

Decision No. C20-0788

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.

**COMMISSION DECISION GRANTING
JOINT MOTION TO LODGE AND DISMISSING
COMPLAINTS WITHOUT PREJUDICE**

Mailed Date: November 5, 2020

Adopted Date: October 22, 2020

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I. BY THE COMMISSION

A. Statement

1. By this Decision we grant the Motion to Lodge filed jointly by Complainants La Plata Electric Association, Inc. (LPEA) and United Power, Inc. (United). More importantly, we dismiss both complaints without prejudice because the courts, and not the Commission, are the more appropriate venue to address the one issue that remains in these consolidated proceedings.

B. The Complainants’ Joint Motion to Lodge

2. Before we turn to the jurisdiction question, we address the Complainants’ Joint Motion to Lodge. On October 16, 2020, United and LPEA moved the Commission¹ to accept into the record of this proceeding, a briefing it had filed in another proceeding, 19F-0691E. The briefing addresses the Commission’s jurisdiction over the energy storage issues raised in that

¹ The Complainants styled their October 16 motion as a motion to lodge. Our rules do not contemplate motions to lodge. However we construe the motion as one to supplement the record.

proceeding, and Complainants ask the Commission to consider those arguments in this proceeding. They also ask that we waive response time to the motion.

3. Tri-State Generation and Transmission Association, Inc. (Tri-State) filed its response to the Joint Motion on October 20, 2020. It argues that the briefing introduces new facts and arguments that were not previously in the record. As it is, the parties have had ample opportunity to address the Commission's jurisdiction to hear these complaint cases, and Tri-State had an opportunity to respond to any outstanding facts or legal arguments when it filed its response, but chose not to. Therefore, we find that there is no harm to Tri-State if we grant the motion and accept the briefing into this proceeding. Accordingly we grant the Motion to Lodge. Because Tri-State has filed a response, we waive any remaining response time.

C. The Commission's Jurisdiction to Address the MEICO Question

4. When they began, the disputes at issue here concerned "exit charges" (make-whole payments) that Complainants could pay to part ways with Respondent, Tri-State. Practically speaking, Complainants could pay an exit charge to terminate their membership in, and Wholesale Electric Service Contract with, Tri-State. Tri-State had provided United with a preliminary exit charge which United believed was far too high. La Plata had asked Tri-State for an exit charge but Tri-State declined to provide La Plata with an exit charge. The two cooperatives then filed their respective complaints at the Commission.²

5. The complaint proceedings did not arrive at the Commission in a vacuum. Two months before the complaints were filed, Tri-State admitted its first non-utility member. Tri-State contended that this change in membership also changed its regulator; it filed a petition

² The procedural history of these proceedings is largely set forth in Recommended Decision No. R20-0502 issued July 10, 2020. We pick up where the Recommended Decision left off and provide additional background necessary for our discussion here.

for declaratory order at the Federal Energy Regulatory Commission (FERC) and asked FERC to determine that Tri-State's rates and charges like the exit charges at issue here, were exclusively regulated by FERC.

6. The Commission disagreed with Tri-State's assessment. We intervened in the proceedings at FERC and argued that the Commission, and not FERC, had jurisdiction to hear the complaint proceedings.

7. In March, FERC issued an initial order on Tri-State's petition. It concluded that it did not have exclusive jurisdiction over the complaint proceedings. In practice, this meant that the Commission could continue to hear the claims in the complaints. Tri-State moved FERC to reconsider its conclusion, while the complaint proceedings moved forward at the Commission.

8. In April, Complainants filed a Motion for Partial Summary Judgment or Determination of a Question of Law, asking the Administrative Law Judge (ALJ) to determine two questions: first, that the Commission and not FERC had jurisdiction to hear the complaints, and second, whether Tri-State's addition of a non-utility member was lawful under Colorado corporate law. Relying on FERC's initial March decision, the ALJ concluded that the Commission's jurisdiction to hear the complaints was not preempted. The ALJ did not reach the second question.

9. In May, the parties proceeded through an evidentiary hearing that was held electronically.

10. By July, the ALJ had issued the recommended decision in this proceeding. The extensive recommended decision adopted an exit fee methodology, found that Tri-State's refusal to provide an exit fee to either cooperative was unjust, unreasonable and discriminatory, but did

not set an exit fee for either cooperative. Tri-State, United, and La Plata all filed exceptions to the recommended decision.

11. As the Commission was preparing to address the exceptions in August, FERC issued a second order addressing its jurisdiction over the exit fee disputes. It reversed its earlier position and determined that it had exclusive jurisdiction over the exit fee disputes from the date that MEICO, Inc. (MEICO) became a non-utility member of Tri-State (September 3, 2019). While in force, that decision preempts this Commission's jurisdiction over the exit charges, leaving us unable to adjudicate them.

12. FERC's August order significantly changed the posture of these proceedings. The claims set forth in the complaints are no longer before us. The only issue before us is one that grew out of Tri-State's challenge to this Commission's jurisdiction and that Complainants ask us to resolve: whether Tri-State can add non-utility members like MEICO under its bylaws and Colorado's corporate law. Regardless of the way a question arrives before us, the preliminary question we must answer is whether we have jurisdiction to hear such a claim.³

D. The Commission's Jurisdiction to Adjudicate the MEICO Question

13. The parties have briefed this issue and unsurprisingly have taken opposite positions as to whether the Commission can hear corporate law questions like those presented by MEICO's admission to Tri-State membership.

14. For their part, Complainants argue that the Commission has authority to adjudicate this claim. They find support for their position in three places. First, they cite cases from Colorado and other jurisdictions supporting the proposition that the Commission has

³ *Keystone, a Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484, 488 n.6 (Colo. 1989) (the Commission "has jurisdiction to determine the facts on which its own jurisdiction depends and to make a jurisdictional ruling based on the facts.")

inherent ability to determine its own jurisdiction. Second, they rely on the broad language in § 40-3-102, C.R.S. (as well as cases interpreting that section), authorizing the Commission “to do all things . . . which are necessary or convenient in the exercise” of its utility regulatory authority. Finally, Complainants highlight statements in the above-referenced FERC orders indicating that Colorado state law questions are best adjudicated in a Colorado forum.

15. That the Commission has authority to determine the scope of its own jurisdiction is a fairly unremarkable proposition of law. However, Complainants argue that the authority to make such a threshold determination also includes, in this instance, the authority to fully adjudicate the corporate law question that is presented by Tri-State’s addition of non-utility members. Such an argument puts the cart before the horse.⁴ Whether the Commission has subject matter jurisdiction over a claim is a preliminary question that must be determined by examining the *res* of the claim in light of the Commission’s statutory authority.

16. To that end, the Complainants read § 40-3-102, C.R.S. (titled “Regulation of rates – correction of abuses”) as vesting in the Commission authority to adjudicate a corporate law question. We do not read that section so broadly. On its face, that section imbues the Commission with power to govern the rates and charges of regulated utilities. Complainants argue that the catchall provision in that section, providing that the Commission can “do all things whether specifically designated in articles 1 to 7 of [title 40] or in addition thereto, which are necessary or convenient in the exercise of such power” expands the scope of our jurisdiction to adjudicating a corporate law claim. We disagree for two reasons.

⁴ What is more, none of the cases cited by Complainants support the proposition that the Commission can, as part of its inquiry into its jurisdiction, adjudicate a claim that does not arise from the Public Utility Laws.

17. First, the catchall provision is limited to the Commission's power to regulate the rates and charges of utilities. But, as discussed earlier, the claims involving exit charges are no longer before this Commission. Without the exit charges before us we cannot exercise the power over rates and charges that Section 102 and its catchall provision give to the Commission. Put another way, because answering the corporate law question is not regulating rates or charges, Section 102 no longer applies here. This leaves us unable to reach the corporate law question inherent in Tri-State's addition of non-utility members. Second, even if the exit charge claims made here were not preempted by FERC's order, we would not read the catchall provision as providing the Commission with jurisdiction over corporate law claims. The Commission has never had the powers of a court of general jurisdiction.⁵ Instead, its adjudicatory jurisdiction is limited to those claims and issues that arise from the utilities law of this state.⁶ It is undisputed that whether Tri-State could or properly did admit non-utility members presents a question of corporate law, which places it beyond the jurisdiction of the Commission.

18. Lastly, we disagree with Complainants' contention that certain statements FERC made in adjudicating its own jurisdiction over Tri-State's rates "confirm" that this Commission has jurisdiction over corporate law questions. To begin, the question whether Colorado law leaves standalone corporate law claims to this Commission or to the courts was never presented to FERC. More importantly, because it is a question of Colorado law, FERC's conclusion on that

⁵ See, e.g., *People v. Colorado Title & Tr. Co.*, 178 P. 6, 10 (Colo. 1918) ("The Public Utilities Commission is not a court, but is an administrative commission, having certain delegated powers, and charged with the performance of certain executive and administrative duties, and its powers are subject to the action of the courts in matters of which the courts have jurisdiction. The Legislature did not give the commission power to render judicial decisions or jurisdiction over remedial rights as exercised by the courts.").

⁶ Cf. *Intermountain Rural Elec. Ass'n v. Colorado Cent. Power Co.*, 307 P.2d 1101, 1104 (Colo. 1957) ("The Public Utilities Commission is a legally constituted administrative body with exclusive jurisdiction in its constituted field."); *Dev. Recovery Co., LLC v. Pub. Serv. Co. of Colorado*, 2017 COA 86, ¶¶ 19-25 (the court's analysis demonstrating that claims for breach of contract, breach of the implied covenant of good faith and fair dealing, and unjust enrichment [claims that do not arise from the Utility Laws] are properly filed in court.).

score would not be binding on this Commission. Even still, both FERC orders addressing its jurisdiction over the complaints⁷ steered clear of any statements regarding whether the corporate law question ought to be heard before this Commission or a court. The orders only went so far as to leave questions of Colorado law to Colorado tribunals.⁸

19. At the end of the day, FERC's order preempting this Commission's jurisdiction over the exit charge claims spun these proceedings into an unusual legal posture. The order removed claims related to the exit charges from our jurisdiction. And we cannot hear the remaining corporate law questions because they do not arise from the Public Utility Laws of Colorado. With nothing before us that we can adjudicate we must dismiss these complaints without prejudice.

20. We note, however, that the Commission's doors will be open to hear the exit fee disputes if Complainants' corporate law challenges succeed in court.

21. Our decision to dismiss the complaints renders moot the outstanding exceptions as well as the numerous filings made by non-parties to these proceedings.

II. ORDER

A. The Commission Orders That:

1. Complainants La Plata Electric Association, Inc. and United Power, Inc.'s Joint Motion to Lodge filed October 16, 2020, is granted.

⁷ Tri-State Generation & Transmission Ass'n, Inc., 172 FERC ¶ 61,173, P 34 (Aug. 28, 2020); Tri-State Generation & Transmission Ass'n, Inc., 170 FERC ¶ 61224, P 31 (March 20, 2020).

⁸ Complainants point to the statement that "resolution of the pending Colorado PUC proceedings, *or other litigation concerning Colorado law issues*" (emphasis added) might cause FERC to reevaluate its jurisdictional conclusion as support for their contention. We disagree, and instead view this statement as reflecting an understanding that litigation surrounding the corporate law questions may need to be heard in a court of general jurisdiction.

2. This Commission lacks jurisdiction to adjudicate whether MEICO, Inc. was properly admitted as a member of Tri-State Generation and Transmission Association, Inc. and is rightfully a full owner under Colorado law.

3. The Complaints filed by La Plata Electric Association, Inc. and United Power, Inc. are hereby dismissed without prejudice.

4. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
October 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