

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

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DELTA-MONTROSE ELECTRIC ASSOCIATION,)	
)	
)	
COMPLAINANT,)	
)	
V.)	PROCEEDING NO. 18F-____E
)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,)	
)	
)	
RESPONDENT.)	

FORMAL COMPLAINT

Pursuant to § 40-6-108(1), C.R.S., and 4 CCR 723-1-1302, Delta-Montrose Electric Association (DMEA), on behalf of itself and the retail customers who are its member-owners, files this Formal Complaint (Complaint) with the Colorado Public Utilities Commission (Commission). In support of its Complaint, DMEA states as follows:

NATURE OF THE PROCEEDING

1. The Complaint relates to the exit charge Tri-State Generation and Transmission Association, Inc. (Tri-State), demands from DMEA before DMEA can withdraw from membership in Tri-State. While Tri-State touts ‘voluntary and open’ membership, it has set a punitive exit charge that is unjust, unreasonable, and discriminatory in violation of Colorado law.

INTRODUCTION

2. DMEA is a western Colorado nonprofit rural electric distribution cooperative serving approximately 28,000 member-owners in Montrose, Delta, and Gunnison counties.

DMEA's service territory encompasses counties that, while rich in natural resources, are among Colorado's economically poorest.

3. Tri-State, a public utility under Colorado law, is a nonprofit generation and transmission cooperative corporation headquartered in Westminster, Colorado. Tri-State is organized under Colorado law and provides generation and transmission services to 43 member cooperatives in Colorado, Wyoming, Nebraska, and New Mexico, including DMEA.¹

4. As a Tri-State member, DMEA purchases services from Tri-State under a Wholesale Electric Service Contract (WESC) that runs through 2040. DMEA passes on the costs of Tri-State's services to its member-owners through retail rates.

5. DMEA, and by extension its member-owners, have wholesale power supply options available to them that are significantly less expensive and environmentally cleaner than Tri-State's power supply. Through its Board of Directors, DMEA has a fiduciary responsibility to consider and pursue these alternative power supply options so as to stabilize and control its member-owners' retail rates.

6. For more than a decade, DMEA has pressed Tri-State to stabilize its electric rates and to let DMEA develop more local, cost-effective renewable resources. Tri-State has been unreceptive to these efforts, limiting DMEA's development of local renewable generation, and the average price paid by Tri-State's member cooperatives has increased by 56 percent since 2005.

7. DMEA and other rural cooperatives have watched as other Colorado utilities—including those serving urban areas—take advantage of declining wholesale costs to move to

¹ Approximately sixty-five percent of Tri-State's member sales are to Colorado members. *See* Tri-State Generation and Transmission Ass'n, Inc., *Powering Potential: 2018 Investor Presentation*, at 5, *available at* <https://www.tristategt.org/sites/ts/files/PDF/2018-SECfilings/InvestorPresentation-070318.pdf>.

cheaper and cleaner power sources.² Meanwhile DMEA member-owners have paid Tri-State's increases through their electric bills, with those increases in turn inhibiting economic development and growth in the rural economy.

8. Tri-State publicly emphasizes that its first “core principle” as a cooperative is “voluntary and open membership,”³ and says member cooperatives can withdraw from Tri-State.

9. In 2016, a New Mexico-based Tri-State member, Kit Carson Electric Cooperative (Kit Carson), withdrew from Tri-State after paying a \$37 million exit charge.⁴ Tri-State publicly endorsed that exit charge as “fair” and sufficient to “protect[] the interests of all [Tri-State's remaining] members.”⁵

10. Like Kit Carson, DMEA seeks to pay an exit charge that will satisfy its obligations related to Tri-State's debts and resources acquired on DMEA's behalf, while at the same time potentially allowing DMEA to migrate to a cleaner generation mix and stabilize its customers' retail rates.

11. Recognizing the critical importance of these goals for its member-owners and lacking confidence in Tri-State's ability to close the gap between its wholesale rates and those of

² For example, Public Service Company of Colorado's recent Colorado Energy Plan successfully brought forward over 2,000 MW of renewable and battery storage resources with projected customer savings of more than \$200 million on a present value basis.

