Decision No. R20-0502

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.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE ROBERT I. GARVEY GRANTING RELIEF REQUESTED AND SETTING EXIT CHARGE METHODOLOGY

Mailed Date: July 10, 2020

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I. SUMMARY

1. La Plata Electric Association, Inc. (La Plata or LPEA) and United Power, Inc. (United Power) (collectively, Complainants) filed the above-captioned formal complaints

(Complaints) against Tri-State Generation and Transmission Association, Inc. (Tri-State) on November 5 and 6, 2019, respectively, requesting that this Commission determine a just, reasonable, and non-discriminatory exit charge for Complainants. La Plata, United Power, and Tri-State, collectively, are the Parties to this proceeding.

2. On November 25, 2019, by Decision No. R19-0955-I, the Commission consolidated the Complaints in Proceeding Nos. 19F-0620E and 19F-0621E and designated Commissioner Frances Koncilja as the Hearing Commissioner.

3. On December 19, 2019, by Decision No. C19-1001-I, a procedural schedule was adopted, which included dates for the Parties to file testimony and scheduled an evidentiary hearing for March 23rd through March 27th, 2020. In addition, Hearing Commissioner Koncilja ordered the Parties to file briefs by December 20, 2019, to address "the question of whether this Commission has jurisdiction over all or any part of the claims asserted in the Complaints."[1]

4. On December 19, 2019, the Poudre Valley Rural Electric Association Inc. (PVREA) filed its Motion to Intervene.

5. On December 20, 2019, in response to the order in Decision No. R19-1001-I, United Power and La Plata filed a Joint Submission on the Issue of the Commission's Jurisdiction Over This Exit Charge, and Tri-State filed its Brief on Jurisdiction and Request for Hearing.

6. On December 23, 2019, Tri-State filed its Motion to Stay.

7. On December 23, 2019, Mountain View Electric Association (MVEA) filed its Notice of Intervention or Motion to Intervene.

[1] Decision No. C19-1001-I, paragraph 12.

8. On December 30, 2019, Tri-State filed its Unopposed Motion for Extraordinary Protection of Highly Confidential Information.

9. On January 6, 2020, the Big Horn Rural Electric Company; Carbon Power & Light, Inc.; Garland Light & Power Co.; High West Energy, Inc.; High Plains Power, Inc.; Niobrara Electric Association, Inc.; Wheatland Rural Electric Association; and Wyrulec Company, Inc. (collectively, the Wyoming Members) filed their Motion to Intervene.

10. On January 10, 2020, La Plata and United Power filed their Direct Testimony.

11. On January 16, 2020, Wheat Belt Public Power District, Midwest Electric Cooperative Cooperation, Roosevelt Public Power District, Chimney Rock Public Power District and Panhandle Rural Electric Membership Association (collectively, the Nebraska Members) filed their Motion to Intervene.

12. On January 21, 2020, the Southeast Colorado Power Association; K.C. Electric Association; Y-W Electric Association, Inc.; Morgan County Rural Electric Association; and Highline Electric Association (collectively, the Colorado Members) filed their Motion to Intervene.

13. On January 30, 2020, by Decision No. R20-0073-I, the interventions of PVREA, MVEA, the Wyoming Members, the Nebraska Members, and the Colorado Members were denied.

14. On February 10, 2020, Central New Mexico Electric Cooperative, Inc.; Columbus Electric Cooperative, Inc.; Continental Divide Electric Cooperative, Inc.; Jemez Mountain Electric Cooperative, Inc.; Mora-San Miguel Electric Cooperative, Inc.; Northern Rio Arriba Electric Cooperative, Inc.; Otero County Electric Cooperative, Inc.; Sierra Electric Cooperative, Inc.;

Socorro Electric Cooperative, Inc.; and Southwestern Electric Cooperative, Inc. (collectively, the New Mexico Cooperatives) filed their Motion to Intervene.

15. On February 12, 2020, by Decision No. R20-0097-I, Hearing Commissioner Koncilja found that the Commission had jurisdiction over the Complaints. The Hearing Commissioner was "unpersuaded" that the MIECO Inc.[2] transaction was proper under Colorado Law and put the Parties on notice that they were expected to answer questions about this transaction at the evidentiary hearing. The Hearing Commissioner also found the Complaints ripe and denied the Motion to Stay.

16. On February 12, 2020, Tri-State filed its Answer Testimony.

17. On February 26, 2020, Tri-State filed its Answer to the Complaints of La Plata and United Power.

18. On March 6, 2020, the Parties filed their Stipulation Regarding Procedural Schedule (Stipulation). In the Stipulation, the Parties proposed to supplement the procedural schedule and provide additional testimony concerning the questions raised in Decision No. R20-0097-I.

19. On March 10, 2020, La Plata and United Power filed their Rebuttal Testimony.

20. On March 10, 2020, by Decision No. R20-0157-I, the Stipulation was approved.

21. On March 11, 2020, Tri-State filed its Supplemental Testimony.

22. On March 11, 2020, the State of Wyoming filed its Motion to Intervene.

[2] The addition of MEICO Inc. as a member/owner of Tri-State was the basis of Tri-Sate's argument that the Commission was without jurisdiction in this matter.

23. Commissioner Koncilja's term expired in January 2020. She was asked and agreed to continue to serve until a new commissioner was appointed and confirmed in her stead. A new Commissioner was sworn in on March 13, 2020.

24. On March 13, 2020, by Decision No. R20-0175-I, the evidentiary hearing in this proceeding, scheduled for March 23rd through March 27th, 2020, was suspended and the proceeding returned to the Commission *en banc.*

25. On March 16, 2020, the Complainants jointly filed their Supplemental Testimony.

26. On March 25, 2020, by Decision No. C20-0201-I, the Commission referred the matter to an Administrative Law Judge (ALJ).

27. On April 3, 2020, by Decision No. R20-0218-I, a status conference was scheduled for April 14, 2020, and the intervention of the State of Wyoming was denied.

28. At the status conference on April 14, 2020, the Parties agreed to a procedural schedule that called for the evidentiary hearing to commence on May 18, 2020.

29. On April 16, 2020, Tri-State filed its Motion *in Limine* to Exclude the Rebuttal Testimony of Herrick K. Lidstone, Jr. and Jason R. Wiener and to Shorten Response Time (Motion *in Limine*). Tri-State also filed its Motion to Supplement Answer Testimony and Shorten Response Time (Motion to Supplement).

30. On April 20, 2020, Complainants filed their Motion to the Commission *En Banc* Requesting Initial Commission Decision.

31. On April 27, 2020, Complainants filed their Joint Response in Opposition to Respondent's Motion *in Limine*.

32. On April 27, 2020, Complainants filed their Joint Motion for Partial Summary Judgement or Determination of a Question of Law and their Highly Confidential Joint Rule 1101(f) Notice and Request to Declare Initial DMEA Exit Charge Public (Request to Declare Initial DMEA Exit Charge Public).

33. On May 4, 2020, by Decision Nos. R20-0330-I and R20-0332-I, the Motion *in Limine* and Motion to Supplement, respectively, were denied.

34. On May 8, 2020, Tri-State filed its Response to Complainants' Request to Declare Initial DMEA Exit Charge Public.

35. On the same date, by Decision No. R20-0357-I, the Request to Declare Initial DMEA Exit Charge Public was granted.

36. On May 11, 2020, Tri-State filed its Response to Complainant's Joint Motion for Partial Summary Judgement or Determination of a Question of Law.

37. On May 15, 2020, by Decision No. R20-0371-I, the Complainant's Joint Motion for Partial Summary Judgement was granted.

38. On May 18, 2020, the evidentiary hearing in the above-captioned proceeding was called via video conferencing at 9:00 a.m.[3]

[3] The hearing was held via video conferencing due to the Covid-19 pandemic. Due to the pandemic, everyone associated with this proceeding had to adjust the normal way of doing things, and sometimes that can cause problems. This time it did not. The undersigned ALJ would like to personally thank everyone involved in this hearing. To all of the attorneys, witnesses and as always, the court reporters, thank you. All Parties worked before and during the hearing to make sure the hearing was conducted without a problem. I personally appreciate and thank those who were active in the hearing and those behind the scenes who probably did most of the work.

Finally, this was the first hearing the Commission has conducted via video conferencing. There were many questions and changes about how we would, or even could, hold the hearing between the setting of the hearing to the holding of the hearing one month later. Sometimes I had doubts we would be ready or could even do it. There is no question in

39. As a preliminary matter, Hearing Exhibits 100-102, 300-365, 368-378, 382-399 400- 410 and 412-414 and 600-603 were admitted by stipulation of the Parties.

40. La Plata offered the testimony of Jessica Matlock and Susan Tierney. United Power offered the testimony of Dean Hubbuck and Sandra Ringelstetter-Ennis (Ringelstetter). Tri-State offered the testimony of Rick Gordon, Bradford Nebergall, Joel Badlow, Bradford Cornell, Charles Cicchetti and Patrick Bridges. Hearing Exhibits 500-512 were offered and admitted. Hearing Exhibits 366, 367, 411, and 411C were offered, but not admitted. Administrative Notice was taken of Colorado House Bill 20-1225. At the conclusion of the evidence, the record was closed. The matter was then taken under advisement.

41. Pursuant to § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record of the hearing and a written recommended decision in this matter.

II. FINDINGS OF FACT

42. LPEA was founded in 1939 by a group of citizens and organized under the Federal Rural Electrification Administration Act. LPEA started providing power to rural Coloradan member-owners in February 1941.[4]

43. As of 2018, LPEA serves over 46,000 meters in a 3,370 square-mile service area.[5]

my mind it would not have happened without the tireless and unending work of Christie Nicks. Everyone involved in this proceeding owes her a debt of gratitude, although none greater than me. Thank you very much.

