

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20M-0218E

IN THE MATTER OF THE COMMISSION'S CONSIDERATION OF THE EXISTING RESOURCES OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. PRIOR TO ITS INITIAL ELECTRIC RESOURCE PLAN FILING PURSUANT TO 40-2-134, C.R.S.

**INTERIM DECISION GRANTING
THE WESTERN WAY'S INTERVENTION,
AND TRI-STATE'S REVISED MOTION FOR
EXTRAORDINARY PROTECTION**

Mailed Date: August 11, 2020
Adopted Date: July 22, 2020

I. BY THE COMMISSION

A. Statement

1. On June 1, 2020, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed an assessment of its existing generation resources. Tri-State made the filing consistent with the new provisions in the Commission's Rules Regulating Electric Utilities, 4 *Code of Colorado Regulations* (CCR) 723-3, that govern Electric Resource Plans (ERPs) filed by Tri-State (ERP Rules for Tri-State). The new ERP Rules for Tri-State were promulgated in Proceeding No. 19R-0408E pursuant to § 40-2-134, C.R.S.

2. By this Decision, we address The Western Way's (TWW) intervention and Tri-State's revised request for extraordinary protection of certain data.

B. The Western Way's Intervention

3. By Decision No. C20-0437, issued on June 11, 2020, the Commission established a notice and intervention period for this Proceeding. Requests for intervention were due July 1,

2020. On July 1, 2020, TWW timely filed a motion seeking permissive intervention. On July 10, 2020, Tri-State filed a response contesting TWW's motion.

4. On July 20, 2020, TWW filed a motion seeking leave to reply and a reply to Tri-State's response. On July 21, 2020, Tri-State filed a response to TWW's motion for leave to reply.

5. We begin by addressing TWW's July 20 motion for leave to reply and Tri-State's July 21 response to that motion. Commission Rule 1400 of the Rules of Practice and Procedure, 4 CCR 723-1, permits replies if a movant can show, as relevant here, an incorrect statement or error of law. TWW's motion for leave argues, in part, that Tri-State made an incorrect statement of law when it asserted that in order to intervene, TWW must show why its interests are distinct from those represented by the Office of Consumer Counsel (OCC). Tri-State reiterated this argument in its response to TWW's motion for leave. But, Rule 1401(c) only requires that discussion if a motion to permissively intervene is filed by "a residential consumer, agricultural consumer, or small business consumer." TWW is none of these; therefore, it need not include in its motion to intervene a discussion of how the OCC inadequately represents its interests. We find TWW has shown an incorrect statement of law and accordingly we grant TWW's motion for leave to reply and accept its reply. Because Tri-State has already responded, we waive any remaining response time to TWW's motion for leave to reply.

6. Turning to TWW's intervention, we have considered the arguments in TWW's motion for intervention, Tri-State's response, and TWW's reply to Tri-State's response. TWW's motion for permissive intervention generally follows the outline of Rule 1401, though Tri-State's

response raises a number of perceived deficiencies with respect to whether TWW's motion for intervention fits the technical requirements of our Rule.¹

7. TWW describes itself as an IRS Section 501(c)(3) non-profit charitable organization that is based in Denver and focuses on "delivering conservative free-market solutions to energy and environmental challenges facing the Western U.S."² TWW states its mission is "to steward economic growth and environmental responsibility across the Western states, including Arizona, Colorado, Idaho, Montana, Nevada, Utah, and Wyoming."³ In its motion to intervene, TWW points out that it has performed an extensive study of the Tri-State generation system.

8. TWW also states that:

- it seeks to evaluate the competitiveness of Tri-State's G&T system compared to potentially more affordable alternatives available in the market;
- the communities for whom TWW advocates frequently do not have a voice when it comes to designing and running the systems to which they are beholden for a service as essential as electricity; and
- it is important that the localized environmental impacts of Tri-State's resource portfolio be evaluated in the context of the communities most affected by these choices.

9. We recognize that TWW's motion may not strictly adhere to the intervention requirements in Rule 1401. However, this is a pre-ERP miscellaneous proceeding and therefore we are less inclined to strictly construe our rules in a way that could exclude stakeholders. It is helpful to the Commission to hear from voices across the political spectrum. As TWW

¹ Rule 1401(c) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, governs motions to intervene. The rule provides that the Commission exercises its discretion when ruling on motions to intervene, and it outlines a handful of factors that the Commission considers when determining whether to grant permissive interventions.

² TWW Intervention at p. 1,

³ *Id.*

represents a viewpoint distinct from the other parties, allowing the organization to determine whether it may have a valuable contribution to the upcoming ERP proceeding could result in an increase of the diversity of input the Commission receives. We find that these reasons constitute good cause under Rule 1003 to waive Rule 1401 and to allow TWW to intervene in this proceeding.

10. We reiterate that involvement in this proceeding does not necessarily guarantee intervention into the ERP proceeding. The Commission will evaluate motions to intervene in that proceeding at a future date.

C. Motion for Extraordinary Protection

11. On June 1, 2020, Tri-State filed a Motion for Extraordinary Protection of Highly Confidential Information (Motion). Tri-State sought to protect nine categories of information or documents. It argued that eight of the categories included commercially sensitive information or data that could be used to derive commercially sensitive information. The ninth category was certain provisions of Tri-State's existing power purchase agreements (PPAs) that are subject to a confidentiality clause. Tri-State also attached to its Motion a proposed highly confidential nondisclosure agreement (NDA), as required by Commission Rules.

12. On July 1, 2020, two responses to Tri-State's Motion were filed. The Interwest Energy Alliance (Interwest) filed one, and the Natural Resources Defense Council (NRDC), Sierra Club, Western Colorado Alliance (WCA), Southwest Energy Efficiency Project (SWEEP), and Western Resource Advocates (WRA) jointly filed the other.

13. Interwest's response states that Tri-State's request might be overly broad. It draws a general comparison to Tri-State's request and the protection Public Service Company of Colorado seeks in similar proceedings, and also suggests we consider the PacifiCorp Integrated

Resource Planning process (and provides a related web address). Ultimately, Interwest requests that we deny Tri-State's Motion and that we the parties have an additional five business days to suggest revisions that might better contour the confidentiality protection to the information, or in the alternative, that it have five additional business days to amend its response to provide objections to particular pieces of information that it believes are misclassified. Interwest has not filed any additional proposals or objections since it filed its response.

14. NRDC, Sierra Club, WCA, SWEEP, and WRA filed a joint response to Tri-State's Motion. They argue that Tri-State's scheduled outage information should not be confidential because it is common for certain types of outage information to be made publicly available. The organizations argue that Tri-State has failed to meet its burden to show that the nine categories Tri-State wishes to protect are highly confidential. They argue that the legal support Tri-State offers relies on proceedings where no party challenged the breadth of the utility's confidentiality motion, and contend that Tri-State's request is too broad and may include publicly available information. The joint respondents also contend that the New Mexico PRC has in past proceedings denied extraordinary protection to information similar to that which Tri-State seeks to protect.

15. Additionally, the organizations take issue with a provision in Tri-State's NDA that prohibits parties from disclosing highly confidential information to "any person, entity, or representative of an entity that is currently selling or that ... intends to sell electricity at wholesale in any of the states in which [Tri-State] operates."⁴ The organizations state that this provision might limit the ability of parties to properly review information, and attached their own version of an NDA.

⁴ Joint Response at p. 11.

16. On July 13, 2020, in reply to the concerns raised in the two Responses, Tri-State filed its own Response that modified its Motion by narrowing the categories of highly confidential information and provided additional support for its request. It now seeks extraordinary protection for seven categories of information: (1) Fixed Operation and Maintenance (O&M) Expenses; (2) Variable O&M Expenses; (3) Fuel Curves (Gas and Coal); (4) Contract/PPA Energy Rate; (5) Contract/PPA Capacity Rate except when either concerns Tri-State's LAP and CRSP hydro power purchase contracts with WAPA; (6) Performance or Operating Output guarantees and any associated pricing adjustments included in Tri-State's Renewable PPAs; and (7) Any information protected by a confidentiality clause in a PPA.

17. As well, Tri-State provides additional argument to support its updated requests (pages 15 to 21 of its Response). Tri-State argues that these seven categories of information contain market sensitive data or data protected by a confidentiality clause, and that broader dissemination of the information could result in harm to the company and its members.

18. The Commission has reviewed Tri-State's Motion, the two Responses, and Tri-State's Response. We find Tri-State's Response, coupled with the discussion in its Motion, adequately supports highly confidential treatment for the seven categories that ultimately comprise Tri-State's request. In addition, we are unmoved by the challenges to confidentiality raised in the two Responses to Tri-State's Motion. The respondents do not raise strong arguments that they will be harmed by the level of confidentiality Tri-State seeks in its revised request or by its revised confidentiality designations. After all, the respondents claim they will be able to access all of the information. Our review indicates that Tri-State's revised confidentiality designations are appropriate.

19. In our view, granting Tri-State’s revised request for extraordinary protection strikes an appropriate balance between the need for public information in this pre-ERP proceeding and the potential risk of harm to Tri-State and its members.

II. ORDER

A. It Is Ordered That:

- 1. The Motion to Intervene filed by The Western Way on July 1, 2020 is granted.
- 2. Consistent with the discussion above, Tri-State Generation Transmission Association, Inc.’s Motion for Extraordinary Protection filed on June 1, 2020 (as revised), is granted.
- 3. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS’ WEEKLY MEETING
July 22, 2020.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners