

Decision No. R20-0073-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 OF
HEARING COMMISSIONER
FRANCES A. KONCILJA
ADDRESSING INTERVENTIONS AND *PRO HAC VICE*
ADMISSION OF OUT-OF-STATE COUNSEL**

Mailed Date: January 30, 2020

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I. STATEMENT

1. La Plata Electric Association, Inc. (La Plata) and United Power, Inc. (United Power) (collectively, Complainants) filed these formal complaints against Tri-State Generation and Transmission Association, Inc. (Tri-State). On November 25, 2019 by Decision No. C19-0955-I, the Commission consolidated the complaints in Proceeding Nos. 19F-0620E and 19F-0621E and designated Commissioner Frances Koncilja as the Hearing Commissioner.

2. Through this Interim Decision, the Hearing Commissioner rules on outstanding procedural matters. The Hearing Commissioner denies the motions to intervene filed by third-party entities seeking to intervene in these consolidated complaint proceedings and denies as moot the related applications for *pro hac vice* admission of these entities' out-of-state counsel. The Commission grants the application for *pro hac vice* admission of out-of-state counsel for Respondent Tri-State.

II. INTERVENTIONS

A. Notices of Intervention of Right; Motions to Intervene

1. PVREA

3. On December 19, 2019, Poudre Valley Rural Electric Association, Inc. (PVREA), filed a motion to intervene. PVREA claims it has a contractual interest because it purchases wholesale electric power and energy from Tri-State through a wholesale electric service contract. PVREA contends Tri-State will not represent its interests since Tri-State is the counterparty. PVREA claims it also has a relevant membership interest as a member of Tri-State. PVREA contends Tri-State cannot and will not represent its individual interest. PVREA contends it is also entitled to intervene as of right since the requested relief is for the Commission to set an exit charge. PVREA contends if the Commission sets this charge, PVREA would be able to use it for its own exit. PVREA argues if Complainants and other members exit from Tri-State, PVREA and other remaining members would sustain a rate impact from any stranded costs. Finally, PVREA asserts a settlement could affect the exit charge that may be established for PVREA.

4. On December 26, 2019, Tri-State filed a response indicating it does not oppose PVREA's intervention.

5. On January 2, 2020, United Power filed a response opposing the intervention. United Power claims PVREA's intervention would cause unnecessary delay and complication. United Power states while it and La Plata have attempted to explore their withdrawal rights, PVREA has not. United Power argues PVREA fails to identify any legally protected right that may be affected by the outcome of these proceedings. United Power asserts that denying PVREA's intervention is consistent with the Commission's denial of United Power's intervention

in the last withdrawal complaint proceeding.¹ United Power states in that case, like PVREA does here, United Power claimed its contractual and membership interests supported its intervention. United Power also responds that PVREA misconstrues the scope of the requested relief, which United Power states is for the Commission to declare an exit charge for the two Complainants.

6. On January 2, 2020, La Plata filed a response indicating it opposes PVREA's intervention for the same reasons stated by United Power.

7. On January 7, 2020, PVREA filed a motion for leave to reply and a reply to the oppositions of United Power and La Plata. PVREA asserts its reply is warranted under Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1400(e) of the Commission's Rules of Practice and Procedure, in order to correct misrepresented facts. PVREA states it did request and receive an exit charge from Tri-State in November 2018. PVREA states if the Commission sets an exit charge, other members may use that charge for their own exits. PVREA also disputes that the requested relief is limited to Complainants. PVREA counters that in a December 4, 2019 letter, United Power indicated it desires to determine what is a fair and equitable exit fee not just for United Power but for all the members.²

2. MVEA

8. On December 23, 2019, Mountain View Electric Association, Inc. (MVEA) filed a notice of intervention, or in the alternative, motion to intervene. MVEA states it is a member of and contracts with Tri-State to purchase wholesale electric power. MVEA contends the requested relief asks the Commission to make findings regarding Tri-State's bylaws, to which MVEA is

¹ See Decision No. C19-0135-I, Proceeding No. 18F-0866E, issued February 1, 2019, at ¶ 6 (finding United Power was not entitled to intervene as of right and denying the request for permissive intervention).

² PVREA provides a copy of this letter as Exhibit 1 to its motion for leave to reply.

subject. MVEA states those findings may result in an interpretation that creates an advantage for one member over another. MVEA argues the requested relief may establish precedent regarding the formulation of an exit charge. MVEA also argues the requested relief may affect the rates, terms, and conditions upon which it purchases power from Tri-State.

9. On December 26, 2019, Tri-State filed a response indicating it does not oppose MVEA's intervention.

10. On January 2, 2020, United Power filed a response opposing the intervention. United Power claims MVEA's intervention would cause unnecessary delay and complication. United Power states while it and La Plata have attempted to explore their withdrawal rights, MVEA has not. United Power argues MVEA fails to identify any legally protected right that may be affected by the outcome of these proceedings. United Power argues that denying MVEA's intervention is consistent with the Commission's denial of MVEA's intervention in the last withdrawal complaint proceeding, Proceeding No. 18F-0866E, where MVEA similarly claimed the rulings in that proceeding would affect its contract rights. United Power also responds that MVEA misconstrues the scope of the requested relief, which United Power states is for the Commission to declare an exit charge for the two Complainants.

11. On January 2, 2020, La Plata filed a response indicating it opposes MVEA's intervention for the same reasons stated by United Power.

3. Wyoming Members

12. On January 6, 2020, Big Horn Rural Electric Company; Carbon Power & Light, Inc.; Garland Light & Power Co.; High West Energy Inc.; High Plains Power, Inc.; Niobrara Electric Association, Inc.; Wheatland Rural Electric Association; and Wyrulec Company, Inc. (collectively, the Wyoming Members), filed a motion to intervene as of right or, in the

alternative, by permission. The Wyoming Members state they are rural electric distribution cooperatives and members of Tri-State. They each are party to a wholesale electric service contract with Tri-State and the Tri-State bylaws. The Wyoming Members state the Commission's decisions on whether Complainants may withdraw and on what terms will affect the costs recovered by Tri-State through its postage stamp rate and the margins available for patronage capital allocation. The Wyoming Members claim these decisions will result in the Commission asserting regulatory authority over utilities and consumers outside of Colorado. They state their interests are not adequately represented by Complainants, whose interest is in a low withdrawal amount, or by Tri-State, who cannot withdraw from itself and will not be responsible for cost shifts.

13. On January 7, 2020, Tri-State filed a response indicating it does not oppose the Wyoming Members' intervention.

14. On January 21, 2020, United Power and La Plata filed a response opposing the intervention. They claim the interests asserted by the Wyoming Members do not sufficiently entitle them to intervention and do not outweigh the need for an efficient proceeding. United Power and La Plata respond that, in the last withdrawal complaint proceeding, Proceeding No. 18F-0866E, the Commission denied intervention of entities asserting the same interest the Wyoming Members claim here, namely, that the Commission's calculation of an exit charge could impact the charges the Wyoming Members' end-users have to pay. United Power and La Plata state they have asked the Commission to determine exit charges for *their* departures. They argue the Wyoming Members' claimed interest that withdrawal will result in higher rates is counterfactual and insufficient.

4. Nebraska Members

15. On January 16, 2020, Wheat Belt Public Power District; Midwest Electric Cooperative Corporation; Chimney Rock Public Power District; and Panhandle Rural Electric Membership Association (collectively, the Nebraska Members), filed a motion to intervene. The Nebraska Members are rural distribution public power districts or rural electric distribution cooperatives and Tri-State members. The Nebraska Members assert they are party to the Tri-State bylaws that address withdrawal and share in the costs and margins through Tri-State's postage stamp rate and allocation of patronage capital. They contend the decisions in these proceedings regarding Complainants' withdrawal could result in higher rates. The Nebraska Members claim a decision by the Commission on an exit charge for one member could result in the Commission asserting authority over out-of-state Nebraska entities. They state their interests are not adequately represented by Tri-State as they are not similarly situated as members.

16. On January 21, 2020, Tri-State filed a response indicating it does not oppose the Nebraska Members' intervention.

17. On January 21, 2020, United Power and La Plata filed a response opposing the intervention. They respond the interests asserted by the Nebraska Members do not entitle them to intervention and do not outweigh the need for an efficient proceeding. They note the Nebraska Members filed nearly the exact motion in the last withdrawal complaint proceeding, Proceeding No. 18F-0866E, and were denied intervention. United Power and La Plata state they have asked the Commission to determine exit charges for *their* departures. They argue the Nebraska Members' claimed interest that withdrawal will result in higher rates is counterfactual and insufficient.

5. Colorado Members

18. On January 21, 2020, Southeast Colorado Power Association; K.C. Electric Association; Y-W Electric Association, Inc.; Morgan County Rural Electric Association; and Highline Electric Association (collectively, the Colorado Members), filed a notice of intervention as of right or, in the alternative, a motion to intervene. The Colorado Members state they each are party to a wholesale electric service contract with Tri-State and the bylaws. They claim they share in the costs and margins of the association through Tri-State's postage stamp rate and the allocation of patronage capital. The Colorado Members claim that decisions about Complainants' withdrawal will affect the costs recovered by Tri-State which, in turn, will affect the rates they must charge their customers. They also argue the Commission's decisions may assert regulatory authority over exempt utilities. Finally, they state their interests are not adequately represented by Complainants, whose interest is in a low withdrawal amount, or by Tri-State, who cannot withdraw from itself and will not be responsible for cost shifts.

19. On January 28, 2020, Tri-State filed a response indicating it does not oppose the Colorado Members' intervention.

B. Grant of Leave to Reply

20. In accordance with Rule 4 CCR 723-1-1308(b) of the Commission's Rules of Practice and Procedure, the Hearing Commissioner will allow PVREA to reply to the responses filed by United Power and La Plata opposing PVREA's intervention, although the Hearing Commissioner notes it is unusual for a party to reply to a response. In its reply, PVREA states that, contrary to the assertions of United Power and La Plata, PVREA did request and receive an exit charge from Tri-State.

C. Denial of Motions

21. After review of the notices of intervention of right and the motions to intervene filed by PVREA, MVEA, the Wyoming Members, the Nebraska Members, and the Colorado Members, the Hearing Commissioner denies the intervention of these entities as parties in these consolidated complaint proceedings.

22. Requests for intervention are subject to statute and the Commission's rules. Section 40-6-109(1), C.R.S., creates two classes of intervenors: (1) those who may intervene as of right; and (2) those whom the Commission permits to intervene.

23. Rule 4 CCR 723-1-1401(b) of the Commission's Rules of Practice and Procedure governs interventions as of right and states in pertinent part: "A notice of intervention as of right ... shall state the basis for the claimed legally protected right that may be affected by the proceeding." The Hearing Commissioner finds none of these entities have met their burden to state the basis for the "legally protected right" that would entitle them to intervene as of right in these complaint proceedings. The notices of intervention of right are therefore denied.

24. Rule 4 CCR 723-1-1401(c) of the Commission's Rules of Practice and Procedure states the minimum standards for permissive intervention and requires that:

A motion to permissively intervene shall state the specific grounds relied upon for intervention; the claim or defense within the scope of the Commission's jurisdiction on which the requested intervention is based, including the specific interest that justifies intervention; and why the filer is positioned to represent that interest in a manner that will advance the just resolution of the proceeding. The motion must demonstrate that the subject proceeding may substantially affect the pecuniary or tangible interests of the movant (or those it may represent) and that the movant's interests would not otherwise be adequately represented. ... The Commission will consider these factors in determining whether permissive intervention should be granted. Subjective, policy, or academic interest in a proceeding is not a sufficient basis to intervene.

25. The Commission has the discretion to grant or to deny permissive interventions. *Public Service Co. v. Trigen-Nations Energy Co., L.L.P.*, 982 P.2d 316, 327 (Colo. 1999). Pursuant to Rule 1401(c), that discretion is based upon the hearing officer's determination of whether the person seeking permissive intervention has satisfied the requirements of Rule 1401(c). Pursuant to Rule 4 CCR 723-1-1500, the person seeking leave to intervene by permission bears the burden of proof with respect to the relief sought.

26. All of these third-party entities contend that they have relevant contractual and membership interests that may be affected by the Commission's decisions in these complaint proceedings. The Hearing Commissioner finds these entities have failed to "demonstrate that the subject proceeding may substantially affect [their] pecuniary or tangible interests" and show that their interests "would not otherwise be adequately represented" as required in Rule 1401(c) for permissive intervention. The Hearing Commissioner also finds these interventions are not needed to develop a comprehensive record in these complaint proceedings and to resolve the specific issues presented. In making these determinations, the Hearing Commissioner considers the Commission's statutory charge to "conduct its proceedings in such a manner as will best conduce the proper dispatch of business and the ends of justice." *See* § 40-6-101(1), C.R.S. Were all these interventions granted, the administrative burden would unnecessarily complicate and slow these complaint proceedings moving forward. Balancing the claimed interests shown by these entities with the Commission's need for an efficient proceeding, these interventions are properly denied.

III. PRO HAC VICE ADMISSION

27. An attorney who is not licensed to practice law in Colorado must be granted permission to appear *pro hac vice* before the Commission in these consolidated proceedings. Rule 4 CCR 723-1-1201(a) governs the admission of out-of-state attorneys. This rule requires

compliance with Colorado Rule of Civil Procedure (Colo.R.Civ.P.) 205.4, which itself expressly incorporates Colo.R.Civ.P. 205.3. As pertinent here, Colo.R.Civ.P. 205.3(2)(a) details what an out-of-state attorney must do to be permitted to appear *pro hac vice*.

28. On December 5, 2019, Mr. James M. Costan of the law firm of Dentons US LLP in Washington, D.C., filed a motion to appear *pro hac vice* on behalf of Tri-State and attested to the pertinent requirements in Colo.R.Civ.P. 205.3. On December 10, 2019, the Commission received proof of *pro hac vice* registration of Mr. Costan. The Hearing Commissioner finds that Mr. Costan meets the requirements in Colo.R.Civ.P. 205.4. The Hearing Commissioner therefore grants Mr. Costan's request to appear *pro hac vice* as an attorney in this matter on behalf of Tri-State.

29. On January 21, 2020, Mr. David Jarecke of the Law Firm of Blankenau Wilmoth Jarecke LLP of Lincoln Nebraska, filed a motion to appear *pro hac vice* on behalf of the Nebraska Members and attested to the pertinent requirements in Colo.R.Civ.P. 205.3. On January 29, 2020, the Commission received proof of *pro hac vice* registration of Mr. Jarecke. Because the intervention of the Nebraska Members is denied, Mr. Jarecke's motion to appear *pro hac vice* as an attorney in this matter on behalf of the Nebraska Members is denied as moot.

IV. ORDER

A. It Is Ordered That:

1. The motion for leave to reply filed by Poudre Valley Rural Electric Association, Inc. (PVREA) on January 7, 2020, is granted.
2. The motion to intervene filed by PVREA on December 19, 2019, by is denied.
3. The notice of intervention, or in the alternative, motion to intervene filed by Mountain View Electric Association, Inc. on December 23, 2019, is denied.

4. The motion to intervene as of right or, in the alternative, by permission, filed by Big Horn Rural Electric Company; Carbon Power & Light, Inc.; Garland Light & Power Co.; High West Energy Inc.; High Plains Power, Inc.; Niobrara Electric Association, Inc.; Wheatland Rural Electric Association; and Wyrulec Company, Inc. (collectively, the Wyoming Members) on January 6, 2020, is denied.

5. The motion to intervene filed by Wheat Belt Public Power District; Midwest Electric Cooperative Corporation; Chimney Rock Public Power District; and Panhandle Rural Electric Membership Association (collectively, the Nebraska Members) on January 16, 2020, is denied.

6. The notice of intervention as of right or, in the alternative, a motion to intervene filed by Southeast Colorado Power Association; K.C. Electric Association; Y-W Electric Association, Inc.; Morgan County Rural Electric Association; and Highline Electric Association (collectively, the Colorado Members) on January 21, 2020, is denied.

7. The motion to appear *pro hac vice* of Mr. James M. Costan of the law firm of Dentons US LLP in Washington, D.C. filed on December 5, 2019, is granted.

8. The motion to appear *pro hac vice* of Mr. David Jarecke of the Law Firm of Blankenau Wilmoth Jarecke LLP of Lincoln Nebraska filed on January 21, 2020, is denied as moot.

9. This Decision is effective on its Mailed Date.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

Hearing Commissioner

ATTEST: A TRUE COPY

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

Doug Dean,
Director