³ See Tri-State Generation and Transmission Ass'n, Inc., Powering Potential: 2018 Investor Presentation, at 4, available at <https://www.tristategt.org/sites/ts/files/PDF/2018-SECfilings/InvestorPresentation-070318.pdf>. Tri-State also touts “democratic member control” as one of its core principles. *Id.* Tri-State is governed by its Board of Directors. Each of Tri-State's 43 member cooperatives elects an individual from its own Board of Directors to serve on the Tri-State Board. These individuals are often referred to as “dual directors” since they serve both on the member Board and the Tri-State Board. Tri-State characterizes this as “democratic” governance, claiming that each member system is represented at Tri-State by its dual director: one system, one vote. The reality, however, is that these dual directors are required to represent Tri-State's interest when sitting on the Tri-State Board, as Tri-State makes clear in regular fiduciary duty presentations to its Board. See, e.g., Attachment A (excerpt from Tri-State fiduciary duty 2013 presentation to Board).

⁴ See J.R. Logan, *Kit Carson CEO Reyes says Tri-State break has two big advantages*, The Taos News (June 30, 2016), available at <https://www.taosnews.com/stories/kit-carson-ceo-reyes-says-tri-state-break-has-two-big-advantages,23584> (also provided as Attachment B).

⁵ Press Release, Tri-State Generation and Transmission Ass'n, Inc., *Tri-State and Kit Carson Electric Cooperative enter into membership withdrawal agreement* (June 27, 2016), available at <https://www.tristategt.org/content/tri-state-and-kit-carson-electric-cooperative-enter-membership-withdrawal-agreement%C2%A0> (also provided as Attachment C).

the broader market, DMEA sought to withdraw from Tri-State and requested an exit charge in November 2016.

12. In response, Tri-State calculated a dramatically high exit charge and has declined to meaningfully vary from that calculation in the intervening years.⁶ Tri-State also refuses to share key information with DMEA or other Tri-State member cooperatives—*i.e.*, the entities who own Tri-State—that would let them adequately understand how Tri-State derived its exit charge inputs. Tri-State similarly refuses to provide meaningful information as to how it calculated the Kit Carson exit charge.

13. Nevertheless, the unreasonableness of Tri-State's exit charge for DMEA is apparent even without this key information. For example, Tri-State's exit charge lacks any discernible connection to DMEA's share of Tri-State's roughly \$3.8 billion in total liabilities, including \$3.089 billion in outstanding long-term debt as of September 2018. Indeed, if DMEA's exit charge were proportioned out to all Tri-State cooperatives, the collective exit charges would exceed Tri-State's liabilities by *billions of dollars*, with Tri-State also retaining all of its operating assets. A multibillion-dollar Tri-State windfall is the hallmark of neither a just nor reasonable exit charge, particularly given Tri-State's status as a nonprofit entity operated to benefit its member cooperatives.

14. Moreover, DMEA's exit charge is vastly disproportionate to Kit Carson's \$37 million charge, notwithstanding several key similarities between them, including (1) Kit Carson's exit occurred only months before Tri-State calculated DMEA's exit charge; (2) Tri-

⁶ Tri-State claims the exit charge calculation for DMEA is confidential despite multiple disclosures by Tri-State. DMEA believes its exit charge calculation is no longer confidential but will treat it as such until the Commission can consider the issue. Accordingly, any attachments to this Complaint that include this exit charge figure have been provided with that figure redacted, pending further discussion of this issue with Tri-State, and consideration of this issue by the Commission, if necessary.

State claimed to apply the same calculation methodology to the respective exit charges; and (3) Kit Carson had the same WESC as DMEA, with the same 2040 term.

15. Like Kit Carson, DMEA seeks a just, reasonable, and nondiscriminatory exit charge from Tri-State. But Tri-State's disparate Kit Carson and DMEA exit charges—even when accounting for differences between the cooperatives—reflect discriminatory, abusive, and unjust and unreasonable treatment against DMEA that Colorado public utilities law exists to remedy. DMEA is willing to pay an exit charge fair to Tri-State's remaining members, but cannot ask its own member-owners to pay an exorbitant exit charge. DMEA has a utility obligation to respond to charges that are unjust, unreasonable, and discriminatory.

