

Decision No. C19-0546-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18F-0866E

DELTA-MONTROSE ELECTRIC ASSOCIATION,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC.,

RESPONDENT.

**INTERIM DECISION DENYING
MOTION FOR PROTECTIVE ORDER**

Mailed Date: June 25, 2019
Adopted Date: June 20, 2019

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I. BY THE COMMISSION**A. Statement**

1. On June 14, 2019, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed its Motion for Protective Order (Motion) pursuant to Rules 4 *Code of Colorado Regulations* 723-1-1001 and 1405(a) and (g) of the Commission Rules of Practice and Procedure, and Colorado Rule of Civil Procedure (C.R.C.P.) 26(c), Tri-State requests a protective order related to a Notice of Deposition served by Delta-Montrose Electric Association (DMEA) on June 7, 2019, pursuant to C.R.C.P. 30(b)(6). Tri-State seeks a protective order that the depositions not go forward, as well as a protective order related to other scheduled depositions, precluding questioning of any Tri-State witness on matters related to Tri-State's potential regulation by the Federal Energy Regulatory Commission (FERC).

2. Tri-State indicates that it objected to DMEA's C.R.C.P. 30(b)(6) Notice since it wanted information irrelevant to the claims and defenses of this complaint proceeding. Tri-State argues that this complaint concerns whether DMEA may withdraw as a member of Tri-State, the terms of any withdrawal and the benefits DMEA may obtain from withdrawal.

3. Responses to the Motion were filed by DMEA and the Colorado Energy Office (CEO).

B. Discussion**1. Motion for Protective Order**

4. According to the Motion, Tri-State's Board of Directors (BOD or Board), during their June 3 and 4, 2019 strategic planning session received information regarding FERC jurisdiction over Tri-State, as well as a recommendation that Tri-State's BOD permit the cooperative to become rate regulated by FERC. Subsequently, on June 7, 2019, DMEA served

Tri-State with a Notice of Deposition pursuant to C.R.C.P. 30(b)(6) which listed six topics concerning Tri-State's potential bid for rate regulation by FERC.

5. Tri-State objected to DMEA's Rule 30(b)(6) Notice because it sought information Tri-State argues is irrelevant to the claims and defenses of this Proceeding, which according to Tri-State, concerns whether DMEA may withdraw as a member of Tri-State, the terms of any withdrawal, and the purported benefits DMEA may derive from withdrawal. Tri-State further sought DMEA's assurance that in depositions set for the week of June 17, 2019, including depositions responsive to an earlier DMEA notice pursuant to C.R.C.P. 30(b)(6), DMEA would not inquire into the subject matter of Tri-State's potential rate regulation by FERC. On June 13, 2019, DMEA noted it would not withdraw the Rule 30(b)(6) Notice nor agree to refrain from questioning Tri-State's witnesses concerning FERC rate regulation.

6. Tri-State asserts that it is currently subject to an exemption under the Federal Power Act pursuant to § 201(f), which exempts an electric cooperative from FERC jurisdiction that receives financing under the Rural Electrification Act of 1936. Tri-State acknowledges that while it has contemplated seeking FERC regulation since approximately 2010, it recently presented to its BOD, information regarding FERC jurisdiction and the pros and cons of FERC regulation and a recommendation that Tri-State's BOD permit it to become rate regulated by FERC. It is anticipated that the BOD will vote on the matter at its next regularly scheduled meeting in early July.

7. Tri-State argues that the discovery rules, while they are to be liberally construed, nevertheless have limitations. Tri-State argues that "[t]he discovery process can be abused by disproportionate and inappropriate requests that increase the cost of litigation, harass an

opponent, or tend to delay a fair and just determination of the legal issues.” *Citing, In re Attorney D.*, 57 P.3d 395, 399 (Colo. 2002), *as modified on denial of reh'g* (November 18, 2002).

8. Tri-State goes on to argue that while discovery generally has a wide scope, “the 2002 amendments [to C.R.C.P. 26(b)(1)] signal to the court that it has the authority to confine discovery to the claims and defenses asserted in the pleadings, and they signal to the parties that they have no entitlement to discovery to develop new claims or defenses not already identified.” *Citing, DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 28. Since the decision in *DCP Midstream*, C.R.C.P. 26(b)(1) was further amended in 2015 to state that discovery “is no longer permitted simply because it is relevant to the ‘subject matter involved in the action.’ . . . In short, the concept is to allow discovery of what a party/lawyer needs to prove its case, but not what a party/lawyer wants to know about the subject of a case.” C.R.C.P. 26, Comments, ¶ 14 (Scope of Discovery).

9. According to Tri-Sate, DMEA’s Rule 30(b)(6) Notice seeks information not relevant to the claims or defenses in this Proceeding and imposes burdens not proportional to the needs of the case. Tri-State argues that FERC regulation is irrelevant to the claims and defenses in this Proceeding, rendering it outside the Scope of Discovery; Second, given the length of time Tri-State has had this issue under consideration, and the negligible value of any information to be discovered, it is Tri-State’s contention that the burden of preparing a witness to testify on the topics in the Rule 30(b)(6) Notice is not proportional to the needs of the case. Tri-State also maintains that the discovery is not being sought for a proper purpose in this Proceeding. According to Tri-Sate, if DMEA wishes to seek information about potential Tri-State rate regulation by FERC in order to be prepared for the upcoming Board vote on the subject, it should obtain that information through normal Board inquiries and pursuant to standard Board practices.

It cannot be permitted to use discovery in this Proceeding to obtain information it should seek through regular business procedures.

10. In addition, Tri-State contends that the topics on which DMEA demands Tri-State designate a witness in the Rule 30(b)(6) Notice have nothing to do with the claims DMEA raises in its Complaint. Tri-State urges that FERC-related discovery will not assist in the determination of whether DMEA has a right of withdrawal under Tri-State's Bylaws and what amount it must pay to Tri-State and the remaining members to leave them economically whole if DMEA departs. Tri-State claims that the only purpose of the discovery is the vague hope it will allow development of new claims, and DMEA has "no entitlement to discovery to develop new claims or defenses not already identified." *Citing, DCP Midstream, 2013 CO 36, ¶ 28.*

11. Further, Tri-State makes the claim that the burden on it of preparing a witness to testify on a FERC matter is not proportional to the needs of the case. *Citing C.R.C.P. 26(b)(1),* Tri-State points out that whether discovery is proportional to the needs of the case turns on "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." *C.R.C.P. 26(b)(1).* Tri-State concludes that consideration of these factors demonstrates DMEA's inquiries into FERC rate regulation are not proportional to the needs of the case. Tri-State posits that discovery into Tri-State's evaluation of FERC rate regulation is not important to resolving a dispute regarding DMEA's effort to withdraw from membership and the amount of any contract buyout amount it must pay if it does withdraw.

12. Finally, Tri-State asserts that the discovery is not being sought for a proper purpose, rather DMEA is using discovery in this Proceeding in an effort to investigate and influence the forthcoming Board action.

2. DMEA's Response

13. DMEA on the other hand takes the position that Tri-State's attempted FERC move bears on the substance of the Public Utilities Commission's (Commission or PUC) evaluation of the merits of DMEA's Formal Complaint. DMEA expects that discovery into Tri-State's motivations and actions with respect to FERC jurisdiction will shed significant light on whether Tri-State's proposed exit charge is just, reasonable, and nondiscriminatory—or instead an intentionally moving target, part of a larger effort to indefinitely delay or thwart DMEA from ending its ownership of, and voluntary membership in, Tri-State. Moreover, DMEA posits that the procedure through which Tri-State apparently will attempt to obtain FERC oversight, admitting a new member, bears on the exit charge calculation itself.

14. DMEA claims that its discovery on FERC jurisdiction is relevant to Tri-State's ongoing effort to undermine the Commission's jurisdiction. DMEA maintains that Tri-State continued to place the Commission's jurisdiction at the center of its defense even before its FERC maneuver came to light. For example, three different witnesses in Tri-State's answer case testified that the Commission should not determine a fair and reasonable exit charge. In an affidavit attached to DMEA's Response, it notes that in a conference call and webinar last week that included Tri-State's management, its corporate counsel and witness in this matter, and its membership, Tri-State left no doubt about its view of the effect of FERC jurisdiction.¹

¹ See, confidential Exhibit D attached to DMEA's Response to Motion for Protective Order.

15. DMEA also argues that its proposed discovery is relevant to the justness and reasonableness of Tri-State's proposed exit fee. DMEA takes the position that the truth of the assertions made by Tri-State is key to whether or not Tri-State's proposed exit charge is actually a reasonable and considered calculation—or instead, an arbitrary number manufactured with the purpose of preventing DMEA from leaving Tri-State at all. In DMEA's view, if Tri-State has been considering a move to FERC for years, but decided to wait until the last possible minute to pull the trigger, this truth would cast significant doubt on Tri-State's credibility.

16. As to Tri-State's claims that the discovery is disproportionate, DMEA counters that there is no burden associated with allowing a witness already under oath to answer questions based on personal knowledge. DMEA points to Administrative Law Judge (ALJ) Denman's decision on a previous discovery dispute where in considering the importance of the issues, the ALJ noted that “[f]or example, DMEA's full performance under its wholesale power contract, that lasts through 2040 without a termination clause, would provide to Tri-State (and its 42 other members) an estimated net present value of revenue of approximately \$557 million,”² and noted that the dispute over the exit fee could amount to hundreds of millions of dollars. DMEA claims its litigation counsel worked full-time to review thousands of documents. DMEA concludes that in light of this effort, Tri-State's discussion of “the burden of preparing a witness to testify on the topics in the Rule 30(b)(6) Notice” lacks credibility.³

17. At any rate, DMEA argues that none of the Rule 30(b)(6) topics should be outside the personal knowledge of one or more witnesses that Tri-State already designated to testify, and it should take little effort to identify the Tri-State executive most involved in the FERC issue and

² Decision No. R19-0466-I issued June 3, 2019 at ¶ 35.

³ Motion at p. 10.

“prepare” them to tell the truth. According to DMEA, Tri-State’s management has already spent considerable time discussing the FERC issue, going so far as to tell its members during the June 13, 2019 conference call that “[w]e can’t overcommunicate enough about this topic. We want to make sure everyone is informed.”⁴

18. Finally, DMEA maintains that the potential admission of a new member is relevant to the calculation of DMEA’s exit charge. DMEA notes that new load or facilities dedicated to this new purported FERC-jurisdictional-making customer could alter the calculation of a just, reasonable, and nondiscriminatory exit charge.

3. CEO Response

19. CEO believes DMEA’s deposition topics are relevant to this Proceeding for two reasons: (1) potential FERC rate regulation may affect the Commission’s jurisdiction over this case; and (2) understanding how and why Tri-State is seeking FERC rate regulation may provide evidence relevant to the question of whether Tri-State’s proffered exit charge methodology is just, reasonable, and non-discriminatory.

20. CEO is of the opinion that FERC rate regulation over Tri-State may affect the Commission’s jurisdiction over this Proceeding. CEO notes that Tri-State continues to raise questions about the Commission’s jurisdiction to provide the relief DMEA requests, for example, by asserting that instead of setting a just, reasonable, and non-discriminatory exit charge, a proper exercise of the Commission’s jurisdiction would be to direct DMEA to complete the withdrawal negotiations ordered by Tri-State’s Board. CEO advances the argument that information about how and why Tri-State is considering pursuing FERC jurisdiction and the

⁴ See, Exhibit C attached to DMEA’s Response to Tri-State’s Motion for Protective Order, *Affidavit of Virginia Harman*.

scope of that jurisdiction may be relevant, if for example, Tri-State seeks again to remove this Complaint from the Commission's jurisdiction.

21. In addition, CEO notes that it understands that Tri-State intends to become subject to FERC rate regulation by adding a new member. CEO reasons that a new member of Tri-State would presumably have ownership rights, patronage rights, and enter into a contract with Tri-State to purchase electricity for some number of years. This new member would therefore purchase some of the electricity that DMEA would no longer be purchasing if it withdraws from membership. Gaining a new member would, according to the Mark-to-Market methodology Tri-State used to calculate its preferred exit charge, decrease the "net present value of the net loss to Tri-State's margin"⁵ caused by DMEA's withdrawal. CEO concludes that information about how Tri-State intends to gain FERC rate regulation—specifically related to the size and load of the new member—would provide information relevant to the Commission's determination of a just, reasonable, and non-discriminatory exit charge because it will help the Commission assess the impact of DMEA's withdrawal on Tri-State's remaining members.

C. Findings and Conclusions

22. The Scope of Discovery has been set out by this Commission on numerous occasions. We are generally guided by the following principles.

23. Commission Rule 1405 governs discovery in Commission proceedings. Rule 1405 incorporates by reference specific provisions of the discovery rules found at C.R.C.P. Rules 26 through 37. "The Commission discourages discovery disputes, and will sanction parties and attorneys that do not cooperate in good faith." Rule 1405(g).

⁵ CEO Response at ¶ 8.

24. A party may serve discovery upon another party to discover any matter, not privileged, that is relevant to a claim or defense of a party. Rule 26(b)(1). The scope of pretrial (or prehearing) discovery is broad in order to effectuate its purposes, some of which are: discovery of relevant evidence, simplification of issues, elimination of surprise at hearing, and promotion of settlement of issues and of cases. *Silva v. Basin Western, Inc.*, 47 P.3d 1184, 1188 (Colo. 2002). Preparation for cross-examination of witnesses at hearing is another purpose of discovery.

25. Consistent with discovery purposes, the concept of relevance with respect to discovery requests is a broad one (*Sewell v. Public Service Company of Colorado*, 832 P.2d 994, 999 (Colo. App. 1991)), and it “is not equivalent to the standard for admissibility of evidence at trial” (*Williams v. District Court*, 866 P.2d 908, 911 (Colo. 1993)). The test for relevance for purposes of discovery is whether the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.” Rule 26(b)(1), C.R.C.P. Moreover, requests for information reasonably calculated to lead to the discovery of admissible information related to a respondent’s defenses is permissible. (*See Williams v. District Court*, 866 P.2d at 911-912.). “Information is discoverable if it is sufficiently related to the issues in the litigation,” including facts giving rise to claims or defenses. (*Williams v. District Court*, 866 P.2d at 914). In determining what is discoverable, a party should not be limited by its opponent’s theory of the case. (*Gopher Excavation, Inc. v. N. Am. Pipe Corp.*, 17-CV-1021-MSK-KHR, 2017 U.S. Dist. LEXIS 217798, at *8-12, 2017 WL 735530 (D. Colo. Dec. 15, 2017).

26. When determining discovery disputes, “the rules should be construed liberally to effectuate the full extent of their truth-seeking purpose, and in close cases the balance must be

struck in favor of allowing discovery.” *National Farmers Union Property and Casualty Co. v. District Court*, 718 P.2d 1044, 1046 (Colo. 1986).

27. However, discovery is not without its limits. In *Silva v. Basin Western, Inc.*, 47 P.3d at 1188, the Colorado Supreme Court warned that “[t]he need for discovery must be balanced by weighing a party’s right to privacy and protection from harassment against the other party’s right to discover information that is relevant.”

28. As Tri-State quotes in its Motion, “[t]o resolve a dispute regarding the proper scope of discovery in a particular case, the trial court should, at a minimum, consider the cost-benefit and proportionality factors set forth in C.R.C.P. 26(b)(2)(F).” *DCP Midstream*, 2013 CO 36, ¶ 35. “When tailoring discovery, the factors relevant to a trial court’s decision will vary depending on the circumstances of the case, and trial courts always possess discretion to consider any or all of the factors listed—or any other pertinent factors—as the needs of the case require.” *Id.*, ¶ 9. Moreover, whether discovery is proportional to the needs of the case turns on “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” C.R.C.P. 26(b)(1).

29. We agree with DMEA and CEO that the issue of Tri-State seeking jurisdiction under FERC is relevant to the Proceeding and to the claims that the exit charge is unjust and unreasonable. It is certainly relevant that by successfully obtaining FERC jurisdictional rate regulation over it, Tri-State would succeed in circumventing PUC jurisdiction and require DMEA to seek relief in a different venue. This has been an apparent strategy of Tri-State throughout this Proceeding, seeking to dismiss the Complaint before the Commission due to lack

of jurisdiction, and seeking similar relief in the Adams County District Court, which were both rebuffed by the respective venues.

30. It is also relevant that Tri-State has indicated to its members and BOD that it intends to add a new member to the cooperative. How that new member affects the cooperative structure, as well as any mitigating affect admitting a new member would have on the cooperative that would alter the calculations Tri-State presumably utilized to determine DMEA's exit charge are squarely within the four corners of DMEA's complaint.

31. Regarding Tri-State's argument that the FERC centric discovery imposes burdens not proportional to the needs of the case, we find Tri-State's arguments here non-availing. DMEA and CEO have provided arguments that tend to show that the matter of FERC regulation of Tri-State is not irrelevant to the claims and defenses in this Proceeding, but are directly related to the claim of an unjust and unreasonable charge.

32. DMEA's position that none of the Rule 30(b)(6) topics should be outside the personal knowledge of one or more witnesses that Tri-State already designated to testify is persuasive. As DMEA points out, "it should take little effort to identify the Tri-State executive most involved in the FERC issue and 'prepare' them to"⁶ discuss this proposal. As DMEA points out, Tri-State's management has already spent considerable time discussing the FERC issue, going so far as to tell its members during the June 13, 2019 conference call that "[w]e can't overcommunicate enough about this topic."

33. We are convinced that under the standards of C.R.C.P. 26(b)(1), the issue of whether Tri-State intends to seek FERC jurisdiction is relevant to the claims asserted by DMEA

⁶ DMEA Response at p. 7.

in its Complaint, as well as the defenses raised by Tri-State, especially that the Commission is without jurisdiction to hear this matter. Further, we find that discovery related to FERC jurisdiction is “proportional to the needs of the case, ... the parties’ relative access to relevant information, the parties’ resources, [and] the importance of the discovery in resolving the issues.”⁷ We are additionally satisfied that the burden or expense of discovery related to Tri-State’s proposal to seek FERC jurisdiction does not outweigh its benefit, given the importance of this matter to this Proceeding.

34. Therefore, Tri-State’s Motion for Protective Order is denied. Tri-State shall make available any witnesses that have already been deposed to answer further questions regarding its proposal to seek FERC jurisdiction, in addition to any witnesses yet to be deposed. Further, to the extent that the parties relied on C.R.C.P. 121 § 1-12(1) to stay any discovery on the issue of Tri-State’s proposal to seek FERC jurisdiction pending a ruling on Tri-State’s Motion, that stay shall be lifted immediately upon issuance of this Decision.

II. ORDER

A. It Is Ordered That:

1. The Motion of Tri-State Generation and Transmission Association, Inc. (Tri-State) for Protective Order (Motion) filed on June 14, 2019 is denied consistent with the discussion above.

2. Any stay of discovery related to the issue of Tri-State’s proposal to seek Federal Energy Regulatory Commission jurisdiction pursuant to Colorado Rule of Civil Procedure 121 § 1-12(1) pending a decision on the Motion is lifted as of the effective date of this Decision.

⁷ C.R.C.P. 26(b)(1).

3. Tri-State shall make available to Delta-Montrose Electric Association, any witnesses that have already been deposed to answer further questions regarding its proposal to seek Federal Energy Regulatory Commission jurisdiction, in addition to any witnesses yet to be deposed.

4. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
June 20, 2019.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

Commissioners

COMMISSIONER JOHN GAVAN IS RECUSED.