

Decision No. R20-0149-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 MOTIONS CONTESTING
INTERIM DECISION, REQUEST TO
PARTICIPATE AS *AMICUS CURIAE*,
MOTION TO INTERVENE, AND *PRO HAC VICE*
ADMISSION OF OUT-OF-STATE COUNSEL**

Mailed Date: March 6, 2020

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I. SUMMARY

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 5 and 6, 2019, respectively requesting that this Commission determine a just, reasonable, and non-discriminatory exit charge for Complainants. 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 Decision, the Hearing Commissioner rules on outstanding procedural matters. The Hearing Commissioner denies the motions contesting Interim Decision No. R20-0073-I, denies the motion to intervene filed by certain New Mexico cooperatives, and denies as moot the application for *pro hac vice* admission of Henry F. Bailey, Jr. Finally, the Hearing Commissioner grants, in part, the alternative request of the Nebraska movants to participate as *amicus curiae* by providing legal arguments relating to the issue of jurisdiction and

invites other interested non-parties to participate as *amicus curiae* by providing legal arguments relating to the issue of jurisdiction in this proceeding by filing a Notice of Participation as *Amicus Curiae* within five days of the effective date of this Decision.

II. STATEMENT

3. As explained in Interim Decision No. R20-0073-I, La Plata and United Power assert similar, but not identical claims, alleging that Tri-State has either refused to provide an exit charge and or has provided an unreasonably high exit charge, contrary to the Public Utilities Law of the State of Colorado. Both La Plata and United Power also assert that Tri-State is treating the Complainants differently than it has treated other rural electric utilities, namely Kit Carson Electric Cooperative and Delta Montrose Electric Association (Delta Montrose Electric) whom Tri-State provided an exit charge.

4. Interim Decision No. R19-1001-I, issued on December 19, 2019, established, *inter alia*, dates for filing direct testimony on January 10, 2020, answer testimony on February 12, 2020, rebuttal testimony on March, 10, 2020, set an evidentiary hearing for March 23 through 27, 2020, and set a deadline for filing statements of position of April 2, 2020. Direct and answer testimony have been filed.

5. Interim Decision No. R20-0073-I, issued January 30, 2020, denied the requests for intervention filed by certain non-parties, which decision those non-parties now request be made immediately appealable.

6. Interim Decision No. R20-0097-I issued February 12, 2020, (not directly challenged in these motions contesting interim decision) found that the Commission has jurisdiction over these complaints, determined the complaints were ripe for adjudication, and denied the request of Tri-State to stay these proceedings.

7. Certain New Mexico Cooperatives filed a Motion to Intervene, and an Amended Motion to Intervene on February 11, 2020.

8. In total, 29 non parties have now requested permission to intervene in these consolidated complaints.

III. FINDINGS AND CONCLUSIONS AS TO THE MOTIONS CONTESTING INTERIM DECISION NO. R20-0073-I

9. The four motions contesting Interim Decision No. R20-0073-I ask that the Hearing Commissioner certify the decision (which denied the contesting entities' interventions) for immediate appeal to the Commission *en banc*. Poudre Valley Rural Electric Association, Inc., filed its motion on January 31, 2020. The Colorado Joint Movants¹ filed their motion on February 5, 2020. The Wyoming Joint Movants² filed their motion on February 10, 2020. And the Nebraska Joint Movants³ filed their motion on February 11, 2020. The Nebraska Joint Movants also request, in the alternative, leave to participate as *amicus curiae*, pursuant to the Rules of the Commission.

10. On February 13, 2020, Tri-State filed a response to the motions contesting the interim decision in which it indicated that it did not oppose the motions or the relief requested in the respective motions.

11. Through statute and rule, the Commission entrusts its hearing officers (Administrative Law Judges or Hearing Commissioners) to manage their cases independently.

¹ Southeast Colorado Power Association, K.C. Electric Association, Y-W Electric Association, Inc., Morgan County Rural Electric Association, and Highline Electric Association (Colorado Joint Movants).

² 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. (Wyoming Joint Movants).

³ Wheat Belt Public Power District, Midwest Electric Cooperative Corporation, Chimney Rock Public Power District, and Panhandle Rural Electric Membership Association (Nebraska Joint Movants).

The Commission, *en banc*, itself has discretion to overturn hearing officers' rulings when the matters are certified as appealable. However, particularly, when a case is ongoing before the hearing officer, the Commission's review is treated much like an appeal to a higher court. Consistent with Colorado Rule of Civil Procedure (Colo.R.Civ.P.) 24, under Commission Rule 1401 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, requests for permissive intervention are addressed by the hearing officer in his or her sound discretion, and as in court, the decision upon the request is reversible only for an abuse of that discretion. *Grijalva v. Elkins*, 132 Colo. 315, 287 P.2d 970 (1955). It can seldom be shown that such discretion was abused in denying the permissive right to intervene. *Allen Calculators, Inc., v. National Cash Register Co.*, 322 U.S. 137, 64 S.Ct. 905 (1944). To show an abuse of discretion, the decision must be shown to be manifestly arbitrary, unreasonable, or unfair. *See, e.g., King v. People*, 785 P.2d 596, 603 (Colo. 1990).

12. It is within the Hearing Commissioner's considerable discretion whether to certify an interim decision for immediate appeal to the Commission *en banc*. *See* 4 CCR 723-1-1502(d). Such a decision necessarily balances the disruption to the ongoing proceeding against the arguments made by the challenging non-party. In this case, the four motions, three of which are very nearly identical, misunderstand the claims in this case and argue that this is a ratemaking case. It is not. This is a complaint proceeding. Contrary to the assertions echoed from one motion to the next, the complaints do not ask the Commission to set a uniform "exit fee rate"—and given the fact-intensive nature of this inquiry, the Commission could not do so.

13. The motions are unpersuasive: none of the motions address with any seriousness the deficiencies that resulted in the denial of each party's request to intervene. Instead, the motions make conclusory and speculative statements, and largely skirt the issue.

14. Of equal import is the fact that the non-parties have each failed to demonstrate, pursuant to Rule 1401(c), why each entity's interests would not otherwise be adequately represented by Tri-State. Nothing in each of the non-parties' initial request for permissive intervention or in their subsequent motions address this matter, other than conclusory statements lacking any sort of substance.

15. Of note is the fact that the Commission, *en banc*, denied almost identical requests⁴ for intervention in a similar complaint brought by Delta Montrose Electric against Tri-State in proceeding No. 18F-0866E.⁵ While the Commission is not bound by the doctrine of *stare decisis*, the Hearing Commissioner also takes note of this fact in denying the requests for immediate certification.

16. The cursory and nearly identical argument in each of these motions cuts against allowing these parties to disrupt or impede this proceeding by appealing the interim decision to the Commission *en banc*. The lack of compelling argument addressing the reasons that the movants were not granted intervention also supports denying the request. Accordingly, the motions' request to certify the interim decision as immediately appealable is denied.⁶

IV. FINDINGS AND CONCLUSIONS AS TO THE NEW MEXICO COOPERATIVES' MOTION TO INTERVENE

17. The deadline for timely intervention was December 6, 2019 or December 7, 2019—30 days after the Notice of Hearing issued.⁷ Yet on February 11, 2020, certain New

⁴ It appears that one of the intervenors copied most of its Motion to Intervene from this earlier proceeding, and included a date of January 2019 in the signature block and filed it in this proceeding.

⁵ Decision No. C19-0135-I issued February 1, 2019 in Proceeding No. 18F-0866E.

⁶ The Nebraska Movants' alternative request to participate as *amicus curiae* is addressed below, alongside the invitation to other interested parties to participate as *amici curiae*, pursuant to a filing that is compliant with the rules of the Commission.

⁷ § 40-6-108(2)(a), C.R.S.

Mexico cooperative members of Tri-State⁸ jointly filed an Amended Motion to Intervene. Tri-State responded to the motion two days later, stating that it did not oppose the motion or relief requested therein. On February 21, 2020, United Power filed a substantive response opposing the New Mexico Cooperatives' intervention. Having reviewed the Amended Motion to Intervene, the Hearing Commissioner denies the intervention of the New Mexico Cooperatives as parties in these consolidated complaint proceedings, as explained below.

18. The Motion was not timely filed as required by Commission Rule 1401(a) and is thus denied.⁹

19. Furthermore, the untimely Motion does not provide a basis to grant the requested intervention. The discussion below details why the New Mexico Cooperatives, as the other cooperatives seeking intervention, have been denied permission to intervene in this complaint proceeding.

20. 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.

21. 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

⁸ Central New Mexico Electric Cooperative, Inc., Columbus Electric Cooperative, Inc., Continental Divide Electric Cooperative, Inc., Jemez Mountain Electric Cooperative, Inc., Mora-San Miguel Electric Cooperative, Inc., Northern Rio Arriba Electric Cooperative, Inc., Otero County Electric Cooperative, Inc., Sierra Electric Cooperative, Inc., Socorro Electric Cooperative, Inc., Southwestern Electric Cooperative, Inc. (New Mexico Cooperatives).

⁹ The Hearing Commissioner notes that she could have denied the first set of Motions to Intervene decided in R20-0073-I, on the basis of their late filing and failure to request a waiver of Commission Rules. She did not, instead she ruled on the lack of substance of the motions. However, non-parties and parties have an obligation to familiarize themselves with the Rules of the Commission and to follow the Rules of the Commission.

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.

22. The New Mexico Cooperatives base their claims to intervention of right on similar grounds as did the Nebraska Movants and Wyoming Movants.

23. 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.

24. 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.

25. The New Mexico Cooperatives fail to address the Colorado case law that exists with respect to permissive interventions; instead citing to one case, *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004), which does not provide legal support for its intervention but instead deals with standing to assert a claim. The New Mexico Cooperatives conflate standing with the

requirements to permissively intervene, two distinct issues with their own set of standards. Whether a party has standing to bring a claim does not bear on the issue here, which is whether a party has shown sufficient reason to grant it permissive intervention pursuant to the standards of § 40-6-109(1), C.R.S., and Commission Rule 4 CCR 723-1-1401(c). Further, the *dicta* quoted by the New Mexico Cooperatives does not establish that the New Mexico Cooperatives are entitled to permissive intervention.

26. The New Mexico Cooperatives contend that they have relevant contractual and membership interests that may be affected by the Commission's decisions in these complaint proceedings. As it is, none of the out-of-state electric cooperatives have established that they may intervene as of right in this proceeding. The New Mexico Cooperatives' notice of intervention of right is therefore denied.

27. The Hearing Commissioner finds these entities, like the other out-of-state cooperatives, 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.

28. 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). The entity seeking leave to intervene by permission bears the burden of proof with respect to the relief sought.

29. 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 manner as will best conduce the proper dispatch of business and the ends of justice." See § 40-6-101(1), C.R.S.

30. Were 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.

V. PRO HAC VICE ADMISSION

31. 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 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*.

32. On February 10, 2020, Mr. Henry F. Bailey, Jr., of the Law Firm of Bailey Stock Harmon Cottam Lopez of Cheyenne, Wyoming, filed a motion on behalf of the Wyoming Movants to appear *pro hac vice* in this matter and attested to the pertinent requirements in Colo.R.Civ.P. 205.3. On February 19, 2020, the Commission received proof of *pro hac vice* registration of Mr. Bailey. Because the intervention of the Wyoming Movants was denied, and their motion to certify that decision is denied, Mr. Bailey's motion to appear *pro hac vice* as an attorney in this matter on behalf of the Wyoming Movants is denied as moot.

VI. AMICUS PARTICIPATION

33. The Nebraska Movants request, in the alternative, to participate as *amicus curiae*. If granted *amicus* status, the Nebraska Movants represent that they do not intend to provide evidentiary testimony or conduct discovery, but that they anticipate providing legal arguments on jurisdictional issues raised in the course of this proceeding. They suggest that allowing legal argument from a diverse set of stakeholders will assist the Commission in its duty.

34. The Nebraska Movants, however, also state that they reserve “the right to address other legal issues as circumstances warrant.”¹⁰ The Hearing Commissioner agrees that entities motivated to provide thoughtful legal analysis as to jurisdiction may be helpful in this proceeding. Accordingly, the Nebraska Movants will be allowed to participate as *amicus curiae* as provided in Rule 4 CCR 723-1-1200(c), but only with respect to the issue that they have identified—legal arguments on jurisdictional issues. Granting the Nebraska Movants *carte blanche* permission to participate as an *amicus* abrogates the criteria set forth in Commission Rule 1200(c). Thus the request of the Nebraska Movants to participate as an *amicus curiae* is granted in part and denied in part.

35. Even at this stage of the proceeding, the parties have created a sizeable record. This limits the value of additional evidentiary participation.

36. Other entities denied permissive intervention that wish to participate as *amicus curiae* with respect to the legal issue of jurisdiction may file a Notice of Participation as *Amicus Curiae* within five days of the effective date of this Decision. If they wish to participate with respect to legal issues, other than jurisdiction, they must move, pursuant to 4 CCR 723-1-1200(c) within five days of the mail date of this Decision

¹⁰ Nebraska Movants’ Request to Intervene at p. 3.

VII. ORDER**A. It Is Ordered That:**

1. The motion contesting Interim Decision No. R20-0073-I filed on January 31, 2020 by Poudre Valley Rural Electric Association is denied.

2. The motion contesting Interim Decision No. R20-0073-I filed on February 5, 2020 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 Cooperatives) is denied.

3. The motion contesting Interim Decision No. R20-0073-I filed on February 10, 2020 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 Cooperatives) is denied.

4. The motion contesting Interim Decision No. R20-0073-I filed on February 11, 2020 by Wheat Belt Public Power District, Midwest Electric Cooperative Corporation, Chimney Rock Public Power District, and Panhandle Rural Electric Membership Association, is denied. The Nebraska Movants alternative request to participate as an *amicus* is granted in part and denied in part. These entities (collectively, the Nebraska Cooperatives) may participate jointly as *amicus curiae* by providing legal argument with respect to jurisdiction.

5. The Amended Motion to Intervene filed jointly on February 11, 2020, by Central New Mexico Electric Cooperative, Inc., Columbus Electric Cooperative, Inc., Continental Divide Electric Cooperative, Inc., Jemez Mountain Electric Cooperative, Inc., Mora-San Miguel Electric Cooperative, Inc., Northern Rio Arriba Electric Cooperative, Inc., Otero County Electric

Cooperative, Inc., Sierra Electric Cooperative, Inc., Socorro Electric Cooperative, Inc., and Southwestern Electric Cooperative, Inc. (collectively, the New Mexico Cooperatives), is denied.

6. The motion to appear *pro hac vice* filed on February 10, 2020, by Mr. Henry F. Bailey, Jr., of the law firm of Bailey Stock Harmon Cottam Lopez of Cheyenne, Wyoming, is denied as moot.

7. Cooperatives wishing to participate as *amicus curiae* with respect to the legal issue of jurisdiction may do so by filing a Notice of Participation as *Amicus Curiae*, within five days of the effective date of this Decision.

8. Cooperatives who wish to participate as *amicus curiae*, with respect to legal issues other than jurisdiction issues, may move to do so pursuant to 4 *Code of Colorado Regulations* 723-1-1200(c) within five days of the effective date of this Decision

9. This Decision is effective on its Mailed Date.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

Hearing Commissioner