16. DMEA participated in a lengthy internal Tri-State dispute and appeal process (called Board Policy 316) without obtaining a just, reasonable, and nondiscriminatory exit charge. During the Board Policy 316 process, Tri-State maintained its high exit charge and refused to give DMEA information that would let it meaningfully evaluate either the DMEA or Kit Carson exit calculations. Tri-State also asserted it can set an exit charge “in its sole discretion,” notwithstanding whether the charge is just or reasonable under Articles 1–7 of Title 40, C.R.S. (Public Utilities Law).

17. Tri-State's “core principle” of “voluntary and open membership,” reflected in the withdrawal provisions of the Tri-State Bylaws,⁷ is hollow if Tri-State can unilaterally set an exit charge that is unjust, unreasonable, and discriminatory. In essence, Tri-State maintains it has the right to deprive rural Coloradans of less expensive and cleaner generation resources, and deny them opportunities for local growth and economic development that come with that lower-cost energy supply.

⁷ Tri-State's Bylaws are provided as Attachment D.

18. Through this Complaint, DMEA requests that this Commission: (a) exercise its jurisdiction over Tri-State as a public utility subject to Colorado’s Public Utilities Law; (b) investigate Tri-State’s exit charge to DMEA and declare it contrary to Colorado law as unjust, unreasonable, and discriminatory; and (c) exercise its statutory authority to establish an exit charge that is just, reasonable, and nondiscriminatory.

JURISDICTION

I. General Jurisdictional Background

19. The Commission has jurisdiction to act on the allegations and claims in this Complaint under Article XXV of the Constitution of the State of Colorado and under the Public Utilities Law.⁸

20. DMEA is a public utility under § 40-1-103(2)(a), C.R.S., and has opted through a vote of its member-owners to exempt itself from Commission regulation under the Public Utilities Law.⁹ Accordingly, DMEA is regulated under § 40-9.5-101, C.R.S., *et seq.* DMEA is governed by an elected Board of Directors and must provide member-owners with electric service inside its certificated service territory.

21. Like DMEA, Tri-State is also a public utility under Colorado law because it is a “cooperative electric association, or nonprofit electric corporation or association” which the law declares “to be affected with a public interest and to be a public utility and to be subject to the

⁸ Article XXV states that “In addition to the powers now vested in the General Assembly of the State of Colorado, all power to regulate the facilities, service and rates and charges” of a public utility “is hereby vested in such agency of the State of Colorado as the General Assembly shall by law designate. Until such time as the General Assembly may otherwise designate, said authority shall be vested in the Public Utilities Commission of the State of Colorado.”

⁹ See §§ 40-9.5-103 and -104, C.R.S. (allowing distribution cooperatives like DMEA to elect exemption from the Public Utilities Law).

jurisdiction, control, and regulation of the commission and to the provisions of articles 1 to 7 of [Title 40].”¹⁰

22. Unlike DMEA, however, Tri-State as a “nonprofit generation and transmission electric corporation[] or association[]” cannot exempt itself from public utility regulation under the Public Utilities Law.¹¹

23. Colorado’s Public Utilities Law gives the Commission broad jurisdiction over public utilities like Tri-State. The Commission has the power, authority, and duty “to govern and regulate all rates, charges, and tariffs of every public utility” (except those like DMEA who have exempted themselves), to “correct abuses” by public utilities, to “prevent unjust discriminations . . . in the rates, charges, and tariffs of such public utilities,” to “generally supervise and regulate every public utility in this state,” and “to do all things” that are “necessary or convenient in the exercise of such powers.”¹²

24. The Public Utilities Law also provides that, except as expressly authorized by statute, no regulated public utility “shall make or grant any preference or advantage” or “establish or maintain any unreasonable difference as to rates [or] charges”¹³

25. In addition, the Public Utilities Law gives the Commission expansive authority to prescribe remedies in complaint proceedings such as this. Section 40-3-111(1), C.R.S., provides:

Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, [...] or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, [...] the Commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter

¹⁰ § 40-1-103(2)(a), C.R.S.; *W. Colo. Power Co. v. Pub. Utils. Comm’n*, 411 P.2d 785, 794-96 (Colo. 1966).

¹¹ § 40-9.5-102, C.R.S.; § 40-9.5-103, C.R.S.

¹² § 40-3-102, C.R.S.

¹³ § 40-3-106(1)(a), C.R.S.

observed and in force and shall fix the same by order. In making this determination, the Commission may consider [...] any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.¹⁴

26. Similarly, § 40-3-111(2)(a), C.R.S. provides that “[t]he Commission has the power . . . upon complaint, to investigate a single rate, fare, toll, rental, charge, classification, rule, contract, or practice, or the entire schedule of rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices of any public utility; and to establish new rates, fares, tolls, rentals, charges, classifications, rules, contracts, practices, or schedules, in lieu thereof.”¹⁵

27. Colorado’s Public Utilities Law facially applies to Tri-State as a nonprofit generation and transmission cooperative corporation, and prevents it from “establish[ing], charg[ing], or collect[ing] a discriminatory or preferential rate, charge, rule, or regulation” in violation of § 40-3-106(1), C.R.S. or § 40-3-111, C.R.S.¹⁶

II. The Commission’s Previous Exercise of Jurisdiction over Tri-State in Proceeding No. 13F-0145E

28. In response to a 2013 complaint filed by several other Tri-State member cooperatives, the Commission confirmed its jurisdiction over Tri-State as a public utility in Proceeding No. 13F-0145E.¹⁷

29. In that proceeding, three Tri-State member cooperatives (La Plata Electric Association, Inc., Empire Electric Association, Inc., and White River Electric Association) brought a complaint (Colorado Co-Op Complaint) alleging that Tri-State’s all-energy (and no

¹⁴ § 40-3-111(1), C.R.S.

¹⁵ § 40-3-111(2)(a), C.R.S.

¹⁶ § 40-6-111(4)(a), C.R.S.

¹⁷ The proceeding was captioned *La Plata Electric Association, Inc.; Empire Electric Association, Inc.; White River Electric Association, Inc.; BP America Production Company, Encana Oil & Gas (USA), Inc., Enterprise Products Operating LLC, and ExxonMobil Production Company as Members of the Rural Electric Consumer Alliance; and Kinder Morgan CO₂ Company, LP, v. Tri-State Generation and Transmission Association, Inc.*

demand component) A-37 rate was unlawful, unjust, unreasonable, discriminatory, and preferential. The member cooperatives maintained that the Commission had jurisdiction to act on their complaint under Article XXV of the Colorado State Constitution and the Public Utilities Law. Tri-State moved to dismiss, alleging that the Commission lacked jurisdiction to hear the complaint.¹⁸

30. The Administrative Law Judge (ALJ) denied Tri-State's motion to dismiss the Colorado Co-op Complaint in Decision No. R13-1119-I (Attachment E). The ALJ rejected Tri-State's arguments and made the following findings:

- Tri-State concedes that it is a public utility;
- Article XXV of the Colorado State Constitution places the primary duty and responsibility of determining just and reasonable public utility rates with the Commission. The primary purpose of utility regulation is to ensure that the rates charged by utilities are not excessive or unjustly discriminatory;
- Nonprofit generation and transmission cooperative corporations like Tri-State are subject to rate jurisdiction under the Public Utilities Law, including § 40-3-106(1), §§ 40-6-108(1)(a) and (b), and § 40-3-102, C.R.S. Reading those statutes together, nothing can be ascertained which would diminish any Commission jurisdiction under Public Utilities Law to investigate tariff changes and, if necessary, to prescribe just and reasonable rates or charges;
- Specifically, § 40-6-111(4)(a), C.R.S., provides that the Commission shall, upon complaint filed by any member or customer of a cooperative electric association, determine whether the *rate or charge* in question is contrary to § 40-6-111, § 40-3-106(1), or § 40-3-111, C.R.S.;
- Tri-State's concerns regarding the full rate regulation it assumed would be asserted by the Commission if it did not dismiss the complaint were speculative at best; and

¹⁸ Tri-State alleged that the Commission could not exercise jurisdiction because, among other things: (1) it would violate the U.S. Constitution's Commerce Clause; (2) section 40-2-112(1), C.R.S. provides that nonprofit generation and transmission electric associations "may be" subject to less regulation and no rate regulation; (3) there is no requirement for Tri-State to file with the Commission tariffs, contracts, or electric service agreements; (4) section 40-6-108(1)(b), C.R.S., which requires 25 customers to file a complaint, was not meant to apply to generation and transmission electric associations like Tri-State because it only has 18 Colorado member systems; and (5) entertaining the complaint would interfere with contractual obligations because each Tri-State member system has entered into a wholesale electric service contract which obligates them to pay the rates duly adopted by Tri-State's Board of Directors.

- The Commerce Clause arguments raised by Tri-State are not available to it since Congress has provided an avenue for state regulation over Tri-State’s wholesale interstate rates. Given the lack of federal oversight over the wholesale rates of Tri-State,¹⁹ the Commission must utilize its authorized jurisdiction to investigate claims that Tri-State’s rates or charges are unjust, unreasonable, or discriminatory.

31. Tri-State filed a motion contesting Decision No. R13-1119-I. In Part I of Decision No. C14-0006-I, the Commission unanimously confirmed that it had jurisdiction to hear the Colorado Co-op Complaint, finding that “Colorado has important interests in the Commission performing its duties under Article XXV and the Public Utilities Law to regulate public utilities. Colorado’s interests are reflected in §§ 40-3-101, 106(1), and 111(1), C.R.S., which prevent a public utility from charging unjust, unreasonable, discriminatory, or preferential rates.”²⁰

32. In Part II of Decision No. C14-0006-I, the Commission on a 2-1 vote²¹ found that, notwithstanding its determination in Part I, it could not require Tri-State to undertake a partial or full rate case. The Commission confined its review to a defined legal issue: whether the failure to include a demand and energy charge in a utility rate violates regulatory principles. Commissioner Tarpey dissented from Part II of the decision, stating:

[W]hile a ‘full-blown’ rate case may not be acceptable, there is no reason to assume that could be the only possible remedy. It may be a determination that Tri-State needs to develop within a certain amount of time a rate that is not in violation of Colorado law and policy. There may be other remedies but these will be unknown because the parties are being denied the opportunity to present any remedies.²²

¹⁹ Tri-State’s member rates and charges are not regulated by the Federal Energy Regulatory Commission.

²⁰ Decision No. C14-0006-I, at 20, ¶ 44, Proceeding No. 13F-0145E (mailed Jan 3, 2014) (Attachment F).

²¹ Chairman Epel and Commissioner Patton, with Commissioner Tarpey dissenting.

²² *Id.*, Commissioner James K. Tarpey Dissenting in Part, at 28, ¶ 6. Here, the Commission need not undertake anything like a rate case, full-blown or otherwise, to address DMEA’s claims.

33. After the issuance of Decision No. C14-0006-I, the parties reached a settlement in which Tri-State agreed to modify its rates, and by Decision No. R16-0045 the ALJ approved a joint motion to withdraw the Colorado Co-op Complaint.

34. As confirmed in Proceeding No. 13F-0145E, the Commission has legal authority to act on the allegations and claims asserted in this Complaint pursuant to Article XXV of the Colorado Constitution and the Public Utilities Law. These authorities provide that the Commission must act in order to prevent a public utility from charging unjust, unreasonable, discriminatory, or preferential rates, fares, tolls, rentals, charges or classifications.²³

GENERAL ALLEGATIONS

I. Kit Carson's 2016 Withdrawal from Tri-State

35. The equitable member withdrawal provision in Article I, Section 3 of Tri-State's Bylaws reflects Tri-State's "core principle" of "voluntary and open membership."

36. Consistent with this "core principle" and for the same reasons DMEA now seeks to exit, Kit Carson exited the Tri-State system in 2016. After having initially demanded \$137 million as an exit charge,²⁴ Tri-State calculated a final \$37 million exit charge²⁵ for Kit Carson's withdrawal from Tri-State.

²³ § 40-3-111(1), C.R.S. and § 40-3-111(2)(a), C.R.S., provide the Commission with broad statutory authority and discretion to investigate and establish "a single rate, fare, toll, rental, charge, classification, rule, contract, or practice, or the entire schedule of rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices of any public utility." § 40-3-111(2), C.R.S. The Commission also has jurisdiction "to establish new rates, fares, tolls, rentals, charges, classifications, rules, contracts, and practices, or schedules, in lieu thereof." *Id.*

²⁴ *See supra*, fn. 4. With respect to the initial \$137 million exit charge, Kit Carson's CEO stated that "Tri-State calculated its exit formula by multiplying the annual revenue it collects from Kit Carson and multiplying it by the number of years remaining in the contract, then subtracting Tri-State's costs." *See* Attachment G.

