Decision No. R14-0646-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

LA PLATA ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.; AND, WHITE RIVER ELECTRIC ASSOCIATION, INC.,

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE PAUL C. GOMEZ DENYING MOTION FOR PROTECTIVE ORDER; REQUIRING RESPONSE TO DISCOVERY AND SETTING DEPOSITION SCHEDULE; AND, SETTING PRE-HEARING CONFERENCE

Mailed Date: June 12, 2014

I. STATEMENT

1. On May 19, 2014, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a Motion for Protective Order (Motion) seeking a protective order from proposed discovery requests and depositions by La Plata Electric Association, Inc., Empire Electric Association, Inc., and White River Electric Association, Inc. as Complainants, and Intervenors identified as the Rural Electric Consumer Alliance, consisting of BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Production Company as members of the Rural Electric Consumer Alliance; and Kinder Morgan CO_2 Company (collectively, Complaining Parties).

2. Tri-State seeks a protective order pursuant to Commission Rule 4 *Code of Colorado Regulations* 723-1-1405(g), Rules of Practice and Procedure and Colorado Rule of Civil Procedure (CRCP) 26(b)(1). Based on Tri-State's interpretation of the scope of this complaint proceeding established by Commission Decision Nos. C14-0006-I issued January 3, 2014 and C14-0337-I issued March 31, 2014, it maintains that certain discovery requests and subjects for deposition of the Complaining Parties are burdensome because they exceed the scope of this proceeding.

3. Specifically, Tri-State seeks a protective order regarding Complaining Parties' Data Requests CP 1-15, 1-16, 1-19 through 1-25, 1-31 through 1-37, 1-40 through 1-43, and CP 1-5. Tri-State also seeks a protective order regarding Complaining Parties' Deposition Notice categories 1 through 4 concerning transmission planning, load forecasting, generation and resource planning, and capital budgets.

4. Tri-State bases its objections to the propounded discovery and deposition subjects on its interpretation of the scope of this proceeding based on the above cited Commission Decisions. Tri-State takes the position that the Commission substantially narrowed the scope of the Complaint proceeding to the single issue of whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate in this case violates Colorado law and policy.

5. Tri-State also notes that the Complaining Parties have disclaimed challenges to Tri-State's revenue requirement by stating that the Complaining Parties do not object to a lawfully established across-the-board increase to Tri-State's A-36 rate to collect total revenues which were approved by the Tri-State Board of Directors. Tri-State goes on to argue that any references to its cost of service is the same as an inquiry into Tri-State's revenue requirement and therefore constitutes a rate making process inquiry which is beyond the scope of this proceeding.

Tri-State then goes through each discovery request listed above and states its specific objection to each request.

6. Tri-State concludes that each of the data requests and deposition subjects it objects to, while relevant to the process by which it determines the amount of revenue to be recovered through the wholesale rates Tri-State charges to its Member Systems, or to the day-to-day planning and operations of its generation and transmission system, they are not relevant to the narrow issue of Tri-State's present rate design and whether that rate design includes a demand component or otherwise violates Colorado law and policy.

7. The Complaining Parties, on the other hand, define the scope of this proceeding in broader terms and as a result conclude that the discovery requests and depositions constitute an appropriate inquiry into whether Tri-State's rates accurately reflect its cost of service. According to the Complaining Parties, the fact that they are not challenging the overall level of revenues does not diminish the relevancy of Tri-State's cost of service to this proceeding.

8. In addressing the scope, the Complaining Parties argue that it is much broader than Tri-State asserts. The Complaining Parties urge that the constrained scope advocated by Tri-State be rejected outright. The Complaining Parties argue that the Commission intended for the Complaint to be more broadly construed than Tri-State represents.

9. According to the Complaining Parties, the Commission intended that the lawfulness of Tri-State's cost allocation and rate design methodology be connected here to the cost of providing service, which would allow for a consideration of all the circumstances underlying the rate issue.

10. The Complaining Parties argue that the importance and integration of cost of service in the design of rates is critical to a complete analysis and is fully supported by the

National Association of Regulatory Utility Commissioners as set out in its Electric Utility Cost Allocation Manual.

11. In addition, the Complaining Parties contend that the discovery requests and deposition subjects at issue are not only within the scope of the Complaint as established by the Commission, but are also consistent with the concept of relevance under CRCP 26(b). The Complaining Parties argue that the information regarding Tri-State's cost of providing service is both relevant and necessary to show that Tri-State's cost allocation and rate design methodology results in rates that do not accurately reflect the cost of service rendered which violates Colorado law.

II. FINDINGS

A. Scope

12. While it appeared that the scope of this proceeding had been firmly established by the Commission and acknowledged by the parties, it now appears that it must be addressed once more. The scope of this proceeding has been defined by the Commission, particularly in Interim Decision No. C14-0337-I. Because that Commission Decision is unambiguous and straight-forward, there is no need for a protracted discussion here.

13. Two paragraphs of Interim Decision No. C14-0337-I define the scope of this proceeding. In Paragraph No. 21, the Commission held that the "Interim Decision [No. C14-0006-I] "permits **full adjudication** of whether a demand component is absent from Tri-State's rate **and** whether the A-37 rate is unjust, unreasonable, discriminatory, or preferential." (Emphasis added). This language is again emphasized in Paragraph No. 23. It is readily evident that by the use of the conjunction "and," the Commission intended that the

scope of this proceeding is to include not only whether a demand component is absent from the A-37 rate, but also, whether that rate is unjust, unreasonable, discriminatory, or preferential.

14. Paragraph No. 24 of Decision No. C14-0337-I provides that, "Interim Decision [No. C14-0006-I] allows ALJ Gomez in his discretion to admit and consider **all relevant facts and circumstances** to whether Tri-State's rate contains a demand component, **which may include Tri-State's rate-setting methodology, and to whether the A-37 rate is unjust, unreasonable, discriminatory, or preferential under Colorado law** …" (Emphasis added). The Commission was unequivocal that Tri-State's rate-setting methodology was to be at issue in addition to whether the A-37 rate is unjust unreasonable, discriminatory, or preferential.

15. As a result, it is found that while the lack of a demand component in Tri-State's A-37 (and A-38) rate is a major issue of the Complaint, Tri-State's rate-setting methodology is at issue as well. It is in the discretion of the ALJ to determine whether to admit and consider all relevant facts and circumstances in addressing those issues. It is determined that such information is critical to a finding in this proceeding. As a result, it is found that the discovery requests and deposition subjects of the Complaining Parties are not beyond the scope of this proceeding.

B. CRCP 26(b)

16. Regarding the scope of discovery under Rule 26, "any matter, not privileged, which is relevant to the subject matter involved in the pending action" is discoverable. CRCP 26(b)(1). "Relevant evidence" pertaining to discovery is of course distinct from "relevant evidence" admissible at trial. While the hearing standard is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence, the more relaxed standard under

Rule 26 allows discovery of matters "reasonably calculated to lead to the discovery of admissible evidence" *Id*.

17. It is not necessary that the information sought must be relevant to any particular issue in the case – it must only be pertinent or germane to the subject matter of the underlying action. Pursuant to Rule 26(b), relevance is to be construed liberally to effectuate the full extent of the truth seeking purposes. *Williams v. District Court*, 866 P.2d 908 (Colo. 1993).

18. In determining what relevant evidence is discoverable, the Colorado Supreme Court has employed a balancing test which weighs the preference for broad discovery against the recognition that disproportionate discovery may increase the cost of litigation, harass the opponent, and delay a fair and just determination of the legal issues. *Silva v. Basin Western, Inc.*, 47 P.3d 1184 (Colo. 2002). Nonetheless, discovery rules are to be liberally construed to eliminate surprise at trial, permit the discovery of relevant evidence, simplify issues, and to promote the expeditious settlement of cases. *Id.*; *See also, Jenkins v. District Court*, 676 P.2d 1201 (Colo. 1984).

19. Rule 26(c) does recognize that relevant evidence, for purposes of discovery may be beyond the reach of the parties if its production would be unduly burdensome or oppressive; however, this has been held to be a defense of last resort. *Bristol Myers Co. v. District Court*, 422 P.2d 373 (1967). The finder of fact has "broad discretion to manage the discovery process in a fashion that will implement the philosophy of full disclosure of relevant information and at the same time afford the participants the maximum protection against harmful side effects." *Bond v. District Court*, 682 P.2d 33, 40 (Colo. 1984).

20. Construing the discovery rules liberally in order to effectuate the full extent of their truth seeking purpose, and incorporating the Commission's judgment regarding the scope of

this proceeding as set out above, it is found that the discovery requests and deposition topics at issue are within the scope of this proceeding. It is found that the matter sought pursuant to the discovery requests and deposition topics are reasonably calculated to lead to the discovery of admissible evidence and are therefore discoverable. In addition, as the records which are part of the discovery requests are kept in the ordinary course of business by Tri-State, their production will not be burdensome. Therefore, Tri-State's Motion will be denied.

21. As a result, Tri-State will be ordered to respond to any outstanding discovery requests of the Complaining Parties, identified above in Paragraph No. 3, within 5 days of the date of this Decision. Tri-State will also be required to respond to the requests for deposition as identified above in Paragraph No. 3 within 5 days of the date of this Decision.

22. Additionally, the procedural schedule adopted in Interim Decision No. R14-0423-I issued April 23, 2014 was suspended by Interim Decision No. R14-0590-I issued June 2, 2014 pending an order regarding Tri-State's Motion. Consequently, it is necessary to schedule a scheduling conference in order to establish new procedural dates regarding discovery and the filing of testimony and to determine whether it is appropriate to reschedule the evidentiary hearing dates.

23. Therefore, a pre-hearing conference will be scheduled on **Thursday, June 19, 2014**.

III. ORDER

A. It Is Ordered That:

1. The Motion for Protective Order filed by Tri-State Generation and Transmission Association, Inc. (Tri-State) is denied consistent with the discussion above.

2. Tri-State shall respond to the Complaining Parties' Data Requests CP 1-15, 1-16, 1-19 through 1-25, 1-31 through 1-37, and 1-40 through 1-43, and CP 1-5, as identified above in Paragraph No. 3, no later than 5 days after the date of this Decision or by the close of business on June 17, 2014.

3. Tri-State shall respond to, and schedule depositions requested by the Complaining Parties regarding Deposition Notice categories 1 through 4 concerning transmission planning, load forecasting, generation and resource planning, and capital budgets, as identified above in Paragraph No. 3, no later than 5 days after the date of this Decision or by the close of business on June 17, 2014.

4. A pre-hearing conference is scheduled as follows:

DATE: June 19, 2014

TIME: 10:00 a.m.

PLACE: Hearing Room
Colorado Public Utilities Commission
1560 Broadway, Suite 250
Denver, Colorado

5. This Decision is effective immediately.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge