Decision No. C14-0006-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

LA PLATA ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; WHITE RIVER ELECTRIC ASSOCIATION, INC.; BP AMERICA PRODUCTION COMPANY, ENCANA OIL & GAS (USA), INC., ENTERPRISE PRODUCTS OPERATING LLC, AND EXXONMOBIL POWER AND GAS SERVICES INC. ON BEHALF OF EXXONMOBIL PRODUCTION COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, AS MEMBERS OF THE RURAL ELECTRIC CONSUMER ALLIANCE; AND KINDER MORGAN CO2 COMPANY, LP,

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

INTERIM DECISION GRANTING IN PART AND DENYING IN PART RESPONDENT TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.'S MOTION CONTESTING INTERIM DECISION NO. R13-1119-I

Mailed Date: January 3, 2014
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I. BY THE COMMISSION

A. Statement

1. The Complaint

1. On March 4, 2013, La Plata Electric Association, Inc.; Empire Electric Association, Inc.; White River Electric Association, Inc.; BP America Production Company; Encana Oil & Gas (USA), Inc.; Enterprise Products Operating LLC; ExxonMobil Power and Gas Services Inc.; and Kinder Morgan CO_2 Company, LP (collectively, the Complainants), filed their Formal Complaint against Respondent Tri-State Generation and Transmission Association, Inc. (Tri-State).

2. Tri-State is a generation and transmission cooperative corporation that provides electricity on a wholesale basis to 44 member-system cooperatives located in Colorado, Wyoming, Nebraska, and New Mexico, who in turn provide electricity to their retail member-customers.[1] The Complaint asserts that Tri-State is declared to be affected with a public interest and is a "public utility" subject to the jurisdiction, control, and regulation of the

[1] Formal Complaint, at ¶¶ 1, 3.

Public Utilities Commission (Commission or PUC) under Title 40, Articles 1 through 7, of Colorado's public utilities law.[2]

3. The Complaint raises issues of the structure and components of wholesale electricity rates that account for the two major costs of producing electricity: capital investment in the facilities used to produce the electricity; and fuel. The fixed costs of the facilities necessary to produce electricity, or production capacity, are reflected in the "demand" component of the rate. The variable fuel costs necessary to produce the electricity consumed over time are contained in the "energy" component. Customers' usage patterns affect demands upon electricity production capacity: usage that coincides with peak times of the day or season places relatively higher capital needs on the system than usage spread evenly throughout the period.[3] Consumers whose usage is concentrated during peak periods are referred to as "low-load factor" customers, and those whose usage is relatively constant are "high-load factor" customers.

4. The Complainants allege that, prior to January 1, 2013, Tri-State charged a rate design upon its members known as "A-36" that properly accounted for demand and energy costs.[4] Effective January 1, 2013, Tri-State implemented a new "A-37" wholesale rate design.[5] The Complainants assert that A-37 charges only for the amount of energy consumed and does

[2] *Id.*, at ¶ 4.

[3] *See Colorado Ute Electric Association, Inc. v. Public Utilities Commission*, 760 P.2d 627, 631-32, nn. 2, 3 (Colo. 1988). For example, a customer that consumes 24 units of electricity during only a one-hour period of a day places higher demands upon production capacity than a customer that consumes 1 unit of electricity each hour of a day, even though the two customers consume the same total amount of energy during that day. The former requires capacity of at least 24 units at any one time; in contrast, the latter requires only one unit of production capacity.

[4] *See* Formal Complaint at ¶ 26.

[5] *Id.*, at ¶ 17.

not account for demand costs, which allegedly shifts demand costs upon customers whose usage does not impose the same degree of capacity burdens upon the system:

> The cumulative effect of the methodology approved by Tri-State is a dramatic increase in rates for high-load factor distribution cooperatives and high-load factor member-customers and a simultaneous lowering of rates for low-load factor distribution cooperatives and low-load factor customers without regard to the cost of providing service.[6]

5. The Complainants allege that Colorado regulatory law imposes a requirement upon utilities to charge its customers rates that accurately reflect the cost of service rendered.[7] Therefore, the Complaint says, the A-37 rate is unjust, unreasonable, discriminatory, and preferential in violation of Colorado's public utilities law.[8]

6. The Complainants object only to the rate design imposed upon its Colorado members and the absence of a demand component to its structure; they are not attempting to alter the total amount of revenue, or the "revenue requirement," that otherwise would be generated for Tri-State from its Colorado members through the A-37 rate design.[9]

7. The Complainants also allege that Tri-State violated the public utilities law by not filing the A-37 rate with the Commission and not providing notice to the Commission or Tri-State's customers of the A-37 rate change.[10]

8. The Complaint requests the following relief:

- An order finding that the A-37 rate is unjust, unreasonable, preferential, and discriminatory;

[6] *Id.*, at ¶ 18.
[7] *Id.*, at ¶ 44.
[8] *Id.*, at ¶¶ 40-52.
[9] *Id.*, at ¶¶ 26, Relief Requested (i), (ii), at page 19.
[10] *Id.*, at ¶¶ 28-39.

- An order establishing a cost allocation and rate design methodology for Tri-State that is just, reasonable, not preferential, and not discriminatory;

- An order requiring Tri-State to pay an appropriate refund to any cooperative that was billed more under the A-37 rate than it would have been billed under the A-36 rate;

- An award of such additional or other relief as the Commission deems proper.[11]

2. Tri-State's Motion to Dismiss Formal Complaint

9. On April 4, 2013, Tri-State filed its Motion to Dismiss Formal Complaint. In summary, Tri-State asserts that it operates in interstate commerce by its production, purchase, transmission, and sale of electricity in interstate commerce and to its member systems located in four states, and thus the dormant Commerce Clause prohibits the Commission from rate regulating Tri-State. The Motion argues that regulation of its wholesale rates violates the *per se* test under the Commerce Clause, because it would have the practical effect of controlling commerce occurring entirely outside the boundaries of Colorado.[12] Alternatively, Tri-State contends that Commission rate regulation is prohibited by the Commerce Clause test articulated in *Pike v. Bruce Church*, which, in short, weighs the state interest in the subject regulation against the burdens imposed on interstate commerce.[13] Tri-State argues that Commission rate design regulation would alter member rates in its other states and thus the effects of state

[11] *Id.*, Relief Requested (iii) through (vi), at page 20.

[12] Tri-State Motion to Dismiss, filed April 4, 2013, at 17, citing *KT&G Corp. v. Att'y Gen.,* 535 F.3d 1114, 1143 (10th Cir. 2008), *ACLU v. Johnson,* 194 F.3d 1149, 1161 (10th Cir. 1999), and *Healy v. Beer Institute,* 491 U.S. 324, 335-40 (1989).

[13] *Pike v. Bruce Church,* 397 U.S. 137, 142 (1970).

regulation on interstate commerce are significant and substantial, outweighing any state interest in wholesale rate regulation.[14]

10. Tri-State's Motion to Dismiss cites Commission decisions and comments dating back to 1975, in which the Commission made statements that it does not engage in rate regulation of Tri-State. Tri-State argues that the Commission premised these statements in recognition of the burdens such regulation would impose on interstate commerce, as held in *Tri-State Generation & Transmission Ass 'n, Inc. v. Pub. Serv. Comm 'n of Wyoming,* 412 F.2d 115 (10th Cir. 1969).[15]

11. Tri-State also moves to dismiss BP America Production Company; Encana Oil & Gas (USA), Inc.; Enterprise Products Operating LLC; ExxonMobil Power and Gas Services Inc.; and Kinder Morgan CO_2 Company, LP (the Industrial Complainants), for lack of standing. Tri-State contends that these are retail consumers and not members of Tri-State, and challenges to retail rates should be asserted against their retail cooperatives under the procedures provided in § 40-9.5-101, *et seq*., C.R.S.[16]

3. The Administrative Law Judge's Interim Decision

12. Before taking evidence on the merits of the Complaint, the Administrative Law Judge (ALJ) ordered the filing of written testimony and an evidentiary hearing on only the issues raised in Tri-State's Motion to Dismiss.[17] After the parties filed written testimony, participated

[14] Tri-State Motion to Dismiss at 22.

[15] *Id.*, at 24-29.

[16] *Id.*, at 32-36.

[17] Interim Order of Administrative Law Judge Paul C. Gomez Granting in Part Unopposed Motion to Vacate Procedural Schedule and Establish New Procedural Schedule; Decision No. R13-0648-I, issued May 31, 2013.

in the evidentiary hearing, conducted cross examination, and submitted statements of position, the ALJ issued his Interim Decision denying Tri-State's Motion to Dismiss.[18]

13. The Interim Decision first examines whether Colorado law authorizes the Commission to hear rate claims against Tri-State. The Interim Decision cites Article XXV of the Colorado constitution, the public utilities statutes, and Colorado Supreme Court precedent to find that the Commission has the authority to protect the interests of the public from excessive, unjustly discriminatory, and burdensome rates charged by utilities.[19] The Interim Decision notes Tri-State's concession that it is a "public utility" under Colorado law and then cites § 40-6-111(4)(a), C.R.S., which says:

> Notwithstanding any other provision of law, no cooperative electric association shall establish, charge, or collect a discriminatory or preferential rate, charge, rule, or regulation which would be violative of section 40-3-106 (1) or section 40-3-111.[20]

Based upon its analysis of this and other statutory provisions, the Interim Decision concludes that Colorado law provides the Commission with jurisdiction over Tri-State's rates.[21]

14. The Interim Decision rules that the previous Commission decisions and comments addressing Commission jurisdiction over Tri-State's rates were not made in any proceeding in which a complaint had been filed against Tri-State's rates, and that those statements mostly were incidental to the Commission's ultimate findings on other issues.[22]

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[18] Interim Decision of Administrative Law Judge Paul C. Gomez Denying Motion to Dismiss and Certifying Interim Decision as Immediately Appealable; Decision No. R13-1119-I, issued September 11, 2013 (Interim Decision).

[19] *Id.*, at ¶¶ 47-49.

[20] *Id.*, at ¶¶ 50-51.

[21] *Id.*, at ¶ 56.

[22] *Id.*, at ¶ 64.

15. The Interim Decision often references rules issued by the federal Rural Utilities Service (RUS), which has authority over cooperatives like Tri-State that receive financing under the Rural Electric Act. RUS exercises its rate authority only if the cooperative's ability to repay federal loans has been compromised, and its rules acknowledge state rate regulation authority over cooperatives. The Interim Decision notes that "[g]iven the lack of federal oversight over the wholesale rates of Tri-State, it is incumbent upon the Commission to utilize its authorized jurisdiction to investigate claims that the company's rates may be unjust, unreasonable, or discriminatory."[23]

16. Tri-State's principal Commerce Clause argument is that, as a generation and transmission cooperative, it operates in interstate commerce, and any form of rate regulation constitutes a Commerce Clause violation under both the *per se* and *Pike* balancing tests. The Interim Decision finds Tri-State's argument "less than convincing" due to the existence of the RUS rules authorizing state rate regulation over cooperatives.[24] The Interim Decision also states:

> It is apparent then that state jurisdiction over a cooperative such as Tri-State is permitted by federal law. Since the RUS has made room for regulation of Tri-State's rates by this Commission, it appears that there can be no attack on that authorization pursuant to the Commerce Clause.[25]

17. Tri-State argued that revising the A-37 rate would alter power consumption in Colorado, which in turn would result in a less optimal dispatch of its overall system. However, the Interim Decision quotes cross-examination evidence from Mr. Corrigan of Tri-State stating

[23] *Id.*, at ¶ 71.
[24] *Id.*, at ¶81.
[25] *Id.*, at ¶ 82.

that setting a different rate in one state would not change operation of the system, and Tri-State would continue to minimize the system costs to the membership as a whole.[26]

18. Tri-State contended that Commission regulation of the A-37 rate design would require full rate regulation, thus infringing upon the revenue requirements and cost structures in its other states. The ALJ rules that "Tri-State's assumptions regarding the degree to which the Commission may assert rate regulation is merely speculative and premature at this point."[27] For these and other reasons, the Interim Decision rules that Commission assertion of jurisdiction over the Complaint does not violate the *per se* test.

19. The Interim Decision finds that the *Pike* balancing test also does not deprive the Commission of jurisdiction. The state's interest is shown through the RUS rules granting state commission oversight of a cooperative's rates, which outweighs Tri-State's "speculative" contention that the Commission would engage in full rate regulation and thus burden its interstate operations.[28]

20. The Interim Decision denies Tri-State's motion to dismiss the Industrial Complainants on standing grounds. The ALJ finds that these end users could purchase electricity only from their retail cooperatives that in turn pass through any unjust or discriminatory wholesale rate charged by Tri-State. The ALJ cites § 40-6-108(1)(d), C.R.S., which says that the Commission "is not required to dismiss any complaint because of the absence of direct damage to the complainant." The Industrial Complainants satisfied the

[26] *Id.*, at ¶85.
[27] *Id.*, at ¶ 87.
[28] *Id.*, at ¶ 88-89.

governing test for standing, because they asserted facts showing an injury in fact and have a legally protected and cognizable interest in the justness of Tri-State's rates.[29]

21. The ALJ therefore denied Tri-State's Motion to Dismiss and certified the Interim Decision for an immediate appeal to the Commission pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-1502(d) of the Commission's Rules of Practice and Procedure.

4. Tri-State's Motion Contesting Interim Decision and Complainants' Response

22. Tri-State's Motion Contesting Interim Decision argues several grounds, summarized as follows:

- The Interim Decision ignores 40 years of Commission precedent recognizing that the Commerce Clause bars the Commission from regulating Tri-State's wholesale rates.
- The ALJ's application of the RUS rules, which acknowledge state commission authority to rate regulate wholesale cooperatives, amounts to a bar to Tri-State asserting a Commerce Clause challenge.
- The Interim Decision incorrectly dismisses Tri-State's contention that Commission review of the A-37 rate design would result in full rate regulation of Tri-State.
- Commission regulation of Tri-State's rates constitutes a *per se* violation of the Commerce Clause on three grounds: rate design regulation would have the practical effect of controlling conduct beyond Colorado's borders; interstate commerce would be burdened by the prospect of inconsistent regulation across multiple states; and, the Tenth Circuit's ruling in *Tri-State v. Wyoming,* which Tri-State characterizes as barring state rate regulation of an entity engaged in interstate commerce, governs in this proceeding.
- Commission review of the A-37 rate design cannot pass the *Pike* balancing test, because the state's interest is *de minimis* and is outweighed by the impacts upon interstate commerce.

[29] *Id.*, at ¶¶ 90-96.

- The Industrial Complainants lack standing because their claims implicate the retail rates charged by the member systems and thus must be adjudicated pursuant to the statutes governing such claims.

The grounds and case citations underlying Tri-State's Motion Contesting the Interim Decision are addressed in more detail in our Discussion below.

23. The Complainants responded to Tri-State's Motion and, in short, argue that: Colorado public utility law grants the Commission jurisdiction to hear claims over Tri-State's wholesale rate design; prior Commission rulings did not address its jurisdiction over the type of rate complaint filed against Tri-State in this proceeding and thus do not bar the Commission from exercising jurisdiction; the congressional grant of authority to state commissions to regulate Tri-State's wholesale rates bars a Commerce Clause challenge; Tri-State's *per se* challenge, which asserts that Commission regulation of Tri-State's rates would control conduct outside Colorado's borders, fails because the complaint seeks regulation of rates charged only within the borders of Colorado; Colorado's interests in adjudicating Tri-State's wholesale rate design outweigh Tri-State's speculative positions on potential burdens upon interstate commerce; and, the Industrial Complainants have standing.[30]

24. The Complainants' brief also cites to the action pending in United States District Court for the District of Colorado, in which members of Tri-State located in Nebraska brought claims against Tri-State, including a common law claim alleging breach of Tri-State's obligation to set utility rates fairly.[31] As characterized by the federal court:

> Tri-State moves to dismiss this claim, pointing out that choice of law provisions in the governing contracts between Plaintiffs and Tri-State provide that Colorado law governs the contracts. (ECF No. 1-41, at 13 n.9, 21 n.13.) Tri-State then

[30] Complainants' Response to Tri-State's Motion Contesting Interim Decision No. R13-1119-I, submitted October 21, 2013.

[31] *Chimney Rock Pub. Power Dist. v. Tri-State Gen. & Trans. Ass'n*, Civ. Action No. 10-cv-03249-WJM-KMT, 2012 WL 84572, 2012 U.S. Dist. LEXIS 3402 (D. Colo, Jan. 11, 2012).

explains that the common law duty to fairly set utility rates has been preempted in Colorado by a comprehensive scheme of state constitutional amendments, statutes, and regulations that govern Colorado's public utilities. (*Id*. at 21-25.) Therefore, Tri-State argues, this claim fails as a matter of law.[32]

B. Discussion

1. Part I

25. Tri-State does not contest the findings and rulings in the Interim Decision that, setting aside the Commerce Clause issues, the Commission has jurisdiction pursuant to Article XXV and the public utilities statutes over Tri-State as a "public utility" and to hear a complaint alleging that its rates are unjust, unreasonable, discriminatory, and preferential. Rather, Tri-State's objection to Commission jurisdiction relies upon the dormant Commerce Clause.[33]

26. Tri-State argues that Commission regulation of the A-37 rate would have the practical effect of controlling conduct outside of Colorado, thus constituting a *per se* violation of the Commerce Clause. Tri-State's principal citation is *Healy v. Beer Institute*, 491 U.S. 324 (1989), in which a Connecticut statute was found to inhibit out-of-state pricing decisions and effectively set a price cap in bordering states.[34] Tri-State also relies heavily upon the decisions in *Tri-State Generation & Transmission Association, Inc. v. Public Service Commission of Wyoming*, 412 F.2d 115 (10th Cir. 1969) (*Tri-State v. Wyoming*), and *New York v. Federal Energy Regulatory Commission*, 535 U.S. 1 (2002) (*New York v. FERC*), for the proposition that

[32] *Id.*, 2012 WL 84572 at *5, 2012 U.S. Dist. LEXIS 3402 at *14.

[33] As stated by Tri-State: "In summary, the Commission's jurisdiction exists in this docket, if at all, only within the confines permitted by the dormant Commerce Clause….where the exercise of the Commission's ostensible jurisdiction under Colorado law would violate federal Commerce Clause protections afforded to an *inter*state G&T such as Tri-State, the Commission cannot act." Tri-State's Motion Contesting Interim Decision, at 17 (emphasis that of Tri-State).

[34] *Healy*, 491 U.S at 339.

Tri-State is an electric cooperative operating in interstate commerce and any state commission regulation of Tri-State constitutes a Commerce Clause violation as a matter of law.[35]

27. The United States Supreme Court has rejected the proposition that, if an entity operates within interstate commerce, any state regulation of the entity represents a violation of the Commerce Clause. In *Exxon Corp. v. Governor of Maryland,*[36] a Maryland statute prohibited producers or refiners of petroleum products from operating retail service stations within the state. Because no petroleum products were produced or refined in Maryland,[37] the entities subject to the statute all operated in interstate commerce. They argued that the Maryland statute interfered "with the natural functioning of the interstate market either through prohibition or through burdensome regulation."[38] The Court disagreed: "we cannot adopt appellants' novel suggestion that because the economic market for petroleum products is nationwide, no State has the power to regulate the retail marketing of gas."[39] Also, in *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375 (1983), a case with facts similar to the proceeding here, the Court noted that wholesale electric cooperatives operate in interstate commerce;[40] yet, the Court denied a wholesale cooperative's Commerce Clause challenge to the state commission's assertion of rate jurisdiction.

28. With regard to *Tri-State v. Wyoming*, the Tenth Circuit premised its holding—that Tri-State's contracts with sellers of power and its members' operations were not subject to

[35] Tri-State's Motion Contesting Interim Decision, at 12, n. 7, 16, 17-18, 27, n. 20, 31, n. 24, 33-34, 41, 43, 44.

[36] *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

[37] *Id.*, 437 U.S. at 123.

[38] *Id.*, 437 U.S. at 127.

[39] *Id.*, 437 U.S. at 128.

[40] *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389-90 (1983).

regulation by the Wyoming commission—upon the case line applicable at that time, specifically citing *Public Utilities Commission of Rhode Island v. Attleboro Steam & Electric Company*, 273 U.S. 83 (1927). *Attleboro* established a bright line test that categorized ***wholesale*** electric services as imposing a direct burden on interstate commerce and was thus beyond the purview of state commissions, in contrast to ***retail*** services that were within state commission authority.[41] The *Attleboro* wholesale/retail distinction as a dispositive test under the Commerce Clause was overturned in *Arkansas Electric*, holding that "*Attleboro* can no longer be thought to provide the sole standard by which to decide this case, and we proceed instead to undertake an analysis grounded more solidly in our modern cases [referencing the *Pike* balancing test]."[42] Thus, *Tri-State v Wyoming* rests upon outdated law.

29. Additionally, the interstate commerce analysis that the court applied to the facts in *Tri-State v. Wyoming* actually impairs Tri-State's argument. The Tenth Circuit affirmed that, at the time the district court had issued its judgment, which was only a few months after the Wyoming Commission had asserted jurisdiction over Tri-State, "the Commission's orders had ***had but a negligible impact upon interstate commerce***."[43] The court held that the burden on interstate commerce arose ***after*** Tri-State had been denied revenues from its members for over two years.[44] In the proceeding here, the Complainants have agreed to sustain the total amount of revenue that Tri-State otherwise would receive under A-37; thus, under *Tri-State v Wyoming*, Commission assertion of jurisdiction without affecting Tri-State's revenue stream results in only a "negligible impact" upon Tri-State's interstate operations.

[41] *See* the Supreme Court's interpretation of *Attleboro* in *Arkansas Electric*, 461 U.S. at 389-93.
[42] *Arkansas Electric*, 461 U.S. at 393.
[43] *Tri-State v. Wyoming,* 412 F.2d 115, 118 (10th Cir. 1969) (emphasis added).
[44] *Id.*, 412 F.2d at 118-19.

30. The *New York v. FERC* case does not bar the Commission from hearing the Complaint. It addressed whether FERC had congressional authority to regulate retail transmission services, which operated in interstate commerce. This case also affirmed that, where FERC determined not to regulate a form of retail transmission service, state commissions were permitted to do so, even though the service was interstate in nature.[45] Further, *New York v. FERC* does not address the issue here—the scope of a state commission's authority to regulate a cooperative operating in interstate commerce. In *Arkansas Electric*, the Court characterized the interstate electricity market in essentially the same terms as it did in *New York v. FERC*,[46] and yet the Court held that the Commerce Clause did not preclude state regulation of a wholesale utility's rates.

31. In this context the ALJ made his statements regarding the RUS rules. The ALJ observed that Tri-State's argument—that any state rate regulation upon a cooperative operating in interstate commerce violates the Commerce Clause—"is less than convincing" in the framework of established RUS rules authorizing state commission rate regulation of cooperatives; otherwise, the RUS rules would be a nullity. We see the ALJ's observation as providing another reason that Tri-State's interstate commerce position is overbroad.

32. To the extent the Interim Decision could be interpreted as holding that the RUS rules ("Congress may authorize the States to engage in regulation that the *Commerce Clause* would otherwise forbid") foreclose a Commerce Clause challenge, the congressional intent to absolve the state from Commerce Clause challenges must be "unmistakably clear."[47]

[45] *New York v. FERC*, 535 U.S. 1, 16, 23 ("And, as discussed below, FERC did not assert jurisdiction over bundled retail transmissions, leaving New York with control over even the transmission component of bundled retail sales.") ("We agree with FERC that transmissions on the interconnected national grids constitute transmissions in interstate commerce.")

[46] *Arkansas Electric*, 461 U.S. at 381.

[47] *Maine v. Taylor*, 477 U.S. 131, 139 (1986).

We agree with Tri-State that the RUS rules do not reflect the intent necessary to absolve a state from a Commerce Clause challenge, and thus we do not base this Decision in any way upon a Commerce Clause exemption. As stated in the Interim Decision and elsewhere in this Decision, however, the RUS rules may be relevant to consideration of the *per se* and *Pike* balancing tests.

33. Tri-State relies heavily on its contention that any Commission regulation of Tri-State's rate design would result in full rate regulation, including establishment of a new, Colorado-specific revenue requirement. Tri-State says that setting a Colorado revenue requirement impacts and burdens system-wide revenue requirements and rates charged to customers located outside Colorado.[48] The Complainants, however, have stipulated that the revenue requirement for Colorado otherwise obtainable under the A-37 rate design will be sustained. Further, the Commission typically bifurcates its rate cases into a revenue requirement phase and a subsequent rate design phase, thus demonstrating the ability of the Commission to consider rate design without altering a given revenue requirement. If Tri-State's Colorado revenue requirement is unaltered by adjudication of its rate design, then Tri-State's out-of-state revenue requirements and thus its rates should be unaffected.

34. Tri-State argues that altering rate design would result in different and less than optimal dispatching, which in turn will result in higher costs to be absorbed by out-of-state members. This contention was countered by the cross-examination of Tri-State's Mr. Corrigan, who admitted that the setting of a different rate in one state would not change operation of the Tri-State system and that Tri-State would continue to minimize system costs to the membership as a whole.[49]

[48] Tri-State Motion Contesting Interim Decision at 26-27 and testimony cited.
[49] Interim Decision at ¶85.

35. Tri-State argues that the ALJ took Mr. Corrigan's testimony out of context without consideration of his complete testimony.[50] The ALJ was in a position to hear, consider, and evaluate all the testimony in its proper context, and we do not find a basis to overrule his interpretation of Mr. Corrigan's testimony. Further, the Commission has expertise in the area of dispatching, and we are not persuaded by Tri-State's position that a different rate design alters a utility's efforts to minimize system costs as a whole.

36. Tri-State alleges that Commission rate design regulation would burden Tri-State's ability to engage in the buying and selling of electricity outside of Colorado.[51] Although the testimony cited in Tri-State's briefing describes its interstate transactions, it does not provide evidence of how Commission regulation of its Colorado rate design would impair or even affect them. Further, the Court in *Arkansas Electric* characterized this same contention as a "hypothetical possibility" and insufficient as a facial challenge to state commission assertion of rate authority over a wholesale cooperative.[52]

37. Tri-State also argues that state regulation will downgrade its credit rating, thus increasing its borrowing costs. Complainants' stipulation that Tri-State's revenue amounts will not change diminishes this risk. Further, this and other state commissions regulate the rates of investor-owned utilities that operate on a multi-state basis, and Tri-State cites no case law that a

[50] Tri-State Motion Contesting Interim Decision at 44-45.

[51] *Id.*, at 28.

[52] *Arkansas Electric*, 461 U.S. at 395 ("[I]t is true that regulation of the prices AECC charges to its members may have some effect on the price structure of the interstate grid of which AECC is a part. But, again, we find it difficult to distinguish AECC in this respect from most relatively large utilities which sell power both directly to the public and to other utilities. It is not inconceivable that a particular rate structure required by the Arkansas PSC would be so unreasonable as to disturb appreciably the interstate market for electric power. But, as we said in our discussion of the pre-emption issue, see *supra, at 389*, we are not willing to allow such a hypothetical possibility to control this facial challenge to the PSC's mere assertion of regulatory jurisdiction.").

Commerce Clause violation results if the financial markets consider state regulation as part of a utility's credit rating.

38. The prospect of inconsistent treatment if other states engage in similar regulation is also part of Tri-State's Commerce Clause challenge.[53] Citing *Healy*, Tri-State says the Commission must consider "how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation."[54]

39. In support, Tri-State first cites to the inability of Complainant witnesses to identify a multi-state generating and transmission cooperative, other than Tri-State, that presently is rate regulated.[55] Tri-State however, fails to connect the nonexistence of other rate regulated wholesale cooperatives with burdens upon interstate commerce resulting from multiple states regulating wholesale cooperatives' rate design. Considering the long history of wholesale cooperatives in the nation, the absence of similar regulation only undermines Tri-State's contention that there is a prospect of such regulation or any danger of burdens upon interstate commerce.

40. Tri-State's second ground underlying its inconsistent regulation argument is that "at least three states in which Tri-State has Member Systems—Colorado, New Mexico and Wyoming—have competing interests in ensuring that the wholesale rates charged in their respective states are the lowest in the Tri-State system, which could lead to disallowance of full cost recovery for Tri-State."[56] Again, Complainants' stipulation to maintain the same amount of

[53] Tri-State's Motion Contesting Interim Decision at 28.
[54] *Id.*, at 28 (quoting *Healy*, 491 U.S. at 336).
[55] *Id.*, at 29.
[56] *Id.*, at 31.

revenues diminishes Tri-State's concern that resolving the Complaint will decrease its Colorado revenues.

41. For these reasons, Commission assertion of jurisdiction to hear the Complaint does not amount to a practical effect of controlling conduct outside of Colorado that would constitute a *per se* violation of the Commerce Clause.

42. We agree with the ALJ's conclusion that the *Pike* balancing test also does not divest the Commission of jurisdiction to hear the Complaint.[57] Under *Pike*:

> Where a statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.…If a legitimate local purpose is found, then the question becomes one of degree.[58]

43. Tri-State argues that the effect of Commission regulation is substantial, rather than incidental, and outweighs Colorado's interest in such regulation.[59] Tri-State begins by characterizing the state's interests as either non-existent or *de minimis*, citing what it contends is a statutory exclusion of Commission authority over interstate commerce and an interest in not violating the Commerce Clause.[60] Tri-State says the Commission would be interfering with the contractual relationships between Tri-State and its member systems.[61] Tri-State cites to comments previously filed by the Complainants that the Commission has no jurisdiction over Tri-State's rates and that a cooperative's method of self-governance is the most efficient form of regulation.[62] Tri-State adds that the state has no interest in Tri-State's rates, because any risk of

[57] Interim Decision, at ¶¶ 88-89.
[58] *Pike*, 397 U.S. at 142.
[59] Tri-State's Motion Contesting Interim Decision at 35.
[60] *Id.*, at 36-37.
[61] *Id.*, at 37.
[62] *Id.*

imposing monopolistic prices is overcome by the cooperative model that refunds excesses back to its members, in contrast to an investor-owned utility that distributes profits among its shareholders.[63] Tri-State also says that the cooperative model balances the interests of all member systems and provides safeguards against undue rate discrimination.[64] Finally, a member system has the right to exit, thus preventing a majority of the Board from disadvantaging the interests of minority members.[65]

44. We find that Colorado has important interests in the Commission performing its duties under Article XXV and the public utilities law to regulate public utilities. Colorado's interests are reflected in §§ 40-3-101, 106(1), and 111(1), C.R.S., which prevent a public utility from charging unjust, unreasonable, discriminatory, or preferential rates. As stated by our Supreme Court, the "PUC must therefore set rates which protect ***the right*** of consumers to pay a rate which accurately reflects the cost of service rendered."[66] Indeed, the Court also recognized that:

> [T]he Commission possesses not only the power and authority, but also the duty to prescribe the rates of all utilities subject to its jurisdiction. The fact that the instant case involves rate design, as opposed to rate increase, is irrelevant for purposes of the analysis. After all, rate design, just as much as rate levels, could produce unjust, unreasonable, discriminatory, or preferential results.[67]

45. We also agree with the ALJ's recognition of the regulatory gap over Tri-State's rates. Neither FERC nor the RUS protects Tri-State's customers from allegedly improper rates, and the RUS asserts rate authority only if Tri-State is unable to satisfy its federal debt

[63] *Id.*, at 39.

[64] *Id.*, at 39-40.

[65] *Id.*, at 40.

[66] *Colorado Ute*, 760 P.2d at 642 (quoting *Public Service Co. v. Public Utilities Comm'n,* 644 P.2d 933, 939 (Colo. 1982)).

[67] *Id.*, at 639.

obligations. The RUS rules, which acknowledge state commission rate regulation of wholesale cooperatives, confirm a state's interest to evaluate Tri-State's rate design.

46. We disagree with Tri-State's evaluation of the state's interests. Tri-State's citation to § 40-7-111, C.R.S., and its assertion that the state has an interest in not violating the Commerce Clause are circular and evade the issue of what constitutes a Commerce Clause violation in this context. In *Colorado Ute*, our Supreme Court ruled that a cooperative's ability to set rates for its members does not rise above the Commission's duty to regulate rate design.[68] We also do not place much weight on Tri-State's contention that its members have a right to exit. The evidence shows that members are contractually obligated to Tri-State through 2050; and there is no evidence, and Tri-State does not assert, that a member may leave without substantial financial consequences.

47. The purported burdens upon interstate commerce asserted by Tri-State, that are to be weighed against state interests, are the same as those it advances in support of its *per se* arguments: Tri-State's credit may be impaired;[69] the system's overall operations would be impacted by a state-specific rate design;[70] regulation of Tri-State's rate design would require a state-specific revenue requirement and thus impact out-of-state rates; and, its broad contention that, because it operates in interstate commerce, any regulation imposed upon it constitutes an impermissible burden.[71]

[68] *Id.*, at 639.
[69] Tri-State's Motion Contesting Interim Decision, at 41.
[70] *Id.*
[71] *Id.*, at 41-43.

48. As already discussed, the alleged credit and revenue requirement concerns are alleviated by Complainants' stipulation to maintain the amount of revenues Tri-State receives through its A-37 rate. The case law, particularly *Exxon v. Maryland* and *Arkansas Electric* addressed above, demonstrate that state regulation of an entity engaged extensively in interstate commerce does not constitute a violation of the Commerce Clause; rather, the courts and this Commission must evaluate the specific state statute or regulation and its effects upon out-of-state operations under the *Pike* balancing criteria.[72]

49. For these reasons, we affirm the ALJ's conclusion that the *Pike* balancing test does not preclude the Commission from asserting jurisdiction over the Complaint at this stage of the proceedings.