²⁵ This \$37 million net cash consisted of \$49.5 million as an early termination fee for withdrawing from membership offset by \$12.5 million for the retirement of Kit Carson's patronage capital. *See* Tri-State Generation and Transmission Ass'n Inc., Quarterly Report, at 8 (Nov. 4, 2016) *available at* <https://www.tristategt.org/sites/ts/files/PDF/2016-SECFilings/10Q-093016.pdf>. Tri-State's summary of the exit can be found on page 64 of its 2016 10-K filed with the SEC. Tri-State Generation and Transmission Ass'n, Inc., Annual Report (Form 10-K), at 64 (Mar. 10, 2017), *available at* <https://www.tristategt.org/sites/ts/files/PDF/2016-SECFilings/10K-EOY-123116.pdf>.

37. Tri-State embraced the \$37 million Kit Carson exit charge as just, reasonable, and nondiscriminatory for Kit Carson and for Tri-State’s other member cooperatives. Tri-State publicly described it as “fair and equitable,” and “protect[ing] the interests of all [Tri-State’s remaining] members.”²⁶

II. DMEA’s Efforts for a Just, Reasonable, and Nondiscriminatory Exit Charge

38. Over the past two years, DMEA has worked within the limits of the Tri-State system to obtain a just, reasonable, and nondiscriminatory exit charge. Before filing this Complaint, DMEA exhausted Tri-State’s information request policy (called Board Policy 406) and Tri-State’s informal and formal Board Policy 316 dispute resolution processes. In doing so, DMEA sought: (a) to understand how Kit Carson’s \$37 million exit charge related to the disproportionate exit charge calculation for DMEA; (b) to meaningfully understand how Tri-State determined DMEA’s exit charge; and (c) to obtain a just, reasonable, and nondiscriminatory exit charge allowing its Tri-State withdrawal.²⁷

39. In both the Policy 406 and Policy 316 processes, Tri-State refused to provide information DMEA had requested to reconcile DMEA’s disproportionately large exit charge with that of Kit Carson. Tri-State claimed to have applied the same exit charge methodology to DMEA and Kit Carson, and did not dispute that the cooperatives shared key factors—for example, both were the only cooperatives in the Tri-State system with WESCs running through 2040. Tri-State nevertheless claimed the value to Tri-State of one member cooperative’s WESC “is not relevant to the value to Tri-State of any other Member System’s [WESC].”²⁸ Tri-State also refused to share “calculations and information about [Kit Carson’s] withdrawal” with DMEA on the grounds it “will be a burdensome exercise that, at best, will only distract the

²⁶ See Attachment C.

²⁷ DMEA’s information request under Policy 406 is provided as Attachment H.

²⁸ See Attachment I at 2 (May 8, 2018 Tri-State letter).

parties by focusing on a transaction that has little or no relevance to DMEA's proposed withdrawal from Tri-State."²⁹

40. Tri-State's assertion that the Kit Carson exit charge is "not relevant" to the DMEA exit charge is conclusory and lacks merit. The Kit Carson exit charge, and the manner in which it was determined, is directly relevant to the question of whether Tri-State prescribed an unjust, unreasonable, and discriminatory exit charge for DMEA.

41. Through the Policy 316 dispute process DMEA also sought more information about Tri-State's calculation of DMEA's own exit charge. Tri-State refused, saying DMEA could "replicate" Tri-State's exit charge based on Tri-State "inputs."³⁰ Replicating an exit charge formula using inputs, however, is different from understanding *how the inputs themselves were derived*. Lacking access to Tri-State's spreadsheets and work papers, DMEA could only speculate as to how Tri-State calculated the variables yielding its substantial exit charge.

III. Tri-State is Obligated under Colorado Law to Provide Member Cooperatives a Just, Reasonable, and Nondiscriminatory Exit Charge

42. Tri-State believes it can set exit charges how it wants and without any obligation under Colorado law to provide exit charges that are just, reasonable, and nondiscriminatory.

43. During the Board Policy 316 dispute process, Tri-State argued Article I, Section 3 of the Tri-State Bylaws (which says a member cooperative can withdraw on "such equitable terms and conditions as the Board of Directors may prescribe") means Tri-State "may but need not" prescribe just and reasonable exit terms.³¹

²⁹ See Attachment J (August 23, 2018 Tri-State Board decision denying DMEA's complaint under Board Policy 316) at 7. It should be noted that Kit Carson gave Tri-State explicit permission to share Kit Carson-related exit charge materials with DMEA.

³⁰ See *id.* at 5,7.

³¹ *Id.* at 7.

44. In the same Policy 316 decision, Tri-State refused to give DMEA the requested exit-charge related information for itself and for Kit Carson. This continued to deprive DMEA—a member and owner of Tri-State—of the ability to evaluate the underlying assumptions and bases used to calculate the unjust and unreasonable exit charge.

45. Tri-State’s position that DMEA has no right to withdraw from Tri-State and that any withdrawal is entirely within the discretion of the Board reveals the hollowness of Tri-State’s “core principle” of “voluntary and open membership.” It also violates Colorado law: Tri-State may not arbitrarily let some of its member cooperatives exit while essentially holding others captive through unjust, unreasonable, and discriminatory exit charges—the justifications for which are never explained.³²

46. On September 21, 2018, DMEA appealed Tri-State’s denial of DMEA’s Board Policy 316 formal complaint (Attachment L). The Board Policy 316 process ended approximately two months later when Tri-State denied DMEA’s appeal (Attachment M).

IV. DMEA’s Request to the Commission

47. Because Tri-State is a public utility subject to Colorado’s Public Utilities Law, the Commission should exercise its jurisdiction to decide both the lawfulness of Tri-State’s position that it can impose unjust, unreasonable, and discriminatory exit charges, as well as the lawfulness of DMEA’s exit charge.

48. If the Commission determines DMEA’s exit charge is unlawful, DMEA requests the Commission, consistent with its statutory authority and mandate, adjudicate a just, reasonable, and nondiscriminatory exit charge for DMEA. Such a request does not require the

³² In 2016, Tri-State tried to amend its Bylaws to let the Board set a member’s exit charge in the Board’s “sole discretion.” See Attachment K. The proposed change was rejected. Tri-State’s position in the Board Policy 316 process—that Tri-State has the power to set unjust, unreasonable, and discriminatory exit charges—contradicts the failed 2016 attempt to amend the Bylaws to provide the Tri-State Board sole discretion to prescribe an exit charge.

Commission to apply the Tri-State WESC, Tri-State's Bylaws, or any Tri-State contract with DMEA for that matter. Nor does it require changing any rate Tri-State currently charges its members; as such, a rate case—whether “full blown” or otherwise—is unnecessary.

49. DMEA will be filing a motion asking the Commission to hear this Complaint *en banc* and to establish a procedural schedule commencing in February 2019. This will allow DMEA to put forward expert testimony for a just, reasonable, and nondiscriminatory exit charge for Commission adjudication.

50. DMEA's request to the Commission is narrow. But the long-term economic and environmental benefits to DMEA's rural member-owners—and other rural citizens across the state—would be significant. Having exhausted its other options, DMEA respectfully requests that the Commission fulfill its primary mandate of protecting public utility customers by: (a) exercising jurisdiction over Tri-State as a public utility subject to Colorado's Public Utilities Law; (b) investigating Tri-State's DMEA exit charge and declaring it contrary to Colorado law as unjust, unreasonable, and discriminatory; and (c) exercising its statutory authority to establish an exit charge that is just, reasonable, and nondiscriminatory.

FIRST CLAIM
(UNJUST AND UNREASONABLE EXIT CHARGE)

51. DMEA incorporates the allegations in the paragraphs above.

52. Section 40-3-101, C.R.S., § 40-3-102, C.R.S., § 40-3-111(1), C.R.S., and § 40-3-111(2)(a), C.R.S. are each applicable to Tri-State as a public utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision giving Tri-State an exemption from these statutes.

53. Tri-State's prescribed DMEA exit charge is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

54. Tri-State's exit charge for DMEA is not just and reasonable.

55. Because the exit charge is not just and reasonable, the Commission has the authority and duty under Colorado's Public Utilities Law to determine an exit charge for DMEA that is just and reasonable.³³

56. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(a), C.R.S., as DMEA is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

57. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(b), C.R.S., as DMEA represents more than 25 end-use customers of Tri-State.

58. DMEA has standing to bring this claim based upon, without limitation, § 40-6-111(4)(a), C.R.S., as DMEA is either a member of Tri-State, a retail customer of electric cooperatives that are served by Tri-State, or a public utility.

SECOND CLAIM
(DISCRIMINATORY EXIT CHARGE)

59. DMEA incorporates the allegations in the paragraphs above.

60. Section 40-3-106(1), C.R.S. and § 40-3-111(4)(a), C.R.S. prohibit public utilities, including nonprofit generation and transmission corporations like Tri-State, from charging rates or establishing charges that are preferential or discriminatory.

61. Section 40-3-102, C.R.S., § 40-3-106(1)(a), C.R.S., § 40-3-111(1), C.R.S., § 40-3-111(2)(a), C.R.S., and § 40-3-111(4)(a), C.R.S., are each applicable to Tri-State as a public

³³ See § 40-3-111(1), C.R.S. ("Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making this determination, the commission may consider any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.")

utility subject to the Public Utilities Law. There is no statute, rule, or Commission decision giving Tri-State an exemption from these statutes.

62. Tri-State's DMEA exit charge is a charge, classification, contract, fare, practice, rate, regulation, rule, schedule, service, or toll.

63. Tri-State refuses to explain how it set a \$37 million exit charge for Kit Carson while demanding DMEA pay an exit charge that is dramatically and disproportionately higher.

64. Tri-State's exit charges for Kit Carson and DMEA represent an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect.

65. Because Tri-State's exit charges for Kit Carson and DMEA demonstrate an unreasonable difference as to rates, charges, services, or facilities between customers, between localities, between any class of service, or in any other respect, the Commission has the authority and duty to determine an exit charge for DMEA that is not discriminatory pursuant to the Public Utilities Law.³⁴

66. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(a), C.R.S., as DMEA is either a corporation, person, civic association, or body politic authorized to bring a complaint against a public utility.

67. DMEA has standing to bring this claim based upon, without limitation, § 40-6-108(1)(b), C.R.S., as DMEA represents more than 25 end-use customers of Tri-State.

³⁴ See § 40-3-111(1), C.R.S. ("Whenever the Commission upon complaint finds that the rates, tolls, fares, rentals, charges, or classifications demanded, observed, charged, or collected by any public utility for any service, product, or commodity, or in connection therewith, or that the rules, regulations, practices, or contracts affecting such rates, fares, tolls, rentals, charges, or classifications are unjust, unreasonable, discriminatory, or preferential, or in any way violate any provision of law, the commission shall determine the just, reasonable, or sufficient rates, fares, tolls, rentals, charges, rules, regulations, practices, or contracts to be thereafter observed and in force and shall fix the same by order. In making this determination, the commission may consider any factors which influence an adequate supply of energy, encourage energy conservation, or encourage renewable energy development.")

68. DMEA has standing to bring this claim based upon, without limitation, § 40-6-111(4)(a), C.R.S., as DMEA is either a member of Tri-State, a retail customer of electric cooperatives that are served by Tri-State, or a public utility.

SERVICE OF DOCUMENTS

DMEA requests that all testimony, discovery, pleadings, and other documents in this proceeding be served on the following:

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RELIEF REQUESTED

DMEA requests that the Commission provide the following relief:

- (i) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that the DMEA exit charge prescribed by Tri-State is unjust and unreasonable;
- (ii) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., finding that the DMEA exit charge prescribed by Tri-State is discriminatory;

- (iii) Issue an order pursuant to the Commission's authority under §§ 40-3-101, 40-3-102, 40-3-106(1)(a), 40-3-111(1), 40-3-111(2)(a), and 40-6-111(4)(a), C.R.S., establishing an exit charge for DMEA that is just, reasonable, and nondiscriminatory; and
- (iv) Award DMEA such additional or other relief as the Commission deems proper.

Respectfully submitted this 6th day of December, 2018.

By: /s/ Matthew S. Larson
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**ATTORNEYS FOR DELTA-MONTROSE
ELECTRIC ASSOCIATION**

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of December 2018, a copy of the foregoing **FORMAL COMPLAINT** was filed with the Colorado Public Utilities Commission via e-file and a copy was served via e-mail to the following:

Doug Dean	Doug.dean@state.co.us	Colorado Public Utilities Commission
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/s/ Hannah Bucher
Hannah Bucher