

Decision No. R20-0371-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
GRANTING MOTION FOR SUMMARY JUDGEMENT**

Mailed Date: May 15, 2020

TABLE OF CONTENTS

I. SUMMARY.....	2
II. MOTION FOR SUMMARY JUDGEMENT	4
A. Complainants' Undisputed Facts.....	4

B. Complainants’ First Argument - Tri-State’s Addition of the Non-Utility Members Violated § 7- 55-101(1)(d), C.R.S.....	7
C. Complainants’ Second Argument - Tri-States Addition of the Non-Utility Members Conflicts with Its Articles of Incorporation and Bylaws.....	8
D. Complainants’ Third Argument - Tri-State’s Addition of the Non-Utility Members Is Outside the Lawful Purposes of the Cooperative.	9
III. RESPONSE TO SUMMARY JUDGEMENT	9
A. Argument of Tri-State - The Commission lacks the authority under Colorado law to rule on the validity of corporate acts or adjudicate property rights.	9
B. FERC has Determined that Adding the Non-Utility Members is Permitted	10
IV. APPLICABLE LAW	10
V. DISCUSSION.....	11
A. Commission Jurisdiction	12
B. Burden of Proof for Federal Preemption	13
C. Question of Law or Mixed Question of Fact and Law	14
D. Federal Preemption.....	14
VI. ORDER.....	16
A. It Is Ordered That:	16

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. 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.

4. 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*.

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

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

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

8. At the status conference the parties agreed to a procedural schedule that called for an evidentiary hearing to begin on May 18, 2020.

9. On April 27, 2020, Complainants filed their Joint Motion for Partial Summary Judgment or Determination of a Question of Law.

10. On May 11, 2020, Tri-State filed its Response to Complainants' Joint Motion for Partial Summary Judgment or Determination of a Question of Law.

11. On May 13, 2020, Complainants filed their Motion for Leave to File a Reply Request for Waiver of Response Time and Reply in Support of Their Joint Motion for Partial Summary Judgment or Determination of a Question of Law.

II. MOTION FOR SUMMARY JUDGEMENT

A. Complainants' Undisputed Facts

12. The Complainants list the following as the undisputed facts:
 - a) Tri-State is incorporated under Title 7, Article 55 of the Colorado Revised Statutes.
 - b) In April 2019 Tri-State member-owners voted to amend Article I, § 2 of Tri-State's Bylaws to create additional classes of membership in Tri-State. Article I, § 2 now states that "[n]otwithstanding any other provision of these Bylaws to the contrary, the Board of Directors may establish one or more classes of membership in addition to the existing all-requirements class of membership."
 - c) The April 2019 amendment also provided that "[s]uch rights and preferences and limitations on the rights and preferences may differ between membership classes and may be different for individual members within an additional class of membership."
 - d) On July 9, 2019, Tri-State's Board of Directors voted to seek FERC rate regulation by attempting to add new members it believed would eliminate its exemption from FERC jurisdiction.
 - e) In 2019, Tri-State purported to add three new members—MIECO, Inc. ("MIECO"), Olson's Greenhouses of Colorado, LLC ("Olson's"), and Ellgen Ranch Company ("Ellgen") (collectively the "non-utility members")—by signing membership agreements with each company.
 - f) There was no membership vote in favor of adding the non-utility members as Tri-State members.
 - g) Tri-State's primary purpose in adding the three non-utility members was to become FERC jurisdictional.
 - h) Prior to April 2019, Tri-State admitted new members by a vote of the existing members, never by action of Tri-State's Board of Directors or by contracts alone.
 - i) Article VII, § 1 of Tri-State's Articles of Incorporation states that "the number of directors shall equal the number of members of this Corporation, and one (1) director shall be elected by each member."
 - j) Article III, § 4 and Article IV, § 3 of Tri-State's Bylaws also refer to the requirement that each Tri-State member has the right to elect one director to serve on Tri-State's Board of Directors.

- k) Tri-State purported to admit the three non-utility members without providing them the right to elect one director to serve on Tri-State's Board of Directors.
- l) Article VI of Tri-State's Articles of Incorporation states that "[t]his Corporation shall be obligated to account on a patronage basis to all its members as provided in the Bylaws."
- m) Article VII, § 3 of Tri-State's Bylaws provides that patronage capital is allocated based on purchases of electric power and energy:

In order to induce patronage and to assure that the Corporation will operate on a non-profit basis, the Corporation is obligated to account on a patronage basis to all its members for all amounts received and receivable from the furnishing of electric power and energy in excess of the sum of (a) operating costs and expenses properly chargeable against the furnishing of electric power and energy, (b) amounts required to offset any losses incurred during the current or any prior fiscal year, and (c) adjustments to reserves or deferred credit accounts for the purpose of stabilizing margins and rate increases from year to year.
- n) Article I, § 3 of Tri-State's Bylaws requires that members enter into "all requirements contracts" for the purchase of electric power and energy.
- o) Article I, § 1 of Tri-State's Bylaws requires that "[a]pplicants for membership in this Corporation shall be eligible for membership by: ... (b) [a]greeing to purchase from this Corporation electric power and energy as hereinafter specified in Section 3 of this Article I"
- p) Article II, § 6 of Tri-State's Bylaws provides that members "will independently operate and maintain a separate electricity distribution system" for the satisfaction of their "all-requirements" contracts with Tri-State.
- q) The non-utility members do not purchase electric power and energy for resale from Tri-State.
- r) Olson's is a greenhouse that grows plants. It purchases thermal energy (steam) from Tri-State for its own use. 23 21.
- s) MIECO sells natural gas to Tri-State.
- t) Ellgen rents land from a wholly owned subsidiary of Tri-State (Colowyo Coal Co., L.P.) on which it grows crops and grazes cattle.
- u) Because the non-utility members do not purchase electric power and energy from Tri-State, they cannot and do not satisfy the requirements for patronage capital allocations set forth in the Bylaws.

- v) The non-utility members do not satisfy the requirement in Article I, § 3 of Tri-State’s Bylaws to purchase electric power and energy from Tri-State and the requirement in Article II, § 6 of Tri-State’s Bylaws “to independently operate and maintain a separate electricity distribution system” for the satisfaction of their “all requirements” contracts with Tri-State.
- w) Article I, § 4(a) of Tri-State’s Bylaws provides that a member may withdraw “upon compliance with such equitable terms and conditions as the Board of Directors may prescribe, provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation.”
- x) Tri-State’s Articles of Incorporation can be amended only as described in C.R.S. § 7-55-109, which requires certain procedural actions before any amendment can be effective. There is no record evidence that Tri-State has met any of those requirements or otherwise has attempted to amend its Articles of Incorporation.
- y) The non-utility members were conferred rights and agreed to terms and conditions of membership in a contract, while every other member-owner of Tri-State was conferred rights and agreed to terms and conditions as set forth in the Bylaws.
- z) Tri-State’s Articles of Incorporation allow its Bylaws to be amended “in the manner specified in the Bylaws.”
- aa) Tri-State’s Articles of Incorporation do not provide that its Bylaws may be amended by a contract with Tri-State.
- bb) Article II of Tri-State’s Articles of Incorporation defines its corporate purpose as:
 - (a) Generating, manufacturing, purchasing, acquiring and accumulating electric power and energy for its members and transmitting, distributing, furnishing, selling and disposing of such electric power and energy primarily to its members, provided that this Corporation may dispose of its electric power and energy to other than members insofar as it may have excess power and energy which can be disposed of on an interchange or sales basis for the ultimate benefit of its members; and
 - (b) Any other lawful purpose.
- cc) On April 9, 2020, Tri-State’s Board of Directors passed a Resolution ratifying the membership agreements with MIECO, Olson’s, and Ellgen.

dd) On April 9, 2020, Tri-State's Board of Directors passed a Resolution purporting to explain the financial or operational benefit to Tri-State from the addition of the non-utility members.¹

13. Complainants argue that the addition of the non-utility members violated Colorado law and Tri-State's governing documents.

B. Complainants' First Argument - Tri-State's Addition of the Non-Utility Members Violated § 7-55-101(1)(d), C.R.S.

14. Complainants state that the cooperatives incorporated under § 7-55-101(1)(d), C.R.S., require that members meet uniform terms and conditions stated in its bylaws. They argue that the addition of the non-utility members violates the uniformity terms in the following ways:

- a) The non-utility members do not elect a representative to serve on Tri-State's Board of Directors or have a Board vote, while all other Tri-State members have the right to Board representation pursuant to Tri-State's Articles of Incorporation and Bylaws.
- b) The non-utility members receive patronage capital allocations even though the allocations are not calculated in the manner required by Tri-State's Articles of Incorporation and Bylaws for all other Tri-State members—by purchasing electric power and energy.
- c) The non-utility members do not purchase electricity and do not “independently operate and maintain a separate electricity distribution system” for the satisfaction of their “all-requirements” contracts with Tri-State, as required by the Bylaws of all other Tri-State members.
- d) The non-utility members have withdrawal rights that are far different than the withdrawal rights afforded to all other Tri-State members.
- e) The three non-utility members were conferred rights and agreed to terms and conditions of membership in a contract, while all other Tri-State members were conferred rights and agreed to terms and conditions set forth in the Bylaws.
- f) All Tri-State members other than the non-utility members were admitted to membership by a vote of the existing members.²

¹ See pp. 3-11 of Complainants' Joint Motion for Partial Summary Judgement.

² See pp. 13-14 of Complainants' Joint Motion for Partial Summary Judgement.

15. Complainants argue that all of these provisions violate the uniformity required by § 7-55-101(1)(d), C.R.S., and make the admission of the non-utility members null and void.

16. In addition, Complaints argue that the membership agreements that purport to allow non-utility members to waive uniform treatment are not allowed under § 7-55-101(1)(d), C.R.S.

C. Complainants' Second Argument - Tri-States Addition of the Non-Utility Members Conflicts with Its Articles of Incorporation and Bylaws

17. Complainants argue that the membership agreements entered into by the non-utility members conflicted with the Articles of Incorporation and Bylaws of Tri-State and that a later email stating that the non-utility members removed obligations was not valid under Colorado law.

18. Complainants argue that membership obligations imposed by the Articles of Incorporation cannot be amended by an email under Colorado law.

19. In addition, Complainants argue that Tri-State's Articles of Incorporation nor its Bylaws allow for amendment by private contract. According to the Complainants the membership agreements conflict with the Articles of Incorporation or its Bylaws in the following ways:

- a) The non-utility members cannot elect a representative to serve on the Board of Directors, which violates Tri-State's Articles and Bylaws
- b) The non-utility members receive patronage capital allocations in violation of Tri-State's Articles and Bylaws.
- c) The non-utility members do not purchase electric power and energy, and do not "independently operate and maintain a separate electricity distribution system" for the satisfaction of their "all-requirements" contracts with Tri-State, as required by the Bylaws.
- d) The non-utility members have withdrawal rights that are in conflict with the withdrawal rights provided by Tri-State's Bylaws.

D. Complainants' Third Argument - Tri-State's Addition of the Non-Utility Members Is Outside the Lawful Purposes of the Cooperative.

20. Finally, the Complainants argue that the addition of the non-utility members was outside the lawful purposes of the cooperative.

21. Complainants argue Tri-State has admitted that the addition of the non-utility members was for the single purpose of avoiding Commission jurisdiction. The addition of these members are by means at odds with Colorado law, the Articles of Incorporation and the bylaws, and is not a lawful purpose.

III. RESPONSE TO SUMMARY JUDGEMENT

A. Argument of Tri-State - The Commission lacks the authority under Colorado law to rule on the validity of corporate acts or adjudicate property rights.

22. Tri-State argues that under Colorado law the admission of the non-utility members may not be challenged as *ultra vires* in this forum. Tri-State claims that the Commission is an administrative agency with a specific and limited constitutional and statutory mandate, not a court of general jurisdiction that can adjudicate tort, contract, and corporate formation/governance claims.

23. Tri-State adds that the Complainants have filed an action in Colorado District Court asserting "the purported addition of those members was unlawful and invalid."³ Tri-State believes by this action the Complainants also believe that the District Court is the proper venue to determine the answer to this question. Section 7-55-101(1)(d). C.R.S., does not impose a "uniformity requirement" on Tri-State that voids the admission of the non-utility Members

³ Tri-State's Response at p. 15.

24. Tri-State refutes the Complainants' argument that the uniformity requirement of § 7-55-101(1)(d), C.R.S., is mandatory and cannot be waived.

25. Tri-State points to the use of the word "may" in the statute to show that subsection (d) is part of a definition or description of an entity that may qualify as an Article 55 cooperative.

B. FERC has Determined that Adding the Non-Utility Members is Permitted

26. Tri-State contends that the Federal Regulatory Commission (FERC) found that the addition of the non-utility members was permitted under Tri-Sate's bylaws. There was no violation of the bylaws as contended by the Complainants.

27. Tri-State contends that the addition of the non-utility members was for a lawful purpose, contrary to the argument of the Complainants. Tri-State asserts that it is lawful to seek consistent regulation and that Complainants provide no support for their argument that any action taken that is not squarely within its stated purpose is void.

IV. APPLICABLE LAW

28. Rule 1400 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, permits summary judgment motions filed in accordance with Colorado Rule of Civil Procedure 56.

29. Summary judgment is appropriate when the pleadings and supporting documents clearly demonstrate that no issues of material fact exist and the moving party is entitled to judgment as a matter of law. A court must afford all favorable inferences that may be drawn from the undisputed facts to the nonmoving party, and must resolve all doubts as to the existence of a triable issue of fact against the moving party. *Cotter Corporation v. American Empire Surplus Lines Insurance Company*, 90 P.3d 814, 819 (Colo. 2004); *see also A.C. Excavating, Inc. v. Yacht Club II Homeowners Association, Inc.*, 114 P.3d 862, 865 (Colo. 2005) (same).

30. “Summary judgment is a drastic remedy, and is never warranted except on a clear showing that there is no genuine issue as to any material fact.” *People v. Hernandez & Associates, Inc.*, 736 P.2d 1238 (Colo. App. 1986). Even if “it is extremely doubtful that a genuine issue of [material] fact exists[,] ... summary judgment is not appropriate in cases of doubt.” *Abrahamsen v. Mountain States Telephone and Telegraph Company*, 494 P.2d 1287, 1290 (Colo. 1972).

V. DISCUSSION

31. As a threshold matter, the ALJ finds there is no genuine issue as to any material fact. The facts are straight forward. In the Response filed by Tri-State, most disputed facts are either listed as incomplete or as legal opinions.

32. Because there are no disputed facts, the next step is look at the relief requested by the Complainants, which is set forth below:

Tri-State alleges in Separate Defense No. 2 that the Commission lacks subject matter jurisdiction over these Proceedings. Tri-State bases this defense, in part, on the argument that it is subject to FERC’s exclusive jurisdiction, which preempts the Commission’s jurisdiction. The factual predicate for Tri-State’s argument is that adding the three non-utility members ended Tri-State’s exemption from FERC jurisdiction. Tri-State’s defense fails as a matter of law.⁴

For these reasons, the Commission should enter summary judgment in Complainants’ favor on Tri-State’s Separate Defense No. 2.⁵

⁴ Complainants Joint Motion for Partial Summary Judgement or Determination of a Question of Law, p. 19.(Footnotes omitted)

⁵ *Id.* at p. 21

33. That is, the requested relief is that the ALJ find in favor of the Complainants concerning Tri-State's Separate Defense No. 2 as stated in its Answer to the Complaint filed on February 26, 2020. Separate Defense No. 2 states:

The Commission lacks subject matter jurisdiction with respect to the claims set forth in LPEA's Complaint.⁶

34. Tri-State's argument that the Commission lacks subject matter jurisdiction is based on a theory of federal preemption.⁷ So, if the Commission has subject matter jurisdiction, and if that jurisdiction is not preempted by federal law, the Motion for Summary Judgment should be granted.

A. Commission Jurisdiction

35. Hearing Commissioner Koncilja addressed the issue of Commission jurisdiction in this proceeding in Decision No. R20-0097-I issued February 12, 2020.

36. Decision No. R20-0097-I found as follows:

21. The Colorado Constitution vests the Commission with the power to regulate the facilities, service, rates, and charges of every public utility operating within Colorado. Through the Public Utilities Law the General Assembly has also authorized the Commission "to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses" and "to do all things, whether specifically designated in Articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power."

22. That power includes hearing complaints alleging that a public utility has established or fixed an unlawful rule, regulation, or charge. The Commission can also hear complaints alleging that a utility has established preferential or discriminatory rates or charges.

23. The first claim in United Power's complaint alleges the exit charge Tri-State prescribed United Power is not just and reasonable because it is too high. Under Colorado law, the Commission has jurisdiction to hear this claim.

⁶ Answer of Tri-State Generation and Transmission Association Inc. to Formal Complaint of La Plata Electric Association Inc., p.12. The Answer to the United Power Complaint contains the same Separate Defense No. 2 with the name United Power substituted

⁷ Response to Complainants' Joint Motion for Partial Summary Judgment or Determination of a Question of Law, p.26.

The Commission also has jurisdiction to hear United Power's second claim, which alleges the exit charge is discriminatory when compared [to] the exit charge of DMEA in Proceeding No. 18F-0866E.

24. La Plata also asserts two claims. It alleges that Tri-State's failure to provide it with any exit charge at all is: (1) unjust and unreasonable; and (2) discriminatory because other members have received exit charges. While this presents a new variation on the exit charge theme, the Commission can hear claims arising from an omission under § 40-6-108, C.R.S., which allows the Commission to hear complaints concerning "any act or thing done *or omitted to be done*" by Tri-State that is ". . . in violation, or claimed to be in violation, of any provision of law or of any order or rule of the [C]ommission." And, the Commission can hear these particular claims because it is the Commission's "duty . . . to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; [and to] *prevent unjust discriminations and extortions* in the rates, charges and tariffs of such public utilities of this state" (emphasis added) under § 40-3-102, C.R.S.⁸

37. This discussion by Hearing Commissioner Koncilja establishes Commission jurisdiction in this matter. The conclusions stand on firm legal ground and will not be disturbed.⁹

B. Burden of Proof for Federal Preemption

38. Essential in considering whether there is federal preemption is determining who bears the burden of proof. Does the burden fall on the Respondent to prove that the proceeding is preempted, or on the Complainants to show that the proceeding is not preempted?

39. Both parties claim that the burden is on the other.

40. While Colorado Courts have not addressed this question, it has been addressed by the Tenth Circuit Court of Appeals. "Federal preemption is an affirmative defense upon which the [Respondent] bears the burden of proof."¹⁰

41. Therefore, the burden to show federal preemption rests upon Tri-State.

⁸ Decision No. R20-0097-I, paragraphs 21-24, p. 8-9. (Footnotes omitted)

⁹ In addition to the legal analysis provided by the Hearing Commissioner, FERC also determined that the Commission has concurrent jurisdiction in this matter Tri-State Generation & Transmission Ass'n, Inc., 170 FERC ¶ 61224, P 121, 2020 WL 1321788, at *32 (Mar. 20, 2020).

¹⁰ *Emerson v. Kan City S. Ry. Co.* 502 F.3d 1126, 1133, 1134. (10th Cir. 2007) (Citations omitted).

C. Question of Law or Mixed Question of Fact and Law

42. The next issue is whether the determination of federal preemption is a question of law or a mixed question of law and fact.

43. Courts have been clear that “preemption is purely a legal issue. Federal courts in [the Tenth] Circuit and across other jurisdictions agree as much.”¹¹

D. Federal Preemption

44. There are two types of federal preemption of state law, or in this case state regulation, express and implied.¹²

45. Express preemption occurs when Congress "define[s] explicitly the extent to which its enactments pre-empt state law." ¹³

46. Implied preemption can be either through a showing that the scope of a federal statute indicated Congress intended federal law to occupy the field entirely¹⁴ or implied conflict preemption. Implied conflict preemption occurs when “it is ‘impossible for a private party to comply with both state and federal requirements,’ or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”¹⁵

47. Tri-State has not asserted that a federal statute exists that explicitly occupies the field causing the Commission’s jurisdiction to be preempted.

¹¹ *Beltran v. InterExchange, Inc.*, 2018 U.S. Dist. LEXIS 131621, p.17

¹² *Choate v. Champion Home Builders Co.*, 222 F.3d 788, 792 (10th Cir. 2007).

¹³ *Id.*

¹⁴ *Emerson v. Kan City S. Ry. Co.* 502 F.3d 1126, 1129. (10th Cir. 2007).

¹⁵ *Id.* quoting *Sprietsma v. Mercury Marine* 537 U.S. 51, 65 123 S. Ct. 518 (2002).

48. Tri-State asserts that the addition of the non-utility members has been approved by FERC and therefore Tri-State has been FERC jurisdictional since September of 2019.¹⁶¹⁷

49. Tri-State appears to further assert that with the filing of an exit methodology at FERC on April 13, 2020, a conflict was created stripping the Commission of its jurisdiction in determining the issues in the above-captioned proceeding.¹⁸

50. But the mere filing of the tariff sheets does not create a conflict which causes federal preemption. As stated by FERC in its recent decision:

However, recognizing that no federal court has stated that the Commission has exclusive jurisdiction over rules or practices that directly affect a jurisdictional rate, we decline to find that we have exclusive jurisdiction over Tri-State's exit charges. As a result, we find that the Colorado PUC's jurisdiction over complaints before it regarding Tri-State's exit charges is not currently preempted. A ruling by the Colorado PUC on those complaints would not be preempted unless and **until such ruling conflicts with a Commission-approved tariff or agreement** (*emphasis added*) that establishes how Tri-State's exit charges will be calculated. We note that Tri-State has not yet filed, and **the Commission has not yet approved, a methodology for determining Tri-State's exit charges.** (*emphasis added*) If Tri-State seeks to place matters regarding its exit charges before the Commission, it should make an appropriate filing at the Commission, which could include a filing setting forth a methodology for determining such charges.¹⁹

¹⁶ Response to Complainants' Joint Motion for Partial Summary Judgment or Determination of a Question of Law, p. 19.

¹⁷ The ALJ, in reading FERC Decision 170 FERC ¶ 61224, does not conclude as argued by Tri-State that the validity of the admission of the non-utility members is dispositive and binding. FERC specifically did not rule that the addition of the non-utility members was lawful under Colorado statutes, "*First, we take no position on the question of whether Mico's membership in Tri-State required state regulatory approval or otherwise violated Colorado statutes and regulations. Rather, we consider Tri-State's jurisdictional status and the related issues raised in the Petition based solely on the record before us, and we decline to resolve the Colorado law issues raised by various protesters, which we believe are more appropriately handled in state fora. As a result, however, we note that the resolution of the pending Colorado PUC proceedings, or other litigation concerning Colorado law issues, could be relevant to Commission proceedings in the future, and we would consider relevant findings at that time.*" Tri-State Generation & Transmission Ass'n, Inc., 170 FERC ¶ 61224, P 76, 2020 WL 1321788, at *32 (Mar. 20, 2020) (Emphasis added)

¹⁸ *Id.* at pp.26-29.

¹⁹ Tri-State Generation & Transmission Ass'n, Inc., 170 FERC ¶ 61224, P 121, 2020 WL 1321788, at *32 (Mar. 20, 2020).

51. Before there can be preemption, there must be a conflict. If there is no conflict between state regulations and federal regulations, there cannot be federal preemption. If there is not a FERC “approved tariff or agreement” on the exit charge for Tri-State members, there cannot be a conflict.

52. The question of whether the inclusion of non-utility members is in accordance with Colorado law is currently irrelevant to the question of federal preemption in the instant proceeding. The undersigned explicitly does not reach the issue of whether the addition of the non-utility members to Tri-State was legal under Colorado law.

53. The Motion for Summary Judgement is granted.

VI. ORDER

A. It Is Ordered That:

1. The Joint Motion for Partial Summary Judgement or Determination of a Question of Law filed by La Plata Electric Association, Inc. (La Plata) and United Power, Inc. (United Power) (collectively, Complainants) on April 27, 2020, is granted.

2. The Motion for Leave to File a Reply Request for Waiver of Response Time and Reply in Support of Their Joint Motion for Partial Summary Judgment or Determination of a Question of Law filed by the Complainants on May 13, 2020 is denied as moot.

3. Summary Judgement is granted in favor of the Complainants as to Tri-State Generation and Transmission Association, Inc.’s Separate Defense No. 2 as filed in their Answer to the Complaint of La Plata and United Power filed on February 26, 2020.

4. 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