(Decision No. 86499)

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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IN THE MATTER OF THE APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., FOR AN ORDER AUTHORIZING IT TO ISSUE CERTAIN SECURITIES, TO WIT, A NOTE TO THE UNITED STATES OF AMERICA IN AN AMOUNT NOT TO EXCEED $33,505,000, AND A SUPPLEMENTAL MORTGAGE AND FINANCING STATEMENT TO THE UNITED STATES OF AMERICA.	APPLICATION NO. 28091-Securities ORDER OF THE COMMISSION DISMISSING APPLICATION

March 18, 1975

Appearances: John J. Conway, Esq., Denver, Colorado, and Raphael J. Moses, Esq., Boulder, Colorado, for Applicant, Tri-State Generation and Transmission Association, Inc.;
James D. Grundy, Denver, Colorado, of the Staff of the Commission.

PROCEDURE AND RECORD

On January 20, 1975, Tri-State Generation and Transmission Association, Inc. (hereinafter referred to as Tri-State or Applicant), filed with this Commission the above-titled application for authority (1) to execute an Amendment dated as of March 29, 1975, to the Amending Loan Contract between Applicant and the United States of America dated as of May 8, 1956, and (2) to execute a Mortgage Note to the United States of America in an amount not to exceed $33,505,000,and (3) to execute a Supplemental Mortgage and Financing Statement to the United States of America. The said Note is to bear interest at the rate of 5.0% per annum, and it is payable within thirty-five (35) years thereafter.

The matter was set for hearing after due and proper notice to all interested parties on February 10, 1975, at 9 a.m. in the Hearing Room of the Commission, 507 Columbine Building,1845 Sherman Street, Denver, Colorado, at which time and place the application was heard by Hearing Examiner Thomas M. McCaffrey, to whom the matter was assigned pursuant to law.

No protests were filed with regard to the application, and no one appeared at the hearing in opposition to the granting of the authority sought therein.

Applicant's Finance Manager testified in support of the application.

Exhibits 1 through 11, inclusive, were offered and admitted into evidence. Exhibit 1 consisted of proofs of publication received from 13 newspapers in which a Notice of the Filing of the Application was published, and Applicant requested and received permission to supplement this exhibit by the late filing of proofs from such other newspapers in which the Notice was published, once the same were received by Applicant.

At the conclusion of the hearing,the application was taken under advisement.

On February 18,1975, at the request of the Examiner, the Commission issued Decision No. 86371, wherein it is generally indicated that questions exist as to the jurisdiction of this Commission with respect to the application, and the Commission therefore ordered a continuance until March 21, 1975.

On February 21, 1975, Applicant filed an Application for Reconsideration of Decision No. 86371, alleging, inter alia, that said Decision was unlawful, unjust, and unwarranted for certain reasons set forth in said Application for Reconsideration.

On February 21, 1975, the Hearing Examiner issued Decision No. 86391, in which it was stated, inter alia, that since clear and convincing evidence of record shows that Applicant's only method of repaying the debt to be incurred, if this application is granted, will be by increased sales of electric power and energy and by drastically increased rates, with this Commission allegedly having no jurisdiction over the rates Applicant may charge its members, a serious question of this Commission's jurisdiction over Applicant's operations does exist. So that the Commission's jurisdiction over the Applicant could be determined, the Examiner in the aforesaid Decision No. 86391 reopened the record and set the matter for additional hearing on the question of jurisdiction, said hearing being set for Thursday, March 6,1975, at 10 a.m. in the Hearing Room of the Commission, Columbine Building, 1845 Sherman Street, Denver, Colorado. In said Decision, the Examiner also ordered that Applicant was to file a written Brief setting forth its position on this Commission's jurisdiction and argument in support thereof, said Brief to be submitted on or before Friday, February 28, 1975. By letter dated February 27, 1975, the Examiner granted Tri-State an extension of time to March 4, 1975, within which to submit its Brief, and Applicant's Brief was duly filed on March 4, 1975. The additional hearing was held as scheduled by Examiner Thomas M. McCaffrey.

At the hearing on March 6, 1975, Applicant offered into evidence an additional 16 exhibits (which, inadvertantly, were incorrectly numbered Exhibits 1 through 16). The additional 16 exhibits were admitted into evidence. At the conclusion of the additional hearing on March 6, 1975, the application was again taken under advisement.

