

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

LA PLATA ELECTRIC ASSOCIATION, INC., EMPIRE ELECTRIC ASSOCIATION, INC., WHITE RIVER ELECTRIC ASSOCIATION, INC., BP AMERICA PRODUCTION COMPANY, ENCANA OIL & GAS (USA), INC., ENTERPRISE PRODUCTS OPERATING LLC, AND EXXONMOBIL POWER AND GAS SERVICES INC. ON BEHALF OF EXXONMOBIL PRODUCTION COMPANY, A DIVISION OF EXXON MOBIL CORPORATION, AS MEMBERS OF THE RURAL ELECTRIC CONSUMER ALLIANCE, AND KINDER MORGAN CO2 COMPANY, LP,

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

**INTERIM DECISION DENYING MOTION
FOR RECONSIDERATION,
MODIFICATION, OR CLARIFICATION**

Mailed Date: March 31, 2014

Adopted Date: March 12, 2014

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I. BY THE COMMISSION**A. Statement**

1. On January 23, 2014, La Plata Electric Association, Inc., Empire Electric Association, Inc., White River Electric Association, Inc., BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, ExxonMobil Power and Gas Services Inc., and Kinder Morgan CO₂ Company, LP (collectively, the Complainants) filed their Motion for Reconsideration, Modification, or Clarification (Motion), objecting to portions of Decision No. C14-0006-I issued January 3, 2014 (Interim Decision). Respondent Tri-State Generation and Transmission Association, Inc. (Tri-State), filed its Response in Opposition to the Motion on February 6, 2014. For the reasons stated below, we deny the Motion.

B. Discussion

2. On March 4, 2013, Complainants, three rural electric distribution cooperatives and five retail electricity customers, filed their Formal Complaint against Tri-State, a generation and transmission cooperative corporation providing electricity on a wholesale basis to the complainant cooperatives and other cooperatives located in Colorado, Wyoming, Nebraska, and New Mexico.¹ The Complaint challenges Tri-State's "A-37" rate charged to its member systems beginning January 1, 2013, on two factual grounds. First, the rate design allegedly fails to reflect the cost of service rendered due to the absence of a demand component in its structure.² Second, Tri-State failed to file the new A-37 rate with the Commission or provide notice to the Commission or Tri-State's customers of the rate change.³ Based upon these allegations,

¹ Formal Complaint filed by the Complainants on March 4, 2013, ¶¶ 1, 3.

² *Id.*, ¶¶ 16, 44.

³ *Id.*, ¶¶ 31, 37.

the Complainants request three forms of relief: 1) a finding that the A-37 rate is unjust, unreasonable, preferential, and discriminatory in violation of Colorado law; 2) the Commission establishment of a compliant cost allocation and rate design methodology for Tri-State's rates; and, 3) the Commission order refunds to any cooperative billed more under the A-37 rate than it would have been billed under Tri-State's previous rate, known as "A-36."⁴ The Commission referred the proceeding to Administrative Law Judge (ALJ) Paul C. Gomez.

3. On April 4, 2013, Tri-State filed its Motion to Dismiss Formal Complaint. Tri-State contended that the federal dormant Commerce Clause, in conjunction with § 40-7-111, C.R.S., deprives the Commission from exercising jurisdiction over the Formal Complaint.⁵ After taking evidence and briefing on Tri-State's motion to dismiss, the ALJ on September 11, 2013, denied Tri-State's motion to dismiss and certified his decision for Commission *en banc* review before hearing the case on its merits.⁶

4. Upon consideration of Tri-State's motion contesting the ALJ's denial of its motion to dismiss and Complainants' response, the Commission, on January 3, 2014, issued its Interim Decision. The Interim Decision affirmed the ALJ's denial of Tri-State's Commerce Clause challenge to the Commission's jurisdiction to hear the Formal Complaint.⁷ The Commission remanded to the ALJ the claim that the A-37 rate and the absence of a demand component are unjust, unreasonable, preferential, and discriminatory under Colorado law.⁸ A majority of the Commission declined to hear the claims based upon Tri-State's alleged failure

⁴ *Id.*, pp. 19-20.

⁵ Motion to Dismiss Formal Complaint, filed by Tri-State on April 4, 2013, pp. 13-24.

⁶ Decision No. R13-1119-I, Interim Decision of Administrative Law Judge Paul C. Gomez Denying Motion to Dismiss and Certifying Interim Decision as Immediately Appealable, issued September 11, 2013.

⁷ Decision No. C14-0006-I, Interim Decision Granting in Part and Denying in Part Respondent Tri-State Generation and Transmission Association, Inc.'s Motion Contesting Interim Decision No. R13-1119-I, issued January 3, 2014, ¶ 49.

⁸ *Id.*, ¶ 44.

to file or provide notice of the new A-37 rate.⁹ The majority dismissed the Complainants' requests for the Commission to establish a methodology for Tri-State to set its rates and for an award of refunds.¹⁰ A majority of the Commission also granted Tri-State's motion to deny standing to the Industrial Complainants, but allowed them to participate in the proceeding as permissible intervenors.¹¹

5. The Commission remanded the case to the ALJ, defining the scope of the case as follows: "whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate under the circumstances of this case violates Colorado law and policy."¹²

6. Ordering paragraph 3 of the Interim Decision cited Rule 1502(b) of our procedural rules,¹³ which precludes the filing of exceptions or applications for rehearing, reargument, or reconsideration (RRR) to interim decisions. Challenges to Commission rulings contained in interim decisions may be filed through exceptions to a Recommended Decision issued by an ALJ or as part of an application for RRR of a final Commission decision.¹⁴

7. On January 23, 2014, the Complainants filed their Motion, requesting the Commission to reconsider, modify, or clarify the Interim Decision in four ways:

- a. To allow the admission of Tri-State's cost allocation and rate design methodology into evidence on the issue of whether the A-37 rate contains a demand component. Complainants argue the Interim Decision could be interpreted to allow evidence of only whether the A-37 rate contains a component labeled as "demand" and thus preclude evidence of how Tri-State's rate setting methodology results in the practical exclusion of a demand component and non-compliance with Colorado law prohibiting unjust, unreasonable, discriminatory, and preferential rates;

⁹ *Id.*, ¶¶ 51, 52, 56.

¹⁰ *Id.*, ¶¶ 51, 52.

¹¹ *Id.*, ¶ 59.

¹² *Id.*, ¶ 58.

¹³ 4 *Code of Colorado Regulations* 723-1-1502(b) of the Commission's Rules of Practice and Procedure.

¹⁴ *Id.*

- b. To have the ALJ and the Commission establish a range of compliant cost allocation and rate design methodologies for Tri-State's future rates;
- c. To allow the ALJ to hear Complainants' claims arising from Tri-State's alleged failure to file and provide notice of the A-37 rate. Complainants also request restoration of their remedies resulting from these alleged failures, such as recovery of refunds based upon the difference between the A-37 and A-36 rates.
- d. To grant standing to the Industrial Complainants to bring the claims alleged in the Complaint.¹⁵

8. Complainants acknowledge the procedural conflict between their Motion and the Interim Decision's citation to Rule 1502(b) and its preclusion of applications for RRR. Complainants admit the Interim Decision "correctly captured the intent of Rule 1502(b)";¹⁶ however, they rely on other rules to authorize the Commission to hear their Motion.

9. Complainants cite Rule 1502(c) as authorization for its Motion, because it allows a party to file a motion to set aside, modify, or stay an interim decision with "the presiding officer." Complainants recognize the absence of the Commission or the Commission *en banc* from the definition of "presiding officer"; yet, they contend an interim decision must be entered by a presiding officer and, because the ruling at issue is styled as an "interim decision," the Commission must be a presiding officer able to hear a motion to modify under Rule 1502(c).¹⁷ Alternatively, the Complainants rely upon Rule 1502(d) as a mechanism for the Commission to certify an interim decision for review by the Commission *en banc*.¹⁸

¹⁵ Motion for Reconsideration, Modification, or Clarification of Decision No. C14-0006-I, filed by the Complainants on January 23, 2014, pp. 3, 4.

¹⁶ *Id.*, ¶ 37.

¹⁷ *Id.*, ¶ 39.

¹⁸ *Id.*, ¶ 40.

10. Complainants also ask the Commission to disregard the “interim” qualification of its decision and instead classify it as simply a “decision” of the Commission subject to RRR under Rule 1506 and § 40-6-114(1), C.R.S. Complainants assert a right to be heard on a decision reaching a “final,” dispositive conclusion dismissing their claims in whole or in part.¹⁹

11. Complainants request the Commission, if it does not permit the Motion to be heard under Rules 1502(c), 1502(d), or 1506, to consider it as a motion for clarification.²⁰

12. In response to the Motion, Tri-State focuses exclusively upon procedural issues.²¹ Tri-State cites Rule 1502(b) as the applicable authority prohibiting RRR and deferring challenges to Commission interim decisions until the ALJ issues a Recommended Decision or as part of an application for RRR after a final Commission decision.

13. Tri-State interprets Rule 1502(c) as not authorizing Complainants’ Motion, due to the absence of “Commission” from the definition of “presiding officer” who may hear motions to modify interim decisions under Rule 1502(c).²² Rule 1502(d) also is misplaced, Tri-State argues, because of the incongruity of a certification for review of a Commission interim decision by the Commission.²³ Tri-State characterizes Complainants’ procedural arguments as efforts to evade the more specific prohibition upon RRR in Rule 1502(b).²⁴ Tri-State also references the history of the Commission’s promulgation and interpretation of Rule 1502 and urges the Commission to exercise its discretion to forgo hearing Complainants’ challenges at this time.²⁵

¹⁹ *Id.*, ¶ 41.

²⁰ *Id.*, ¶ 42.

²¹ Respondent Tri-State Generation and Transmission Association’s Response in Opposition to Complainants’ Motion for Reconsideration, Modification, or Clarification of Interim Decision No. C14-0006-I, filed by Tri-State on February 6, 2014, fn. 1.

²² *Id.*, pp. 3, 4.

²³ *Id.*, p. 4.

²⁴ *Id.*

²⁵ *Id.*, pp. 4-6.

Finally, Tri-State objects to Complainants' attempt to classify the interim decision as a "decision" subject to RRR under Rule 1506, because it ignores the plain meaning of Rule 1502(b).²⁶

C. Conclusions and Findings

14. The aspects of the Motion requesting the Commission to establish a range of acceptable rate setting methodologies, to hear claims and consider remedies based upon allegations of a failure to file or provide notice of the A-37 rate, and to grant standing to the Industrial Complainants as original plaintiffs amount to applications for reconsideration, reargument, or rehearing. These requests seek the reversal or modification of rulings contained in the Interim Decision and thus are prohibited at this stage of the proceedings under Rule 1502(b). The circumstances presented here do not warrant a waiver of Rule 1502(b).

15. The other procedural rules upon which Complainants rely do not apply. Rule 1502(c) permits the filing of motions to modify an interim decision issued by a "presiding officer"; but, the definition of "presiding officer" excludes any reference to the Commission or the Commission acting *en banc*.²⁷ The purpose of Rule 1502(c) is to allow parties in cases before the ALJ or a commissioner acting in the role of a hearing examiner to seek a modification of an interim ruling as the case proceeds on referral from the Commission, not to permit applications for reconsideration of a Commission interim decision.

16. Rule 1502(d) authorizes an ALJ or hearing Commissioner to certify his or her non-final decision for Commission review *en banc* before conducting further proceedings.

²⁶ *Id.*, pp. 6-7.

²⁷ 4 *Code of Colorado Regulations* 723-1-1004(z).

This rule also allows the full Commission to certify an interim decision, issued by any hearing officer, for review by the Commission *en banc*. Rule 1502(d) was invoked by the ALJ in this case, when he certified his interim decision on the applicability of the dormant Commerce Clause to the Commission for *en banc* review. It does not include a circular process in which interim decisions issued by the Commission *en banc* are certified for another *en banc* review.

17. We also deny Complainants' characterization of the Interim Decision as a "decision" subject to RRR under Rule 1506 and § 40-6-114, C.R.S. Complainants' position eliminates the distinction between a non-final Commission decision rendered on a threshold or separate issue of the case, which is an "interim decision," versus a final decision resolving all issues in the proceeding. It also would render Rule 1502(b)'s prohibition upon RRR meaningless. Complainants' interpretation complicates the judicial review process and conflicts with the principle precluding judicial review of non-final Commission decisions.²⁸

18. Application of Rule 1502(b) does not infringe upon the Complainants' rights to be heard regarding a final, dispositive decision. The Interim Decision is not a final Commission decision, and Rule 1502(b) permits a party to challenge interim rulings through exceptions to a Recommended Decision issued by an ALJ or as part of an application for RRR of a final Commission decision.

19. For these reasons, the Commission denies the aspects of Complainants' Motion requesting reconsideration of the Interim Decision's rulings that: declined to establish a range of

²⁸ Section 40-6-114(4), C.R.S., could be interpreted as authorizing judicial review of any Commission decision ruling upon an application for RRR, and thus Complainants' transformation of an interim decision into a generic "decision" subject to RRR may result incorrectly in judicial review of a non-final Commission decision. ("If no application for rehearing, reargument, or reconsideration has been made or, if made, is withdrawn, a suit to enforce, enjoin, suspend, modify, or set aside any final decision of the commission, in whole or in part, may be brought in a district court of the state of Colorado as set forth in this article; except that, if any party to a proceeding applies for reconsideration, reargument, or rehearing, no other party may appeal until the commission has ruled on the application. For purposes of judicial review, a decision on an application for rehearing, reargument, or reconsideration shall be deemed final on the date said decision is served on the parties to the proceeding.")

acceptable rate setting methodologies; dismissed claims and remedies based upon allegations of a failure to file or provide notice of the A-37 rate; and, denied standing to the Industrial Complainants as original plaintiffs.

20. Complainants' Motion also requests the Commission to clarify the meaning of the Interim Decision and allow evidence of Tri-State's rate setting methodology to show the absence of a demand component in rates charged by member cooperatives. This aspect of Complainants' Motion is for clarification, not for reconsideration, and thus is not subject to the prohibition upon RRR under Rule 1502(b).

21. The Complainants' Motion interprets the Interim Decision as limiting admissible evidence to only whether the rate invoiced by Tri-State contains an element labeled "demand." Complainants' interpretation is incorrect; the Interim Decision permits full adjudication of whether a demand component is absent from Tri-State's rate and whether the A-37 rate is unjust, unreasonable, discriminatory, or preferential.

22. Contrary to Complainants' contention, the Interim Decision does not misinterpret their claim; rather, the Interim Decision's description of the claim quotes from the Complaint:

The cumulative effect of *the methodology* approved by Tri-State is a dramatic increase in rates for high-load factor distribution cooperatives and high-load factor member-customers and a simultaneous lowering of rates for low-load factor distribution cooperatives and low-load factor customers *without regard to the cost of providing service.*²⁹

23. The Interim Decision also contains broad ordering language allowing the ALJ to consider all of the circumstances underlying this issue: "This proceeding is remanded to the

²⁹ Decision No. C14-0006-I, Interim Decision Granting in Part and Denying in Part Respondent Tri-State Generation and Transmission Association, Inc.'s Motion Contesting Interim Decision No. R13-1119-I, issued January 3, 2014, ¶ 4, quoting Formal Complaint filed by the Complainants on March 4, 2013, at ¶ 18 (emphasis added).

Administrative Law Judge to hear and issue a Recommended Decision on whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate *under the circumstances of this case* violates Colorado law and policy."³⁰

24. Because the Interim Decision allows ALJ Gomez in his discretion to admit and consider all relevant facts and circumstances to whether Tri-State's rate contains a demand component, which may include Tri-State's rate-setting methodology, and to whether the A-37 rate is unjust, unreasonable, discriminatory, or preferential under Colorado law, Complainants' Motion for clarification is denied as unnecessary.

II. ORDER

A. It Is Ordered That:

1. The Motion for Reconsideration, Modification, or Clarification filed on January 23, 2014, by La Plata Electric Association, Inc., Empire Electric Association, Inc., White River Electric Association, Inc., BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, ExxonMobil Power and Gas Services Inc., and Kinder Morgan CO₂ Company, LP, is denied.
2. This proceeding is remanded to the Administrative Law Judge.
3. This Decision is effective on its mailed date.

³⁰ *Id.*, Ordering ¶ 2, at p. 25 (emphasis added). *See also Id.*, at ¶ 58: "We refer to the ALJ the claims of whether Tri-State's A-37 rate contains a demand component and whether Tri-State's A-37 rate under the circumstances of this case."

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
March 12, 2014.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners