

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 APPROVAL OF THE RETIREMENT OF THE NUCLA STATION, AND REQUEST FOR WAIVER OF RULE 3103(D).

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
APPROVING SETTLEMENT
AGREEMENT AND GRANTING VARIANCE**

Mailed Date: October 2, 2020

TABLE OF CONTENTS

I.	STATEMENT.....	2
A.	Background.....	2
B.	Application and Tri-State’s Testimony	6
C.	Intervenors’ Pre-Settlement Positions	7
1.	Staff.....	7
2.	OCC.....	8
3.	Local Governments	9
D.	Tri-State’s Rebuttal Testimony	9
E.	Settlement Agreement	10
F.	WRA’s Comments.....	14
1.	WRA.....	14
2.	Tri-State’s Response to WRA’s Comments.....	15
II.	ANALYSIS.....	16
A.	Burden of Proof.....	16
B.	Modified Procedure	16
C.	Settlement Agreement	17
D.	WRA’s Requests	18

III. ORDER.....	19
A. The Commission Orders That:	19

I. STATEMENT

A. Background

1. On February 14, 2020, Tri-State Generation and Transmission Association, Inc. (Tri-State or Company) filed a Verified Application and Request for Waiver of Rule 3103(d) (Application) 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.¹ 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 the 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, 2022.² 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.³ With the Application, Tri-State filed the direct testimony of Barry W. Ingold, Terry L. Nelson, and Robert W. Wolaver.

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

¹ 4 *Code of Colorado Regulations* (CCR) 723-3.

² Application at 2.

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

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

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 *amicus curiae* in this proceeding.

8. On March 30, 2020, the Application was automatically deemed complete pursuant to Rule 1303(c)(III) of the Commission's Rules of Practice and Procedure.⁴

9. On April 23, 2020, the Commission referred this proceeding to an Administrative Law Judge (ALJ) for disposition.⁵ The proceeding was subsequently assigned to the undersigned ALJ. In its Decision, the Commission directed the ALJ to investigate the following issues:

(1) the reclamation of the coal mine associated with Nucla Station, to the extent that the cost of such mine reclamation is a relevant expense that should be included in the scope of the total financial impact of the Nucla Station's retirement; (2) how any disposition of water rights that Tri-State owns in connection with the Nucla Station's operations will be in the public interest; (3) a detailed cost estimate and timeframe for the Nucla Station's decommissioning; (4) a precise description of all facilities that are included in the Nucla Station's

⁴ 4 CCR 723-1.

⁵ Decision No. C20-0282-I.

decommissioning; and (5) the ongoing monitoring and environmental compliance that will be necessary at the site.⁶

10. 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 Commission's Decision No. C20-0282-I; 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.

11. On May 28, 2020, the Towns of Naturita and Nucla, the County of Montrose (collectively Local Governments), and the Colorado Co-Operative Company (CCC) filed a Joint Motion to Intervene, and WRA filed a Motion for Late Intervention. The specific interests identified by both WRA and CCC as justifying their interventions were the water rights associated with the Nucla Station.

12. On May 29, 2020, Tri-State filed the supplemental testimony ordered in Decision No. R20-0329-I. In that supplemental direct testimony, Mr. Ingold, who is Tri-State's Senior Vice President for 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."⁷

13. 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.

⁶ *Id.* at 3 (¶ 7).

⁷ Supplemental Direct Testimony of Barry W. Ingold at 11:4-5.

14. On June 2, 2020, Tri-State filed a Response in Opposition to WRA's Motion for Late Intervention and a Response to the Joint Motion to Intervene in which Tri-State stated that it did not oppose the intervention of the Local Governments, but did 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.

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

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

17. On July 14, 2020, the ALJ issued Decision No. R20-0504-I that extended the statutory deadline, granted the interventions of Staff, the OCC, and the Local Governments, denied the interventions of WRA and CCC, established a prehearing schedule, scheduled the remote hearing for August 27 and 28, 2020, and addressed the filing and presentation of electronic exhibits. In denying the interventions of WRA and CCC, the ALJ stated:

[T]he 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 [from Mr. Ingold] 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; (b) it does not anticipate a change in the status of its water rights during the pendency of this proceeding; 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 water rights associated with the Nucla Station. 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.⁸

⁸ Decision No. R20-0504-I at 9-10 (¶ 27) (footnotes omitted).

18. On July 15, 2020, Adam Gribb and Joseph Pereira filed answer testimony on behalf of Staff and the OCC, respectively.

19. On August 10, 2020, Messrs. Ingold and Nelson filed rebuttal testimony on behalf of Tri-State.

20. On August 17, 2020, the parties to this proceeding filed an Unopposed Unanimous Stipulation for Settlement (Settlement Agreement) and Unopposed Motion to Vacate Procedural Schedule (Unopposed Motion to Vacate). Among other things, the parties requested that the hearing be vacated due to the parties' settlement of the proceeding.

21. On August 26, 2020, the ALJ issued Decision No. R20-0618-I that granted the Unopposed Motion to Vacate and vacated the hearing scheduled for August 27 and 28, 2020.

22. On August 27, 2020, WRA filed its Comments in Support of the Settlement in its role as *Amicus Curiae* in this proceeding (WRA's Comments). WRA also offered recommendations for requirements to be imposed on Tri-State in addition to those required by the Settlement Agreement.

23. On September 3, 2020, Tri-State filed its Response to WRA's Comments in which it opposes WRA's recommendations (Tri-State's Response).

B. Application and Tri-State's Testimony

24. As noted above, in the Application Tri-State requests: (a) approval of the retirement of the Nucla Station and the abandonment or discontinuation of such facilities without equivalent replacement; and (b) waiver of the notice requirements of Commission Rule 3103(d).⁹ Notwithstanding the lack of prior Commission approval, Tri-State ceased operation of the Nucla

⁹ 4 CCR 723-3.

Station on September 9, 2019. Tri-State did so due to the inability of the Nucla Station to produce competitively-priced electricity.¹⁰ Tri-State did not file the Application before retiring the Nucla Station because it “was focused on the closure of Nucla Station as an environmental matter, and did not recognize initially that Commission approval was also required.”¹¹

C. Intervenor’s Pre-Settlement Positions

1. Staff

25. In its Notice of Intervention, Staff identified the following specific issues it intended to investigate and address: (a) whether Tri-State has provided adequate evidence that it will have adequate generating resources to meet future needs; (b) whether Tri-State provided adequate evidence that the retirement of Nucla Station will not result in any reduction in system reliability; (c) whether Tri-State provided adequate information regarding its workforce transition plans pursuant to § 40-2-133, C.R.S.; and (d) whether Tri-State has provided adequate information regarding its decommissioning and removal plans such that the community of Nucla is not exposed to the long-term blight created by an abandoned generation facility.¹²

26. In Mr. Gribb’s Answer testimony, Staff stated that Tri-State had provided in discovery, adequate evidence establishing that it would have adequate generating resources to meet future needs and that the retirement of the Nucla Station would not materially impact system reliability. Mr. Gribb also testified that Tri-State had produced evidence in discovery that satisfies Tri-State’s obligations under § 40-2-133, C.R.S. Finally, Mr. Gribb stated that Staff would not oppose granting the Application if: (a) the Commission confirms that a transfer of

¹⁰ Direct Testimony of Mr. Ingold at 7:8-14; Direct Testimony of Mr. Wolaver at 3:12-23 (both filed with the Application).

¹¹ Supplemental Direct Testimony of Mr. Ingold at 6:22-7:7.

¹² Staff’s Notice of Intervention at 1-2 (¶ 2).

water rights is not in the normal course of business for a public utility, thus requiring Tri-State to seek prior authorization by the Commission pursuant to § 40-5-105, C.R.S., and Commission Rule 3104 for such a transfer; and (b) Tri-State provided in rebuttal testimony “a precise description of all facilities that are included in the Nucla Station’s decommissioning.”¹³

2. OCC

27. In its Notice of Intervention, the OCC identified the following issues it intended to investigate and address: (a) whether Tri-State’s proposed \$17 million estimated cost of decommissioning the Nucla Station is reasonable; (b) the basis for and the activity included in the proposed \$17 million cost estimate; (c) whether Tri-State should file periodic reports with the Commission showing the Company’s decommissioning project; (d) whether the decommissioning costs will be allocated to all members identified in Attachment E to the Application; (e) how the decommissioning costs will be allocated among all members identified in Attachment E to the Application; (f) whether the proposed dismantling and remediation of the Nucla Station is adequate and sufficient from an environmental perspective; (g) whether Tri-State adequately evaluated the impact of the retirement on system capacity and reliability; (h) whether Tri-State adequately evaluated the impact of the retirement on system costs, including replacement power and changes in transmission infrastructure; (i) whether Tri-State acted in the public interest by financially delaying retirement until the fuel source was exhausted; (j) whether Tri-State’s proposed treatment of the impacted workers and communities is a just and reasonable workforce transition plan; (k) whether Tri-State is seeking a ruling on its proposed

¹³ Answer Testimony of Mr. Gribb 14:8-15:2.

decommissioning costs; and (l) whether any assets associated with the Nucla Station will be transferred and subject to § 40-5-105, C.R.S.¹⁴

28. Based on the information provided in discovery, the OCC stated in its Answer testimony that it “does not oppose the retirement of the Nucla Station and does not take a position on the Commission’s final decision.”¹⁵

3. Local Governments

29. In their Joint Motion to Intervene, the Local Governments explained that they are “directly impacted by the retirement of the Nucla Station in the form of sales and property tax revenues as well as the displacement and relocation of their citizens who were and are employed by Tri-State.”¹⁶ The Local Governments also identified their interest in the diversion of water from the San Miguel River.¹⁷ The Local Governments did not file Answer Testimony and have not raised any other issues in this proceeding.

D. Tri-State’s Rebuttal Testimony

30. In its rebuttal testimony, Tri-State stated that if it seeks to transfer, sell, abandon, or dispose of its water rights associated with the Nucla Station, it will first file either an application with the Commission for approval thereof pursuant to § 40-5-105, C.R.S., or a petition for declaratory judgment that no such approval is required given the specific circumstances of the proposed transaction.¹⁸ Tri-State also testified that it has donated \$500,000

¹⁴ OCC’s Notice of Intervention at 2-3 (¶ 5).

¹⁵ Answer Testimony of Mr. Pereira at 5:13-15.

¹⁶ Joint Motion to Intervene at 2 (¶ 3).

¹⁷ *Id.*

¹⁸ Supplemental Direct Testimony of Mr. Ingold at 11:15-16; Rebuttal Testimony of Mr. Ingold at 6:8-13.

to the West End Pay It Forward Trust, and continues to coordinate with the Local Governments to assist them in applying for those funds. Additionally, Tri-State has communicated to the Local Governments its willingness to continue outside of this proceeding, discussions related to a just transition for the Nucla Station employees and the communities represented by the Local Governments. Tri-State is also willing to include CCC in those discussions.¹⁹

E. Settlement Agreement

31. In the Settlement Agreement, Staff states:

On the basis of Tri-State's evidence and representations in Rebuttal Testimony, Staff agrees that the Application should be granted. Staff finds that the description of facilities to be included in Nucla Station's decommissioning are sufficiently detailed. And Tri-State has committed itself to seek prior Commission review before any loss of its existing water rights, be it through a sale or some other conveyance of Tri-State's water right interests. Relying on the information and assurances in Tri-State's Rebuttal Testimony, as well as all other prefiled written testimony and attachments submitted by the parties to this proceeding, Staff concludes that the Commission should grant Tri-State's application to amend its CPCN for Nucla Station to discontinue and dismantle its Nucla Station facility without replacement.²⁰

32. Similarly, the OCC states:

The OCC agrees that the Application should be granted because the only substantive request is that "the Commission approve the retirement of the Nucla Station and the abandonment or discontinuation of such facilities without equivalent replacement," and there is no approval of the issues OCC or the Commission raised on the decommissioning process, costs, water or any other utility asset transfers or rights, etc. The OCC also withdraws the request for hearing included in its Notice of Intervention.²¹

33. Finally, the Local Governments state:

On the basis of Tri-State's commitment to seek prior Commission review before any transfer of its existing water rights and the assurances of Tri-State to Montrose County, the Town of Nucla, and the Town of Naturita that Tri-State will continue discussions outside of this proceeding related to a just transition for

¹⁹ See Rebuttal Testimony of Mr. Ingold at 7:17-20; Unopposed Stipulation and Motion at 8 (¶ 18).

²⁰ Settlement Agreement at 10 (¶ 24(a)) (Footnotes 2 and 3 omitted).

²¹ *Id.* at 10 (¶ 24(b)).

the Nucla Station employees and the impacted communities, the Local Governments agree the Application should be granted.²²

34. The parties state in the Settlement Agreement that Tri-State has provided sufficient information concerning the issues raised by the Commission in Decision No. C20-0282-I.²³ As noted above, those issues are:

(1) the reclamation of the coal mine associated with Nucla Station, to the extent that the cost of such mine reclamation is a relevant expense that should be included in the scope of the total financial impact of the Nucla Station's retirement; (2) how any disposition of water rights that Tri-State owns in connection with the Nucla Station's operations will be in the public interest; (3) a detailed cost estimate and timeframe for the Nucla Station's decommissioning; (4) a precise description of all facilities that are included in the Nucla Station's decommissioning; and (5) the ongoing monitoring and environmental compliance that will be necessary at the site.²⁴

35. As to the coal mine reclamation costs, Mr. Ingold testified that the mine is the New Horizon Mine, which is owned, managed, and operated by Elk Ridge Mining and Reclamation LLC (Elk Ridge). Tri-State is the sole member of Elk Ridge, which is not regulated by the Commission.²⁵ According to Mr. Ingold,

[t]he cost to reclaim the New Horizon Mine has already been accrued on Elk Ridge's books as an Asset Retirement Obligation, as required by general accounting practices. The associated asset to cover that liability has already been collected via the fuel cost for the Nucla Station when it was operating. . . . [For this reason,] [t]hose costs are not included in Tri-State's costs associated with retiring and decommissioning Nucla Station. Therefore, from Tri-State's perspective and for purposes of the present Application, those costs are not relevant to the total financial impact of the plant's retirement.²⁶

²² *Id.* at 11 (¶ 24(c)).

²³ *See* Decision No. C20-0282-I at 3 (¶ 7).

²⁴ *Id.* at 2-3 (¶ 7).

²⁵ Rebuttal Testimony of Mr. Ingold at 2:20-3:17.

²⁶ *Id.* at 3:21-4:13.

Mr. Ingold noted that the OCC agreed with this conclusion, as stated in Mr. Pereira's Answer Testimony.²⁷

36. As to the water rights, the ALJ previously ruled that they are not at issue in this proceeding because Tri-State 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 the Nucla Station; (b) it does not anticipate a change in the status of its water rights during the pendency of this proceeding; 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 water rights associated with the Nucla Station.²⁸ As a result, it is too early to determine how any disposition of water rights that Tri-State owns in connection with the Nucla Station's operations will be in the public interest because Tri-State has no current plans to dispose of the water rights.

37. As to the decommissioning cost estimate and timeframe, a description of the facilities to be decommissioned, and the ongoing monitoring and environmental compliance, Tri-State provided detailed information. Specifically, Tri-State testified that the initial budget for the demolition and restoration costs is \$17,107,712. Tri-State also stated that the asbestos remediation and demolition of the Nucla Station structures would be completed by the end of 2021, and that the site remediation and closure of the process ponds at the site would take an additional two years to be completed.²⁹ And, Tri-State also provided a description of the facilities

²⁷ *Id.* at 4:13-15.

²⁸ Decision No. R20-0504-I at 9-10 (¶ 27).

²⁹ Direct Testimony of Mr. Nelson at 4:21-5:6; Supplemental Direct Testimony of Mr. Nelson at 14:15-17:2.

to be decommissioned³⁰ and the steps it will take to monitor the site on an ongoing basis and to comply with environmental laws.³¹

38. Finally, as noted above, “Tri-State has donated \$500,000 to the West End Pay It Forward Trust, and continues to coordinate with Montrose County, the Town of Nucla, and the Town of Naturita to assist them in applying for those funds.”³² According to its website, the West End Pay It Forward Trust serves “Nucla, Naturita, Paradox, and Bedrock areas” through “grants for community and economic development.”³³ As to the water rights,

Tri-State acknowledges the ALJ’s encouragement to involve the Local Governments and non-parties [WRA] and [CCC] in the process of determining what to do, if anything, with the water rights associated with the Nucla Station. [] Tri-State has communicated to the Local Governments and WRA its willingness to engage in such discussions and is similarly willing to discuss this issue with CCC.³⁴

39. Based on the foregoing, Tri-State, Staff, and the OCC agree that: (a) “Tri-State has demonstrated that it is in the public interest to retire and decommission the Nucla Station as set forth in the Application and Tri-State’s supporting testimony;”³⁵ and (b) “under the limited circumstances presented here good cause exists to grant, for this Application only, Tri-State’s request for a waiver from the notice provisions Commission Rule 3103(c) & (d), or, in the alternative, a variance from that rule.”³⁶

³⁰ Direct Testimony of Mr. Nelson at 3:21-4:3; Supplemental Direct Testimony of Mr. Nelson at 7:8-10:6; Rebuttal Testimony of Mr. Ingold at 6:5-7; Rebuttal Testimony of Mr. Nelson at 3:9-4:3.

³¹ Direct Testimony of Mr. Nelson at 5:7-11; Supplemental Direct Testimony of Mr. Nelson at 10:7-14:14.

³² Settlement and Unopposed Motion to Vacate at 7-8 (¶ 18).

³³ <https://www.westendpayitforward.org/about>.

³⁴ Settlement and Unopposed Motion to Vacate at 8 (¶ 19).

³⁵ *Id.* at 10 (¶ 24).

³⁶ *Id.* at 11 (¶ 25).

F. WRA's Comments**1. WRA**

40. In its Comments, WRA states that it supports the Settlement Agreement and it believes the Settlement Agreement is in the public interest. However, WRA is concerned about a single sentence in the Settlement Agreement suggesting that Tri-State may not do anything with the water rights associated with the Nucla Station. WRA states that doing nothing would lead to a “spoliation or devaluation” of the water rights, which would be contrary to WRA’s obligation as a public utility to maintain the value of its assets.³⁷ To minimize the risk of such an outcome, WRA makes three recommendations.

41. First, WRA requests that the Commission require Tri-State to file within three years either: (a) an application for transfer of the Nucla Station water rights; or (b) a status report explaining why a transfer of the water rights could not be completed by that date, and identifying an expected date upon which a transfer application will be filed.³⁸

42. Second, WRA requests that the Commission require Tri-State to submit a water rights portfolio valuation prepared by a “water rights professional” as part of its future transfer application. The valuation report would identify “the location of the Nucla Station water rights, the decreed amount of water rights, the historic use of water rights, and [] the estimated market value of the water rights.”³⁹

43. Third, WRA requests that the Commission require the transfer application to identify whether Tri-State considered and evaluated alternative uses of the Nucla Station water

³⁷ WRA’s Comments at 5.

³⁸ *Id.*

³⁹ *Id.* at 5-6.

rights that would support the public interest, such as environmental uses or uses that would assist communities impacted by the Nucla Station closure.⁴⁰

44. WRA believes that adopting these requirements “will ensure that the Commission has the evidence necessary to decide . . . whether any proposed [future] transfer of the Nucla Station water rights is in the public interest.”⁴¹

2. Tri-State’s Response to WRA’s Comments

45. Tri-State makes four primary arguments against WRA’s recommendations. First, Tri-State asserts that WRA is once again attempting to enlarge the issues in this proceeding to include Tri-State’s water rights, which the ALJ has already ruled are outside of the scope of this proceeding in Decision No. R20-0504-I.⁴² Second, even if such water rights were within the scope of this proceeding, Tri-State contends that WRA’s recommendations are policy prescriptions and not “legal argument” that may “assist the Commission in arriving at a just and reasonable determination of a proceeding,”⁴³ as required by Commission Rule 1200⁴⁴ that governs *amicus curiae*.⁴⁵ Third, Tri-State argues that there is no legal basis to impose the requirements on Tri-State requested by WRA.⁴⁶ Finally, Tri-State states that WRA misrepresents the risk of the devaluation or abandonment of Tri-State’s water rights as justification for its recommendations.⁴⁷

⁴⁰ *Id.* at 6.

⁴¹ *Id.* at 5.

⁴² Tri-State’s Response at 6-8, 12-13.

⁴³ *Id.* at 5.

⁴⁴ 4 CCR 723-1.

⁴⁵ Tri-State’s Response at 8 n.5.

⁴⁶ *Id.* at 8-10.

⁴⁷ *Id.* at 10-11.

II. ANALYSIS

A. Burden of Proof

46. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon “the proponent of an order.”⁴⁸ Tri-State, as the party seeking an order by the Commission, bears the burden of proof by a preponderance of the evidence.⁴⁹ The evidence must be “substantial evidence,” which is defined as “such relevant evidence as a reasonable [person’s] mind might accept as adequate to support a conclusion . . . it must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.”⁵⁰ This standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence.⁵¹

B. Modified Procedure

47. The Application, as modified by the Settlement Agreement executed by all of the parties in this proceeding, is uncontested. Moreover, the parties agree that a hearing is unnecessary. Finally, the Application and Settlement Agreement are supported by sworn testimony and attachments that verify sufficient facts to support the Application and Settlement Agreement. Accordingly, pursuant to § 40-6-109(5), C.R.S., and Commission Rule 1403,⁵² the Application, as modified by the Settlement Agreement, will be considered under the modified procedure, without a formal hearing.

⁴⁸ § 24-4-105(7), C.R.S.

⁴⁹ Section 24-4-105(7), C.R.S.; § 13-25-127(1), C.R.S.; Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1.

⁵⁰ See, e.g., *City of Boulder v. Pub. Utils. Comm’n*, 996 P.2d 1270, 1278 (Colo. 2000) (quoting *CF&I Steel, L.P. v. Pub. Utils. Comm’n*, 949 P.2d 577, 585 (Colo. 1997)).

⁵¹ *Swain v. Colorado Department of Revenue*, 717 P.2d 507 (Colo. App. 1985).

⁵² 4 CCR 723-1.

C. Settlement Agreement

48. Based upon substantial evidence in the record as a whole, the ALJ finds and concludes that the Settlement Agreement is just and reasonable and not contrary to the public interest. The ALJ shall approve the Settlement Agreement without material modification and shall grant the Application, as modified and clarified by the Settlement Agreement and the testimony referenced therein.

49. As to the waiver request, Rule 3103 states in relevant part:

- (c) Customer notice of application. In addition to complying with the notice requirements of the Commission's Rules Regulating Practice and Procedure, a utility applying to curtail, restrict, abandon or discontinue service without equivalent replacement shall prepare a written notice as provided in subparagraphs 3002(d)(I) - (XII) and shall mail or deliver the notice at least 30 days before the application's requested effective date to each of the applying utility's affected customers. The customer notice shall include a statement detailing the requested restriction, curtailment, or abandonment or discontinuance without equivalent replacement.
- (d) If no customers will be affected by the grant of the application, the notice must meet the requirements of subparagraphs 3002(d)(I) – (XII) and shall be mailed to the Board of County Commissioners of each affected county, and to the mayor of each affected city, town, or municipality.⁵³

50. As noted above, Mr. Ingold testified frankly that Tri-State did not file the Application before retiring the Nucla Station, and thus did not provide any notice pursuant to Commission Rule 3102(d), because it “was focused on the closure of Nucla Station as an environmental matter, and did not recognize initially that Commission approval was also required.”⁵⁴ In other words, Tri-State overlooked the legal requirement to obtain the Commission's approval before decommissioning the Nucla Station. Tri-State provided notice

⁵³ 4 CCR 723-3.

⁵⁴ Supplemental Direct Testimony of Mr. Ingold at 6:22-7:7.

pursuant to Commission Rule 3103(d) after filing the Application, and thus after decommissioning the Nucla Station, pursuant to leave granted by the ALJ.⁵⁵

51. Tri-State's failure to recognize an important legal duty imposed on all regulated electric utilities is problematic and must not be repeated. However, the ALJ agrees with Staff and the OCC that, under the particular circumstances presented in this proceeding, good cause exists to grant Tri-State's request for a variance from the notice provisions of Commission Rule 3103(c) and (d).⁵⁶

D. WRA's Requests

52. WRA's requests in its Comments are denied because they exceed the scope of the issues that WRA was given permission to address as an *amicus curiae* in this proceeding in Decision No. R20-0329-I. In that decision, the ALJ granted WRA's request to provide legal argument on: (a) legal precedent regarding the type of information a utility must provide in a Certificate of Public Convenience and Necessity for abandonment under Rule 3103; and (b) a utility's obligation to seek Commission approval prior to a transfer of water rights under § 40-5-105, C.R.S. WRA's recommendations do not address the first issue. And, Tri-State's commitment to file with the Commission an 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 water rights associated with the Nucla Station, renders moot the second issue.⁵⁷ While WRA's recommendation to require Tri-State to

⁵⁵ Decision No. R20-0329-I issued on May 1, 2020 at 5-7 (¶¶ 14-16).

⁵⁶ The Settlement Agreement states that "[n]ot all parties agree" that Commission Rule 3103(c) and (d), 4 CCR 723-3, required notice to be provided before the decommissioning of the Nucla Station. Unopposed Settlement Agreement and Motion at 9 n.1. The ALJ does not decide this question because it is unnecessary under the circumstances of this proceeding.

⁵⁷ Decision No. R20-0504-I at 9-10 (¶ 27); Settlement Agreement at 5 (¶ 14); Supplemental Direct Testimony of Mr. Ingold at 11:15-16; Rebuttal Testimony of Mr. Ingold at 6:8-13.

file within three years such an application or a status report explaining why a transfer of the water rights could not be completed by that date, and identifying an expected date upon which a transfer application will be filed, is related to the second issue, it nevertheless exceeds the scope of that issue identified in Decision No. R20-0329-I. Accordingly, WRA's recommendations shall not be adopted.

53. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following Order.

III. ORDER

A. The Commission Orders That:

1. For the reasons stated above, the Unopposed Unanimous Stipulation for Settlement filed on August 17, 2020 by Tri-State Generation and Transmission Association, Inc. (Tri-State), Trial Staff of the Commission, the Office of Consumer Counsel, the Town of Naturita, Colorado, the Town of Nucla, Colorado, and the County of Montrose (collectively, Local Governments) (Settlement Agreement), is approved, consistent with the discussion above. The Settlement Agreement is attached to this Decision as Appendix A.

2. A variance from the notice requirements of Commission Rule 3103(c) and (d) of the Rules Regulating Electric Utilities, 4 *Colorado Code Regulations* 723-3, is granted.

3. The Application for Approval of the Retirement of the Nucla Station filed on February 14, 2020 by Tri-State, as modified by the Settlement Agreement and testimony referenced therein, is granted consistent with the discussion above.

4. Proceeding No. 20A-0059E is closed.

5. 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.

6. 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 within 20 days after service, 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.

7. 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

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director