

Decision No. C19-0955-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 CONSOLIDATING PROCEEDINGS
FOR ALL PURPOSES; ON PROCEDURAL MATTERS;
AND, GRANTING MOTIONS TO APPEAR *PRO HAC VICE***

Mailed Date: November 25, 2019

Adopted Date: November 20, 2019

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I. BY THE COMMISSION

A. Statement

1. In these formal complaints filed on November 5 and 6, 2019, La Plata Electric Association, Inc. (La Plata) and United Power, Inc. (United Power) (collectively, Complainants) mainly argue that Tri-State Generation and Transmission Association, Inc. (Tri-State) has blocked their efforts to exercise their lawful withdrawal rights and has now placed a moratorium on providing member exit charges altogether. Complainants maintain that Tri-State is working to attempt to eliminate the Commission’s jurisdiction altogether through its actions at the Federal Energy Regulatory Commission (FERC). Additionally, Complainants allege that Tri-State has displayed a lack of candor to this Commission, the Colorado General Assembly, and its own members necessitating this complaint. Both Complainants request that the Commission exercise its jurisdiction to confirm the unlawfulness of: (1) Tri-State’s position that it can unjustly, unreasonably, and discriminatorily deny an exit charge to them; and (2) Tri-State’s actual refusal to provide Complainants an exit charge. If the Commission determines Tri-State’s conduct is unlawful, Complainants request the Commission, under its statutory authority adjudicate a just, reasonable, and nondiscriminatory exit charge.

2. La Plata asks for the following relief: i.) an order finding that Tri-State’s refusal to provide an exit charge is unjust and unreasonable; ii.) an order finding that Tri-State’s refusal to

provide an exit charge to the Complainants is discriminatory; iii.) establish an exit charge for Complainants that is just, reasonable, and nondiscriminatory; and, iv.) any additional relief the Commission deems proper.

3. Untied Power asks for the following relief: i.) finding that the exit charge for United Power prescribed by Tri-State is unjust and unreasonable; ii.) that the United Power exit charge is discriminatory; iii.) establish an exit charge that is just, reasonable, and nondiscriminatory; and iv.) any additional relief as the Commission deems proper.

4. On November 5, 2019, La Plata filed a Motion Requesting Establishment of a Procedural Schedule, and Assignment of Hearing Commissioner--or in the Alternate, Hearing *En Banc* (Motion). United Power filed a similar motion on November 7, 2019.

5. Pursuant to the Motion, Complainants request that the Commission act now to establish a procedural schedule, rather than wait until after Tri-State files its answer. Complainants argue that the actions of Tri-State require establishing a procedural schedule at the outset with the filing of testimony to commence in December 2019.

6. Complainants argue that the proposed procedural schedule is not expedited *per se*, but is expedited in the sense that Complainants request a procedural schedule now rather than after Tri-State files its answer. It is also appropriate to establish a procedural schedule now according to Complainants, given the likelihood of preliminary motions practice by Tri-State. Complainants assert the proposed procedural schedule is intended to accommodate to some degree, such motions practice. In addition, Complainants request that a Hearing Commissioner or in the alternate, the Commission hear this matter *en banc*. Complainants argue the proposed

procedural schedule is intended to accommodate to some degree, such motions practice.

Complainant’s Motions set out a proposed procedural schedule as follows:

December 13, 2019	Complainants file Direct Testimony
January 24, 2020	Tri-State files Answer Testimony
February 28, 2020	Complainants file Rebuttal Testimony
March 10-13, 2020	Evidentiary Hearing
April 10, 2020	SOPs due

7. On November 6, 2019, Commission Director Doug Dean sent an Order to Satisfy or Answer informing Tri-State of the formal complaint filed against it by La Plata, as well as an Order Setting Hearing and Notice of Hearing. The Order and Notice of Hearing set a hearing for January 20, 2020.

8. On November 7, 2019, an Amended Order Setting Hearing and Notice of Hearing was issued amending the hearing date for the La Plata Complaint to January 21, 2020.

9. On November 7, 2019, Commission Director Doug Dean sent an Order to Satisfy or Answer informing Tri-State of the formal complaint filed against it by United Power, as well as an Order Setting Hearing and Notice of Hearing. The Order and Notice of Hearing set a hearing for January 22, 2020.

10. On November 13, 2019, the Commission issued Decision No. C19-0927-I in Proceeding No. 19F-0620E, in which it shortened the response time to the Motions to November 15, 2019. Tri-State filed its response to the Motions on that date.

11. Tri-State expresses in its response to the Motions that it “is concerned with what it perceives as inequitable treatment from the very commencement of this proceeding”¹ given the shortened response time to the Motions.

¹ Tri-State Response at ¶ 1.

12. Turning to the Motions, Tri-State argues that Complainants did not state that they actually intend to withdraw from Tri-State and require an exit charge to accomplish that. Rather, Tri-State argues Complainants complain only that Tri-State's alleged actions prevent it from potentially exercising their withdraw rights. According to Tri-State, Complainants' only urgency is to have the Commission provide an advisory opinion for a potential withdrawal at some point in the future. As such, Tri-State takes the position that there is no need for an expedited schedule. Given the financial and operational implications of a member's withdrawal from Tri-State, the Company suggests the Commission and public interest are best served by allowing time for development of a comprehensive record informing a decision.

13. Tri-State also wishes to make the Commission aware that a Contract Committee was formed, in part, to provide the very relief Complainants seek in this proceeding – a framework for member withdrawals, and to investigate and consider alternative contracts, including partial contracts. Tri-State maintains the committee is scheduled to conclude its work and present its recommendations to the board of directors at Tri-State's Annual Meeting in early April 2020.

14. Tri-State asks whether this proceeding is an appropriate use of the Commission's and parties' time and resources. Tri-State finds it troubling that the Complainants seek to use the Commission and its proceedings to leverage their position in, if not outright undermine the process that they are involved in with Tri-State's other members on the Contract Committee.

15. Addressing the proposed procedural schedule, Tri-State argues that it is not realistic, reasonable, or in the public interest to attempt to develop, in the first instance, a new withdrawal methodology through a litigated proceeding, especially on the compressed timeframe that has been proposed. Tri-State urges the Commission to consider that Complainants have

fully controlled the timing of commencing this proceeding. Under the proposed schedule, Tri-State complains that in addition to pre-filing opportunities to organize resources and prepare their cases, Complainants would have an additional five and a half weeks to prepare direct testimony. Tri-State goes on to complain that while it would have six weeks to prepare answer testimony, a large portion of that period overlaps with the holiday season. Further, Tri-State is concerned that Complainants failed to confer with it which means it has no opportunity to consider witness and attorney availability.

16. As a result, Tri-State suggests that the Commission reject Complainants' proposed schedule and direct the parties to confer and present a procedural schedule to the Commission for approval. Tri-State also proposes that the matter be heard *en banc*.

B. Findings and Conclusions

17. Given the posture of these proceedings at this time, there are several procedural matters to be considered. Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1402 of the Commission's Rules of Practice and Procedure, governs and establishes the standard for consolidation. In relevant part, the Rule states: "[T]he Commission may consolidate proceedings where the issues are substantially similar and the rights of the parties will not be prejudiced." Whether to consolidate lies in the Commission's sound discretion.

18. First, we find it appropriate to consolidate these two formal complaint proceedings. We find that doing so will conserve resources and improve efficiencies, given the similar nature of the claims in each complaint. We find that no party will be prejudiced by consolidating these matters for all purposes and that consolidation reduces, if not eliminates entirely, confusion about the proceedings in which a particular issue will be addressed.

19. Second, as set out above, the Complainants submitted a proposed procedural schedule for approval. Tri-State strongly opposes the proposed schedule for several reasons. While we intend to move this matter along with all dispatch, we nonetheless find it reasonable to not accept the proposed schedule and require the parties to confer and agree upon a proposed schedule that they will submit to the Commission by close of business on December 6, 2019. The proposed schedule should include timelines for a date to file briefs on the issue of Commission jurisdiction (discussed in more detail below); for Tri-State to answer the Complaints and/or file any motion to dismiss; the filing of written testimony (direct, answer, and rebuttal); a deadline for the filing of dispositive motions or a settlement agreement; a date for the filing of closing statements of position; and a discovery schedule to the extent that it deviates from Rule 4 CCR 723-1-1405.

20. In the event the parties are unable to arrive at a consensus procedural schedule, the Commission will issue a procedural schedule.

21. Third, the jurisdictional question continues to hover over these complaint proceedings. As before, this threshold question must be answered and resolved prior to the filing of written testimony. In our view, it is imperative that the issue of jurisdiction not insinuate itself into the evidentiary hearing issues if the cases move forward to hearing. Therefore, we will require the parties to brief the specific question of jurisdiction in separate pleadings due prior to the filing of written direct testimony and with sufficient time for us to consider the question and make a determination. The parties shall consider the date for filing these briefs in their proposed procedural schedule to be filed with the Commission. We will further require that the briefs be filed simultaneously with no reply briefs.

22. Fourth, La Plata asks for the following relief: i.) an order finding that Tri-State's refusal to provide an exit charge is unjust and unreasonable; ii.) an order finding that Tri-State's refusal to provide an exit charge to the Complainants is discriminatory; iii.) establish an exit charge for Complainants that is just reasonable, and nondiscriminatory; and, iv.) any additional relief the Commission deems proper.

23. United Power asks for the following relief: i.) finding that the exit charge for United power prescribed by Tri-State is unjust and unreasonable; ii.) that the United Power exit charge is discriminatory; iii.) establish an exit charge that is just, reasonable, and nondiscriminatory; and any additional relief as the Commission deems proper.

24. We find it necessary to seek some clarification from Complainants regarding the relief they seek. For example, regarding the exit charges and a determination of "just and reasonable," what will that entail in a complaint proceeding and what evidence will allow the Commission to make that determination?

25. Fifth, Complainants sought either a hearing *en banc* or by a Hearing Commissioner. Tri-State specifically requests a hearing *en banc*. We determine that this matter will be heard by a Hearing Commissioner. Commissioner Frances Koncilja will be designated as Hearing Commissioner for this proceeding.

26. Sixth, these Complaints were previously set for hearing through the Director's Order to Satisfy or Answer sent to Tri-State on January 20, 2020 and January 22, 2020. Those Orders were sent to Tri-State on November 7, 2019, providing Tri-State with 20 days in which to answer the allegations contained in the Complaint. Because we are requiring the parties to file a proposed procedural schedule that includes an evidentiary hearing date, as well as a deadline for

Tri-State to file an answer, we find it appropriate to vacate the hearing dates contained in the Orders to Satisfy or Answer as well as the 20-day time period for Tri-State to file its answer.

27. Finally, requests for *pro hac vice* admission on behalf of United Power were filed by Jenna L. McGrath and Charles A. Patrizia on November 15, 2019. Both submitted the required affidavits and motions requesting *pro hac vice* admission. In addition, they have both paid the appropriate fees to the Colorado Supreme Court.

28. An attorney who is not licensed to practice law in Colorado must be granted permission to appear *pro hac vice* in Commission proceedings. Rule 4 CCR 723-1-1201(a) governs the admission of out-of-state attorneys. Rule 1201(a) requires compliance with Colorado Rule of Civil Procedure (CRCP) 205.4, which itself expressly incorporates CRCP 205.3.

29. As pertinent here, CRCP 205.3(2)(a) details what an out-of-state attorney must do to be permitted to appear *pro hac vice* and includes these requirements:

- (a) File a verified motion with the administrative agency requesting permission to appear;
- (b) Designate an associate attorney who is admitted and licensed to practice law in Colorado;
- (c) File a copy of the verified motion with the Clerk of the Supreme Court Office of Attorney Regulation at the same time the verified motion is filed with the administrative agency;
- (d) Pay the required fee to the Clerk of the Supreme Court collected by the Office of Attorney Regulation; and
- (e) Obtain permission from the administrative agency for such appearance.

30. In their November 15, 2019 Motions, Ms. McGrath and Mr. Patrizia attest to the requirements above, and on November 21, 2019, the Commission received Proof of *pro hac vice* Registration for both Ms. McGrath and Mr. Patrizia.

31. Ms. McGrath meets the requirements of CRCP 205.4. We therefore grant Ms. McGrath's request to appear *pro hac vice*.

32. Mr. Patrizia meets the requirements of CRCP 205.4. We therefore grant Mr. Patrizia's request to appear *pro hac vice*.

II. ORDER

A. It Is Ordered That:

1. Consistent with the discussion above, Proceeding Nos. 19F-0620E and 19F-0621E are consolidated for all purposes.

2. The parties in each proceeding are parties in the consolidated proceeding.

3. Proceeding No. 19F-0620E is designated as the primary proceeding.

4. All proceeding numbers and captions in the consolidated proceeding shall be listed on all future filings as shown above on this Decision. Proceeding No. 19F-0620E shall appear first.

5. The parties to this proceeding are required to file a proposed procedural schedule consistent with the discussion above. The proposed procedural schedule is to be filed no later than close of business on December 6, 2019.

6. The parties are to incorporate into the proposed procedural schedule, time to file separate briefs on the issue of Commission jurisdiction to hear these complaints. These briefs are to be filed prior to the filing of direct testimony and with sufficient time for the Commission to consider the question and make a determination. The briefs are to be filed simultaneously with no reply briefs.

7. Complainants are to file clarification regarding the relief sought. Such clarification will be due no later than December 13, 2019.

8. This consolidated complaint proceeding shall be heard before Hearing Commissioner Frances Koncilja.

9. The procedural process set forth in the Commission Director’s Order to Satisfy or Answer issued to Tri-State Generation and Transmission Association, Inc. (Tri-State) on November 6, 2019, including the dates for an evidentiary hearing and the 20-day time period in which Tri-State was to file an answer to the complaints is hereby vacated.

10. The Motion to Appear *Pro Hac Vice* filed by Ms. Jenna L. McGrath on November 15, 2019 is granted.

11. The Motion to Appear *Pro Hac Vice* filed by Mr. Charles A. Patrizia on November 15, 2019 is granted.

12. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING
November 20, 2019.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners