

Decision No. R14-0502-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13F-0145E

LA PLATA ELECTRIC ASSOCIATION, INC.; EMPIRE ELECTRIC ASSOCIATION, INC.;
AND, WHITE RIVER ELECTRIC ASSOCIATION, INC.,

COMPLAINANTS,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
PAUL C. GOMEZ
DENYING MOTION FOR
DETERMINATION OF LAW**

Mailed Date: May 12, 2014

I. **STATEMENT**

A. **Background**

1. In response to a Remand Order by the Commission pursuant to Interim Decision No. C14-0006-I issued on January 3, 2014, and Interim Decision No. C14-0337-I, issued on March 31, 2014, the undersigned Administrative Law Judge (ALJ) set a pre-hearing conference for April 21, 2014 by Interim Decision No. R14-0392-I, issued April 11, 2014, in order to determine how the underlying complaint proceeding would go forward given the directives of the Commission's Remand Order and to establish a procedural schedule.

2. At the scheduled date and time, the pre-hearing conference was held. Appearances were entered by La Plata Electric Association, Inc., Empire Electric Association, Inc., and White River Electric Association, Inc. (collectively, Complainants); BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Production Company as members of the Rural Electric Consumer Alliance; Kinder Morgan CO₂ Company, LP (collectively, Intervenors);¹ and, Tri-State Transmission and Generation Association, Inc. (Tri-State).

3. At the pre-hearing conference, the Complaining Parties raised for the first time, the argument that pursuant to Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1308(e) of the Rules of Practice and Procedure, Tri-State failed to file its Answer in a timely manner since more than 14 days had elapsed since a Decision was issued on its Motion to Dismiss. The Complaining Parties were instructed to file the argument as a written motion no later than April 24, 2014.

4. On April 24, 2014, the Complaining Parties filed a Motion for a Determination of Law (Motion). The Complaining Parties point out that Tri-State has not filed its Answer to the Complaint as of the date of the Motion. The Complaining Parties argue that pursuant to Rule 4 CCR 723-1-1308(e) and Colorado Rule of Civil Procedure (C.R.C.P.) 12(a), Tri-State failed to file its Answer no later than 14 days after the Commission's Interim Decision No. C14-0006-I issued January 3, 2014 on Tri-State's motion contesting Interim Decision No. R13-1119-I issued September 11, 2013.

¹ As a matter of convenience, Complainants and Intervenors will be referred to as "Complaining Parties."

5. The Complaining Parties sought a motion for reconsideration, modification, or clarification of Interim Decision No. C14-0006-I on January 23, 2014, which the Complaining Parties note was six days after an answer or response pleading was due under Commission Rules and the C.R.C.P. The Complaining Parties further assert that even assuming that its January 23, 2014 motion tolled the deadline to file an answer, Commission Decision No. C14-0337-I addressing that motion was issued March 31, 2014. Consequently, utilizing that decision as the milepost to measure the 14-day deadline under Commission rules and the C.R.C.P. to file its Answer, Tri-State missed that deadline of April 14, 2014 as well.

6. As a result, the Complaining Parties urge the Commission to deem the allegations in the Complaint admitted, deem Tri-State to have waived the right to raise affirmative defenses, and grant the relief requested in the Complaint.

7. Tri-State filed its response to the Motion on April 30, 2014. Tri-State takes the position that the Motion is inconsistent with the Complaining Parties' prior statements and positions, as well as contrary to law and the previous decisions in this proceeding.

8. Tri-State argues that the positions and statements regarding the procedural aspects of this matter made and agreed to by the Complaining Parties demonstrate a clear waiver of the arguments made in the Complaining Parties' Motion. Tri-State argues that the Complaining Parties have discussed, agreed to, or proposed various procedural issues which include dates for the filing of Tri-State's Answer without reference to a deadline to file the Answer. Tri-State contends that at a minimum, the Complaining Parties should not now be allowed to contradict the understanding under which all parties have been moving forward in this proceeding.

9. Tri-State points to the language of Interim Decision No. R13-0473-I which states that a deadline for Tri-State to file its Answer will be set subsequent to a determination regarding

its initial Motion to Dismiss, and notes that no deadline was established following either the Interim Decision of the Commission issued on January 3, 2014 or March 31, 2014 regarding Tri-State's initial Motion to Dismiss. Rather, a deadline for filing an Answer was established for the first time in Interim Decision No. R14-0423-I, issued on April 23, 2014, which was established as May 16, 2014.

10. Tri-State refers to the body of decisions issued in this proceeding as depicting the uniqueness of the Complaint and the proceedings to date. Tri-State also notes that a deadline to file an Answer has been established in two Interim Decisions (R13-0473-I and R14-0423-I), which renders the Motion unnecessary and improper. Nonetheless, Tri-State maintains that even if the Motion is deemed proper, the relief requested is unwarranted under the unique circumstances of this proceeding and waiving the timing requirements under Commission rules would be appropriate.

