

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0059E

IN THE MATTER OF THE VERIFIED APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. FOR APPROVAL OF THE RETIREMENT OF THE NUCLA STATION, AND REQUEST FOR WAIVER OF RULE 3103(D),

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
CONOR F. FARLEY
GRANTING-IN-PART AND DENYING-IN-PART
UNOPPOSED MOTION, ORDERING SUPPLEMENTAL
DIRECT TESTIMONY, SCHEDULING PREHEARING
CONFERENCE, REQUIRING PARTIES
TO CONFER, AND REQUIRING TRI-STATE
TO FILE A REPORT REGARDING THE CONFERRAL
BEFORE THE PREHEARING CONFERENCE**

Mailed Date: May 1, 2020

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I. BY THE COMMISSION**A. Background**

1. On February 14, 2020, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a Verified Application and Request for Waiver of Rule 3103(d) in which it requests that the Commission: (a) approve the retirement of the Nucla Station and the abandonment or discontinuation of such facilities without equivalent replacement; and (b) waive the notice requirements of Commission Rule 3103(d) of the Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* 723-3 (Application). The Nucla Station ceased operations on September 9, 2019, which Tri-State officially announced on September 19, 2019. Tri-State had entered into an agreement with the Colorado Department of Public Health and Environment, the U.S. Environmental Protection Agency, WildEarth Guardians, and the National Parks Conservation Association in September 2016 to retire the Nucla Station by December 31, 2022.¹ Tri-State moved up the retirement date due to the “dwindling” use of the Nucla Station caused by the inability of the Nucla Station to produce electricity at a competitive cost compared to natural gas and renewable-generated electricity.²

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

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

4. On March 16, 2020, Western Resource Advocates (WRA) filed a Motion for Leave to Participate as *Amicus Curiae* and Response to Tri-State’s Request to Waive Commission Rules (WRA’s Motion).

¹ Application at 2.

² Direct Testimony of Barr W. Ingold at 7:8-14; Direct Testimony of Robert W. Wolaver at 3:12-23 (both filed with Application).

5. On March 17, 2020, Trial Staff of the Commission (Staff) filed a notice of intervention by right and entry of appearance.

6. On March 23, 2020, Tri-State filed an Unopposed Motion Regarding Request for Waiver, Additional Notice, and Limited Extended Intervention Period (Unopposed Motion). Tri-State states that Staff, the OCC, and WRA do not oppose the Unopposed Motion.

7. On March 24, 2020, Tri-State filed a Response to WRA's Motion in which it stated that it did not oppose WRA's participation as an *amicus curiae* in this proceeding.

8. On April 23, 2020, the Commission deemed the Application complete and referred this proceeding to an Administrative Law Judge (ALJ) for disposition.³ The proceeding was subsequently assigned to the undersigned ALJ.

B. Motions

1. WRA's Motion

9. In its Motion, WRA requests permission to participate as an *amicus curiae* for purposes of providing legal argument on: (1) legal precedent regarding the type of information a utility must provide in a Certificate of Public Convenience and Necessity for abandonment under Rule 3103; and (2) a utility's obligation to seek Commission approval prior to a transfer of water rights under § 40-5-105, C.R.S. No party opposes WRA's request. Accordingly, the ALJ shall grant WRA's request to participate as an *amicus curiae* for the stated purposes.

³ Decision No. C20-0282-I.

2. Unopposed Motion

a. Background

10. In the Application, Tri-State requests “a waiver of the local government notice requirements set forth in Commission Rule 3103(d).”⁴ As support, Tri-State asserts that: (a) “neither Tri-State’s Members nor their respective member-customers will be affected by the grant of this Application” because “reliable service to Tri-State’s Members and their respective end-use member-customers will continue unchanged;” and (b) “Tri-State previously conducted an extensive outreach program with affected counties and municipalities.”⁵ Tri-State effectively concludes that, under the circumstances of this proceeding, “the local government notice requirements set forth in Commission Rule 3103(d)” are not required and thus should be waived.⁶

b. Unopposed Motion

11. In the Unopposed Motion, Tri-State elaborates on its justification for requesting the waiver. Specifically, Tri-State states that “[r]ead in conjunction with Rule 3103(c), the notice provisions of Rule 3103(d) appear to contemplate that notice consistent with the requirements of Rule 3002(d)(I)-(XII) be issued prior to the retirement of Nucla Station.” However, such notice is no longer possible since Tri-State has already ceased operation of the Nucla Station. For this reason, Tri-State is requesting a waiver of the requirements of Rule 3103(d).⁷

12. However, “based on discussions with Staff counsel, Tri-State agrees that it is appropriate to clarify the extent of its waiver request, and provide additional notice to relevant

⁴ Application at 9.

⁵ *Id.* at 7.

⁶ *Id.* at 9.

⁷ Unopposed Motion at 2 (¶ 3).

local governments and an opportunity for such governments to intervene in this proceeding.”⁸ As to the waiver request, “Tri-State seeks only a waiver of the notice provisions of Rule 3103(d) to the extent such provisions require notice be provided prior to the termination of operations at Nucla Station.”⁹ In the Unopposed Motion, Tri-State requests that the Commission “expedite its decision with respect to the prior notice provisions of Rule 3103(d) so that Tri-State may timely take any required actions and provide appropriate information in support of its Application.”¹⁰ More specifically, Tri-State is requesting an expedited decision on its “limited waiver of rule 3103(d) requested in the Application.”¹¹

13. As to the notice, Tri-State proposes to provide the additional notice to the Towns of Nucla, Naturita, and Norwood, and to Montrose, Mesa, Delta, and San Miguel Counties by U.S. postal service and/or electronic mail within one week of a Commission decision granting the Unopposed Motion. The additional notice would include all of the information required by Rules 3103(d) and 3002(d)(I)-(XII).¹² Finally, Tri-State proposes a three-week extension of the intervention period for the local governments that receive the notice with such extension running from the date of Tri-State’s proposed notice.¹³

c. Analysis

14. The ALJ shall grant that portion of the Unopposed Motion requesting: (a) authorization to provide notice meeting the requirements of Rule 3002(d)(I)-(XII) to the Towns of Nucla, Naturita, and Norwood, and to Montrose, Mesa, Delta, and San Miguel

⁸ *Id.* at 3 (¶ 4).

⁹ *Id.* at 3 (¶ 5) (underscoring omitted).

¹⁰ *Id.*

¹¹ *Id.* at 4 (¶ b of the request for relief).

¹² *Id.* at 3 (¶ 6).

¹³ *Id.* at 4 (¶ 7).

Counties; and (b) a three-week intervention period for the local governments that receive the notice with such extension running from the date of Tri-State's proposed notice. No party opposes Tri-State's request and there is no evidence or argument that granting that portion of Tri-State's request will create any prejudice.

15. However, the ALJ shall deny the request for an expedited decision addressing whether Rule 3103(d) required notice meeting the requirements of Rule 3002(d)(I)-(XII) to be provided to the identified towns and counties prior to the retirement of the Nucla Station. One or more of the towns and counties that will now receive notice might seek to intervene in this proceeding and provide evidence and/or argument concerning the proper interpretation of Rule 3103(d). The ALJ concludes that it would be inappropriate to decide the question before any such new intervenors are given the opportunity to weigh-in.

16. In addition, Tri-State's argument that it requires an expedited decision interpreting Rule 3103(d) "so that [it] may timely take any required actions and provide appropriate information in support of its Application" is unsupported.¹⁴ However, Tri-State does not identify the "actions" or "information" that are allegedly contingent on a decision interpreting Rule 3103(d) and no such "actions" or "information" are readily apparent. Further, none of the information required by Rule 3002(d)(I)-(XII) in the notice to the towns and counties ordered above is dependent on a determination of whether Rule 3103(d) required Tri-State to provide the notice before it retired the Nucla Station. As a result, the ALJ concludes that there is no need to

¹⁴ *Id.* at 3 (¶ 5).

expedite a decision interpreting Rule 3103(d) and Tri-State's request for such a decision shall be denied.¹⁵

C. Supplemental Direct Testimony

17. In Decision No. C20-0282-I, the Commission directed the ALJ to investigate several issues raised by the Application.¹⁶ In light of the Commission's directive and the fact that the proceeding will be delayed due to the additional notice provided to the towns and counties noted above, the ALJ shall order Tri-State to file supplemental direct testimony addressing the topics identified by the Commission. In the supplemental direct testimony, Tri-State must also address why it did not file the Application before: (a) it announced in July 2019 that the Nucla Station would cease operations when it exhausted its remaining on-site fuel supply; and (b) the Nucla Station exhausted its on-site fuel supply on September 9, 2019. The deadline for filing the supplemental direct testimony will be May 29, 2020.

D. Prehearing Conference

18. It is appropriate to hold a prehearing conference in this proceeding. Accordingly, a prehearing conference shall be scheduled for June 11, 2020 at 9:00 a.m.

19. Tri-State, Staff, the OCC, and any additional towns or counties who seek intervention shall confer in advance of the prehearing conference regarding a schedule for this proceeding. Tri-State shall file a report of the results of the conferral. If there is agreement on a procedural schedule, the report shall state as much and detail the stipulated procedural schedule and associated discovery procedures. If agreement is not achieved, the report shall state as much

¹⁵ For the same reason, the ALJ will not expedite a decision on the question of "whether the community notification requirements in Rules 3103(d) is limited to impacts related to service, or also include a requirement for a utility to notify affected counties and cities regarding the economic and environmental impacts that could occur from a plant abandonment." WRA Motion at 10 (¶ 23).

¹⁶ Decision No. C20-0282-I at 3 (¶ 7).

and identify the competing schedules and discovery procedures. For purposes of developing a schedule, the latest date on which the hearing must conclude is August 28, 2020, which is based on the assumption that the proceeding will be decided within the 250-day deadline provided by § 40-6-109.5(1), C.R.S. The deadline to file the report shall be June 9, 2020.

20. All parties and individuals or entities seeking party-status must appear at the prehearing conference. Failure to attend or to participate in the prehearing conference is a waiver of any objection to the rulings made, to the procedural schedule established, and to the hearing dates scheduled during the prehearing conference.

II. ORDER

A. It Is Ordered That:

1. Tri-State Generation and Transmission Association, Inc. (Tri-State), Trial Staff of the Commission, and the Office of Consumer Counsel are the current parties to this proceeding.

2. The Motion for Leave to Participate as *Amicus Curiae* and Response to Tri-State's Request to Waive Commission Rules filed by Western Resource Advocates on March 16, 2020, is granted consistent with the discussion above.

3. The Unopposed Motion Regarding Request for Waiver, Additional Notice, and Limited Extended Intervention Period filed by Tri-State on March 23, 2020, is granted-in-part and denied-in-part consistent with the discussion above. Tri-State shall provide the additional notice satisfying the requirements of Rule 3002(d)(I)-(XII), 4 *Code of Colorado Regulations*, to the Towns of Nucla, Naturita, and Norwood, and to Montrose, Mesa, Delta, and San Miguel Counties within one week of the mailed date of this Decision. The recipients of the notice shall then have three weeks from the date of Tri-State's notice to intervene in this proceeding.

4. Tri-State shall file the supplemental direct testimony described above on or before May 29, 2020.

5. A prehearing conference in this proceeding is scheduled as follows:

DATE: June 11, 2020

TIME: 9:00 a.m.

PLACE: Commission Hearing Room B
1560 Broadway, 2nd Floor
Denver, Colorado

6. Tri-State shall file the report of the conferral identified above on or before June 9, 2020.

7. This Decision is effective immediately.

S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

CONOR F. FARLEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director