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| DISTRICT COURT, ADAMS COUNTY, COLORADO 1100 Judicial Center Drive Brighton, Colorado 80601 Telephone: 303.659.1161 | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| <p>Plaintiff: UNITED POWER, INC.</p> <p>v.</p> <p>Defendants: TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., MIECO, INC., ELLGEN RANCH COMPANY, and OLSON'S GREENHOUSES OF COLORADO, LLC.</p> | |
| <p><i>Attorneys for Plaintiff, United Power, Inc.:</i></p> <p>Name: Michael L. O'Donnell (#10273) Peter W. Herzog III (<i>pro hac vice application to be filed</i>) Joel S. Neckers (#40886) Wheeler Trigg O'Donnell LLP</p> <p>Address: 370 Seventeenth Street, Suite 4500 Denver, CO 80202-5647</p> <p>Telephone: 303.244.1800 Facsimile: 303.244.1879 Email: odonnell@wtotrial.com pherzog@wtotrial.com neckers@wtotrial.com</p> | <p style="text-align: center;">PLAINTIFF UNITED POWER, INC.'S COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES</p> |

Plaintiff United Power, Inc. ("United Power"), through its undersigned counsel, files this Complaint for Declaratory Relief and Damages against Defendants Tri-State Generation and Transmission Association, Inc. ("Tri-State"), MIECO, Inc. ("MIECO"), Ellgen Ranch Company ("Ellgen"), and Olson's Greenhouses of Colorado, LLC ("Olson's"). In support thereof, United Power states and alleges as follows:

NATURE OF THE ACTION

1. Tri-State is a generation and transmission cooperative owned by 43 distribution cooperatives. Although Tri-State purported to add three non-utility members in 2019, for the reasons alleged below, the purported addition of those members was unlawful and invalid, so Tri-State continues to be wholly owned by its 43 utility members. Tri-State staff has enlisted the assistance of a small group of directors who sit on the Board's Executive Committee, which also doubles as its Litigation Committee, and together they conduct a great deal of Tri-State's business in secret, concealing information even from its own member-owners.

2. United Power is Tri-State's largest member, representing nearly 17% of Tri-State's revenues in 2019. For years, United Power has been dissatisfied with the mismanagement of Tri-State as it failed to adapt to changes in the market and continued to source coal generated power for its members instead of cheaper and greener renewable energy. United Power watched as, first, Kit Carson Electric Cooperative ("Kit Carson") withdrew from membership, followed by Delta-Montrose Electric Association ("DMEA"). Both paid negotiated amounts to buy out of their Wholesale Electric Service Contracts ("WESC") in order to access renewable power sources and provide savings to their members.

3. As a founding member of Tri-State, United Power preferred not to withdraw but to modify its contractual relationship with Tri-State in a way that would permit the cooperative family to stay together while also offering member-owners who so desired to buy less than all their power requirements from Tri-State. To United Power, that approach made eminent sense. It would allow member-owners to take

advantage of cheaper and greener renewable energy sources, reducing rates to their members, and de-carbonizing Tri-State in the process.

4. United Power then spent years and hundreds of thousands of dollars working in good faith with Tri-State staff to accomplish its goal of modifying its all requirements relationship with Tri-State. Unbeknownst to United Power, Tri-State never had any intention of allowing United Power to modify its relationship because it is United Power's load and purchases that have permitted Tri-State to avoid raising rates and prevented other member-owners from following Kit Carson and DMEA out the door.

5. In November 2019, fed up with Tri-State's dissembling, United Power filed a formal complaint with the Colorado Public Utilities Commission ("Commission" or "PUC"). United Power asked the PUC to set a just, reasonable and non-discriminatory charge for it to buy out of its all-requirements contract with, and to withdraw from, Tri-State. Since that time, Tri-State has done everything in its power to prevent the PUC from ruling in the case and to prevent United Power from withdrawing as a Tri-State member-owner, a right it has under Tri-State's Bylaws.

6. The Evidentiary Hearing on United Power's PUC proceeding was originally scheduled for March 23-27, 2020. It recently was re-scheduled for May 18-22, 2020. Notwithstanding that imminent proceeding, it has become completely clear that Tri-State has declared war on the Colorado PUC and literally will stop at nothing to try to prevent it from deciding a just, reasonable and non-discriminatory charge for United Power to withdraw as a member-owner of Tri-State. Tri-State's legion of

attorneys—whose fees are paid by Tri-State member-owners—are desperately seeking the expedited assistance of the Federal Energy Regulatory Commission (“FERC”) in creating a conflict that Tri-State will then use to claim that the PUC’s jurisdiction has been pre-empted.

7. Had Tri-State simply allowed United Power to exercise its right to withdraw as a Tri-State member-owner on equitable terms proportionately similar to those it afforded to Kit Carson and DMEA, the story of Tri-State’s dissembling and its culture of concealment, would never have been told. But for reasons that will require discovery under the Colorado Rules of Civil Procedure, Tri-State wouldn’t, or couldn’t, afford United Power the same basic Bylaw right exercised by other Tri-State member-owners.

8. Discovery in the PUC proceeding has revealed that Tri-State fraudulently induced United Power to champion the 2019 Bylaw amendment which Tri-State now seeks to use against the PUC and United Power. Tri-State needs United Power’s load, and its \$50 plus million annual subsidy, to survive. So it has engaged in a multi-year fraud to prevent United Power from ever exercising its contractual right to withdraw. If the PUC is permitted to decide a just, reasonable and non-discriminatory exit charge, perhaps Tri-State finally will afford United Power the same rights and privileges as Kit Carson and DMEA.

9. If not, however, United Power intends to prove that approval of the 2019 Bylaw amendment Tri-State has used to pursue FERC rate jurisdiction was procured by fraud, so that any claim to federal jurisdiction that derives from its use is invalid. United

Power will prove that Tri-State's so-called non-utility members, MIECO, Ellgen and Olson's, were recruited by Tri-State to interfere with United Power's right to withdraw from Tri-State on equitable terms and thereafter conspired with Tri-State to unlawfully deprive United Power of its right to petition the PUC to establish a just, reasonable and non-discriminatory exit charge. United Power also will prove that the April 9, 2020 Tri-State Board resolutions designed to imprison it and other Tri-State member-owners are *ultra vires* and inapplicable to United Power. United Power further intends to prove that Tri-State has breached the Bylaw contract as well as the WESC by, among other things, violating the duty of good faith and fair dealing implied into each, by discriminating against United Power in favor of Kit Carson and DMEA, and by unilaterally and unlawfully amending the WESC through Board Policies. As a result of such breaches, United Power intends to seek a declaration that Tri-State is precluded from enforcing the WESC under the doctrine of prior breach. Finally, and in the alternative, United Power will prove that Tri-State's breaches, and Defendants' tortious conduct, have caused United Power hundreds of millions of dollars in damages.

10. This action thus seeks very different relief from that sought before the PUC. United Power pleads common law relief in this Court that is not available in the PUC, against Defendants who are not parties to that proceeding. And United Power seeks relief from the PUC under the Public Utilities Law that is not available in this Court. This Complaint is filed not to address any harm to Tri-State, but rather to address individual and specific harm that has been levied against United Power by Tri-State and its co-conspirators.

PARTIES

11. United Power was founded in 1938 as a not-for-profit rural electric cooperative providing services to homes and businesses throughout Colorado's northern front-range. United Power is headquartered in Adams County and is a founding member of Tri-State. Its service territory extends from the mountains of Coal Creek and Golden Gate Canyon, along the I-25 corridor and Carbon Valley region, to the farmlands of Brighton, Hudson, and Keenesburg. United Power serves more than 90,000 meters representing more than 250,000 customers.

12. Tri-State is a generation and transmission cooperative corporation headquartered in Westminster, Colorado. Tri-State is organized pursuant to Colorado law and provides generation and transmission services to 43 member-owners in Colorado, Wyoming, Nebraska, and New Mexico. Tri-State also purports to have three non-utility member companies to which Tri-State does not provide generation or transmission services.

13. MIECO is a Delaware corporation with its headquarters in Long Beach, California. MIECO sells natural gas to Tri-State. It purported to become a member of Tri-State in September 2019.

14. Ellgen is a Colorado corporation with its headquarters in Craig, Colorado. Ellgen engages in agricultural and ranching activities. Ellgen rents land from a wholly owned subsidiary of Tri-State (Colowyo Coal Co., L.P.) on which it grows crops and grazes cattle. It purported to become a member of Tri-State in November 2019.

