

Decision No. C20-0333-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0620E

LA PLATA ELECTRIC ASSOCIATION, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC.,

RESPONDENT.

PROCEEDING NO. 19F-0621E

UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

**INTERIM DECISION DENYING MOTION FOR
INITIAL COMMISSION DECISION**

Mailed Date: May 5, 2020
Mailed Date: April 29, 2020

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I. **STATEMENT**

1. By this Decision, we deny the motion by La Plata Electric Association, Inc. (La Plata) and United Power, Inc. (United Power) (collectively, Complainants) Requesting Initial Commission Decision (Motion). We find that the time savings hoped for by Complainants may not be as significant as thought.

A. **Complainants' Motion**

2. On April 20, 2020 and pursuant to § 40-6-109(6), C.R.S. and Rule 1404(b) of the Public Utilities Commission's (Commission or PUC) Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, Complainants request that the Commission enter an order directing an Initial Commission Decision in this proceeding, and directing the omission of the Administrative Law Judge's (ALJ) recommended decision, in order to render a final Commission decision pursuant to Rule 1505(a) as soon as practicable. Further, given that time is of the essence, Complainants requested a shortened response time to this Motion of seven days to Monday April 27, 2020, pursuant to Rule 1308(c). The request for shortened response time was granted by Decision No. C20-0286-I, issued on April 22, 2020 which shortened response time to Friday, April 24, 2020.

3. Complainants argue that Tri-State Generation and Transmission Association, Inc.'s (Tri-State) strategy is to delay these proceedings while simultaneously seeking expedited relief at the Federal Energy Regulatory Commission (FERC) in order to preempt this Commission from rendering a decision in this proceeding. Complainants point out that Tri-State

has argued in several FERC proceedings that Tri-State's purported addition of new non-utility members has eliminated Tri-State's exemption from FERC rate jurisdiction under the Federal Power Act. Complainants also indicate Tri-State has taken the position that as a consequence, this Commission's jurisdiction to determine a just, reasonable, and non-discriminatory exit charge for both La Plata and United Power is preempted.

4. Complainants reference Tri-State's various filings at FERC including a petition seeking a declaratory order to this effect in Tri-State's FERC Declaratory Order Proceeding, where FERC held that this Commission's jurisdiction is not currently preempted, and cannot be preempted unless and until such time as FERC has approved a Tri-State exit charge tariff.

5. Complainants state that on the eve of the status conference to restart this proceeding, and without disclosure to the ALJ in a filing Tri-State made in this proceeding that same day, Tri-State filed an exit charge methodology tariff at FERC. According to Complainants, Tri-State requested a waiver of the usual 60-day notice period prior to FERC tariffs becoming effective, requesting that FERC deem the tariff filing effective April 14, 2020.

6. Complainants posit that in the event FERC declines to waive the 60-day notice period, Tri-State will nonetheless put forth another argument to displace the Commission's jurisdiction and will try and take the position that the tariff filing is effective by operation of law 60 days from its filing (June 12, 2020).

B. Tri-State's Response

7. Tri-State argues that Complainants' Motion is replete with rhetoric, hyperbole, dramatic analogies, and disparaging comments regarding Tri-State and its motives – all intended to create a false sense of urgency in an effort to convince the Commission that immediate action

is required.¹ Tri-State takes the position that Complainants' Motion fails to recognize that the underlying issues are issues of subject matter jurisdiction and preemption. Tri-State argues that it is simply whether the Commission has subject matter jurisdiction to hear and decide the present formal complaints, or it does not. Tri-State urges that such jurisdiction cannot be acquiesced to by Tri-State, nor immunized from preemption through "the race to the finish" that the Complainants claim is imperative.

8. According to Tri-State, it is Complainants' concern that the Commission may, in fact, lack subject matter jurisdiction that motivates their request for "a final Commission decision pursuant to Rule 1505(a) as soon as practicable."²

9. Tri-State argues that contrary to the Complainants' characterization that Tri-State has created a jurisdictional "race to the finish line" that merits dispensing with the recommended decision to save 27 days, the jurisdictional outcome will not be changed if the Commission foregoes the recommended decision and proceeds directly to an initial Commission decision. Tri-State takes the position that either the Commission has jurisdiction or it does not, and that determination will not depend on whether its initial decision is entered 27 days earlier. Tri-State portrays Complainants' characterization of Tri-State's actions as being motivated by a desire to delay this proceeding is inaccurate and contradicted by a proper understanding of the jurisdictional issues. According to Tri-State, the Commission's functions do not imperatively and unavoidably require it to make the initial decision in this proceeding since this procedural change will have no bearing on the underlying jurisdictional issue that motivates the Complainants' Motion.

¹ Tri-State Response filed April 24, 2020.

² *Id.* at ¶ 8.

10. Tri-State is of the opinion that the ruling Complainants ask the Commission to expedite is a purely advisory opinion. Tri-State argues that a ruling will have no effect unless and until Complainants actually exit. Further, if and when Complainants exit, FERC will have jurisdiction over their exit, including exit charge terms, even if it has not yet approved Tri-State's Contract Termination Payment methodology. Tri-State points to FERC regulations that provide for FERC review upon 60 days' notice, of the termination of a wholesale electricity contract that is subject to FERC jurisdiction. (18 *Code of Federal Regulations* § 35.15(a)). In addition, the Complainants' exit would presumably ultimately be effectuated by a termination agreement, which would be subject to FERC review under 16 U.S.C. § 824d.5. Thus, in light of FERC's ruling which Tri-State claims indicates it is FERC-jurisdictional, Tri-State asserts that this proceeding is nothing more than a wasteful effort by Complainants to procure advice from this Commission, which FERC could ultimately reject.

11. With the transition of this proceeding from a Hearing Commissioner to an ALJ, and as a result of the current public health crisis, Tri-State proposes that there is an opportunity for the Commission to take the time to thoroughly review Tri-State's new methodology, which Tri-State proposes will govern any future exits by Complainants should they choose to do so. Accordingly, Tri-State has sought leave to supplement its testimony in this proceeding to include this information.

12. Tri-State asserts that while its motion to supplement its testimony is presently pending before an ALJ, its proposed supplemental testimony is not merely highly relevant evidence, rather it is Tri-State's position as to exit charges. By directing an Initial Commission Decision, Tri-State believes that it would somehow be denied the opportunity to effectively present that position resulting in a denial of due process.

13. Tri-State supposes that under the unique circumstances of this case, it is essential that the Commission follow its normal procedures to ensure that due process is provided, especially where the Complainants have failed to demonstrate that there is an imperative and unavoidable need for the Commission to depart from its normal procedures. Tri-State concludes that the Commission should not resort to procedural shortcuts in such a complex proceeding, especially when such shortcuts will not resolve the underlying jurisdictional issues.

II. FINDINGS AND CONCLUSIONS

14. Complainants ask that we enter an order directing an Initial Commission Decision in this proceeding, and directing the omission of the ALJ's recommended decision, in order to render a final Commission decision as soon as practicable. Consequently, we must determine whether time is of the essence, and if so, whether directing an Initial Commission Decision addresses Complainants' concerns.

15. The discretion for the Commission to make the initial decision in a matter in which it has not presided at the evidentiary hearing is provided under § 40-6-109(6), C.R.S., which states as follows:

The commission may make the initial decision in cases where it has not presided at the taking of evidence, and the recommended decision of the individual commissioner or administrative law judge may be omitted in any case in which the commission finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

16. Tri-State, in its response to the Motion, takes the position that FERC jurisdiction over the Contract Exit Methodology and the PUC's complaint proceedings is a *fait accompli* and to go forward is a waste of time and resources. However, we find it useful to note that those declarations emanate from Tri-State itself rather than from any law or agency pronouncement.

