

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0059E

IN THE MATTER OF THE VERIFIED APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. FOR A FOR APPROVAL OF THE RETIREMENT OF THE NUCLA STATION, AND REQUEST FOR WAIVER OF RULE 3103(D).

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
EXTENDING DEADLINE, ADDRESSING
INTERVENTIONS, ESTABLISHING PREHEARING
SCHEDULE, SETTING REMOTE HEARING, AND
ADDRESSING ELECTRONIC EXHIBITS**

Mailed Date: July 14, 2020

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I. **BY THE COMMISSION**

A. **Background**

1. On February 14, 2020, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a Verified Application and Request for Waiver of Rule 3103(d) in which it requests that the Commission: (a) approve the retirement of the Nucla Station and the abandonment or discontinuation of such facilities without equivalent replacement; and (b) waive the notice requirements of Commission Rule 3103(d) of the Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3 (Application). The Nucla Station ceased operations on September 9, 2019, which Tri-State officially announced on September 19, 2019. Tri-State had entered into an agreement with Colorado Department of Public Health and Environment, the U.S. Environmental Protection Agency, WildEarth Guardians, and the National Parks Conservation Association in September 2016 to retire the Nucla Station by December 31, 2022.¹ Tri-State moved up the retirement date due to the “dwindling” use of the Nucla Station caused by the inability of the Nucla Station to produce electricity at a competitive cost compared to natural gas and renewable-generated electricity.²

2. Later on February 14, 2020, the Commission issued notice of the Application.

3. On March 13, 2020, the Office of Consumer Counsel (OCC) filed a notice of intervention and entry of appearance.

¹ Application at 2.

² Direct Testimony of Barr W. Ingold at 7:8-14; Direct Testimony of Robert W. Wolaver at 3:12-23 (both filed with Application).

4. On March 16, 2020, Western Resource Advocates (WRA) filed a Motion for Leave to Participate as *Amicus Curiae* and Response to Tri-State's Request to Waive Commission Rules (WRA's *Amicus* Motion).

5. On March 17, 2020, Trial Staff of the Commission (Staff) filed a notice of intervention by right and entry of appearance.

6. On March 23, 2020, Tri-State filed an Unopposed Motion Regarding Request for Waiver, Additional Notice, and Limited Extended Intervention Period (Unopposed Motion). Tri-State states that Staff, the OCC, and WRA do not oppose the Unopposed Motion.

7. On March 24, 2020, Tri-State filed a Response to WRA's *Amicus* Motion in which it stated that it did not oppose WRA's participation as an *amicus curiae* in this proceeding.

8. On April 23, 2020, the Commission deemed the Application complete and referred this proceeding to an Administrative Law Judge (ALJ) for disposition.³ The proceeding was subsequently assigned to the undersigned ALJ. In its Decision, the Commission directed the ALJ to investigate several issues, including "how any disposition of water rights that Tri-State owns in connection with the Nucla Station's operations will be in the public interest."

9. On May 1, 2020, the ALJ issued Decision No. R20-0329-I that, among other things, granted-in-part and denied-in-part the Unopposed Motion, granted WRA's *Amicus* Motion, ordered supplemental direct testimony on questions identified in the decision, scheduled an in-person prehearing conference for June 11, 2020, and required Tri-State to confer with Staff, the OCC, and any additional towns, counties, and/or entities seeking intervention regarding a schedule for this proceeding and to file a report of the results of the conferral by June 9, 2020.

³ Decision No. R20-0282-I.

10. On May 28, 2020, the Towns of Naturita and Nucla, the County of Montrose, and the Colorado Co-Operative Company (CCC) filed a Joint Motion to Intervene (Joint Motion to Intervene), and WRA filed a Motion for Late Intervention (WRA's Late Intervention).

11. On May 29, 2020, Tri-State filed the supplemental testimony ordered in Decision No. R20-0329-I. In that supplemental direct testimony, Barry W. Ingold, Tri-State Senior Vice President, Generation, stated that Tri-State currently has "no definitive plans to transfer any public utility assets, including water rights, as a result of decommissioning [the] Nucla Station."⁴

12. On June 1, 2020, the ALJ issued Decision No. R20-0413-I that converted the in-person prehearing conference into a remote prehearing conference due to the COVID-19 pandemic and provided instructions on how to participate remotely.

13. On June 2, 2020, Tri-State filed a Response in Opposition to WRA's Motion for Late Intervention (Opposition to WRA's Late Intervention) and a Response to the Joint Motion to Intervene in which Tri-State stated that it does not oppose the interventions of Towns of Naturita and Nucla and the County of Montrose, but does oppose the interventions of CCC and WRA because Tri-State's water rights, which CCC and WRA identified as their sole interest in this proceeding, are not at issue in this proceeding.

14. On June 9, 2020, Tri-State filed its Conferral Report, as required by Decision No. R20-0329-I.

15. On June 11, 2020, the remote prehearing conference took place.

B. Extension of Statutory Deadline

16. As stated in the Notice, because Tri-State filed testimony with the Application, the Commission is required by § 40-6-109.5(1), C.R.S., to issue its decision within 120 days of the

⁴ Supplemental Direct Testimony of Barry W. Ingold at 11:4-5.

Application being deemed complete by the Commission. Thus, the Commission's decision in this proceeding must issue by August 21, 2020. However, § 40-6-109.5(1), C.R.S., also provides that the Commission may, in its discretion and by a separate decision, extend the time for a decision by an additional 130 days.

17. Here, considering the time available, the time necessary to address other pending matters, and the need for the Commission to have adequate time to deliberate the issues presented in this matter, it is not feasible for a final Commission decision to issue by August 21, 2020. Accordingly, pursuant to § 40-6-109.5(1), C.R.S., it is necessary to extend the deadline for an additional 130 days to December 29, 2020.

C. Interventions

1. Interventions by Right

18. Staff and the OCC are intervenors by right. They are parties in this proceeding.

2. Motions for Permissive Intervention

a. Law

19. Rule 1401(c), 4 CCR 723-1, states:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. If a motion to permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene.

20. Based on the foregoing, a person or entity seeking permissive intervention bears the burden of establishing, among other things: (a) the claim or defense within the scope of the Commission's jurisdiction that the requested intervention is based upon; and (b) a pecuniary or tangible interest that may be substantially affected by the outcome of the proceeding.

b. WRA's Late Intervention

(1) WRA's Argument

21. In its Late Intervention, WRA states that since it filed its *Amicus* Motion, the Commission issued two decisions that caused WRA to want to participate as a party in this proceeding. First, the Commission issued Decision No. C20-0373 on April 22, 2020, in which it denied a petition for declaratory order filed by Black Hills Colorado Electric, LLC. Specifically, the Commission found that the transfer of the water rights at issue in that proceeding was not in the normal course of business and authorization by the Commission for the transfer of those rights is required under § 40-5-105, C.R.S.⁵ Second, in this proceeding, the Commission issued Decision No. C20-0282, in it which it “directed[ed] the ALJ to investigate . . . how any disposition of water rights that Tri-State owns in connection with the Nucla Station's operations will be in the public interest.”⁶ According to WRA, “[t]hrough these two recent decisions, the Commission has . . . indicated that it would like to consider facts and evidence related to water rights as a part of the overall consideration as to whether the utility's Abandonment and Transfer plans are in the public interest.”⁷

22. The specific interest identified by WRA that justifies its intervention in this proceeding is “protecting the natural environment through advocating for protection of adequate

⁵ Decision No. C20-0373 issued in Proceeding No. 20D-0076E on April 22, 2020 at 7 (¶ 23).

⁶ Decision No. C20-0282-I at 3 (¶ 7).

⁷ WRA's Motion for Late Intervention at 4 (¶ 6).

in-stream flows.”⁸ According to WRA, “a transfer, change of use, or abandonment of the Nucla Station water rights will impact” that interest.⁹ WRA further states that

[i]t is capable of presenting discussion, testimony, and legal argument in this proceeding as to the nature of water rights and the way in which a change of use in these water rights may impact the natural environment, considerations that should be accounted for as part of the public interest.¹⁰

WRA concludes that:

[i]t is important for parties and the Commission to develop evidence on the record about the historical usage of water at Nucla Station as a part of this proceeding—reviewing this basic information about the nature of the Nucla Station water rights will help parties and the Commission understand how much “money is in the bank.” This information will aid in the Commission’s understanding about the amount of water that may be available to transfer to other uses, which will inform the Commission’s decision as to whether the disposition of those water rights is in the public interest, thereby advancing a just resolution of this proceeding.¹¹

