission and energy production facilities, even when a project implicates a statewide interest.[356] Interwest argues that the Commission must respect federal, state, and local governments' authority to govern siting decisions, and that the Commission does not have implied authority, particularly when considering the array of federal, state, and local authorities with authority over issues related to historic and culturally significant sites in Colorado.[357]

111. Interwest, COSSA, and SEIA agree with CIEA that this Proceeding should be converted to an investigatory or miscellaneous docket to consider more background information about the extent of its authority.[358] If the Commission promulgates Rules, Interwest suggests that the Commission focus those Rules on requiring utilities to document and report their activities and approved permits, with particular attention to permits related to historic and cultural sites that are significant to federally recognized Tribal Governments.[359] Such reporting could be submitted as compliance filings in CPCN, transmission planning, and integrated resource planning proceedings when the information is available (after applications are approved).[360] It suggests that such information be used for objective informational purposes, not to form a basis for Commission decision-making and approval of applications.[361]

112. GRID states that the Commission does not have explicit siting authority and must defer to local authorities, but that the proposed Rules do not encroach upon "the primary role of local siting authorities in their decisions regarding infrastructure."[362] In the spirit of

[356] *Id.* at 3, citing § 24-65.1-101, C.R.S.
[357] *Id.*
[358] *Id.* at 1; COSSA and SEIA's comments filed November 27, 2024 at 4 ("COSSA and SEIA's 11/27/24 Comments").
[359] Interwest's 11/27/24 Comments at 1.
[360] *Id.* at 1-2.
[361] *Id.*
[362] GRID's 12/11/24 Comments at 1.

Senate Bill ("SB") 21-272, GRID states that equity must be considered in all the Commission's decisions.[363] GRID acknowledges that the proposed Rules create risks for bidders and developers, and notes that there "will be no easy, trimmed solution" in this Proceeding.[364]

113. WRA submits that the Commission has discretion to consider the potential impact of energy infrastructure on a significant site, both in ERP and CPCN proceedings.[365] WRA argues that § 40-5-101(1)(a), C.R.S., does not preclude the Commission from considering impacts on cultural and historic resources, nor does it govern what the Commission may consider within an ERP proceeding.[366] It asserts that the Commission plainly has authority to consider a project's costs and risks, which are influenced by impacts to a significant site.[367] WRA and GRID submit that the Commission's authority is confirmed by its actions in Public Service's ERP Proceeding.[368] They explain that the Commission declined to approve a wind project in its Phase II decision based on potential adverse impacts to Sand Creek Massacre National Historic Site's viewshed and instead imposed several obligations on Public Service.[369]

B. Practical Issues about the Timing of Routing and Siting Activities

114. Tri-State, Public Service, and Black Hills agree that project sites and routes are often not known or selected when the utility seeks a CPCN or makes an ERP filing.[370] Public Service explains that CPCN and ERP proceedings are time-consuming, resource-intensive, and often heavily litigated, which means that Public Service does not ordinarily have enough

[363] *Id.* at 2.
[364] *Id.*
[365] WRA's comments filed December 11, 2024 at 3 ("WRA's 12/11/24 Comments").
[366] *Id.*
[367] *See id.* at 3-4.
[368] WRA and GRID's joint comments filed April 8, 2025 at 4 ("WRA and GRID's 4/8/25 Comments").
[369] *Id.,* citing Decision No. C24-0052 at ¶¶ 200-207 (issued January 23, 2024) in Proceeding No. 21A-0141E.
[370] Tri-State's 11/27/24 Comments at 4; Tri-State's 8/9/24 Comments at 4; Black Hills' 11/26/24 Comments at 3; Black Hills' 8/9/24 Comments at 4-5. *See* Public Service's 8/9/24 Comments at 5-6.

regulatory certainty to move forward with finalizing a transmission line's route, siting a generation facility, or securing the necessary permits.[371] When it files a CPCN application, Public Service generally only knows the project study area, which can be geographically expansive, spanning hundreds of square miles.[372] Similarly, Black Hills states that as a practical matter, a utility only knows general geographical parameters of a proposed site when it seeks a CPCN, and that a utility cannot know with any reliable degree of certainty, the exact location of planned generation or associated transmission infrastructure when it makes an ERP Phase I filing.[373] Indeed, a utility does not know this until bids are submitted (and selected) during an ERP's Phase II.[374]

115. Along these lines, Public Service submits that it is important for the Commission to consider when siting activities can practically and efficiently move forward for investments that are not yet approved.[375] Public Service is concerned that proposed Rules with blanket requirements to make findings on siting-related matters when the specific locational information needed to inform such an evaluation is often not yet sufficiently developed could result in confusion, undue delay, and a significant obstacle to the timely and efficient generation and transmission resource development that the state's clean energy transition requires.[376] Likewise, Black Hills notes that the proposed Rules assume that siting and routing decisions could be known when the Commission issues a CPCN or ERP decision.[377] Similarly, Tri-State explains that the proposed Rules would require siting, advanced engineering, and other studies to be performed substantially before filing

[371] Public Service's 8/9/24 Comments at 4.
[372] *Id.* at 5-6. A CPCN application includes the boundaries of the study area to identify potentially feasible transmission line routes and substation site alternatives that would meet the project's objectives. *Id.* at 6.
[373] Black Hills' 11/26/24 Comments at 3.
[374] *Id.*; Black Hills' 8/9/24 Comments at 4-5.
[375] Public Service's 8/9/24 Comments at 3-4.
[376] Public Service's 11/25/24 Comments at 2.
[377] Black Hills' 11/26/24 Comments at 3.

a CPCN application, thereby creating costly administrative and operational inefficiencies.[378] This will result in significant incurred costs before the Commission has determined that the public convenience and necessity require the project.[379] Tri-State asserts that until the Commission confirms that the public convenience and necessity requires a project, it makes little sense to spend substantial resources to develop a project to a high level of siting and engineering detail.[380]

116. While it recognizes that it is important to consider cultural and historic resources, Tri-State submits that it is premature to do this during the CPCN process, and that the better approach is to leave these considerations to local and federal permitting processes, which occur at an appropriate time in the process (*i.e.*, after a CPCN is granted and specific project locations and routes are identified).[381] Indeed, Tri-State notes that eligible sites' features are considered during a project's permitting phase (post-CPCN), and that identifying a significant site is inherently a siting issue appropriately addressed during detailed engineering and project permitting (after Commission approvals).[382] For example, during the post-CPCN detailed engineering and project permitting phase for a linear transmission line, Tri-State explains that a utility must consider negotiations with private landowners, federal land right-of-way applications, state and federal environmental permitting, local government land-use permitting, sensitive and endangered species issues, cultural resources, wetlands and rivers, and the NEPA process (when applicable).[383] It submits that removing significant sites from this broader context would complicate and unnecessarily delay the overall process.[384]

[378] Tri-State's 8/9/24 Comments at 4.
[379] *Id.*
[380] Tri-State's 11/27/24 Comments at 4.
[381] *See id.*
[382] *Id. See* Tri-State's 8/22/24 Comments at 2.
[383] Tri-State's 8/22/24 Comments at 2-3.
[384] *Id.* at 3.

117. Further elucidating these issues, Public Service outlines the below example of the post-CPCN routing, siting activities, and related outreach that it performs when constructing a transmission line and related substation.[385] After the Commission grants a transmission CPCN, Public Service performs a siting and routing study, which typically includes the following four steps:

- Step 1: Public Service gathers land use and environmental resource data within the study area and organizes that data into a geographic information system ("GIS") database that is used to inform the next steps. As relevant here, this includes data on land use, environmental resources, prime farmland, wildlife habitats, threatened and endangered specifies, water resources, visual or aesthetic concerns, cultural resources, including architectural and archaeological sites, and Tribal resources.[386]
- Step 2: Public Service analyzes the collected data to identify a particular resource's sensitivity to the introduction of a new transmission line or substation. This includes determining potential adverse responses to direct and indirect effects associated with construction, operation, and maintenance of the new facility. Public Service generally designates cultural resources as having a high sensitivity.[387]
- Step 3: Building on the results of the above analyses, combined with aerial photo imagery, environmental resource data, field reconnaissance visits, Public Service develops a network of route alternatives and analyzes each alternative's mileage.[388]
- Step 4: To narrow down the transmission line route or siting alternatives, Public Service compares alternatives to determine which are the most compatible with existing land uses, meets its needs, and have the least impact on the community. During this process, Public Service evaluates options using criteria developed in consultation with potentially impacted communities and stakeholders. It also confirms that the preferred route meets applicable utility engineering standards, including supply adequacy, system reliability, and public safety standards.[389]

118. Public Service engages in significant public outreach alongside the above-described study.[390] It also holds project coordination meetings and pre-permitting application meetings with impacted local governments to proactively address and provide

[385] Public Service's 8/9/24 Comments at 5-9.
[386] *Id.* at 7.
[387] *Id.*
[388] *Id.*
[389] *Id.* at 7-8.
[390] *Id.* at 8.

resolution to comments, questions, and requests for additional information before filing a permit application.[391] Local permitting processes require utilities to provide detailed information and analyses about potential environmental, land-use, cultural, and historic impacts.[392] When federal permitting is required, Public Service also complies with federal outreach and analyses requirements. For example, new generation projects may require federal permitting, which triggers a Section 106 NHPA review, a process that requires consultation with state and Tribal historic preservation officers, similar to the engagement that the proposed Rules contemplate.[393] It is not uncommon for permitting authorities to require Public Service to provide multiple rounds of additional information or revisions to an application.[394] Once the permitting authority deems the application complete, a public hearing process typically follows, which creates another opportunity to address concerns and hear from the public.[395]

119. Likewise, after the Commission approves a bid portfolio, Black Hills performs routing studies, including geographic and environmental analyses as part of the local permitting process.[396] Black Hills is concerned that requiring bidders to identify significant sites could reduce the number of bids submitted, thereby jeopardizing utilities' ability to cost-effectively develop generation and transmission assets.[397] What is more, bidders cannot know if their proposed locations are at or near a significant site if the Commission can designate a geographic area as a significant site after the bid is submitted.[398]

[391] *Id.*
[392] *See id.* at 9.
[393] *Id. See* 54 U.S.C. § 306101 *et. seq.*; 54 U.S.C. § 306108.
[394] Public Service's 8/9/24 Comments at 9.
[395] *Id.*
[396] Black Hills' 11/26/24 Comments at 3.
[397] *Id.*
[398] Black Hills' 8/9/24 Comments at 4-5.

120. Along these lines, Public Service encourages the Commission to consider the potential for unintended consequences resulting from creating significantly more onerous requirements for public utilities to site transmission or generation resources than private developers and other entities not subject to the Commission's jurisdiction.[399] For example, if adopted Rules ultimately make it more challenging for public utilities than nonregulated entities to move forward with investments, this could undermine the Commission's ability to ensure that Colorado energy development considers and mitigates the potential for adverse cultural impacts that the proposed Rules are intended to guard against.[400]

121. Interwest submits that economic efficiency warrants a predictable, step-by-step planning, approval, and development process to allow for long-term planning consistent with regulatory requirements.[401] Utilities do not have the necessary information about siting and precise locational information to be able to submit a final permit application to all federal, state, and local jurisdictions when it files a CPCN application or makes an ERP Phase I filing.[402] For these reasons, Interwest submits that the more fully developed and separate federal, state, and local permitting process should continue to address the considerations at issue here.[403]

122. COSSA and SEIA agree with many of the above comments. They explain that impacts to significant sites on private land are reviewed during the local land use siting and permitting process.[404] Successful bidders in ERPs do not obtain local land use permits until after they have an "off-take" agreement with a utility, which is after an ERP's Phase II is complete.[405]

[399] Public Service's 8/9/24 Comments at 4.
[400] *Id.*
[401] Interwest's 11/27/24 Comments at 3.
[402] *Id.*
[403] *Id.* at 3-4.
[404] COSSA and SEIA's 11/27/24 Comments at 1.
[405] *Id.*

They note that some local jurisdictions do not allow renewable energy developers to apply for a local land use permit until they can demonstrate that they have an "off-take" agreement with a utility, but the proposed Rules may require developers to seek county land use permits before bidding into an ERP.[406]

123. To illustrate the potential impact this could have, COSSA and SEIA point to Public Service's last ERP where 1,073 bids were submitted in response to an RFP, and approximately 20 of those bids were selected during the ERP's Phase II.[407] Because local land use planning jurisdictions currently only review projects selected in an ERP's Phase II, local governments only reviewed the 20 selected projects from Public Service's last ERP. Under the proposed Rules, local governments would have been required to review 1,073 projects—before those projects were actually bid—rather than just the 20 projects that were ultimately selected.[408] For these reasons, COSSA and SEIA submit that adopting the proposed Rules will have a dramatic impact, and will significantly increase local governments' resource needs so they may review a much larger volume of applications.[409] They caution the Commission to consider the impact of its Rules on other governmental entities' time and resources.[410]

124. The Ute Mountain Ute Tribe does not suggest that the Rules usurp local siting authority or require utilities to provide specific location information for future generation and transmission resources that are not yet available.[411] It emphasizes that this Proceeding presents an opportunity to enact meaningful rules and policies "on tribal consultation, whether between the

[406] *Id.* at 1-2.
[407] *Id.* at 2, citing Public Service's 30-day report filed March 30, 2023 in Proceeding No. 21A-0141E and Decision No. C24-0052 (issued January 23, 2024) in Proceeding No. 21A-0141E (Phase II Decision).
[408] *Id.*
[409] *Id.*
[410] *Id.*
[411] Ute Mountain Ute Tribe's comments filed December 13, 2024 at 3 ("Ute Mountain Ute Tribe's 12/13/24 Comments").

Commission and Tribal Governments or between Colorado's regulated utilities and Tribal Governments."[412] It suggests that the Commission consider adopting rules or "a formal policy with Tribal Governments" and provides examples of three existing policies that other states and the federal government adopted (discussed in more detail later).[413] The Ute Mountain Ute Tribe submits that the Commission can adopt rules or policies that ensure that the Commission's decision-making considers impacts to significant sites and mitigation.[414]

125. WRA acknowledges that there are practical challenges with comprehensively identifying and evaluating impacts on cultural resources and significant sites within utility planning processes but submits that Rules that prioritize and foster consultation and engagement with Tribal Governments can improve how impacts on Tribal Governments are considered and ensure more inclusive and culturally sensitive decision-making.[415]

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

126. Like other commenters, COSSA and SEIA are concerned that the proposed Rules may overlap or conflict with existing local and use planning processes.[416] They explain that Colorado counties have had control over land-use and siting decisions since the General Assembly passed House Bill ("HB") 74-1041 (codified at §§ 24-65.1-101, *et seq*., C.R.S.,) (*i.e*., the "1041 laws").[417] They understand that this authority is very important to county governments.[418] In support, they note that when SB 24-212 was considered, local governments raised critical

[412] *Id.* at 4.
[413] *Id.* at 4-6.
[414] *Id.* at 6.
[415] WRA's 12/11/24 Comments at 5.
[416] COSSA and SEIA's 11/27/24 Comments at 3.
[417] *Id.*
[418] *Id.*

concerns about state overreach into local land use planning authority.[419] If adopted Rules are viewed as overstepping into counties' local land use planning authority, COSSA and SEIA are extremely concerned that conflicts will arise between the Commission and local governments, including protracted litigation about jurisdictional boundaries, thereby slowing progress toward reaching the state's decarbonization targets.[420] They advise the Commission to proceed carefully and consider the jurisdictional limits of HB 74-1041 before promulgating Rules that may impact siting decisions.[421]

127. Tri-State submits that considering cultural resources and significant sites is inherently a project siting issue that happens post-CPCN.[422] Tri-State asserts that the proposed Rules duplicate and substantially overlap with actions that other governmental entities already require.[423] Tri-State explains that cultural resource surveys are a frequent and customary part of its generation and transmission planning and permitting process, already required by a variety of federal, state, and local laws and regulations, making the proposed Rules unnecessary.[424] Surveys also arise in the context of what is known as "1041 permitting" in Colorado, per HB 74-1041 (codified at §§ 24-65.1-101, *et seq*., C.R.S.).[425] Tri-State explains that HB 74-1041 gives local governments authority to designate and regulate areas and activities of state interest.[426] This includes "areas containing, or having significant impact upon, historical, natural, or archaeological resources of statewide importance," per § 24-65.1-201(1)(d), C.R.S., and site selection and construction for a public utilities' major facilities, per § 24-65.1-203(1)(f), C.R.S.

[419] *Id.* at 3-4.
[420] *Id.* at 4.
[421] *Id.*
[422] Tri-State's 8/9/24 Comments at 9.
[423] Tri-State's 11/27/24 Comments at 4.
[424] *Id.* at 4-5. *See* Tri-State's 8/9/24 Comments at 7.
[425] *See* Tri-State's 8/9/24 Comments at 7.
[426] *Id*. *See* § 24-65.1-201(1), C.R.S.

For example, for its Burlington to Lamar transmission line, Tri-State performed a Class I cultural resource records search; a Class III pedestrian field survey on all state lands and areas with a suitable habitat for federal threatened species; a visual impact assessment at a distance of approximately 10 miles from the transmission line; and an NHPA Section 106 architectural resources survey and 700 plus page report.[427] Tri-State performed similar activities for its Dolores Canyon Solar Facility along with a research design and mitigation plan for cultural resources, and a treatment plan for human burials and fragmentary remains, including full sampling and analysis of cultural materials.[428] Tri-State performed these activities post-CPCN, at the site selection and permitting stage.[429] In the federal permitting context, the federal agency typically leads communication with History Colorado, with indirect involvement from project proponents (who pay the costs of cultural resource services associated with project permitting).[430]

128. Public Service explains that much of the analyses and engagement aimed at identifying and evaluating cultural impacts occurs in siting processes and related requirements within the purview of federal, state, and local governments and other permitting authorities, post-CPCN and ERP.[431] Local permitting processes require utilities to submit detailed information and analyses about potential environmental, land-use, cultural, and historic impacts; typically hold public hearings; consider extensive public feedback; and often require multiple rounds of updates and revisions to address additional questions or concerns.[432] When federal permitting is also required, additional analysis and outreach are required, including for example, federal permitting

[427] *See* Tri-State's 8/9/24 Comments at 7-8.
[428] *See id.* at 8.
[429] *Id.*
[430] *Id.* at 9.
[431] Public Service's 8/9/24 Comments at 3.
[432] *Id.* at 9.

for new generation projects (which trigger Section 106 NHPA review).[433] Given all of this, Public Service advises the Commission to consider the critical function and authority that local governments and state and federal agencies play in siting and permitting to avoid duplicative or conflicting processes.[434]

129. Black Hills echoes many of the above comments. It agrees that federal permitting or "consultation" requirements, or other restrictions may apply to a project, depending on project funding sources, land ownership, and other considerations.[435] This is in addition to Tribal Governments' requirements relating to protections and processes for land they own.[436]

130. Interwest explains that there are a number of federal, state, and local entities which oversee compliance with various regulatory regimes developed to identify and protect sites of historic and cultural significance.[437] For example, if a project is located on federal land, otherwise requires a federal permit or authorization, or receives federal funding, the project is subject to NHPA's Section 106, and a cultural resource survey in accordance with state-specific guidelines is required.[438] Developers are required to consult with History Colorado for any project that receives federal funding, permits, or approvals, or if a project regulated at the state level impacts a property nominated for or listed on the State Register.[439]

131. To address the many concerns discussed, Interwest suggests that the Commission:

- require utilities to make post-CPCN filings reflecting compliance with permitting authorities' requirements as a more viable approach to recognize jurisdictional variations and existing requirements without duplicating them in Commission Rules;

[433] *Id.*
[434] *Id.* at 3-4.
[435] Black Hills' 11/26/24 Comments at 5.
[436] *Id.*
[437] Interwest's 11/27/24 Comments at 4.
[438] Interwest's 8/9/24 Comments at 10. It adds that recent legislative changes to § 29-20-405, C.R.S., require local governments within the Brunot Area to consult with Tribal Governments before any land use approval. *Id.*
[439] *Id.* at 15.

- regularly consult with Tribal Governments about significant sites they have identified and how to mitigate impacts, which may prevent conflicting and overlapping regulatory siting review and mitigation oversite; and
- consider legislative action as the most appropriate avenue for statewide action.[440]

132. GRID agrees that the federal government has existing processes to preserve significant sites through NHPA's Section 106.[441] It "concedes with" Interwest's suggestion that post-CPCN reporting on Tribal consultation may be an appropriate mechanism to preserve historic and culturally significant sites.[442] It suggests that this would complement NHPA's Section 106, not duplicate it.[443]

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

133. GRID acknowledges that the Commission and utilities lack expertise to properly identify significant sites and submits that History Colorado "serves as the best fitted agency between the utilities, the Commission and Colorado state-based Tribes."[444] It asserts that deferring to History Colorado--who has sufficient expertise and experience--can streamline disjointed timelines during ERP and CPCN proceedings.[445] GRID recommends that the Commission consider requesting that the General Assembly create a fund that could be used to pay for expenses associated with "early identified administrative services," Tribal Governmental engagement, technical experts, and archaeological services.[446] GRID asserts that such a fund would reduce the burden that the proposed Rules place on bidders in ERPs' early planning stages.[447]

[440] *Id.* at 11. *See* Interwest's 11/27/24 Comments at 5-6.
[441] *See* GRID's 12/11/24 Comments at 4.
[442] *Id.*
[443] *See id.*
[444] *Id.* at 3.
[445] *Id.*
[446] *Id.*
[447] *See id.*

134. Tri-State submits that whether mitigation is sufficient should be determined between History Colorado and the relevant Tribal Governments, and that inserting the Commission into that process will negatively impact the efficiency and effectiveness of such a process, and the resulting outcomes for the involved parties.[448]

135. Interwest explains that the federal, state, local and Tribal Governments which oversee compliance with various regulatory regimes designed to identify and protect historic and culturally significant sites have the expertise to identify impacts, mitigation, prevention measures, or available alternatives.[449] It submits that the practical reach of the Commission's authority and expertise as to the sufficiency of a utility's treatment of significant sites is likely to consult with Tribal Governments for information gathering purposes, and record a utility's compliance based on such consultations.[450] Interwest views this as a procedural test rather a substantive one.[451] Even so, such a procedural sufficiency test could not be extended to override a federal, state, or local government's findings relating to the site.[452] It explains that it is unlikely that sufficient evidence will be available when a utility seeks Commission approval of a transmission plan, resource plan (even in Phase II), or a CPCN.[453] A substantive sufficiency review would likely be fraught with potential for conflict with "the findings and timing of review procedures undertaken by other authorized agencies and Tribal Governments."[454] As a result, including a substantive sufficiency review as proposed would potentially result in utilities and third-parties expending significant resources without advancing the Commission's underlying goals.[455]

[448] Tri-State's 11/27/24 Comments at 5.
[449] Interwest's 11/27/24 Comments at 4.
[450] *See id.* at 4-5.
[451] *Id.* at 5.
[452] *Id.*
[453] *Id.*
[454] *Id.*
[455] *See id.* at 5.

136. COSSA and SEIA are concerned that the proposed Rules would require utilities to assess significant site impacts during an ERP's Phase II bid review process, which would put tremendous time pressure on utility staff who already face an incredibly compressed timeframe in which they have to review hundreds of bids.[456] They are also concerned that the proposed Rules contemplate a utility reviewing bidders' significant site treatment behind closed doors with no transparency as to how a utility measures impacts, or how impacts are disclosed to bidders and the public in an ERP's Phase II report.[457] They note that it remains unclear whether utilities have the in-house expertise to properly judge impacts to significant sites.[458]

V. DISCUSSION, FINDINGS, ANALYSIS, AND CONCLUSIONS

A. Proposed Rules

137. As an initial matter, the ALJ notes that while this Proceeding may have been initiated with the hope that Rules could be quickly promulgated, the ALJ took a deliberate and measured approach allowing numerous opportunities for public comment and engagement on the proposed Rules, including opportunities to address specific concerns the ALJ identified.[459]

138. The definitions in proposed Rule 3001(i) and (mm) interact significantly with proposed Rules 3102(b)(XI), 3605(g)(II)(G)(iv), 3605(g)(III)(C)(v), 3605(h)(II)(F), 3613(h), 3616(d), 3617(c), 3620, and 3627(c)(XIV). Indeed, those definitions lay the groundwork for the remaining proposed Rules, providing context and meaning for the potential impact of the proposed Rules. As a result, problems with proposed Rule 3001(i) and (mm) carry over into the rest of the proposed Rules. For example, as Black Hills explained, unless utilities have clarity on what constitutes a cultural resource, viewshed, or sacred object, they will be unable to identify impacts

[456] *See* COSSA and SEIA's 11/27/24 Comments at 3.
[457] *Id.*
[458] *Id.* at 2.
[459] *See supra*, ¶¶ 4-6.

to them, propose mitigation, or describe requirements related to identifying and repatriating cultural and historic resources as contemplated by other proposed Rules.[460] As explained below, proposed Rule 3001(i) and (mm) raise serious and significant concerns that the ALJ is unable to overcome on this record.

139. Comments on Rule 3001(i) and (mm) indicate that determining whether an item or viewshed is a cultural or historic resource or whether a location is a significant site requires a subjective analysis by individuals with the necessary cultural and historic expertise. As many comments indicate, this likely requires subject-matter experts. Indeed, comments note that the federal government has made clear that Indigenous knowledge must be treated as expert knowledge.[461] The Ute Mountain Ute Tribe submits that only the relevant Tribal Government can ultimately decide whether a site is significant to it.[462] Its other comments indicate that the significance of a site or whether an item is a cultural or historic resource may vary depending on the "the cultural orientation" of the viewer.[463] Put differently, the Ute Mountain Ute Tribe's comments indicate that answering these questions through a "Eurocentric" mindset, or applying the "dominant" culture rather than the culture and perspectives of the relevant Tribal Government is likely to result in different outcomes.[464] To illustrate this point, it provides an example where a person with a Eurocentric mindset may view a particular location as interesting, while a person with "a traditional mindset" may view the same location as being imbued with cultural, ceremonial, or spiritual meaning even where there is no specific visual trigger (Macos River example).[465] In another example, the Ute Mountain Ute Tribe explains how viewsheds important

[460] *See* Black Hills' 8/9/24 Comments at 2-3.
[461] Ute Mountain Ute Tribe's 8/12/24 Comments at 9.
[462] *Id.* at 13.
[463] *See* Ute Mountain Ute Tribe's 8/23/24 Comments at 10-11.
[464] *See id.* at 10-13.
[465] *Id.* at 13.

to Indigenous cultures may not register in the same way to a Eurocentric mindset. It explains that a single butte that aligns with a solar solstice or equinox from a particular vantage point may have cultural or religious significance to an Indigenous culture, but that significance may not register with other cultures in the same way.[466] Likewise, old trading posts and boarding school sites may have strong significance to Tribal Governments, even when no physical structures remain.[467]

140. All of this leads the ALJ agree with the Ute Mountain Ute Tribe that it is important to acknowledge where Indigenous knowledge is held.[468] Comments indicate that access to Indigenous knowledge is limited, including information in History Colorado's database.[469] History Colorado's database is accessible only to professionals meeting the Secretary of the Interior's standards for archaeology, and who agree to the terms and conditions of access (including confidentiality).[470] Notably, comments indicate that the database does not capture all significant sites and cultural and historic resources in the state.[471] Certain Indigenous knowledge may only be available through a Tribal Government, and even within a Tribal Government, that knowledge may have additional layers of confidentiality that further restricts access.[472] Along these lines, Tribal Governments may not be able to identify the precise location of a significant site or fully share why a site is significant based on tribal, cultural, and historical reasons.[473]

141. Refining proposed Rule 3001(i) and (mm)'s definitions as suggested does not eliminate the need for cultural and historical expertise to understand and apply those definitions. The Joint Tribe Commenters' proposed definition of "cultural and historic resources" confirms

[466] *Id.* at 11-12.
[467] Ute Mountain Ute Tribe's 8/12/24 Comments at 13.
[468] *See id.* at 9.
[469] *Id.*
[470] History Colorado's 8/9/24 Comments at 4-5.
[471] *See* Ute Mountain Ute Tribe's 8/12/24 Comments at 9.
[472] *Id.*
[473] *See id.* at 7-8; WRA's 8/22/24 Comments at 4.

this. They suggest that the terms be defined to include "cultural resources and ceremonial sites, both physical and intangible, with historical, traditional, spiritual, religious, or cultural significance, ancestral remains and associated funerary objects, objects of cultural patrimony, viewsheds, and sacred objects."[474] It is difficult to imagine how a person without cultural and historic expertise could determine that an intangible site or resource carries historical, traditional, spiritual, religious, or cultural significance, and whether objects are sacred or "of cultural patrimony." Although the ALJ does not discount the importance of viewsheds, including them in the definition of cultural and historic resources creates a plethora of other concerns. As CIEA notes, this term has no metric or standard.[475] Comments offer none. Rather, as noted above, comments indicate that a viewshed (and impacts to the same) involve complex considerations that require cultural and historic expertise that the Commission lacks, and which may require expansion into other sensory experiences beyond the visual.[476]

142. Proposed Rule 3001(mm)'s definition of significant site is just as concerning. Under proposed Rule 3001(mm)(II), any site registered in History Colorado's database is automatically deemed a significant site, thereby triggering numerous other proposed Rule requirements. Comments indicate that the database does not capture all sites significant to Indigenous People; only professionals meeting federal archaeological standards may access it; and, notably, it includes over 220,000 sites unfiltered for connections or significance to Indigenous People.[477] Based on this record, there is no way to know the potential unintended consequences of treating all 220,000 sites in the database as significant sites. However, given that History

[474] Joint Tribe Commenters' 4/8/25 Comments at 2.
[475] CIEA's 8/22/24 Comments at 16. *See supra*, ¶ 47.
[476] *See supra*, ¶¶ 15, 16, 91.
[477] Ute Mountain Ute Tribe's 8/12/24 Comments at 9; History Colorado's 8/9/24 Comments at 4-5; Public Service's 8/9/24 Comments at 9-10.

Colorado's database includes over 220,000 sites, it is reasonable to expect that the potential breadth of the proposed Rule's definition could be substantial, and therefore, far more impactful on necessary energy development in the state than anticipated. As a practical matter, while comments indicate that History Colorado restricts how accessed data may be used, the record provides no information detailing the contours of such restrictions, leaving questions as to how information gleaned from History Colorado's database may be used in Commission proceedings, if at all (even with confidentiality protections).[478]

143. Provisions in proposed Rule 3001(mm)(II) that would require sites to be treated as significant if "listed or eligible for listing" in a local, state, or national register of historic places raise similar issues. To start, the proposed Rule does not specify that it applies only to registers maintained by governmental entities. Assuming that it does, the proposed Rule fails to identify the specific registers whose eligibility criteria are essentially subsumed in the proposed Rule. Indeed, to determine whether a site is listed or eligible to be listed in a register, the Commission, utilities, Tribal Governments, stakeholders, developers, and the like must have access to these unnamed registers' significant sites data, and must know, understand, and apply eligibility criteria that these numerous unnamed entities employ. This imports a high degree of uncertainty and ambiguity in the proposed Rule. But even if all the registers and their associated eligibility criteria were identified by rule, to understand, apply, and implement the proposed Rule, the Commission, parties and stakeholders would still need cultural and historic expertise. What is more, since the record lacks sufficient information about the volume of sites listed in these unnamed registers, the Commission cannot fully understand or comprehensively evaluate the potential impact of this

[478] *See* Public Service's 8/9/24 Comments at 10. Although Public Service raised this issue in comments filed early in this Proceeding and the ALJ offered numerous opportunities for additional comment, History Colorado did not submit comments addressing this issue. Indeed, History Colorado's only comments were filed on August 9, 2024.

language. Even so, the volume of sites listed in History Colorado's database alone (over 220,000 sites) establishes that proposed Rule 3001(mm)(II)'s breadth is dramatic.

144. Suggestions to modify proposed Rule 3001(mm)(II) fare no better. For example, the Joint Tribe Commenters suggest that the definition in proposed Rule 3001(mm)(II) include sites "nominated" for listing in History Colorado's database, a local, state or national register of historic places, and sites "registered, listed, eligible or nominated" with a Tribal Government's preservation office or database.[479] In addition to the above issues, including sites nominated in such databases could be so far-reaching as to render the other significant site definitions meaningless. For example, the proposed language would require that even when a person nominates a site without regard to whether the nomination meets any eligibility criteria, the site would be treated as significant without further review or process. This gaping hole creates the potential for untold nefarious uses of the Rule. Setting that aside, the record lacks sufficient information for the Commission to understand the breadth of the proposed language and its potential impact. For example, the record lacks information about the current volume of sites nominated to any single database or register, let alone all of them. Nor does the record shed light on whether information on nominated sites would even be accessible to those obligated to comply with the proposed Rules. But the record does indicate that Tribal Governments may not be able to share information about sites registered with them (including specific location information). In such circumstances, those responsible for complying with related proposed Rules (*e.g.*, utilities and developers) may be unable to determine whether a project implicates a site listed, nominated, or eligible for listing in a Tribal Government's database or registry. Even if Tribal Governments made this information available to anyone who asked, utilities and developers may need cultural and

[479] Joint Tribe Commenters' 4/8/25 Comments at 2.

historic expertise merely to identify which Tribal Government to contact given Indigenous Peoples' forced displacement and other mobile histories.

145. Proposed Rule 3001(mm)(III) also has significant issues. To start, the process by which the Commission could designate a site as significant is unclear. However, proposed Rule 3620(d) would allow the Commission to make this determination without a hearing or allowing parties to respond to a Tribal Government's request to designate a significant site. This raises due process concerns. More importantly, the proposed Rule does not identify any criteria by which the Commission would designate a site as significant. Although the ALJ specifically sought comments on this question, none offered a workable solution.[480] Indeed, History Colorado suggests that proposed Rule 3001(mm)(III) be entirely stricken because (among other reasons), it presumes that the Commission does not have sufficient subject-matter expertise to designate significant sites.[481] History Colorado's presumption is correct. As it has never been statutorily charged with identifying or designating significant sites, or cultural and historical resources, the Commission has not developed the expertise needed to do so. In fact, as implied above, the Commission's overall lack of subject-matter expertise in these areas is a significant and persistent obstacle to the Commission's ability to implement most of the proposed Rules. History Colorado, not the Commission, is the long-standing authority on cultural resources in Colorado.[482] Indeed, the State Archaeologist (a section of the Colorado Historical Society within History Colorado), is statutorily charged with coordinating, encouraging, and preserving the full understanding of the state's archaeological resources as it pertains to humankind's cultural heritage;[483] analyzing this state's archaeological resources as to location, quantity, and their

[480] *See* Decision No. R24-0821-I at 5-6.
[481] *See* History Colorado's 8/9/24 Comments at 3.
[482] *Id.* at 5, citing §§ 24-80-401 to 411, C.R.S.
[483] § 24-80-403, C.R.S.

cultural significance; collecting and preserving archaeological resources; and advising and acting as liaison in transactions dealing with archaeological resources between state agencies, other states, and the federal government on common problems and studies, among other related duties.[484] These statutory responsibilities raise questions as to whether the proposed Rules would essentially result in the Commission usurping the State Archaeologist's statutory duties and responsibilities.[485] This issue warrants further evaluation should the Commission decide to promulgate the proposed Rules or other similar Rules in the future, particularly given that the General Assembly has not given the Commission statutory authority to determine the historic and cultural significance of sites and resources in the state, but did give the State Archaeologist such authority.

146. Assuming the proposed Rules do not unlawfully usurp State Archaeologist's statutory duties and responsibilities and could be amended to ensure due process and include clear criteria for the Commission's significant site determination, the fact remains that the Commission lacks the subject-matter expertise to apply such criteria. Indeed, by statute, the State Archaeologist, who is statutorily responsible for determining resources' cultural significance, must be a graduate of a recognized college or university with a post-graduate degree in archaeology or anthropology and must have sufficient practical experience and knowledge in archaeology.[486] This makes sense given the need for historic and cultural expertise to determine the significance of a site or resource.

147. The Commission's lack of subject-matter expertise in these areas bleeds into other proposed Rules. Indeed, while proposed Rule 3001(mm)(I) lists the Sand Creek Massacre National Historic Site in the definition of significant site, the Commission would still need lacking subject-matter expertise to implement other proposed Rules relating to this significant site and its

[484] § 24-80-405(1)(d), (e) and (f), C.R.S.
[485] *See* §§ 24-80-403 to 405, C.R.S.
[486] § 24-80-404, C.R.S. *See* § 24-80-405(1)(d), C.R.S.

cultural and historic resources, or any other specific sites that could be identified in the proposed Rules. For example, History Colorado submits that the Commission should seek its advice on the appropriateness of cultural resource surveys and their findings, instead of simply requiring those surveys to be filed with the Commission (per proposed Rule 3102).[487] History Colorado correctly assumes that the Commission lacks the expertise to determine these issues for itself. Proposed Rule 3605(g)(III)(C)(v) would require the Commission to address the sufficiency of a utility's consideration of significant sites and cultural and historic resources within proposed RFPs, model contracts, evaluation criteria, and during other relevant activities. Proposed Rule 3617(c) includes this same requirement. Similarly, proposed Rule 3605(h)(II)(F) would also require the Commission to consider the sufficiency of a utility's treatment of significant sites and cultural and historic resources thereof, and as relevant, whether mitigations or alternatives are viable and cost-effective. Proposed Rule 3613(h) includes this same requirement. Even if the proposed Rules were amended to include clear criteria (both as to mitigation and the sufficiency of a utility's consideration), the Commission would still need historic and cultural subject-matter expertise to apply that criteria. Tribal Governments' comments confirm this. For example, just as the significance of a site or whether an item or viewshed is a cultural or historic resource may vary depending on the "the cultural orientation" of the viewer,[488] mitigation or treatment of the same would most assuredly vary for the same reasons. While the ALJ appreciates Tribal Governments' position that the relevant Tribal Government should be ultimate arbiter of whether a site is significant to it and whether a utility adequately considered significant sites,[489] delegating this determination and the related decisions (discussed above) to Tribal Governments presents its own

[487] *Id.* at 6.
[488] *See* Ute Mountain Ute Tribe's 8/23/24 Comments at 10-11.
[489] *See e.g.,* Ute Mountain Ute Tribe's 8/12/24 Comments at 13; Southern Ute Indian Tribe's 8/7/24 Comments at 3.

issues.[490] For example, there are questions as to whether this would be an unlawful delegation of the Commission's responsibilities, particularly if such a delegation does not come with discernable standards or limits on Tribal Governments exercising discretion to make the relevant determinations.[491] For all the reasons discussed, the ALJ finds that amending proposed Rule 3001(mm) to include a list of specific significant sites or otherwise amending it to include clear criteria does not address the blaring problem that the Commission lacks the subject-matter expertise necessary to implement the proposed Rules.

148. Adopting existing state and federal definitions does not resolve these concerns.[492] For example, aligning proposed Rule 3001(i) with the definition of historic property under the NHPA, as some suggest, would define cultural and historic resources as

> any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.[493]

149. The plain language of this definition essentially incorporates the National Register of Historic Places' ("National Register") eligibility criteria. Those criteria are far from straight-forward. Specifically, 36 CFR § 60.4 states:

> National Register criteria for evaluation. The quality of significance in American history, architecture, archeology, engineering, and culture is present in districts, sites, buildings, structures, and objects that possess integrity of location, design, setting, materials, workmanship, feeling, and association and
> (a) that are associated with events that have made a significant contribution to the broad patterns of our history; or

[490] This position is understandable given Tribal Governments' sovereignty, justified interests in how sites and their resources are treated, and their expertise in these areas.

[491] *See e.g., Colo. Energy Advocacy Office v. Pub. Service Co. of Colo.*, 704 P.2d 298, 306 (Colo. 1985); *Baca Grande Corp. v. Pub. Utilis. Comm'n*, 544 P.2d 977, 978-79 (Colo. 1976).

[492] That said, the ALJ tends to agree with comments suggesting that differing definitions here may have unintended and negative consequences.

[493] 36 CFR § 800.16(l)(1). *See e.g.*, GRID's 8/9/24 Comments at 4.

> (b) that are associated with the lives of persons significant in our past; or
> (c) that embody the distinctive characteristics of a type, period, or method of construction, or that represent the work of a master, or that possess high artistic values, or that represent a significant and distinguishable entity whose components may lack individual distinction; or
> (d) that have yielded, or may be likely to yield, information important in prehistory or history.

150. Adding to this, 36 CFR § 60.4 also includes numerous "criteria considerations." While some of the above factors may result in readily identifying "cultural and historic resources" or sites with foundations in dominant Western cultures (*i.e.*, birthplace of a President), they do not resolve concerns that cultural and historic expertise is needed to identify resources and sites significant to Indigenous cultures.[494] What is more, using these definitions would also require broader historic or prehistoric expertise.

151. Importing state law definitions of similar terms also does not help. History Colorado provided numerous relevant definitions from the Code of Colorado Regulations.[495] While the definitions appear relatively straight-forward, upon closer inspection, there is little doubt that a person would need cultural and historic expertise to know whether an item or location fits a given definition. For example, the definition of historical resources would require a person with historic and cultural expertise to determine whether a resource provides "information pertaining to the culture of people during the historical period."[496] Likewise, the definition of archaeological resources requires cultural, and broader historic and prehistoric expertise to determine whether the

[494] History Colorado suggests that the Commission use the National Park Service's definition of cultural resource. History Colorado's 8/9/24 Comments at 1 and 3, citing https://www.nps.gov/dscw/cr-nrhp.htm. History Colorado's cited source, a National Park Service website, does not include a separate definition for these terms or for significant sites. Instead, it includes language implying that the National Park Service uses the same criteria for cultural resources as the National Register (above). *See* https://www.nps.gov/dscw/cr-nrhp.htm (last visited July 15, 2025).

[495] *See supra*, ¶¶ 24-25.

[496] *See* 4 CCR 1504-7, Section 2(K).

resource is at least 100 years old and provides "information pertaining to the historical or prehistorical culture of people within the boundaries of the State of Colorado."[497]

152. The many differences in how other state and federal agencies define relevant terms also highlight that moving forward with the proposed Rules would require defining many more terms than currently proposed, further underscoring the Commission's lack of subject-matter expertise in these areas. Indeed, the General Assembly has identified other state entities, such as the State Archaeologist, to accumulate the subject-matter expertise needed to make the type of assessments that the proposed Rules contemplate.[498]

153. In short, better and clearer definitions of these critical terms do not resolve the many concerns discussed above, particularly as to the Commission's lack of subject-matter expertise in the needed areas.[499] These reasons alone justify not adopting the proposed Rules, but there are other significant problems with the proposed Rules that separately warrant not adopting the proposed Rules.

154. For example, comments indicate that the proposed Rules may have a plethora of negative unintended consequences such as importing significant and costly inefficiencies into the CPCN and ERP process with limited benefits by reversing the order in which costly activities are performed; increasing costs for projects to an unknown degree; delaying projects needed to ensure reliable service and that the state meets its decarbonization goals; and limiting the number of bidders able and willing to bid for projects, thereby risking utilities' ability to solicit competitive

[497] *See* 4 CCR 1504-7, Section 2(C).
[498] *See e.g.*, § 24-80-403 to 405, C.R.S.
[499] What is more, the proposed Rules would also require utilities and developers to have the necessary subject-matter expertise to understand and comply with the proposed Rules. This may create other unintended consequences that negatively impact the public interest. *See supra,* fn.176. *See e.g.*, Black Hills' 8/9/24 Comments at 7. For example, the proposed Rules may create significantly more onerous requirements for public utilities to site transmission or generation resources than private developers and other entities not subject to the Commission's jurisdiction, yet another potential unintended consequence. *See* Public Service's 8/9/24 Comments at 4.

bids, likely resulting in higher infrastructure costs.[500] The record establishes that project sites and transmission routes are often not known (or selected) with sufficient geographic specificity when a utility seeks a CPCN or relevant ERP approval.[501] As a result, the Commission does not have the information necessary to assess and decide issues relating to significant sites and their cultural and historic resources when it issues CPCN and ERP decisions. The proposed Rules require this information to be available before the Commission approves a CPCN application or ERP proposal.[502] To comply, utilities would have to perform project implementation activities before the Commission approves such projects. For example, they would need to identify the specific project site or transmission route and develop the project to a high level of siting and engineering detail before making a CPCN or relevant ERP filing.[503] From there, given the need for cultural and historic expertise to determine whether a specific location includes a significant site or cultural and historic resources, a utility may need to perform a cultural resource survey for virtually every location, or, at minimum, hire an expert to determine whether a specific location may include a significant site or cultural and historic resource. Since utilities typically do not know the specific site and routing until much later in the process, they would have to obtain expert opinions, potentially including cultural resource surveys, for potentially extremely broad geographical areas to comply with the proposed Rules. The record is unclear as to the potential costs for the required efforts, but it does indicate that costs typically range from $10,000 to $100,000 for an initial inventory and field reconnaissance for a typical utility-scale renewable energy project.[504] And, those are not even the costs of a cultural resource survey. It would be unsurprising if the

[500] *See supra*, ¶¶ 114-116; 119-123.
[501] *See supra*, ¶¶ 114-116; 119-123.
[502] *See e.g.*, proposed Rules 3102(b)(XI); 3605(g)(II)(G)(iv); 3605(g)(III)(C)(v); 3605(h)(II)(F); 3613(h); 3616(d); 3617(c).
[503] *See supra*, ¶¶ 114-116; 119-123.
[504] Interwest's 8/9/24 Comments at 9.

preapproval work necessary to comply with the proposed Rules results in dramatically increased costs. What is more, given the additional efforts the proposed Rules would require before a CPCN or relevant ERP filing is made, the proposed Rules would most assuredly delay infrastructure projects, irrespective of whether the projects are needed to ensure safe and reliable service, meet the state's decarbonization goals, or even encompass a significant site or resource.[505]

155. Similarly, the proposed Rules will also require developers (*i.e.*, bidders) to engage in potentially costly activities before bidding into an ERP and before their bids are selected.[506] For example, proposed Rule 3616(d) requires a utility's RFP to require bidders to provide information on impacts to significant sites and the historic and cultural resources thereof, "as detailed in Rule 3620." Proposed Rule 3620(b) requires a description of the actual and potential impacts associated with the proposed action; how such impacts can be mitigated or avoided; alternative actions; the identity of Tribal Governments affected; and a record of communications with Tribal Governments and relevant third parties. It is unclear whether bidders could even perform the activities necessary to gather this information before their bid is accepted given potential limits on access to private land on which a project or route may be sited.[507] Thus, the record raises genuine questions as to whether bidders could have a cultural resource survey performed or could otherwise gather the necessary information at this stage in an ERP. Regardless, for the same reasons discussed above, bidders would most likely need to obtain a cultural resource survey or some other expert-level report to comply with the proposed Rule's requirements. As History Colorado notes, this may have the unintended consequence of numerous bidders obtaining

[505] *See* Tri-State's 8/9/24 Comments at 13; Tri-State's 8/22/24 Comments at 3; Public Service's 11/25/24 Comments at 2; COSSA and SEIA's 11/27/24 Comments at 4. The record is unclear as to the amount of delay that will result, as there are numerous activities that would have to be performed.

[506] *See e.g.,* COSSA and SEIA's 11/27/24 Comments at 2.

[507] *See supra*, ¶ 122.

a cultural resource survey or performing similar activities for the same site simultaneously or for numerous different sites, which may or may not ultimately be selected.[508]

156. Some comments indicate that to comply with proposed Rule 3616(d), bidders may need to obtain a local land use permit, even though some jurisdictions do not allow developers to apply for a local land use permit until they can demonstrate that they have an "off-take" agreement with a utility, or do not consider permit applications until after an ERP's Phase II.[509] This raises questions as to whether local governments would entertain a permit application at this early stage, let alone have the resources to consider significantly more permit applications. Either way, the proposed Rules will require developers to incur increased costs just to bid. While the precise cost increase is not clear, comments indicate that at best, such increased costs would be reflected in pricing for projects, and at worst, significant cost increases may reduce renewable energy developers' ability to finance projects in Colorado.[510] For the same reasons, the proposed Rules inherently risk reducing the number of developers who choose to submit bids for Colorado utility projects (*e.g.,* where a bidder either cannot afford the additional upfront costs or is not willing or able to increase their financial investment for the opportunity to bid). This would undermine Rule 3616(a), which requires that utilities' RFPs be "designed to solicit competitive bids to acquire additional resources pursuant to rule 3611," yet another unintended consequence. Negatively impacting utilities' ability to solicit competitive bids for utility infrastructure projects could have significant consequences to the overall costs of utility projects, the state's ability to meet decarbonization goals, and the public interest.

[508] *See* History Colorado's 8/9/24 Comments at 7.
[509] *See supra*, ¶ 122.
[510] Interwest's 8/9/24 Comments at 9.

157. All these increased costs would be incurred before and irrespective of whether the Commission grants a CPCN or approves bid projects, and before it is known that a location includes a significant site or cultural or historic resource. When the Commission does not grant a CPCN or approve a bid project, ratepayers and Tribal Governments experience no benefits from these increased costs. In short, even if the Commission could overcome its lack of required subject-matter expertise, and the many other issues discussed above, the proposed Rules create significant inefficiencies in the CPCN and ERP process that will reverse the order in which costly activities are performed, increase costs with limited benefits, and may have far-reaching unintended consequences. Unfortunately, the proposed Rules' approach to protect significant sites and their resources fail to account for the practical on-the-ground realities of resource planning. That is not to say that solutions to these issues do not exist. But the record lacks those solutions. Before promulgating Rules, the Commission must have a fulsome understanding of potential solutions (and their consequences), as it cannot be disputed that electricity affordability is a major concern in Colorado. It is also critically important to protect significant sites and the historic and cultural resources thereof, but the proposed Rules do not provide a workable path for the Commission to accomplish this goal.

158. For the reasons discussed, the ALJ finds that the proposed Rules create a host of concerning potential outcomes, including numerous negative unintended consequences; have a significant and potentially unlimited scope; are overly broad and vague; are untethered from timing of project development, making compliance difficult or impracticable without significant and costly inefficiencies; have no standards or metrics by which utilities, project developers, or the Commission could make initial determinations or identify and evaluate mitigation plans; requires the Commission to have cultural and historic expertise to implement; requires utilities and

developers to have cultural and historic expertise to understand and apply; and raises due process issues (among others).

159. Notably, the record lacks input from local and federal authorities to better inform the Commission as to how the proposed Rules compare to their requirements, including whether they conflict or overlap with them. Indeed, Kiowa County is the only County that filed comments. Even so, it did not address issues surrounding Colorado counties' authority over land use and siting.[511] As to related jurisdictional concerns, under the plain language of § 40-5-101(1)(a), C.R.S., in deciding whether the present or future public convenience and necessity requires a project for which a CPCN is sought, the Commission may not consider "land use rights or siting issues related to the location or alignment of the proposed electric transmission lines or associated facilities, which are under the jurisdiction of a local government's land use regulation." That said, the ALJ finds that the Commission retains authority to evaluate many policy implications, including impacts to significant sites and cultural and historic resources, as part of its public interest and equity evaluations.[512] But that evaluation cannot influence the Commission's decision-making on whether the public convenience and necessity requires a project, per § 40-5-101(1)(a), C.R.S. Although the Commission has authority to consider impacts to significant sites and cultural and historic resources,[513] it must walk a fine line to ensure that it does not impose requirements that conflict or overlap with requirements that a permitting authority imposes. Doing so risks engaging in siting and land use activities over the Commission lacks jurisdiction. To be sure, local

[511] *See generally*, Kiowa's 8/8/24 Comments.

[512] *Pub. Serv. Co. of Colo. v. Pub. Util. Comm'n*, 350 P.2d 543, 549 (Colo. 1960), *cert. denied*, 364 U.S. 820 (1960). *See* § 40-2-108(3), C.R.S.

