

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

Docket No. 09A-324E

IN THE MATTER OF THE APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. (A) FOR A CERTIFICATE OF ) PUBLIC CONVENIENCE AND NECESSITY FOR THE SAN LUIS VALLEY-CALUMET-COMANCHE TRANSMISSION PROJECT, (B) FOR SPECIFIC FINDINGS WITH RESPECT TO EMF AND NOISE, AND (C) FOR APPROVAL OF OWNERSHIP INTEREST TRANSFER AS NEEDED WHEN PROJECT IS COMPLETED.

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AND

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Docket No. 09A-325-E

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF COLORADO (A) FOR A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY FOR THE SAN LUIS VALLEY-CALUMET-COMANCHE TRANSMISSION PROJECT; (B) FOR SPECIFIC FINDINGS WITH RESPECT TO EMF AND NOISE, AND (C) FOR APPROVAL OF OWNERSHIP INTEREST TRANSFER AS NEEDED WHEN PROJECT IS COMPLETED.

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**TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.'S  
RESPONSE TO: (1) BLANCA RANCH HOLDINGS, LLC'S AND TRINCHERA  
RANCH HOLDINGS, LLC'S MOTION TO DISMISS AND REQUEST FOR LEAVE  
TO FILE A REPLY, AND (2) SUPPLEMENT TO BLANCA RANCH HOLDINGS,  
LLC'S AND TRINCHERA RANCH HOLDINGS, LLC'S MOTION TO DISMISS**

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Pursuant to Rule 1400 of the Rules of Practice and Procedure of the Colorado Public Utilities Commission (the "Commission"), Tri-State Generation and Transmission Association, Inc. ("Tri-State") responds to the Motion to Dismiss filed by Blanca Ranch Holdings, LLC and Trinchera Ranch Holdings, LLC (collectively "Trinchera Ranch") on January 25, 2010, and to the Supplement to Blanca Ranch Holdings, LLC's and Trinchera Ranch Holdings, LLC's Motion to Dismiss filed on January 27, 2010, as follows:

**INTRODUCTION**

Section 40-6-122 of the Colorado Revised Statutes and Rule 1105 of the Rules of Practice and Procedure of the Commission permit *ex parte* communications between persons<sup>1</sup> and Commissioners related to non-adjudicatory proceedings, including

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<sup>1</sup> Rule 1004(s) defines a "person" to mean, among other things, "any individual, firm, partnership, corporation, company, association, cooperative association, joint stock association, joint venture, governmental entity, or

communications related to investigatory dockets and legislation. C.R.S. § 40-6-122(5); 4 C.C.R. § 723-1, Rule 1105(b)(IV), (V). The Commission has determined that Docket Nos. 08I-227E and 09I-041E are investigatory dockets and has invited persons to make *ex parte* presentations to the Commission on matters that are the subject of those investigations. Representatives of Tri-State have made permissible *ex parte* presentations to Commissioner James Tarpey relating to matters that the Commission was considering in Docket Nos. 08I-227E and 09I-041E. Trinchera Ranch suggests that such *ex parte* presentations violate Section 40-6-122 or Rule 1105 because the matters discussed in those dockets may tangentially relate to matters that are the subject of the proceedings in this consolidated CPCN docket. Trinchera Ranch's Motion and the rule interpretation it advocates therein are wholly without merit and must be rejected.

As if dogmatically repeating an allegation can somehow make it true, Trinchera Ranch alleges in paragraph after paragraph that Public Service Company of Colorado ("PSCo") and Tri-State engaged in prohibited *ex parte* communications on various subjects that relate to issues in Tri-State's and PSCo's present applications for a Certificate of Public Convenience and Necessity (the "Applications"), which Applications are the subjects of Docket Nos. 09A-324E and 09A-325E, respectively.<sup>2</sup> Trinchera Ranch misleadingly relies on general topic sentences in the relevant disclosures to leap to the conclusion that the *ex parte* communications must have related to the very issues that are central to Tri-State's Application in this docket.

In reality, Tri-State's *ex parte* communications with Commissioner Tarpey related solely to matters relevant to investigatory Docket Nos. 08I-227E and 09I-041E and legislative proposals. The Commission solicited these communications because it believed that they would be useful to its investigations in Docket Nos. 08I-227E and 09I-041E. To overcome this reality, Trinchera Ranch advocates for an impermissibly broad interpretation of the rule concerning *ex parte* communications that, essentially, makes any *ex parte* communication in an investigatory docket that even tangentially relates to a matter at issue in a pending adjudicatory proceeding *per se* improper. This interpretation defeats the Commission's intent in adopting the rule concerning permissible *ex parte* communications. Moreover, when stripped of Trinchera Ranch's inflammatory rhetoric, Trinchera Ranch's motion is simply a challenge to 4 C.C.R. § 723-1, Rule 1105 itself. If Trinchera Ranch is concerned with the constitutionality of Rule 1105, Trinchera may bring a facial challenge in court. Its present motion, however, is not the appropriate vehicle to make such a challenge.

Trinchera Ranch's request for relief should be summarily denied. Trinchera Ranch has not shown that dismissing this proceeding is warranted under the circumstances or that the Commissioners should recuse themselves. Relatedly, Trinchera Ranch's request for recusal should be denied for impossibility of compliance.

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other legal entity." 4 C.C.R. § 723-1, Rule 1004(s). Accordingly, Tri-State falls within the definition of a "person."

<sup>2</sup> Tri-State believes that Trinchera Ranch's allegations of prohibited *ex parte* communications between PSCo and the Commission are equally without merit. PSCo will respond separately to those allegations; as such, those allegations are not addressed herein.

## ARGUMENT AND AUTHORITIES

**A. *Ex Parte* Communications Relating to Investigatory Matters Or Legislative Proposals Are Permissible Under Section 40-6-122 of the Colorado Revised Statutes and Rule 1105 of the Rules of Practice And Procedure of the Commission.**

During the 2008 legislative session, the General Assembly passed, and the Governor signed, House Bill 08-1227 ("HB 08-1227"), which, among other things, amended Section 40-6-122 of the Colorado Revised Statutes. Section 40-6-122 governs *ex parte* communications with Commissioners and Administrative Law Judges. See C.R.S. § 40-6-122. Essentially, the amendment limited the prohibition on *ex parte* communications to apply only to adjudicatory proceedings. See C.R.S. § 40-6-122. Adjudicatory proceedings do not include rule-making proceedings or discussions on legislative proposals. See C.R.S. § 40-6-122(5)

Rule 1105 of the Rules of Practice and Procedures of the Commissions governs *ex parte* communications with the Commission. See 4 C.C.R. § 723-1, Rule 1105. Following the enactment of HB 08-1227, the Commission modified Rule 1105 to make it consistent with HB 08-1227. See Decision No. C08-0622, Docket No. 08R-243ALL, and Decision No. C09-0054, Docket No. 09R-027ALL. The Commission also ruled that investigatory dockets are not adjudicatory proceedings and, therefore, *ex parte* communications between persons and the Commission concerning these dockets are not prohibited communications.<sup>3</sup> See Decision No. C08-0622, at ¶ 7, n.1 ("By extension, rulemaking would include pre-rulemaking activities such as investigatory dockets.").

The Commission has instructed that any person that engages in a permissible *ex parte* communication file with the Commission a letter disclosing the content of the communication. See Decision No. C08-1156, ¶ 9, Docket No. 08I-227E (Exhibit A); Decision No. C09-0092, ¶ 31, Docket No. 09I-041E (Exhibit B). The purpose of the letter is to provide other interested persons with enough information to allow them to decide whether they too wish to hold *ex parte* meetings to share their views on the subject.<sup>4</sup> *Id.*

The Commission has found that *ex parte* communications are a useful investigatory tool and encourages *ex parte* communications that "relate to matters being investigated[.]" See Exhibit A, ¶ 7 ("The Commission considers that *ex parte* communications by parties in [investigatory] dockets . . . can be a useful investigatory tool."), Exhibit B, ¶ 30 (explaining

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<sup>3</sup> The Commission's Rule 1105 is also consistent with federal rules governing *ex parte* communications with federal commissions. See, e.g., 17 C.F.R. 4.7(f) ("The prohibition of paragraph (b) of this section do not apply to a communication occasioned by and concerning a nonadjudicative function of the Commission, including such functions as the initiation, conduct, or disposition of a separate investigation . . . whether or not it involves a party already in an adjudicative proceeding . . .").

<sup>4</sup> Trinchera Ranch claims that the subject *ex parte* communications have denied it due process. Mot. at ¶¶ 16, 24. Trinchera Ranch, however, had an opportunity to hold its own *ex parte* communications with the Commissioners. Thus, as to any due process right Trinchera Ranch may have had with respect to *ex parte* communications, Trinchera Ranch effectively waived it when it voluntarily chose not to participate in *ex parte* communications in these same dockets. See *Walton v. Indus. Comm'n of State*, 738 P.2d 66, 67 (Colo. App. 1987) (holding party waived due process right by not participating in hearing).

"*ex parte* contacts must relate to matters being investigated in [investigatory dockets.]"). In fact, the Commission specifically invited any person to "make an *ex parte* presentation to a Commissioner" on any matter "being investigated" by the Commission in Docket Nos. 08I-227E and 09I-041E. *See* Exhibit A at ¶ 8 ("Any such *ex parte* contacts must relate to matters being investigated in this docket and cannot concern any matter pending before the Commission in any other docket.") and Exhibit B at ¶ 30 (same).

**B. Tri-State's *Ex Parte* Communications Were Permissible Under Section 40-6-122 of the Colorado Revised Statutes and Rule 1105 of the Rules of Practice and Procedure of the Commission.**

In response to the Commission's invitation to engage in *ex parte* communications relating to matters being investigated in Docket Nos. 08I-227E and 09I-041E, Tri-State representatives met with Commissioner Tarpey on March, 31, 2009, April 20, 2009, and June 15, 2009. *See* Mot. at ¶ 12. The matters discussed included:

1. The "Commission's March 30, 2009 workshop concerning electric transmission issues and future planned workshops in Docket No. 08I-227E," as well as "issues the Commission has identified for consideration in . . . Docket No. 09I-041E."
2. "Pending transmission legislation."
3. The "Commission's investigatory docket concerning electric transmission issues (Docket No. 08I-227E); Commissioner Tarpey's expectations for the July 16, 2009 panel discussion in Docket No. 09I-041E; [and] current initiatives of the Western Governors' Association regarding transmission and renewable energy resource zones[.]"

*See* Disclosure Letters from Thomas J. Dougherty to Doug Dean, Executive Director, March 31, 2009, June 16, 2009 (Exhibit C); James Tarpey, Colorado Public Utilities Commission Statutory Memoranda for Record, April 3, 2009, April 21, 2009,<sup>5</sup> June 19, 2009 (Exhibit D).

These *ex parte* communications were permissible under Section 40-6-122 and Rule 1105 because they related to matters being investigated in Docket Nos. 08I-227E and 09I-041E or related to legislative proposals. *See* 4 C.C.R. § 723-1, Rule 1105(b)(IV), (V); C.R.S.

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<sup>5</sup> On footnote 2 of its Motion, Trinchera Ranch avers that other *ex parte* communications may have taken place that it is not aware of. *See* Mot. at 14, n.2. As an example, Trinchera Ranch notes that Tri-State did not file in either Docket No. 08I-227E or Docket No. 09I-041E a disclosure letter for the April 20, 2009 meeting with Commissioner Tarpey. As evidenced by Commissioner Tarpey's Memorandum of Record, the discussion related to pending transmission legislation and was not related to any pending non-adjudicatory or adjudicatory docket. Therefore, there was no reason to file a disclosure letter in either of these dockets, and Rule 1106 did not otherwise require Tri-State to file a disclosure letter. *See* 4 C.C.R. § 723-1, Rule 1106; *see also* 4 C.C.R. 723-1, Rule 1004(m) (defining *ex parte* communications only as those communications that relate to pending dockets). Commissioner Tarpey did file a Memorandum of Record memorializing the meeting because the disclosure requirements for Commissioners are broader. *See* 4 C.C.R. § 723-1, Rule 1106(c) and C.R.S. § 40-6-122.

§ 40-6-122(5). Furthermore, no matters specific to Tri-State's Application in this docket were discussed with Commissioner Tarpey. *See* Exhibits C and D.

Trinchera Ranch acknowledges that it has no knowledge of the content of the discussions between Tri-State and Commissioner Tarpey beyond what is stated in the disclosures and memoranda. *See* Mot. at ¶ 24. Despite its lack of information, Trinchera Ranch makes the bold, unsupported assertion that these communications "related to and in certain cases directly concerned the subject matter of" Tri-State's Application and, therefore, are prohibited. *Id.* at ¶¶ 23, 12-13.

To support its conclusion, Trinchera Ranch suggests an unreasonably broad interpretation of the prohibited *ex parte* communication rule. *See* 4 C.C.R. § 723-1, Rule 1105. Simply, Trinchera Ranch argues that an *ex parte* communication on a matter that tangentially relates to—or concerns, albeit in the abstract—a matter that is pending before the Commission is, *per se*, a prohibited *ex parte* communication. In Trinchera Ranch's overly broad view of the rule, it is not the specific substance of the communication that determines whether the communication relates to an adjudicatory proceeding, it is the general subject matter. *See* Mot. at ¶ 18 ("The question is whether the 'subject matter' relates to any pending adjudicatory proceeding."). So, for example, any *ex parte* communication concerning general transmission issues in investigatory Docket No. 08I-227E is, according to Trinchera Ranch, an impermissible communication because this concurrently pending docket relates to a CPCN application for a specific transmission line. *See* Exhibit A; Mot. at ¶ 12.

The interpretation Trinchera Ranch's advocates strips the rule concerning permissible *ex parte* communications of all its usefulness to the Commission and to any other stakeholder having an interest in the subject matter of the Commission's investigatory dockets. Furthermore, Trinchera Ranch's interpretation is impractical in application and would create bad public policy. Taken to its logical conclusion, Trinchera Ranch's argument would mean that any conversation on any "subject matter," between a Commissioner and a person—including Commission staff<sup>6</sup>—that is in any way related to the "subject matter" of an adjudicatory proceeding would be a prohibited communication. *See, e.g.,* Mot. at ¶ 23 ("Since the individual facts on this case cannot be separated from the law and policy considerations that will govern the Commission's decision in this matter, the *ex parte* communications infect this case.").

As the Commission is aware, companies like Tri-State and PSCo conduct business before the Commission on a routine basis and on a wide range of subject matters, some general in nature and some specific to a particular project. Trinchera Ranch's interpretation of Rule 1105 would allow only entities such as itself to participate in investigatory dockets where the Commission has authorized use of *ex parte* communications, and would exclude the utilities from such communications if the general "subject matter" of those dockets may somehow relate to the specific "subject matter" of an adjudicatory proceeding such as a CPCN application in which the utility is or may later be involved. This is not a reasonable

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<sup>6</sup> *See* Decision No. C09-0092, at ¶29 (ruling Commission Staff "will be available to assist the Commission in this proceeding" based on the "Commission's determination that the instant docket is not an adjudicatory proceeding").

interpretation of Rule 1105 and is inconsistent with the Commission's own application of that rule.<sup>7</sup>

**C. Tri-State's Permissible *Ex Parte* Communications Occurred In Dockets That Can Have No Application To The Present CPCN Dockets.**

Trinchera Ranch also fails to note that Tri-State's permissible *ex parte* communications in Docket Nos. 08I-227E and 09I-041E were in the context of dockets where the Commission was considering prospective changes to its rules. Accordingly, as a practical and legal matter, the rules that were the subject of those communications cannot be applied to the Applications that are the subjects of the present dockets.

Docket No. 08I-227E was opened on June 11, 2006 – nearly three years before Tri-State's present CPCN Application was filed – "to consider issues related to electric transmission and to identify transmission planning activities that merit more active involvement by the Commission[.]" Decision No. C08-0607, ¶ I.A.1. That docket was closed on October 8, 2009 and has lead to the Commission's current proposed rulemaking in Docket No. 09R-904E. *See* Decision No. C09-1405. Initial comments in connection with the Commission's proposed rules are not due until February 1, 2010, a hearing on the proposed rules is scheduled for February 23, 2010, and a decision of whether to adopt the proposed rules may or may not occur at some unknown future date. Accordingly, Tri-State's permissible *ex parte* communications in the predecessor, now closed, investigatory docket have already been taken into consideration, if at all, in the proposed rules that are the subject of Docket No. 09R-904E. Those proposed rules have not yet been adopted and will not be applied to the CPCN Applications pending before the Commission in this docket.

Similarly, Docket No. 09I-041E was opened on January 30, 2009, to "request comments from interested persons on whether and how the Commission could amend its ERP Rules to treat the resource plans of cooperative generation and transmission associations such as Tri-State Generation and Transmission Association (Tri-State)." Decision No. C09-0092, ¶ I.A.2. The fact that Docket No. 09I-041E related to Tri-State's resource planning further illustrates the unreasonableness of Trinchera Ranch's position in connection with the current transmission line CPCN dockets. The Commission has not issued an Order closing that docket, however, the Commission may take administrative notice of the fact that on December 9, 2009, the Commission accepted an agreement between Tri-State and Western Resource Advocates concerning Tri-State's future resource planning process. Accordingly, the Commission promulgated no rules in Docket No. 09I-041E that could be applied to the present transmission line CPCN Applications.

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<sup>7</sup> The only reference to Tri-State in Trinchera Ranch's Supplement to its Motion to Dismiss is a citation to the Direct Testimony of Dr. Robert L. Pearson who, like PSCo's witnesses, states that 150 mG is a reasonable magnetic field limit for purposes of the present CPCN Applications. Trinchera Ranch does not offer any evidence, nor does it even suggest, that Dr. Pearson's position was included in a prohibited *ex parte* communication or is in any way related to a prohibited *ex parte* communication. The mere fact that Dr. Pearson reaches the same conclusion as PSCo's witnesses on this issue does not constitute evidence of wrongdoing or prejudice to Trinchera Ranch.

Had Trinchera Ranch taken the time to investigate the dockets in which the subject permissible *ex parte* communications were made, rather than asserting baseless allegations of wrongdoing by the Commissioners and Tri-State, it would have been immediately clear that not only were these communications proper and permissible, but also such communications have no bearing on the subject matter of these CPCN proceedings.

**D. The Proceedings Should Not Be Dismissed Nor Should the Commissioners Disqualify Themselves Because Trinchera Ranch Has Not Shown Tri-State Engaged in Prohibited *Ex Parte* Communications.**

Trinchera Ranch has asked the Commission to dismiss Tri-State's docket. *See* Mot. at ¶ 25. Alternatively, Trinchera Ranch has asked that Commissioners Binz, Tarpey, and Baker recuse themselves from this docket based on the alleged prohibited communications with Tri-State and PSCo. *See id.* at ¶ 26 ("Trinchera Ranch requests the recusal of those Commissioners who have been the subject of improper communications . . ."); *see also id.* at ¶¶ 6, 11-13 (listing *ex parte* communications with all three Commissioners). Trinchera Ranch, however, has failed to show that Tri-State or any of the Commissioners engaged in prohibited *ex parte* communications or that the communications have created any bias. *C.f. Mountain States Tel. and Tel. Co. v. Pub. Utils. Comm'n of State of Colo.*, 763 P.2d 1020, 1028 (Colo. 1988) ("A decision maker is not disqualified on due process grounds simply for having taken a position, even in public, on a policy issue related to the dispute, if there is no showing that the decision maker is incapable of judging the particular controversy fairly on the basis of its own circumstances."). Thus, the remedies Trinchera Ranch seeks are not justified under the circumstances.

The reality is that the Commission invited *ex parte* communications from Tri-State, and participated in those communications. Commissioners and Administrative Law Judges are viewed as serving in a quasi-judicial capacity when acting as such, and, therefore, are subject to the Colorado Judicial Code of Conduct. *State Dep't of Highways, Div of Highways v. Copper Mountain, Inc.*, 624 P.2d 936, 937 (Colo. App. 1981) (applying Colorado's Judicial Code of Conduct to evaluate need for recusal of Commissioner). "There is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities." *Mountain States Tel.*, 763 P.2d at 1028. Commissioners, like judges, are presumed to know and apply the law—including the Commission's rules concerning *ex parte* communications—and are not presumed to have violated the Code of Judicial Conduct. *See People ex rel. S.G.*, 91 P.3d 443, 450 (Colo. App. 2004) (holding presumption exists trial judges know and apply the law, including the Code of Judicial Conduct). Because the allegations in Trinchera Ranch's Motion are speculative, the Commission should deny the Motion and the relief requested therein.

Whether in a judicial or quasi-judicial proceeding, dismissal is a drastic remedy only to be used in extreme circumstances. *See Cornelius v. River Ridge Ranch Landowners Ass'n*, 202 P.3d 564, 571 (Colo. 2009). This is particularly true where, as here, less severe remedies

are available.<sup>8</sup> See 4 C.C.R. § 723-1, Rule 1107(b)-(d); *Steiner v. Minn. Life Ins. Co.*, 85 P.3d 135, 142 (Colo. 2004) (observing "the court must consider whether effective alternative remedies, less severe than dismissal, are available"). Dismissal is a disproportionate remedy in this case and, in light of the lack of any evidence supporting a finding of impropriety, is completely unwarranted.

Similarly, recusal is an extreme remedy. In the absence of a valid reason for disqualification, the Commissioners, like judges, have a duty to preside over the case. *C.f. Blades v. DaFoe*, 666 P.2d 1226, 1128 (Colo. App. 1983), *rev'd on other grounds*, 704 P.2d 317 (Colo. 1985); *Moody v. Corsentino*, 843 P.2d 1355, 1374 (Colo. 1993) ("Unless a reasonable person could infer that the judge would in all probability be prejudiced against the petitioner, the judge's duty is to sit on the case.").

While recusal may be necessary where a party has "a good faith belief that a commissioner . . . has engaged in a prohibited communication or may not be impartial[.]" (4 C.C.R. § 723-1, Rule 1108(a); *accord* Canon 3(C)(1) of the Colorado Code of Judicial Conduct (stating a judge should disqualify himself or herself if judge's impartiality might "reasonably be questioned")), Trinchera Ranch has not demonstrated any facts supporting a good faith belief that such impropriety has occurred, nor has it shown that any of the Commissioners' impartiality might reasonably be questioned. To the contrary, the disclosure statements on which Trinchera Ranch relies demonstrate the exact opposite.

Trinchera Ranch has no good faith basis to seek to disqualify Commissioners Binz, Tarpey, and Baker. Trinchera Ranch's allegation of bias and impartiality are based upon speculation and leaps in logic. Unsubstantiated allegations of bias and impartiality cannot form an appropriate basis for recusal. *C.f. People v. Rodriguez*, 209 P.3d 1151, 1162 (Colo. App. 2008) (holding "more than mere speculation concerning the possibility of prejudice must be demonstrated to warrant a reversal; the record must clearly establish bias"). Thus, disqualification is not necessary or warranted. See *In re Marriage of McSoud*, 131 P.3d 1208, 1223 (Colo. App. 2006) (recusal is necessary only when "facts have been set forth that create a reasonable inference of a 'bent of mind' which will prevent the judge from dealing fairly with the party seeking disqualification"). Moreover, the relief Trinchera Ranch seeks should be denied for impossibility of compliance. Trinchera Ranch has accused all three Commissioners of engaging in prohibited *ex parte* communications. To recuse all three Commissioners would leave the Commission unable to exercise its legislative mandates as they relate to this proceeding. This form of relief is improper. *C.f. State Civil Serv. Comm'n v. Colo. State Bd. of Health*, 111 Colo. 109, 112, 138 P.2d 934, 935 (Colo. 1943) (denying request to enforce writ of mandamus directing commissioners to disqualify themselves in hearing because no new commissioners could be appointed to oversee hearing).

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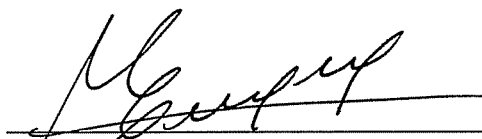
<sup>8</sup> As discussed herein, Tri-State believes that no remedy is warranted at all under the circumstances alleged by Trinchera Ranch. Should the Commission believe that any action is necessary, the facts of this matter indicate that the relief, if any, should be as authorized in Commission Rule 1107(c) or (d).



## CONCLUSION

For the foregoing reasons, Tri-State respectfully requests that the Commission enter an Order denying Blanca Ranch Holdings, LLC's and Trinchera Ranch Holding, LLC's Motion to Dismiss and Request for Leave to File a Reply,<sup>9</sup> and denying the Supplement to Blanca Ranch Holdings, LLC's and Trinchera Ranch Holdings, LLC's Motion to Dismiss.

Dated this 29<sup>th</sup> day of January, 2010.



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<sup>9</sup> By electronic mail to all parties on January 25, 2010, Administrative Law Judge Jennings-Fader denied Trinchera Ranch's request for leave to file a reply in connection with its instant Motion.

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response of Tri-State to Blanca Ranch Holdings and Trinchera Ranch Holding's Motion to Dismiss and Supplement to Motion to Dismiss was served on this 29th day of January, 2010, via email on all parties on this service list:

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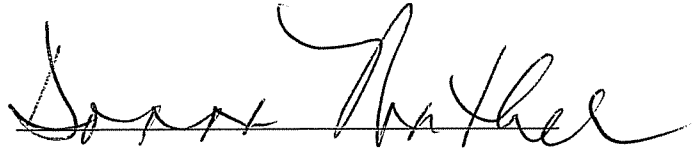
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A handwritten signature in black ink, appearing to read "Chere Mitchell", written over a horizontal line.

Decision No. C08-1156

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 08I-227E

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IN THE MATTER OF THE INVESTIGATION OF ELECTRIC TRANSMISSION ISSUES  
AND THE OPENING OF AN INVESTIGATORY DOCKET.

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**ORDER CLARIFYING SCOPE AND PROCEDURES**

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Mailed Date: November 5, 2008

Adopted Date: October 29, 2008

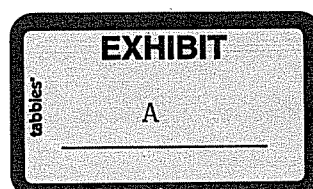
**I. BY THE COMMISSION**

**A. Background**

1. On June 13, 2008, we issued Decision No. C08-0607 that opened an investigatory docket and ordered Staff of the Commission to conduct the investigation on issues related to electric transmission expansion and transmission planning activities that merit more active involvement by the Commission. The scope of the investigation was outlined in the Appendix A Preliminary Statement of Goals of the Docket. The Decision also requested interested parties to suggest other areas of inquiry the Commission should pursue over the next year or more.

2. We received comments from nine interested parties. In general, the comments were supportive and in agreement to the Decision and Preliminary Statement of Goals. Some comments suggested issues that the Commission should include to expand the scope, and others believed that the scope was too broad and the Commission should restrict the scope of this investigatory docket according to statutory limitations.

3. On August 15, 2008, we issued Decision No. C08-0821 that requested interested parties make a further filing commenting on the various positions articulated in the opening



comments as well as any additional information parties believe would be beneficial to this docket.

4. We received six reply comments from interested parties, which, in general, reinforced each party's position and view regarding the transmission expansion and planning activities. In addition, we have received more than 30 comments from citizens, who live in or around the Colorado eastern plains. They stated their support for the expansion of the existing transmission system into their communities to encourage the development and delivery of energy from the indentified Generation Development Areas.

5. We are continuously monitoring issues related to transmission activities within Colorado and throughout the Western Inerconnection. To effectively and efficiently use our limited resources, we will host panel discussions and/or workshops regarding topics of interest to us. Since this is an investigatory docket, we may engage in direct discussions about the transmission issues with the parties as the investigation proceeds. Specifically, we intend to use a communications process called "permit-but-disclose" and the procedural guidelines established in Decision No. C08-0903, Docket No. 08I-113EG.

#### **B. The Permit-but-Disclose Process**

6. During the 2008 legislative session, the General Assembly passed, and the Governor signed, House Bill 08-1227, legislation that continued the Commission following its Sunset review. One provision of that legislation modified the requirements applicable to the Commission concerning *ex parte* contacts with interested parties in certain Commission proceedings. Generally, the provision narrowed the effective statutory prohibition on *ex parte* contacts to apply only to adjudicatory proceedings. In a recent emergency rule, the Commission modified its Rules of Practice and Procedure to conform to the new statute. Finally, the

Commission has determined that investigatory dockets such as the instant docket are not adjudicatory proceedings and, therefore, *ex parte* communications are permissible within the purview of that statute.

7. The Commission considers that *ex parte* communications by parties in dockets such as this can be a useful investigatory tool. As eligible dockets arise, we will decide, on a case-by-case basis, whether to employ this new tool. Although it is not required by statute, we will adopt a set of rigorous practices for disclosure of *ex parte* presentations so that the process is helpful to the Commission and to parties and, most importantly, open and transparent.

8. As of the mailed date of this order, any party<sup>1</sup> may make an *ex parte* presentation to a Commissioner in a meeting that may include Commission Staff. Any such *ex parte* contact should relate to matters being investigated in this docket and should not concern any matter pending before the Commission in any other docket.

9. Within two business days following a permitted *ex parte* presentation, the party requesting the meeting shall file with the Commission in this docket a letter disclosing the contact. The disclosure letter shall state the time, date, and place of the meeting, list the persons attending, and shall contain a summary description of the presentation. If any materials were provided to the Commissioner during the meeting, those shall be identified in the letter and attached. For filing purposes, the disclosure and any attachments shall include an original and three copies. In addition, one electronic copy of the disclosure letter and any other materials should be filed with the Commission. The disclosure letter and any other material must provide other parties with sufficient enough information to allow them to decide whether they wish to

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<sup>1</sup> In a docket such as a rulemaking or this investigatory docket, there are no “parties” in the usual sense of applicants, complainants, respondents or intervenors. Instead, there are “interested parties,” and it is in this sense that we use the term “party” in this order.

hold *ex parte* meetings to share their views on the subject. Parties should not simply file a disclosure that indicates they discussed the Transmission Investigatory Docket, but should also include the specific topics covered (for example, cost allocation, incentive, etc.).

10. The disclosure letter and any attached materials will become part of the official record in this case. Further, the disclosure letter and other provided material will be promptly scanned and posted to the Commission's website in connection with other documents and orders in this docket. Since this is not an adjudicatory proceeding, and because the disclosure letters will be promptly posted to the Commission's website, parties are not required to serve any other interested party with a copy of the disclosure or attachments. Any materials asserted to be confidential will be treated in the same manner as confidential material provided in comments in a rulemaking proceeding.

11. For our part, the Commissioners will attempt to accommodate all reasonable requests for *ex parte* meetings, subject to the schedule and availability of each Commissioner. We may give preference in scheduling to a party that has not made a prior *ex parte* presentation in this docket, in contrast to a party wishing to make an additional presentation. Finally, it may be worth noting that there is no requirement that a party make the same presentation to each of the three Commissioners. In other words, parties may elect to meet (in separate meetings) with one, two, or all three commissioners. However, in such situations, copies of all the presentations, with letter(s) disclosing the separate contacts and presentations, must be filed with the Commission in this docket.

12. To schedule an *ex parte* presentation with a Commissioner, the interested party should contact either Donna Acierno, assistant to the Commissioners, or Larry Shiao, the lead



member of the Commission Staff in this case. When contacting either Ms. Acierno or Mr. Shiao, the interested party should identify that the presentation is associated with this matter.

## **II. ORDER**

### **A. The Commission Orders That:**

1. The scope of this investigation is further clarified consistent with the above discussion.
2. Additional procedures, schedule dates, and directions are provided to interested parties as discussed above.
3. This Order is effective upon its Mailed Date.

### **B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING October 29, 2008.**

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Commissioners

COMMISSIONER JAMES K. TARPEY  
ABSENT.

Decision No. C09-0092

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 09I-041E

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IN THE MATTER OF AMENDMENTS TO THE ELECTRIC RESOURCE PLANNING  
RULES, 4 CCR 723-3, Rules 3600-3615.

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**NOTICE OF INQUIRY AND ORDER  
ESTABLISHING INVESTIGATORY DOCKET**

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Mailed Date: January 30, 2009  
Adopted Date: January 28, 2009

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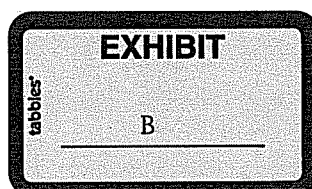
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**I. BY THE COMMISSION:**

**A. Overview**

1. This matter comes before the Commission for consideration of possible changes to the Commission's Electric Resource Planning Rules, 4 Code of Colorado Regulations (CCR) 723-3, Rules 3600-3615 (ERP Rules).

2. The purpose of this Notice of Inquiry (NOI) is to request comments from interested persons on whether and how the Commission could amend its ERP Rules to treat the



resource plans of cooperative generation and transmission associations such as Tri-State Generation and Transmission Association (Tri-State).

3. The Commission seeks comments from interested persons on proposals discussed in this Notice and on questions contained in Attachment A to this Notice by March 16, 2009. Interested persons will be invited to file replies to comments of others by April 1, 2009. Interested persons are encouraged to provide any relevant comments in addition to those highlighted by our questions. After considering the comments of interested persons and after further deliberation, the Commission will determine whether to proceed with a formal rulemaking and whether to issue draft rules.

#### **B. Background**

4. On June 6, 2001 the Commission initiated an “Integrated Resource Plan” (IRP) investigation in Docket No. 01M-250E. The comments received in that docket led to the promulgation of rules in 2002 that proposed significant changes to the resource planning rules then in effect. The IRP rules then effect, codified as 4 CCR 723-21, required all utilities – including cooperative electric generation and transmission associations – to file specific resource planning information, subject to Commission review. Specifically, Rule 723-21-10.4 stated “The Commission may hold a hearing for the purpose of reviewing and rendering a decision regarding the contents of the utility’s IRP upon filing.”

5. On May 29, 2002, the Commission adopted Decision No. C02-0793 in Docket No. 02R-0137E, “In The Matter Of Proposed Amendments to the Electric Integrated Resource Planning Rules, 4 CCR 723-21.” In general, this Decision adopted the Commission’s Least-Cost Resource Planning (LCP) Rules, replacing its IRP rules then in effect. The LCP rules were codified under the new numbering scheme as 4 CCR 723-3-3600, et seq. In support of its new

rules, the Commission cited statutory authority as §§ 40-2-108, 40-2-123, 40-3-102, 40-3-111, and 40-4-101, C.R.S.

6. Two of the many issues confronted by the Commission in this 2002 rulemaking concerned how to treat cooperative generation and transmission associations such as Tri-State. The first question was whether to apply the rules' competitive bidding requirements to Tri-State; the second question was how to treat the quadrennial filing by Tri-State of its resource plan. After considering numerous comments from parties on these topics, the Commission concluded:

Most pertinently, the Commission lacks rate jurisdiction over Tri-State. We note that bidding is primarily a process aimed at acquiring resources at the lowest cost. Without rate authority, we conclude, it is inappropriate to subject Tri-State to the competitive resource acquisition requirements specified in the rules. Still, the Commission does exercise facilities jurisdiction over Tri-State through the CPCN requirement. Therefore, we require Tri-State to comply with certain reporting requirements regarding loads and resources information, and the assessment of need for additional resources. Because of the incentive structure of member-owned associations such as Tri-State, it is unnecessary for the Commission to approve Tri-State's assessment of need. We require electric generation and transmission associations to file the information as a report, without application for approval.<sup>1</sup>

In short, the new LCP rules changed the requirements for electric generation and transmission cooperatives to require only the filing of reports, with no provision for subsequent Commission action or approval.

7. In its Decision on Rehearing, Reconsideration or Reargument in Docket No. 02R-137E, the Commission modified slightly the reporting requirements applied to Tri-State. The modification required cooperative generation and transmission associations to report their efforts to comply with the requirements of § 40-2-123, C.R.S. as part of their annual progress report required by Rule 3614. The Commission did not modify its decision to forego hearings or

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<sup>1</sup> Decision No. C02-793, ¶ 14, adopted May 29, 2002, mailed July 22, 2002.

require approval of resource plans filed by cooperative generation and transmission associations and concluded (concerning the annual report about §40-2-123 C.R.S. compliance): “Parties can review the report, and may request a hearing through established complaint or show-cause procedures, if necessary.”<sup>2</sup>

8. The Commission revisited its Least Cost Planning Rules in 2007, adopting amendments in an emergency rule by Decision No. C07-0829 on September 19, 2007. On December 19, 2007 the Commission issued Decision No. C07-1101, which adopted permanent rules that were identical to the emergency rules. The emergency rules and the permanent rules made many changes to the then-existing LCP rules, especially with respect to the treatment of “Section 123” resources, the use of an independent evaluator to review the bidding and modeling process, and the creation of an abbreviated post-bid review of resources by the Commission. The rules were renamed again, to be the Electric Resource Planning or ERP rules. Relevant to the instant inquiry, the 2007 rule amendments did not modify the requirements applied to cooperative generation and transmission associations that had been adopted in 2002.

9. On October 31, 2007, Tri-State filed its resource plan with the Commission in Docket No. 07M-445E, as required by Rule 3605. The Commission received the report and did not initially set the matter for hearing.

10. At the Commission’s request, on August 13, 2008, executives of Tri-State made a presentation to the Commission on the resource planning activities of the association, pursuant to Decision No. C08-0608 issued in Docket No. 07M-445E. During the course of the presentation, Chairman Binz asked the representatives whether Tri-State would be willing to provide additional detail and backup information for some of the charts and graphs shown in the Tri-State

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<sup>2</sup> Decision No. C02-0991, ¶ 6.(i).

presentation. At the hearing, counsel for Tri-State was non-committal concerning the association's willingness to provide the requested detail.

11. On September 10, 2008 the Commission issued Decision No. C08-0994 in Docket No. 07M-445E, which ordered Tri-State to provide certain additional information. In general, the requested information concerned the load and resource information underlying the August 13, 2008 presentation. The order also requested some details of the component demand forecasts of the member cooperatives used to construct the Tri-State load forecast.

12. On October 27, 2008, in a letter to Commission Director Doug Dean, Tri-State declined to provide the requested information to the Commission, citing the limits of Commission jurisdiction as expressed in the Commission's own rules. In relevant part, the letter from the Tri-State's General Counsel reads:

This letter is in response to the above referenced order. If the Commission has any jurisdiction at all over Tri-State's resource planning, that jurisdiction is limited by its own rules. Under the Commission's electric rules (Rule 3602) Tri-State is subject only to the reporting requirements specified in Rule 3605. Tri-State filed its 2007 Electric Resource Plan on October 31, 2007. The Commission has acknowledged that the plan was timely filed and that it contained the required information. (Decision No. C08-0994, Par.2) Further, when the Commission opened Docket No. 07M-445E for the purpose of accepting Tri-State's 2007 Electric Resource Plan, it stated that the docket would be opened "for the limited purpose of receiving" Tri-State's ERP (Decision No. C07-0981) and it stated further in that Order that the docket is now closed."

As you know, Tri-State agreed to appear at the Commission to answer certain questions about our filing, but we made it very clear that our appearance was voluntary and that the Commission could not order Tri-State to appear. (See my previous letter dated July 8, 2008).

The order expands the scope of that meeting and seeks to obtain more information from Tri-State, substantially beyond that required in the Commission's rules, and pertaining to electric resources over which the Commission has acknowledged it has no jurisdiction over Tri-State (DSM and out of state resources).

Tri-State has fully complied with all requirements in this docket. The docket has been closed. The Commission has no jurisdictional basis for its order requesting additional information from Tri-State.

**C. Discussion**

13. With substantial understatement, we note that the energy world has changed since 2002 when the Commission last reviewed its resource planning rules as they apply to cooperative generation and transmission associations. The technical, environmental and political landscape facing utilities, their customers and their regulators has been made-over since that time. Dominating this fundamental change is our understanding of the threat of global climate change. But close behind are other major drivers: uncertainty about future costs of traditional generation technology; the availability of new renewable resources; the potential to apply the tools of the internet to the electric grid (i.e., "smart grid"); the increased desire for national energy security; the growth of distributed generation; the demands of energy development in Colorado; and the need for additional transmission investment. Finally, it is clear that the current severe economic downturn is affecting everything utilities do.

14. Governor Ritter and the Colorado General Assembly have responded to the challenges facing Colorado in these areas. During 2007, the Governor championed, and the General Assembly passed, several important legislative measures designed to enable the "New Energy Economy" in Colorado. New legislation addressed a revised renewable energy standard, energy efficiency implementation, net metering policies, electric transmission investment, and new jobs in Colorado tied to renewable energy development. In November 2007, Governor Ritter announced the "Colorado Climate Action Plan," committing Colorado to reducing its greenhouse gas emissions by 20% by 2020 and by 80% by 2050.<sup>3</sup>

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<sup>3</sup> Following the release of the Climate Action Plan, Executive Order D 004 08, dated April 22, 2008, asks the Commission "to seek from each utility within its jurisdiction an ERP that includes an analysis that shows how the utility could achieve a 20% reduction in its greenhouse gas emissions from 2005 levels by the year 2020."

15. The Commission has also responded to these challenges in several ways. First, we quickly revised our resource planning rules to reflect the requirements of the numerous legislative changes enacted in 2007. We further revised our "Least Cost Planning" rules to fully implement the requirements of § 40-2-123, C.R.S., to recognize the role of new renewable technologies in the resource plans of investor-owned utilities. Second, and most importantly, the Commission held hearings and issued major decisions in several significant dockets for investor-owned utilities. These decisions addressed resource planning, gas and electric demand-side management plans, and generation and transmission cases. The largest of these dockets, the ERP plan of Public Service Company of Colorado (Docket No. 07A-447E), addresses that company's resource needs for the next eight years, approves the utility's request to close two coal-fired power plants, incorporates a realistic estimate of the future costs of carbon emissions in planning assumptions, and approves the acquisition of large amounts of utility-scale solar generation as Section 123 resources.

16. With this background, it is reasonable for the Commission to review the status of cooperative generation and transmission associations under our resource planning rules. Simply put, the logic that led the Commission in 2002 to decline to actively examine Tri-State's resource planning process may be less compelling now.

17. The Commission has clear authority to issue Certificates of Public Convenience and Necessity (CPCNs) to Tri-State for the construction of major generation and transmission facilities in Colorado. Tri-State is engaged in some large transmission projects now, and we expect that the association may propose to build a generation facility in Colorado to meet future needs. Because of these activities, it makes sense to examine whether our resource planning



rules complement our duty and authority to make determinations regarding the need for such facilities.

18. Under the current rules, the Commission will make findings of “public convenience” and “necessity” only upon application of the utility for certification of a specific facility. For cooperative generation and transmission associations, this would likely be at a point in time when it may be infeasible to compare alternatives. This is in contrast to the treatment of investor-owned utilities that must also submit to a resource planning inquiry in which the regulators gather information earlier and take a longer and broader look at resource planning. This point was acknowledged by the Commission in the 2002 rulemaking:

Finally, the parties argue that the LCP rules violate SB 01-144 [40-2-123, C.R.S.] because, under the rules, the Commission will not review the resource plans of cooperative electric generation and transmission associations (G&T). The parties argue that SB01-144 applies to cooperative G&Ts such as Tri-State. And, the parties contend, Commission review of these companies' resource plans in CPCN proceedings is insufficient, because the Commission would have before it only the resource that is the subject of the proceeding. In addition, the parties point out that energy efficiency and renewable resources are small scale, and would not be the subject of any CPCN process. The parties request that a cooperative G&T be required to present its plan for how it intends to integrate these resources in its resource planning process. The parties suggest that the Commission allow public review and comment, and a hearing if necessary on the plan.

Decision No. C02-0991 ¶ 6.(g)

19. As discussed, there appear to be several valid reasons to consider changing the manner in which our ERP Rules apply to cooperative generation and transmission associations. On the other hand, there are undoubtedly valid arguments why our ERP rules should be different for cooperative generation and transmission associations. The economics, geography and energy use in the areas served by rural cooperatives is, in general, different than those of Colorado's investor-owned utilities. Financing of generation, transmission and distribution facilities is

sometimes done differently for rural cooperative associations, and the associations are non-profit. Regulation by this Commission must take those differences into account.

20. While cooperative generation and transmission associations are different in some respects from investor-owned utilities, they face the same threat of climate change, the same uncertain future for costs of building and operating power plants, share the same transmission system as the rest of Colorado, and serve residents of the same state served by Colorado's investor-owned utilities.

21. In the case of Tri-State, the association operates in four state regulatory jurisdictions, posing a potential challenge for coordinating regulation among states that assert jurisdiction over Tri-State's facilities or its planning. But this situation need not pose an insurmountable challenge: there are examples (e.g., PacifiCorp in Washington, Oregon, California, Utah, Wyoming and Idaho) in which an integrated multi-state utility files for approval of resource plans in several states. The Commission seeks comments on how this consideration should affect our analysis.

#### **D. Policy Options**

22. The purpose of this Notice of Inquiry is not to decide these issues now, but rather to solicit comments from interested persons about options the Commission might consider. We now identify three different general approaches the Commission might take in this matter. We seek comment on these three options, in addition to any other approaches set forth in the comments.

23. Option A is a modification of the business-as-usual course under the current ERP Rules, in which cooperative generation and transmission associations would continue to file quadrennial resource plans with annual updates. This option would also require that a

cooperative generation and transmission association present its resource plan in a formal presentation to the Commission and provide any additional information required by the Commission. Under Option A, the Commission would receive the cooperative generation and transmission association's plan, but not approve, deny or modify the plan. This approach would essentially remove any rule-based objections of the sort raised by Tri-State in its October 27, 2008 letter declining to respond to the Commission's request for additional information.

24. Under Option B the Commission would require quadrennial filings by cooperative generation and transmission associations that would be subject to hearing. After examining the utility's proposed resource plan, the Commission would issue an order with findings on the utility's assessment of need and would identify a preferred resource plan, which might be the utility's proposed plan, or contain modifications to the utility's proposed plan. Under this option, the Commission's findings in the resource planning case would be considered when the utility subsequently seeks a CPCN to construct major generation or transmission facilities. If the facility proposed for a CPCN is consistent with the Commission's finding in the resource planning decision, the application would receive streamlined consideration and be approved absent a showing by a party that the Commission's preferred resource plan is no longer appropriate. If the proposed facility is not consistent with the Commission's preferred resource plan, additional scrutiny would be required before the Commission acts to grant or deny the CPCN. Option B would not require the cooperative generation and transmission association to employ competitive bidding in its resource acquisition efforts and would not require a Phase II ERP proceeding or the use of an Independent Evaluator.

25. Option C would apply the same rules to the cooperative generation and transmission association as now apply to investor-owned utilities such as Public Service

Company of Colorado and Black Hills/Colorado Electric Utility Company, LP. All electric utilities would be subject to competitive bidding rules and would be required to propose resource plans incorporating High, Medium, and Low "Section 123" resources in addition to the utility's preferred plan. The Commission would approve a needs forecast and a resource plan, as in the case of investor-owned utilities. Utility-owned resources would be included in the approved plan if the utility's bid was superior to the proposals of independent power producers, considering cost and other relevant factors. Under this option, a utility-owned generation resource included in the Commission-approved plan would carry the presumption of approval for a subsequent CPCN, while a proposed utility-owned resource not in the Commission-approved resource plan would carry the opposite presumption.

26. In addition to these three options, the Commission seeks comments on two other options: 1) retaining the status quo in our rules; and 2) eliminating the rule requirement that cooperative generation and transmission associations file a quadrennial resource plan. We ask commenters who support retaining the status quo to explain how the Commission might better use the information in the quadrennial filings now being made by cooperative generation and transmission associations.

27. In addition to comments on the options discussed above, the Commission solicits additional comments and legal argument on the questions included in Attachment A to this Order.

28. Finally, we do not intend that the filed materials will be the sole means of conducting our inquiry. Since this is an investigatory docket, we may engage in direct discussions about the issues with the participants as the investigation proceeds. Specifically, we intend to use a communications process, similar to that used in federal agencies and established by this Commission in Docket No. 08I-113EG, called "permit-but-disclose."

Similar to the process established for Docket No. 08I-113EG, we establish procedural guidelines in this Order respecting its use. Eventually, the Commission intends to set out the permit-but-disclose communications process in our Rules of Practice and Procedure.

**E. The Permit-but-Disclose Process**

29. During the 2008 legislative session, the General Assembly passed, and the Governor signed, House Bill 08-1227 (HB 08-1227). HB 08-1227, among other things, modified the requirements applicable to the Commission concerning ex parte contacts with interested persons in non-adjudicatory proceedings. In a recent emergency rulemaking docket, the Commission modified its Rules of Practice and Procedure 4 CCR 723-1, to conform to the new statute. See Decision No. C08-0622, in Docket No. 08R-243ALL, mailed June 19, 2008 and Decision No. C09-0054 in Docket No. 09R-027ALL, mailed January 21, 2009. The Commission also determined that investigatory dockets such as the instant docket are not adjudicatory proceedings and, therefore, ex parte communications are permissible within the purview of that statute. *Id.*, at ¶ 7, fn. 1. Consistent with the Commission's determination that the instant docket is not an adjudicatory proceeding, all Staff will be available to assist the Commission in this proceeding.

30. As of the mailed date of this Order, any person may make an ex parte presentation to a Commissioner in a meeting that may include Staff. Any such ex parte contacts must relate to matters being investigated in this docket and cannot concern any matter pending before the Commission in any other docket.

31. Within two business days following a permitted ex parte presentation, the person requesting the meeting shall file with the Commission in this docket a letter disclosing the contact. The disclosure letter shall state the time, date, and place of the meeting, list the

individuals attending, and shall contain a summary description of the presentation, and a statement that the subject matter of the communication did not relate to any pending adjudicatory proceeding before the Commission. If any materials were provided to the Commissioner during the meeting, those shall be identified in the letter and attached. For filing purposes, the disclosure and any attachments shall include an original and three copies. In addition, one electronic copy of the disclosure letter and any other materials should be filed with the Commission. The disclosure letter and any other material must provide other interested persons with sufficient information to allow them to decide whether they wish to hold ex parte meetings to share their views on the subject. Interested persons should not simply file a disclosure that indicates they discussed the docket, but should also include the specific topics covered (for example, discussion of specific options presented in this decision, jurisdictional limitations, other resource planning options for cooperative generation and transmission associations, etc.).

32. The disclosure letter and any attached materials will become part of the official record in this case. Further, the disclosure letter and other provided material will be promptly scanned and posted to the Commission's website in connection with other documents and orders in this docket. Since this is not an adjudicatory proceeding, and because the disclosure letters will be promptly posted to the Commission's website, interested persons are not required to serve any other interested persons with a copy of the disclosure or attachments. Any materials asserted to be confidential will be treated in the same manner as confidential material provided in comments in a rulemaking today.

33. For our part, the Commissioners will attempt to accommodate all reasonable requests for ex parte meetings, subject to the schedule and availability of each Commissioner. We may give preference in scheduling to a party that has not made a prior ex parte presentation

in this docket, in contrast to a party wishing to make an additional presentation. Finally, it may be worth noting that there is no requirement that a party make the same presentation to each of the three Commissioners. In other words, parties may elect to meet (in separate meetings) with one, two, or all three Commissioners. However, in such situations, copies of all the presentations, with letter(s) disclosing the separate contacts and presentations, must be filed with the Commission in this docket.

34. To schedule an ex parte presentation with a Commissioner, the interested party should contact either Ms. Donna Acierno, Assistant to the Commissioners, or Mr. Bob Bergman, the lead member of Staff in this case. When contacting either Ms. Acierno or Mr. Bergman, the interested party should identify that the presentation is associated with this case.

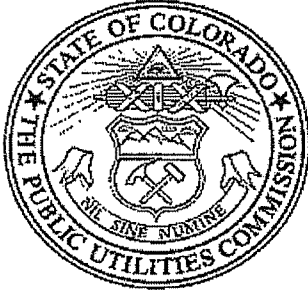
## **II. ORDER**

### **A. The Commission Orders That:**

1. This docket is established for the purpose of considering possible changes to the Commission's Electric Resource Planning Rules, 4 Code of Colorado Regulations (CCR) 3600-3615, with respect to cooperative generation and transmission associations, consistent with the above discussion.
2. This Notice of Inquiry is issued to solicit comments from interested persons with respect to the issues identified by the Commission in this Order, to solicit answers to questions posed in Appendix A to this Order and to invite comment on any other related matters.
3. Interested persons shall file by March 16, 2009 Initial Comments on the matters identified in this Notice of Inquiry.
4. Replies to comments of others shall be filed by April 1, 2009.
5. This Order is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING,  
January 28, 2009.**

(S E A L)



ATTEST: A TRUE COPY

*Doug Dean*

Doug Dean,  
Director

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

RONALD J. BINZ

---

JAMES K. TARPEY

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MATT BAKER

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Commissioners



ATTACHMENT A

Commission Questions Regarding Resource Planning for Cooperative Generation  
and Transmission Associations

1. Are the *legal* standards for issuing a CPCN for a major generation or transmission facility in Colorado different as between an investor-owned utility (*e.g.*, Public Service Company of Colorado) and a not-for-profit generation or transmission facility owned by rural electric cooperative associations (*e.g.*, Tri-State)?
2. Should the *policy* standards for issuing a CPCN for a major generation or transmission facility in Colorado be different as between an investor-owned utility (*e.g.*, Public Service Company of Colorado) and a cooperative generation and transmission association (*e.g.*, Tri-State)?
3. Can the Commission legally require a utility to have an approved ERP plan as a condition precedent to approving an application for a CPCN for a major generation facility?
4. What is the practice in other states with comparable authority to the Colorado PUC with respect to CPCN applications from entities over which the state commission has limited authority?
5. Under Options B and C outlined in this Order, the Commission contemplates possible hearings on the proposed resource plan for a cooperative generation and transmission association. What steps can the Commission take to ensure that the hearing process is as streamlined and efficient as possible in each case?
6. In addition to the options described in this Order, what other options are available to the Commission to exercise appropriate oversight for the resource planning activities of cooperative generation and transmission associations?

Thomas J. Dougherty  
Attorney at Law  
303.628.9524  
tdougherty@rothgerber.com



ROTHGERBER  
JOHNSON &  
LYONS LLP

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www.rothgerber.com

Denver • Colorado Springs • Casper

March 31, 2009

Doug Dean, Executive Director  
Colorado Public Utilities Commission  
1560 Broadway, Suite 250  
Denver, Colorado 80202

Dear Mr. Dean:

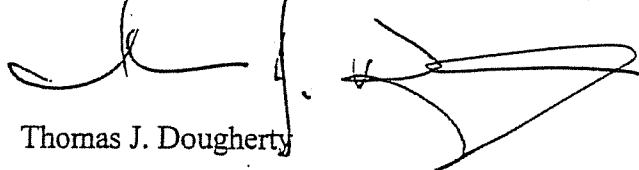
On March 31, 2009, from 11:30 a.m. to approximately 1:30 p.m., I met with Commissioner Jim Tarpey at the Ship's Tavern restaurant. The topics of discussion included the Commission's March 30, 2009 workshop concerning electric transmission issues and future planned workshops in Docket No. 08I-227E, issues the Commission has identified for consideration in Decision No. C09-0092 and the possibility of working toward an acceptable outcome in Docket No. 09I-041E, Commissioner Tarpey's work in Jordan, and various personal matters. No written materials were provided.

The Commission has determined that Docket No. 08I-227E and Docket No. 09I-041E are investigatory dockets in which *ex parte* communications are permissible provided that they are properly disclosed. The above-referenced discussion did not relate to any other pending adjudicatory proceeding before the Commission.

Please let me know if you require any further information concerning my meeting with Commissioner Tarpey.

Sincerely,

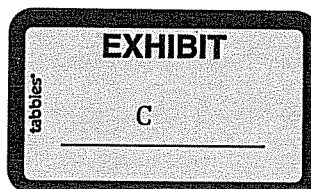
ROTHGERBER JOHNSON & LYONS LLP



Thomas J. Dougherty

TJD:dm

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LYONS LLP

Thomas J. Dougherty  
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303.628.9524  
tdougherty@rothgerber.com

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1200 Seventeenth Street  
Denver, Colorado 80202-5855  
Telephone 303.623.9000  
Fax 303.623.9222  
www.rothgerber.com

Denver · Colorado Springs · Casper

June 16, 2009

***Via Hand Delivery***

Doug Dean, Executive Director  
Colorado Public Utilities Commission  
1560 Broadway, Suite 250  
Denver, Colorado 80202

Dear Mr. Dean:

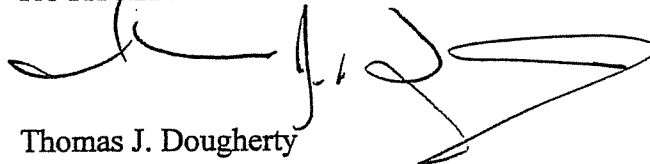
On June 15, 2009, from 8:00 a.m. to approximately 9:30 a.m., I met with Commissioner Jim Tarpey at the Delectable Egg restaurant. The topics of discussion included the Commission's investigatory docket concerning electric transmission issues (Docket No. 08I-227E); Commissioner Tarpey's expectations for the July 16, 2009 panel discussion in Docket No. 09I-041E; current initiatives of the Western Governors' Association regarding transmission and renewable energy resource zones; and Commissioner Tarpey's work in Jordan. No written materials were provided.

The Commission has determined that Docket No. 08I-227E and Docket No. 09I-041E are investigatory dockets in which *ex parte* communications are permissible provided that they are properly disclosed. The above-referenced discussion did not relate to any other pending adjudicatory proceeding before the Commission.

Please let me know if you require any further information concerning my meeting with Commissioner Tarpey.

Sincerely,

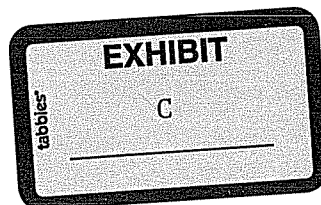
ROTHGERBER JOHNSON & LYONS LLP



Thomas J. Dougherty

TJD:dm

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# COLORADO PUBLIC UTILITIES COMMISSION STATUTORY MEMORANDUM FOR RECORD

§ 40-6-122, C.R.S., requires PUC Commissioners and Administrative Law Judges to disclose all private communications to or from interested persons concerning matters under the commissioners' or judges' jurisdiction. This memorandum will be filed with the Director of the PUC and will be maintained on file and available for public inspection for a minimum of three years after submission. This memorandum is not required for communications made during public meetings.

Date, time and place:

3-31-09; 11<sup>30</sup><sub>AM</sub> - 1<sup>00</sup><sub>PM</sub>; The Ship's Tavern

Persons Present:

Tom Dougherty, Esq.  
Commissioner Jim Tarpey

Subject of Communication:

Transmission issues

Brief Description of Communication:

Regional grid activities;  
Transmission workshop;  
ERP process  
Transmission planning by Tri-State

*Delean by [initials]*

I certify that the subject matter of this communication was not related to any pending proceeding before the Commission.

Signature:

James K. Tarpey

Date:

4-3-09

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EXHIBIT

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# COLORADO PUBLIC UTILITIES COMMISSION STATUTORY MEMORANDUM FOR RECORD

§ 40-6-122, C.R.S., requires PUC Commissioners and Administrative Law Judges to disclose all private communications to or from interested persons concerning matters under the commissioners' or judges' jurisdiction. This memorandum will be filed with the Director of the PUC and will be maintained on file and available for public inspection for a minimum of three years after submission. This memorandum is not required for communications made during public meetings.

Date, time and place:

4/29/09, 7:30 AM - 8:30 AM, The Delectable Egg, Denver, CO

Persons Present:

Toel Blahow, Tri-State  
Tom Dougherty, attorney for Tri-State  
Commissioner Jim Tarpey

Subject of Communication:

Transmission

Brief Description of Communication:

Pending transmission legislation

I certify that the subject matter of this communication was not related to any pending proceeding before the Commission.

Signature:

James K. Tarpey

Date:

4/29/09

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EXHIBIT

D

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# COLORADO PUBLIC UTILITIES COMMISSION STATUTORY MEMORANDUM FOR RECORD

§ 40-6-122, C.R.S., requires PUC Commissioners and Administrative Law Judges to disclose all private communications to or from interested persons concerning matters under the commissioners' or judges' jurisdiction. This memorandum will be filed with the Director of the PUC and will be maintained on file and available for public inspection for a minimum of three years after submission. This memorandum is not required for communications made during public meetings.

Date, time and place:

6/15/09; 8<sup>50</sup> AM; The Ricketts Egg

Persons Present:

Thomas Dransfield, Esq.

Commissioner Jim Targem

Subject of Communication:

Electric Transmission

Brief Description of Communication:

Federal and state legislation affecting transmission;  
PUC Transmission workshops;  
Hearing re Tri-State on 7/16/09

DR

I certify that the subject matter of this communication was not related to any pending proceeding before the Commission.

Signature:

James K. Targem

Date:

6-19-09

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EXHIBIT

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