(2) Tri-State’s Argument

23. In its Opposition to WRA’s Late Intervention, Tri-State asserts that “it has made no decision on the ‘transfer, change of use, or abandonment’ or other disposition of its water rights at Nucla Station and is not requesting that the Commission approve any such disposition at this time.”¹² As support, WRA cites the Supplemental Direct Testimony of Mr. Ingold.¹³ In addition, at the prehearing conference, Tri-State stated that: (a) it does not anticipate the status of its water rights will change during this proceeding;¹⁴ and (b) if, in the future, it seeks to transfer or otherwise dispose of the water rights associated with the Nucla Station, it will file with the Commission a separate application pursuant to § 40-5-105, C.R.S., and/or a petition for

⁸ *Id.* at 6 (¶ 12).

⁹ *Id.*

¹⁰ *Id.* at 7 (¶ 13).

¹¹ *Id.* at 8 (¶ 15).

¹² Tri-State’s Opposition to WRA’s Late Intervention at 4.

¹³ *Id.* See *supra* at 4 (quoting Supplemental Direct Testimony of Mr. Ingold).

¹⁴ Transcript of June 11, 2020 Prehearing Conference at 6.

declaratory action seeking a declaration that such an application is unnecessary.¹⁵ Tri-State concludes that the water rights associated with the Nucla Station will not be addressed in this proceeding and, therefore, WRA has not established a pecuniary or tangible interest that may be substantially affected by the outcome of this proceeding.¹⁶

24. Tri-State also argues that WRA has not established good cause for late intervention because nothing has changed since WRA filed its *Amicus* Motion. In that Motion, WRA stated that “water-related impacts resulting from the abandonment of Nucla Station are relevant to the Commission’s review of the Application or subsequent proceedings, as they relate to the public interest.”¹⁷ Tri-State asserts that “it is disingenuous for WRA to now suggest that the Commission’s decision requiring additional information related to water rights is a new development that necessitates a change in WRA’s role in this proceeding.”¹⁸ Tri-State concludes that WRA has had a “change of heart regarding its approach to this proceeding,” which does not establish good cause to grant its Motion.¹⁹

(3) Analysis

25. The ALJ shall deny WRA’s Motion for Late Intervention. The sole interest identified by WRA that it contends justifies its intervention in this proceeding is the impact of a transfer, change of use, or abandonment of the Nucla Station water rights on adequate in-stream flows and, thus, the natural environment.²⁰ WRA further states that it wants to participate in this proceeding as a party to obtain evidence concerning the value of the water rights associated with the Nucla Station. With that evidence, the Commission would have an understanding of “a

¹⁵ *Id.* at 6-7.

¹⁶ Tri-State’s Opposition to WRA’s Late Intervention at 5.

¹⁷ WRA’s *Amicus* Motion at 2-3 (¶ 3).

¹⁸ Tri-State’s Opposition to WRA’s Late Intervention at 6.

¹⁹ *Id.*

ballpark of what those water rights are worth, and the kinds of future transfers that might be possible.”²¹

26. At the prehearing conference, WRA asserted that the Commission could use the evidence from this proceeding concerning the value of the water rights in any future proceeding filed by Tri-State pursuant to § 40-5-105, C.R.S., to determine whether the sale, assignment, or lease of such rights is not contrary to the public interest.²² While it conceded that it would be inappropriate for the ALJ to make any findings of fact and conclusions of law as to the value of the water rights in this proceeding, WRA nevertheless maintained that it is important to obtain such evidence in this proceeding. WRA did not argue, however, that there is a risk of spoliation of the evidence relevant to determining the value of the water rights, and it is not self-apparent that such a risk exists.

27. In sharp contrast to WRA’s arguments justifying its intervention, the Application filed by Tri-State does not mention the water rights associated with the Nucla Station, much less seek Commission action concerning those rights. In addition, as noted above, Tri-State has submitted sworn testimony and made representations to the Commission that: (a) it has no plans to transfer, change the usage of, abandon, or otherwise impact the water rights associated with Nucla Station;²³ (b) it does not anticipate a change in the status of its water rights during the pendency of this proceeding;²⁴ and (c) it will file with the Commission a separate application pursuant to § 40-5-105, C.R.S., and/or a petition for declaratory action seeking a declaration that such an application is unnecessary if, in the future, it seeks to transfer or otherwise dispose of the

²⁰ WRA’s Motion for Late Intervention at 6 (¶ 12).

²¹ Transcript of June 11, 2020 Prehearing Conference at 12-13.

²² *Id.* at 13. See also Decision No. C20-0373 issued in proceeding No. 20D-0076E on May 15, 2020 at 7 (¶ 24).

²³ Supplemental Direct Testimony of Barry W. Ingold at 11:1-9.

²⁴ Transcript of June 11, 2020 Prehearing Conference at 6.

water rights associated with the Nucla Station.²⁵ Based on the Application, the testimony of Mr. Ingold, and the representations made by Mr. Dougherty at the prehearing conference, the water rights associated with Nucla Station are simply not at issue in this proceeding.

28. Based on the foregoing, the ALJ finds and concludes that WRA has not carried its burden of establishing that: (a) a claim or defense at issue within this proceeding justifying its intervention; or (b) it has a pecuniary or tangible interest that will be substantially affected by the outcome in this proceeding. Accordingly, WRA's Motion for Late Intervention shall be denied and WRA can continue to participate in this proceeding as an *amicus curiae*.

c. Joint Motion to Intervene

(1) CCC

29. In the Joint Motion to Intervene, CCC states that:

[it] is a water cooperative company and delivers water to its member who primarily use the water for agricultural purposes. . . . [T]he CCC shares a point of diversion from the San Miguel River with Tri-State. [The CCC's] members have a pecuniary and tangible interest in the ultimate disposition and diversion of Tri-State's decreed water and should be privy to the discussions regarding possible proposed changes of use or changes in the diversion arrangements that may directly impact its system and members.²⁶

In its response to the Joint Motion to Intervene, Tri-State opposed CCC's intervention for the same reason it opposes WRA's intervention – namely, that Tri-State's water rights associated with the Nucla Station are not at issue in this proceeding.

30. At the prehearing conference, CCC confirmed that its sole interest in this proceeding is in the water rights related to the Nucla Station that are held by Tri-State.

²⁵ *Id.* at 6-7.

²⁶ Joint Motion to Intervene at 2 (¶ 4).

Specifically, CCC stated that its concern is that the water rights are not transferred in a way that harms CCC. After hearing the representations of Tri-State and the colloquy between the ALJ and WRA's attorney at the prehearing conference, the President of CCC stated that, if the water rights associated with the Nucla Station are not "discussed or decided upon" in this proceeding, it would withdraw its intervention.

31. Based on the foregoing, CCC's intervention shall be denied for the same reasons WRA's Motion for Late Intervention has been denied. For the reasons stated above, the water rights associated with the Nucla Station will not be at issue in this proceeding. Accordingly, CCC has not carried its burden of establishing: (a) a claim or defense at issue in this proceeding justifying its intervention; or (b) it has a pecuniary or tangible interest that will be substantially affected by the outcome in this proceeding.

32. The denial of the interventions of WRA and CCC in this proceeding does not reflect a judgment that the water rights associated with the Nucla Station are unimportant. On the contrary, based on input by WRA and CCC in support of their motions, the water rights appear to be potentially of significant importance to CCC, the Towns of Nucla and Naturita, the County of Montrose, and WRA. This is the reason the ALJ urged Tri-State to involve at least CCC, the Towns of Nucla and Naturita, the County of Montrose, and WRA in the process of determining what to do, if anything, with the water rights associated with the Nucla Station. The denial of the interventions of WRA and CCC in this proceeding merely reflect the fact that, based on the sworn testimony of Tri-State and its additional representations made at the prehearing conference, the water rights associated with the Nucla Station are not at issue in this proceeding.

(2) Towns of Naturita and Nucla and County of Montrose

33. Tri-State does not oppose the interventions of the Towns of Naturita and Nucla and the County of Montrose. For that reason, and because the Towns of Naturita and Nucla and the County of Montrose have carried their burdens of establishing the requirements of Rule 1401(c), 4 CCR 723-1, the requests to intervene in this proceeding by the Towns of Naturita and Nucla and the County of Montrose shall be granted.

D. Schedule

34. R20-0329-I ordered: (a) Tri-State and all towns or counties who intervene as of right or who seek to permissively intervene to confer in advance of the prehearing conference regarding a schedule for this proceeding; and (b) Tri-State to file a report of the results of the conferral by June 9, 2020.

35. On June 9, 2020, Tri-State filed the report stating that it, Staff, the OCC, the Towns of Nucla and Naturita, the County of Montrose, CCC, and WRA had agreed to the following schedule:

<u>Event</u>	<u>Deadline</u>
Answer Testimony	July 15, 2020
Rebuttal Testimony and Cross-Answer Testimony	August 10, 2020
Settlement, Stipulations, and Prehearing Motions	August 17, 2020
Corrections to Testimony	August 21, 2020
Evidentiary Hearing	August 27-28, 2020
SOPS	September 11, 2020

36. As stated at the prehearing conference, the schedule stated above is reasonable and shall be adopted. In addition, the ALJ has made August 21, 2020, the deadline for responses to prehearing motions. As a result, the final schedule is as follows:

<u>Event</u>	<u>Deadline</u>
Answer Testimony	July 15, 2020
Rebuttal Testimony and Cross-Answer Testimony	August 10, 2020
Settlement, Stipulations, and Prehearing Motions	August 17, 2020
Corrections to Testimony	August 21, 2020
Responses to Prehearing Motions	August 21, 2020
Evidentiary Hearing	August 27-28, 2020
SOPS	September 11, 2020

37. Finally, the parties agreed that agree that Commission Rule 1405, 4 CCR 723-1, will apply to the discovery procedures in this proceeding subject to two modifications: (a) discovery served after 3:00 p.m. on a Friday will be considered as served the next business day for purposes of calculating the due date for responses; and (b) parties will also serve copies of discovery requests and responses to all other parties at the same time requests or responses are provided to the party responding to the discovery requests or who issued the discovery requests. The agreement and modifications to Rule 1405, 4 CCR 723-1, for purposes of this proceeding are adopted.

E. Remote Hearing

1. On March 10, 2020, Colorado Governor Jared Polis declared a state of emergency over the novel coronavirus pandemic (COVID-19). Since then, Colorado State government and

the Commission have been working diligently to address how to safely and effectively manage the challenges presented by COVID-19. These efforts have focused on limiting the disruption to the services delivered by the Commission (and other State agencies), while attempting to mitigate the risks to State employees and the public. For example, the Commission has been conducting its Weekly Meetings remotely, and the Commission has asked members of the public not to attend meetings in person, but to view them by webcast. Finally, public access to the building containing the Commission's offices and hearing rooms has been restricted and it is unclear when the restriction will be lifted.

2. Under these circumstances, the hearing in this proceeding shall be conducted as a remote hearing at which the participants will appear from remote locations. The ALJ finds that holding a remote hearing is consistent with current public health advisories to prevent the spread of COVID-19. The ALJ concludes that it is in the public interest to hold the hearing in this proceeding as a remote hearing.

3. Attachment A to this Decision provides the requirements and information addressing how to use the GoToMeeting platform for participating in the remote hearing.

F. Electronic Exhibits

4. The presentation of evidence at the hearing shall be done through electronic exhibits to the fullest extent possible. Instructions for the electronic presentation of exhibits at the hearing (and for preparing prefiled testimony) are included in Attachment B.

II. ORDER

A. It Is Ordered That:

1. The Motion for Late Intervention filed by Western Resource Advocates is denied for the reasons stated above.

2. The Joint Motion to Intervene filed by the Towns of Naturita and Nucla, the County of Montrose, and the Colorado Co-Operative Company (Joint Motion to Intervene) is granted-in-part and denied-in-part consistent with the discussion above.

3. Tri-State Generation and Transmission Association, Inc. (Tri-State), Trial Staff of the Commission, the Office of Consumer Counsel, the Towns of Naturita and Nucla, and the County of Montrose are parties to this proceeding.

4. A remote evidentiary hearing in this proceeding is scheduled as follows:

DATE: August 27-28, 2020

TIME: 9:00 a.m.

FOR WEBCASTS: Hearing Room A

METHOD: Join by video conference at the link to be provided by the email from the Administrative Law Judge, **OR**

Join by telephone: Dial the telephone number provided in the email, and when prompted, enter the PIN (or Meeting ID) in the email.

5. The parties, witnesses, and members of the public should not attend the remote hearing in-person.

6. The procedural schedule stated in paragraph 36 above is adopted.

7. For the reasons stated above, the deadline for a Commission decision on the Application filed in this proceeding is extended to December 29, 2020.

8. In addition to other requirements of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1 (e.g., Rule 1202 regarding pre-filed

testimony), all pre-filed hearing exhibits shall be marked for identification and filed in accordance with this Decision, including Attachment B hereto.

9. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director