[513] Whether the Commission has authority to determine whether a site is significant or includes cultural or historic resources is a separate, and open question that must be explored further should the Commission proceed with promulgating these or similar Rules. *See supra*, ¶¶ 145, 152.

governments (including counties and municipalities)[514] have statutory authority to designate certain areas of state interest, including "areas containing, or having significant impact upon, historical, natural, or archaeological resources of statewide importance," and areas around key facilities in which development may have a material effect on the key facility or surrounding community.[515] Similarly, local governments may designate certain activities of state interest, including "site selection and construction of major facilities of a public utility."[516] What is more, § 24-65.1-202(3), C.R.S., provides:

> Areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance, as determined by the state historical society, the department of natural resources, and the appropriate local government, shall be administered by the appropriate state agency in conjunction with the appropriate local government in a manner that will allow man to function in harmony with, rather than be destructive to, these resources. Consideration is to be given to the protection of those areas essential for wildlife habitat. Development in areas containing historical, archaeological, or natural resources shall be conducted in a manner which will minimize damage to those resources for future use.

160. These statutes establish that local governments have specific authority to decide and address many of the same considerations at issue here involving energy infrastructure development in areas where significant sites and their cultural and historic resources are found. Notably, the General Assembly declared that local governments have broad authority to plan for and regulate the use of land within their jurisdictions.[517] Indeed, through the Local Government Land Use Control Enabling Act (§§ 29-20-101 *et seq*., C.R.S.), the General Assembly reaffirmed local governments' authority to preserve "areas of historical and archaeological importance," and gave local governments authority to regulate surface impacts of energy and carbon management

[514] *See* § 24-65.1-102(2), C.R.S.
[515] § 24-65.1-201(1)(c) and (d), C.R.S.
[516] § 24-65.1-203(1)(f), C.R.S.
[517] § 29-20-102(1), C.R.S.

operations, including location and siting for the same.[518] All of this is to say that there is significant potential for the Commission to overstep into local governments' authority on these issues, or to issue decisions (such as mitigation requirements) that conflict with, duplicate, or overlap local governments' treatment and decisions relating to the same area or resource. For example, the proposed Rules may result in the Commission designating a site as significant, in conflict with a local, state, or federal authority's decision not to designate a site as significant or otherwise afford it historic or cultural protection.[519] As the record shows, the many differences between the critical definitions proposed here and other governmental entities' definitions of similar terms may increase the odds that the Commission could make decisions at odds with other entities' decisions.[520] This raises numerous concerns, particularly considering that the Commission lacks the subject-matter expertise relevant to such decisions. Colorado currently has approximately 130 local jurisdictions with preservation ordinances.[521] Given this, and that Colorado encompasses federal land, the Commission would need to consider a significant volume of local and federal permitting laws and requirements to ensure that it does not overstep its authority. Comments indicate that as many as 25 federal laws may be implicated, and this does not even include the potentially significant volume of related federal regulations.[522] Indeed, the numerous relevant laws and requirements support History Colorado's preference that permitting agencies take the lead in final decision-making on impacts to cultural resources and mitigation.[523] All of this makes it critical

[518] § 29-20-104(1)(c) and (h)(II), C.R.S.

[519] *See e.g.*, proposed Rule 3001(mm)(III) (allowing the Commission to designate significant sites). *See also,* Interwest's 8/9/24 Comments at 5; § 24-80-301, C.R.S. (authorizing counties to create their own historical societies with the same objectives as the state's historical society).

[520] *See supra*, ¶¶ 24-25, 35, 148-151.

[521] *See* https://www.historycolorado.org/office-archaeology-historic-preservation (last visited July 15, 2025).

[522] At minimum, the following federal laws may be relevant: NHPA (54 USC §§ 300101 to 320303); NAGPRA (25 USC §§ 3001 *et seq.*); AIRFA (42 USC § 1996); ARPA, (16 USC §§ 470aa, *et seq.*); NEPA (42 USC §§ 4321 *et seq.*); and ESA (16 USC §§ 1531 *et seq*.).

[523] *See* History Colorado's 8/9/24 Comments at 8.

for the Commission to receive significantly more input from local governments and relevant federal agencies before moving forward with Rules.

161. For all the reasons discussed, the ALJ finds that the issues with the proposed Rules are numerous and complex, so much so that the ALJ is unable to identify solutions to salvage the proposed Rules. As such, the ALJ declines to adopt Rule amendments. This is not to say that the Commission should take no action to safeguard significant sites and their historic and cultural resources. To this end, the ALJ identifies several potential next steps for the Commission's consideration.

B. Potential Options for the Commission to Consider

162. Below, this Decision outlines options to aid the Commission in identifying workable avenues to achieve this Proceeding's goals. This Decision explicitly does not enter any orders about these potential avenues.

163. First, the ALJ recommends that the Commission continue the process of working with the CCIA and meeting directly with representatives of the Colorado-based Tribes (Ute Mountain Ute and Southern Ute Indian Tribes). It may be that improving communication and engaging in formal consultation will establish a clearer scope for future Rules. Notably, both Colorado-based Tribal Governments requested increased communications and formal consultation.[524] As set forth in the CCIA's State-Tribal Consultation Guide ("CCIA's Guide"), and discussed in comments, the process of Tribal Consultation is nuanced, may have many steps and components, and requires deep consideration toward relationship-building.[525] CCIA's Guide indicates that as of 2014 (when it was published), at least four state agencies consult on a

[524] Southern Ute Indian Tribe's 8/7/24 Comments at 5. *See* Ute Mountain Ute Tribe's 8/12/24 Comments at 10.

[525] *See generally* Attachment E to Decision No. R25-0159-I.

government-to-government basis with the Ute Mountain Ute and Southern Ute Indian Tribes through a Tribal Consultation Agreement.[526] CCIA's Guide includes a complete copy of that Agreement that could be useful to the Commission in identifying its approach to consultation.[527] The CCIA's Guide provides a lot of practical and useful information, such as the roles or titles of persons withing the Tribal Governments that should be contacted; a sample invitation to attend a consultation session to a Tribal Representative; sample agendas; and tips for successful consultation (including cultural awareness), among other things.[528] The CCIA's experience and statutory responsibilities in these areas makes it a critical partner in determining appropriate next steps, both as to this recommendation and the next. Indeed, the CCIA is responsible for coordinating intergovernmental dealings between Tribal Governments and the state, per § 24-44-103(1)(a), C.R.S. Engaging more robustly with the CCIA may have many other benefits given the experience and backgrounds of its voting members (*e.g.*, voting members include the Department of Local Affairs' Executive Director and representatives from Ute Mountain Ute and Southern Ute Indian Tribes).[529]

164. Second, the ALJ recommends that the Commission consider adopting a formal written policy, (with help and support from the CCIA), that outlines its approach to ensure meaningful consultation, interaction, and engagement with Tribal Governments on topics significant to those entities, including protecting significant sites and cultural and historic resources. This Proceeding has highlighted the need for a Commission policy that facilitates consultation, interaction, and input from Tribal Governments, both formally and informally. To this end, the Commission could seek feedback from federal agencies and other states' agencies

[526] *Id.* at 13.
[527] *Id.* at 14-20.
[528] *Id.* at 21-22; 24; 28-30; 33-35.
[529] § 24-44-104(1)(a)(II)(D) and (III), C.R.S.

who have such policies.[530] Indeed, the Commission may find similar policies or approaches that federal or state entities have adopted useful. Attachments A to D to Decision No. R25-0159-I are examples of such policies or approaches.[531] For example, the Federal Energy Regulatory Commission's ("FERC") approaches to Tribal consultation may provide a helpful template or framework for the Commission, such as pre-proceeding or early-stage tribal consultation, with disclosure.[532] The Ute Mountain Ute Tribe suggests that the Commission consider adopting rules or a formal policy, highlighting policies that FERC, the Minnesota Public Utilities Commission ("Minnesota"), and the California Public Utilities Commission ("California") adopted.[533] It emphasizes FERC's policy "to encourage and facilitate involvement by Indian tribes in the areas over which the Commission has jurisdiction," and which affirms that FERC "will endeavor to work with Indian tribes on a government-to-government basis . . . and will seek to address the effects of proposed projects on tribal rights and resources through consultation . . ."[534]

165. Public Service, Tri-State, Black Hills, COSSA, and SEIA ("Joint Commenters") agree that it is important for Tribal Governments to have the opportunity to participate in relevant Commission proceedings, especially those that could impact culturally significant sites.[535] To this end, they agree with WRA that the Commission could benefit from more formal policies and

[530] Engaging with federal agencies and other states' agencies may also provide useful information to help the Commission evaluate whether it should adopt a policy to prioritize avoiding impacts to significant sites and their resources, and a "declaration of non-avoidance" when avoidance is not possible, as suggested by the Ute Mountain Ute Tribe. *See* Ute Mountain Ute Tribe's 8/12/24 Comments at 3-5.

[531] Attachments A and B are FERC's Policy Statement on Consultation with Indian Tribes in Commission Proceedings and Revision to the same; Attachment C is the Tribal Participation Guide for FERC Environmental Reviews; and Attachment D is the Minnesota Public Utilities Commission's Tribal Engagement/Consultation Policy.

[532] *See generally* Attachments A, B, and C to Decision No. R25-0159-I.

[533] Ute Mountain Ute Tribe's 12/13/24 Comments at 5-6.

[534] *Id.* at 4-5, quoting *Policy Statement on Consultation with Indian Tribes in Commission Proceedings,* Order No. 635, 104 FERC 61,108 (2003), and citing 18 CFR § 2.1c (2014) and https://www.ecfr.gov/current/title-18/chapter-I/subchapter-A/part-2/subject-group ECFR12433f73a71320c/section-2.1c.

[535] Joint Commenters' joint comments filed April 8, 2025 at 2 ("Joint Commenters' 4/8/25 Comments").

procedures for Tribal Government consultation.[536] They support the Commission considering consultation principles and policies that other state or federal entities have adopted (in the Attachments to Decision No. R25-0159-I).[537] Joint Commenters submit that Minnesota's Tribal Engagement/Consultation Policy ("Minnesota's Policy") has worked well, and that Minnesota regularly conducts proceedings similar to the Commission's.[538] Minnesota's Policy provides opportunities for both regular and issue-specific dialogue on issues that are important to Tribal Governments in Minnesota and draws a clear distinction between government-to-government consultation and Tribal Governments' participation in adjudicated proceedings.[539] They submit that Minnesota's Policy also creates a robust noticing process to inform Tribal Governments and historic preservation offices about disputed matters before the Minnesota Commission that have potential to impact their interests.[540] Joint Commenters state that implementing a similar policy here could help the Commission more proactively inform Tribal Governments and historic preservation offices about potential impacts to significant sites.[541] They assert that more formalized Tribal Government consultation processes and increased coordination between the Commission, Tribal Governments, and History Colorado could help utilities, developers and permitting authorities identify significant sites and proactively mitigate the potential for adverse impacts to the same.[542] They add that where potential impacts are known at the time a CPCN application is filed, active government-to-government consultation could ensure that Tribal Governments are aware of such a proceeding.[543]

[536] *Id.*
[537] *Id.*
[538] *Id.*
[539] *Id.*
[540] *Id.*
[541] *Id.* at 2-3.
[542] *Id.* at 3.
[543] *Id.* at 4.

166. The ALJ agrees that it may be helpful for the Commission to consider Minnesota's Policy, but in so doing, the Commission should be cognizant of potentially significant differences between the Commission and Minnesota.[544] For example, Minnesota may have specific statutory siting and land-use authority, whereas the Commission does not. Other differences between the Commission and Minnesota should be considered, such as staffing resources and subject-matter expertise. For example, Minnesota has an on-staff "Commission Tribal Liaison" while the Commission does not.[545] While state agencies like the Department of Regulatory Agencies have Tribal Liaisons, the Commission should consider also working with the CCIA to determine whether existing staffing is sufficient or whether the need for the Commission to interact with Tribal Governments is voluminous enough to justify additional resources.[546]

167. The Ute Mountain Ute Tribe submits that Minnesota's policy emphasizes that it "strives to ensure tribal perspectives and tribal voices are incorporated"[547] into its process, but that in Colorado, it would be better for the Commission to actively seek Tribal Government perspectives and engagement, which would give Tribal Governments the ability to raise concerns when energy projects may impact significant sites.[548] It notes that California's policy emphasizes facilitating Tribal Government participation and confidentiality considerations as to Tribal cultural resources, history, traditions, religious activities and sites. It highlights that one of the goals of California's policy is to protect Tribal cultural resources, and that the policy requires California to

[544] *See generally,* Attachment D to Decision No. R25-0159-I.
[545] *See id.* at 6.
[546] Attachment D to Decision No. R25-0159-I at 6.
[547] Ute Mountain Ute Tribe's 12/13/24 Comments at 5, quoting Minnesota's *Tribal Engagement/Consultation Policy* at 1 and citing https://mn.gov/puc/assets/Tribal%20Consultation_2024_Final%20with%20Signatures_tcm14-640720.pdf.
[548] *Id.* at 5-6.

"carefully consider all tribal government comments regarding potential impacts on tribal cultural resources and suggested mitigation measures."[549]

168. WRA makes numerous comments that are relevant to the broader context of a formal Commission policy ensuring meaningful consultation, interaction, and engagement with Tribal Governments. WRA recommends that the Commission consider the role of its government-to-government Tribal consultation, including significant sites and impacts thereupon, and to ensure that processes are clear and streamlined for Tribal Governments.[550] It notes that Rules regulate utilities, but not the Commission itself.[551] WRA identifies questions that arise from a hypothetical situation to illustrate this point.[552] Specifically, where a Tribal Government asks the Commission to designate a significant site through the government-to-government consultation process, how will the Commission respond?[553] It also asks whether Commission Staff will raise this issue in the relevant proceeding and whether the Commission will encourage the Tribal Government to intervene despite the time and resources required to do so.[554] WRA submits that the Commission should consider whether there is procedural support or informational resources that the Commission can provide to Tribal Governments that are new to Commission proceedings.[555] The ALJ recommends that the Commission consider such issues as it determines next steps, including a potential formal policy.

169. Such a policy could include a standing practice to consult with Tribal Governments at least once each year and file a report and consultation log in a public repository proceeding that

[549] *Id.* at 6, quoting *Tribal Consultation Policy of the California Public Utilities Commission*, (April 26, 2018) at 2 and 7.
[550] WRA's 8/9/24 Comments at 6-7.
[551] *Id.* at 7.
[552] *Id.*
[553] *Id.*
[554] *Id.*
[555] *Id.* at 13.

summarizes the non-confidential results of consultations, including whether Commission proceedings impacted Tribal Governments, and if so, how that was managed.[556] Reports could provide valuable information to help the Commission determine whether Rules are necessary, and if so, how those Rules could be crafted in a way that avoids the numerous issues discussed above while also achieving the Commission's goals. To recognize the Commission's unique structure as an entity with quasi-judicial and quasi-legislative functions, the policy should outline differences between consulting with Tribal Governments when there is a disputed proceeding before the Commission (*i.e.,* to avoid unlawful *ex parte* communications) and when there is not.[557] The policy could also identify the appropriate individuals within the Commission who will be involved with Tribal consultation, which may vary depending on circumstances and procedural contexts. The policy could include Commission commitments, such as committing to: provide Tribal Governments notice of proceedings that have the potential to impact them (as soon as this is known) in the manner and to the persons the Tribal Governments designate; maintain a notification list of Tribal Governments including their preferred manner of notice that could be shared with utilities as needed; and maintain documentation and information on current and historical Tribal Governments' territory in Colorado, which could include a Colorado map that provides a high-level snapshot to help determine whether a proceeding may implicate a Tribal Government's interests.[558] The contours of a potential policy could initially be explored through informal processes, such as informal stakeholder meetings, outreach to state agencies who currently engage in government-to-government Tribal consultation, and outreach to other states or the federal government about their experiences and practices. The Commission could also initiate an

[556] *See e.g.,* Attachment D to Decision No. R25-0159-I at 3.
[557] *See e.g., id.* at 4-5.
[558] *See e.g., id.* at 5.

investigatory or miscellaneous proceeding to explore a potential policy. These approaches should allow the Commission to get a better understanding of how best to consult with Tribal Governments (including how they wish to be consulted), and to ensure that such consultation appropriately considers and accounts for CCIA's role and responsibilities.

170. Finally, the ALJ recommends the Commission further engage directly with federal, state, and local governments who have background and expertise in preserving cultural and historic resources, and land use permitting. Given the significant volume of potentially duplicative, overlapping, or conflicting requirements relating to land use permitting and their overlay into preserving cultural and historic resources, this expertise may be instrumental in helping the Commission identify how it can achieve this Proceeding's goals without the many unintended consequences discussed herein. The Commission sought History Colorado's input prior to initiating this Proceeding.[559] Notwithstanding these efforts, History Colorado commented that promulgating the proposed Rules all but guarantees added confusion to an already well-established process among cultural resource professionals.[560] This comment is telling. At the very least, it suggests that the Commission would benefit from engaging further with History Colorado and its divisions or departments. What is more, History Colorado's experience with over 75 electric utility projects subject to federal, state, and local laws since January 1, 2020 may prove invaluable.[561] The Commission may be able to glean numerous benefits from History Colorado's experience, in addition to simply learning more about its well-defined process for entities involved in energy projects.[562] For the reasons discussed, the ALJ recommends that at minimum, the Commission

[559] *See* NOPR at 8.
[560] History Colorado's 8/9/24 Comments at 7.
[561] *Id.* at 8.
[562] *See id.*

consider engaging directly with the National Park Service, History Colorado, the Colorado Historical Society, the State Archaeologist, and as many local permitting authorities as possible.

171. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding and recommends that the Commission enter the following order.

VI. ORDER

A. The Commission Orders That:

1. The proposed amendments to the Commission's Rules Regulating Electric Utilities 3 *Code of Colorado Regulations* ("CCR") 723-3 in this Proceeding are not adopted.

2. This Proceeding is closed.

3. 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.

4. 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.

5. 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

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Rebecca E. White,
Director