[4] Hearing Exhibit 100, p. 8.

[5] *Id*.

44. LPEA was a member of the Colorado-Ute Electric Association (Colorado-Ute) until the early 1990's when the Colorado-Ute filed for bankruptcy. After leaving the Colorado Ute, LPEA joined Tri-State.[6]

45. LPEA purchases power from Tri-State under a contract called a Wholesale Electric Service Contract (WESC). The WESC requires that La Plata purchase 95 percent[7] of its power from Tri-State.[8] The WESC runs until 2050.

46. Jessica Matlock is the Chief Executive Officer for La Plata.[9]

47. United Power is a nonprofit rural electric distribution cooperative currently serving more than 93,000 meters in Adams, Weld, Jefferson, Boulder, Gilpin and Broomfield counties in Colorado.[10]

48. United Power is an original founding member of Tri-State and has been a member-owner since 1952. United Power buys wholesale power and transmission services from Tri-State.[11]

49. United Power has a WESC to purchase power and services from Tri-State through 2050. United Power's WESC is also an all-requirements contract.

50. John Parker is the Chief Executive Officer for United Power.[12] Dean Hubbuck is the Chief Energy Resource Officer for United Power.[13]

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[6] *Id*. at p. 8-9.
[7] This is also known as an all-requirements contract.
[8] *Id*. at p. 11.
[9] *Id*. at p. 6.
[10] Hearing Exhibit 301, p. 10.
[11] *Id*.
[12] Hearing Exhibit 301, p. 7.
[13] Hearing Exhibit 306, p. 5.

51. Sandra Ringelstetter Ennis is a Managing Director in the Energy, Environment, Communications, and Infrastructure Practice of NERA Economic Consulting (NERA), as well as NERA's Chief Operating Officer. Ms. Ringelstetter has worked in the electricity industry for over thirty years as an engineer in the resource planning department of an electric and gas utility, and then as a consultant in the areas of power market assessment, power market price forecasting, power plant valuation, financing support, due diligence and transaction support, emissions analyses for New Source Review compliance, and methodologies and algorithms for the simulation of electric systems.[14]

52. Tri-State is a generation and transmission cooperative corporation operated on a not-for-profit basis. It is owned by 42 not-for-profit rural distribution cooperatives and public power districts in Colorado, Nebraska, New Mexico, and Wyoming (Utility Members), as well as three Non-Utility Members. Tri-State began with 24 Utility Members when it was established and later grew to have 44 Utility Members prior to the withdrawal of Kit Carson Electric Cooperative (Kit Carson) in 2016, and the withdrawal of Delta Montrose Electric Association (DMEA), effective May 1, 2020. Tri-State facilitates the generation and transmission of electricity across a four-state, 200,000-square-mile area. Tri-State's Utility Members serve customers in 56 Colorado counties, 20 Nebraska counties, 28 New Mexico counties, and 14 counties in Wyoming.[15]

53. Tri-State's business is carried out for the mutual benefit of all of its Members. Tri-State is a wholesale electric supplier – *i.e.,* an aggregator of the Members' loads. It is owned by the Members, not shareholders, and Tri-State does not seek to generate a profit for outside

[14] Hearing Exhibit 302, p. 7.
[15] Hearing Exhibit 400, p. 16.

investors. Unlike an investor-owned utility or a distribution cooperative, Tri-State has no retail customers or exclusive service territory. Rather, Tri-State buys and generates electric power, and transmits, delivers, and sells the power to its Utility Members. The Utility Members, in turn, distribute and resell the electricity they purchase at wholesale from Tri-State to their own retail member-customers and ratepayers.

54. While all Tri-State Members have a vote on issues as set forth in the bylaws, Tri-State's wholesale electric rates, service, and day-to-day business matters are governed by a 43-person, democratically-elected Board of Directors, with one director elected by each Utility Member. Board members live in the rural areas the Utility Members serve. Tri-State's Board is directly accountable to the Members; the Utility Members, in turn, are directly accountable to their own member-consumers and ratepayers.[16]

55. Shoshone River Power left Tri-State in 1985.[17]

56. Five Nebraska Members of Tri-State attempted to withdraw in 2009.[18]

57. Kit Carson withdrew in 2016 and DMEA withdrew effective May 1, 2020.[19]

58. Duane Highley is the Chief Executive Officer for Tri-State.[20] Rick Gordon is Chairman of the Tri-State Board of Directors and MVEA's representative on Tri-State's Board.[21]

[16] *Id*. at 16:15-17:9.
[17] *Id*. at 21.
[18] *Id*.
[19] *Id*. at p.22.
[20] Hearing Exhibit 400, p. 3.
[21] Hearing Exhibit 401, p. 3.

Brad Nebergall is a Senior Vice President, Energy Management, for Tri-State.[22] Joel Badlow is a Senior Vice President, Transmission, for Tri-State.[23] Patrick Bridges is a Senior Vice President and Chief Financial Officer for Tri-State.[24]

59. Bradford Cornell is the Managing Director of the Berkeley Research Group. Mr. Cornell has 40 years of experience in researching, teaching and consulting on valuation and how it relates to accounting information.[25] Charles Cicchetti is also a Managing Director and a Member of the Berkeley Research Group.[26]

60. In May 2017, LPEA presented a whitepaper to a convening of the Tri-State Contract Committee, with a proposal to increase the five-percent self-generation allowance to ten percent and allow those Members not utilizing their self-generation allotment to share it with other Members. The proposals were not accepted.[27]

61. The Tri-State Contract Committee was dissolved in July of 2017 with no changes made to allow Members an additional self-generation allowance.[28]

62. The Tri-State Contracts Committee was reformed in June of 2019.[29]

[22] Hearing Exhibit 402, p. 3.
[23] Hearing Exhibit 403, p. 3.
[24] Hearing Exhibit 406, p. 5.
[25] Hearing Exhibit 404, p. 3.
[26] Hearing Exhibit 405, p. 3.
[27] Hearing Exhibit 100, p. 13.
[28] *Id*.
[29] *Id.* at p. 15.

63. On July 2, 2019, LPEA submitted a letter to Tri-State officially requesting an exit charge.[30]

64. On August 19, 2019, a meeting was held between LPEA's Board and Tri-State CEO Highley to discuss options for calculating an exit fee.[31]

65. After the August 19, 2019 meeting, "other members made requests for exit fee quotes and shopping letters."[32]

66. In a September 2019 board meeting, Tri-State's Board voted to place a temporary moratorium on providing exit fees and "shopping letters"[33] to Tri-State Members until the Tri-State Contracts Committee finished its work on these issues.[34]

67. As of the date of the hearing, LPEA has not been provided an indicative buyout calculation, an exit charge, or a shopping letter from Tri-State.

68. LPEA expert Dr. Susan Tierney is a Senior Advisor at Analysis Group, Inc., an economic, finance and strategy consulting firm. Dr. Tierney has 35 years of experience in policy issues related to public utilities, state and federal ratemaking and regulation, and energy and environmental policy.[35]

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[30] *Id*. at Attachment JM-4

[31] Hearing Exhibit 100, p. 18; Hearing Exhibit 400, p. 42.

[32] Hearing Exhibit 400, p. 43.

[33] This letter authorized members to investigate the cost of obtaining an alternative supply of power if it withdrew from Tri-State. *See* Hearing Exhibit 100, Attachment JM-5

[34] *Id*.

[35] Hearing Exhibit 102, pp. 5-6.

69. In May of 2018, the United Power Board of Directors decided to seek a partial-requirements contract[36] with Tri-State.[37]

70. In August of 2018, United Power asked for an "indicative buyout calculation."[38]

71. On August 16, 2018, Michael McInnis of Tri-State sent United Power CEO Parker an email with an indicative buyout number of $1,254,572,000. This number was calculated using the Shoshone Method. In the email, Mr. McInnis described the Shoshone method as follows: "an estimate is made of the present value of a revenue a departing member would have paid to Tri-State through the remaining term of its contract."[39]

72. Tri-State provided United Power with a shopping letter in August of 2019.[40]

73. Tri-State does not consider the indicative number calculated using the Shoshone method to be a buyout amount, nor does it consider the indicative number to be a fair and reasonable exit charge. Rather, it considers the indicative buyout calculation to be a starting point for negotiations.[41]

74. As of the date of the hearing, Tri-State has not provided United Power with an exit charge.

75. Kit Carson made a formal request for a buyout number in December 2014.[42]

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[36] A partial-requirements contract would allow United Power to purchase less than 95 percent of its energy from Tri-State.
[37] Hearing Exhibit 301, p. 13.
[38] *Id*. at p. 20.
[39] *Id*. at Attachment JDP-10.
[40] Hearing Transcript Vol. II, p. 70:4-21.
[41] *Id.*
[42] Hearing Exhibit 395, p. 12.

76. Kit Carson was provided an indicative buyout number of $119,000,000.[43]

77. Kit Carson agreed to pay an exit charge of $37,000,000.[44]

78. In October of 2015, the Tri-State Board of Directors approved the buyout number for Kit Carson.[45]

79. Tri-State considers the exit charge paid by Kit Carson to be fair, just and reasonable and non-discriminatory.[46]

80. DMEA was provided an indicative buyout number of $322,000,000.[47]

81. DMEA agreed to pay an exit charge of $62,500,000.[48]

82. Tri-State considers the exit charge paid by DMEA to be fair, just and reasonable and non-discriminatory.[49]

83. Tri-State does not propose a methodology to calculate an actual exit charge for La Plata or United Power.[50]

III. ISSUES

84. Is Tri-State's refusal to provide an exit charge to La Plata and United Power unjust and unreasonable?

[43] Hearing Transcript Vol. II, p. 70:20.
[44] Hearing Exhibit 305, p. 35.
[45] Hearing Exhibit 395, p. 12.
[46] Hearing Transcript Vol II, p. 178:9-18.
[47] *Id*. at p. 249:5.
[48] Hearing Exhibit 305, p. 35.
[49] Hearing Transcript Vol II, p. 178:24-179:3.
[50] Hearing Exhibit 400, p. 61:7-10.

85. Is Tri-State's refusal to provide an exit charge to La Plata and United Power discriminatory?

86. What is the proper methodology to calculate a just, reasonable, and non-discriminatory exit charge for La Plata and United Power?

IV. APPLICABLE LAW

87. As the proponent of a Commission order, Complainants bear the burden of persuasion in this proceeding pursuant to Rule 1500 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

88. Except as otherwise provided by statute, the Administrative Procedure Act imposes the burden of proof in administrative adjudicatory proceedings upon "the proponent of an order." § 24-4-105(7), C.R.S. As provided in Commission Rule 1500, 4 CCR 723-1, "[t]he proponent of the order is that party commencing a proceeding." Here, the Complainants are the proponents as they commenced the proceeding through the filing of their respective Complaints.

89. Complainants bear the burden of proof by a preponderance of the evidence. *See*, § 13-25-127(1), C.R.S.; 4 CCR 723-1-1500. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App.1985). While the quantum of evidence that constitutes a preponderance cannot be reduced to a simple formula, a party has met this burden of proof when the evidence, on the whole and however slightly, tips in favor of that party.

90. The preponderance of the evidence standard is understood and applied most easily in cases in which: (a) there are disputed facts; and (b) the resolution of the dispositive issue, or of an important issue, depends on the facts as determined by the decision-maker.

91. On the other hand, the preponderance standard is less easily understood and applied in the context of a rate case because: (a) many of the thorniest and most controversial issues require policy-based decisions; (b) parties present facts to persuade the decision-maker to adopt or change a particular policy or approach (*i.e.,* regulatory principle) and generally speaking, do not dispute facts *per se*; and (c) the Commission "may set rates based on the evidence as a whole" and "need not base its decision on specific empirical support in the form of a study or data." *Colorado Office of Consumer Counsel v. Colo. PUC*, 275 P.3d 656, 660 (Colo. 2012). For these reasons, the ALJ principally applied the reasonable basis standard when resolving issues in this proceeding.

92. The Colorado Constitution vests the Commission with the power to regulate the facilities, service, rates, and charges of every public utility operating within Colorado.[51] Through the Public Utilities Law, the General Assembly has also authorized the Commission "to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses" and "to do all things, whether specifically designated in Articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power."[52]

[51] *See* Colo. Const. art. XXV

[52] *See* § 40-3-102, C.R.S.

93. That power includes hearing complaints alleging that a public utility has established or fixed an unlawful rule, regulation, or charge.[53] The Commission can also hear complaints alleging that a utility has established preferential or discriminatory rates or charges.[54]

94. The Commission can hear claims arising from an omission under § 40-6-108, C.R.S., which allows the Commission to hear complaints concerning "any act or thing done or omitted to be done" that is ". . . in violation, or claimed to be in violation, of any provision of law or of any order or rule of the [C]ommission." And, the Commission can hear these particular claims because it is the Commission's "duty . . . to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; [and to] prevent unjust discriminations and extortions in the rates, charges and tariffs of such public utilities of this state" under § 40-3-102, C.R.S.

95. The issue in this proceeding is a matter of public interest. The Commission has an independent duty to determine matters that are within the public interest. *Caldwell v. Public Utilities Commission*, 692 P.2d 1085, 1089 (Colo. 1984). As a result, the Commission is not bound by the Parties' proposals. The Commission may do what the Commission deems necessary to assure that the final result is just, reasonable, and in the public interest *provided* the record supports the result *and provided* the reasons for the choices made (*e.g.*, policy decisions) are stated.

[53] *See* § 40-6-108(1)(a), C.R.S.

[54] *See* § 40-6-111(4)(a), C.R.S.; *see also* Proceeding No. 18F-0866E, Decision No. C19-0297-I (April 1, 2019), at ¶¶ 16-23 (explaining that Colorado law empowers the Commission to hear, among other things, a member cooperative's complaint alleging that Tri-State's membership-exit fee "is discriminatory, unjust, or unreasonable.").

96. In reaching his decision in this matter, the ALJ is mindful of these principles and of the Commission's duty. The ALJ has considered all arguments presented, including those arguments not specifically addressed in this Decision. Likewise, the ALJ has considered all evidence presented at the hearing, even if the evidence is not specifically addressed in this Decision.

IV. ARGUMENTS OF THE PARTIES

A. Arguments of La Plata

1. Public Utilities Law Governs this Proceeding

97. La Plata argues that from the onset of this proceeding, Tri-State has attempted to characterize this proceeding as a "contract case." La Plata contends that this case is not a contract case but rather, firmly falls under the Commission's jurisdiction to establish a just, reasonable, and non-discriminatory exit charge for LPEA.

98. La Plata points to the Commission's holding in Proceeding No. 18F-0866E in which the Commission, in a nearly identical complaint proceeding involving DMEA and Tri-State, held that DMEA's complaint did not assert a breach of contract claim but rather, was governed by Public Utilities Law.[55]

99. La Plata further asserts that the Hearing Commissioner's findings in Decision No. R20-0097-I in this proceeding, and later the General Assembly's passage of House Bill 20-1225, which was signed into law March 27, 2020, support the finding that this matter is to establish an exit charge and is not a breach of contract action.

[55] La Plata's Statement of Position, p. 6 (*citing* Proceeding No. 18F-0866E, Decision No. C19-0297-I, at 4-5, ¶¶ 11-13 (mailed Apr. 1, 2019)).

2. La Plata's Exit Charge Methodology

100. La Plata states that Dr. Tierney developed her methodology without input from La Plata and consistent with traditional ratemaking principles.

101. Dr. Tierney's methodology uses the ratemaking principles of (1) fairness; (2) cost-incurrence (rates based on cost); and (3) transparency. Dr. Tierney defines each of these principles the following way:

a) Fair – the methodology must not discriminate between departing and remaining members, and must not create incentives to either stay with or exit Tri-State. A fair, non-discriminatory exit charge harms neither remaining members nor the departing member, nor is it punitive in a manner which prevents members from being able to leave at all.

b) Cost-based- the methodology must be based, to the extent possible, on actual and unavoidable costs already incurred by Tri-State in anticipation of providing service to the departing member. A methodology should rely as little as possible on uncertain, subjective, and potentially-avoidable long-term cost projections—and should instead focus on the departing member's share of the financial benefits and burdens associated with Tri-State ownership, including any stranded assets or liabilities which would fall to the remaining members.

c) Transparency – the methodology must be straightforward, verifiable, and based on publicly-available information, to the extent possible. This serves to reduce the administrative inefficiency, transaction costs, and information asymmetry that have disadvantaged Tri-State members seeking to properly weigh the costs and benefits of their continued membership.[56]

102. Dr. Tierney's methodology uses publicly available information and a foundation of total assets (A), liabilities (L), and equity (E). The formula is as follows:

Exit Charge = A – L – E, where:

A = La Plata's % Share of Tri-State's Assets,

L = La Plata's % Share of Tri-State's Liabilities & Economic Commitments, and

E = La Plata's equity interest in Tri-State (*i.e.,* La Plata's patronage capital), which

[56] La Plata's Statement of Position, pp. 9-11.

La Plata would surrender (*i.e.,* effectively pay over to Tri-State) upon withdrawal.[57]

103. In Hearing Exhibit 501 and Table SFT-1 contained in Hearing Exhibit 101, the inclusions and exclusions for the Assets, Liabilities and Equity are listed.

104. Using Dr. Tierney's methodology, the exit charge for La Plata is $96.990 million.

3. La Plata's Assessment of United Power's Proposal

105. La Plata states that United Power's methodology is a reasonable alternative but lacks the benefit of being simpler to use and that Dr. Tierney's methodology more fully captures the ownership side of the cooperative business model.[58]

106. La Plata argues that United Power's methodology as proposed by Ms. Ringelstetter utilizes a more complicated allocation approach with her weighted vintage of debt calculation.[59] La Plata also believes that Ms. Ringelstetter's methodology fails to incorporate the asset side of the balance sheet in her calculation of the exit charge.

107. La Plata also argues that if the Commission deems that Ms. Ringelstetter's methodology is preferable to Dr. Tierney's methodology, the Commission should strongly consider removing the power purchase agreement (PPA) component of Ms. Ringelstetter's methodology consistent with her recommendation in her Rebuttal Testimony.

[57] Hearing Exhibit 101, p. 34:13-20.
[58] La Plata's Statement of Position, p. 16.
[59] *Id*. at p. 17.

4. A Hybrid Approach

108. Finally, La Plata presents a hybrid approach, noting that the Commission has often, in ratemaking proceedings, adopted such an approach.

109. La Plata specifically suggests using United Power's exit charge methodology, but with Dr. Tierney's 2019-share-of-member-sales approach to setting the allocator, replacing the vintage-share-of-debt approach used by Ms. Ringelstetter.

110. La Plata states using this approach would result in an exit charge of $175.915 million, consisting of the surrender of $74.446 million in undiscounted patronage capital and $101.469 million in cash.

B. Arguments of United Power

1. Public Utilities Law Governs this Proceeding

111. United Power, like La Plata, argues that this matter falls under Public Utilities Law.

112. United Power also points to the Commission's holding in Proceeding No. 18F-0866E in which the Commission, in a nearly identical complaint proceeding involving DMEA and Tri-State, held that DMEA's complaint did not assert a breach of contract claim but rather, was governed by Public Utilities Law.[60]

113. United Power argues that the Commission is vested with the ability to determine whether rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity . . . are unjust, unreasonable, discriminatory, or preferential.

[60] United Power's Statement of Position, p. 6.

114. United Power further asserts that the purpose of this proceeding is to establish a charge as defined by statute and that the Commission has the authority and duty to set an exit charge for United Power that is just, reasonable, and non-discriminatory.[61]

2. United Power's Proposed Methodology is Consistent with the WESC, Tri-State's Bylaws, and Note Purchase Agreements

115. United Power argues that its exit charge methodology is based on and consistent with Tri-State's bylaws. Specifically, United Power looks to Article II, Section 4, which permits a Member to transfer or dispose of all or substantially all of its assets, or reorganize or merge, so long as the "member pays and discharges . . . that member's proportionate share . . . of [Tri-State's] long-term obligations (such as promissory notes, purchased electric energy, fuel, plant or equipment leases, and the like)."[62]

116. Based on this provision, Ms. Ringelstetter's methodology assesses two factors: (1) United Power's pro rata share of Tri-State's indebtedness; and (2) United Power's share of the equity in Tri-State.[63]

117. United Power further argues that an exiting Member's pro rata share of indebtedness should be offset by that Member's share of the equity in Tri-State. United Power asserts that Tri-State's bylaws and applicable cooperative law require the return of patronage capital to member-owners.

[61] *Id*. at pp. 7-8.
[62] *Id*. at p. 8.
[63] *Id*.

118. United Power concludes that an exit charge methodology supported by the Parties' pertinent documents and consistent with common sense is just, reasonable, and non-discriminatory.[64]

3. United Power's Methodology is Consistent with Other Exit Charges

119. United Power argues that in order to assess the reasonableness of an exit charge, it is important to compare the methodology to the exit charges paid by Kit Carson and DMEA.

120. United Power points to the testimony of Tri-State Board Chairman, Mr. Gordon, and Tri-State's Chief Financial Officer, Pat Bridges, to support the proposition that the Kit Carson and DMEA exit charges made the non-withdrawing Members "whole" and satisfied the withdrawing Member's contractual obligations to Tri-State.

121. United Power also references Mr. Gordon's and Mr. Highley's testimony that the Kit Carson and DMEA exit charges were "just, reasonable, and non-discriminatory to support its [proposed] methodology" in this proceeding.

122. United Power further argues that Tri-State provided no evidence that the proposed methodology is unjust, unreasonable, or discriminatory.

4. Tri-State's Indicative Exit Charge is Unjust, Unreasonable, and Discriminatory

123. United Power argues that the "indicative" exit charge provided by Tri-State to United Power would result in an unjust, unreasonable, and discriminatory exit charge.

[64] *Id.* at pp. 10, 12.

124. In support of this argument, United Power cites the testimony of its CEO, Mr. Parker, stating that the indicative exit charge number was only a starting point for negotiations, not an actual exit charge that is fair and reasonable.[65]

C. Arguments of Tri-State

1. The Commission Should Not Create an Exit Fee – Due to Prior Cases and the Failure of Complainants to Follow Tri-State's Bylaws the WESC

125. Tri-State argues that WESCs are essential to properly functioning energy markets.

126. Tri-State continues that state and federal courts have stressed that WESCs must be enforced. This argument is based upon *Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc.,* 805 F.2d 351 (10th Cir. 1986), and *Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc.*, 874 F2d 1346 (10th Cir. 1989).

127. In support of its argument that the WESC must be enforced, Tri-State also cites to an instance when five Nebraska Members attempted to withdraw from Tri-State in 2009 and a Montana case from 1971.

128. Tri-State states that it has relied on the promises made by La Plata and United Power in the WESC to finance its Generation and Transmission and that La Plata and United Power have benefited from the WESC.

129. Tri-State argues that the its bylaws include a provision for a Member to withdraw in Article I, Section 4. This portion of the bylaws requires the exiting Member to meet all contractual obligations before it will be permitted to withdraw.

[65] *Id*. at p. 13.

130. Tri-State further argues that the Complainants have done nothing to comply with this provision, unlike Kit Carson and DMEA where the agreed-upon terms of the withdrawal were sufficient to satisfy each Member's contractual obligations.

131. Tri-State claims that the Complainants "declined" to engage in similar discussions.

132. Tri-State argues that for these reasons, the Commission should not allow La Plata and United Power to change the terms of the WESC.

2. The Commission Should Not Create an Exit Fee – For Failure to Demonstrate Tri-State Acted Unjust, Unreasonable, or Discriminatory

133. As an initial argument, Tri-State asserts that there is no explicit provision in Colorado law addressing exit charges and therefore, no requirement that the Commission establish an exit charge in this proceeding. Without an explicit requirement, any exit charge found by the Commission in this proceeding would have no support under Colorado law.[66]

134. Tri-State further argues that if the Commission determines it can set an exit charge, the Commission is still required to find that Complainants have met their burden of demonstrating that the present exit charge, or the lack thereof, is unjust and unreasonable.[67] Tri-State contends that there is no basis in the record for this finding due to the Commission not allowing Tri-State to present its exit charge methodology.

[66] Tri-State's Statement of Position, pp. 20-21.
[67] *Id*. at pp. 21-22.

135. Tri-State continues that the Complainants have failed to meet their burden with respect to discrimination. Specifically, Complainants failed to demonstrate that they are similarly situated to Kit Carson and DMEA.[68]

136. Tri-State further argues that because Kit Carson's and DMEA's cases ended in a settlement agreement without a Commission decision finding that the agreed-upon exit charges were just and reasonable, the Commission cannot retroactively make that finding. Absent this finding, Tri-State argues it is irrelevant that Tri-State itself deemed the settlement agreements, and the respective exit charges included therein, just and reasonable and therefore not valid references to develop an exit charge.

137. Finally, Tri-State argues that if the Commission deems an exit charge is required, Tri-State should be directed to file a proposed exit charge.

3. The Commission Should Treat any Exit Fee as a Breach of Contract

138. Tri-State makes a series of arguments based in contract. Foremost is that an exit charge should make Tri-State Members whole and unharmed. Tri-State asserts that in order to achieve this result, any exit fee must: (1) reflect the costs LPEA and United Power would have borne had they remained Members throughout the full term of their WESCs; and (2) be sufficient to "hold . . . remaining members harmless from increased responsibility for the financial obligations . . . at the time of [LPEA's and United's] withdrawal."[69]

[68] *Id*. at p. 22.
[69] Tri-State's Statement of Position, p. 30.

139. Tri-State also argues that the withdraw of the Complainants may cause Tri-State to suffer a credit down grade and "to offer to prepay up to $182.8 million in debt."[70] These scenarios, according to Tri-State, could lead to bankruptcy.

140. Tri-State takes issue with the proposed methodologies presented by the Complainants. Tri-State argues that they do not follow ratemaking principles.

141. Tri-State argues that La Plata's methodology as proposed by Dr. Tierney does not take into account costs for stranded infrastructure, the length of the WESC, or the effect of a departure on other Tri-State Members.[71]

142. Tri-State finds fault with United Power's methodology as provided by Ms. Ringelsetter for its failure to account for the remaining time of the WESC. Tri-State also takes issue with Ms. Ringelsetter's failure to include transmission related debt in her calculation.[72]

V. DISCUSSION

A. The Commission has the Authority and Should Determine an Exit Charge

143. The recurrent theme throughout this proceeding has been the question of whether the Commission has the authority to address the relief requested by the Complainants. The Complainants are adamant not only in their belief that the Commission has the authority to rule on an exit fee but that it is only through Commission action that they will receive an exit charge.

144. Tri-State, on the other hand, has been just as adamant that the Commission does not have this authority. In making this argument, Tri-State has attempted almost every conceivable

[70] *Id*.
[71] *Id.* at pp. 36-37.
[72] *Id*. at p. 38.

device – from requests for stays to filings at the Federal Energy Regulatory Commission (FERC) – to delay or deny this Commission granting of the requested relief. After a hearing, in which Tri-State presented no methodology to calculate an exit fee,[73] the first 34 pages of its 45-page Statement of Position do not even address the methodologies proposed by the Complainants. Rather, Tri-State implores the Commission either to not provide an exit fee, or to allow Tri-State, at this late date, to provide a methodology for calculating an exit charge.[74]

145. The first issue, and part of the primary defense of Tri-State, is whether the Commission has the authority to set an exit fee. Much of Tri-State's defense is that the Commission does not have such authority, or if it does, it should not do so.

146. Because this is a case of first impression, it is important to understand whether the Commission has this authority and if so, whether it should set an exit fee in this matter.

147. Throughout the pre-filed testimony, the hearing itself and its Statement of Position, Tri-State has encouraged the Commission to view the underlying dispute in the context of a breach of contract. Tri-State has framed this proceeding as a contract dispute to request that the Commission not act upon the requested relief and alternatively, to make its Members whole. For the limited purpose of determining whether this proceeding falls under Public Utilities Law or Contract Law, Tri-State's contract claims are addressed below.

148. While this is a case of first impression to reach an evidentiary hearing, it is not the first time that a Member of Tri-State has requested the Commission grant the relief sought here in

[73] Hearing Exhibit 400, p. 61:7-10; Hearing Exhibit 404, p. 14:13-18.
[74] Tri-State's Statement of Position p. 44-45.

a complaint proceeding. Nor is it the first time that Tri-State has claimed the Commission lacks jurisdiction to rule on such relief.

149. At the outset, it must be stated that Tri-State does not dispute it is a Public Utility as defined by Colorado law and did not dispute this fact in any of the previous proceedings discussed below.

150. In Proceeding No. 13F-0145E, a complaint was filed by a number of Tri-State Members[75] against Tri-State concerning rate increases implemented by Tri-State. It was alleged that Tri-State failed to follow Colorado statutes when the rate increases were enacted.

151. Tri-State filed a Motion to Dismiss claiming the Commission was without jurisdiction. The Motion was based upon many theories including prohibition due to the Commerce Clause of the Federal Constitution, and because the Commission had never previously regulated Tri-State's rates.

152. ALJ Gomez had the parties pre-file testimony and held a hearing solely on the jurisdiction question.

153. In Decision No. R13-1119-I, ALJ Gomez held that the Commission had jurisdiction to hear the Complaint proceeding.[76] ALJ Gomez started by detailing the powers and duties of the Commission. He went on to find that the Commission had jurisdiction to determine whether a rate of Tri-State was just and reasonable. Specifically, ALJ Gomez stated:

[75] La Plata Electric was among the Complainants in this case. There were other non-members of Tri-State that also filed the complaint with the Tri-State members.

[76] *See* Decision No. R13-1119-I in Proceeding No. 13F-0145E.

> 54. The language of § 40-6-111(4)(a), C.R.S., precludes cooperative electric associations from establishing, charging, or collecting discriminatory or preferential rates which would not only violate § 40-6-111, C.R.S., but also § 40-3-106(1), C.R.S. Notably, § 40-3-106(1), C.R.S., does not contain a requirement that a rate considered under that section must have been previously filed with the Commission. But most importantly, it is apparent that the legislature provided a clear avenue for members or customers of electric cooperative associations to seek relief for any rate violations pursuant to either of those two statutory provisions.
>
> 55. Further, incorporating §§ 40-6-108(1)(a) and (b), C.R.S. (the Commission's primary complaint procedure statute) into the interpretation of Commission rate jurisdiction with §§ 40-6-111(1) and (4)(a), C.R.S., it becomes apparent that not only are these provisions consistent with each other, but the last sentence of § 40-6-111(4)(a), C.R.S., in effect lessens the requirements of § 40-6-108(1)(b), C.R.S., which requires that a complaint as to the reasonableness of any rates or charges of an electric utility must be signed by not less than 25 customers or prospective customers of the public utility, which in turn, as stated supra, eases the regulatory burden on cooperative electric associations. *Colorado-Ute Electric Association, Inc. at 637*. This interpretation is further augmented by § 40-6-110, C.R.S., which provides that "[a]ny public utility has a right to complain **on any grounds** upon which complaints are allowed to be filed by other parties, and the same procedure shall be adopted and followed as in other cases." (Emphasis added).
>
> 56. Reading those statutes together, along with § 40-3-102, C.R.S., nothing can be ascertained which would diminish any of the Commission's jurisdictional powers under Public Utilities Law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates as applicable to Tri-State. Consequently, it is found that the Public Utilities Law and specifically the statutory provisions cited above (and harmonized) provide the Commission with state jurisdiction over Tri-State's rates.[77]

154. ALJ Gomez distinguished previous proceedings from the filing in Proceeding No. 13F-0145E because those previous proceedings had not been initiated by the filing of a complaint. He then made the decision immediately appealable to the Commission *en banc.*

[77] Decision No. R13-1119-I in Proceeding No. 13F-0145E (citation omitted).

155. Tri-State filed an appeal before the Commission. In Decision No. C14-0006-I, the Commission narrowed the scope of the proceeding but maintained jurisdiction.[78] Ultimately, the matter settled without a hearing.

156. Put simply, Proceeding No. 13F-0145E established the Commission's jurisdiction and authority under Public Utilities Law to determine the reasonableness or discriminatory nature of a rate prescribed by Tri-State through the filing of a complaint by a Tri-State Member. Although the Commission is not bound by *stare decisis,* the undersigned ALJ believes that the decision made by ALJ Gomez stands on firm legal ground.

157. In Proceeding No. 18F-0866E, DMEA filed a complaint requesting the Commission determine an exit charge from Tri-State. The same relief requested in the instant proceeding. Once again, Tri-State questioned the jurisdiction of the Commission. Tri-State contended the exit fee was outside of the Commission's ratemaking jurisdiction, asserted United States Constitutional claims, and argued that the proceeding was a contract dispute. In Decision No. C19-0297-I, the Commission, *en banc*, rejected each of these arguments.

158. Specifically, the Commission addressed Tri-State's jurisdiction argument as follows:

> 22. Tri-State contends that the fee cannot violate any provision of law over which the PUC has jurisdiction because § 40-3-101(1), C.R.S., excludes the exit fee from the Public Utilities Law entirely. But § 40-3-101(1), C.R.S., does not operate to that effect. Instead, § 40-3-101(1), C.R.S., sets forth general requirements for certain public utility rates and charges. And, because it is not the only section that governs

[78] Included in Decision No. C14-0006-I was a blistering dissent to the limiting of the scope by Commissioner Tarpey, which include this passage: "*The Commission's responsibilities were also made clear in Colorado-Ute Electric Association, Inc. v. Public Utilities Commission, 760 P.2d 627, 639 (Colo. 1988): 'Until the General Assembly changes the law, the Commission possesses not only the power and authority, but also the duty to prescribe the rates of all utilities subject to its jurisdiction.'*"

public utility rates and charges, it provides one of a few standards against which a public utility's actions, rates, or charges can be tested.

23. In this case, § 40-6-111(4)(a), C.R.S., provides that when a public utility files a complaint, the Commission shall determine whether the rate or charge in question is contrary to the standards in that section, in § 40-3-106(1), C.R.S., or in § 40-3-111, C.R.S. The standards in § 40-3-106(1), C.R.S., prohibit public utilities from establishing preferential or discriminatory rates or charges. So, the Commission can determine whether the exit fee is preferential or discriminatory. Section 40-3-111, C.R.S., empowers the Commission to go beyond the general guidelines Tri-State focuses on in § 40-3-101(1), C.R.S., by prohibiting, among other things, unjust or unreasonable charges for, or in connection with, any service, product, or commodity. Under this section, the Commission may consider whether a charge to leave behind Tri-State membership (and the attendant purchase and generation of electric power, along with the transmission, delivery, and sale of that power to electric cooperatives) is just and reasonable. Coupled with the Commission's duty to regulate the rates and charges of every public utility of this state to correct abuses, these statutory provisions enable the Commission to determine whether such a charge is discriminatory, unjust, or unreasonable.

159. The Commission also addressed Tri-State's contract argument:

11. The allegations in the complaint begin by asserting that Tri-State has "set a punitive exit charge that is unjust, unreasonable, and discriminatory in violation of Colorado law." This language mirrors §§ 40-3-101, -102, and -111(1), C.R.S. 2018, which provide that the Commission shall determine a just and reasonable charge if, upon complaint, it finds a charge is unjust, unreasonable, or discriminatory. From the outset, it appears that DMEA relies on the Public Utilities Law rather than Tri-State's bylaws as the foundation of its claims.

12. The first claim for relief alleges that the amount of the exit fee violates the Public Utilities Law because it is not just and reasonable. It references statutory provisions empowering the Commission to hear complaints and asks the Commission, pursuant to that statutory authority, to determine a just and reasonable amount. The second claim for relief alleges that the amount of the exit fee violates the Public Utilities Law because it is discriminatory in light of the exit fee charged to the Kit Carson cooperative. It also references the Commission's statutory authority and asks the Commission to use that authority to determine a just and reasonable exit fee.

13. Neither claim for relief is pleaded as a contract claim. Both claims allege that the exit fee violates the Public Utilities Law. So, we conclude that on its face the complaint asserts statutory claims.

> 14. And the substance of the complaint is not a breach of contract for two reasons. First, while the complaint describes, by way of background, the internal dispute process governed by Tri-State's bylaws, the two claims for relief do not place at issue the bylaws' interpretation or application. Second, the complaint relies on the Public Utilities Law, not obligations contained in Tri-State's bylaws, to assert its two claims. While DMEA and Tri-State have a relationship governed in part by Tri-State's bylaws, the relationship is also governed in part by the Public Utilities Law. Because the complaint seeks to test the exit fee against the requirements of the Public Utilities Law, we conclude that the substance of the complaint seeks to enforce obligations arising from statute, not contract.

160. Ultimately, Proceeding No. 18F-0866E resulted in a settlement. Yet as a harbinger of future Tri-State actions, the Commission in closing Proceeding No. 18F-0866E stated the following:

> 3. At the Commission's July 17, 2019 Weekly Meeting, we voiced our concern that the settlement might not be in the public interest, that its terms could be onerous and would be hidden from the public and the Commission, that the third party in this proceeding—the Colorado Energy Office–had been silent on the settlement, and that throughout this proceeding, Tri-State had employed dilatory tactics that were detrimental to stakeholders and the Commission.
>
> 4. To protect the public interest and the dignity of this tribunal, we ordered the Colorado Energy Office to submit a filing indicating whether its counsel believed the terms of the agreement were in the public interest and we ordered the parties to file a public version and a highly confidential version of the executed settlement agreement.
>
> 5. For the same reasons, and concerned that Tri-State had been working to undermine our jurisdiction as we and the other parties worked to resolve this dispute, we ordered Tri-State to file a summary of all actions taken by Tri-State, its employees and any third party consultants, including attorneys, from the period January 1, 2019, through Friday, July 12, 2019, concerning the steps it has taken to consider and move Tri-State toward regulation by FERC.
>
> 6. Tri-State never filed its summary.[79]

[79] *See* Decision No. C19-0690 in Proceeding No. 18F-0866E.

161. Put simply, the Commission re-affirmed the findings of ALJ Gomez and rejected Tri-State's argument that the proceeding was a contract dispute. The undersigned ALJ again believes that these decisions are on firm legal ground and shall be followed.

162. In the instant proceeding, Tri-State has presented the Commission with a similar argument to those made in the previous two proceedings discussed above. Tri-State, once again, asserts contract theories and argues that the Commission does not have authority to determine an exit charge.

163. La Plata and United Power, however, remind the Commission of the unsuccessful attempts by Tri-State to evade Commission authority to determine an exit charge with these arguments.

164. The undersigned ALJ agrees with the Complainants that the Commission has firmly established that this proceeding falls under Public Utilities Law. It is not necessary to repeat the discussion from Proceeding No. 18F-0866E. The situation concerning United Power is on all fours with the situation of DMEA. This proceeding follows the logic in the DMEA proceeding in holding that United Power's Complaint falls squarely under Public Utilities Law.

165. The situation with La Plata is slightly different.[80] On one hand, DMEA and United Power have alleged that the exit charge proposed by Tri-State is unjust, unreasonable, and discriminatory. La Plata, on the other hand, alleges that Tri-State's failure to provide an exit charge is unjust, unreasonable, and discriminatory.

[80] This difference was not addressed by Tri-State but for a full record it will be addressed by this decision.

166. The authority for the Commission to determine an exit charge in the situation where Tri-State has failed to provide an exit charge was addressed by Hearing Commissioner Koncija in this proceeding in Decision No. R20-0097-I. She found as follows:

> 24. La Plata also asserts two claims. It alleges that Tri-State's failure to provide it with any exit charge at all is: (1) unjust and unreasonable; and (2) discriminatory because other members have received exit charges. While this presents a new variation on the exit charge theme, the Commission can hear claims arising from an omission under § 40-6-108, C.R.S., which allows the Commission to hear complaints concerning "any act or thing done *or omitted to be done*" by Tri-State that is ". . . in violation, or claimed to be in violation, of any provision of law or of any order or rule of the [C]ommission." And, the Commission can hear these particular claims because it is the Commission's "duty . . . to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; [and to] *prevent unjust discriminations and extortions* in the rates, charges and tariffs of such public utilities of this state" (emphasis added) under § 40-3-102, C.R.S.[81]

167. Although a different fact pattern, the authority exists for the Commission to rule on this rate under Public Utilities Law.

168. Tri-State also argues that even if the Commission has the authority to determine an exit charge, it should not exercise that authority because doing so would be contrary to long-standing public policy. Tri-State supports this premise with a series of cases in which cooperatives have attempted to "evade" a WESC.[82]

169. The fatal flaw with Tri-State's argument is that the cases cited fall under contract law and not Public Utilities Law.

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[81] Decision No. R20-0097-I, ¶ 24.

[82] *See* Tri-State's Statement of Position, n.25.

170. In addition, the General Assembly has made it abundantly clear that it does not view this type of dispute as being an "evasion" of a contract. The General Assembly acknowledged the Commission's jurisdiction and views it the duty of the Commission to "adjudicate a complaint concerning just and reasonable 'exit' charges assessed by a wholesale electric cooperative against a retail electric cooperative."[83]

171. The instant Complaints fall under Public Utilities Law; not contract law. The undersigned ALJ finds the Commission has jurisdiction, authority and, most importantly, the duty to determine the proper exit charge or exit charge methodology. To find otherwise would be contrary to public policy.

B. The Acts of Tri-State Were Unjust, Unreasonable, and Discriminatory

172. Tri-State argues that the Commission must make the determination that the actions of Tri-State were unjust, unreasonable, and discriminatory before finding that the Commission has the authority to determine an exit charge.

173. Tri-State first argues that the negotiated exit fees of DMEA and Kit Carson "as would be expected, resulted in departure fees that are different from the present proceeding" and that Tri-State has "consistently treated all Members equally with regard to withdrawal."[84]

174. Tri-State continues that the Commission cannot retroactively determine that the DMEA and Kit Carson exit charges were just and reasonable. Further, the determination by Tri-State and those Members that the exit charges were just and reasonable is irrelevant.

[83] Colorado House Bill 20-1225 (signed March 27, 2020).
[84] Tri-State's Statement of Position, p. 19.

175. Finally, Tri-State argues that the Complainants have not shown that they are similarly situated to Kit Carson and DMEA. Tri-State argues that negotiated settlements have no precedential value for a variety of reasons, including the passage of time, changed market conditions, and other unique factors.[85]

176. While it may not be necessary to find that the actions of Tri-State were unjust, unreasonable, and discriminatory before determining an exit charge, for the sake of argument, the actions of Tri-State will be examined.

177. To find that the actions of Tri-State were discriminatory, it must be found that United Power and La Plata are similarly situated to Kit Carson and DMEA.

178. La Plata and United Power are, without question, similarly situated to Kit Carson and DMEA. La Plata, United Power, DMEA and Kit Carson either were or are member/owners of Tri-State. They all signed WESC contracts. They are all "requirements members" of Tri-State.[86]

179. Next, the actions of Tri-State regarding Kit Carson and DMEA must be examined. Each of these Members of Tri-State requested an exit charge and a shopping letter. Both received an "indicative number" and a shopping letter. Kit Carson received an "indicative number" of $119,000,000. DMEA received an "indicative number" of $322,000,000.

180. Tri-State eventually entered into negotiations with Kit Carson and DMEA, and those parties agreed on an exit charge. The Kit Carson negotiated exit charge was $37,000,000.

[85] *Id*. at pp. 23-24.

[86] Although the addition of Non-Utility Members has not been found to be legal under Colorado law, none of these members are Non-Utility Members.

The DMEA negotiated exit charge was $62,500,000. The negotiations with both Kit Carson and DMEA resulted in an exit charge that, according to Tri-State CEO Highley, made Tri-State whole, met Kit Carson's and DMEA's contractual obligations, and was just and reasonable.[87]

181. Tri-State in its testimony appears to set up a process that has been used in the past for determining an exit charge. A Member requests a charge and a shopping letter. Tri-State provides an indicative number that is only a starting point for an exit charge and the shopping letter. These actions serve as the catalyst to a negotiated agreement that meets the exiting Member's contractual commitments and is just and reasonable to both the departing Member and Tri-State's remaining Members.

182. Compare those experiences to the Complainants in the instant case. In June of 2019, La Plata requested an exit charge and a shopping letter. On August 19, 2019, a meeting was held between LPEA's Board and Tri-State CEO Highley to discuss options for calculating an exit charge. At the end of the meeting, neither an exit charge, nor an indicative number, nor a shopping letter, was provided to La Plata. One month later, Tri-State placed a moratorium on all requests for exit charges and shopping letters. As of the hearing, La Plata has not received an indicative number,[88] an exit charge, or a shopping letter, nor has Tri-State conducted negotiations[89] with La Plata concerning an exit charge.

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[87] Hearing Transcript Vol II, pp. 200:24 –201:24.

[88] In Mr. Bridges Answer testimony, Hearing Exhibit 406, p. 67:1-4, a "make whole" number for La Plata is stated, $614,500,000. There is no evidence that this number was provided to La Plata in any other form than Answer Testimony.

[89] It is noted that generally the negotiations of the Parties toward a settlement are not admissible. In the instant case, no evidence was presented that the Parties had conducted negotiations. The substance of any negotiations would not be admissible. The relevance of the lack of negotiations with United Power and La Plata is only to show the actions of Tri-State toward Kit Carson and DMEA were not the same as Tri-State's actions towards the Complainants in the instant case.

183. In August of 2018, United Power requested an exit charge and a shopping letter. United Power was provided with an indicative number of $1,254,572,000 and a shopping letter.

184. The indicative number is the only exit charge that has been provided to United Power.[90] There is no evidence that the Tri-State and United Power engaged in negotiations after Tri-State presented the indicative number.

185. The Parties see the indicative number in a different light. Tri-State viewed it as an "initial ballpark estimate that provides a rough order of magnitude which is subject to further refinement through discussions with the specific Member."[91] United Power, on the other hand, viewed the number as an outrageous exit charge, that, if they would have agreed to it, would have been acceptable to Tri-State.[92]

186. Here, there is no question that La Plata has not been treated in the same manner as Kit Carson and DMEA. The actions of Tri-State are discriminatory with respect to La Plata. Tri-State has failed to address the exit charge, provide a shopping letter or work toward determining an exit charge for La Plata.

187. Although the actions of Tri-State with respect to United Power are closer to its actions towards Kit Carson and DMEA, Tri-State's actions towards United Power were nonetheless discriminatory. While Tri-State started the process that was used to determine the exit charges of Kit Carson and DMEA, it stopped after the first step. Unlike with Kit Carson and

[90] In the Answer Testimony of Patrick Bridges, Hearing Exhibit 406, p. 67:5-9, a new "make whole" amount, $1,730,000,000, is stated for United Power. There is no evidence that this updated "make whole" or indicative number was provided to United Power in any form other than the Answer Testimony.

[91] Hearing Exhibit 401, p. 32:10-12.

[92] Hearing Transcript Vol II, p. 69:15-24.

DMEA, Tri-State left United Power with the indicative number as its exit charge. That is, United Power was left with an exit charge, which even by the testimony of Tri-State's own witnesses, was not just or reasonable. Kit Carson and DMEA were eventually provided exit charges that Tri-State deemed to meet their contractual obligations and resulted in a just and reasonable exit charge. This was never provided to United Power.

188. Also bolstering this argument was the testimony that United Power may not even be given the opportunity to withdraw from Tri-State. Mr. Highley testified that Tri-State could determine that it would not permit United Power to exit Tri-State.[93] To allow one Member to pay an exit charge and then deny that opportunity to another Member is discriminatory.

189. The Complainants have shown that they are similarly situated to Kit Carson and DMEA and that they were treated in a discriminatory manner.

C. The Exit Charge Should Not Be Viewed as a Breach of Contract

190. Contrary to statements made by Tri-State's counsel during the hearing and in its Statement of Position,[94] Tri-State did not provide an exit charge methodology in this proceeding. The Answer Testimony of Tri-State CEO Highley stated the following:

> Q: IS TRI-STATE PROVIDING AT THIS TIME A BUYOUT NUMBER FOR LPEA OR UNITED, OR A METHODOLOGY BY WHICH SUCH A NUMBER CAN BE CALCULATED?
>
> A: No.[95]

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[93] *See* Hearing Transcript Vol II, pp. 188:22-189:1-24.

[94] "The Commission must explain the authority permitting it to ignore the terms of Tri-State's bylaws and the WESCs and simply create an exit fee, rather than ordering Tri-State to establish a fee for review, **or reviewing the exit fee methodology Tri-State set during the course of these proceedings."** *(emphasis added).* Tri-State's Statement of Position, p. 4.

[95] Hearing Exhibit 400, pp. 61:7-10.

191. And from Tri-State expert Dr. Cornell:

> Q: HAVE YOU BEEN ASKED TO PROPOSE AN EXIT FEE CALCULATION OR METHODOLOGY?
>
> A: No. I understand a committee of the Tri-State Board of Directors is in the process of developing a recommended approach, which the Board will consider. I am only discussing general economic principles that should apply to the analysis and explaining flaws in the approaches offered by Dr. Tierney and Ms. [Ringelstetter].[96]

192. Rather than propose a competing methodology, Tri-State pursued a strategy of attempting to thwart the Commission of its jurisdiction and encouraging the Commission not to exercise its authority and to find fault with Complainants' experts for their failure to view the exit charge as a breach of contract.

193. As discussed above, this is a complaint case that falls under Public Utilities Law. It is not a case that falls under contract law. But the question remains whether the exit charge should be assessed as a breach of contract.

194. Tri-State argues, without proposing a methodology, that the exit charge should include "expectancy damages" and "make whole" other Members of Tri-State.

195. Tri-State, again viewing this proceeding as a breach of contract case, states that when a party breaches a contract, it is required to pay "expectancy damages."[97] But this argument fails based upon the testimony of Tri-State's own witnesses.

196. The indicative charge given to Kit Carson, DMEA and United Power use the Shoshone method to determine the charge or the "make whole" number. Yet, Tri-State is clear that

[96] Hearing Exhibit 404, p. 14:13-18.

[97] Tri-State's Statement of Position, p. 29.

this method is only a starting point to negotiations and gives an unreasonable and unjust exit charge. According to the testimony of Tri-State Board Chairman, Mr. Gordon, any exit charge that is based on the "make whole" number does not result in a just and reasonable exit fee. Specifically, Mr. Gordon testified as follows:

> ALJ GARVEY: Q. So the Shoshone method, which can also be making whole, is not necessarily the fair and reasonable number that I should look at, but I should look at that from a negotiated standpoint as a starting point for Tri-State? That's what I took from that.
>
> MR. GORDON: A. Yes, I think that's fair. I think that's fair.[98]

197. The "make whole" number, when viewed as a breach of contract amount, was only used as a negotiation starting point for Kit Carson and DMEA. The exit charges paid by Kit Carson and DMEA, which Tri-State stated met all their contract obligations and made other Members whole, were not treated as a breach of contract for purposes of calculating those exit charges.

198. These "make whole" numbers also require forecasting generation needs for the next 30 years. At best, these forecasts are a guess. In addition, this "make whole" requirement would cause a departing Member to pay for its generation twice, once to Tri-State and then again from whomever they purchase the generation in the future. On its face, this is unjust and unreasonable.

199. Finally, this would provide no guidance for Tri-State Members in the future. The past few years have seen Members ask for an exit charge; this was met with resistance from Tri-State. Tri-State's solution was to not provide an exit charge methodology but cause the Members

[98] Hearing Transcript Vol. III, p. 51:15-21.

to file a complaint with the Commission. After the complaints were filed, Tri-State attempted to avoid the jurisdiction of this Commission.

200. It is important that Members who wish to seek alternatives can easily assess the pros and cons of maintaining membership. The evidence presented in this proceeding, and the reason this proceeding was filed, makes it clear that Tri-State is not overly concerned with addressing the concerns of its Members. An exit charge methodology requiring 30-year forecasts left in the hands of Tri-State is the worst possible solution if the goal is a just and reasonable exit fee.

201. Also instructive is a recent FERC ruling in a complaint proceeding concerning an exit fee for a utility cooperative. In *Am Wind Energy Ass'n v Southwest Power Pool, Inc.,* 167 FERC ¶ 61,033 (2019), a non-transmission owner in a utility co-op alleged that the exit fee it was charged was unjust, unreasonable, and discriminatory. The exit fee was defined by the co-op as "the sum of the withdrawing member's existing obligations at the time of withdrawal."[99]

202. FERC determined that the exit fee as applied to non-transmission members[100] was unjust and unreasonable and directed the cooperative to eliminate the exit fee for non-transmission owners.[101]

[99] *American Wind Energy Ass'n v. Southwest Power Pool, Inc.*, 167 FERC ¶ 61,033, at ¶ 3, EL19-11-000 (April 18, 2019).

[100] It is noted that FERC made this ruling due to the fact that the owners were non-transmission owners. FERC noted that the loss of a transmission owner would have a greater financial impact. It is noted to support the proposition that exit charges have been found to be unjust and unreasonable when the exit charge requires meeting all financial obligations.

[101] *Id*. at ¶ 2.

203. Here, the exit charge shall not be viewed as a contract breach and thus, will not include the "make whole" number required under the Shoshone and Market to Market methodologies.[102]

D. The Value of Kit Carson and DMEA

204. Tri-State has attempted to downplay the relevance of the exit charges paid by Kit Carson and DMEA. Numerous times in its testimony, Tri-State has urged the Commission to disregard these exit charges as they were "negotiated" as part of a settlement agreement.

205. The fact that the exit charge was negotiated makes no difference to the undersigned ALJ. In ratemaking, it is the common practice to look at similar utilities to determine a proper return on equity (ROE). Typically, a proxy group will be looked at to determine the proper ROE. The undersigned has never questioned or had the validity of a comparable utility in a proxy group questioned due to the fact that the ROE was the result of a settlement agreement.

206. Ratemaking is not an exact science and the evidence as a whole can be used to determine the proper rate.[103] There is no better evidence of what an exit charge from Tri-State is than the agreed-upon exit charge for two former Tri-State Members. The Tri-State Board determined that these charges made it Members whole and were just and reasonable. There is no other evidence that is nearly as helpful in determining a just and reasonable exit charge rate.

207. Tri-State determined that Kit Carson's and DMEA's exit charges were just and reasonable, fulfilled the contractual obligations of the departing Members and did not harm the

[102] Yet another problem with using these calculations is the testimony that the Shoshone and Market to Market methodologies result in "make whole" numbers, but the agreements with Kit Carson and DMEA, which yielded exit charges well below these numbers, also made Tri-State Members whole.

[103] *Colorado Office of Consumer Counsel,* 275 P.3d at 660.

remaining Members of Tri-State. The Complainants ask the Commission to determine an exit charge that meets these standards.

208. In addition, much of Tri-State's case consisted of a warning to the Commission of how providing an exit charge to the Complainants could lead to dire consequences for Tri-State and its remaining Members. Tri State CEO Highley in his testimony specifically encouraged the undersigned ALJ to consider these factors.[104]

209. There was, however, no evidence of what exact harm the exit charges sought will cause Tri-State. Because Tri-State provided no proposed methodology, it did not quantify how various exit charges would have different detrimental effects for Tri-State. There was only speculative testimony that if the Complainants leave Tri-State, there *could* be harm to Tri-State and its Members. But Tri-State did not establish if the mere exit of these Members would cause the purported harmful consequences, nor did Tri-State establish whether the detrimental effects of the departing Members would be cured by the exit charge making remaining Members whole.

210. The best way for the undersigned to determine an exit charge that will cause the least amount of harm to Tri-State is to attempt to reach the same result as the exit charges that Tri-State agreed to with its other Members, DMEA and Kit Carson. It is assumed that Tri-State would not have agreed to an exit charge that caused itself or its Members harm. And as of the date of the hearing in this proceeding, there is no evidence that the feared result of Members leaving without

[104] Hearing Transcript Vol. II, p. 210:12-19.

making the other Members whole[105] has manifested itself after Kit Carson and DMEA left Tri-State.

211. Any exit charge must attempt to protect current Members from unjust or unreasonable harm and also must not encourage Members to leave Tri-State. Just as important though, the exit fee cannot be one that makes it impossible for a Member to leave. As FERC found, an exit fee is unjust and unreasonable when it creates a barrier to entry for future Members due to the inability to pay the exit charge.[106]

212. In addition, as mentioned above, the actions of Tri-State have led multiple Members to seek an exit charge. In fact, due to the number of Members that were seeking an exit fee, Tri-State put a moratorium on providing an indicative exit charge and shopping letter. The determination of an exit charge methodology is a larger issue than one affecting just the Complainants in this proceeding. The exit charge must provide guidance to all current Tri-State Members and any future Members.

E. Methodology

213. During the hearing, two proposed methodologies were presented for calculating an exit charge. La Plata provided a methodology and a resultant exit charge, and United Power presented a methodology and a resultant exit charge. Tri-State, however, failed to propose a methodology for the Commission to consider.

[105] Making whole in this context is defined as paying expectancy damages. There is no question that according to Tri-State, Kit Carson and DMEA made the other Members whole without paying expectancy damages.
[106] *American Wind*, 167 FERC ¶ 61,033, at ¶ 54.

214. Because the determination of an exit charge methodology, and the resulting exit charges for United Power and La Plata, is one of first impression for the Commission, there are no previous proceedings to serve as guidance. Both proposals will be examined and then set against basic ratemaking principles of the Commission to determine the proper methodology.

1. La Plata's Methodology

215. La Plata's methodology as proposed by Dr. Tierney adopts three ratemaking principles: (1) fairness; (2) cost-incurrence (rates based on cost); and (3) transparency.

216. Dr. Tierney defines "fair" as an exit charge that harms neither remaining Members nor the departing Member, nor is it punitive in a manner which prevents Members from being able to leave at all.[107]

217. She defines "cost based" as basing the exit charge on actual and unavoidable costs already incurred by Tri-State in anticipation of providing service to the departing Member. It should also rely as little as possible on uncertain, subjective, and potentially-avoidable long-term cost projections – and should instead focus on the departing Member's share of the financial benefits and burdens associated with Tri-State ownership, including any stranded assets or liabilities which would fall to the remaining Members.[108]

218. Dr. Tierney defines transparent as straightforward, verifiable, and based on publicly available information, to the extent possible.[109]

[107] La Plata's Statement of Position, p. 10.
[108] *Id.*
[109] *Id.*

219. Her exit charge methodology uses the following formula: (A) – (L) – (E), where (A) represents assets, (L) represents liabilities and (E) represents equity. Dr. Tierney's formula results in the following calculation of an exit charge:

$ thousands
$236,509 (A) -$259,053 (L) = -$22,544 -$74,446 (E -patronage capital) =

$96,990 Exit Charge[110]

2. United Power's Methodology

220. United Power's methodology as proposed by Ms. Ringelstetter is simply a Member's pro rata share of Tri-State's indebtedness (based on Tri-State's SEC filings) minus the Member's patronage capital.[111]

221. United Power states that this methodology is transparent, easily implemented, replicable, and fair to Tri-State's remaining Members because it discharges them from any indebtedness already undertaken to serve United Power.[112]

222. Under Ms. Ringelstetter's methodology, the exit charge for United Power would be calculated as follows if using a power purchase agreements (PPA) obligation:

$ thousands
$354,678 (debt) -$119,903 (Patronage Capital) =
$234,775 Exit Charge[113]

[110] Hearing Exhibit 501.
[111] United Power's Statement of Position, p. 9.
[112] United Power's Statement of Position, p. 10.
[113] Hearing Exhibit 503. Ms. Ringelstetter also provides an exit charge of $156,250,000 without PPAs.

3. Discussion

223. The undersigned finds that both methodologies are transparent, easy to replicate and give guidance for Tri-State Members to determine their own exit charge. All three of these qualities are important for future use and to ensure that all Members are treated in a non-discriminatory manner.

224. Both proposed methodologies provide a clear answer to any future Member considering leaving Tri-State. There is no black box or required numbers that are uncertain or require extensive work to provide a Member with a discernable exit charge amount.

225. But due to the need to extend this methodology to other Tri-State Members, only one of these methods can be approved. One methodology cannot be approved to determine an exit charge for La Plata and a different method for United Power. There must be only one methodology that is applicable for all Tri-State Members.

226. In assessing which methodology to adopt, or whether to deviate from the proposals, it is important to understand and remember that the exit charge must be just and reasonable. In order to achieve a just and reasonable result, the only guideposts available are the exit charges paid by Kit Carson and DMEA.

227. Tri-State officials have testified that the exit charges for Kit Carson and DMEA made the other Members whole, fulfilled their contractual obligations, and were just and reasonable.

228. There has been no testimony by the Complainants that the exit charges assessed to Kit Carson and DMEA were not just and reasonable.

229. In examining the two proposals, the undersigned ALJ finds just and reasonable the methodology that most closely results in an exit charge in line with the exit fees paid by Kit Carson and DMEA. While the exit charges for Kit Carson and DMEA may have been negotiated, it must be remembered that ratemaking is not an exact science and following the example of Kit Carson and DMEA will lead to a just and reasonable exit charge for Members seeking to leave, as well as Members seeking to stay, in Tri-State. The exit charge will also be non-discriminatory, and neither encourage nor discourage Members from leaving Tri-State. All Members will be treated the same.

230. The exit charge should attempt to cause little to no disruption to the remaining Members; but it also should not create a windfall for the remaining Members. Further, it should be just and reasonable in comparison to the exit charges paid by Kit Carson and DMEA.

231. The ALJ agrees with United Power that a common-sense approach to calculating the exit charge requires that it be based upon Tri-State's outstanding debts attributable to the exiting Member. Both the WESC and Tri-State's bylaws reference the need for a Member to pay its pro rata share of indebtedness in the event of transfer by a Member. Taking that total indebtedness and subtracting a Member's patronage capital, as argued by United Power, would leave Tri-State in a position had the Member never joined Tri-State.[114]

232. But most important, this methodology results in exit charges that are comparable to the exit charges paid by Kit Carson and DMEA. Tri-State has stated that these exit charges were just and reasonable, fulfilled the departing Members' contractual obligations, and made the remaining Members whole.

[114] And as testified by Ms. Ringelstetter perhaps even better. *See* Hearing Transcript Vol II, pp. 148:20–149:8.

233. Table 5 of Hearing Exhibit 305 shows that United Power's methodology, when applied to Kit Carson and DMEA, fall very close to the actual exit charges each of these Members paid.[115]

234. In adopting United Power's methodology as proposed by Ms. Ringelstetter, there are two issues that remain; whether to include in the exit charge calculation (1) the PPA contracts and/or (2) transmission issues.

235. Ms. Ringelstetter, in her Direct Testimony, included a placeholder for the PPA contracts in her exit charge calculation for United Power because the information concerning the PPAs had not been provided by Tri-State.[116]

236. It is clear that in this initial analysis, Ms. Ringelstetter believed the PPA contracts should be part of the debt calculation to determine an exit charge. In her Direct Testimony, she specifically stated: "Insofar as Tri-State's PPAs trigger debt-like obligations, it is reasonable to include them as part of Tri-State's overall indebtedness."[117]

237. In her Rebuttal Testimony, Ms. Ringelstetter uses the actual number for the PPA contracts after receiving the information in discovery. But she believes that exclusion of the PPAs may be justified for several reasons.[118]

[115] United Power's methodology results in an exit charge of $47,000,000, compared to the actual charge of $37,000,000, and results in a DMEA exit charge of $70,000,000, compared to the actual charge of $62,500,000.
[116] Hearing Exhibit 305, p. 32:3-9.
[117] Hearing Exhibit 302, p. 20:5-6.
[118] *Id*. at p. 33.

238. In her justification not to include the PPAs, Ms. Ringelstetter does not directly refute her initial statement that the PPAs may trigger debt-like obligations.

239. In addition, in Table 5 of Hearing Exhibit 305, the exit charge with PPAs for United Power is 1.7 times billings, which is more in line with the exit charges of DMEA (1.7 x billings) and Kit Carson (2.2 x billings), than the 1.1 times billings without PPAs. To keep the exit charge methodology in line with Kit Carson and DMEA, and in light of Ms. Ringelstetter's initial analysis and reasoning, the PPAs will be included in the debt calculation to determine the exit charge.

240. The issue of transmission charges was not part of the settlement in DMEA, nor was it part of the methodology proposed by Ms. Ringelstetter, and therefore will not be considered in determining the exit charge.

241. Because United Power's methodology as proposed by Ms. Ringelstetter provides the Members of Tri-State a just, reasonable, and non-discriminatory exit charge, it will be adopted by the Commission.

242. A technical conference shall be scheduled to update any financial numbers and provide an exact exit charge.

VI. CONCLUSIONS

243. Tri-State's refusal to provide an exit charge to La Plata and United Power was unjust and unreasonable.

244. Tri-State's refusal to provide an exit charge to La Plata and United Power was discriminatory.

245. United Power's exit charge methodology as proposed by Ms. Ringelstetter is the proper methodology to calculate an exit fee for Members of Tri-State and will be adopted as an exit charge rate for Tri-State, consistent with the discussion above.

VII. ORDER

A. It Is Ordered That:

1. The refusal by Tri-State Generation and Transmission Association, Inc. (Tri-State) to provide an exit charge to La Electric Association, Inc. (La Plata) was unjust and unreasonable.

2. Tri-State's refusal to provide an exit charge to La Plata was discriminatory.

3. Tri-State's refusal to provide an exit charge to United Power Inc. (United Power) was unjust and unreasonable.

4. Tri-State's refusal to provide an exit charge to United Power was discriminatory.

5. United Power's exit charge methodology as proposed by Ms. Ringelstetter is the proper methodology to calculate an exit fee for Members of Tri-State and is therefore adopted as an exit charge rate for Tri-State, consistent with the discussion above.

6. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

7. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the Parties, who may file exceptions to it.

8. Response time to exceptions shall be shortened to seven days.

9. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

10. If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

11. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

_____

Administrative Law Judge