

Decision No. C19-1001-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 HEARING COMMISSIONER
KONCILJA ESTABLISHING PROCEDURAL SCHEDULE
AND DIRECTING THE PARTIES TO COMPLY WITH
COMMISSION RULES 1100 AND 1101.**

Mailed Date: December 13, 2019

I. STATEMENT

1. As set forth in detail in Decision No. C10-0955-I, issued November 25, 2019, in these consolidated proceedings, La Plata Electric Association, Inc. (La Plata) and United Power, Inc. (United Power) (collectively, Complaints or Complainants, as appropriate) filed these formal Complaints against Tri-State Generation and Transmission Association, Inc. (Tri-State) on

November 5 and 6, 2019, respectively. (La Plata, United Power, and Tri-State are collectively referred to as the Parties).

2. By Decision No. C19-0955-I, the Commission consolidated the Complaints in Proceeding Nos. 19F-0620E and 19F-0621E, designated Proceeding No. 19F-0620E as the primary proceeding, ordered, *inter alia*, that the Parties confer and, if possible, file a joint procedural schedule no later than close of business on December 6, 2019, designated Commissioner Koncilja as the Hearing Commissioner, and ordered the Complainants to file certain clarifications by December 13, 2019.

3. On December 6, 2019, the Complainants filed a “Schedule of Proceedings Proposed by United Power, Inc. and La Plata Electric Association” (Complainants’ Proposed Schedule). The Complainants also requested that the Commission enter an order to make available for use in these consolidated proceedings discovery responses, documents, and deposition testimony given by Tri-State witnesses in Proceeding No. 18F-0866E brought by Delta Montrose Electric Association (DMEA) against Tri-State (DMEA Proceeding).

4. On December 6, 2019, Tri-State filed “Tri-State Generation and Transmission Association’s Proposed Procedural Schedule” (Tri-State Proposed Schedule). In addition, on December 9, 2019, Tri-State filed “Tri-State Generation and Transmission Association’s Response to Complainants’ Schedule of Proceedings” (Tri-State Additional Response), objecting to the Complainants’ request to make the Tri-State information submitted in the DMEA Proceeding available to the Parties and the Commission in these consolidated proceedings.

II. POSITIONS OF THE PARTIES

5. The Parties state that they negotiated in good faith but were unable to agree on a hearing schedule, although they did agree that simultaneous briefing as to the Commission’s jurisdiction should be filed on December 20, 2019.

6. In arguing for a later procedural schedule, Tri-State asserts that the subject matter of these Complaints, namely the terms, conditions, and amount that either La Plata or United Power should be required to pay to withdraw from Tri-State, is being considered by the Contract Committee established by Tri-State's Board of Directors and that the work of the Contract Committee is scheduled to be completed in early April 2020. Tri-State further asserts that to the extent the Commission finds it has jurisdiction over these Complaints, the Commission should set evidentiary hearings for May 18-22, 2020.

7. La Plata and United Power assert that they are entitled to an earlier resolution of these matters and request an earlier evidentiary hearing of April 6-10, 2020. La Plata and United Power contend that the request for more time by Tri-State is no different than the claims Tri-State made in the DMEA Proceeding and there is no guarantee when the Contract Committee will finish its work.

8. La Plata and United Power also request that, to avoid needless duplication and unnecessary expense, all documents produced by Tri-State, discovery responses, and deposition testimony given by Tri-State witnesses in Proceeding No. 18F-0866E (collectively, Tri-State Information) be used in these consolidated proceedings. La Plata and United Power contend that the Commission can use Commission Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1100(d) as well as Commission Rule 4 CCR 723-1-1003 to prevent hardship, promote equity, or more effectively implement overall policies, such as the just, speedy, and inexpensive determination of a proceeding.

9. Tri-State in its Additional Response asserts that the issues raised in these Complaints are not a continuation of the DMEA Proceeding because they contain very different facts developed at very different times and under different circumstances, and that therefore the wholesale importation of information from the DMEA Proceeding is inappropriate. Tri-State

further asserts that significant portions of the Tri-State Information was designated confidential or highly confidential pursuant to Rule 4 CCR 723-1-1100(b) and that Rule 4 CCR 723-1-1101(h) provides this type of information shall not be used for any other purpose other than the proceeding in which it was produced. Tri-State also states that neither Complainant was a party in the DMEA Proceeding and disputes that providing access to the Tri-State Information will expedite and or reduce the cost of these consolidated proceedings. Instead, Tri-State proposes the Parties be directed to work together to narrow the scope of the request through the normal discovery processes.

10. Complainants, on the other hand, assert that Tri-State over-designated materials as confidential or highly confidential in the DMEA Proceeding and that DMEA had requested de-designation but the case settled before that could be accomplished. Complainants further assert that requiring Complainants to separately identify each piece of information to which they seek access invades counsel’s protected litigation strategy and would serve only to increase rather than decrease the cost of obtaining the information.

11. La Plata and United Power, presented at page 2 of Complainants’ Proposed Schedule, the following chart that lays out the differences in the scheduling requests.

