

Decision No. R20-0687

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0691E

UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING MOTION TO DISMISS AND
DISMISSING COMPLAINT WITHOUT PREJUDICE**

Mailed Date: September 25, 2020

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I. STATEMENT

1. On December 5, 2019, United Power, Inc. (United or Complainant) filed the above-captioned Formal Complaint (Complaint) against Tri-State Generation and Transmission Association, Inc. (Tri-State or Respondent). The Complaint requested that this Commission issue an order: (1) finding that Tri-State's assessment of a capacity charge on United, based on United's use of an electric storage resource (ESR), is unjust, unreasonable, and discriminatory; (2) directing Tri-State to withdraw and reverse all billings, interest, and late fees related to United's ESR; and (3) prohibiting Tri-State from imposing any future billings related to United's ESR. That filing commenced the above-captioned Proceeding. United and Tri-State are the Parties to this Proceeding.

2. On December 6, 2019, pursuant to Rules 1205(a) and 1302(g) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (2015), the Commission's Director served on Tri-State an Order to Satisfy or Answer the Complaint, and an Order Setting Hearing and Notice of Hearing. Respondent was ordered to Satisfy or Answer the Complaint within 20 days, or by December 26, 2019.

3. On December 9, 2019, United filed an Out of State Counsel's Verified Motion Requesting *Pro Hac Vice* Admission for Peter W. Herzog III of the St. Louis, Missouri, office of the law firm of Wheeler Trigg O'Donnell LLP to appear as co-counsel on behalf of United (Mr. Herzog's *PHV* Motion). Tri-State did not oppose the admission of Mr. Herzog as *pro hac vice* counsel for United, and Mr. Herzog's *PHV* Motion was granted in Decision No. R19-1025-I (mailed December 19, 2019).

4. On December 11, 2019, by Minute Order, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition. The undersigned ALJ was subsequently assigned to preside over this Proceeding.

5. By Decision No. R19-1021-I (mailed on December 18, 2019), the ALJ scheduled a prehearing conference for January 7, 2020. Decision No. R19-1046-I (mailed on December 30, 2019) amended the topics for discussion at the prehearing conference, and Decision No. R20-0010-I (mailed on January 6, 2020) later vacated the prehearing conference.

6. On December 26, 2019, Tri-State timely filed a Motion to Dismiss Formal Complaint or, in the Alternative, to Stay Proceedings (Motion to Dismiss).

7. On January 3, 2020, United and Tri-State filed a Joint Motion to Set Oral Argument on Respondent's Motion to Dismiss for January 14, 2020. By Decision No. R20-0010-I, the ALJ declined to schedule oral argument on the Motion to Dismiss in light of the Commission's expressed intention, at its January 8, 2020 Weekly Meeting (CWM), to deliberate about holding this Proceeding in abeyance pending a jurisdictional decision in Proceeding Nos. 19F-0620E and 19F-0621E.

8. Also on January 3, 2020, Tri-State filed an Out of State Counsel's Verified Unopposed Motion Requesting *Pro Hac Vice* Admission and Request for Waiver of Response Time for James M. Costan of the law firm of Dentons US LLP in Washington, D.C., to appear as co-counsel on behalf of Tri-State (Mr. Costan's *PHV* Motion). United did not oppose the admission of Mr. Costan as *pro hac vice* counsel for Tri-State.

9. At the January 8, 2020 CWM, the Commission placed this Proceeding in abeyance pending a jurisdictional decision in the above-referenced Proceeding Nos. 19F-0620E and 19F-0621E. Because of this decision by the Commission, the ALJ did not rule on

Mr. Costan's *PHV* Motion that was pending at the time of the abeyance order. It appears that the Commission never ruled on Mr. Costan's *PHV* Motion.

10. On January 9, 2020, United filed its Opposition to Respondent's Motion to Dismiss Formal Complaint or, in the Alternative, to Stay Proceeding (United's Response or Response).

11. By Minute Order date April 15, 2020, the Commission once again returned this matter to the ALJ to move forward with the proceeding.¹

12. In accordance with § 40-6-109, C.R.S., the ALJ transmits to the Commission the record in this case along with a written recommended decision and order.

II. FINDINGS OF FACT

13. The facts found in this Decision are undisputed and uncontroverted.

14. United is a nonprofit rural electric distribution cooperative that serves more than 93,000 meters representing more than 250,000 customers throughout Colorado's northern Front Range.

15. United is an original founding member of Tri-State and has been a member-owner since 1952. United purchases wholesale power and transmission services from Tri-State pursuant to a Wholesale Electric Service Contract (WESC) that runs through 2050.

¹ Although the Commission held this Proceeding in abeyance pending a jurisdictional decision in Proceeding Nos. 19F-0620E and 19F-0621E, the jurisdictional questions raised in those Proceedings were not addressed until Decision No. R20-0502 was issued on July 10, 2020. Pursuant to § 40-6-108(4), C.R.S., the deadline for issuance of a final Commission decision is 210 days after the filing of testimony and exhibits by Complainants. Because no date has yet been set for Complainant to file testimony and exhibits in this case, and that event has not yet occurred, there is no statutory deadline for the issuance of a final Commission decision in this Proceeding.

16. United's WESC with Tri-State is an all-requirements contract that requires United to purchase 95 percent of its power from Tri-State. United then passes the costs of Tri-State's services on to United's member-owners through retail rates.

17. In October 2017, United contracted for the purchase and installation of a 4.5 MW ESR, which was energized in December 2018 before becoming commercially operational in 2019. United's ESR consists only of battery storage that takes previously-generated and purchased electric power,² then stores it, and then releases it for future use.

18. Tri-State is a generation and transmission cooperative corporation based in Westminster, Colorado, and operates on a not-for-profit basis. Tri-State has 43 not-for-profit rural distribution cooperatives and public power districts (Utility Members) to whom it provides wholesale electric service for resale by its Utility Members to their retail customers in Colorado, Nebraska, New Mexico, and Wyoming. Tri-State also has three Non-Utility Members that do not take wholesale electric power service from Tri-State.

19. Tri-State's wholesale electric rates, service, and day-to-day business matters are governed by an elected 43-person Board of Directors (Board), with one director being elected by each Utility Member. The Board is directly accountable to the Utility Members who, in turn, are accountable to their member-consumers and ratepayers. The Board governs pursuant to various board policies that shape the many transactions between Tri-State and its Utility Members.

20. Tri-State is a wholesale electric supplier owned by its members and, unlike an investor-owned utility or distribution cooperative, Tri-State has no retail customers or exclusive service territory. Tri-State buys and generates electric power, and transmits, delivers, and sells

² For simplicity, the term "electric power" is used in this Decision as short hand for the various components of Tri-State's rates that are charged to United.

the power to its Utility Members, who then distribute and resell the electric power they have purchased at wholesale to their own retail member-customers and ratepayers.

21. Tri-State and its Utility Members facilitate this buy-sell wholesale transaction pursuant to long-term, all-requirements WESCs. The WESC requires Tri-State to maintain the capability to deliver electric power to satisfy the requirements of the Utility Member using Tri-State's transmission system as well as transmission provided by other entities and sub-transmission system assets. The costs of transmission services are then recovered by the Tri-State transmission/delivery demand rate that Tri-State incorporates as part of its Wholesale Firm Power Service Class A Rate (Rate Schedule A-40).

22. Tri-State's billing to its members each month for wholesale electric power is divided into three parts: (1) an Energy Rate, being the unit cost per amount of energy taken by the Utility Member; (2) a Generation Demand Rate, representing the allocation of Tri-State's costs of generating or purchasing enough energy to satisfy peak demand across all member systems; and (3) a Transmission Rate representing Tri-State's costs associated with delivering peak load energy to its Utility Members.

23. Despite being all-requirements contracts, the WESCs allow Utility Members to use distributed or renewable generation sources owned or controlled by a Utility Member to serve up to 5 percent of the Utility Member's total load. The Tri-State Board issued Board Policy 115 in 2002 to provide direction as to how Utility Members could use this 5 percent option provided in the WESC.

24. In June 2018, the Tri-State Board amended Board Policy 115 to include energy storage devices, such as battery storage, as acceptable sources by which Utility Members could serve up to 5 percent of the Utility Member's total load. Board Policy 115 now requires Utility

Members to submit applications prior to implementing any eligible project and, once the project is approved, the Utility Member is required to enter into a Member Generation Contract with Tri-State that, subject again to Board approval, outlines the specific provisions of the project.

25. Board Policy 115 also requires that Utility Members choosing to implement battery storage projects be subject to a so-called “Net-Metering Option” for calculating the Generation Demand portion of the Utility Member’s bill. Under this Net Metering Option, Tri-State charges the Utility Member for its net peak load (*i.e.*, the measured load ignoring battery usage). For the Transmission/Delivery Demand portion of the Utility Member’s bill, however, Board Policy 115 allows Tri-State to bill the Utility Member for gross peak load, which is the measured load *plus* the battery capacity. Because the Transmission/Delivery Demand charge is only applied during a peak load period, this gross metering billing is only charged to a Utility Member at that time.

III. DISCUSSION AND CONCLUSION

A. Applicable Law

26. To the extent Respondent’s Motion asserts that the Commission lacks subject matter jurisdiction, this Motion is treated as a Colorado Rule of Civil Procedure (Colo.R.Civ.P.) 12(b)(1) motion. *See Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924 (Colo. 1993). The ALJ, in ruling on the Motion, employs the Colorado Rules of Civil Procedure and relies on Colorado court decisions when interpreting said rules. Rule 1001 of the Rules of Practice and Procedure, 4 CCR 723-1.

27. “Subject matter jurisdiction concerns the authority of the [Commission] to decide a particular matter.” *In re Marriage of Haddad*, 93 P.3d 617, 619 (Colo. App. 2004). There are several general principles that apply once a party raises subject matter jurisdiction as an issue.

First, it is the complainant's burden to prove the Commission's jurisdiction to decide the case or claim, which the complainant may meet by a *prima facie* showing of threshold jurisdiction. *See Medina v. Colorado*, 35 P.3d 443, 452 (Colo. 2001); *Pioneer Astro Industries, Inc. v. District Court*, 566 P.2d 1067, 1068 (Colo. 1977). Second, allegations raised in a complaint have no presumption of truthfulness. *Medina*, 35 P.3d at 452 (citations omitted). The Commission may weigh evidence, whether adduced at hearing or provided in writing, and may consider evidence outside the complaint to resolve motions to dismiss for lack of subject matter jurisdiction and to determine the existence of its own power to hear the case. *See Smith v. Town of Snowmass Village*, 919 P.2d 868, 871 (Colo. App. 1996); *Trinity Broadcasting*, 848 P.2d at 925. Finally, a complainant's failure to establish the Commission's subject matter jurisdiction requires dismissal of the complaint or claim. *City of Boulder v. Public Service Company of Colorado*, 996 P.2d 198, 203 (Colo. App. 1999). In such a case, because the Commission has no subject matter jurisdiction to consider the matter, a dismissal pursuant to Colo.R.Civ.P. 12(b)(1) is not a determination on the merits of the complaint.

28. As to the specific jurisdictional arguments raised by Tri-State in its Motion to Dismiss, § 201(b) of the Federal Power Act (FPA) gives the Federal Energy Regulatory Commission (FERC) jurisdiction over “the transmission of electric energy in interstate commerce” and the “sale of electric energy at wholesale in interstate commerce,” as well as “all facilities for such transmission or sale.” The states, however, retain jurisdiction over “any other sale of electric energy” and “over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”³

³ 16 U.S.C. § 824(b)(1) and (2).

29. In a decision rendered in March 2020, in the ongoing proceedings before FERC on issues regarding its jurisdiction over Tri-State, FERC concluded that it has exclusive jurisdiction over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and all facilities for such transmission or sale. However, FERC also concluded, “neither the Supreme Court nor the appellate courts have expressly found that the Commission has *exclusive* jurisdiction over rules and practices that directly affect jurisdictional rates.” 170 FERC ¶ 61,224 at 45-46. (emphasis in original) FERC’s decision indicated that, in such cases, there might be concurrent jurisdiction between itself and this Commission, when such rules and practices are at issue, as opposed to when jurisdictional rates themselves are at issue when FERC would retain exclusive subject-matter jurisdiction.

30. This latter conclusion, has since been upheld by the U.S. Court of Appeals for the D.C. Circuit by virtue of a decision issued in July 2020, when it clarified that the FPA gives FERC “exclusive authority over the regulation of the sale of electric energy at wholesale in interstate commerce, including both wholesale electricity rates *and any rule or practice affecting such rates.*” *NARUC v. FERC*, No. 19-1142 at 3 (D.C. Cir., July 10, 2020) (emphasis added).

B. Discussion and Conclusion

31. The Complaint alleges that the capacity charge assessed by Tri-State against United for use of United’s ESR system amounts to a “double charge” that amounts to an unfair, unreasonable, or discriminatory charge or rate in violation of the Colorado Public Utilities Law.⁴

32. In its Motion, Tri-State argued that it is a non-exempt “public utility” according to Section 201(f) of the FPA as of September 3, 2019 (the day Tri-State admitted its first Non-Utility Member), and that because of this change in status, Tri-State is subject to FERC’s

⁴ Specifically, § 40-6-108(1), § 40-3-111(1), § 40-3-112(2)(a), and § 40-3-106(1), C.R.S.

exclusive subject matter jurisdiction, pursuant to § 201(e) of the FPA. According to Tri-State, because Part II of the FPA grants FERC broad jurisdiction over the transmission of electricity in interstate commerce, the sale of electricity at wholesale in interstate commerce, and all facilities used for such transmission or sale, FERC's jurisdiction includes all rates, charges, and all rules and regulations affecting such rates or charges – including the charges at issue in this Proceeding.

33. Given this broad jurisdictional authority of FERC, Tri-State argued that this Commission's authority over the subject matter of this Complaint is preempted by FERC's exclusive jurisdiction under the FPA.

34. In its Response, United argued that because FERC has not ruled that Tri-State is under its jurisdiction and has not accepted any filing by Tri-State that would bring Tri-State under FERC's jurisdiction, this Commission retains jurisdiction to determine if the charges at issue are unjust, unreasonable, or discriminatory. Further, United argued that, even if Tri-State were under the jurisdiction of FERC, the charges disputed in this Proceeding are retail rates, as opposed to wholesale rates over which FERC could assert its exclusive jurisdiction. In United's view, the wholesale energy transaction (*i.e.*, providing electric power to United's ESR) ends along with federal jurisdiction at the moment the energy is transmitted. The "double charge" alleged here, according to United, is then a charge regarding a retail rate over which FERC has no regulatory authority.

35. As to United's first argument – that FERC itself has not made a ruling or accepted any filing that would bring Tri-State under its jurisdiction, during the time since United filed its Response, there have been numerous FERC decisions that have in fact made just such rulings and have accepted Tri-State's filings. In Decision No. 170 FERC ¶ 61,224, issued March 20,

2020, FERC concluded that Tri-State had in fact become a jurisdictional public utility under Part II of the FPA on September 3, 2019. FERC also issued two additional decisions on March 20, 2020, which accepted various filings made by Tri-State including the Wholesale Service Contracts, Stated Rate Tariff, and certain Tri-State bylaws.⁵

36. As discussed above, the FPA Part II makes it clear that FERC has exclusive subject-matter jurisdiction over the transmission of electric energy in interstate commerce, the sale of electric energy at wholesale in interstate commerce, and all facilities for such transmission or sale.⁶ FERC's conclusion in its March 20, 2020 decision suggests that this exclusive jurisdiction may not necessarily automatically include jurisdiction over rules and practices directly affecting jurisdictional rates.⁷ However, the basis of this conclusion, namely, that neither the Supreme Court nor the appellate courts have expressly found exclusive subject-matter jurisdiction over such rules and practices, has since been severely undercut by the U.S. Court of Appeals for the D.C. Circuit in its *NARUC v. FERC* decision issued in July 2020, discussed above. *See NARUC v. FERC* (D.C. Cir., July 10, 2020).

37. The implication of the decision in *NARUC v. FERC* for the instant case is that, in determining whether FERC has exclusive jurisdiction over the charges at issue here, it is largely irrelevant whether the charges are defined as a jurisdictional rate *or* if they are more analogous to a rule or practice that directly affect a jurisdictional rate. Moreover, given that FERC has since

⁵ *See* 170 FERC ¶ 61,223; 170 FERC ¶ 61,221. The ALJ is aware that in 170 FERC ¶ 61,223 FERC rejected filing of Board Policy 115 and the Generation Contracts without prejudice due to a need for additional filings. The ALJ notes that in 170 FERC ¶ 61,221, FERC accepted Tri-State's filing of the Wholesale Service Contracts, along with the attached Rate Schedules and Board Policy 115 and, as a result, there are ongoing settlement negotiations at FERC regarding Tri-State's rates and charges. Given that the charges contested by United here are also being contested by United before FERC as part of these negotiations, there appears to be at least implicit acknowledgement from FERC and United that FERC has, at minimum, concurrent jurisdiction regarding these rates.

⁶ 16 U.S.C. § 824(b)(1).

⁷ *See* 170 FERC ¶ 61,224 at 45-46.

accepted Tri-State's rate filings (which include the charge at issue here as part of its FERC rate schedule), it is clear that the capacity charge here is a rate over which FERC has asserted exclusive jurisdiction under Part II of the FPA.

38. This conclusion was made doubly clear by FERC in its August 28, 2020 decision in Docket No. EL20-16-001 where it further modified the Declaratory Order discussed above and found that the exit charges at issue in that proceeding were in fact jurisdictional wholesale rates over which FERC maintained exclusive jurisdiction and over which this Commission's jurisdiction was accordingly preempted. 170 FERC ¶ 61,173 at 16.⁸ According to FERC, although the payment of an exit charge affects the timing of Tri-State's recovery of its cost requirements to meet the full wholesale requirements of its members, it does not change the nature of the charge as a jurisdictional rate paid by the member to Tri-State to cover those costs. *See Id.* That is true here as well. The capacity charge challenged in this Proceeding is a charge billed to Tri-State's members as part of its rate structure to recover costs incurred by Tri-State in providing full wholesale requirements to those members. Similarly, this Commission then lacks jurisdiction over such wholesale rates filed and accepted for filing by FERC.

39. Taken together, regardless of how the capacity charge is defined, these decisions by FERC and the D.C. Circuit lead to the conclusion that disputes regarding the capacity charges challenged here (and any other rates contemplated under the Wholesale Service Agreements) are subject to FERC's exclusive jurisdiction. Moreover, any decision by this Commission regarding the justness and reasonableness of the capacity charges would be preempted by FERC pursuant to Part II of the FPA.

⁸ In its Order, 170 FERC ¶ 61,173, FERC once again chose not to make a specific assertion of jurisdiction over a rule or practice affecting a jurisdictional rate despite the U.S. Court of Appeals' decision. *See Id.*, Footnote 75.

40. FERC has determined it has jurisdiction over Tri-State, has accepted Tri-State's filings, including the Wholesale Service Agreements and rates at issue in this Proceeding, and thus has exclusive subject matter jurisdiction over Tri-State's rates, charges, rules, or practices affecting rates or charges. Therefore, any jurisdiction this Commission might have had over the rates and charges challenged in United's Complaint is preempted.

41. For its part, United has failed to make a *prima facie* showing that the Commission's exercise of jurisdiction over this matter is lawful and is not preempted. United's argument that FERC has not accepted the filings that would bring Tri-State's rates under federal jurisdiction is no longer the case. In fact, in subsequent filings in the numerous FERC dockets involving Tri-State's rate filings, United has raised the very same protests over the capacity charges that it seeks to adjudicate in this Complaint before this Commission. While in no way dispositive, United's advocacy expresses a tacit recognition on the part of United that ongoing disputes over Tri-State's rates, charges, and rules have moved to proceedings before FERC.

42. As for United's argument that these capacity charges are retail as opposed to wholesale rates, FERC's acceptance of Tri-State's rates which, as filed include the capacity charges at issue here as part of the overall rate structure, fit squarely within the FPA's broad grant of jurisdiction to FERC over jurisdictional rates *and* rules or practices significantly affecting such rates. Tri-State sells electric power to United pursuant to its WESC with United and the Transmission/Delivery Demand charge. United, not Tri-State, sells electric power to United's retail customers. Tri-State does not have retail customers, nor is Tri-State's assessment of the capacity charge a retail sale to United.

43. This Commission is not bound by traditional rules of *stare decisis*; that is, the Commission's prior decisions cannot be applied as binding precedent in future proceedings –

involving either the same utility or other utilities. The Commission's decision in each new proceeding must be based upon new, substantial evidence in the record of the new case.⁹ Mindful of those legal principles, the ALJ notes that the conclusions reached in this Decision are *not* inconsistent with prior Commission decisions. In particular, in Proceeding No. 18F-0866E, the issue of jurisdiction regarding exit charges for another of Tri-State's members was litigated, with the Commission, sitting *en banc*, deciding the issue of jurisdiction under Colorado law, and finding that it did retain jurisdiction over such exit charges.¹⁰ In the most reductive terms, one distinguishing characteristic between that proceeding and the instant Proceeding is that exit charges (as opposed to jurisdictional rates) were at issue.

44. The true distinction between these two proceedings, however, is more nuanced but no less critical. The analysis in Decision No. C19-0297-I¹¹ addressed the issue of jurisdiction only under Colorado state law and under an assumption that FERC had, at that time, not chosen to exercise its own jurisdiction over the charges in dispute. At this time in the instant Proceeding, FERC *has* clearly exercised its exclusive subject-matter jurisdiction over these charges and rates, and this Commission therefore cannot rely on Colorado law to determine the jurisdictional question.

45. Put simply, in Proceeding No. 18F-0866E, the jurisdictional question before the Commission was whether this Commission retained jurisdiction *in the absence* of a clear assertion of jurisdiction by FERC. Conversely, the jurisdictional question presented in this

⁹ *Colorado Ute Electric Association, Inc., v. Public Utilities Commission*, 198 Colo. 534, 602 P.2d 861, 865 (Colo. 1979); *B & M Service, Inc. v. Public Utilities Commission*, 163 Colo. 228, 429 P.2d 293 (1967).

¹⁰ See Decision No. C19-0297-I. The rationale in this Proceeding was once again employed and extensively cited in Proceeding No. 19F-0620E, Recommended Decision No. R20-0502 (mailed July 10, 2020) and discussed briefly above.

¹¹ Decision No. C19-0297-I was issued in Proceeding No. 18F-0866E on April 1, 2019.

Proceeding is whether this Commission's jurisdiction has been preempted by the later announced explicit assertion of jurisdiction by FERC.

46. Under the Supremacy Clause of the United States Constitution, federal law preempts contrary state law. The Supreme Court, in specifically addressing preemption in the context of the FPA, has found that the FPA creates a clear division of authority between state and federal regulators and that state attempts to interfere with FERC's congressionally-created domain by setting or disregarding wholesale rates, are preempted. *See Hughes v. Talen Energy Marketing LLC*, 136 S.Ct. 1288 (2016) ("But States may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates"). FERC's express assertion of exclusive jurisdiction over Tri-State's rates in dispute in this Proceeding creates an analogous situation whereby the applicable provisions of the FPA and FERC's assertion of jurisdiction over those rates preempts this Commission's authority and jurisdiction over the same rates.

47. In its Response, United wants this Commission to adjudicate whether MIECO's admission as a Tri-State member affects Tri-State's status as wholly-owned by non-jurisdictional entities for the purposes of FERC's jurisdiction under the FPA Part II; that is whether Tri-State's admission of MIECO as a member removed Tri-State's FPA § 201(f) exemption, with the result that FERC has exclusive jurisdiction. United's arguments are directly related to the question of FERC's jurisdiction over Tri-State and its rates. While this Commission has the authority to decide whether it has subject matter jurisdiction, FERC has the exclusive authority to decide its own jurisdiction. Indeed, FERC denied United's request for rehearing of the March 20, 2020 Declaratory Order and rejected United's arguments related to MIECO's membership in Tri-State.

FERC declined to modify its finding that Tri-State was no longer subject to the FPA § 201(f) exemption and held that:

... [T]he statutory requirements to end Tri-State's FPA section 201(f) exemption were met because Miecoco is a private company with a partial ownership interest in Tri-State. Based on these facts, Tri-State ceased to be "wholly owned by exempt entities," and, therefore, was no longer eligible for the FPA section 201(f) exemption.¹²

48. For these reasons, in this Decision the ALJ declines to adjudicate whether FERC has subject-matter jurisdiction, based upon issues related to Tri-State's admission of MIECO as a member. As discussed *supra*, FERC has exercised its authority and has determined that it has exclusive subject-matter jurisdiction over Tri-State's rates.

49. Finally, in its Response, United appears to suggest that the Commission should refrain from finding in Tri-State's favor regarding subject-matter jurisdiction because even with a FERC decision that conclusively decides the matter (as is the case here), such a decision would be subject to judicial review and therefore not the final disposition of the matter. Response, p. 22, fn. 99. While such a decision could be subject to judicial review under 16 U.S.C. § 8251(b), this argument is premature, speculative, and does not preclude this Commission from rendering a decision in the instant Proceeding. Even assuming FERC's decisions on Tri-State's rate filings were appealed, such judicial review would not automatically operate as a stay of FERC's orders,¹³ and regardless, this Commission cannot refuse to decide the parameters of its own subject-matter jurisdiction based only upon speculation that a FERC order *might* be overturned in judicial review. Further, dismissal of the Complaint by granting Tri-State's Motion

¹² 170 FERC ¶ 61,173 at 12 and 13 (footnotes omitted).

¹³ See 16 U.S.C. § 8251(c).

to dismiss is *without* prejudice, which means that, even if the FERC decisions finding exclusive jurisdiction over Tri-State's rates were overturned, United could refile a similar complaint.

50. In rendering this Decision, the ALJ has carefully reviewed and considered all facts and information presented in the pleadings filed in this proceeding by United and Tri-State, even if this Decision does not specifically address all the facts and information presented. The ALJ has carefully reviewed and considered all the legal arguments made in Tri-State's Motion to Dismiss and United's Response to Motion, including those legal arguments not specifically addressed in this Decision.

51. Because the ALJ has determined that the Commission does not have subject-matter jurisdiction over the claims brought by United in the Complaint in this Proceeding, Tri-State's Motion to Dismiss must be granted.

52. Based on the foregoing, the ALJ will grant Tri-State's Motion to Dismiss and will dismiss the Complaint without prejudice.

53. Tri-State's Alternative Motion to Stay Proceeding will be denied as moot.

54. All pending motions not yet adjudicated will be denied as moot.

55. In accordance with § 40-6-109, C.R.S., the undersigned Administrative Law Judge recommends that the Commission enter the following order.

IV. ORDER

A. The Commission Orders That:

1. Consistent with the findings, discussion, and conclusions above, the Motion to Dismiss Complaint, filed by Tri-State Generation and Transmission Association, Inc. (Tri-State) on December 26, 2019, is granted.

2. The Alternative Motion to Stay Proceeding, also filed by Tri-State on December 26, 2019, is denied as moot.

3. Consistent with the findings, discussion, and conclusions above, the Formal Complaint, filed on December 5, 2019 by United Power, Inc., is dismissed without prejudice.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

5. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director