50. Tri-State recently represented to the federal court sitting in Colorado that its rates are subject to a "comprehensive scheme of state constitutional amendments, statutes, and regulations that govern Colorado's public utilities."[73] We interpret this statement as an acknowledgement of at least some room for Commission regulation of its rates.

2. Part II

51. Fundamental issues confront the Commission of what can and should the Commission do with the various claims and requests for relief in the Complaint. The focus of

[72] Tri-State argues that, because the cooperative in *Arkansas Electric* served only in-state customers with power generated in-state, the Court's holding in *Arkansas Electric* is distinguishable; however, the rate design at issue in this proceeding also applies to only in-state members, not to any out-of-state member. In addition, Tri-State fails to acknowledge that the Arkansas cooperative obtained at least a portion of its power from out-of-state sources (461 U.S. at 381) not completely in-state as Tri-State suggests in its following statement: "Specifically, the Supreme Court emphasized that Arkansas Electric Cooperative supplied 'power from generating facilities located within the State to member cooperatives, all of whom are located within the State.'" Tri-State's Motion Contesting Interim Decision, at 32) (emphasis that of Tri-State).

[73] *See Chimney Rock Pub. Power Dist. v. Tri-State Gen. & Trans. Ass'n*, Civ. Action No. 10-cv-03249-WJM-KMT, 2012 WL 84572 at *5, 2012 U.S. Dist. LEXIS 3402 at *14 (D. Colo, Jan. 11, 2012).

the ALJ's Recommended Decision is whether an alleged absence of a demand component to the A-37 rate results in unjust, unreasonable, preferential, and discriminatory rates in violation of Colorado law. However, the Complaint's claims and requests for relief extend much farther. Complainants seek to have Tri-State file with the Commission "schedules showing all rates collected together with all rules, regulations and contracts that in any manner affect or relate to their rates."[74] The Complainants also allege that Tri-State must provide 30 days' notice of any change in rates.[75] According to the Complaint, any rate changes would be prohibited absent filing of a rate schedule or providing the requisite notice.[76] The underlying basis for these claims, if proven, would compel the Commission to recognize that the filing and notice infirmities be remedied.

52. The Complaint reaches beyond filing and notice requirements and requests a Commission decision "establishing a cost allocation and rate design methodology for Tri-State."[77] The Complaint requests the Commission not only to establish a methodology, but also to deem the previous A-36 rate design as just and reasonable for Colorado and require Tri-State "to pay an appropriate refund to any cooperative that was billed more under the A-37 rate than it would have been billed under the A-36 rate."[78]

53. These other claims and requests for relief infringe upon our long-standing practice of declining to engage in general rate regulation of Tri-State. In his Interim Decision, the ALJ dismissed the 60 years of precedent in which the Commission specifically declined to rate regulate Tri-State as "mostly incidental" and "[c]onsequently, it is not necessary to use those

[74] Formal Complaint, at ¶ 29.
[75] Id., at ¶¶ 35-37.
[76] *Id.*, at ¶¶ 32, 38.
[77] *Id.*, Relief Requested, ¶ (iv), at p. 20.
[78] *Id.*, Relief Requested, ¶ (v), at p. 20.

prior Commission decisions as precedent in this matter…." "Further, the outcome of those prior Commission decisions does not affect the analysis above of Commission jurisdiction based on Colorado Public Utilities Law."[79] But, the practical effect of implementing and applying the law to the claims and requests for relief is precisely what this Commission must address.

54. The precedent cited by Tri-State in its filings and in the Interim Decision reflects the judgment of the Commission not to interfere with the detailed rate making process in which Tri-State engages. It recognizes that full rate regulation would require a comprehensive rate case, necessitating the establishment of a Colorado-specific rate base and revenue requirement for Tri-State that would interfere with its operations. For the Commission to undertake a partial or full rate case would be a significant, and not mostly incidental, departure from the Commission's previous decisions that the PUC does not regulate Tri-State's rates.

55. This precedent also acknowledges the cooperative model of governance that has served its members since Tri-State's inception, and that the Commission should not be a forum to resolve particularized rate disputes among Tri-State's cooperative members. If we hear all of the claims asserted in the Complaint, the Commission and its staff henceforth would be required to entertain any claim that an alleged action by Tri-State fails statutorily required criteria.

56. These policies are reflected in existing Commission Rule 3000(c) of the Rules Regulating Electric Utilities 4 CCR 723-3, which exempts generation and transmission cooperatives from the rules governing the filing of tariffs for changes in rates.

57. The issues on Tri-State's motion to dismiss include not only whether the Commission is foreclosed constitutionally from reviewing the Complaint, but also whether the Commission should depart from 60 years of precedent in which it specifically declined to rate

[79] Interim Decision, ¶ 64

regulate Tri-State. Therefore, we confine Commission review to a defined legal issue—whether the failure to include a demand and energy charge is a violation of regulatory principles—which is an inquiry consistent with Colorado law.

58. We refer to the ALJ the claims of whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate under the circumstances of this case violates Colorado law and policy.

3. Part III

a. Standing of the Industrial Complainants

59. For the reasons stated above in Part II in which we narrow the claims on remand, dismiss other claims, and acknowledge the cooperative model of governance, we grant Tri-State's motion dismissing the Industrial Complainants as named complainants in this proceeding. The interests asserted by the Industrial Complainants, however, satisfy the standards for permissive intervention pursuant to 4 CCR 723-1-1401(c), and thus Commission grants them intervenor status.

II. ORDER

A. It Is Ordered That:

1. Respondent Tri-State Generation and Transmission Association, Inc.'s (Tri-State) Motion Contesting Interim Decision No. R13-1119-I is granted in part and denied in part, consistent with the Discussion in this Interim Decision.

2. This proceeding is remanded to the Administrative Law Judge to hear and issue a Recommended Decision on whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate under the circumstances of this case violates Colorado law and policy.

3. Consistent with 4 *Code of Colorado Regulations* 723-1-1502(b), this Decision is not subject to exceptions or applications for rehearing, reargument, or reconsideration. Any person aggrieved may challenge the matters determined in this Interim Decision in the Recommended Decision to be issued by the Administrative Law Judge.

4. This Decision is effective on its mailed date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING December 18, 2013.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

Commissioners

ATTEST: A TRUE COPY

Doug Dean,
Director

COMMISSIONER JAMES K. TARPEY DISSENTING IN PART.

III. COMMISSIONER JAMES K. TARPEY DISSENTING IN PART:

1. I concur with Part I of the majority decision, but I respectfully dissent from Parts II and III.

2. While the majority acknowledges the Public Utilities Commission's (Commission or PUC) jurisdiction to hear the Complaint and its duty to set rates which protect consumers, the majority goes beyond the jurisdictional question before it and limits the next phase of the proceeding to the legal issue of "whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate under the circumstances of this case violated Colorado law and policy."

3. With that limitation, any evidence addressing the "balancing of interests" concept will be outside the scope of the proceeding. Any evidence addressing possible remedies that would be consistent with the public interest will not be allowed. If Tri-State Generation and Transmission Association, Inc.'s (Tri-State) A-37 rate is found to violate Colorado law and policy, the majority opinion will result in the complaint being dismissed from further consideration or remedial action.

4. Among the reasons given by the majority are the following: several of Complainants' requests for relief go too far and would compel the Commission to take remedial action; and other requests would require the Commission to depart from its practice of over 60 years of not regulating Tri-State's rates. Also, the majority notes the cooperative model of governance in place since Tri-State's inception, believes the Commission should not be the forum for resolving disputes among members, and expresses its concern that the Commission and its staff may become involved in future cases where allegations are made that Tri-State is violating the public utilities law.

5. The current procedural stage of this proceeding is central to this dissent. Tri-State raises its Commerce Clause challenge to the mere assertion of Commission jurisdiction to hear the Complaint. The parties have not submitted any evidence on the merits of the A-37 rate.

Various remedial options have not been proposed or supported through evidence and the Administrative Law Judge (ALJ) has not recommended any remedy.

6. If Tri-State's A-37 rate violates Colorado law and policy, I expect it to be difficult to "balance the interests" and decide upon an appropriate remedy. While a "full-blown" rate case may not be acceptable, there is no reason to assume that could be the only possible remedy. It may be a determination that Tri-State needs to develop within a certain amount of time a rate that is not in violation of Colorado law and policy. There may be other remedies but these will be unknown because the parties are being denied the opportunity to present any remedies. As a result, I emphasize the reason for my dissent—the majority has concluded, without any evidentiary support, that no remedy is available and is closing off any exploration of possible remedies.

7. The majority's rationale for limiting the scope of the reference back to the ALJ is fatally flawed when compared with its duties as discussed by the Colorado Supreme Court in *Ohio and Colo. Smelting & Ref. Co. v. Public Util. Comm'n*, 187 P. 1082 (1920). The case involved judicial review of a PUC decision, which allowed a utility to increase rates to a customer above those allowed in a contract between the utility and the customer.

8. In that case, the Supreme Court discussed the necessity of establishing the value of certain property[80] and using that value as a basis for setting rates. The Commission had established a rate but had no evidence to support its decision. The Supreme Court reversed the Commission's decision and, as pertinent here, said the following regarding the Commission:

[80] The need to address value before setting rates is inapplicable here, because Complainants have stipulated to the revenue requirement set by Tri-State.

> It is not a court to consider and determine only that which is brought before it. It is a legislative agent, with certain administrative duties. One of its duties is to investigate and determine in the interest of the State. For this purpose the State has provided it with the proper engineers and other expert assistants to ascertain whatever facts may be necessary or important to justify a conclusion in any case, and this independent of, or in addition to, any testimony produced by the parties directly interested. Indeed, the statute expressly provides that the commission may investigate and determine as to any rate, rule or regulation, upon its own initiative.
>
> Ohio and Colo. Smelting & Ref. Co. v. Public Util. Comm'n, 187 P. 1082, 1086 (1920).

9. Consistent with the 1920 Colorado Supreme Court decision, the Commission frequently resolves proceedings where the relief granted differs from that sought by the parties; where the staff is available to assist the Commissioners; and where the Commission is primarily guided by the public interest and not the specific interest of a particular person or entity.

10. The Commission's responsibilities were also made clear in *Colorado-Ute Electric Association, Inc. v. Public Utilities Commission*, 760 P.2d 627, 639 (Colo. 1988): "Until the General Assembly changes the law, the Commission possesses not only the power and authority, but also the duty to prescribe the rates of all utilities subject to its jurisdiction."

11. For all the above reasons, I dissent from parts II and III of the majority Decision. Instead, I would affirm Decision No. R13-1119-I for the reasons set forth therein and direct the ALJ to take evidence on the merits of the Complaint and issue a Recommended Decision. This approach would allow the Commission to have before it evidence addressing Tri-State's A-37 rate; whether it violates Colorado law and policy; and, if necessary, what remedies would be

available to allow the Commission to determine what would be in the public interest and an appropriate "balancing of the interests."

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JAMES K. TARPEY

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Commissioner