

Decision No. R19-0487-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18F-0866E

DELTA-MONTROSE ELECTRIC ASSOCIATION,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
DENYING TRI-STATE'S MOTION TO COMPEL
ON THE REDACTED GUZMAN AGREEMENT**

Mailed Date: June 7, 2019

I. STATEMENT

1. This Interim Decision denies the portion of the Motion to Compel Production and Request for Shortened Response Time (Motion to Compel), filed on May 3, 2019 by Tri-State Generation and Transmission Association, Inc. (Tri-State), asking the Commission to compel production of an unredacted version of an agreement between Delta-Montrose Electric Association (DMEA) and Guzman Energy LLC (Guzman Agreement).

A. Procedural History.

2. On December 6, 2018, DMEA filed a formal complaint against Tri-State, commencing this proceeding.

3. The procedural history of the above-captioned proceeding is set forth in Decisions previously issued by the Commission in this Proceeding, and is repeated here only as necessary to put this Interim Decision into context.

4. Tri-State served its First Set of Written Discovery Requests (Discovery Requests) on DMEA on April 10, 2019, consisting of 24 Requests for Productions of Documents and 4 Interrogatories, for a total of 28 Discovery Requests. On April 22, 2019, DMEA served objections and responses to Tri-State's discovery requests.

5. On May 3, 2019, Tri-State filed the Motion to Compel, seeking to compel DMEA to respond, or to respond more fully, to ten of Tri-State's discovery requests. Tri-State sought a Commission Decision compelling DMEA to respond to the ten disputed discovery requests.

6. On May 10, 2019, DMEA filed its Response to Respondent's Motion to Compel (DMEA Response), urging the Commission to deny Tri-State's Motion to Compel.

7. On May 15, 2019, Tri-State filed the Motion for Leave to Reply addressed in this Decision. Although the Administrative Law Judge (ALJ) shortened response time to the Motion for Leave to Reply to 12 Noon on Monday, May 20, 2019, DMEA failed to file any Response.

8. In Decision No. R19-0466-I (mailed on June 3, 2019), the ALJ granted Tri-State's Motion to Compel in part and denied it in part.

II. FINDINGS AND CONCLUSIONS

9. The Guzman Agreement is a letter agreement, and a commercial contract, between DMEA and Guzman Energy LLC, a potential buyer and a potential seller of wholesale electricity, who appear to be two parties with adverse financial interests. Portions of

certain sentences and entire paragraphs in the Guzman Agreement have been redacted as “WORK PRODUCT-PRIVILEGED.”¹

10. In the Motion to Compel, Tri-State argued that DMEA could not have included confidential attorney work product in the Guzman Agreement, because it is a contract, and commercial contracts between parties with adverse financial interests do not include the text of the parties’ litigation work product materials. Tri-State asked the Commission to order DMEA to produce the Guzman Agreement without redaction, or alternatively for the Commission to conduct an *in camera* review of the Guzman Agreement.²

11. In response, DMEA implied that the ALJ should be able to conclude that the redacted parts of the Guzman Agreement are privileged work product, because those parts are part of or adjacent to discussions of this Commission proceeding. After reviewing the redacted portions of the Guzman Agreement, the ALJ could not conclude that the redacted material is attorney work product.

12. Therefore, the ALJ ordered DMEA to submit to him, under seal, an unredacted version of the Guzman Agreement for an *in camera* review no later than 5:00 p.m. MST on Thursday, June 6, 2019.³ Counsel for DMEA promptly delivered the unredacted Guzman Agreement to the ALJ on the morning of June 6, 2019.

13. Rule 1405 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, governs discovery in Commission proceedings and incorporates by

¹ See DMEA Response, Exhibit E.

² Motion to Compel at pp. 15-16.

³ Decision No. R19-0466-I, Ordering Paragraph No. 2 at P. 30.

reference Rule 26(b)(3), Colorado Rules of Civil Procedure (C.R.C.P.). Rule 26(b)(3), C.R.C.P., provides in pertinent part that:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this Rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

14. The Colorado Supreme Court has limitations on discovery under the work product doctrine:

Limitations also exist as to discovery of information falling within the work product doctrine. Documents prepared in anticipation of litigation or for trial are discoverable “only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” C.R.C.P. 26(b)(3). Work product materials enjoy a qualified immunity from discovery because “the general policy against invading the privacy of an attorney's course of preparation is so well recognized and so essential to the orderly working of our system of legal procedure that a burden rests on the one who would invade that privacy to establish adequate reasons to justify production” *Hickman v. Taylor*, 329 U.S. 495, 91 L. Ed. 451, 67 S. Ct. 385 (1947). As a result, the party seeking discovery must overcome the burden imposed by C.R.C.P. 26(b)(3) regardless of whether the materials are prepared for trial by an attorney or by some other agent of a party. *Hawkins v. District Court*, 638 P.2d 1372 at 1376-77 (Colo. 1982). However, Rule 26(b)(3) is not intended to protect materials prepared in the ordinary course of business from general discovery. *Id.*, 638 P.2d at 1377.⁴

15. After the *in camera* review of the Guzman Agreement, the ALJ concludes that the redacted text in the Guzman Agreement constitutes privileged work product information. The redacted text includes the mental impressions, conclusions, opinions, or legal theories of an

⁴ *National Farmers Union Property and Casualty Co. v. District Court*, 718 P.2d 1044, 1047 (Colo. 1986).

attorney or attorneys concerning anticipated litigation between DMEA and Tri-State. The Commission has a duty to protect such work product information from disclosure under Rule 26(b)(3), C.R.C.P., and Rule 1405 of the Rules of Practice and Procedure, 4 CCR 723-1. While it is unusual to find privileged attorney work product in a contract between two commercial parties with different, or even adverse, financial interests, that is not precluded by Rule 26(b)(3), C.R.C.P., or Rule 1405, 4 CCR 723-1. If a contract does include privileged work product information, such privileged information is entitled to protection from disclosure in this proceeding.

16. The ALJ also finds that, in the Motion to Compel, Tri-State has not shown that it “has substantial need of the materials in the preparation of [its] case and that [it] is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” Thus, the ALJ concludes that, as the party seeking discovery, Tri-State has not overcome the burden imposed by C.R.C.P. 26(b)(3) to obtain discovery of the unredacted Guzman Agreement.

17. The portion of the Motion to Compel requesting an order compelling discovery of the unredacted Guzman Agreement will be denied.

III. ORDER

A. It Is Ordered That:

1. The portion of the Motion to Compel Production and Request for Shortened Response Time, filed on May 3, 2019 by Tri-State Generation and Transmission Association, Inc., requesting that the Commission compel production of an unredacted version of the agreement between Delta-Montrose Electric Association and Guzman Energy LLC is denied, consistent with the foregoing discussion, findings, and conclusions.

2. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director