

Decision No. R24-0357-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0585E

IN THE MATTER OF THE APPLICATION OF TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. FOR APPROVAL OF ITS 2023 ELECTRIC RESOURCE PLAN.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
AVIV SEGEV
DENYING, IN PART, AND GRANTING, IN PART,
MOTION TO COMPEL DISCOVERY RESPONSES,
COMPELLING DISCOVERY RESPONSES, AND DENYING
MOTION FOR LEAVE TO REPLY**

Mailed Date: May 28, 2024

I. STATEMENT

A. Procedural Background

1. On December 1, 2023, Tri-State Generation and Transmission Association, Inc. (“Tri-State”) filed an Application for Approval of its 2023 Electric Resource Plan (Application). The filing of the Application commenced this Proceeding.

2. By Decision No. R24-0080-I, issued February 6, 2024, the undersigned Administrative Law Judge (“ALJ”), among other things, granted La Plata Electric Association, Inc.’s and Mountain Parks Electric, Inc.’s (together, “LPEA/MPE”) Motion to intervene in this Proceeding.

3. On April 29, 2024, La Plata Electric Association, Inc. And Mountain Parks Electric, Inc.’s Motion to Compel Tri-State Generation and Transmission Association, Inc. to

Respond to Discovery Requests Nos. LPEA-MPE 1-5, 1-9, 1-10, 1-11, and 1-12 (Motion to Compel) was filed by LPEA/MPE.

4. On May 13, 2024, the Office of the Utility Consumer Advocate's Response in Support of La Plata Electric Association, Inc. And Mountain Parks Electric, Inc.'s Motion to Compel Responses to Discovery (UCA's Response to the Motion to Compel) was filed by the Office of the Utility Consumer Advocate (UCA).

5. On May 13, 2024, Tri-State Generation and Transmission Association Inc.'s Response in Opposition to La Plata Electric Association and Mountain Parks Electric, Inc.'s Motion to Compel Responses to Discovery (Tri-States' Response to the Motion to Compel) was filed by Tri-State.

6. On May 22, 2024, Tri-State Generation and Transmission Association's Motion for Leave to Reply and Reply in Opposition to the Office of the Utility Consumer Advocate's Response in Support of La Plata Electric Association, Inc. and Mountain Parks Electric, Inc.'s Motion to Compel (Motion to Leave to Reply) was filed by Tri-State.

B. The Discovery Requests at Issue¹

7. The discovery requests at issue in the Motion to Compel are as follows:

LPEA-MPE 1-9(a), (b), (c), and (f) - With respect to the five Scenarios presented in Tri-State's ERP, as discussed in Hearing Exhibit 101, Direct Testimony of Lisa K. Tiffin at 24-25:

¹ The Motion to Compel states that discovery requests at issue are attached in Exhibit A to the Motion to Compel. However, no document entitled as "Exhibit A" has been attached to the Motion to Compel (and none of the attachments that were attached to the Motion to Compel include said discovery requests). Therefore, the discovery requests at issue, as listed below, have been quoted from the body of the Motion to Compel and UCA's Response to the Motion to Compel. *See* Motion to Compel at 6-7, 12, and UCA's Response to the Motion to Compel at 7, 9-10. Tri-State did not contest the accuracy of the discovery requests as the same are set forth in the Motion to Compel and/or UCA's Response to the Motion to Compel.

- a. How will Tri-State allocate the costs shown in the financial analysis for each Scenario among its members?
- b. Please provide a projection of the revenue to be recovered from each Tri-State member, for each year of that an approved ERP will be in effect, if none of the five Scenarios are approved.
- c. Please provide a projection of the revenue to be recovered from each Tri-State member under each Scenario, for each year of that the approved ERP will be in effect.
- ...
- f. Please provide executable workpapers sufficient to show Tri-State's projection of the rate impacts of each Scenario for each Tri-State member through 2030, under Tri-State's currently approved rates.

LPEA-MPE 1-10 –For the five Scenarios presented in Tri-State's ERP:

- a. Please provide a projection of the revenue to be recovered from La Plata through 2030 in each scenario, based on Tri-State's currently approved rates and formulas.
- b. Please provide executable workpapers sufficient to show Tri-State's projection of the revenue to be recovered from La Plata through 2030 in each scenario, under Tri-State's currently approved rates and formulas.

LPEA-MPE 1-11 – For the five Scenarios presented in Tri-State's ERP:

- a. Please provide a projection of the revenue to be recovered from Mountain Parks through 2030 in each scenario, based on Tri-State's currently approved rates and formulas.
- b. Please provide executable workpapers sufficient to show Tri-State's projection of the revenue to be recovered from Mountain Parks through 2030 in each scenario, under Tri-State's currently approved rates and formulas.

LPEA-MPE No. 1-5

Please provide an accounting of all Tri-State debt for which Tri-State is not current on its debt service, including the name of the creditor, the date and amount of the issue, and the amount(s) not current, and the date of last payment.

LPEA-MPE No. 1-12

For each of the five Scenarios presented in Tri-State's ERP:

- a. State the total amount of additional debt necessary to implement the Scenario under the generic portfolio assumptions presented in the ERP Report.

- b. State the total amount of additional debt projected to be incurred to implement the Scenario under the generic portfolio assumptions presented in the ERP Report.
- c. State the amount of additional generation-related debt necessary to implement the Scenario under the generic portfolio assumptions presented in the ERP Report.
- d. State the total amount of additional generation-related debt projected to be incurred to implement the Scenario under the generic portfolio assumptions presented in the ERP Report.
- e. State the amount of additional transmission-related debt necessary to implement the Scenario under the generic portfolio assumptions presented in the ERP Report.
- f. State the total amount of additional transmission-related debt projected to be incurred to implement the Scenario under the generic portfolio assumptions presented in the ERP Report.

C. Motion to Compel

8. With respect to Discovery Request Nos. LPEA-MPE 1-9(a), (b), (c), and (f), LPEA-MPE 1-10, and LPEA-MPE 1-11 LPEA/MPE state that these requests seek relevant information.² LPEA/MPE explain that:

The information at issue in these requests—the allocation of the \$2.6 billion price tag for Tri-State’s preferred ERP portfolio and the projected revenue Tri-State will collect from its members if the plan is approved—would be direct and significant evidence of how the plan will affect Tri-State’s members, which goes to the core of the question whether the Commission should find that Tri-State’s plan is cost-effective and in the public interest. Tri-State’s plan must be ‘cost-effective,’ a term defined to include consideration of the ‘rate impact’ of the resource portfolio and whether the proposed new resources can be acquired ‘at a reasonable cost.’³

9. With respect to Discovery Request Nos. LPEA-MPE 1-5 and 1-12, LPEA/MPE, again, asserts that these requests seek relevant information and states:

The amount of debt required to implement the scenarios in Tri-State’s ERP and the current status of Tri-State’s debt service are relevant to whether Tri-State’s \$2.6 billion budget is reasonable in light of its current financial situation. If the Commission approves Tri-State’s preferred

² Motion to Compel at 7.

³ *Id.*, citing Rules 3605 and 3602(c) of the Rules Regulating Electrical Utilities, 4 Code of Colorado Regulations (“CCR”) 723-3.

portfolio, the utility will take on large amounts of new debt even after the use of the federal New ERA funding (assuming that the USDA grants Tri-State's application). Whether it can do so at a reasonable cost to members and while maintaining its financial health is an important question in this proceeding. The amount of debt Tri-State would take on is directly relevant to the 'reasonable cost' and 'rate impact' considerations under Rule 3605.⁴

D. Responses to the Motion to Compel

10. In UCA's Response to the Motion to Compel, with respect to LPEA-MPE 1-9(a), (b), (c), and (f), UCA argues that this request implicates "costs," which are regulated by the Commission, as opposed to "rates," which are regulated by the Federal Energy Regulatory Commission ("FERC").⁵ UCA further explains that:

All aspects of Tri-State's business operations are intertwined with costs and rates, and Tri-State should not be permitted to conveniently invoke FERC jurisdiction to inhibit the PUC's regulatory authority over electric resource planning.⁶

With respect to LPEA-MPE No. 1-5 and LPEA-MPE No. 1-12, UCA states:

Information regarding Tri-State's debt is indicative of Tri-State's financial health, which has a direct impact on Tri-State's ability to implement the ERP, including its obligations to ensure reliability and resource adequacy. The purpose of the PUC's regulation of ERPs is to establish a process to determine the need for additional electric resources and to develop cost-effective resource portfolios to meet such need reliably.[⁷] The reliability of Tri-State's proposed ERP, including Tri-State's ability to implement the plan, is a key issue in this proceeding and falls squarely within the regulatory authority of the PUC. The PUC has the authority and is required to evaluate a wholesale electric cooperative plan using rules that it has adopted and are applicable to wholesale electric cooperatives.[⁸]⁹

11. In Tri-State's Response to the Motion to Compel, Tri-State, with respect to Discovery Requests LPEA-MPE 1-9(a) – (c), LPEA-MPE 1-10, and LPEA-MPE 1-11, Tri-State

⁴ *Id.* at 12-13.

⁵ UCA's Response to the Motion to Compel at 8.

⁶ *Id.* at 9.

⁷ Citing Rule 3601 of the Rules Regulating Electric utilities 4 CCR 723-3.

⁸ Citing § 40-2-134, C.R.S.

⁹ UCA's Response to the Motion to Compel at 10.

states that “these requests each seek information outside the scope of this proceeding that bears no relevance to the claims or defenses of any party.”¹⁰ Tri-State explains that “these requests asks [sic] Tri-State, in effect, to supply information about how it will pursue future rate filings before FERC and to speculate on FERC’s approval of the same.”¹¹ With respect to LPEA-MPE 1-5 and LPEA-MPE 1-12, Tri-States states that these “debt-related requests go to topics plainly on the federal side of the Federal Power Act’s bright-line jurisdictional rule.”¹² Tri-State explains:

Although Movants attempt to couch their request in terms of issues at stake in the ERP, they ultimately seek Commission review of whether additional debt is ‘prudent’^[13] and explain that their requests are motivated by concerns about Tri-State’s cost of service. These issues are within FERC’s exclusive jurisdiction—FERC is the only regulatory authority empowered to pass on whether Tri-State’s debt is prudent and whether the rate impacts of the debt are reasonable.^[14]¹⁵

E. Motion to Leave to Reply

12. In the Motion for Leave to Reply, Tri-State states that UCA’s argument that “FERC’s exclusive regulatory authority over rates will not affect the Commission’s authority to ‘engage in legitimate resource planning activities within the State of Colorado[,]’”¹⁶ constitutes a “surprise” and therefore a reply to the same should be permitted pursuant to Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-3.¹⁷ Tri-State further states that “the Commission

¹⁰ Tri-State’s Response to the Motion to Compel at 7.

¹¹ *Id.* at 8.

¹² *Id.* at 12.

¹³ *Citing* the Motion to Compel at 13.

¹⁴ *Citing e.g.*, Tri-State Generation & Transmission Ass’n, Inc., 186 FERC ¶ 61183, at ¶ 135 (2024) (“Tri-State avers that its proposed rate structure aims to recover a revenue requirement including service costs and a required net margin, highlighting: (1) **the need to satisfy financial requirements** in lending documents, including a **debt service** ratio and financial benchmarks[.]”) (emphasis added).

¹⁵ Tri-State’s Response to the Motion to Compel at 13.

¹⁶ Motion for Leave to Reply at 3, *citing* UCA’s Response to the Motion to Compel at 5.

¹⁷ Motion for Leave to Reply at 3.

cannot undertake an analysis in which it would ‘assume a rate would be charged other than the rate adopted by’¹⁸ FERC.”¹⁹

F. Applicable Legal Standards

13. Rule 1400(e) of the Rules of Practice and Procedure, 4 CCR 723-1 states:
A movant may not file a reply to a response unless the Commission orders otherwise. Any motion for leave to file a reply must demonstrate:
(I) a material misrepresentation of a fact;
(II) accident or surprise, which ordinary prudence could not have guarded against;
(III) newly discovered facts or issues, material for the moving party which that party could not, with reasonable diligence, have discovered at the time the motion was filed; or
(IV) an incorrect statement or error of law.

14. Rule 1405 of the Rules of Practice and Procedure, 4 CCR 723-1 requires that discovery requests in Commission proceedings must be “reasonably calculated to lead to the discovery of admissible evidence.”²⁰

15. Pursuant to Rule 1500 Rules of Practice and Procedure, 4 CCR 723-1, “[t]he burden of proof... shall be on the party that is the proponent of a decision...”

16. Rule 3605(a)(IV) of the Rules Regulating Electric Utilities, 4 CCR 723-3 states that an electric resource plan filed pursuant to Rule 3605(a) shall include:

(A) The proposed resource acquisition period; however, the resource acquisition period for the initial plan filing submitted in accordance with subparagraph 3605(a)(I) shall extend through 2030. The utility shall consistently use the specified resource acquisition and planning periods throughout the entire electric resource plan and resource acquisition process. The utility shall include a detailed explanation as to why the specific period was chosen in light of the assessment of the needs of the utility system.

¹⁸ *Citing* Transmission Agency of N. California v. Sierra Pac. Power Co., 295 F.3d 918, 929 (9th Cir. 2002).

¹⁹ Tri-State’s Response to the Motion to Compel at 8.

²⁰ Colo. R. Civ. Pro. 26(b)(1) (2012).

(B) An annual electric demand and energy forecast developed pursuant to paragraph 3605(b).

(C) An assessment of existing resources developed pursuant to paragraph 3605(c).

(D) An assessment of transmission resources pursuant to paragraph 3605(d).

(E) An assessment of planning reserve margins and contingency plans for the acquisition of additional resources developed pursuant to paragraph 3605(e).

(F) An assessment of the need for additional resources developed pursuant to paragraph 3605(f).

17. Rule 3605(g)(III)(B) of the Rules Regulating Electric Utilities, 4 CCR 723-2,

states:

The Phase I decision approving or denying the electric resource plan shall address the contents of the utility's plan filed in accordance with paragraph 3605(a). If the record contains sufficient evidence, the Commission shall specifically approve or modify: the utility's assessment of need for additional resources in the resource acquisition period; the utility's plans for acquiring additional resources through an all-source competitive acquisition process or through an alternative acquisition process; and components of the utility's proposed RFP, such as the model contracts and the proposed evaluation criteria.

G. Analysis

18. With respect to Discovery Requests LPEA-MPE 1-9(a), (b), (c), and (f), LPEA-MPE 1-10, and LPEA-MPE 1-11, the ALJ finds and concludes that LPEA/MPE failed to meet the burden of proof to show that these discovery requests, which concern cost allocation to individual members of Tri-State, are calculated to lead to the discovery of admissible evidence in this Phase I ERP Proceeding. Therefore, LPEA/MPE's request to compel responses to Discovery Requests LPEA-MPE 1-9(a), (b), (c), and (f), LPEA-MPE 1-10, and LPEA-MPE 1-11 will be denied, as ordered below.

19. With respect to Discovery Request LPEA-MPE 1-5, the ALJ finds and concludes that this request is overbroad and the granting of which may require Tri-State to disclose

information that falls outside the scope of this Phase I ERP Proceeding, especially in light of the LPEA/MPE's request to compel responses to Discovery Request LPEA-MPE 1-12 (discussed below). Therefore, LPEA/MPE's request to compel responses to discovery request LPEA-MPE 1-5 will be denied as ordered below.

20. With respect to Discovery Request LPEA-MPE 1-12, the ALJ finds and concludes that LPEA/MPE demonstrated that this discovery request is reasonably calculated to lead to the discovery of admissible evidence. As such, LPEA/MPE's request to compel discovery responses to Discovery Requests LPEA-MPE 1-12 will be granted as ordered below.

21. With respect to the Motion for Leave to Reply, the ALJ finds and concludes that Tri-State did not meet its burden of proof to show that UCA's Response to the Motion to Compel falls under any of the circumstances listed in Rule 1400(e)(I)-(IV) of the Rules of Practice and Procedure, 4 CCR 723-3. More specifically, while UCA's arguments addressed in the Motion for Leave to Reply may be new in this Proceeding, they concern Tri-State's own statements in a prior Commission proceeding²¹ about issues that were raised in the Motion to Compel.²² As such, UCA's arguments do not qualify as a "surprise" within the meaning of Rule 1400(e)(II) of the Rules of Practice and Procedure, 4 CCR 723-3. Therefore, the Motion for Leave to Reply will be denied, as ordered below. Because no harm will come to any intervenor as a result of the denial of the Motion for Leave to Reply, response time for the same will be waived, *sua sponte*, pursuant to Rule 1308(c) of the Rules of Practice and Procedure, 4 CCR 723-1.

²¹ See UCA's Response to the Motion to Compel at 9, 11 and Tri-State's Responses to Commission Questions, filed on September 11, 2019, in Proceeding No. 19M-0460E, attached as Attachment 2 to UCA's Response to the Motion to Compel.

²² See *generally*, Motion to Compel at 7-11.

II. ORDER

A. It is Ordered That:

1. Consistent with the discussion above, response time to Tri-State Generation and Transmission Association's Motion for Leave to Reply and Reply in Opposition to the Office of the Utility Consumer Advocate's Response in Support of La Plata Electric Association, Inc. and Mountain Parks Electric, Inc.'s Motion to Compel (Motion for Leave to Reply), filed May 22, 2024 is waived, *sua sponte*.

2. Consistent with the discussion above, the Motion for Leave to Reply is denied.

3. Consistent with the discussion above, La Plata Electric Association, Inc. And Mountain Parks Electric, Inc.'s Motion to Compel Tri-State Generation and Transmission Association, Inc. to Respond to Discovery Requests Nos. LPEA-MPE 1-5, 1-9, 1-10, 1-11, and 1-12, filed April 29, 2024, is denied, in part, and granted, in part.

4. La Plata Electrical Association, Inc.'s and Mountain Parks Electric, Inc.'s (together, LPEA/MPE) requests to compel Tri-State's response to Discovery Requests LPEA-MPE 1-9(a), (b), (c), and (f), LPEA-MPE 1-10, LPEA-MPE 1-11, and LPEA-MPE 1-5, as set forth in section I.B. of this Decision, are denied.

5. Consistent with the discussion above, LPEA/MPE's request to compel Tri-State's response to Discovery Request LPEA-MPE 1-12, as set forth in section I.B. of this Decision, is granted.

6. Tri-State is compelled to produce responses to Discovery Request LPEA-MPE 1-12, as set forth in section I.B. of this Decision, within 10 days of the date of issuance of this Decision.

7. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law Judge

A handwritten signature in cursive script that reads "Rebecca E. White".

Rebecca E. White,
Director