

Decision No. R20-0330-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 *IN LIMINE* TO
EXCLUDE THE REBUTTAL TESTIMONY
OF HERRICK K. LIDSTONE, JR. AND JASON R. WIENER**

Mailed Date: May 4, 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. 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 December 19, 2019, by Decision No. R19-1001-I, Hearing Commissioner Koncilja ordered the parties to file briefs by December 20, 2019 to address “the question of whether this Commission has jurisdiction over all or any part of the claims asserted in the Complaints.”¹

4. On December 20, 2019, United Power and La Plata filed a Joint Submission on the Issue of the Commission’s Jurisdiction Over this Exit Charge and Tri-State filed its Brief on

¹ Decision No. R19-1001-I, paragraph 12.

Jurisdiction and Request for Hearing in response to Hearing Commissioner Koncilja's order in Decision No. R19-1001-I.

5. On February 12, 2020, by Decision No. R20-0097-I, Hearing Commissioner Koncilja found that the Commission had jurisdiction over the complaints. The Hearing Commissioner was "unpersuaded" that the MIECO Inc. (MIECO) transaction² was proper under Colorado Law and put the parties on notice that they were expected to answer questions about this transaction at the evidentiary hearing.

6. On March 6, 2020, the parties filed their Stipulation Regarding Procedural Schedule (Stipulation). In the Stipulation, the parties proposed to supplement the procedural schedule and provide additional testimony concerning the questions raised in Decision No. R20-0097-I.

7. On March 10, 2020, by Decision No. R20-0157-I, the Stipulation was approved.

8. On March 11, 2020, Tri-State filed its Supplemental Testimony.

9. On March 16, 2020, the Complainants jointly filed their Supplemental Testimony.

10. 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.

11. 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 returned to the Commission *en banc*.

² The addition of MEICO as a member owner of Tri-State was the basis of Tri-Sate's argument that the Commission was without jurisdiction in this matter.

12. On March 25, 2020, by Decision No. C20-0201-I, the Commission referred the matter to an ALJ.

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

14. During the status conference, the parties agreed to a procedural schedule that called for the evidentiary hearing to commence on May 18, 2020.

15. On April 16, 2020, Tri-State filed its Motion *in Limine* to Exclude the Rebuttal Testimony of Herrick K. Lidstone, Jr. and Jason R. Wiener and to Shorten Response Time (Motion *in Limine*). Tri-State also filed its Motion to Supplement Answer Testimony and Shorten Response Time.

16. On April 27, 2020 Complainants filed their Joint Response in Opposition to Respondent's Motion *in Limine* to Exclude the Rebuttal Testimony of Herrick K. Lidstone and Jason R. Wiener.

II. MOTION IN LIMINE

A. Tri-State's Argument

17. In its Motion *in Limine*, Tri-State argues that Mr. Lidstone's and Mr. Wiener's rebuttal testimonies should be stricken because they consist of nothing more than legal opinions and conclusions. Tri-State continues that allowing this testimony would usurp the role of the Commission.

18. In the alternative, Tri-State requests the opportunity to respond with additional pre-filed testimony.

B. Complainants' Argument

19. Complainants respond that the testimony of Mr. Lidstone and Mr. Wiener is relevant, probative, and admissible. Complainants argue that Tri-State advocates the incorrect evidentiary standard for administrative hearings.

20. Complainants further question the timing of this objection, one month after the supplemental testimony was filed.

21. Complainants also reject the request for additional testimony by Tri-State. Complainants provide affidavits that show the subject was discussed prior to the filing of the Stipulation on March 6, 2020.

C. Discussion

22. The undersigned ALJ steps into this proceeding at an unusual time. This requires understanding on how the proceeding progressed to its present posture. While the undersigned may not have made some of the same decisions as the Hearing Commissioner, unless such decisions are contrary to law, this proceeding will continue on the course set by the Hearing Commissioner.

23. The Hearing Commissioner ordered the parties to address jurisdictional issues on December 19, 2019.

24. On December 20, 2019, Tri-State filed its Brief on Jurisdiction and Request for Hearing (Brief) in response to the Hearing Commissioner's order in Decision No. R19-1001-I. In its Brief, Tri-State argued that the Commission was without jurisdiction, basing this assertion on

the addition of MEICO, a non-utility member of the cooperative. Tri-State also requested a hearing “to the extent the Commission determines there are jurisdictional facts in dispute.”³

25. In Decision No. R20-0097-I, the Hearing Commissioner found that the Commission had jurisdiction over the instant case. The Hearing Commissioner went beyond just finding jurisdiction by adding the following:

A review of the record developed to date leaves the Hearing Commissioner unpersuaded that the MIECO transaction was proper under Colorado law, that it resulted in MIECO becoming a member of Tri-State, and that MIECO’s membership results in the Complaints being preempted by federal law. There are simply too many questions surrounding the MIECO transaction, the propriety of its purported ‘membership’ under Tri-State’s articles of incorporation and bylaws, and Colorado law to displace the jurisdictional *status quo*. Many of these questions turn on facts that are unclear or missing from this record. Therefore, the Parties are on notice that each must be prepared to answer these questions thoroughly during the evidentiary hearings scheduled in these consolidated proceedings for March 23 through 27, 2020.⁴

26. This paragraph does not articulate the specific questions to be asked. It does, however, specify that these questions are to be directed at both parties and are to address the MEICO transaction as well as the areas of “the propriety of its purported ‘membership’ under Tri-State’s articles of incorporation and bylaws, and Colorado law.” The undersigned interprets this paragraph to reserve time at the start of the evidentiary hearing, as requested by Tri-State, on the issue of the validity of the MEIICO transaction. At that time of that decision, the Hearing Commissioner did not believe that the Commission had been divested of jurisdiction but was aware of the pending petition before the Federal Energy Regulatory Commission (FERC). The

³ Brief p. 2.

⁴ Decision No. R20-0097-I, Paragraph 28. (emphasis in original)

undersigned assumes that due to this petition before FERC, the Hearing Commissioner requested more information on the transaction.⁵

27. In response to Decision No. R20-0097-I, the Parties entered a Stipulation filed on March 6, 2020 and approved by the Hearing Commissioner on March 10, 2020. The Stipulation calls for supplemental testimony to be filed by Tri-State on March 11, 2020 and by the Complainants on March 16, 2020. The Stipulation provided no restrictions on the testimony nor was there any additional testimony agreed to by the parties.

28. In reviewing the testimony at issue in the Motion *in Limine*, the undersigned ALJ finds that the testimony is responsive to the instructions given by the Hearing Commissioner. Specifically, the testimony addresses the questions she presented to the parties.

29. The Commission is not bound by the technical rules of evidence. The evidence need only possess reliable probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs.⁶

30. The testimony of Mr. Lidstone and Mr. Wiener clearly possess reliable probative value in this proceeding. It addresses the questions that were presented by the Hearing Commissioner in Decision No. R20-0097-I. It is hard to imagine how testimony could be presented without addressing the question of whether the actions resulting in MIECO becoming a member of Tri-State conformed to Colorado law when that was the question asked by the Hearing Commissioner. The Hearing Commissioner did not instruct the parties to file

⁵ Since Decision No. R20-0097-I was issued, FERC has ruled on the petition. In its ruling FERC found that there was currently concurrent jurisdiction concerning the issues in the above captioned proceeding. But FERC declined to decide if the MEICO transaction was proper under Colorado law. FERC found that that question is best determined in the state fora. 170 FERC ¶ 61,224.

⁶ *Rule 1501(a) of the Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1.*

supplemental testimony, only that the parties should be prepared to answer the questions at issue during the evidentiary hearing. The parties agreed to the filing of additional testimony.

31. The ALJ agrees with the Complainants that the testimony of Mr. Lidstone and Mr. Wiener is relevant and probative to the determination of “the propriety of its purported ‘membership’ under Tri-State’s articles of incorporation and bylaws, and Colorado law.” If admitted during the evidentiary hearing, the ALJ shall give it the proper weight.

32. The parties agreed to a Stipulation with regards to supplemental testimony on March 6, 2020. As discussed above, the Stipulation called for testimony to be filed by Tri-State followed by testimony filed by the Complainants. No additional testimony was agreed upon by the parties. Tri-State cannot at this late date attempt to supplement the record yet again.

33. Good cause is not found to allow for Tri-State to supplement the record with additional testimony.

III. ORDER

A. It Is Ordered That:

1. The Motion *in Limine* to Exclude the Rebuttal Testimony of Herrick K. Lidstone, Jr. and Jason R. Wiener filed by Tri-State Generation and Transmission Association, Inc. on April 16, 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