Event	United Power & La Plata Proposal	Tri-State Proposal
Simultaneous briefing on Commission jurisdiction	12/20/19	12/20/19
United Power & La Plata file direct testimony	1/15/2020	2/28/2020
Tri-State files answer testimony	2/18/2020	4/10/2020
United Power & La Plata file rebuttal testimony	3/16/2020	5/8/2020
Evidentiary Hearing	4/6-10/2020	5/18-22/2020
Statements of Position due	4/20/2020	6/2/2020

III. FINDINGS AND CONCLUSIONS

12. All Parties to these consolidated proceedings are entitled to an expeditious and efficient resolution of these matters, beginning first with a decision as to the jurisdiction of this Commission over the matters asserted in the Complaints. Therefore, the Hearing Commissioner establishes December 20, 2019, the date all Parties agreed to, as the date Parties must file their briefs on the question of whether this Commission has jurisdiction over all or any part of the claims asserted in the Complaints. Neither of the proposed schedules take into account the work load of the Hearing Commissioner in the next few months and thus the proposals are rejected. Instead, the following hearing schedule is adopted:

Simultaneous Briefings on Commission Jurisdiction	12/20/19
United Power & La Plata - Direct Testimony	1/10/2020
Tri-State - Answer Testimony	2/12/2020
United Power & La Plata - Rebuttal Testimony	3/10/2020
Evidentiary Hearing	3/23-27/2020
Statements of Position	4/02/2020

13. This schedule requires Complainants to file Direct Testimony earlier than they suggested but it also provides Tri-State 33 days to file Answer Testimony.

14. The proposal by Tri-State that Complainants must confer and agree to what, if anything, should be included from the DMEA Proceeding is rejected because it is unreasonably onerous, will delay the resolution of these matters, and/or increase costs. Further, Tri-State’s suggestion that the Parties confer as to what information should be submitted from the DMEA Proceeding is either unworkable or defeats the purpose of the alleged confidentiality, because the confidentiality designations will prohibit Complainants from reviewing the information.

15. It will expedite these proceedings and reduce costs if Tri-State immediately provides access to the Tri-State Information to Complainants. However, Tri-State is currently entitled to the confidentiality protections that it asserted in the DMEA Proceeding. In order to preserve those confidentiality designations, while at the same time providing access to the information, Complainants are ordered to comply with Rules 4 CCR 723-1-1100 and 4 CCR 723-1-1101, including the execution, service, and filing of the appropriate non-disclosure agreements pursuant to Rule 4 CCR 723-1-1101(i).

16. Upon compliance by Complainants with Rule 4 CCR 723-1-1101(i), Tri-State shall provide immediate access to the Tri-State Information to Complainants.

17. The Hearing Commissioner declines, at this time, to take administrative notice of the Tri-State Information because there is no current showing that the Tri-State Information constitutes admissible evidence in these consolidated proceedings. However, the Tri-State Information is discoverable as it will likely lead to the discovery of admissible information because of the similarity of the claims asserted.

18. Public access to information is an important policy of the state of Colorado in both statutes and case law of the state. Therefore, the Parties are instructed to confer by December 30, 2019, to determine if they can reach agreement whether the Tri-State Information is currently entitled to the continued protection and the designations of confidential and or highly confidential. If the Parties are able to resolve the confidentiality disputes, they are ordered to file an agreement in these consolidated proceedings on or before December 30, 2019. If the Parties are unable to reach agreement, Tri-State is ordered to submit, for *in camera* review, the information to which it asserts confidential or highly confidential protection and Tri-State's legal and factual bases for these designations, by close of business on January 3, 2020.

IV. ORDER

A. It Is Ordered That:

1. The following procedural schedule is adopted in these consolidated proceedings:

Simultaneous Briefings on Commission Jurisdiction	12/20/19
United Power & La Plata - Direct Testimony	1/10/2020
Tri-State – Answer Testimony	2/12/2020
United Power & La Plata - Rebuttal Testimony	3/10/2020
Evidentiary Hearing	3/23-27/2020
Statements of Position	4/02/2020

2. Complainants must immediately comply with Rules 4 CCR 723-1-1100 and 1101, including executing, filing, and serving the appropriate non-disclosure agreements, pursuant to Rule 4 CCR 723-1-1101(i), with respect to the Tri-State Information.

3. Upon receipt of the appropriate non-disclosure agreements, Tri-State shall immediately provide access to the Complainants the Tri-State Information in the DMEA Proceeding, which information shall continue to be entitled to the confidentiality designations asserted until further order of the Commission.

4. The Parties shall confer as to the appropriateness of those confidentiality designations and attempt to reach agreement by December 30, 2019, and file the results of their conferral.

5. If disputes as to confidentiality still exist after the conferral, Tri-State is ordered to provide the disputed information for an *in camera* review along with a statement of the legal and factual bases for continuing to assert confidentiality protections, by the close of business on January 3, 2020.

6. Complainants are still obligated to comply with the requirement in Decision No. C19-0955-I to provide certain clarifications by December 13, 2019.

7. This Decision is effective on its Mailed Date.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

Hearing Commissioner

ATTEST: A TRUE COPY

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

Doug Dean,
Director