Applicant requested and received permission from Examiner McCaffrey to file a supplemental brief on or before March 11, 1975, which brief was duly filed.

FINDINGS OF FACT

Based upon all the evidence of record in this proceeding, it is found as fact that:

1. Applicant, Tri-State Generation and Transmission Association, Inc., is an electric cooperative association and is presently engaged in the purchase and transmission of electric power and energy for sale at wholesale to its members located within and without the state of Colorado. Its transmission system is inter-connected with the systems of United States Bureau of Reclamation and Public Service Company of Colorado. Applicant at the present time neither owns nor operates any generating plant facilities.

2. Applicant is a corporation organized under the laws of the state of Colorado, and copies of its Articles of Incorporation and all amendments thereto, properly certified, are on file with this Commission.

3. By this application Tri-State seeks an order authorizing it to issue certain securities, as follows: (1) to execute an amendment dated as of March 29, 1974, to the Amending Loan Contract between Applicant and the United States of America dated May 8, 1956; (2) to execute a Mortgage Note to the United States of America in an amount not to exceed $33,505,000; and (3) to execute a Supplemental Mortgage and Financing Statement to the United States of America. Applicant proposes to use the funds to be raised by the issuance of the described securities for the acquisition and construction of facilities and other properties, to reimburse general funds for monies expended on the acquisition and construction of facilities and other properties, to repay short-term indebtedness, and for other lawful purposes, including, without limitation, the financing of the following properties and facilities:

(a) 230kV transmission line from Gore Pass to Windy Gap, and 20/26.6/35 MVA 138-69kV substation at Gore Pass (Colorado); (b) 230 kV transmisstion line from Big Sandy to Burlington, and 60/80/100 MVA 230-115 kV substation at Burlington (Colorado); (c) 115 kV transmission line from Rancho (Fountain) to Falcon (Colorado); (d) 115 kV transmission line (4.5 miles) from near Lyons to near Niwot (Colorado); (e) 115 kV switching station near Medicine Bow (Wyoming); (f) 230 kV transmission line from Archer (Wyoming) to Story (Colorado), together with terminals at both points; (g) 230 kV transmission line from Archer to Laramie, together with terminal facilities at Laramie (Wyoming); (h) AC-DC-AC Conversion Station (Nebraska); and for other purposes related to the foregoing.

4. Applicant sells only at wholesale only to its members, consisting of 25 electrical cooperatives located in Colorado, Wyoming, and Nebraska, which cooperatives sell the power and energy retail directly to the public. Some of Applicant's member cooperatives serve both within Colorado and Wyoming, some within both Colorado and Nebraska, in one instance (Rural Electric Company, Inc.), within all three states. One of Applicant's members, Sheridan-Johnson Rural Electrification Association, serves within Wyoming and Montana.

5. A portion of the power and energy utilized in Colorado by Tri-State's Colorado members is generated outside of the state, and thus must, of necessity, flow across the state line, through the Bureau of Reclamation and Basin Electric Power in South Dakota.

6. At the present time Applicant's only operations in Colorado are in interstate commerce.

7. This Commission has no jurisdiction over Applicant's rates or securities.

8. Section 40-1-104 CRS 1973, requires that security applications be disposed of within thirty (30) days after petition is filed with the Commission unless it is necessary for good cause to continue the same for a longer period. Inasmuch as this application has been continued until March 21, 1975, the Commission finds that due and timely execution of its functions imperatively and unavoidably requires that the Recommended Decision of the hearing examiner be omitted.

CONCLUSIONS ON FINDINGS OF FACT

Based on the foregoing findings of fact and all the evidence of record, it is concluded that:

1. This Commission has no jurisdiction over the subject matter of this application, and the application should thus be dismissed.

2. Pursuant to 40-6-109, CRS 1973, this Decision should be the initial decision of the Commission.

DISCUSSION

Until 1961 this Commission did not have express statutory jurisdiction over rural electric cooperatives, such as Tri-State. In that year, however, the Legislature passed what is now 40-1-103(3), CRS 1973, which expressly declared that:

> "(2) Every cooperative electric association, or nonprofit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be effected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of this title."

From the above-quoted portion of 40-1-103(2), CRS 1973, it would appear that the Applicant, a cooperative electric association, is clearly a public utility subject to this Commission jurisdiction, and this Commission has so held in at least six prior decisions rendered on securities applications filed by Tri-State. That Tri-State is a public utility within the meaning of the statute would seem to be fortified by the Colorado Supreme Court's language in Western Colorado Power Company v. PUC, 159 Colo. 262, 411 P.2d 785 (1966). This case arose out of the filing of an application with this Commission by Colorado-Ute Electric Association, Inc., for a certificate of public convenience and necessity for authority to construct near Hayden, Colorado, a steam electric generating plant together with associated transmission lines and related facilities necessary to deliver power to certain new customers it sought to serve at wholesale. Colorado-Ute later filed an application for Commission authority

to issue securities to finance the Hayden project, and this application was consolidated for hearing with the securities application. At the time of filing said application with this Commission, Colorado-Ute had constructed transmission lines and a generating plant to supply the electric requirements of its then members, consisting of four electrical cooperative associations, all located and serving customers within the state of Colorado.

One of the basic issues in the Western Colorado Power case, supra, was the constitutionality of the above-cited portion of 40-1-103(2), CRS 1973. Although the question of whether Colorado-Ute is a "co-operative electric association" within the meaning of the statute was not raised directly as an issue in that case, the Court did proceed to decide this issue, and in doing so, stated:

> "No issue has been raised in this case that Colorado-Ute is not a 'co-operative electric association.' By the terms of the statute, therefore, it is subject to the 'jurisdiction, control and regulation' of the Public Utilities Commission, and we so hold."
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> "Western and Public Service admit that Colorado-Ute is a public utility. The Legislature has declared in no uncertain terms that it is a public utility. It furnishes electrical energy which is used by countless consumers in a very large segment of this state. The widespread interest of the public is clearly shown, and this Court should not declare the legislative act to be void, especially when the parties themselves admit that it is valid and enforceable.
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> "There is an abundance of authority to support the classification of a wholesaler of energy to distributors as a public utility. North Carolina Public Service Co., et al. v. Southern Power Co., 282 Federal 837; Boone County Rural Electric Membership Cooperation, et al. v. Public Service Company of Indiana, et al., 239 Ind. 525, 159 N.E.2d 121; Orndoff v. Public Utilities Commission, 135 Ohio State 438, 21 N.E.2d 334; Industrial Gas Company v. Public Utilities Commission of Ohio, 135 Ohio St. 408, 21 N.E.2d 166; Wisconsin Traction Company v. Green Bay & Miss. Canal Co., 188 Wisc. 54, 205 N.W. 551." (159 Colo. 262, 280-281)

The constitutional issue before the Court in the Western Colorado Power case was whether that portion of the statute [now 40-1-103(2), CRS 1973] conferring jurisdiction over cooperatives in this Commission violated the Constitution of Colorado or of the United States. In answering this question in the negative, the Court stated:

"The record shows that Colorado-Ute in wholesaling electric power intends to serve various classes of customers including consuming cooperatives, other wholesaling cooperative, governmental or quasi-governmental bodies (Salt River), and even an arm of the Federal Government, the Bureau of Reclamation, together with any other applicants for service if approved by the Commission. We hold that its business is affected with a public interest and is subject to regulation under the police power of the State of Colorado, and that such regulation does not violate either the Constitution of the State of Colorado or the Constitution of the United States." (159 Colo. 262, 280.)

The above pronouncements by the Colorado Court would seem to bring Tri-State clearly within this Commission's jurisdiction for all purposes within the meaning of 40-1-103(2), CRS 1973. Certain facts, however, clearly distinguish this Tri-State application from the position of Colorado-Ute in the Western Colorado Power case, in that in the Western Colorado Power case: (1) The initial issue before the Court (and this Commission) was whether the public convenience and necessity required the construction and operation of the Hayden plant in view of the acknowledged adequacy of existing service; (2) all of Colorado-Ute's sources of power were within Colorado; (3) the Court makes no mention of possible undue burden on interstate commerce; and (4) the Western Colorado Power case (1966) was decided before the U.S. Circuit Court of Appeals' decision in Tri-State Generation & Transmission Association, Inc. v. The Public Service Commission of Wyoming (1969), 412 F2d 115 (1969) wherein it was held, that Tri-State is engaged in interstate commerce.

The Tri-State case, not the Western Colorado Power case, is controlling of the jurisdictional issue in the within application.

It is the interstate characteristic of Applicant's operation together with the absence of any generating facilities within the State of Colorado, that distinguishes the operations of Tri-State, from the operations of Colorado-Ute, as set forth in the Western Colorado Power case. Although the instant application is a securities application rather than a rate application, it must be recognized that securities and rates are closely bound together. With respect to rates, the leading case involving an interstate operator was the case of Public Utilities Commission of Rhode Island v. Attleboro Steam and Electric Company, 273 U.S. 83 (1926). In that case Narragansett Electric Lighting Company, a Rhode Island company, contracted to sell at wholesale to Attleboro Company, a Massachusetts company, with the current to be delivered by Narragansett to Attleboro at Rhode Island - Massachusetts stateline for use in Massachusetts. Narragansett attempted, before the Rhode Island Public Utilities Commission, to get a rate increase over the rates specified in the contract. The Commission granted the increase, and Attleboro appealed. The Rhode Island Supreme Court held that the Commission ruling imposed a direct burden on interstate commerce and was invalid because of conflict with the commerce clause of the Federal Constitution. The United States Supreme Court affirmed the decision of the Rhode Island Supreme Court. Because of its pertinence to the issue to be decided in this proceeding, it is appropriate to quote at some length from the Attleboro case:

"It is conceded, rightly, that the sale of electric current by the Narragansett company to the Attleboro company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the Stateline. The transmission of electric current from one State to another, like that of gas, is interstate commerce, Coal & Coke Co. v. Pub. Serv. Comm., 84 W. Va. 662, 669, and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination. Peoples' Gas Co. v. Pub. Serv. Comm'n., 270 U.S. 550, 554.

* * * *

"In the Kansas Gas Co. case, the company, whose business was principally interstate, transported natural gas by continuous pipe lines from wells in Oklahoma and Kansas into Missouri, and there sold and delivered it to distributing companies, which then sold and delivered it to local customers. In holding that the rate which the Company charged for the gas sold to the distributing companies -- those at which these companies sold to the local customers not being involved -- was not subject to regulation by the Public Utilities Commission of Missouri, the Court said that, while in the absence of congressional action a State may generally enact laws of internal police, although they have an indirect effect upon interstate commerce, 'the commerce clause of the Constitution, of its own force, restrains the States from imposing direct burdens upon interstate commerce', and a State enactment imposing such a 'direct burden' must fall, being a direct restraint of that which in the absence of federal regulation should be free, Minnesota Rate Cases, 230 U.S. 352, 396; that the sale and delivery to the distributing companies was 'an inseparable part of a transaction in interstate commerce -- not local but essentially national in character -- and enforcement of a selling price in such a transaction places a direct burden upon such commerce inconsistent with that freedom of interstate trade which it was the purpose of the commerce clause to secure and preserve;' that in the Pennsylvania Gas Co. case the decision rested on the ground that the service to the customers for which the regulated charge was made, was 'essentially local', and the things done were after the business in its essentially national aspect had come to an end -- the supplying of local customers being 'a local business', even though the gas be brought from another State, in which in the local interest

is paramount and the interference with interstate commerce, if any, indirect and of minor importance, but that in the sale of gas in wholesale quantities, not to consumers, but to distributing companies for resale to consumers, where the transportation, sale and delivery constitutes an unbroken chain, fundamentally interstate from beginning to end, 'the paramount interest is not local but national, admitting of and requiring uniformity of regulation', which, 'even though it be the uniformity of governmental non-action, may be highly necessary to preserve equality of opportunity and treatment among the various communities and States concerned.'

"It is clear that the present case is controlled by the Kansas Gas Co. case. The order of the Rhode Island Commission is not, as in the Pennsylvania Gas Co. case, a regulation of the rates charged to local customers, having merely an incidental effect upon interstate commerce, but is a regulation of the rates charged by the Narragansett company for the interstate service to the Attleboro company, which places a direct burden upon interstate commerce. Being the imposition of a direct burden upon interstate commerce, from which the State is restrained by the force of the Commerce Clause, it must necessarily fall, regardless of its purpose. (citing cases) It is immaterial that the Narragansett Company is a Rhode Island corporation subject to regulation by the commission in its local business, or that Rhode Island is the State from which the electric current is transmitted in interstate commerce, and not that in which it is received, as in the Kansas Gas Co. case. The forwarding State obviously has no more authority than the receiving State to place a direct burden upon interstate commerce. Pennsylvania v. West Virginia, 262 U.S. 553, 596. Nor is it material that the general business of the Narragansett company appears to be chiefly local, while in the Kansas Gas Co. case the company was principally engaged in interstate business. The test of the validity of a state regulation is not the character of the general business of the company, but whether the particular business which is regulated is essentially local or national in character; and if the regulation places a direct burden upon its interstate business it is none the less beyond the power of the State because this may be a smaller part of its general business. Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett company because this would result in indirect benefit to the customers of the Narragansett company in Rhode Island, Massachusetts could, by parity of reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro company in that State, who would have, in the aggregate, an interest in the interstate rate

correlative to that of the customers of the Narragansett company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two states in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of power vested in Congress." (citing cases) (Emphasis added.)

The doctrine announced in the Attleboro case has been affirmed in subsequent United States Supreme Court decisions. The Court in U.S. v. PUC of California, 345 U.S. 295 (1953), in denying attempted state regulation, summarized the Attleboro holding as follows:

"Attleboro . . .established what has unquestionably become a fixed premise of our constitutional law . . ., that the Commerce Clause forbade state regulation of some utility rates. State power was held not to extend to an interstate sale 'in wholesale quantities, not to consumers, but the distributing companies for resale to consumers.'

"Attleboro declared state regulation of interstate transmission of power for resale forbidden as a direct burden on interstate commerce. The states may act as to such a subject only when Congress has specifically granted permission for the exercise of the power over articles moving interstate which would otherwise be immune.

"Attleboro . . .left no power in the states to regulate licensees' sales for resale in interstate commerce."

The Attleboro doctrine was also discussed at some length in Federal Power Commission v. Southern California Edison Co., 376 U.S. 205 (1964).

Any question that Applicant Tri-State is engaged in interstate commerce was resolved by the U.S. Court of Appeals for the Tenth Circuit in Tri-State Generation & Transmission Association, Inc. v. The Public Service Commission of Wyoming, et al., 412 F. 2d 115 (1969). There were several issues other than rate jurisdiction involved in that case, but the Court in considering the jurisdictional question said:

"Its (Tri-State's) case is based upon the proposition that the services it performs are in interstate commerce and the charges made are for transaction in commerce over which the Wyoming Commission has no jurisdiction."

* * * *

" We think it is clear that the trial court erred in determining that Tri-State was not engaged in

> interstate commerce. The electrical energy involved in these transactions undoubtedly moves across state-lines, and to that extent, interstate commerce is involved. *** And the services and functions of Tri-State, as those services and functions probe the question of interstate commerce, are indistinguishable from the factual background considered by the Supreme Court in Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Co., 273 U.S. 83, the rationale of which was restated by the high court in Federal Power Commission v. Southern California Edison Co., 376 U.S. 205. The dictates of those cases clearly require a finding that Tri-State is engaged in interstate commerce and we must pass to the question of whether the orders and directives of the Wyoming Commission interfere with that commerce, and, if so, whether the extent of such interference justifies Federal injunctive relief.
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> "The Wyoming Commission, unlike the Rhode Island Commission in Attleboro, supra, asserts no jurisdiction over Tri-State and properly recognizes that its jurisdiction begins and ends with the regulation, of consumer rates originating from wholly intrastate utilities . . . ."

The Wyoming Public Service Commission and five intervening power companies sought review of the Tenth Circuit Court holding, and certiorari was denied. Public Service Commission of Wyoming, et al., v. Tri-State Generation & Transmission Association, Inc., 397 U.S. 1043, 25 L.Ed. 2d 654, 90 S. Ct. 1348 (1970).

There is no question as shown by substantial evidence of record in this proceeding, and as determined by the U.S. Court of Appeals for the Tenth Circuit, that Tri-State is engaged in interstate commerce. No specific permission has been granted by Congress to Colorado or any other state to regulate the rates of interstate transmission of power, and this Commission has no jurisdiction to regulate the rates Tri-State charges its wholesale customers.

It is significant to note that the Federal Power Commission has also held that it does not have jurisdiction over electrical cooperatives such as Tri-State, and this determination has been upheld by the District of Columbia U.S. Circuit Court of Appeals in Salt River Project Agr. Dist. v. FPC, 391 F.2d 470 (1968); cert. den. 393 U.S. 857 (1967). In Dairyland Power Co., 37 F.P.C. 12 (1967), the Federal Power Commission stated:

> "Under the Rural Electrification Act, the Administrator has virtually absolute discretion and exercises extensive and rigid supervision and control over its cooperative borrowers. . . . all of its (the cooperative's) contracts, including those for the purchase and sale of electric energy, must be approved by REA, and by this means REA controls the rates the cooperative pays and the rates it charges . . . ."

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"The thousands of pages of directives and instructions testify to the intimate relationship between the cooperatives and REA, a Federal agency, and the extensive controls and guidance which it exercises.

* * * *

". . . The record for the Rural Electrification Act, which was enacted shortly after the Federal Power Act, demonstrates that the same Congress intended any Federal controls over entities established to implement provisions of the REA should be exercised solely by the Administrator under that Act. The REA constitutes a grant of plenary authority to the Administrator to make policy for, and to exercise regulatory authority over, the cooperatives established by the new Act.

"In addition to these indications of Congressional intent to vest plenary authority in the REA, it is apparent that Congress gave explicit consideration to the question of rate jurisdiction. It was anticipated that 'this legislation should go a long way toward providing the greater modern utility, electricity, and at a reasonable rate;' and that this is the only way the farmer would ever receive electricity at reasonable rates."

* * * *

"Even in the absence of legislation, Congress assumed that the REA, as previously established by Executive Order, had the power to control rates . . . . This certainly implies that REA did have control over the rates charged by the cooperatives."

As stated above, the U.S. Court of Appeals for the District of Columbia in the Salt River case, supra, affirmed the FPC's conclusion that an REA-financed rural electric cooperative is not a public utility within the meaning of Parts II and III of the Federal Power Act, thus leaving rate regulation solely within the jurisdiction of REA.

Although Tri-State has made application to this Commission for authority to issue the securities, as more fully described in Finding of Fact No. 3, and has also sought same authority from the Wyoming Public Service Commission which has been granted, we have concluded that this Commission has no authority to either approve or reject Applicant's securities. It is true that 40-1-104(2) CRS 1973, ostensibly gives this Commission jurisdiction to supervise and control the issuance, assumption, or guarantee of securities of every electric corporation operating as a public utility. However, for reasons hereinafter given, it is apparent that this statute does not apply to an electric cooperative which operates solely in interstate commerce within our borders.

It is appropriate to note that Applicant serves in three states, namely Colorado, wherein it derives 44.7% of its total revenues, in Wyoming, wherein it derives 33.6% of its revenues, and in Nebraska, wherein it derives 21.7% of its revenues. With respect to the sale of power, 43.9% is sold in Colorado, 35.6% in Wyoming, and 20.5% in Nebraska. Thus, while Tri-State derives more revenue from business transacted in Colorado than in the other two states, its Colorado revenues and sales of power are not significantly dominant with respect to the other two states and more particularly Wyoming.

There is a direct relationship between the methods Tri-State necessarily utilizes in financing its operations, on the one hand, and the rates it must charge its members in order to service and repay the money it has borrowed. Inasmuch as the Commission has no regulatory power over Applicant's rates, its exercise of jurisdiction over the issuance of Applicant's securities would be inconsistent and illogical and, conceivable, could result in a difficult, if not chaotic, situation for Tri-State and its members.

If, for example, this Commission were to deny this application for authority to borrow up to the requested sum, the borrowing of which the Rural Electrification Administration (REA) has already given its tacit if not formal approval, Tri-State would be in the position of having obtained one state's (Wyoming's) approval, the approval of a Federal agency (REA), and a rejection by another state (Colorado). If this Commission's denial were made on the very reasonable basis that a granting of the requested authority would result in greatly increased rates to Tri-State's members in Colorado, this Commission would actually be doing indirectly what it cannot do directly, i.e., attempting to regulate Tri-State's rates. Such Commission action would result in unnecessary and very probably seriously detrimental delay in construction of the facilities, for which the funds are needed. Such determination by this Commission would be direct interference with and disruptive of Tri-State's interstate operations.

The only way, then, that this Commission can avoid interfering with REA's regulatory powers over Applicant and/or unduly burdening interstate commerce would be to approve each and every securities application filed by Tri-State -- a meaningless act which in reality is only affirming and verifying a prior finding by the REA that the money to be borrowed and the purposes therefor are just, reasonable, and in the public interest. Additional reasons why this Commission does not have jurisdiction over Applicant's securities are given in pertinent portions of the cases cited hereinafter.

In United Air Lines, Inc. v. Illinois Commerce Commission, 207 N.E. 2d 433, the key issue was whether a part of the Illinois statute giving the Illinois Commission jurisdiction over securities issued by public utilities (referred to in the decision as Section 21) when applied to an interstate carrier results in an undue burden on interstate commerce. In speaking to this issue, the Illinois Court said:

> "Coming to the question of whether the application of §21 to an interstate carrier such as United results in an undue burden on interstate commerce, no claim is made that the federal government has preempted the narrow field involved, nor is it contended that our statute discriminates against interstate commerce.

Instead broadly speaking, it is the contention of United that the regulation of the issuance of the securities of an interstate carrier such as itself is a matter beyond state action, and that the attempt at regulation, without more, imposes an undue burden on interstate commerce. The commission, for its part, asserts that our statute is a valid exercise of the police power which is based upon and permitted by the strong local interest in the financial responsibility of United and its continued ability to provide service for the citizens of this state, and that the application of the statute to United does not result in an undue burden on interstate commerce.

"Although the commerce clause of the federal Constitution confers on the national government the power to regulate commerce, it has long been established that a state may regulate matters of local concern over which the federal authority has not been exercised, even though the regulation has some impact on interstate commerce, provided, however, that it safeguards an obvious state interest and that the local interest at stake outweighs whatever national interest there might be in the prevention of the state restrictions . . . . . As is stated in 15 Am Jur 2d, Commerce, §20, p. 653: 'In determining whether, in the absence of conflicting congressional legislation, a state regulation of interstate commerce contravenes the commerce clause, the determinative factors are the nature and extent of the burden imposed by the regulation, and the relative weights of the state and national interests involved.' A weighing and consideration of these factors in the record at hand leads us to conclude that the application of §21 to United results in an undue burden on interstate commerce."

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"If Illinois can exercise the power to approve or disapprove the issuance of United's securities because it transacts business here, then so also can each of the other sixteen states where United provides intrastate service. There would thus be a total of seventeen jurisdictions asserting the power to approve or reject any issuance of stock proposed by United. The task of seeking and gaining approval from such a number of states would be unjustifiably expensive, time consuming, and burdensome, and could create delay which would directly impair the usefulness of United's facilities for interstate traffic. Just as important, each independent regulating authority would be required to apply locally defined standards of public interest and locally defined rules in order to approve or disapprove or, as our statute suggests (§21), to conditionally approve a single issuance of securities.

> The result, we believe, would be chaotic. The issuance of securities is a single, indivisible act. It cannot be fractionalized and given portions allocated to specific states.
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> "It is suggested by the commission that it is not proper to consider the 'possibility' of multistate regulation and its effects, the implication being that the limitation on the powers of a state over interstate commerce could not come into effect until there is an actual attempt at multiple regulation or an actual obstruction of commerce. The cases, however, reject this view and demonstrate that the possibility of conflict or dual regulation, may be sufficient to curtail powers sought to be asserted by an individual state over interstate commerce where such commerce might be impeded by conflicting and varying regulations."

While United Air Lines in the above case undoubtedly could have more serious problems than Tri-State created by multistate regulation of its securities, Tri-State could find itself in the same chaotic circumstances if conflicting security decisions were rendered by this Commission and by the Wyoming Commission.

The Nebraska Commission also attempted to assert jurisdiction over the same United Air Line securities as in the above-cited Illinois case. The Nebraska Supreme Court in Application of United Air Lines, Inc., 42 PUR 3d 27, 112 N.W. 2d 414 (1961) stated, in pertinent part:

> "This (statutory) language may be rationally applied to corporations where business is exclusively or largely restricted to Nebraska; or stated otherwise, where they are in effect Nebraska operating corporations no matter where organized. To require an interstate carrier of the size and scope of operation of United to comply with it goes beyond the scope of a sound legislative requirement. If Nebraska has power to make that requirement, then every other state where United operates could have like power. The result would be unjustifiably expensive, and near chaos in the keeping of accounts of such carrier. We do not ascribe such a purpose to the legislature." (42 PUR 3d 27, 32)
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> "...But the commerce clause of the (United States) Constitution, of its own force, restrains the states from imposing direct burdens upon interstate commerce." (42 PUR 3d 27, 33)
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> "... Where uniformity is essential for the functioning of commerce, a state may not interpose its local regulation." (42 PUR 3d 27, 34)
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> * * * *

". . . Here the applications go the the very heart of United's interstate business, that of financing purchases of extensive equipment for use in interstate commerce. . . . ." (42 PUR 3d 27, 35)

In Natural Gas Pipeline Co. et al, v. Illinois Commerce Commission, 61 PUR3d 343, 210 N.E.2d 490 (1965), the issue was the jurisdiction of the Federal Power Commission over securities under the Natural Gas Act versus the jurisdiction of the Illinois Commerce Commission over such securities under state legislation. The Illinois Supreme Court stated, in pertinent part:

"The (State) Commerce Commission apparently concedes that the Federal Power Commission has this authority, but it argues, nevertheless, that state and federal regulation of financing of facilities subject to regulation by the Federal Power Commission can logically and practically coexist. It points out that the regulation by Illinois is for a different purpose and of a different scope than the regulation which can reasonably be expected on the part of the federal government; the first being interested in the local effects of a proposed extension, the second in rates and services and the financial ability of the company with respect to the maintenance of adequate and reasonable rates and service. . .

* * * *

"The Federal Power Commission has authority to regulate the issuance of securities issued to finance the acquisition and construction of facilities subject to its jurisdiction . . . Finally, we recognize that when a state regulation would directly or indirectly 'affect the ability of the Federal Power Commission to regulate comprehensively and effectively the transportation and sale of natural gas, and to achieve the uniformity of regulation which was an objective of the Natural Gas Act' or creates the 'prospect of interference with the federal regulatory power,' then the state regulation must yield 'although collision between the state and federal regulation may not be an inevitable consequence." Northern Nat. Gas Co v. Kansas State Corp. Commission (1963) 372 US 84, 91, 92, 47 PUR3d 289, 295, 9 L Ed 2d 601, 607, 608, 83 S Ct 646, 651.

"There is, of course, a close and vital connection between a company's rates, services, and facilities on the one hand and its means and method of financing on the other. (See United Air Lines v. Illinois Commerce Commission [1965] 32 Ill 2d 516, 59 PUR 3d 126, 207 NE2d 433.) . . ."

Evidence in the instant proceeding shows that the control REA exercises over Tri-State is directly analogous to that which the Federal Power Commission exercises over its licensees. It is thus clear that under the holding in the above Natural Gas Pipeline case, this Commission does not have jurisdiction over Tri-State's securities.

The Michigan Court of Appeals in Great Lakes Transmission Co. v. Michigan Public Service Commission, 87 PUR3d 209, 180 N.W.2d 59 (1970) was confronted with the question of state regulation versus federal regulation. In ruling against state regulation, the Court initially pointed out that the State Commission did not deny that there was federal jurisdiction over the company's securities, but it asserted that it also had jurisdiction. The Court then stated:

> "This contention of the commission is valid in so far as it applies to gas companies engaged in the intrastate business of retail sales but is not valid as applied to interstate transportation of gas for resale."

The Court further stated:

> "The interest of the (state) commission in the issuance of securities by a public utility is to prevent overcapitalization . . . The issuance of securities has an important bearing on the financial structure of a public utility and that, in turn, has a direct bearing on the rates set for such companies. The regulation of the rates charged by Great Lakes is not within the jurisdiction of the Michigan Public Service Commission. So, to allow Michigan Public Service Commission to regulate issuance of securities, would be to allow it to affect rates indirectly, which is forbidden to do directly. The regulation of securities issued by Great Lakes in the form of the assessment of a fee thereon is outside the jurisdiction of the Michigan Public Service Commission.
>
> "In summary, the Michigan Public Service Commission has no jurisdiction to regulate the issuance of securities by a corporation, such as Great Lakes, engaged in the transmission of natural gas in interstate commerce where no sales thereof are made directly to consumers. While this result could be compelled by the Natural Gas Act or the Commerce Clause itself, we limit our holding to the facts of this case as the field of securities regulation has been preempted by virtue of the Public Utility Holding Company Act." (Emphasis added.)

The underlined portions of the Great Lakes case are directly analogous with the facts involved in this proceeding.

Accordingly, at this time, this Commission has no jurisdiction over Applicant's rates or securities.

An appropriate order will be entered.

O R D E R

THE COMMISSION ORDERS THAT:

1. Application No. 28091-Securities, being the application of Tri-State Generation and Transmission Association, Inc., for an order authorizing it to issue certain securities be, and hereby is, dismissed.

2. This Order shall be effective forthwith.

DONE IN OPEN MEETING this 18th day of March, 1975.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Commissioners

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