

Decision No. R20-0218-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
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
SETTING STATUS CONFERENCE
AND DENYING *AMICUS CURIAE* STATUS**

Mailed Date: April 3, 2020

TABLE OF CONTENTS

I. SUMMARY.....	2
II. MOTION TO INTERVENE.....	3
A. Wyoming's Argument	3

B. United Power’s Argument.....	4
C. Applicable Law	4
D. Findings and Conclusions.....	6
III. MOTION FOR <i>AMICUS CURIAE</i>	8
IV. STATUS CONFERENCE	9
V. ORDER.....	10
A. It Is Ordered That:	10

I. SUMMARY

1. La Plata Electric Association, Inc. 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. The procedural history of this proceeding is set out in previous Decisions and is repeated here as necessary to put this Decision in context.

3. On March 11, 2020, the State of Wyoming (Wyoming) filed its Motion to Intervene by Permission or in the Alternative to Participate as Amicus Curiae (Motion).

4. Commissioner Koncilja’s term expired in January 2020. She was asked and agreed to continue to serve until a new Commissioner was appointed and confirmed in her stead. A new Commissioner was sworn in on March 13, 2020.

5. On March 13, 2020, by Decision No. R20-0175-I, the evidentiary hearing in this proceeding, scheduled for March 23rd to March 27th, 2020, was suspended and the proceeding returned to the Commission *en banc*.

6. On March 23, 2020, United Power filed its Notice of After-Decided Authority and Request for Video or Telephonic Status Conference (Request for Status Conference).

7. On March 25, 2020, United Power filed its Response to the State of Wyoming's Motion to Intervene by Permission or Alternatively to Participate as Amicus Curiae.

8. On March 25, 2020, by Decision No. C20-0201-I, the Commission referred the matter to an Administrative Law Judge (ALJ).

II. MOTION TO INTERVENE

A. Wyoming's Argument

9. In its Motion, Wyoming states that on January 30, 2020, by Decision No. R20-0073-I, Hearing Commissioner Frances A. Koncilja denied the intervention of the Wyoming members of Tri-State (Wyoming Members)¹ for failing to "state the basis for the 'legally protected right.'"²

10. Wyoming argues that the interests of Wyoming's citizens are entirely unrepresented in these proceedings. Wyoming argues that in its role as *parens patriae*, Wyoming serves as the guardian of its citizens' interests and therefore has a "tangible interest" which qualifies Wyoming for permissive intervention in this matter.

¹ The Wyoming Members include 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.

² State of Wyoming Motion to Intervene by Permission or in the Alternative to Participate as Amicus Curiae, p. 2.

B. United Power's Argument

11. United Power argues that the intervention of Wyoming should be rejected because it is not timely and the asserted interest of Wyoming is insufficient to justify intervention.

12. United Power argues that the deadline to intervene expired nearly four months ago and Wyoming states no good cause to allow the late intervention.

13. United Power also argues that the tangible interest Wyoming claims to have via *parens patriae* has already been found to be an insufficient interest for purposes of permissive intervention. Further, United Power states that the premise of Wyoming's stated interest – specifically, that the Commission has found that a ruling against Tri-State in this proceeding will negatively impact the Wyoming Members' property costs – misstates the ruling of former Commissioner Koncilja.

14. United Power finally argues that to allow an intervention at this late date³ can only unnecessarily delay a resolution in this proceeding.

C. Applicable Law

15. Two classes of parties may intervene in proceedings such as this: parties with a legally protected right that may be impacted by the proceeding (intervention of right), and parties with pecuniary or tangible interests that may be substantially impacted by the proceeding (permissive intervention). Rule 1401(b) and (c), 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure; see § 40-6-109(1), C.R.S., *RAM Broadcasting of Colo. Inc., v. Public Utilities Comm'n*, 702 P.2d 746, 749 (Colo. 1985).

³ All testimony has already been filed.

Commission Rule 1401(c) of the Rules of Practice and Procedure 4 CCR 723-1, requires persons seeking permissive to show the following:

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. If a motion to permissively intervene is filed in a natural gas or electric proceeding by a residential consumer, agricultural consumer, or small business consumer, the motion must discuss whether the distinct interest of the consumer is either not adequately represented by the OCC or inconsistent with other classes of consumers represented by the OCC. 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. Motions to intervene by permission will not be decided prior to expiration of the notice period.

16. The requirement in Rule 1401(c) requiring persons or entities seeking permissive intervention in a proceeding to represent that their interests “would not otherwise be adequately represented” is similar to Colorado Rule of Civil Procedure 24(a), which provides that even if a party seeking intervention in a case has sufficient interest in the case, intervention is not permitted if the interest is adequately represented by the existing parties. *See Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines Owners Ass’n*, 214 P.3d 451, 457 (Colo. App. 2008). This is true even if the party seeking intervention will be bound by the case’s judgment. *See Denver Chapter of the Colo. Motel Ass’n v. City & County of Denver*, 374 P.2d 494, 495-96 (Colo. 1962) (affirming the denial of an intervention by certain taxpayers because their interests were already represented by the city). The test for adequate representation is whether there is an identity of interests, rather than a disagreement over the discretionary litigation strategy of the representative. The presumption of adequate representation can be overcome by

evidence of bad faith, collusion, or negligence on the part of the representative. *Id.*; *Estate of Scott v. Smith*, 577 P.2d 311, 313 (Colo. App. 1978).

17. The Commission has the right to determine how to conduct a proceeding. Pursuant to § 40-6-101(1), C.R.S., the Commission “shall conduct its proceedings in such manner as will best conduce the proper dispatch of business and the ends of justice.” The Commission may look to the Colorado Administrative Procedure Act (APA) (§ 24-4-101 *et seq.* C.R.S.) for guidance. Section 24-4-105, C.R.S. “grants substantial discretion” to agencies such as the Commission “to control the scope and presentation of evidence” in a proceeding. *Williams Natural Gas Company v. Mesa Operating Limited Partnership*, 778 P.2d 309 (Colo. App. 1989).

18. The APA provides, among other things, that that an ALJ shall “regulate the course of the hearing,” “issue appropriate orders which shall control the subsequent course,” and “dispose of motions to intervene.”

19. Additionally, Rule 1401(a) states the Commission may, “for good cause shown, allow late intervention, subject to reasonable procedural requirements.”

D. Findings and Conclusions

20. The ALJ finds it troubling that Wyoming fails to state good cause in support of its late intervention. Wyoming states no reason as to why it waited to intervene until four months after the deadline for interventions. The best that can be surmised is that due to the failure of the Wyoming Members to be granted intervention, Wyoming concluded that it would assert a claimed right. But inexplicably, Wyoming not only fails to state any reason for its failure to timely intervene, but also fails to explain the delay in filing its intervention until more than one month after the denial of the Wyoming Members’ intervention. It appears that Wyoming believes merely citing the rule meets the rule’s requirements for permissive intervention.

21. Further, the ALJ is disturbed by Wyoming's misstatement of Hearing Commissioner Koncilja's ruling in Decision No. R20-0073-I, denying the intervention of the Wyoming Members. Specifically, Wyoming cites to paragraphs 12 and 23 of that Decision to support the proposition that "Commissioner Koncilja found that . . . a ruling against Tri-State would negatively impact the Wyoming Members' property interests."⁴

22. In Decision No. R20-0073-I, Paragraph 12 is a recitation of the Wyoming Members' argument in support of its request for intervention. A recitation of a potential party's argument is not a finding of the Hearing Commissioner. Paragraph 23 of this same Decision contains the finding by Hearing Commissioner Koncilja that the Wyoming Members did not have a "legally protected right" entitling them to intervene as of right. There is no conceivable way to conclude that the Hearing Commissioner "found that a ruling against Tri-State would negatively impact the Wyoming Members' property interests" based on paragraphs 12 and 23 in Decision No. R20-0073-I.

23. The ALJ also agrees with the argument of United Power that the Commission has already denied interventions of parties whose claimed tangible interests were not nearly as attenuated as Wyoming's claimed interest. The undersigned ALJ is very hesitant to contradict a prior finding in this proceeding. The Decision by the Hearing Commissioner denying the intervention of the Wyoming Members rests on solid ground. Granting a party with less of a tangible interest an intervention would be tantamount to contradicting Decision No. R20-0073-I.

24. Finally, to allow an intervention at this time would only serve to delay the proceeding. All testimony has been filed in the proceeding, and it is ready for hearing. Under the

⁴ State of Wyoming Motion to Intervene by Permission or in the Alternative to Participate as Amicus Curiae, p. 2, paragraph 2.

APA, the ALJ has wide discretion to determine the course of the hearing. Without good cause for a late intervention, with no tangible interest, and because it would cause unnecessary delay, the intervention of Wyoming is denied.

III. MOTION FOR AMICUS CURIAE

25. Wyoming's entire argument in support of its request to participate as an *amicus curiae* is as follows:

In the alternative, Wyoming asks to participate fully as *amicus curiae* pursuant to Rule 1200(c) (4 CCR 723-1-1200(c)).⁵

26. United Power did not object to the granting of *amicus curiae* status for Wyoming with respect to the legal issue of jurisdiction. Wyoming did not, however, state it would present legal argument concerning the jurisdiction issue.

27. Further, jurisdiction has been made moot by the Federal Energy Regulatory Commission Decision 170 FERC 61,224 in Docket No. EL20-16-000. It is no longer necessary to entertain legal arguments on this issue.

28. Rule 1200(c) provides:

A non-party who desires to present legal argument to assist the Commission in arriving at a just and reasonable determination of a proceeding may move to participate as an *amicus curiae*. The motion shall identify why the non-party has an interest in the proceeding, shall identify the issues that the non-party will address through argument, and shall explain why the legal argument may be useful to the Commission. An *amicus curiae* is not a party, and may present a legal argument only, as permitted by the Commission. The arguments of *amicus curiae* shall not be considered as evidence in the proceeding and shall not become part of the evidentiary record. All requests for *amicus curiae* status may be accepted or declined at the Commission's discretion. Unless ordered otherwise,

⁵ *Id.* at p. 4, paragraph 13.

the filing deadlines governing *amicus curiae* shall correspond to the deadlines applicable to the parties' opening statements of position, legal briefs or responses to motions.

29. Wyoming failed to state what legal issue it would address if granted *amicus curiae* status. Rather, Wyoming has asserted only what it believes is a tangible interest in the proceeding. Wyoming has not identified “the issues that the non-party will address through argument” nor has Wyoming explained “why the legal argument may be useful to the Commission.” Put simply, Wyoming has failed to address, let alone meet, the requirements of Rue 1200(c).

30. Granting *amicus curiae* status to Wyoming would only lead to an unnecessary expansion of issues. For these reasons, the request of Wyoming for *amicus curiae* status is denied.

IV. STATUS CONFERENCE

31. On March 23, 2020 United Power and La Plata filed a Request for a Status Conference before the Commission *en banc*.

32. On March 25, 2020 the matter was referred to an ALJ.

33. The ALJ agrees with United Power and La Plata that a status conference is needed to determine how this matter shall proceed.

34. The ALJ finds that holding a remote video-conference hearing is consistent with current public health advisories to prevent the spread of COVID-19.

35. The Commission uses the Google Hangouts video conferencing tool to hold video conferences. The parties are encouraged to familiarize themselves with this tool and ensure they

are capable of using it during the status conference. Information and tutorials on the relevant Google tool available at this link may prove helpful:

<https://support.google.com/a/users/answer/9282720?hl=en>.

This link is only provided for the parties' convenience and is not intended to guarantee that the information on the link is accurate or that it provides all the information the parties may need in order to use the relevant Google tool.

36. A link to the video conference will be provided to the parties prior to April 14, 2020. This link is not to be shared with the public or the media. The status conference will be webcast on the Commission's website.

V. ORDER

A. It Is Ordered That:

1. The Motion to Intervene by Permission or in the Alternative to Participate as Amicus Curiae filed by the State of Wyoming on March 11, 2020 is denied.

2. Consistent with the above discussion, a remote video-conference status conference is scheduled as follows:

DATE: April 14, 2020

TIME: 10:00 a.m. MST

METHOD: Online, using Google's platform for video conferencing
The link shall be provided to parties by email

3. Parties may not appear in person at the Commission for the above-scheduled hearing. Instead, parties and witnesses will participate in the video-conference hearing remotely using a computer, consistent with the requirements of this Decision.

4. The parties must ensure they are ready and able to participate in the video-conference hearing, and to present evidence electronically during the hearing using the Google Hangouts video conferencing tool.

5. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director