II. FINDINGS

11. The Motion filed by the Complaining Parties lacks any merit whatsoever. It is agreed that the deadline to file an answer to a complaint as set forth in Commission Rules 4 CCR 723-1-1308(e) and 1400(f) (which incorporates C.R.C.P. 12 by reference) is 14 days after a decision denying a motion to dismiss. However, Decision No. R13-0473-I issued on April 23, 2013, which denied the Complaining Parties' Motion to Strike Tri-State's Motion to Dismiss, at Section II, Paragraph 20 unequivocally stated as follows: "A deadline for Respondent to file its Answer will be set subsequent to a determination regarding the Motion to Dismiss." That declaration should have been sufficient to put all parties to this proceeding on notice that any deadlines either under Commission rules or under the C.R.C.P. for Tri-State to file its Answer were tolled pending the outcome of its initial Motion to Dismiss and the issuance of a

procedural order setting a new date to file the Answer. It does not matter which Commission Decision supposedly began the 14-day clock to file an Answer, as any deadline was tolled by Interim Decision No. R13-0473-I.

12. Despite the unambiguous statement in Interim Decision No. R13-0473-I, the Complaining Parties assert in part that even if the Commission's Interim Decision No. C14-0337-I issued on March 31, 2014 is considered as the Decision to serve as the milestone to determine the deadline to file an Answer, Tri-State should have filed its Answer by April 14, 2014. Despite that assertion, on April 17, 2014, counsel for the Complaining Parties sent an e-mail to the undersigned ALJ as well as to the other legal counsel for the Complaining Parties and legal counsel for Tri-State answering the questions the ALJ requested that the parties be prepared to answer at the pre-hearing conference. That e-mail included a proposed procedural schedule that included a date of July 24, 2014 for Tri-State to file its Answer. If the Complaining Parties truly believed that Tri-State had failed to timely file its Answer, it is inconceivable why the Complaining Parties would have proposed a procedural schedule with a date for the filing of the Answer if they were under the impression that Tri-State failed to timely file its Answer.

13. It is also vexing to the undersigned ALJ that the Complaining Parties altered their position in their written Motion from the oral motion made at the pre-hearing conference. The relief requested by the Complaining Parties in the written Motion for a Determination of Law for an untimely answer is that "the Commission should deem the allegations in the Complaint admitted, deem Tri-State to have waived the right to raise affirmative defenses, and grant the relief requested in the Complaint."²

² See, Motion for a Determination of Law, ¶15, pp. 4-5.

14. However, during the pre-hearing conference, the Complaining Parties represented that from their perspective, the relief for an untimely Answer should be that it merely deprives a Respondent from an opportunity to raise any affirmative defenses,³ and that an additional remedy for an untimely Answer should be that the failure is construed as a general denial across the board and the case goes forward on that basis.⁴ This drastic change in position by the Complaining Parties is troubling to say the least. When the argument was construed as a motion and the Complaining Parties were given the opportunity to submit the motion in writing, it was anticipated that the same arguments made at the pre-hearing conference would be made in the written motion.⁵

15. Given the previous holding in Interim Decision No. R13-0473-I that the date for Tri-State to file its Answer would be determined at some point subsequent to a determination of its appeal to the Commission of the Interim Decision denying its initial Motion to Dismiss, and the revision of the Complaining Parties' position from its arguments made at the pre-hearing conference, the Motion will be denied.

16. In order for this proceeding to continue to a resolution unimpeded, it is imperative that the parties concentrate their energies on prosecuting this matter expeditiously rather than engaging in meritless claims such as this.

³ See, Hearing Transcript, p. 27, lines 19-25.

⁴ The Complaining Parties' legal counsel stated at the hearing:

“And from our perspective, we would have no objection to treating Tri-State's failure to having answered as simply a general denial; and under the rules, having had the opportunity to do that, having not availed themselves of the opportunity to do that, from our perspective the case can move forward subject only to the pending motion to dismiss as we've discussed.” See, Hearing Transcript, p. 28, lines 8-15.

⁵ The hearing transcript further shows that the oral statement of the Complaining Parties regarding the filing of an Answer was construed by the ALJ as a motion and the Complaining Parties were provided the option of reducing the argument made at the pre-hearing conference to writing, to which the Complaining Parties agreed. Hearing Transcript, p. 31, lines 8 to 19.

III. ORDER

A. It Is Ordered That:

1. The Motion for a Determination of Law filed on April 24, 2014 by La Plata Electric Association, Inc.; Empire Electric Association, Inc.; White River Electric Association, Inc.; and, BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Production Company as members of the Rural Electric Consumer Alliance; and Kinder Morgan CO₂ Company, LP is denied consistent with the discussion above.

2. The procedural schedule adopted by Interim Decision No. R14-0423-I, issued on April 23, 2014 is in effect.

3. Tri-State Transmission and Generation Association, Inc.'s Answer to the Complaint is due on May 16, 2014.

4. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

PAUL C. GOMEZ

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director