

Decision No. R20-0327-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
DENYING MOTION TO CONTEST
INTERIM DECISION NO. R20-0073-1**

Mailed Date: May 1, 2020

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.

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 November 25, 2019, by Decision No. C19-0955-I, the Commission consolidated the complaints in Proceeding Nos. 19F-0620E and 19F-0621E, designated Commissioner Frances Koncilja as the Hearing Commissioner, and required the parties to file a proposed procedural schedule by December 6, 2019.

4. On December 19, 2020, by Decision No. R19-1001-I, Hearing Commission Koncilja adopted a procedural schedule which included an evidentiary hearing from March 23 to 27, 2020.

5. On December 23, 2020, Mountain View Electric Association (MVEA) filed its Notice of Intervention or Motion to Intervene.

6. On January 30, 2020, by Decision No. R20-0073-I, the Intervention of MVEA was denied.

7. 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.

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

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

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

11. On April 3, 2020, by Decision No. R20-0218-I, a status conference was scheduled for April 14, 2020.

12. At the status conference on April 14, 2020, an evidentiary hearing was scheduled from May 18 through May 22, 2020.

13. On April 15, 2020, MVEA filed its Motion Contesting Interim Decision No. R20-0073-I (Motion).

14. On April 29, 2020, United Power filed its Response and Opposition to Mountain View Electric Association's Motion Contesting Interim Decision No. R20-0073-I (Response).

II. MOTION CONTESTING INTERIM DECISION NO. R20-0073-I.

15. In its Motion, MVEA states that its Notice of Intervention or Motion to Intervene was filed on December 23, 2019 and that in Decision No. R20-0073-I, issued on January 30, 2020, that intervention was denied. MVEA asks the undersigned ALJ to make Decision No. R20-0073-I "immediately appealable" to the Commission *en banc*.

16. MVEA states in its Motion that La Plata and United Power oppose the relief. Tri-State does not oppose the relief.

17. MVEA asserts that it is entitled to intervene based upon arguments made in its Motion to Intervene filed on December 23, 2019.

18. United Power argues in its Response that MVEA fails to assert any argument or reason why the Hearing Commissioner erred in denying the intervention. United Power also argues that MVEA fails to explain why it has waited over two months to file this Motion. For these reasons United Power believes the Motion should be denied.

19. In Decision No. R20-0073-I, Hearing Commissioner Koncilja found that MVEA did not have a legally protected right and therefore was not entitled to intervene by right.¹ This decision was consistent with the Commission's denial of MVEA's intervention in Proceeding No. 18F-0866E,² which concerned the same issue and in which MVEA asserted the same protected right. Hearing Commissioner Koncilja also found that MVEA "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."³

20. With respect to the purpose and application of certifying an interim decision as immediately appealable, the Commission has stated:

7. Interim orders are generally not subject to exceptions. Rule 1502, 4 Code of Colorado Regulations (CCR) 723-1. However, 1502(b) provides that "[a] presiding officer may certify an interim order as immediately appealable via exceptions." Rule 1502(b), 4 CCR 723-1.

8. In recommending adoption of rule 1502, Judge Ken F. Kirkpatrick summarized:

It is the current practice of the Commission to entertain appeals of interim orders on a discretionary basis. The new rule should not encourage the appeal of interim orders, which would unnecessarily involve the Commission in ongoing proceedings that have been referred to ALJs. In addition, appeals of interim orders almost always unavoidably delay a proceeding. Nonetheless, there are certain circumstances where a significant ruling regulating the future course of the

¹ Decision No. R20-0073-I, paragraph 23

² This decision was made by the Commission *En Banc* in Decision No. C19-0135-I on February 1, 2019.

³ Decision No. R20-0073-I at paragraph 26.

proceeding is made and a review would be appropriate. The rules currently have no mechanism for a presiding officer to certify an interim order as immediately appealable. Putting the presiding officer as the gatekeeper for interim order appeals seems to be a reasonable approach for allowing for some necessary interlocutory appeals but not encouraging practices that will result in unnecessary delay.

Decision No. R05-0461 at 18.

Denying exceptions to Judge Kirkpatrick's Recommended Decision, the Commission reiterated that it is left to the "discretion of ALJs and the Commission as to when interim orders may be appealed." Decision No. R09- 1068-I, issued September 22, 2009, quoting. Decision No. C05-1093 at 36.

Decision No. R12-1466 at 60-61 mailed December 21, 2012, in Proceeding No. 12R-500ALL.

21. Further, the Commission recently reiterated its reliance upon Administrative Law

Judges (in this case, the Hearing Commissioner) to independently manage cases:

Through statute, rule, and sound judicial discretion, the Commission entrusts its ALJs to manage cases independently. The Commission, *en banc*, itself has discretion to overturn the ALJs' rulings when the matters are certified as appealable. Rule 1502(d), 4 CCR 723-1. However, particularly when a case is ongoing before an ALJ, the Commission's review is treated much like an appeal to a higher court. Consistent with C.R.C.P. 24, under Commission Rule 1401, requests for permissive intervention are addressed by the hearing officer in his or her sound discretion; 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, if ever, 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, 88 L.Ed. 1188. 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).

Decision No. C19-0757 at 8, issued September 18, 2019 in Proceeding No. 19AL-0290E.

22. In March of 2020, the Commission upheld its previous findings in a rulemaking proceeding by denying a request to make the denial of an intervention automatically appealable to the Commission.⁴

⁴ Decision No. C20-0177 at 117, in Proceeding No. 19R-0483ALL on March 30, 2020.

23. Here, the denial of the permissive intervention filed by MVEA is consistent with the Commission's findings in Proceeding No. 18F-0866E. The law is clear that a denial of a permissive intervention is reversible only if it is an abuse of discretion. The undersigned ALJ agrees with the denial of MVEA's Motion to Intervene in Decision No. R20-0073-I and does not believe that the denial was in any way arbitrary or an abuse of discretion.

24. The above-captioned proceeding is scheduled for a hearing in three weeks. Granting MVEA's request to make Decision No. R20-0073-I "immediately appealable" to the Commission *en banc* would result in an unnecessary delay in the proceeding. Further, MVEA has failed to provide any explanation as to why it took two-and-one-half months to make this request. If a party truly wishes to make an interim decision "immediately" appealable, the undersigned ALJ finds it odd that such party would wait 75 days to file a motion seeking to do so.

25. The request by MVEA to make Decision No. R20-0073-I "immediately appealable" to the Commission *en banc* is denied.

III. ORDER

A. It Is Ordered That:

1. The Motion Contesting Interim Decision No. R20-0073-I, filed by Mountain View Electric Association on April 15, 2020, is denied.

2. 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