

Decision No. C21-0018

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0691E

UP, INC.,

COMPLAINANT,

v.

TRI-STATE GENERATION AND TRANSMISSION
ASSOCIATION, INC.,

RESPONDENT.

**COMMISSION DECISION UPHOLDING MOTION
TO DISMISS FORMAL COMPLAINT**

Mailed Date: January 11, 2021
Adopted Date: December 16, 2020

I. BY THE COMMISSION

A. Statement

1. By Recommended Decision No. R20-0687, Administrative Law Judge (ALJ) Steven Denman granted Tri-State's Motion to Dismiss the Complaint without prejudice. UP, Inc. (UP) filed its exceptions to the Recommended Decision, arguing that although this case never made it past the pleading stage, after making factual findings and legal conclusions, the ALJ dismissed UP's Complaint, citing case law and Federal Energy Regulatory Commission (FERC) decisions that the parties never raised because they were decided months after the parties had fully submitted the issue for decision. It is UP's position that the decision rests on authority and reasoning that UP was never allowed to address.

2. UP argues that in addition to these claimed procedural infirmities, the ALJ dismissed the entirety of the Complaint based on his finding that the underlying charge falls within FERC regulation as a result of Tri-State Generation and Transmission Association, Inc. (Tri-State) claiming to be FERC-jurisdictional in September 2019. However, UP claims that the ALJ's reasoning rests on a number of flaws that misconstrue facts, shifts the burden to UP to prove Tri-State's defenses, conflicts with Colorado law, and ignores that part of the relief UP seeks which relates to a period of time when Tri-State had no claim to FERC jurisdiction.

3. Tri-State filed a response to UP's exceptions, arguing that UP failed to provide complete information in its exceptions, failing to disclose that FERC had considered and rejected both the premises of its claim (that Tri-State is double charging) and the basis on which it asserts the Commission has jurisdiction to hear this case—that the charges are not wholesale rates and so fall outside FERC jurisdiction. Tri-State takes issue with UP's other arguments in its exceptions.

4. By this Decision we agree with the ALJ good cause exists to grant Tri-State's Motion to Dismiss Formal Complaint. Our analysis and reasoning are set forth below.

B. Background

5. UP filed its Formal Complaint against Tri-State on December 5, 2019, requesting the Commission issue an order: (1) finding that Tri-State's assessment of a capacity charge on UP, based on UP's use of an electric storage resource (ESR), is unjust, unreasonable, and discriminatory; (2) directing Tri-State to withdraw and reverse all billings, interest, and late fees related to UP's ESR; and (3) prohibiting Tri-State from imposing any future billings related to UP's ESR.

6. On December 6, 2019, the Commission Director served Tri-State with an Order to Satisfy or Answer the Complaint, and an Order Setting Hearing and Notice of Hearing. Respondent was ordered to Satisfy or Answer the Complaint within 20 days, or by December 26, 2019.

7. By Minute Order, the Commission referred this matter to an ALJ for disposition.

8. Tri-State filed its Motion to Dismiss Formal Complaint or, in the Alternative, to Stay Proceeding (Motion to Dismiss) on December 26, 2019.

9. On January 3, 2020, UP and Tri-State filed a Joint Motion to Set Oral Argument on Tri-State's Motion to Dismiss for January 14, 2020. By Decision No. R20-0010-I, the ALJ declined to schedule oral argument on the Motion to Dismiss in light of the Commission's expressed intention, at its January 8, 2020 Weekly Meeting, to deliberate about holding this Proceeding in abeyance pending a jurisdictional decision in Proceeding Nos. 19F-0620E and 19F-0621E.

10. At the January 8, 2020 Weekly Meeting, we placed this Proceeding in abeyance pending a jurisdictional decision in the above-referenced Proceeding Nos. 19F-0620E and 19F-0621E.

11. UP filed its Opposition to Tri-State's Motion to Dismiss on January 9, 2020.

12. On April 15, 2020, we lifted the abeyance and returned this matter to an ALJ to continue the Proceeding.

13. On September 25, 2020, the ALJ issued Recommended Decision No. R20-0687 granting Tri-State's Motion to Dismiss for lack of subject matter jurisdiction pursuant to Colorado Rule of Civil Procedure (C.R.C.P.) 12(b)(1).

14. UP filed exceptions to Recommended Decision No. R20-0687 on November 16, 2020.

15. Tri-State filed its response to UP's exceptions on November 30, 2020.

C. Recommended Decision No. R20-0687

16. In determining Tri-State's Motion to Dismiss for lack of subject matter jurisdiction, the ALJ treated the Motion as a Colorado Rule of Civil Procedure (C.R.C.P.) 12(b)(1) motion.¹

17. In its Motion, Tri-State argued Part II of the FPA grants FERC broad jurisdiction over electric transmission in interstate commerce, the sale of electricity at wholesale in interstate commerce, and all facilities used for interstate transmission or sale. As a result, FERC's jurisdiction includes all rates, charges, and all rules and regulations affecting such rates or charges, including the charges at issue in this proceeding. With such broad jurisdiction, Tri-State argued that this Commission's authority over the subject matter of the Complaint is preempted by FERC's exclusive jurisdiction under the FPA.

18. UP responded that since FERC had not ruled that Tri-State is under its exclusive jurisdiction and had not accepted any filing by Tri-State that would bring it under FERC jurisdiction, the PUC retains jurisdiction to determine if the charges pursuant to the Complaint are unjust, unreasonable, or discriminatory. UP argued even if Tri-State were under the jurisdiction of FERC, the charges at issue in this Complaint are retail rates under the authority of this Commission. UP posited the wholesale energy transaction – providing electric power to UP's ESR – ends with federal jurisdiction at the moment the energy is transmitted. According to UP, the alleged double charge must then be a retail rate charge over which FERC has no authority.

19. Considering Tri-State's arguments in its Motion to Dismiss, the ALJ examined § 201(b) of the Federal Power Act (FPA) which provides federal jurisdiction over “the transmission of electric energy in interstate commerce” as well as “all facilities for such

¹ Recommended Decision No. R20-0687 at III.A., ¶26, p.7.

transmission or sale.” Notwithstanding that provision, the FPA carves out jurisdiction for states over “any other sale of electric energy” and “over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”²

20. The ALJ pointed to a March 2020 FERC decision in proceedings involving its jurisdiction over Tri-State where FERC confirmed that it had exclusive jurisdiction over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and all facilities for the transmission or sale of that electric energy.

21. FERC also confirmed that no expression had been made by either the U.S. Supreme Court or the court of appeals that FERC held “*exclusive* jurisdiction over rules and practices that directly affect jurisdictional rates.”³ FERC went on to note that in those cases, concurrent jurisdiction may exist between FERC and the Colorado Commission when such rules and practices are at issue, contrasted with a case when jurisdiction rates themselves are at issue when FERC would retain exclusive subject matter jurisdiction.

22. However, the ALJ noted that FERC’s concurrent jurisdiction pronouncement was short-lived when the U.S. Court of Appeals for the D.C. Circuit in July 2020 clarified that the FPA gives FERC “exclusive authority over the regulation of the sale of electric energy at wholesale in interstate commerce, including both wholesale electricity rates and any rule or practice affecting such rates.”⁴

23. The ALJ also illustrated FERC had in fact issued several decisions that Tri-State is under its jurisdiction and accepted Tri-State’s filings. As an example, the ALJ cited FERC

² *Id.* at p. 8, *citing*, 16 U.S.C. § 824(b)(1) and (2).

³ *Id.* at p. 9, *citing*, 170 FERC ¶ 61,224 at 45-46.

⁴ *National Association of Regulatory Utility Commissioners v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020).

Decision No. 170 FERC ¶ 61,224, issued March 20, 2020, where FERC established Tri-State became jurisdictional under Part II of the FPA on September 3, 2019 when it admitted MIECO as a non-utility member. In addition, FERC issued two decisions on March 20, 2020 accepting various tariff and contract filings by Tri-State, including the Wholesale Services Contract, Stated Rate Tariff and Tri-State bylaws.⁵

24. Everything taken together, the ALJ determined that no matter how the charge pursuant to Policy 115 was defined, those decisions by FERC and the D.C. Circuit Court lead to the conclusion that disputes regarding the capacity charges at issue in this Proceeding are subject to FERC's exclusive jurisdiction. As a result, the ALJ concluded that any decision by this Commission considering the justness and reasonableness of those charges would be preempted by FERC under Part II of the FPA.

25. Because FERC determined it had jurisdiction over Tri-State and included its filings, including the WESC at issue in this proceeding, the ALJ decided FERC has exclusive subject matter jurisdiction over Tri-State's rates, charges, rules, or practices affecting rates or charges. As a result, any jurisdiction this Commission had over the rates and charges challenged in UP's complain is preempted.

26. Further, the ALJ found UP failed to make a *prima facie* showing that the Commission's exercise of jurisdiction over the Complaint is lawful and not preempted. UP's argument that FERC has not accepted the filings that would bring Tri-State's rates under federal jurisdiction was found to be moot. The ALJ pointed to filings in several FERC dockets involving Tri-State's rate filings where UP raised identical protests over the capacity charges it seeks to

⁵ *Id.*, citing, 170 FERC ¶ 61,223; 170 FERC ¶ 61,221, at ¶ 36, pp. 10-11.

adjudicate in this Complaint proceeding, recognizing this as a “tacit recognition” by UP that ongoing disputes over Tri-State’s rates, charges, and rules moved to proceedings at FERC.⁶

27. In its response to Tri-State’s Motion to Dismiss, UP implored the Commission to decide whether the admission of MIECO (a non-utility) as a Tri-State member removed Tri-State’s FPA § 201(f) exemption resulting in exclusive FERC jurisdiction. However, the ALJ declined to make such a determination. Rather, he deferred to FERC’s decision denying UP’s request for rehearing of the March 20, 2020 Declaratory Order and rejecting UP’s arguments regarding MIECO’s membership in Tri-State.⁷

28. Based on these reasons the ALJ dismissed UP’s complaint without prejudice by granting Tri-State’s Motion to Dismiss.

D. UP Exceptions

29. UP asserts that beginning in December 2018 and continuing to the present—over UP’s objection—Tri-State has imposed an unjust, unreasonable, and discriminatory capacity charge on UP when electricity is injected from UP’s ESR back into its own distribution system. UP further asserts that Tri-State’s double charging violates Colorado’s statutory prohibitions on unjust, unreasonable, and discriminatory charges, classifications, contracts, fares, practices, rates, regulations, rules, schedules, services, or tolls.

30. UP argues that the ALJ’s conclusions on these issues were improper because they relied on erroneous factual findings, conflicted with Colorado statutory law, and flipped the burden of proof on the issue of preemption. Further, UP claims the Recommended Decision entirely

⁶ *Id.* at ¶ 41, p.13.

⁷ In declining to modify its findings that Tri-State was no longer subject to exemption pursuant to § 201(f) of the FPA, FERC stated: “[T]he statutory requirements to end Tri-State’s FPA section 201(f) exemption were met because [MIECO] is a private company with a partial ownership interest in Tri-State. Based on these facts, Tri-State ceased to be “wholly owned by exempt entities,” and, therefore, was no longer eligible for the FPA section 201(f) exemption.” 170 FERC ¶ 61,173 at 12 and 13 (footnotes omitted).

ignores the fact that more than 80 percent of the harm UP alleges in the Complaint occurred before Tri-State purportedly became FERC jurisdictional.

31. UP is of the belief this case stalled out at the initial pleading stage. At the time the Recommended Decision was issued, Tri-State had not answered the Complaint, no testimony had been submitted, and no hearing had been completed. So, UP surmises the only evidence presently part of this proceeding is UP's allegations in its Formal Complaint; allegations that are unrebutted on the current record. UP maintains the Recommended Decision ignores this, making multiple factual determinations based on an incomplete record contrary to what it characterizes as its well-pled facts.

32. UP maintains the ALJ simultaneously noted that FERC has jurisdiction over the sale of wholesale electric energy at wholesale and then made incorrect findings of fact that Tri-State's charges to UP related to its ESR are billed "as part of its rate structure to recover costs incurred by Tri-State in providing full wholesale requirements to those members." UP contends those conclusions are incorrect, and the distinction is critical because of language in § 40-2-136(2), C.R.S. which states that cooperative electric associations, like UP should be able to use "energy storage systems that are connected to the cooperative electric association's electrical system and will not, at any time, flow onto the transmission facilities of a wholesale electric cooperative," like Tri-State.

33. According to UP, its ESR is connected to UP's electrical system and does not flow into Tri-State's transmission facilities. So, UP asserts this Commission, not FERC, has exclusive jurisdiction over the charges at issue in this case because the charges relate only to retail rates and Tri-State is subjecting UP to unjust, unreasonable, and discriminatory charges because it is charging UP twice for the same electricity.

34. If the Recommended Decision stands, UP is concerned it will effectively overrule §40-2-136 (HB20-1225) and expand FERC's jurisdiction to anything that happens beyond Tri-State's wholesale point of delivery. UP argues anything that happens on the customer side of the meter (e.g., individual consumers' rooftop solar panels or AC load control) is now subject to FERC jurisdiction.

35. UP characterizes the Recommended Decision as a *sua sponte* ruling on the ALJ's own motion to dismiss that precluded UP from providing input on the two decisions on which it is based. According to UP, the ALJ's decision hinges on its interpretation of *NARUC v. FERC*, 964 F.3d 1177 (D.C. Cir. 2020) and *Tri-State Generation & Transmission Ass'n, Inc.*, 172 FERC ¶ 61,173 (Aug. 28, 2020) both of which were decided months after Tri-State filed its motion to dismiss. UP asserts the Commission should overturn the Recommended Decision because the ALJ misinterpreted both decisions and did so without any input from UP. Contrary to the ALJ's conclusion in the Recommended Decision, UP is of the opinion *NARUC v. FERC* does not conclusively resolve the scope of FERC jurisdiction, and when FERC may preempt state jurisdiction, in general. Rather, UP takes the position the FERC order at issue in *NARUC v. FERC* dealt with participation in organized wholesale markets and FERC's determination that it had authority to prevent state interference with ESR participation in those markets. UP notes neither of those circumstances is present here according.

36. As to the ALJ's reliance on FERC's August 28, 2020 decision issued in Docket No. EL20-16-001, UP states FERC determined that this Commission's jurisdiction over exit charges, and only over exit charges, was preempted. Additionally, FERC concluded that the validity of MIECO's membership in Tri-State could impact FERC's jurisdiction over Tri-State. UP remarks

FERC also stated that this Commission (or a Colorado state court) should decide whether MIECO, Inc. was lawfully added as a Tri-State member.

37. In UP's view, while finding that this Commission's jurisdiction is preempted by FERC, the Recommended Decision declined to address the addition of MIECO and the other non-utility members. UP goes on that the Recommended Decision neither acknowledged that the issue was pending before the full Commission, nor gave UP an opportunity to brief this issue to the ALJ, which was another violation of UP's due process rights.

38. UP goes on to argue that because Tri-State was not FERC jurisdictional until September 3, 2019, its actions prior to that are relevant to this complaint proceeding, which means that the ALJ's Recommended Decision overlooks more than 80 percent of the pre-filing conduct about which UP complains, which occurred between December 2018 and the beginning of September 2019. UP concludes that even if Tri-State becomes FERC rate regulated at a future time, it has not proven that the battery charge dispute here is within FERC's exclusive jurisdiction in order to displace the PUC's authority in this dispute.

39. UP insists the Recommended Decision should be overturned because it finds UP's claims preempted without addressing the fact that Tri-State's FERC jurisdiction depends on whether MIECO and the other non-utility members were added properly. UP states that was a showing Tri-State was required to make in this and the Exit Charge proceedings and which it failed to make in both. UP concludes even though Tri-State did not file its Answer to the Complaint, the Recommended Decision makes factual findings against UP by finding that UP's claims are preempted.

E. Tri-State's Response

40. Tri-State states Policy No. 115, which UP challenges here, applies a “Net Metering Option” to Tri-State members with energy storage projects. Policy 115 computes the Transmission/Delivery Demand portion of monthly billing on gross load, or the measured load plus the battery capacity. According to Tri-State, its Board voted overwhelmingly to approve this approach in order to prevent Members who use batteries from shifting transmission system costs to Members who do not.

41. Tri-State maintains it must maintain transmission capability that enables it to deliver UP's full peak requirements with or without UP's battery. Should something happen to the battery that takes it out of operation, even for a short period, Tri-State asserts it must be prepared to fill the gap and deliver more energy, which is UP's gross load. As a result, UP only pays its fair share to maintain the transmission and delivery system if the battery capacity is included in the transmission rate it is charged.

42. Tri-State addresses UP's claim that the only factual evidence before the ALJ was the allegations in its Formal Complaint and UP's contention the ALJ erred because, had UP only been given the opportunity, it would have “readily” shown its battery is “completely behind a retail meter, meaning that there is no impact on wholesale rates.” Tri-State argues these statements are wrong. Tri-State maintains UP was given that opportunity, but it apparently misunderstands the legal standard it faced, and even had it tried, it would not have shown the amount billed by Tri-State under its wholesale contract with UP for transmission capacity to supply UP with electricity for resale was actually a retail rate.

43. Tri-State notes it moved to dismiss for lack of jurisdiction. As a result, UP had the burden to prove jurisdiction, and the ALJ could consider evidence outside of the complaint and did not have to treat the allegations as true. Tri-State argues the ALJ correctly noted that he may

“weigh evidence, whether adduced at hearing or provided in writing, and may consider evidence outside the complaint to resolve motions to dismiss for lack of subject matter jurisdiction and to determine the existence of its own power to hear the case.” Because both Tri- State and UP offered exhibits to sUPport their respective positions Tri-State contends UP’s argument that the ALJ was limited to its allegations is incorrect.

44. Tri-State asserts that in deciding UP had failed to show the charge was retail in nature, the ALJ relied on several facts: that FERC had accepted Tri-State’s rate filing, including the capacity charges at issue here; that Tri-State sells electric power to UP under a wholesale contract; and that unlike UP, Tri-State does not have retail customers. Tri-State argues none of these facts is contested and all are found in the record before the ALJ. Tri-State insists UP does not point to anything in the ALJ’s discussion of this question that it specifically contests. Tri-State argues the ALJ was not persuaded this case involves retail charges outside FERC’s jurisdiction by UP’s mere allegation that the battery is “behind a retail meter.” And neither was FERC.

45. Because there was nothing preventing UP from providing the Commission notice of the decisions the ALJ addressed, along with its views on their significance, Tri-State takes the position no due process concerns are implicated here. Tri-State argues UP took advantage of exactly this type of opportunity in the Exit Charge case, when FERC issued a decision favoring its position. Consequently, UP had the opportunity to be heard. It is Tri-State’s assertion it was UP’s tactic that it decided not to call the adverse *NARUC v. FERC* decision and the FERC Exit Charge decisions to the Commission’s attention, as it failed to note the adverse FERC rulings on its battery claim in its current briefing.

46. Tri-State regards UP’s argument that Tri-State’s charges under its Net Metering Option are retail rather than wholesale, charges and thus outside FERC’s jurisdiction even though

Tri-State is FERC-jurisdiction as disingenuous and wrong. This is so, according to Tri-State, because UP failed to disclose in this Proceeding that in August, 2020 FERC ruled against UP on precisely the same issue concerning FERC's jurisdiction before FERC itself.⁸ The rate UP challenges, Board Policy 115, including the specific provision at issue addressed to Tri-State's utility members who use battery storage—has been accepted by FERC (as of August 31, 2020) as a federal filed rate. According to Tri-State that acceptance occurred over UP's objection. Tri-State notes UP argued to FERC, as it now argues in this Proceeding, that the Policy 115 Net Metering Option, as applied to battery storage, is (a) a retail rate outside FERC's jurisdiction, and (b) not just and reasonable because it entails a "double charge." Tri-State states FERC addressed, and rejected, UP's arguments, and has now reaffirmed that decision after UP sought rehearing.

47. Tri-State argues UP had full and fair opportunity to make its jurisdictional argument before FERC, lost, and is now barred by *res judicata* from bringing those arguments before this Commission.⁹ Likewise Tri-State asserts it is fundamental that FERC's interpretation of the FPA, including the scope of its own jurisdiction, is authoritative: "FERC's interpretation of the FPA, including its 'jurisdictional provision,' . . . enjoys Chevron deference." While UP may, if it wishes, seek judicial review of FERC's determination that the Policy 115 Net Metering Option falls on the FERC/wholesale side of the FPA jurisdictional split Tri-State opines it would not be appropriate for this Commission to second-guess FERC on that point.

48. Tri-State concludes FERC and the ALJ are correct that the Policy 115 Net Metering Option falls within FERC's exclusive jurisdiction under the FPA. Tri-State asserts UP's complaint in this proceeding contests charges that Tri-State, whose business is selling electricity at wholesale

⁸ *Tri-State Generation and Transmission Association, Inc.*, 172 FERC ¶ 61,172 (August 28, 2020), *reh'g denied* 173 FERC ¶ 61,174 (November 24, 2020).

⁹

and related interstate transmission services, imposed on UP, its wholesale customer, under the WESC between them. However, Tri-State notes no retail rate is involved because there is no retail relationship between the parties.

II. FINDINGS AND CONCLUSIONS

49. The question we resolve on exceptions is whether it was appropriate for the ALJ to grant the Motion to Dismiss for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1). In this instance, to decide the issue, we must look to whether the subject matter of the complaint has been preempted by federal law or decision thus removing authority from this Commission to hear the matter.

50. Subject matter jurisdiction “concerns the [tribunal’s] authority to deal with the class of cases in which it renders judgment.”¹⁰ A court has subject matter jurisdiction if “the case is on of the type of cases that the [tribunal] has been empowered to entertain by the sovereign from which the court derives its authority.”¹¹ “Jurisdiction is not conferred or taken away from a [tribunal] based on the position of a party regarding the [tribunal’s] jurisdiction; instead, jurisdiction concerns the [tribunal’s] authority to decide the class of cases in which it renders judgment and is determined as a matter of law.”¹² “In resolving a motion under Rule 12(b)(1), the court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction to hear the action.”¹³ Issues concerning subject matter jurisdiction may be raised at any time.¹⁴ Under C.R.C.P.

¹⁰ *Closed Basin Landowners Ass’n. v. Rio Grande Water Conservation Dist.*, 734 P.2d 627, 636 (Colo. 1987) (quoting *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981)).

¹¹ *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986).

¹² *Winslow Construction Co. v. City & County of Denver*, 960 P.2d 685, 690 (Colo. 1998).

¹³ 2A James W. Moore & Jo Desha Lucas, *Moore’s Federal Practice*, ¶ 12-07 [2.-1] at 12-49 to 12-50 (2d ed. 1995).

¹⁴ *Sanchez v. State*, 730 P.2d 328,331 (Colo. 1986).

12(b)(1), the plaintiff has the burden of proving jurisdiction exists,¹⁵ and the tribunal is authorized to make appropriate factual findings.¹⁶ The tribunal “need not treat the facts alleged by the non-moving party as true as it would under C.R.C.P. 12(b)(5).”¹⁷ Should the plaintiff fail to establish the subject matter jurisdiction of the tribunal the tribunal is required to dismiss the matter and any other order or judgment entered by the court would be void and unenforceable.¹⁸

51. Whether this Commission possesses subject matter jurisdiction to decide this matter hinges on interpretation of the FPA and whether FERC has asserted its jurisdiction under the FPA on the issue of the capacity charge pursuant to Policy 115.

52. Tri-State’s Motion to Dismiss was based on a characterization of the capacity charge transaction under Tri-State Policy 115 and under an interpretation of the Federal Power Act. The ALJ noted that during the time since UP filed its Response to Tri-State’s Motion to Dismiss, there had been numerous FERC decisions that made just such rulings and accepted Tri-State’s filings. The ALJ cited Decision No. 170 FERC 61,224, issued March 20, 2020, where FERC concluded that Tri-State had in fact become a jurisdictional public utility under Part II of the FPA on September 3, 2019. FERC also issued two additional decisions on March 20, 2020, which accepted various filings made by Tri-State including the Wholesale Service Contracts, Stated Rate Tariff, and certain Tri-State bylaws.

¹⁵ *Capra v. Tucker*, 857 P.2d 1346 (Colo.App. 1993).

¹⁶ *City of Lakewood v. Brace*, 919 P.2d 231 (Colo. 1996).

¹⁷ *Id.*; *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) *citing*, 2 James Wm Moore, Moore’s Federal Practice § 12.304 (3d ed. 1997) “(discussing Federal Rule of Civil Procedure 12(b)(1) and explaining that under 12(b)(1) “when a court reviews a complaint under a factual attack, the allegations have no presumptive truthfulness, and the court that must weigh the evidence has discretion to allow affidavits, documents, and even a limited evidentiary hearing to resolve disputed jurisdictional facts.” Thus, whereas Rule 12(b)(5) constrains the court by requiring it to take the plaintiff’s allegations as true and draw all inferences in the plaintiff’s favor, Rule 12(b)(1) permits the court “to weigh the evidence and satisfy itself as to the existence of its power to hear the case. *Trinity Broadcasting*, 848 P.2d at 925.”

¹⁸ C.R.C.P. 12(b)(1); *Adams County Department of Social Services v. Huynh*, 883 P.2d 573 (Colo.App. 1994).

53. Additionally, the ALJ determined that the FPA Part II makes it clear that FERC has exclusive subject-matter jurisdiction over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and all facilities for such transmission or sale. The ALJ noted FERC's conclusion in its March 20, 2020 decision which suggests that this exclusive jurisdiction may not necessarily automatically include jurisdiction over rules and practices directly affecting jurisdictional rates. However, the basis of this conclusion, that neither the Supreme Court nor the appellate courts have expressly found exclusive subject-matter jurisdiction over such rules and practices, was undermined by the U.S. Court of Appeals for the D.C. Circuit in its *NARUC v. FERC* decision issued in July 2020.

54. Part II of the FPA provides FERC with broad jurisdiction over the transmission of electricity in interstate commerce, the sale of electricity at wholesale in interstate commerce, and all facilities used for that transmission or sale. This results in broad FERC jurisdiction over Tri-State's rates, charges, rules and regulations affecting those rates and charges. We agree with the ALJ that FERC has issued numerous decisions that have found Tri-State to be under its jurisdiction and accepted Tri-State's filings.¹⁹

55. Although FERC held in Decision No. 170 FERC ¶ 61,224 that while it has exclusive subject-matter jurisdiction over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and all facilities for such transmission or sale pursuant to 16 U.S.C. § 824(b)(1), that jurisdiction may not always

¹⁹ See, e.g., FERC Decision No. 170 FERC ¶ 61,224, March 20, 2020 where it concluded Tri-State had become a jurisdictional public utility under Part II of the FPA on September 3, 2019. See also, 170 FERC ¶ 61,223; 170 FERC ¶ 61,221.

include jurisdiction over rules and practices directly affecting jurisdictional rates.²⁰ However, that FERC policy was undercut by the Court in *NARUC v. FERC*.

56. In that decision, the Court elucidated:

Under the Federal Power Act, Congress gives the FERC exclusive authority over the regulation of ‘the sale of electric energy at wholesale interstate commerce,’ including both wholesale electricity rates and any rule or practice ‘affecting’ such rates, along with ‘jurisdiction over all facilities for such transmission or sale of electric energy.’ Congress charged FERC with ensuring that ‘both wholesale rates and the panoply of rules and practices affecting them are just and reasonable.’

57. Clearly, under *NARUC v. FERC* we agree with the ALJ that FERC’s previous determination that concurrent jurisdiction may exist regarding rules and practices affecting jurisdictional rates has been undermined. It is possible that decision may eventually be overturned on appeal, but there is no reason for this Commission to base its decision on speculation.

58. Most importantly, we are persuaded that the issue here, whether Policy 115 is just, reasonable and non-discriminatory, has already been resolved by FERC. By Decision 172 FERC ¶ 61,172, issued August 28, 2020, FERD accepted Tri-State’s Board Policies filing to be effective August 31, 2020, including Board Policy 115 Net Metering Option at issue here. FERC found that Tri-State’s proposal to require energy storage projects to use the Net Metering Option and not permit energy storage projects to use the Bill Crediting Option under Policy 115 was just and reasonable and not unduly discriminatory or preferential (*Id.* at 21).

59. FERC further disagreed with UP that energy storage projects are charged twice for transmission under the Net Metering Option and that Board Policy No. 115 treats energy storage projects in an unduly discriminatory or preferential manner. (*Id.*) Rather, FERC found energy

²⁰ 170 FERC ¶ 61,224 at 45-46.

storage projects such as UP's typically charge at off-peak periods, and under Board Policy 115 are not billed for transmission during this time because Tri-State charges for transmission capacity based on a utility co-op member's usage during the peak period. (*Id.*) FERC went on to find that proposed to charge for transmission when energy storage projects discharge since Tri-State is a full-requirements supplier and remains obligated to supply 100 percent of its utility co-op members' requirements at all times in the event the storage facility is not available. (*Id.*) FERC found this treatment similar to how other non-energy storage member projects are treated under the Net Metering Option of Board Policy 115.

60. To the extent UP argues that Tri-State's charges under its Net Metering Option are retail rather than wholesale charges and therefore outside FERC's jurisdiction, FERC Decision 172 FERC ¶ 61,172 issued August 28, 2020 wholly undermines UP's position, including its position that it was not afforded adequate due process in this proceeding. We agree with Tri-State that *res judicata* now bars UP from further litigating this issue at this Commission.²¹ UP may not "forum shop" in this manner until it receives a ruling agreeable to it.

61. We find that FERC has asserted jurisdiction regarding the justness and reasonableness of the Net Metering Option of Board Policy 115 and issued its decision finding the policy is indeed just, reasonable and non-discriminatory. Even had this matter not already been litigated at FERC, we find the decision in *NARUC v. FERC* sufficient to find that FERC's jurisdiction extends to rules and regulations as well as rates, therefore undoing FERC's previous finding that concurrent jurisdiction in such cases was possible.

²¹ *Public Service Company of Colorado v. Van Wyk*, 27 P.3d 377, 385 n.6 (Colo. 2001).

62. Therefore, we agree with the ALJ's determination to grant Tri-State's Motion to Dismiss this Complaint for lack of subject-matter jurisdiction without prejudice. UP's Motion to Strike Tri-State's Improperly Submitted Evidence is denied as moot.

III. ORDER

A. It Is Ordered That:

1. The Exceptions to Recommended Decision No. R20-0687 filed by UP, Inc. on November 16, 2020 are denied consistent with the discussion above.

2. United Power, Inc.'s Complaint against Tri-State Generation and Transmission Association Inc. is dismissed without prejudice for lack of subject matter jurisdiction pursuant to Colorado Rule of Civil Procedure § 12(b)(1).

3. UP Inc.'s Motion to Strike Tri-State's Improperly Submitted Evidence is denied as moot.

4. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails this Decision.

5. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 16, 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 GILMAN

Commissioners