

1 BEFORE THE PUBLIC UTILITIES COMMISSION
2 OF THE STATE OF COLORADO

3 -----
4 PROCEEDING NO. 19F-0620E
5 -----

6 LA PLATA ELECTRIC ASSOCIATION, INC.,
7
8 Complainant,

9 v.

10 TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION,
11 INC.,

12 Respondent.
13 -----

14 PROCEEDING NO. 19F-0621E
15 -----

16 UNITED POWER, INC.,
17
18 Complainant,

19 v.

20 TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION,
21 INC.,

22 Respondent.
23 -----

24 The above-entitled matter came on for
25 hearing before Administrative Law Judge ROBERT GARVEY,
commencing at 10:05 a.m., on April 14, 2020, pursuant
to videoconference by Google Hangouts meeting, said
proceedings having been reported in shorthand by
Debbie Zoetewey.

Whereupon, the following proceedings
were had:

1 **FOR LA PLATA ELECTRIC ASSOCIATION, INC.:**

2 MATTHEW S. LARSON, ESQ.
3 RAYMOND L. GIFFORD, ESQ.
4 Wilkinson Barker Knauer, LLP
5 1755 Blake Street, Suite 470
6 Denver Colorado 80202

7 **FOR UNITED POWER, INC.:**

8 MICHAEL L. O'DONNELL, ESQ.
9 PETER W. HERZOG, III, ESQ.
10 JOEL NECKERS, ESQ.
11 Wheeler Trigg O'Donnell, LLP
12 370 Seventeenth Street, Suite 4500
13 Denver Colorado 80202

14 **FOR TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION:**

15 THOMAS DOUGHERTY, ESQ.
16 DIETRICH C. HOEFNER, ESQ.
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1 P R O C E E D I N G S

2 A.L.J. GARVEY: We'll go on the record
3 here with consolidated proceedings 19F-0620E and
4 19F-0261E, La Plata Electric Association, Inc., versus
5 Tri-State Generation and Transmission Association,
6 Inc., and United Power, Inc., versus Tri-State
7 Generation and Transmission Association, Inc.

8 I'm Robert Garvey; I'm the
9 administrative law judge assigned to this case. Today
10 is the 14th of April 2020, a little bit after 10 a.m.
11 This proceeding comes on for status conference
12 pursuant to Decision 20-0218-I.

13 I'm going to start with appearances.
14 And I will start with -- we'll go La Plata, United
15 Power and Tri-State. So, identify yourself, say who
16 you are with and go from there.

17 MR. LARSON: This is Matthew Larson of
18 the law firm Wilkinson Barker Knauer, LLP, on behalf
19 of La Plata Electric Association, and also with me is
20 Raymond Gifford of Wilkinson Barker Knauer, LLP, for
21 La Plata.

22 MR. GIFFORD: Good morning.

23 MR. HERZOG: Good morning, Your Honor.
24 This is Peter Herzog, from Wheeler Trigg O'Donnell, on
25 behalf of United Power. Mike O'Donnell and Joel

1 Neckers are also with me.

2 A.L.J. GARVEY: Good morning.

3 MR. DOUGHERTY: Tom Dougherty of the law
4 firm Lewis Roca Rothgerber Christie, representing
5 Tri-State. With me this morning is Dietrich Hoefner,
6 of the same firm.

7 A.L.J. GARVEY: All right.

8 First off, I'll start a few things off
9 here. I owe Mr. Hoefner an apology, because he got an
10 e-mail with one word written on it yesterday that I
11 was sending out. I just want to say that on the
12 record here, I had gotten a -- someone sent me an
13 e-mail with a press release from what happened last
14 week, which I'm sure we will get into. I forwarded
15 that with one word, going, "So," like that, because I
16 didn't know what this was going to mean. And I will
17 say at this time of COVID-19, the "so" was written s-o
18 and not s-e-w to sew something. That's it. There was
19 nothing on there.

20 I quickly -- I was notified of that. I
21 said to Mr. Hoefner, I apologize, please disregard
22 that. So there's nothing that he learned or figured
23 out anything other than, boy, I'm curious of what
24 we're going to do tomorrow. If anyone has any
25 questions, I can further elaborate on that if you

1 want.

2 The next thing, I first will mention
3 that, as you know, I'm taking this case up very late
4 in the game. So I'm curious to hear what people have
5 to say. I've read both of the -- I don't know if
6 they're motions or if they're suggestions or notices
7 or exactly what was filed the last couple of days, so
8 I have read through that.

9 I will tell you I have not read all of
10 the testimony at this point, having just gotten this
11 and not knowing what's going on. I can't speak
12 specifically to every bit of testimony that's been
13 filed so far.

14 That being said, I'll start, Mr. Larson,
15 with La Plata, is there anything that you want to
16 bring up first when we start this or not?

17 MR. LARSON: No, Your Honor. Thank you
18 for letting us briefly speak. I think that we put the
19 schedule out there last week for our motion for
20 consideration, try to start the conversation about
21 when a hearing should occur. We attempted to confer
22 with Tri-State about that schedule; unfortunately,
23 they were not willing to meet or speak to us about it,
24 and then they locked in their filing yesterday.

25 Some of the issues that they believe

1 could be addressed, we're prepared to address those
2 over the course of today. But we stand behind where
3 we are with regard to our proposed procedural
4 schedule, and to the extent, welcome discussion with
5 the administrative law judge on that point.

6 A.L.J. GARVEY: Okay. Mr. Herzog, is
7 there anything you want to add to that?

8 MR. HERZOG: No, Your Honor. We did not
9 know your schedule, and we put in a schedule that was
10 satisfactory and available to all the people on our
11 side. But we are prepared to talk about a different
12 schedule, depending on what your availability is.

13 A.L.J. GARVEY: Okay. Fair enough. And
14 that takes us to Mr. Dougherty. And actually, we'll
15 talk about the schedule at least -- I think that's the
16 last thing we'll talk about today. I think that's
17 where we're going to finish because other things at
18 least that were filed by Tri-State might have an
19 effect on that schedule, so I want to leave that to
20 last. I just want to make sure there's nothing that
21 La Plata and Power want to bring up first.

22 So, Mr. Dougherty, I'm going to turn it
23 to you, and do you have kind of some suggestions? I'm
24 not sure how you want to do that in terms of
25 testimony.

1 So I tell you -- before I do that, do
2 one more thing for me. One of the things
3 Mr. Dougherty did put in his motion was an extension
4 of the deadline for special circumstances. And I have
5 to have a hearing for that; and certainly, that's
6 where I'm going to want to start before we do a
7 procedural schedule.

8 Does anyone have an objection or want to
9 make any hearing as to whether there's exceptional
10 circumstances going on now to move the deadline for
11 this 90 days out?

12 MR. LARSON: Your Honor, from La Plata's
13 perspective, and likely United as well -- let them
14 weigh in on their own -- this hearing is very far
15 along. We've gone through the entire procedural
16 schedule to this point. In fact, we're supposed to
17 already have had statements of position put in in this
18 case. We believe it's time to resolve this case.

19 And also I would add that some of the
20 actions taken by Tri-State, particularly actions taken
21 yesterday at the Federal Energy Regulatory Commission,
22 point out that time is of the essence, and we're
23 prepared to discuss that with you today.

24 But for that reason, we do not believe
25 that extraordinary circumstances warrant a change to

1 the statutory deadline in this case. If anything,
2 Tri-State's actions support moving forward more
3 quickly, just to try to reach a resolution of this
4 proceeding as soon as possible.

5 A.L.J. GARVEY: Okay. Mr. Herzog.

6 MR. HERZOG: Yes, Your Honor. United
7 Power agrees with that completely. In fact,
8 yesterday, despite the fact that Tri-State didn't tell
9 Your Honor about this, they filed a request for FERC
10 to their withdrawal-methodology tariff that would be
11 effective as of today.

12 They are engaged in an all-out race to
13 try to create a conflict between this Commission's
14 jurisdiction and FERC, despite the fact that FERC
15 indicated that the issue of whether Tri-State was even
16 properly before FERC was an issue for the Colorado
17 tribunal.

18 And that goes to the issue that
19 Tri-State had raised about the continuing jurisdiction
20 of the Commission. And I would suggest to you, Judge
21 Garvey, that FERC -- that not only are there
22 circumstances for extending the deadline, there are
23 exceptional circumstances for accelerating the
24 deadline.

25 While Tri-State is in this forum

1 claiming that there are exceptional circumstances that
2 require a delay of the Commission's decision, they are
3 at FERC asking FERC to expedite their decision, even
4 though they are operating under the exact same
5 restrictions as is this Commission in order for even
6 conflict preemption and for attempt to invalidate any
7 actions taken by you or by the Commission after today.

8 A.L.J. GARVEY: Mr. Dougherty, what do
9 you have to say to that?

10 MR. DOUGHERTY: Judge Garvey, first an
11 initial matter, in Tri-State's response that was filed
12 yesterday, we did not move the Commission to extend
13 the proceeding pursuant to the statute for an
14 additional 90 days, as we may keep that up as an issue
15 for discussion today.

16 We believe that under the circumstances,
17 primarily associated with the current public-health
18 order virus, those are textbook extraordinary
19 circumstances that by themselves probably warrant the
20 Commission considering whether we need to extend this
21 if only for reasons to be able to have an in-person
22 hearing.

23 You already saw some examples of
24 technical difficulties that can arise trying to do
25 things remotely. We don't know when we'll be able to

1 have an in-person hearing, at least creating the
2 additional window of time for the Commission to allow
3 the public-health situation to resolve itself makes
4 sense.

5 That doesn't mean the Commission needs
6 to take that entire 90 days; but Tri-State believes
7 that as an initial matter, creating that opportunity
8 and then a little more scheduling flexibility to
9 address some of these issues, that certainly is
10 something worth considering.

11 As to -- I'm sorry, as to United Power's
12 comments about what's going on at FERC, Tri-State has
13 not hidden anything from them in the beginning of this
14 proceeding and before this proceeding as to what its
15 position is relative to FERC's jurisdiction and the
16 withdrawal methodology.

17 None of this is any stricter. Your
18 Honor is well aware of this, as evidenced by your
19 comment of the inadvertent e-mail to Mr. Hoefner. So
20 Tri-State isn't hiding anything in that regard.

21 We believe that the other issues that
22 have been keyed up for discussion today are
23 appropriate issues that may themselves warrant the
24 need for some additional time, and we would advocate
25 that extraordinary circumstances do exist.

1 Finally, the reassignment of this matter
2 from a hearing commissioner to yourself, we think
3 contributes to that. That may not be extraordinary,
4 but it would create a little bit of procedural hiccup,
5 if you will, for you to be able to come up to speed
6 and get this running smoothly again.

7 A.L.J. GARVEY: Okay. First off, I'm
8 getting some complaints about feedback. If you're not
9 talking at the time, just might mute yourself out. So
10 I want to make sure everyone can hear. Keep that in
11 mind.

12 And, Mr. Dougherty, I realize -- and I
13 apologize if I phrased that wrong -- you did not move
14 the Commission to adopt that; but it was one of the
15 things that you had mentioned in there and it's
16 certainly one of the things since I have everyone
17 here, I wanted to bring that up myself. That is what
18 I had intended on.

19 Let me ask you -- and I'll go back to
20 the top here again, start with Mr. Larson -- how do
21 you -- one of the things -- one of the reasons why --
22 I mean, when I looked at the proposed schedule, you
23 have less than two weeks, we start less than two weeks
24 from today, which -- and I certainly understand
25 100 percent, this is ready for a hearing and ready to

1 go. And I believe that the starting date is the day
2 after currently Governor Polis has got the State to
3 reopen at this point. Still the City of Denver would
4 be closed until the 30th.

5 So it seems to be on the cusp of those
6 dates of that. I don't think anyone -- and you tell
7 me if you think otherwise, I think everyone would like
8 to do this in person if we can; is that a fair
9 statement?

10 Again, I've not delved in 100 percent on
11 this, but I think it's kind of a complex case; and
12 while this is a nice method, I think if in a week we
13 could do it in person, that would be good. If it
14 takes two weeks then and it just goes -- if we're
15 talking about two or three weeks, would it be better
16 to do that, and then again, it's an extraordinary
17 circumstance at this point.

18 So I'll start with you and you can
19 respond to those statements.

20 MR. LARSON: Thank you, Your Honor. So,
21 certainly agree that a hearing in person would be
22 preferable. I think, unfortunately, Tri-State's
23 actions, they now filed, after failing to be
24 successful at the FERC in terms of preempting this
25 case, and FERC specifically carved it out in its

1 district court territory order deeming that this case
2 can move forward.

3 So, unfortunately, what they decided
4 instead is, they decided to refile, which puts us on a
5 60-day clock potentially at FERC. So it creates the
6 possibility that this case is going to be preempted.

7 So while I would like to have the case
8 in person -- I agree that would be easier than
9 utilizing this platform, I think, unfortunately, the
10 actions that they continue to take to displace this
11 Commission's jurisdiction are foreclosing that
12 ability.

13 And every single -- the entire theme of
14 Tri-State's filing yesterday, every single item in
15 there is associated with delay and associated with
16 delay so that they can achieve an outcome at the
17 federal level that will result in removing this case
18 or preempting this case, from their perspective.

19 So that's really our concern. It's been
20 a common theme throughout this case. I know you're
21 getting up to speed on the record. But I think what
22 you'll find as you read through the record is
23 continued requests for delay, continued -- you know,
24 trying to kick the can down the road so they continue
25 to take -- those actions were not successful.

1 In fact, something we wanted to discuss
2 with Your Honor today was whether we could make a
3 filing for initial Commission decision under
4 Rule 1404(b) to expedite a decision in this
5 proceeding, wanted to tee that up as a discussion,
6 given Tri-State's action yesterday.

7 So to answer your question, in person
8 would certainly be preferable. I'm not sure that the
9 circumstances here allow for it because of the conduct
10 and actions of Tri-State.

11 A.L.J. GARVEY: Mr. Herzog, anything you
12 want to add to that?

13 MR. HERZOG: Yes, sir, there is. Not
14 only do I agree completely with counsel for LPEA, but
15 I just want to give the Court some context here on
16 this jurisdictional issue and the consequences of the
17 delay that Tri-State is obviously trying to
18 facilitate.

19 Its claim, Judge Garvey, that it is FERC
20 jurisdictional -- and you may not know this because
21 you may not have seen all of the testimony in the
22 record -- is entirely dependent on whether Tri-State
23 properly complied with Colorado law in adding a
24 nonutility member that's by the name of MIECO,
25 M-I-E-C-O, and two other nonutility members.

1 What they did was, they added some
2 nonutility members to try to eliminate the exception
3 from FERC jurisdiction. And United Power and La Plata
4 have, from the beginning, said those additions of
5 those nonutility members violate Colorado law, violate
6 Tri-State's articles of incorporation and their
7 bylaws.

8 And Tri-State went to FERC and filed a
9 DPO, and LPEA, United Power, and even the Commission,
10 Your Honor, contended Tri-State was not FERC
11 jurisdictional because the addition of the nonutility
12 members violated Colorado law.

13 FERC declined to rule on that issue. It
14 said specifically it takes no position on the question
15 of whether MIECO's membership in Tri-State required
16 State regulatory approval or otherwise violated
17 Colorado statutes and regulations.

18 It ruled, then, that those issues are,
19 quote, more appropriately handled in the State forum,
20 namely, this forum, Judge Garvey. And that the,
21 quote, resolution of the pending Colorado PUC
22 proceeding or other litigation concerning Colorado law
23 issues could be relevant to Commission proceedings in
24 the future. End quote.

25 What that means, Judge, is that FERC

1 specifically deferred to the PUC on the question of
2 whether the addition of MIECO and the other nonutility
3 members was valid as a matter of Colorado law, and
4 they unambiguously stated that they could reconsider
5 their own jurisdiction if it ultimately was decided
6 that the addition of the nonutility members failed to
7 comply with Colorado law.

8 Now, Tri-State's apparently so concerned
9 about the decision on that issue that it wants to
10 prevent the Commission from deciding it at all. And
11 how do we know that, Judge? Even though FERC
12 delegated that issue to you and to the Commission,
13 yesterday, they filed their exit-charge methodology --
14 they provided no exit-charge methodology in any of
15 their testimony in the case, they don't have an
16 exit-charge methodology -- LPEA and United Power do --
17 but they filed yesterday with FERC a request that FERC
18 expedite consideration of their exit-charge
19 methodology as a tariff because under those
20 circumstances, there would be a conflict between
21 FERC's jurisdiction and the Commission's jurisdiction.

22 So they don't want to give you a chance,
23 Judge Garvey, to even decide this issue. They are
24 rushing at FERC under the same circumstances -- they
25 say, Oh, Judge, COVID-19, we can't do anything, we

1 have to have an in-person hearing. We can't proceed
2 with this; it's so burdensome.

3 But at FERC they filed a 500-page filing
4 yesterday asking them to -- asking FERC to expedite
5 that consideration so that they could then claim that
6 you don't have the ability, and nobody else has the
7 ability, to decide whether MIECO were properly added.

8 And, Judge, if MIECO and the others are
9 not properly added, and we have -- we have devastating
10 expert testimony on rebuttal on this issue from two of
11 the foremost experts in Colorado who have concluded
12 not only that it doesn't comply with Colorado law, it
13 was a violation of the bylaws and the articles of
14 incorporation.

15 And they recognize what the record
16 suggests, and they don't want to give you or the
17 Commission or anybody else an opportunity to decide
18 it. They want to rush this through FERC in an effort
19 to create a claim of a conflict so they can say to the
20 Commission and to you and to anybody else, you're not
21 allowed to decide.

22 So as Mr. Larson said, there aren't
23 exceptional circumstances to be delaying this. There
24 are exceptional circumstances for expediting it,
25 because they are trying to keep this Commission from

1 deciding an issue that the FERC specifically said it
2 would wait for the Commission to decide.

3 Thank you, sir.

4 A.L.J. GARVEY: Thank you, Mr. Herzog.
5 I appreciate that.

6 Mr. Dougherty, I'm going to give you one
7 last chance here.

8 Is your microphone off? You need to
9 turn it back on.

10 MR. DOUGHERTY: Thank you. I followed
11 your instruction, I muted myself, and forgot to turn
12 myself back on.

13 Counsel can continue their theme of
14 delay as much as they would like. The issues that
15 were identified in Tri-State's response are issues
16 that have nothing to do with the FERC jurisdictional
17 question.

18 Tri-State absolutely has nothing to do
19 with the practical challenges of the public-health
20 orders and the virus situation that we're all faced
21 with right now. That by itself creates practical
22 concerns with the ability to have an efficient hearing
23 and present evidence and develop a record here, as was
24 evidenced at the beginning of this status conference.

25 Tri-State has been working with its own

1 team to see if we could get to a point where we
2 believe we could have a meaningful and effective
3 presentation of evidence using a remote platform, and
4 we are still running into technical problems between
5 all of the different systems that people are using.
6 So that is a very real issue that has nothing to do
7 with the FERC jurisdictional question.

8 The other two issues also that were
9 identified in our response yesterday in terms of
10 either complainants withdrawing their supplemental
11 testimony on jurisdiction or the ALJ striking it or
12 not striking it, allowing Tri-State to submit its own
13 legal argument on those issues, that has nothing to do
14 with what is going on at FERC.

15 And the whole question of further
16 supplementing Tri-State's testimony to put in the
17 withdrawal methodology is something that the
18 complainants have known about since before they filed
19 their complaints in November.

20 It is consistent with Tri-State's
21 position from the very beginning of this proceeding,
22 not be able to put in that sort of evidence until
23 April; and, in fact, we delivered on exactly what we
24 said, and it only makes sense at this point to allow
25 that to go forward.

1 Those are facts and evidence that need
2 to be in this record for the Commission to make an
3 appropriate decision one way or the other; and they
4 have nothing to do with delay, they have nothing to do
5 with what's going on at FERC. They are practical
6 considerations that lead up to whether we can have a
7 hearing in this proceeding and what that hearing
8 should be about.

9 MR. LARSON: Your Honor -- this is Matt
10 Larson for LPEA -- could I raise one item in response
11 to what Mr. Dougherty just said?

12 A.L.J. GARVEY: Sure.

13 MR. LARSON: So if Tri-State is willing
14 to put its FERC filing that it filed yesterday on hold
15 or withdraw its FERC filing to allow this case to
16 proceed on a slower tract, then that solves this
17 problem, we can have a hearing in person. And if
18 Tri-State's willing to do that and willing to say that
19 on the record today, then that will alleviate some of
20 the time pressure.

21 So I think we would be interested in
22 hearing from Mr. Dougherty whether Tri-State is
23 willing to do that given that, according to him, all
24 of this has nothing to do with FERC.

25 A.L.J. GARVEY: Mr. Dougherty, what do

1 you say to that?

2 MR. DOUGHERTY: Tri-State is not willing
3 to move to stay its FERC proceedings. Tri-State
4 believes that to the extent these proceedings are
5 running, they can run in parallel.

6 A.L.J. GARVEY: Let me ask you,
7 Mr. Dougherty, I believe Mr. Herzog has mentioned, I
8 have not seen this filing, but that you asked for
9 expedited relief from FERC?

10 MR. DOUGHERTY: So Tri-State made two
11 filings yesterday, Your Honor --

12 A.L.J. GARVEY: Mr. Dougherty, I asked
13 you a simple question: Did you ask for expedited
14 relief from FERC?

15 MR. DOUGHERTY: Your Honor, I'm pausing
16 because I am not counsel involved in the FERC
17 proceedings.

18 A.L.J. GARVEY: Okay.

19 MR. DOUGHERTY: I have not read those.
20 I have received those, but I have not reviewed those
21 filings in detail. I would not be surprised if one or
22 either or both of those requested expedited treatment,
23 but I personally am not involved in that and don't
24 know that answer.

25 A.L.J. GARVEY: I mean, it's hard for me

1 to square the fact that you want expedited treatment
2 from FERC but you want slowed-down treatment here.
3 That fails to make a lot of sense to me.

4 MR. DOUGHERTY: Your Honor, Tri-State is
5 not asking for slowed-down treatment here. Tri-State
6 is asking for an opportunity to supplement its
7 testimony consistent with the issues that have been
8 raised in our response yesterday.

9 And we are only asking for time to
10 allow -- let me clarify that. Right now, I believe
11 the decision deadline in this proceeding is
12 August 7th. The supplemental testimony that Tri-State
13 is proposing we believe could be done in time to still
14 have a hearing and reach an August 7th deadline.

15 Tri-State raised the possibility of
16 whether the Commission and the parties felt
17 extraordinary circumstances existed. Again, as we
18 discussed before, paragraph 12 of our response is not
19 a request that the Commission find that; it was
20 identifying it as a subject for discussion today.

21 As you noted at the outset of the status
22 conference, the procedural schedule is probably the
23 last thing that we need to talk about after we address
24 all of these other issues. That was one of the
25 issues.

1 So Tri-State is not asking to slow
2 things down here, with the possible exception of all
3 of the parties and the Commission would benefit from
4 having an in-person hearing. We have more than -- I
5 think at last count, depending on what testimony is
6 allowed to come in, we have somewhere around a dozen
7 witnesses, we have probably approaching an equal
8 number of attorneys. We have client representatives,
9 all of whom will want to participate in a proceeding.

10 And with the amount of documentation
11 that will be involved as exhibits and the technical
12 challenges, Tri-State sincerely believes that has to
13 be done in person. And that wouldn't be an issue but
14 for the public-health orders that are in place right
15 now and none of us knowing when those are going to be
16 lifted.

17 So it is not a case of Tri-State
18 intentionally trying to slow things down here and
19 speed things up at FERC.

20 A.L.J. GARVEY: Well, certainly you
21 asked for expedited treatment from FERC, certainly not
22 letting it go at the normal pace.

23 MR. GIFFORD: Your Honor, this is Ray
24 Gifford from La Plata. If I could read from
25 Tri-State's FERC filing yesterday. On the first page,

1 Tri-State respectfully requests the Commission accept
2 the CRL methodology for filing on an expedited basis
3 and allow an effective date of April 14, 2020, which
4 is today. That's expedited.

5 A.L.J. GARVEY: Sounds like that to me.
6 I agree, Mr. Gifford.

7 MR. HERZOG: Could I respond to a couple
8 of other points? Because we were initially just
9 talking about the jurisdictional issue and whether
10 there was the issue of the Commission's continuing
11 jurisdiction and Tri-State's claim and its filing that
12 that was no longer relevant. But then Mr. Dougherty
13 bled into two of the other issues that were raised in
14 Tri-State's filing yesterday afternoon.

15 And neither Mr. Larson or I have had an
16 opportunity to address those. And those pertain --
17 I'll try to be brief, Your Honor. Those pertain to
18 the request that Tri-State be permitted to supplement
19 the testimony to respond to Mr. Lidstone, to
20 Mr. Wiener, the two experts that Tri-State -- or that
21 United Power and La Plata submitted in rebuttal and
22 their request that they now be allowed to submit their
23 contract termination payment methodology that was
24 recently adopted by -- recommended by the Tri-State
25 contract committee and adopted by the Tri-State board

1 of directors.

2 As to the first, Your Honor,
3 Commissioner Koncilja issued an order that indicated
4 that she was going to take evidence on the question of
5 whether MIECO and the other nonutility members were
6 properly added.

7 And in response to that, we --
8 Mr. Larson and I, had extensive discussions with
9 Mr. Dougherty about the fact that Tri-State wanted to
10 submit additional evidence on that issue subsequent to
11 Commissioner Koncilja's order.

12 We took the position initially, Judge,
13 that just as Mr. Dougherty has said repeatedly this
14 morning, it was always their position that there was
15 no jurisdiction. And our response to him was, well,
16 Mr. Dougherty, if that was your position, then as the
17 person who bears the burden of proving a conflict or
18 proving that there is preemption, then you bore the
19 burden of proof on that and you were required to
20 submit that with your answer testimony.

21 But we accommodated Mr. Dougherty and we
22 agreed that Tri-State would be permitted to submit
23 additional testimony and evidence on the question of
24 whether MIECO and the other two nonutility members
25 were properly added.

1 And we said to Mr. Dougherty in a
2 conference room at Lewis Roca, look, Mr. Dougherty,
3 our issue here is, you bore the burden of proof, we're
4 going to allow you to submit additional evidence, but
5 we're entitled to the last word on that. You can't
6 shift the burden of proof to us.

7 And Mr. Dougherty said specifically that
8 they were not seeking to get the last word; that they
9 intended that we would have the opportunity to respond
10 to their evidence.

11 And we said, in those circumstances,
12 then we can agree that you can submit your evidence
13 and we'll submit our evidence and then the record will
14 be closed.

15 And to that end, Judge, we entered into
16 a stipulation regarding the procedural schedule that
17 specified that exact procedure where they would have
18 an opportunity -- and it's before the Commission. We
19 notified Commissioner Koncilja that that was the
20 stipulation that the parties had agreed to, and she
21 asked -- we put it in an e-mail initially, and she
22 asked that it be put in the form of a formal
23 stipulation. And Mr. Dougherty's firm drafted the
24 stipulation, and it's now on record and was filed with
25 the Commission.

1 And it specifically provides that the --
2 that Tri-State would have an opportunity to submit
3 additional evidence on March 11th. It says, On
4 March 11th, Tri-State will file supplemental testimony
5 specifically related to the jurisdictional fact
6 question referenced in the February 12th interim
7 decision.

8 And on March 16th, complainants, United
9 Power and La Plata, will file their own supplemental
10 testimony related to the same jurisdictional fact
11 questions.

12 And, Judge Garvey, they now -- as I said
13 to you when I was speaking earlier, they now recognize
14 that that testimony is devastating to their claim that
15 they properly added MIECO and the other nonutility
16 members under Colorado law.

17 And so now they want to supplement the
18 record in a way that is completely inconsistent with
19 what the parties agreed to, inconsistent with the
20 stipulation, and inconsistent with Mr. Dougherty's
21 representation to Mr. Larson and me that Tri-State was
22 not seeking to have the last word on this issue.

23 Now, turning to the question of the
24 contract termination payment methodology, Judge, the
25 contract committee at Tri-State began meeting in June

1 of last year. And La Plata and United Power filed our
2 formal complaint on November 5th and November 6th
3 respectively.

4 Tri-State has known from the beginning
5 of the commencement of these proceedings, and even
6 before as the parties attempted to engage in some
7 discussion about a just, reasonable nondiscriminatory
8 exit charge, that La Plata and United Power would be
9 presenting a methodology to the Commission for
10 consideration and request that it be adopted in
11 calculating such an exit charge.

12 The procedural schedule was established
13 with us going first on January 10th and with Tri-State
14 providing its answer testimony on February 12th.
15 Tri-State knew that we were -- what methodologies we
16 were proposing, and they elected not to propose any
17 contrary methodology.

18 Instead they said, well, we don't have a
19 board-approved methodology because the contract
20 committee is currently considering that. But there's
21 no reason that Tri-State and its contract committee
22 couldn't have analyzed and recommended an exit-charge
23 methodology to submit with its answer testimony on
24 February 12th. Nothing prohibited them from doing it.
25 That was a deliberate choice that Tri-State made.

1 They could have expedited the
2 consideration of that last summer or this fall or
3 early winter and provided a recommended exit charge,
4 but they didn't. That was a deliberate litigation
5 choice that they made, and it can't provide the basis
6 for now supplementing the record.

7 Secondly, Judge, and this is where I'll
8 end, the exit-charge methodology that was recommended
9 by the contract committee and recently adopted by
10 Tri-State's board is the same mark-to-market
11 methodology that Tri-State employed in calculating the
12 exit charges with Kit Carson and Delta Montrose.

13 Mr. Larson and I represented Delta
14 Montrose in the formal complaint proceeding before the
15 Commission last year that was settled, and that was
16 the same methodology that they proposed for the
17 calculation of an exit charge in that proceeding.

18 They didn't -- they didn't need to wait
19 in order to propose that methodology. Instead, what
20 they did, Judge -- and you'll hear this at the
21 hearing -- they convened a contract committee in the
22 summer of last year to justify imposing a moratorium
23 on all of its members to prevent them from making
24 withdrawal requests, then guess what, almost a year
25 later, all they did is reaffirmed the same

1 mark-to-market methodology it's always employed. It's
2 not a new methodology and there's no justification now
3 for permitting Tri-State to supplement the record.

4 They had the opportunity; they
5 deliberately chose not to present the methodology.
6 They know that's a failure of proof on their part, and
7 they want to fix the record as a result and they
8 shouldn't be entitled to do so.

9 A.L.J. GARVEY: All right. Thank you,
10 Mr. Herzog. Appreciate that.

11 I'm sure we could go on all day with
12 this but we're not going to do that. My basis of
13 looking at this case, the whole reason for this case
14 is the lack of the exit charge being presented. I
15 mean, it's a whole -- that's the whole problem. So I
16 agree with that. I think that that's where that goes.

17 I don't -- this case was supposed to go
18 to a hearing last month. It was all set to go, it was
19 ready to go. But for the fact that Commissioner
20 Koncilja was not reappointed, this case would have
21 gone.

22 I think it's a delay tactic through --
23 what I've seen, again, that's the reason for this
24 case, is because of the delay; and that's what brought
25 this case forward to be filed. So I do agree with

1 that.

2 I don't see any reason -- and at a
3 certain point, there's no more testimony. It's
4 already been extended once; this case should have
5 gone. I don't see any reason for any additional
6 testimony at this time.

7 As far as --

8 MR. DOUGHERTY: Your Honor, may I be
9 heard on that?

10 A.L.J. GARVEY: I'm sorry, was that
11 Mr. Dougherty?

12 MR. DOUGHERTY: I'm sorry. May I be
13 heard on many of those issues, Your Honor?

14 A.L.J. GARVEY: Well, I think we've
15 heard and argued that stuff a bunch. You did not file
16 a formal motion to do that; it's just a discussion
17 right now as far as at least additional testimony. If
18 you want to file a motion later, you can.

19 But we're going to end up with a
20 schedule here. And again, you just set it for
21 discussion; and I can tell you, for the discussion
22 aspect, I think we need to get this case moving. It's
23 set to go and it should be going. I don't see any
24 reason to extend it out again.

25 MR. DOUGHERTY: I appreciate that, Your

1 Honor. I would like to just briefly respond at least
2 with regard to the issue that Mr. Herzog raised
3 concerning the supplemental testimony that has been
4 filed pursuant to the stipulation.

5 A.L.J. GARVEY: Mr. Dougherty, here's
6 what I'll say: If you think there should be
7 supplemental testimony, you have not filed a motion
8 for that yet, we can have a discussion again for
9 another 30 minutes and you file a motion the minute we
10 hang up. I don't want to do that twice. If you want
11 to continue on that, you can file a motion and do
12 that.

13 But as for right now, I'm not going to
14 say file it, and we're going to set a schedule based
15 on the fact that there's not going to be any
16 additional testimony at this point. The motion is
17 not -- this is discussion at this point.

18 As far as extending out for
19 extraordinary circumstances, there's a difference
20 between doing that and making it longer. I'm going to
21 extend it out based upon what I'm hearing just because
22 I don't want to get into a point where we get close to
23 something, and maybe we have it in person if we can.
24 I also don't want to rush myself on it. I think we're
25 going to get tight when we figure this out.

1 I know Mr. Larson's seen me issue
2 decisions. I don't know how good my decisions are,
3 but generally they are pretty prompt, and that --
4 extending the deadline doesn't change my feelings as
5 to when a decision gets out. A decision gets out in
6 30 days of that hearing, and that is a rule that I
7 follow no matter what, if I'm up all night doing it.
8 So it doesn't do that.

9 It's just if something goes -- we have
10 the hearing now, we know if something goes wrong, who
11 knows, one of you gets COVID-19 and ends up in a --
12 and I don't want to -- you know, who knows. We've
13 taken care of that now, so we'll do that.

14 Before we get to the schedule, is there
15 anything that anyone else wants to bring up before
16 that?

17 I'll start with Mr. Larson.

18 MR. LARSON: Yeah. Just one thing, Your
19 Honor. I think all of that conversation kind of
20 underscored exactly what you put your finger on early
21 on, which is that he wants to expedite at FERC and
22 delay at the Commission. I'm glad that we're not
23 dealing with that.

24 I do believe that the FERC proceedings
25 are potentially on as fast as a 60-day clock to try

1 and preempt and displace this Commission's
2 jurisdiction yet again. So as we move into the
3 scheduling conversation, I'd like us to keep that in
4 mind; I'd like to leave this at the initial Commission
5 decision notion that we raised at the beginning of the
6 hearing as we move into that decision.

7 A.L.J. GARVEY: Fair enough.
8 Mr. Herzog, anything you want to add?

9 MR. HERZOG: No, sir.

10 A.L.J. GARVEY: Mr. Dougherty?

11 MR. DOUGHERTY: Nothing else.

12 A.L.J. GARVEY: Okay. Looking at my
13 schedule, again, I think that April schedule is just a
14 little ambitious. And I think we're right on the cusp
15 of potentially being able to have an in-person
16 hearing; I don't know. As I tell my family, you look
17 back two weeks and it's a different story every time.
18 So we look forward two weeks, who knows what's going
19 to happen.

20 My initial thought was perhaps the week
21 of May 18th.

22 MR. LARSON: Your Honor -- oh, I'm
23 sorry.

24 A.L.J. GARVEY: Go ahead, Mr. Larson.

25 MR. LARSON: I appreciate that. I think

1 by the time we get out to May 18th, my concern, again,
2 Tri-State has on the record today, they are unwilling
3 to withdraw their FERC filing, they are unwilling to
4 stop at -- expedited their request for relief at FERC;
5 and it's all in the name of ending this Commission's
6 jurisdiction so that whatever order comes out of this
7 case, preempted by the FERC exit-charge methodology
8 tariff that was filed yesterday.

9 So I would urge the Commission to
10 consider moving that up forward. I know it's
11 difficult to try a case on a platform like this.

12 And also, we're willing to make the
13 filing today for an initial Commission decision to
14 expedite this and try to get a decision in within that
15 60-day window.

16 Unfortunately, Tri-State has led us to
17 this moment; and this is a common theme throughout
18 this case, is that Tri-State continuously pulls the
19 wool over the eyes of this Commission, takes action at
20 FERC, all in the name of not allowing this case to go
21 forward because they don't want to know what the
22 result is going to be.

23 They failed to provide an exit charge at
24 all, not only to the complainants before they brought
25 these cases but over the course of this proceeding.

1 So to the extent that we can move that
2 forward in time and take into consideration the
3 actions Tri-State has taken at FERC, I would urge you
4 to do that.

5 A.L.J. GARVEY: How much earlier --
6 other than the proposed date, how much earlier in
7 May do you think you could do it or be able to do it?

8 MR. LARSON: We could move it all the
9 way up to the first week of May, Your Honor, from
10 LPEA's perspective. And we're willing to do other
11 strategies to try to limit the hearing and shorten the
12 hearing to the maximum extent we can. I know it's a
13 big record, complex case; but under the clock that
14 we're up against at FERC, we're willing to entertain
15 all of those things. That's where the 1404(b) motion
16 idea came from from our perspective, sir.

17 A.L.J. GARVEY: Okay. Mr. Herzog, what
18 do you have to say about that?

19 MR. HERZOG: We're prepared to move
20 forward on the 4th, Your Honor. And I wanted to
21 respond real quick to something you said earlier, I
22 really believe this is a straightforward case that can
23 be tried in about four days.

24 A.L.J. GARVEY: I was really worried,
25 actually, Mr. Dougherty listed there's going to be

1 more, what was it, two dozen lawyers? I'm like, Oh,
2 my God, really? Two dozen lawyers?

3 MR. DOUGHERTY: If I said two dozen,
4 Your Honor, that was a mistake. I think we're looking
5 at about a dozen witnesses, potentially a dozen
6 lawyers.

7 A.L.J. GARVEY: Two dozen, my God. How
8 many attorneys do we need in this case?

9 All right. Mr. Dougherty, I try to look
10 at -- part of it -- I tell you what, part of our deal,
11 we've gone back and forth, Mr. Larson was on another
12 proceeding with me about two weeks ago; and first we
13 had -- we're going to meet on this, Google, then we're
14 going to be Gotomeeting, so we've gone back and forth.

15 I believe we're back -- actually, the
16 Commission, I believe, will be back on Gotomeeting.
17 When we do Gotomeeting, though, there can't be
18 anything else that's scheduled at the same time. So
19 that's -- I don't know if the Commissioners' weekly
20 meeting is going to be on. I don't think so. But --

21 MR. DOUGHERTY: Your Honor, can I be
22 heard on the scheduling issue? Your Honor, Tri-State
23 can make the week of May 18th work. Tri-State
24 believes that that would give the Commission,
25 yourself, time to consider the motion that the parties

1 have suggested that they are going to file today --
2 whether they are filed today or not -- but the motions
3 that have been identified today, that would allow time
4 for consideration of those motions; and if you grant
5 them, for the parties to act on that.

6 That would also allow time, hopefully,
7 for the public-health orders to be lifted such that we
8 can go with an in-person hearing; and if they are not,
9 give the parties time to work out how we would be able
10 to do this technologically using some sort of remote
11 platform.

12 Finally, this was originally set for a
13 five-day hearing. Tri-State believes, if anything,
14 five days will be a challenge, and four days,
15 virtually impossible, from Tri-State's perspective.

16 A.L.J. GARVEY: You know, I kind of go
17 with Mr. Herzog, I don't see it being that gigantic of
18 a thing. When I look -- because I looked at the
19 request for relief this morning again, and I don't
20 think they are that difficult. The biggest one is,
21 What's the price? I mean, that's the big thing out of
22 it.

23 So we can set it for five days; I'm
24 always going to prefer to set things for a longer
25 period of time than a shorter period of time. But,

1 Mr. Larson, you said that 60 days -- again, I haven't
2 looked at the FERC filing, but the 18th would be about
3 30 days from now, is that -- I'm just trying to figure
4 out how we can get around that, is that -- how that
5 would not work if it's the 18th.

6 MR. LARSON: Well, if Tri-State is
7 willing to state on the record today that any exit
8 charge that comes out of this Commission is not
9 preempted by its FERC filing, but Mr. Dougherty is not
10 willing to do that. And Mr. Dougherty is not -- you
11 know, he keeps stating that well, I'm not attorney on
12 the FERC, I'm not representing them at the FERC; if
13 they're willing to say that and they're willing to
14 state that on the record and affirmatively file that
15 with the Commission and make FERC aware that that's
16 the conclusion that they've reached, that the exit
17 charge determined by you, Judge Garvey, will not be
18 preempted, then we've got no problem with May 18th.

19 MR. DOUGHERTY: Your Honor, Mr. Larson's
20 suggestion is contrary to law. The issue is a matter
21 of subject-matter jurisdiction. It either exists or
22 it does not, and it is not something that can be
23 waived by a party.

24 MR. LARSON: So is Tri-State willing to
25 stay the FERC filing? That's the same question that I

1 asked earlier.

2 MR. DOUGHERTY: I already answered that
3 question, Your Honor, Tri-State will not stay the FERC
4 proceedings.

5 MR. LARSON: Yeah, of course they won't.

6 A.L.J. GARVEY: And so here's what I'm
7 looking at: That last week of April, I just think we
8 don't know what's going on. Things can change pretty
9 big during that. And I'm just incredibly reluctant to
10 set it then.

11 The first week of May also is going to
12 be -- I think we're right on the cusp of trying to
13 figure out what's going on. And I don't want to
14 prepare for two types of cases a whole lot if I don't
15 have to.

16 The 11th, the week of the 11th, there's
17 things going on. The week of the 18th of May, there
18 is nothing scheduled at the Commission at all right
19 now. And I think that gives us a shot for doing this
20 with live testimony; and I think by the 18th, we're
21 going to know whether we're going to have live
22 testimony, we're going to know that it ain't happening
23 anytime soon.

24 And so that's what I'm going to rule
25 here. We're going to go to the week of the 18th of

1 May.

2 MR. HERZOG: And, Judge, just very
3 quickly -- because there are other things at issue
4 here, other potential avenues for relief -- do I
5 understand you to be saying, Judge Garvey, that it's
6 your belief that that week is the first reasonable
7 opportunity for the Commission to be able to decide
8 the issue?

9 A.L.J. GARVEY: To hold the hearing?

10 MR. HERZOG: Yes, hold the hearing.

11 A.L.J. GARVEY: Well, I mean, it depends
12 on what avenue you want to hold the hearing. We can
13 hold the hearing tomorrow starting on this one, but I
14 think this case -- I think every party would like to
15 do this in person. And I think in -- especially the
16 way the orders are from the governor and the mayor, at
17 the end of April, someone is -- I guarantee you,
18 somewhere during that week, there's going to be a,
19 We're not coming back, or, We are coming back, I would
20 assume.

21 And so I think the 18th gives us enough
22 time to adjust as to what we're doing. We might be
23 doing it like this, it might be Gotomeeting. But --

24 MR. LARSON: Your Honor, may I raise
25 one -- so given that you've ruled on the 18th, as I

1 understand it, is -- are you open to an initial
2 Commission decision in this matter if we make a motion
3 to that effect?

4 A.L.J. GARVEY: I don't know.

5 MR. LARSON: With the FERC issues that
6 Tri-State has created.

7 A.L.J. GARVEY: Mr. Larson, there's
8 always that problem of me ruling on a motion that's
9 not before me. So I don't really know what that
10 motion says; and so all I can say, if you file a
11 motion -- I'm not sure if it goes to me or if it goes
12 to the Commission.

13 MR. LARSON: I believe it goes to the
14 Commission in full, Your Honor. I think that we can
15 agree on a procedural schedule today, and the process
16 will be the same either way. If they ultimately
17 decide that it should be an ICD and that would be
18 ruled on by the Commission, still go to hearing when
19 you have decided, sir.

20 A.L.J. GARVEY: Normally it comes down
21 to me. I've done initial Commission decisions where
22 it's referred to me for that, but I've never seen it
23 go back. They are the only ones that can take it
24 back, as much as I'd like to send many, many cases
25 back to them, but I think they're the only ones that

1 can take it from me; they sure tell me what to do in
2 some of my cases occasionally.

3 But, yeah, so anyone can file any motion
4 they want and I'll rule on it when it gets to -- or
5 they will rule on it when it gets to them.

6 We'll set this for the week of the 18th.
7 Is there anything else that anyone has, needs to talk
8 about today?

9 MR. DOUGHERTY: Your Honor, the other
10 aspect of the original procedural schedule that was
11 suspended was the deadline for filing post-hearing
12 statements of position. Commissioner Koncilja had
13 originally set what Tri-State believes to be a very
14 expedited schedule of only one week to pull that
15 together.

16 In Tri-State's experience, that is
17 extremely short compared to what the Commission
18 normally allows. Tri-State would request a reasonable
19 amount of time, ten days, to put together the
20 statement of position, which even that is shorter than
21 what the Commission would ordinarily allow. But one
22 week following a hearing of this size and complexity,
23 Tri-State believes it's unnecessary and unreasonable.

24 MR. LARSON: Your Honor, could I respond
25 to that? Could I have an opportunity?

1 A.L.J. GARVEY: Sure, Mr. Larson, go
2 ahead.

3 MR. LARSON: I would note that, as you
4 know, I was counsel for Public Service in their recent
5 electric rate case, a case that was far larger than
6 this case, and we had a seven-day turnaround on our
7 statement of position. So I object to the way that
8 Mr. Dougherty has characterized the practice of the
9 Commission.

10 A.L.J. GARVEY: Mr. Dougherty, you said
11 longer but you didn't say how long, so ten days?

12 MR. DOUGHERTY: I'm sorry, Your Honor, I
13 thought I suggested ten days.

14 A.L.J. GARVEY: Okay. So your
15 suggestion, let me look on here, that's going to the
16 22nd, 29th, approximately the 2nd of June.

17 MR. DOUGHERTY: Or June 1st, Your Honor;
18 that would be fine.

19 A.L.J. GARVEY: All right. Go back to
20 you, Mr. Larson. June 1st, do you have a problem with
21 June 1st?

22 MR. LARSON: I believe this is -- I
23 believe this is actually a fairly straightforward
24 case. I think it's a case about three exit charges:
25 The one offered by LPEA, the one offered by United and

1 the lack of one by Tri-State. So I don't know that we
2 need that much time. We would be willing to do it on
3 a five-day turn, Your Honor.

4 A.L.J. GARVEY: Mr. Herzog, what do you
5 have to say?

6 MR. HERZOG: I'm with Mr. Larson the
7 whole way. I think it's a straightforward case. Our
8 statement of position probably will be drafted before
9 we go to hearing.

10 A.L.J. GARVEY: You know, what I'm going
11 to say right now is, I'm going to say one week right
12 now; but, Mr. Dougherty, I will allow you to --
13 depending how the hearing goes, I'll let you remake a
14 motion to extend that if you want to.

15 Again, I'm anticipating a fairly
16 straightforward case. If that's not the case, if it
17 gets a little bit more tangled up than I'm
18 anticipating and I think there's more time necessary,
19 I will entertain it being extended at that time. Fair
20 enough?

21 MR. DOUGHERTY: Understood. Thank you,
22 Your Honor.

23 A.L.J. GARVEY: So we'll make it one
24 week, which would be the 22nd as of right now.

25 MR. HERZOG: 29th, Your Honor.

1 A.L.J. GARVEY: I'm sorry, 29th. 22nd
2 would be the last day of the hearing.

3 Do we know if -- I'm guessing there
4 might be dailies that are going to be necessary, give
5 the court reporters a heads up on that.

6 MR. LARSON: That's very likely, Your
7 Honor.

8 A.L.J. GARVEY: All right. With
9 everything going on, I don't know, we might have to
10 get some outside court reporters and stuff like that.
11 Probably the earlier we know that the better.

12 All right. Anything else? Mr. Larson,
13 I'll start with you.

14 MR. LARSON: Nothing from our end, Your
15 Honor.

16 A.L.J. GARVEY: Mr. Herzog?

17 MR. HERZOG: No, sir. Thank you.

18 A.L.J. GARVEY: Mr. Dougherty?

19 MR. DOUGHERTY: Nothing further, Your
20 Honor.

21 A.L.J. GARVEY: I'll issue out a
22 decision putting the schedule out there. I have a
23 feeling I'm going to see some motions at some point
24 somewhere along the line, so I will address them as
25 quickly as possible.

1 Please, if you want a shortened
2 deadline, tell me about it. But if there's nothing
3 else, I do appreciate everyone doing this today. I do
4 appreciate everyone getting on here. I know this is
5 not easy, but I think it worked out fairly well. It
6 gives me hope for the future of doing this sort of
7 thing.

8 So, please, everyone stay safe, and I
9 will see you later.

10 Thank you very much. We'll be in
11 adjournment.

12 MR. LARSON: Thank you, Your Honor.

13 (The proceedings concluded at the hour
14 of 11:04 a.m.)

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CERTIFICATE

I, DEBBIE ZOETEWAY, Certified and Registered Merit Reporter, in and for the State of Colorado, do hereby certify that I reported the foregoing proceedings in the first instance, and that later the same was reduced to typewritten form under my direct supervision and control. I further certify that the foregoing is a true and complete transcription of my stenographic notes then and there taken.

Dated April 16, 2020.

/s/ Debbie Zoetewey
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