17. As was established in Decision No. R20-0097-I, issued February 12, 2020, this Commission is vested with the power to regulate the facilities, service, rates, and charges of every public utility operating within Colorado.³ Further, through the Colorado Public Utilities Law, the General Assembly has authorized the Commission “to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses” and “to do all things, whether specifically designated in Articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power.”⁴ That power includes hearing complaints alleging that a public utility has established or fixed an unlawful rule, regulation, or charge.⁵ The Commission is also empowered to hear complaints alleging that a utility has established preferential or discriminatory rates or charges.⁶

18. Moreover, we refer to the March 20, 2020 decision issued by FERC regarding Tri-State’s Petition for Declaratory Order.⁷ As is clear, from Paragraph 121 of FERC’s decision, this Commission does indeed have jurisdiction over the Complaint proceedings despite Tri-State’s arguments to the contrary. That decision states as follows:

A ruling by the Colorado PUC on those complaints would not be preempted unless and until such ruling conflicts with a Commission-approved tariff or agreement that establishes how Tri-State’s exit charges will be calculated. We note that Tri-State has not yet filed, and the [FERC] has not yet approved, a methodology for determining Tri-State’s exit charges. If Tri-State seeks to place matters regarding its exit charges before the Commission, it should make an appropriate filing at the [FERC], which could include a filing setting forth a methodology for determining such charges.⁸

³ See, Colorado Constitution, article XXV.

⁴ See, § 40-3-102, C.R.S.

⁵ See, § 40-6-108(1)(a), C.R.S.

⁶ See, § 40-6-111(4)(a), C.R.S.

⁷ *Order Granting in Part and Denying in Part Petition re Tri-State Generation and Transmission Association, Inc. under EL20-16*, 170FERC61, 224, issued 3/20/2020.

⁸ *Id.* at ¶ 121.

19. According to FERC’s decision, Tri-State “became a jurisdictional public utility under Part II of the [Federal Power Act] upon its admission of MEICO as a member on September 3, 2019.”⁹ FERC went on to find that it has jurisdiction over the determination of Tri-State’s exit charges, but that it did not have sole jurisdiction.¹⁰ As a result, FERC found that “the Colorado PUC’s jurisdiction over complaints regarding such exit charges is not currently preempted.”¹¹

20. It is abundantly clear to us that we possess jurisdiction over this complaint proceeding despite Tri-State’s arguments to the contrary. Nothing in our determination should therefore touch on the issue of jurisdiction other than to indicate we possess such jurisdiction to render a decision here.

21. Tri-State’s argument that § 40-6-109(6), C.R.S., is not a general grant of authority for the Commission to omit a Recommended Decision simply because one party wishes to avoid the time associated with a Recommended Decision. That is our determination to make. In this instance we find that this matter should be concluded as soon as practicable in order to provide some certainty to the parties as it applies to the issue of a just, reasonable, and non-discriminatory exit fee pursuant to § 40-3-102, C.R.S.

22. The question of whether to require an Initial Commission Decision in this proceeding is resolved by our determination that it is necessary in order to keep this matter moving towards resolution. Tri-State provides no legal support for its claim that the Commission may not require such a decision for such a purpose. We find that directing an Initial Commission

⁹ *Id.* at ¶ 82.

¹⁰ *Id.* at ¶¶ 116-121.

¹¹ *Id.* at ¶ 116.

Decision fails to provide the time savings Complainants hope for. Rather, we find that any reduction in the amount of time to prepare a Recommended Decision is negligible and therefore decline to direct such a decision in this matter.

23. Finally, we address Tri-State's statement that its due process rights would be compromised in the event we invoke our discretion under § 40-6-109(6), C.R.S., by directing an Initial Commission Decision, which it believes would somehow deny it the opportunity to effectively present its position resulting in a denial of due process. Tri-State offers no legal support for its conclusory statement for the simple reason that none exists. It is irrational for Tri-State to conclude that by asserting our statutory discretion to direct an Initial Commission Decision we would somehow deprive it of its due process rights. We can only surmise from such an assertion that Tri-State completely fails to comprehend the legislative intent behind providing the discretion to order an Initial Commission Decision. While we encourage vigorous representation of parties before the Commission, we suggest parties take care not to stray into undue speculation.

III. ORDER

A. It Is Ordered That:

1. The Joint Motion to the Commission *En Banc* Requesting Initial Commission Decision filed by La Plata Electric Association, Inc. and United Power, Inc. on April 20, 2020 is denied consistent with the discussion above.

2. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONS' WEEKLY MEETING
April 29, 2020.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners