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.

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

Whereupon, the following proceedings were had:

FOR LA PLATA ELECTRIC ASSOCIATION, INC.:
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FOR UNITED POWER, INC.:
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FOR TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION:
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P R O C E E D I N G S

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

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

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

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

MR. GIFFORD: Good morning.

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

Neckers are also with me.

A.L.J. GARVEY: Good morning.

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

A.L.J. GARVEY: All right.

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

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

want.

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

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

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

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

Some of the issues that they believe

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

While Tri-State is in this forum

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

What that means, Judge, is that FERC

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

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

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

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

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

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

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

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

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

Thank you, sir.

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

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

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

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

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

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

Tri-State has been working with its own

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

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

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

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

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

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

A.L.J. GARVEY: Sure.

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

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

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

you say to that?

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

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

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

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

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

A.L.J. GARVEY: Okay.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

of directors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

that.

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

As far as --

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

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

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

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

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

MR. DOUGHERTY: I appreciate that, Your

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

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

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

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

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

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

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

I'll start with Mr. Larson.

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

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

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

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

MR. HERZOG: No, sir.

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

MR. DOUGHERTY: Nothing else.

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

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

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

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

MR. LARSON: I appreciate that. I think

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

asked earlier.

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

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

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

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

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

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

May.

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

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

MR. HERZOG: Yes, hold the hearing.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HERZOG: 29th, Your Honor.

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

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

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

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

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

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

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

MR. HERZOG: No, sir. Thank you.

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

MR. DOUGHERTY: Nothing further, Your Honor.

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

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

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

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

MR. LARSON: Thank you, Your Honor.

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

CERTIFICATE

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

Dated April 16, 2020.

/s/ Debbie Zoetewey
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