

Decision No. C19-0926-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0621E

UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC.,

RESPONDENT.

**INTERIM DECISION SHORTENING RESPONSE
TIME TO MOTION AND GRANTING
PETER W. HERZOG, III *PRO HAC VICE* ADMISSION**

Mailed Date: November 13, 2019

Adopted Date: November 13, 2019

I. BY THE COMMISSION

A. Statement, Findings, and Conclusions

1. In this formal complaint filed on November 6, 2019, United Power, Inc. (United Power) alleges that Tri-State Generation and Transmission Association, Inc. (Tri-State) has engaged in ongoing efforts to thwart United Power's ability to discharge the fiduciary duties it owes to its members by, fully and completely exploring its power supply options under Colorado Public Utilities Law, by either withdrawing from membership in Tri-State on terms and conditions that are just, reasonable, and nondiscriminatory, or continuing as a Tri-State member under a partial requirements contract that would benefit the environment and United Power's members in a way that is fair and equitable to Tri-State as well. United Power asserts that it files

its formal complaint because Tri-State's actions have prevented United Power from exercising these rights and meaningfully or realistically pursuing either option.

2. United Power claims that Tri-State is obligated under Colorado law to provide member cooperatives, including United Power, with just, reasonable, and nondiscriminatory exit charges. However, according to United Power, Tri-State sets a discriminately high exit charge for United Power which are *de facto* amounts alleging United Power has no right to withdraw from Tri-State and that any withdrawal is entirely within the discretion of the Board of Directors. This conduct, according to United Power, violates Colorado law since Tri-State may not arbitrarily let some of its member cooperatives exit while holding others captive through unjust, unreasonable, and discriminatory exit charges. United Power requests that the Commission exercise its jurisdiction to confirm the unlawfulness of: (1) Tri-State's position that it can unjustly, unreasonably, and discriminatorily deny an exit charge to United Power; and (2) Tri-State's actual refusal to provide United Power an exit charge. If the Commission determines Tri-State's conduct is unlawful, United Power requests the Commission, under its statutory authority, adjudicate a just, reasonable, and nondiscriminatory exit charge.

3. On November 7, 2019, Commission Director Doug Dean sent an Order to Satisfy or Answer letter informing Tri-State of the formal complaint as well as an Order Setting Hearing and Notice of Hearing. The Order set a hearing for January 22, 2020.

4. On November 7, 2019, United Power filed a Motion Requesting Establishment of a Procedural Schedule, and Assignment of Hearing Commissioner—or in the Alternate, Hearing *En Banc* (Motion). Pursuant to the Motion, United Power requests that the Commission act now to establish a procedural schedule. Rather than wait until after Tri-State files its answer before setting a procedural schedule, United Power argues that the actions of Tri-State require

establishing a procedural schedule at the outset with the filing of testimony to commence in December 2019.

5. United Power argues that the procedural schedule it proposes is not expedited *per se*, but is expedited in the sense that United Power requests a procedural schedule now rather than after Tri-State files its answer. It is also appropriate to establish a procedural schedule now according to United Power given the likelihood of preliminary motions practice by Tri-State. The proposed procedural schedule is intended to accommodate to some degree, such motions practice according to United Power.

6. On November 7, 2019, Peter W. Herzog, III of the law firm of Wheeler Trigg O'Donnell LLP filed a verified motion to appear *pro hac vice* in this proceeding on behalf of United Power. Attached to the motion was the Affidavit of Peter W. Herzog III; and authorization from the Colorado Supreme Court authorizing Mr. Herzog to appear *pro hac vice*, pending Commission approval.

7. As to the Motion, we find it appropriate to shorten response time to the Motion to close of business on Friday, November 15, 2019. This will allow us to take up the merits of the Motion at the November 20, 2019 Weekly Meeting.

8. As for the request to appear *pro hac vice*, an attorney who is not licensed to practice law in Colorado must be granted permission to appear *pro hac vice* in Commission proceedings. Rule 1201(a) of the Commission's *Rules of Practice and Procedure 4 Code of Colorado Regulations 723-1*, govern the admission of out-of-state attorneys. Rule 1201(a) requires compliance with Colorado Rule of Civil Procedure (CRCP) 205.4, which itself expressly incorporates CRCP 205.3.

9. As pertinent here, CRCP 205.3(2)(a) details what an out-of-state attorney must do to be permitted to appear *pro hac vice* and includes these requirements:

(a) File a verified motion with the administrative agency requesting permission to appear;

(b) Designate an associate attorney who is admitted and licensed to practice law in Colorado;

(c) File a copy of the verified motion with the Clerk of the Supreme Court Office of Attorney Regulation at the same time the verified motion is filed with the administrative agency;

(d) Pay the required fee to the Clerk of the Supreme Court collected by the Office of Attorney Regulation; and

(e) Obtain permission from the administrative agency for such appearance.

10. In his November 7, 2019 Motion, Mr. Herzog attests to the requirements above and proof of *pro hac vice* registration was attached to his request.

11. Mr. Herzog meets the requirements of CRCP 205.4. We therefore grant Mr. Herzog's request to appear *pro hac vice*.

II. ORDER

A. It Is Ordered That:

1. Response time to the Motion filed by United Power, Inc. on November 7, 2019 Requesting Establishment of a Procedural Schedule, and Assignment of Hearing Commission—or in the Alternate, Hearing *En Banc* is shortened to close of business on Friday, November 15, 2019.

2. Out of State Counsel's Verified Motion Requesting *Pro Hac Vice* Admission filed by Peter W. Herzog, III on November 7, 2019, is granted.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 13, 2019.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners