Decision No. R20-0332-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 SUPPLEMENT ANSWER TESTIMONY

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 December 23, 2019, Tri-State filed its Motion to Stay.

6. 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) transaction[2] 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. The Hearing Commissioner also denied the Motion to Stay.

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

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

11. During the status conference the parties agreed to a procedural schedule that called for the evidentiary hearing to commence on May18, 2020.

[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 April 16, 2020, Tri-State filed its Motion to Supplement Answer Testimony and to Shorten Response Time (Motion to Supplement).

13. On April 27, 2020 Complainants filed their Joint Response in Opposition to Respondent's Motion.

II. MOTION TO SUPPLEMENT ANSWER TESTIMONY

A. Tri-State's Argument

14. In its Motion to Supplement, Tri-State argues that it should be allowed to supplement the record due to the Tri-State board voting to establish a new methodology for determining a Member's Contract Termination Payment (MCTP) on April 1, 2020.

15. Tri-State states that this information was unavailable previously and for that reason, it should be permitted to supplement the record.

B. Complainants' Argument

16. Complainants argue that good cause has not been shown to allow for supplemental testimony at this late stage of the proceeding.

17. Complainants state that the framework for the newly approved MCTP is similar to previously used methodology. Further, they argue that Tri-State made a conscious decision to omit from its Answer Testimony a methodology for calculating an exit charge.

18. Finally, Complainants argue that Tri-State has made this argument in another form and it was rejected.

C. Discussion

19. The undersigned ALJ steps into this proceeding at an unusual time. This requires understanding of 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.

20. All parties, including the Hearing Commissioner, were aware of the board meeting scheduled for April of 2020. Yet the procedural schedule was adopted calling for a hearing in March 2020. Motions to Stay and arguments concerning ripeness were made by Tri-State and rejected by the Hearing Commissioner. The undersigned finds nothing contrary to law in the decisions made by the Hearing Commissioner.

21. The ALJ agrees with the Complainants that Tri-State made a tactical decision not to include in its Answer Testimony a methodology for calculating an exit fee. It appears that Tri-State, rather than provide testimony with a proposed exit methodology, chose to pursue a tactic of federal preemption. Tri-State cannot now change that decision and delay this proceeding further.

22. Tri-State provides no reason why it did not file testimony with a proposed exit fee methodology. Tri-State filed its Answer Testimony with knowledge that the scheduled hearing would occur before its April 2020 board meeting.

23. This dispute first started in August of 2018.[3] Tri-State provides no reason why the April 2020 board meeting could not have been held sooner to addresses the exit fee methodology. This was a tactical decision made by Tri-State with full knowledge of the procedural schedule.

24. Finally, the undersigned ALJ finds that to allow additional testimony at this late stage of the proceeding would be unfair and unduly prejudicial to the Complainants.

[3] Joint Response of United Power and La Plata Electric Association, Inc. in Opposition to Respondent's Motion to Supplement Answer Testimony, p. 2

25. Good cause is not found to allow Tri-State to supplement its Answer Testimony.

III. ORDER

A. It Is Ordered That:

1. The Motion to Supplement Answer Testimony 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

Doug Dean,
Director