

Decision No. C20-0706-I

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

PROCEEDING NO. 19F-0620E

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LA PLATA ELECTRIC ASSOCIATION, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

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PROCEEDING NO. 19F-0621E

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UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

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**INTERIM DECISION GRANTING  
MOTION TO SUPPLEMENT THE RECORD  
AND DENYING REQUEST FOR  
SHORTENED RESPONSE TIME AS MOOT**

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Mailed Date: October 6, 2020

Mailed Date: September 30, 2020

**I. STATEMENT****A. Background**

1. On September 18, 2020, United Power, Inc. (United Power) and La Plata Electric Association (together Complainants) filed a Joint Motion to Lodge and Request for Shortened Response Time (Joint Motion).

2. Complainants wish to supplement the record in this proceeding with the Order issued by the Federal Energy Regulatory Commission (FERC) at 172 FERC ¶ 61,173 in Docket No. EL20-16-001, in which FERC reversed its earlier decision that the Public Utilities Commission (Commission or PUC) has concurrent jurisdiction over this consolidated exit charge proceeding and concluded that the Commission's jurisdiction is pre-empted as of September 3, 2019.

3. Complainants assert that Tri-State Generation and Transmission Association, Inc. (Tri-State), in this consolidated proceeding, previously contended that the Commission lacked subject matter jurisdiction over these exit charges because they fall within FERC's exclusive jurisdiction. While Tri-State was previously exempt from FERC jurisdiction, Complainants point out that Tri-State was exempt from FERC jurisdiction under § 201(f) of the Federal Power Act (FPA) because Tri-State was wholly owned by electric cooperatives exempt from FERC jurisdiction. However, Tri-State argued it extinguished its exemption from FERC jurisdiction by adding MIECO, which is not an electric cooperative, as a member.

4. It is Complainants' contention Tri-State injected substantive Colorado cooperative and corporate law into the case by maintaining MIECO qualifies as a member-owner of Tri-State under Colorado law. Complainants point out that they asserted here that the PUC had jurisdiction over their Complaints by virtue of Article XXV of the Colorado Constitution and the Public Utilities Law. Complainants also rebutted Tri-State's assertion that adding MIECO as a purported

member brought Tri-State within FERC's jurisdiction by eliminating Tri-State's § 201(f) exemption under the FPA. Tri-State remains exempt from FERC regulation under the FPA because MIECO has not been added as a member consistent with Colorado law and has not become an "owner" of Tri-State. Tri-State therefore remains wholly owned by exempt members and is exempt from FERC jurisdiction under § 201(f) of the FPA. Accordingly, Complainants argue that the question of whether Tri-State properly added a non-utility member under Colorado law long has been a core issue in these proceedings.

5. The FERC decision Complainants seek to supplement the record with was issued on August 28, 2020. There, FERC reversed its previous concurrent jurisdiction finding and held that the Colorado PUC's jurisdiction over Tri-State's exit charge is preempted as of the date that Tri-State added MIECO or September 3, 2019.<sup>1</sup> FERC reiterated, however, that it would not "resolve the Colorado law issues ... which ... are more appropriately handled in state fora."<sup>2</sup>

6. Complainants note FERC observed for a second time that "any future Colorado PUC and state court rulings regarding the validity of MIECO's membership in Tri-State could be relevant to" whether FERC has "exclusive jurisdiction over Tri-State's assessment of exit charges."<sup>3</sup> Preemption of the Commission's statutory jurisdiction, therefore, depends on whether the purported addition of MIECO was lawful. According to Complainants, this determination is identical to the issue raised by United Power's Exception, an issue that Administrative Law Judge Garvey did not reach because FERC had ruled there was concurrent jurisdiction.

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<sup>1</sup> *Complainants' Joint Motion to Lodge and Request for Shortened Response Time*, at p.8 citing, 172 FERC ¶ 61,173, para. 34 (August 28, 2020).

<sup>2</sup> *Id.* at para. 35 (quoting Declaratory Order, 170 FERC ¶ 61,224, para. 76, March 20, 2020).

<sup>3</sup> *Id.*

7. Complainants go on to offer a lengthy argument as to why the Commission has jurisdiction to hear the MIECO membership issue.

8. Complainants also request under Commission Rule 4 *Code of Colorado Regulations* 723-1-1308(c) of the Commission's Rules of Practice and Procedure, that the Commission shorten or waive response time because time is of the essence here given the ongoing FERC proceeding and approaching statutory deadline of November 5, 2020 in these consolidated proceedings. Complainants therefore request shortened response time to September 25, 2020.

### **B. Tri-State Response**

9. On September 29, 2020, Tri-State filed its reply to the Joint Motion. Tri-State objects that the Joint Motion goes much farther than merely asking the Commission to take notice of FERC's decision or explaining its relevance to this proceeding. Rather, Tri-State complains that the Joint Motion advances numerous additional legal arguments and requests significant additional relief from the Commission. Tri-State also protests that Complainants did not confer with Tri-State on these aspects of the Joint Motion which the Commission should disregard.

10. Despite its complaints, Tri-State nonetheless offers its lengthy rejoinder of the issues raised by Complainants in the Joint Motion, disputing the statements and arguments raised by Complainants.

## **II. FINDINGS**

11. We find good cause to grant the Joint Motion and accept the FERC Decision into the record. FERC's Decision certainly has direct implications for the Consolidated Complaint proceeding currently on exceptions. Those exceptions will be addressed at the appropriate time at

an upcoming weekly meeting. While the arguments raised by Complainants and Tri-State are interesting, they have no bearing on whether to accept the FERC Decision into the record.

12. We deny the request for expedited treatment of the Joint Motion as moot since response time has run.

### III. ORDER

#### A. It Is Ordered That:

1. The Joint Motion to Lodge (Joint Motion) filed on September 18, 2020, by United Power, Inc. and La Plata Electric Association, Inc., requesting to supplement the record in these consolidated proceeding with Federal Energy Regulatory Commission decision, 172 FERC ¶ 61,173 in Docket No. EL20-16-001, is granted.

2. The request to shorten response time to the Joint Motion is denied as moot.

3. This Decision is effective on its Mailed Date.

#### B. **ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 30, 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