Decision No. R14-0492-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

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

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE PAUL C. GOMEZ CONSTRUING MOTION TO DISMISS AS A MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION

Mailed Date: May 8, 2014

TABLE OF CONTENTS

I. STATEMENT

A. Background

1. On March 4, 2013, La Plata Electric Association, Inc. and Empire Electric Association, Inc., acting on behalf of themselves and their members; White River Electric Association, Inc., acting on behalf of itself and its members; the Rural Electric Consumer Alliance, which consists of BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Power and Gas Services Inc., on behalf of ExxonMobil Production Company, a division of Exxon Mobil Corporation; and Kinder Morgan CO_2 Company, L.P. (collectively, Complainants), pursuant to 4 *Code of Colorado Regulations* (CCR) 723-1-1302 of the Commission's Rules of Practice and Procedure, filed a Formal Complaint which initiated this proceeding.

2. The Formal Complaint generally alleged that Tri-State Generation and Transmission Association, Inc. (Tri-State or Respondent) imposed a new rate referred to as "A-37" implemented on January 1, 2013 which replaced the previously effective "A-36" rate. Complainants alleged that the A-37 rate resulted in a dramatic increase in rates for high load factor distribution cooperatives and high load factor customers without regard to the cost of providing service. Further, Complainants alleged that the A-37 rate resulted in a 10 to 18 percent rate increase for high load factory customers and cooperatives that serve high load factor customers based solely on Respondent's new allocation and rate design methodology. Additionally, Complainants alleged that the A-37 rate had an added deleterious impact on residential time-of-use customers.

3. As a result of those allegations, Complainants sought Commission review of the new cost allocation and rate design methodology as applied to Tri-State's tariff rates to its

Colorado member-systems and their retail customers; a determination that the cost allocation and rate design methodology violates various statutes under the Colorado Public Utilities Law; an order establishing a just, reasonable, non-discriminatory and non-preferential cost allocation and rate design methodology; and, an order requiring Respondent to make an appropriate refund to any cooperative that was billed more under the A-37 rate than it would have been billed under the A-36 rate.

4. Complainants' specific claims for relief were as follows:

> First Claim – Tri-State does not have on file with the Commission schedules showing all rates collected together with all rules, regulations, and contracts that in any manner affect or relate to its A-37 rate since it was put into effect as required by § 40-3-103, C.R.S.
>
> Second Claim – Tri-State did not provide the Commission with any notice of its new A-37 rate, nor has it sought a waiver of the statutory requirement to provide such notice as required by § 40-3-104, C.R.S. Tri-State also failed to provide the public with notice of the new A-37 rate as statutorily required; therefore, Tri-State is prohibited from implementing any change to the A-36 rate.
>
> Third Claim – Tri-State's A-37 rate is unjust and unreasonable pursuant to § 40-3-101, C.R.S., because it is an all energy rate and does not reasonably track costs for a generation and transmission provider whose cost of service includes a substantial amount of fixed capital costs that were incurred in large part to serve demands in peak periods.
>
> Fourth Claim – Tri-State's A-37 rate is preferential or discriminatory because it is not reasonably based on its cost of service.
>
> Fifth Claim – Tri-State's A-37 cost allocation and rate design methodology is not reasonably cost based and consequently causes a disproportionate and discriminatory cost shift to certain cooperatives and customers.

5. On April 4, 2013, Tri-State filed a Motion to Dismiss Formal Complaint (Motion to Dismiss), asserting that the Commission was without jurisdiction to hear the Complaint under several theories including that the Commerce Clause prohibits Commission rate regulation of Respondent.

6. After an evidentiary hearing on the issue of subject matter jurisdiction, Interim Decision No. R13-1119-I, issued September 11, 2013, denied Tri-State's Motion to Dismiss. Additionally, the Decision was made immediately appealable to the Commission.

7. On October 7, 2013, Tri-State filed a Motion Contesting the Interim Decision.

8. On January 3, 2014, the Commission issued Interim Decision No. C14-0006-I in which it granted in part and denied in part Tri-State's Motion Contesting the Interim Decision. In determining that the Commission was not precluded from asserting jurisdiction over the Complaint (or Tri-State) by virtue of the dormant Commerce Clause, the Commission remanded the Complaint with a much-narrowed scope – whether the failure to include a demand and energy charge is a violation of Colorado law and policy.

9. The Commission confirmed its findings in Interim Decision No. C14-0337-I, issued March 31, 2014, where it reaffirmed its previous finding in Interim Decision No. C14-0006-I permitting adjudication of whether a demand component is absent from Tri-State's rate and whether the A-37 rate is unjust, unreasonable, discriminatory, or preferential.

10. A pre-hearing conference was held on April 21, 2014 to confirm the scope of the Commission's remand decision and establish a procedural schedule for an evidentiary hearing. It was agreed by the parties that the result of the Commission's Decision was that Complainants' Claims 1 and 2 were dismissed, as well as the relief requested in paragraphs (i), (ii), (iv), and (v) of the Complaint. As a result, Claims 3, 4, and 5, as well as the relief requested in paragraphs (iii) and (vi) of the Complaint may proceed.

B. Motion to Dismiss

11. On April 18, 2014, Tri-State filed a Motion to Dismiss the Remaining Claims in the Complaint (Second Motion to Dismiss). Tri-State argues that the surviving claims of the

original Complaint, Claims 3, 4, and 5 pertain only to the A-37 rate. However, because the A-37 rate has been superseded by the A-38 rate effective as of January 1, 2014, Tri-State argues that the matter is now moot and Complainants no longer have a valid claim to prosecute before the Commission.

12. Tri-State notes that pursuant to the Affidavit of Mr. James P. Spiers attached to the Second Motion to Dismiss as Exhibit A, the A-37 rate has been superseded by the A-38 rate, and that the A-38 rate is different from the A-37 rate in that it does not include the Predictive Call component, includes a new Capacity Commitment Charge and a new regulatory charge component, and supports a different revenue requirement. As a result, Tri-State concludes that the factual basis for the Complaint is no longer accurate and the remaining claims are moot and must therefore be dismissed.

13. In addition, Tri-State raises the issue again that the Complaint is defective under § 40-6-108, C.R.S., since it does not contain at least 25 signatures of customers or prospective customers of Tri-State.

C. Response to Motion to Dismiss

14. Pursuant to the schedule adopted by Interim Decision No. R14-0423-I issued April 23, 2014, Complainants filed a Response in Opposition to Tri-State's Motion to Dismiss the Remaining Claims in the Complaint on April 24, 2013.

15. Complainants dispute Tri-State's assertions that the Complaint merely contained claims and requests for relief specifically directed at the A-37 rate. Instead, Complainants contend that the Complaint is directed at the cost allocation and rate design methodology that Tri-State implemented for the first time under the A-37 rate rather than the rate itself, or the level of revenue collected under the rate. Complainants point to language in the Complaint that seeks

an Order "pursuant to the Commission's authority under C.R.S. §§ 40-3-101 and 102, finding that Tri-State's cost allocation and rate design methodology implemented on January 1, 2013 is unjust, unreasonable, preferential, and discriminatory."[1]

16. Complainants also point to the Affidavit of James P. Spiers attached as Exhibit A to the Second Motion to Dismiss as support for why the claims and relief requested in the Complaint are not moot. It is Complainants' contention that the same rate design and cost allocation methodology adopted in the A-37 rate has been continued under the A-38 rate. Further, the Complaint is sufficiently broad to encompass the claims challenging the cost allocation and rate design methodology of the A-37 rate, according to Complainants.

17. Complainants also dispute Tri-State's argument that the Complaint is fatally defective since it does not contain at least 25 signatures of customers or potential customers of the utility as required under § 40-6-108(b), C.R.S.

II. FINDINGS

18. Tri-State brings its Second Motion to Dismiss under Commission Rule 1400(f) and Colorado Rule of Civil Procedure (C.R.C.P.) 12(b)(5).

19. Rule 1400(f) provides that "[a] motion to dismiss may be made in accordance with rule 12 of the Colorado Rules of Civil Procedure."

20. Rule 12(b)(5) provides for the challenge of the legal sufficiency of a complaint,[2] when a party attempts to obtain dismissal of an action under Rule 12(b)(5), but when "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56." Rule 12(b).

[1] *See*, Complaint at p. 20, ¶(iii).
[2] *Dorman v. Petrol Aspen*, 914 P.2d 909, 911 (Colo. 1996).

21. Tri-State introduced the Affidavit of James P. Spiers as Exhibit A to its Second Motion to Dismiss, thereby presenting matters outside the Complaint. Because the A-38 rate as described in the affidavit is central to a determination here, it will not be excluded, and consequently, Tri-State's Second Motion to Dismiss will be treated as a motion for summary judgment pursuant to Rule 56.

22. A motion for summary judgment is a drastic measure and appropriate only when the pleadings and supporting documents demonstrate that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[3]

23. The non-moving party is entitled to all favorable inferences that may be drawn from the undisputed facts, and all doubts as to whether a triable issue of fact exists must be resolved against the moving party.[4] Summary judgment is appropriate when the pleadings and supporting documents demonstrate that no genuine issue as to any material fact exists and that the moving party is entitled to summary judgment as a matter of law.[5]

24. As for the burden of proof, initially, the moving party has the burden of showing that there is no genuine issue of material fact to be tried.[6] Where the moving party seeks summary judgment on an issue on which it would not bear the burden of persuasion at trial, the movant's initial burden of production may be satisfied by showing that there is an absence of evidence in the record to support the nonmoving party's case.[7] A conclusory assertion that no issue exists is insufficient, rather, the movant must make an affirmative showing.[8]

---

[3] C.R.C.P. 56(c); *Vail/Arrowhead, Inc. v. District Court*, 954 P.2d 608 (Colo. 1998).
[4] *Compass Insurance Co. v. City of Littleton*, 984 P.2d 606 (Colo. 1999).
[5] *Martini v. Smith*, 42 P.3d 629 (Colo. 2002).
[6] *J.C. v. Dungarvin Colorado, LLC*, 252 P.3d 41 (Colo. App. 2010).
[7] *Sanderson v. American Family Mut. Ins. Co.*, 251 P.3d 1213 (Colo. App. 2010).
[8] *Quist v. Specialties Supply Co., Inc.*, 12 P.3d 863 (Colo. App. 2000).

25. Tri-State argues that because Complainants' surviving claims are limited to the legality of the A-37 rate, which is no longer in effect, those claims are now moot, requiring dismissal of the Complaint.

26. A case is moot when the relief sought, if granted, would have no practical legal effect. When the conduct sought to be redressed is peculiar to a particular event that has already occurred, the finality of the event in a manner incapable of repetition moots the controversy.[9] However, two exceptions to the mootness doctrine are acknowledged. A court may resolve an otherwise moot case if the matter is one that is capable of repetition yet evading review.[10] Second, a moot case may be heard if the matter involves a question of great public importance or an allegedly recurring constitutional violation.[11]

27. Tri-State claims that the A-38 rate is different from the A-37 rate because the A-38 rate does not include the Predictive Call component and includes a new Capacity Commitment Charge and a new regulatory charge component and supports a different revenue requirement. Nevertheless, a review of the Affidavit accompanying the Second Motion to Dismiss and the limited information contained therein regarding the A-38 rate shows otherwise.

28. The Complaint refers not just to the A-37 rate itself, but to the underlying rate design and cost allocation methodology adopted in the A-37 rate. For example, Paragraph 16 of the Complaint sets out the two aspects of the A-37 rate that are challenged as unlawful by Complainants. First, the Complaint states that "demand charges under the A-37 rate are assessed based exclusively on calculated average demands." *Id*. Second, the Complaint goes on to state

[9] *State Board of Chiropractic Examiners v. Stjernholm*, 935 P.2d 959 (Colo. 1997).
[10] *Goedecke v. Department of Inst*., 603 P.2d 123, 124 n. 5 (1979) *citations omitted*.
[11] *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353, 356 n.4 (Colo. 1986) *citations omitted*.

that "Tri-State has adopted an arbitrary on-peak/off-peak differential for its wholesale energy rates at a ratio of 4 to 1, which when coupled with the calculated average demand, collapses to an all-energy rate and results in an on-peak/off-peak differential of only 1.4 to 1 …" *Id*.

29. A review of the A-38 rate information contained in the Affidavit attached to the Second Motion to Dismiss as Exhibit A reveals that "average demands" continue to be a part of the A-38 rate even though the new values are slightly higher. Additionally, there appears to be no change in the energy rates from the A-37 rate to the A-38 rate, indicating that the 4 to 1 ratio continues in effect as part of the A-38 rate. Consequently, there are no significant differences between the A-37 rate and the A-38 rate regarding the claims made in the Complaint. Indeed, the most relevant components of the A-37 rate design at issue in the Complaint, remain in the A-38 rate design.

30. The controversy at issue in the Complaint regarding the A-37 rate clearly continues with the A-38 rate, namely the alleged improper underlying rate design and cost allocation methodology of both rates which are quite similar. Therefore, Tri-State's argument that the remaining claims are moot will be denied. Tri-State has failed to meet the initial prong of the test to show that the subsequent event of putting into effect the A-38 rate renders the surviving claims of the Complaint moot. Clearly the matter at issue is one that is capable of repetition and dismissal of the Complaint would allow the underlying rate design and cost allocation methodology of the A-37 rate to continue as part of the A-38 rate without the possibility of Commission review.

31. As a result, in assessing Tri-State's motion for summary judgment within the standards set out above, it is found that Tri-State has failed to meet its burden of proof regarding its motion for summary judgment. The similarities between the A-37 rate and A-38 rate are

sufficient to show that there remain genuine issues of material fact to be tried in this matter. Tri-State has further failed to show that by virtue of implementing the new A-38 rate, there is now an absence of evidence in the record to support the Complainants' case. Therefore, Tri-State's Second Motion to Dismiss, which is construed as a motion for summary judgment pursuant to C.R.C.P. 12(b)(5), will be denied.[12]

III. ORDER

A. It Is Ordered That:

1. The Motion to Dismiss the Remaining Claims in the Complaint filed by Tri-State Generation and Transmission Association, Inc. is construed as a Motion for Summary Judgment pursuant to Colorado Rule of Civil Procedure 12(b)(5).

2. The Motion for Summary Judgment is denied consistent with the discussion above.

[12] Tri-State's improper attempt to reargue whether the 25 signature requirement contained in § 40-6-108(1)(b), C.R.S. is applicable here will not be addressed in this Interim Decision. The issue was fully dealt with previously in Interim Decision No. R13-1119-I at ¶¶ 55 and 56.

3. This Decision is effective immediately.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge