

Decision No. C20-0723

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0691E

UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

RESPONDENT.

DECISION GRANTING MOTION TO STAY

Mailed Date: October 9, 2020

Adopted Date: October 7, 2020

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I. BY THE COMMISSION**A. Background**

1. On September 29, 2020, United Power, Inc. (United Power) filed a Motion to Stay Recommended Decision No. R20-0687 and for shortened response time (Motion). United Power requests to stay the period of time to file exceptions to Recommended Decision No. R20-0687 issued in this proceeding on September 25, 2020, which granted Tri-State Generation and Transmission, Inc.'s (Tri-State) motion to dismiss the complaint filed on December 26, 2019.

2. United Power urges that to conserve the parties' and the Commission's resources, the Recommended Decision be stayed, and that the time period for filing exceptions to the Recommended Decision be extended until ten days following the Commission's final decision in Proceeding Nos. 19F-0620E and 19F-0621E.

3. United Power further argues that time is of the essence here because a stay or extension would delay the effort and expense to prepare and file exceptions to the Recommended Decision. United Power therefore requested a shortened response time to October 2, 2020.

4. By Interim Decision No. C20-0703-I issued October 1, 2020, response time to the Motion was shortened to October 2, 2020.

B. United Power's Motion

5. United Power expresses that the Administrative Law Judge (ALJ) in Recommended Decision No. R20-0687 issued September 25, 2020,¹ dismissed without prejudice, United Power's Complaint based on decisions issued after Tri-State's motion to dismiss or stay was fully briefed and which United Power had no opportunity to address. The Recommended Decision determined that Tri-State's capacity charges are subject to Federal

¹ ¶¶ 9-11.

Energy Regulatory Commission (FERC) jurisdiction. However, United Power points out that in reaching that decision, FERC stated that the validity of MIECO, Inc.'s (MIECO) membership in Tri-State could impact FERC's jurisdiction over Tri-State and the issue should be determined according to state law by a Colorado tribunal.

6. United Power observes that whether MIECO was lawfully added is now before the Commission in Consolidated Complaint Proceeding Nos. 19F-0620E and 19F-0621E. In order to conserve party and Commission resources, United Power seeks to have Recommended Decision No. R20-0687 stayed and the time period for filing exceptions to the Recommended Decision extended until ten days following the Commission's final decision in the Consolidated Complaint proceedings.

C. Tri-State's Response

7. On October 2, 2020, Tri-State filed its response. Tri-State maintains it has thoroughly rebutted any argument that the Commission can or should void the admission of the Non-Utility Members through pleadings in the Consolidated Complaint proceedings.² According to Tri-State, it has demonstrated that the claims underlying United Power's Motion are not brought pursuant to Public Utilities Law, which defines the limits of Commission jurisdiction, but are instead legal issues that must be decided by a Colorado district court.

8. Tri-State goes on to argue that the district court has original jurisdiction in all civil cases not otherwise excepted in the state constitution and jurisdiction over claims that a

² *Tri-State's Response to Complainants' Joint Motion for Partial Summary Judgment or Determination of a Question of Law*, Proceeding Nos. 19F-620E and 19F-0621E (May 11, 2020) (Attachment A to Tri-State's Response); *Response of Tri-State Generation and Transmission Association, Inc. to United Power, Inc.'s Limited Exception to Recommended Decision No. R20-0502*, Proceeding Nos. 19F-620E and 19F-0621E (Aug. 6, 2020) (Attachment B to Tri-State's Response); *Response of Tri-State Generation and Transmission Association, Inc. to Complainants' Joint Motion to Lodge and Request for Shortened Response Time*, Proceeding Nos. 19F-620E and 19F-0621E (Sept. 29, 2020) (Attachment C to Tri-State's Response).

corporation or association was without authority to act. According to Tri-State, the Public Utilities Law does not provide the Commission the authority to void the admission of the Tri-State non-utility members and United Power has not offered argument to the contrary. As such, Tri-State argues the claims related to the non-utility members are not properly before the Commission. Tri-State concludes that because the Commission has no authority to decide the claims regarding the non-utility members, there is no basis for issuing a stay until such a decision is reached.

D. United Power's Motion for Leave to Reply

9. On October 6, 2020, United Power filed a Motion for Leave to Respond pursuant to Commission Rule 1400(e), 4 *Code of Colorado Regulations* 723-1 of the Commission's Rules of Practice and Procedure. United Power claims Tri-State made several material misrepresentations. For example, United Power argues that Tri-State claims it demonstrated in Proceeding Nos. 19F-620E and 19F-0621E that the Commission has no authority to void Tri-State's admission of MIECO.

10. United Power takes issue with Tri-State's declaration maintaining it is false. Rather, United Power argues the Commission has the authority to reach such a decision, which FERC has declined to answer, stating that a Colorado tribunal (like the Commission) is the appropriate place to make that determination.

11. United Power maintains it could not have anticipated, through ordinary prudence, that Tri-State would attempt to inject additional substantive evidence into this proceeding in response to what is a straightforward motion to stay. United Power asserts the narrow issue it merely requests is that the Commission stay the proceedings so United Power does not have to file exceptions to the ruling on Tri-State's motion to dismiss at this time. According to United

Power, in response, Tri-State injected evidence that has nothing to do with the motion to stay and that ALJ Garvey already excluded from the Exit Charge Proceedings.

E. Findings

12. United Power and Tri-State aggressively engage each other over whether the Commission maintains jurisdiction over the MIECO ownership issue. This is an issue that we intend to address at the appropriate time. However, reaching such a conclusion based on a motion to stay Recommended Decision No. R20-0687 is not the appropriate situation in which to make such a decision. These proceedings, while presenting thought-provoking issues, are procedurally complex. We will analyze the exceptions to the complaint proceedings in due course.

13. We find good cause to grant the stay of Recommended Decision No. R20-0687 as requested by United Power in its Motion pending the Commission's decision on the exceptions in the Consolidated Complaint case (19F-0620E and 0621E). The time period for filing exceptions to the Recommended Decision will be extended until ten days following the Commission's final decision in the Consolidated Complaint Proceedings.

14. We note that in the course of reviewing the pleadings here, United Power's and Tri-State's jurisdictional arguments are piecemeal scattered throughout several pleadings. We find this untenable. Therefore, United Power and Tri-State each have seven days from the date of this Decision to file one cogent pleading setting forth their arguments on the question of Commission jurisdiction to determine the MIECO issue, or inform the Commission that each party will include a full argument in its respective exceptions to the Recommended Decision.

II. ORDER**A. The Commission Orders That:**

1. The Motion filed by United Power, Inc. on September 29, 2020, to Stay Recommended Decision No. R20-0687 is granted.
2. The time period for filing exceptions to the Recommended Decision shall be extended until ten days following the Commission's final decision in the Consolidated Complaint Proceedings 19F-0620E and 19F-0621E.
3. No later than seven days from the effective date of this Decision, United Power, Inc. and Tri-State Generation and Transmission, Inc. shall make a filing either setting forth comprehensive arguments on the question of Commission jurisdiction to determine the MIECO, Inc. issue, or indicate that each party will include a full argument on the jurisdictional issue in the respective exceptions to Recommended Decision No. R20-0687.
4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
October 7, 2020.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOHN GAVAN

MEGAN M. GILMAN

Commissioners

CHAIRMAN JEFFREY P. ACKERMANN
ABSENT.