15. Olson's is a Colorado LLC with its headquarters in Fort Lupton, Colorado. Olson's is a greenhouse that grows plants. It purchases thermal energy (steam) from Tri-State for its own use. It purported to become a member of Tri-State in November 2019.

JURISDICTION AND VENUE

16. Jurisdiction is proper in this Court pursuant to C.R.S. § 13-1-124(1)(a) because the acts giving rise to the claims asserted occurred within the State of Colorado, and these acts involve the transaction of business within the State of Colorado. The Court also has jurisdiction to hear this matter and the power to declare the rights of the parties pursuant to C.R.C.P. 57 and the Colorado Declaratory Judgments Law, C.R.S. § 13-51-101, et seq.

17. The Court has personal jurisdiction over Tri-State because Tri-State is a corporation organized under Colorado law and located in Colorado and has committed the wrongful acts described here in the State of Colorado.

18. The Court has personal jurisdiction over MIECO because MIECO does business in Colorado, and has committed the wrongful acts described here in the State of Colorado.

19. The Court has personal jurisdiction over Ellgen because Ellgen is a corporation organized under Colorado law, located in Colorado, and has committed the wrongful acts described here in the State of Colorado.

20. The Court has personal jurisdiction over Olson's because Olson's is a corporation organized under Colorado law, located in Colorado, and has committed the wrongful acts described here in the State of Colorado.

21. Venue is proper in this Court pursuant to C.R.C.P. 98(c) because Tri-State resides in Adams County and committed the wrongful acts described in this Complaint in Adams County.

GENERAL ALLEGATIONS

I. UNITED POWER'S RELATIONSHIP WITH TRI-STATE.

22. United Power and Tri-State are parties to several contracts, including Tri-State's Bylaws and United Power's WESC. Pursuant to the WESC, United Power is required to purchase at least 95 percent of its wholesale power requirements from Tri-State on an annual basis through 2050.

23. In recent years, United Power has purchased in excess of \$200 million in wholesale electricity annually from Tri-State that it then distributes to its individual members as well as certain industrial and large commercial accounts (e.g. oil and gas customers).

24. United Power refers to the electricity that it sells to its oil and gas accounts as its "indeterminate load." Unlike a residential customer, the load cannot be determined with assurance in amount or permanency.

25. Tri-State charges United Power for the electricity it sells at its "Class A" rate. Tri-State's Class A rate is materially higher now—and has been for years—than what United Power would be required to pay if it purchased electricity on the open market.

26. Tri-State's Class A rate includes a built-in margin (i.e. profit) for the electricity it sells. In recent years that margin has totaled approximately \$45 - \$70 million annually for the electricity that Tri-State sells to all of its members (including

United Power). Due to the expenses associated with delivering electricity to and investing in members' service territories, some members contribute positively to Tri-State's margins while some members negatively impact Tri-State's margins.

27. United Power is Tri-State's largest member, as determined by the amount of electricity that Tri-State sells to it on an annual basis and has been for many years.

28. Not only is United Power the largest member of Tri-State, it also is the fastest growing. Since at least 2012, United Power's increasing load has enabled Tri-State—through its all-requirements contracts and unlawful restrictions on members' contracting for power from other qualified sources—to continue to operate its old, inefficient and high-emitting units. In recent years, United Power has been subsidizing Tri-State's operations by contributing tens of millions of dollars a year to Tri-State's margins. As a result, Tri-State's system has appeared to grow, justifying various capital projects and other expenses, many of which are outside United Power's service territory and provide little to no benefit to United Power's members. Throughout that period, United Power's members have been required to pay substantially higher rates for their power than United Power could have obtained from other suppliers, power that also would have been lower emitting and more efficient, complying with goals established by Colorado law. Instead, United Power's growth has subsidized the other member-owners of Tri-State, many of which have decreasing electricity requirements.

29. In the past four years, by Tri-State's own calculations, United Power has contributed approximately \$150 million to Tri-State's margins.

30. Over the next decade, Tri-State estimates that United Power will continue subsidizing Tri-State's operations by contributing *several hundred million dollars* more to Tri-State's margins through the electricity it purchases from Tri-State. In other words, United Power has already paid and is projected to pay to Tri-State hundreds of millions of dollars more than its fair share of Tri-State's costs, without receiving any significant benefit in return. Rather than work with United Power to achieve a mutually beneficial arrangement, Tri-State has refused to engage with United Power in good faith and misused the cooperative governance structure in an effort to deprive United Power of its right to exit Tri-State.

31. No other Tri-State member has contributed in the past 10 years or is projected in the next 10 years to contribute more to Tri-State's margins than United Power.

32. The net effect of United Power's contributions to Tri-State's margins is that United Power's customers have paid and will continue to pay rates that are significantly above market for their electricity needs.

II. TRI-STATE DENIES UNITED POWER'S REQUESTS FOR AN EQUITABLE EXIT CHARGE.

33. Tri-State's Bylaws constitute a contract between Tri-State and its individual members, including United Power.

34. United Power has performed all of its obligations under the Bylaws.

35. The Bylaws expressly provide that, among other things, a member may withdraw "upon compliance with such equitable terms and conditions as the Board of Directors may prescribe," provided that "it has met all its contractual obligations to this

Corporation.”¹ The Bylaws further require United Power to enter into what is known as an “all requirements” contract (i.e. the WESC) to purchase 95 percent or more of its electricity needs from Tri-State as a condition of membership.² United Power’s Tri-State membership, therefore, is inextricably intertwined with its WESC. United Power has performed all of its obligations under the WESC.

36. Tri-State emphasizes that one of its “core principles” as a cooperative is “voluntary and open membership,” and it agrees that members can withdraw from Tri-State.³

37. In 2016, a New Mexico-based Tri-State member, Kit Carson, withdrew from Tri-State after paying a \$37 million exit charge.

38. In 2019 (effective May 2020), DMEA and Tri-State agreed to an exit charge of \$62.5 million.

39. In both instances, Tri-State only agreed to the exit charges after initially demanding that both members pay punitively high and grossly inflated exit charges, that as it turns out, were similar to the punitively high proposed “indicative buyout calculation” that Tri-State demanded of United Power in August 2018.

40. Tri-State, through its Chairman of the Board of Directors as well as its Chief Financial Officer, among others, has admitted that the final exit charges for Kit Carson and DMEA were just, reasonable, non-discriminatory, and left the remaining

¹ Exhibit 1, Bylaws, ¶ 4(a).

² *Id.* at ¶ 3(d).

³ See, e.g., *Powering Potential: 2018 Investor Presentation*, TRI-STATE GENERATION AND TRANSMISSION ASS’N, at 4, <https://www.tristategt.org/files/TriState-AnnualReport-FY2017-040318.pdf>.

members “whole.” In other words, the exit charges to which Tri-State agreed for Kit Carson and DMEA, constituted “equitable terms and conditions” for both members to withdraw. United Power, all along, has been seeking the same fair and equitable treatment.

41. In August 2018, United Power exercised its right to explore options for withdrawing from Tri-State under the Bylaws by requesting an exit charge. Tri-State stated that it could provide United Power with an “indicative buyout calculation” that would be within 10 percent of the actual exit charge that Tri-State would in fact propose charging United Power to exit. Tri-State further stated that in order to provide United Power with a more precise exit charge, United Power would have to pay Tri-State a \$250,000 fee.

42. United Power declined to pay the \$250,000, and Tri-State thereafter provided it with an “indicative buyout calculation” of approximately \$1.2 billion. If paid to Tri-State, that figure would result in a massive windfall to Tri-State and its non-withdrawing members.

43. To put Tri-State’s proposed “indicative buyout calculation” in perspective, if all but one of the current Tri-State members elected to exit Tri-State at the same time and paid a proportionately similar exit charge, the last remaining member would own all of Tri-State’s assets free and clear and would have \$5 billion additional in cash.

44. Tri-State provided the punitively high indicative buyout calculation to United Power—which it represented would be within 10% of the actual buyout number—in an effort to block a United Power withdrawal, notwithstanding the fact that

United Power has a right to withdraw under the Bylaws and a right to be treated as equitably as Kit Carson and DMEA were. Tri-State’s punitive and inequitable buyout calculation constituted the first of several material breaches of the Bylaws that was intended to prevent United Power from exercising its contractual right to exit Tri-State on equitable terms and conditions.

III. TRI-STATE PROCURES A BYLAW AMENDMENT THROUGH FRAUDULENT AND BAD FAITH CONCEALMENT AND MISREPRESENTATION OF MATERIAL INFORMATION.

45. For most of its corporate existence, Tri-State’s Bylaws have allowed one class of membership only. That is, the Bylaws have historically required that Tri-State members agree to an “all requirements” class of membership, where Tri-State’s members (all of whom have historically been rural, electrical cooperatives), are each required to purchase 95 percent or more of their electricity needs from Tri-State.

46. In 2018, in addition to its request for an exit charge, United Power also began exploring other options that would allow it and other Tri-State members to remain part of Tri-State, while transitioning, at least in part, to cleaner and cheaper sources of power, through what is known as a “partial requirements contract.”

47. The idea of a partial requirements contract is that Tri-State members, if they choose, would remain Tri-State members, but would have more flexibility to purchase a larger portion of their electricity needs from the open market (e.g. from other renewable energy suppliers).⁴

⁴ Adding a new class of membership to allow for a partial requirements class of membership required an amendment to Tri-State’s Bylaws, which in turn, required an affirmative vote of Tri-State’s 43 members.

48. At a presentation to Mountain Parks Electric on January 3, 2019, United Power’s New Business Director Jerry Marizza explained that “the proposal for a partial requirements contract option would assure that Tri-State continues to provide a portion of United Power’s energy purchases, while allowing United Power to meet its electricity load growth by pursuing its own local renewable energy projects, or buying wholesale power from other providers.”⁵

49. Beginning in late 2018, United Power proposed amending Tri-State’s Bylaws to allow for partial requirements members. United Power understood—based on Tri-State’s representations—that Tri-State envisioned using partial requirements contracts to allow its member-owners to pursue more local renewable energy projects that would, in turn, help Tri-State and its members meet Colorado’s clean power goals. But Tri-State was constructing a Trojan Horse.

50. Indeed, although Tri-State’s publicly-stated purpose for amending the Bylaws was to allow for partial requirements contracts, the amendment was only a pretext for Tri-State’s actual purpose—creating a new class of membership that would permit the addition of non-utility members, to eliminate Tri-State’s FERC exemption and prevent United Power or any other Colorado member from obtaining exit charges from the PUC. Tri-State concealed that purpose from its member-owners at every step along the way before the Bylaw amendment was passed in April 2019.

⁵ Clean Cooperative, 1/17/19, by Joe Smyth (<https://www.cleancooperative.com/news/United-power-says-tri-state-policies-are-turning-away-large-customers>).

51. Tri-State staff and the Board's Executive/Litigation Committee knew that United Power was unhappy with Tri-State's management and was actively considering its options. But United Power had also shared with Tri-State staff its genuine desire not to withdraw from Tri-State; instead, United Power wanted to modify its relationship with Tri-State while keeping the Tri-State cooperative family together. Tri-State staff knew that Tri-State's loss of all, or even part, of United Power's load would have enormous adverse effects on Tri-State's financial health. Tri-State staff also knew that other Tri-State member-owners were, for similar reasons, interested in retaining United Power as a Tri-State member.

52. So Tri-State saw its opportunity, using United Power as a Trojan Horse to convince Tri-State's membership to amend Tri-State's Bylaws in a way that members believed would benefit them. Unbeknownst to United Power and other Tri-State members, however, Tri-State secretly was engaged in a project to become FERC rate regulated, a project that required a Bylaw amendment to accomplish its secret goal.

53. Tri-State staff, fraudulently and in bad faith, led United Power to believe that Tri-State was sincerely interested in creating an opportunity for United Power and other Tri-State member-owners to modify their all-requirements contractual relationships with Tri-State. Tri-State never had any such interest or intention.

54. As of December 2018, Tri-State already had been consulting with outside and in-house counsel about becoming FERC jurisdictional for at least six months, and possibly much longer. In fact, Tri-State had initiated a secret project, codenamed "Blue Sky II," which was designed to explore ways for Tri-State to become FERC

jurisdictional. Tri-State concealed the existence of Blue Sky II from its members. By December 2018, Tri-State already had drafted the tariffs that it would need to file with FERC if it were to seek to become FERC regulated. Tri-State concealed from United Power and even from the Colorado PUC, the existence of those draft tariffs.⁶

55. Reasonably and justifiably believing that Tri-State was acting in good faith, United Power drafted a proposed Bylaw amendment that would create a new membership class in Tri-State. Had United Power's proposed amendment been adopted by Tri-State's membership, it would have allowed new or existing Tri-State members to elect partial, rather than full, requirements memberships.

56. But Tri-State staff resisted United Power's proposal, because Tri-State never had any intention of allowing members to choose unilaterally to elect partial requirements memberships. Instead, Tri-State staff insisted on language in the Bylaw amendment that would give the Tri-State Board discretion whether, and on what terms, to establish a new partial requirements membership class.

57. Tri-State staff persuaded United Power that the language it proposed was necessary to give Tri-State the flexibility to consider other, non-partial requirements options, but that staff fully supported both a partial requirements membership class and United Power's desire to transition to partial requirements. Neither was true.

58. United Power believes, and therefore alleges, that Tri-State's proposed Bylaw amendment was drafted by its outside counsel with specific knowledge of Tri-

⁶ Transcript of 7/12/19 Hearing at 25:23-26:05, *Delta-Montrose Elec. Ass'n, Complainant*, No. 18F-0866E (Colo. P.U.C.).

State's secret scheme to seek FERC rate regulation and to ensure that United Power would never secure a Bylaw right to elect partial requirements membership.

59. Nevertheless, reasonably and justifiably believing that Tri-State was acting in good faith, United Power, primarily through former CEO John Parker and current Chief Energy Resource Officer Dean Hubbuck, spent weeks in early 2019 crisscrossing Colorado to explain to Tri-State member-owners the purpose of the Bylaw amendment and create support for it.

60. Throughout 2018 and 2019, Tri-State concealed from United Power the very existence of Blue Sky II.

61. Tri-State continued to represent to United Power and other Tri-State members in early 2019 that an amendment to the Bylaws to create new membership classes would allow for partial requirements contracts. Tri-State concealed from United Power that it never had any intention of modifying its all requirements relationship with United Power and was, instead, planning to use the Bylaw amendment to try to imprison United Power, and its annual \$50 million plus subsidy, until 2050.

62. Among Tri-State's many material non-disclosures and misrepresentations, it regularly stated that the purpose of the Bylaw amendment was to allow for the creation of new membership classes that would facilitate partial requirements contracts:

Some Members have asked the Board to consider partial-requirements contracts or subscription contracts. ... In order to consider these changes, it is necessary to first amend the bylaws to permit additional classes of membership.⁷

⁷ Exhibit 2, Proposed Bylaw Changes Questions and Answers Memorandum, at 1.

63. Tri-State also represented that the Board “intends to carefully consider the pluses and minuses to the existing Members before it decides to establish any additional class of membership,” and further, that it would establish a Contract Committee to consider the different class of membership and alternative contracts.⁸

64. The true purpose of the Bylaw amendment was not to create a realistic partial requirements option for its members but instead to use the amendment to displace the Colorado PUC’s jurisdiction over member withdrawals. To that end, none of Tri-State’s statements about the Bylaw amendment ever disclosed Tri-State’s true intentions. To the contrary, it affirmatively misled United Power and its other member-owners that the “**Board has no current intention to seek FERC jurisdiction.**”⁹ Tri-State made this representation to induce a favorable vote from its member-owners on the Bylaw amendment, even though the representation was false, misleading, and concealed material facts regarding Tri-State’s intentions about becoming FERC jurisdictional.

65. United Power and the other member-owners reasonably and justifiably believed that Tri-State was acting in good faith and honestly regarding the amendment to the Bylaws and Tri-State’s intentions related there to.

66. In the weeks and months preceding Tri-State’s representation to its members that it had “no current intention” to seek FERC jurisdiction, however, there were hundreds of Tri-State internal and external communications (with outside and in-

⁸ *Id.*, at 3.

⁹ *Id.* at 2.

house counsel) about that very possibility.¹⁰ Prior to the member vote on the Bylaw amendment, Tri-State even briefed its incoming Chief Executive Officer, Duane Highley, on the secret plan to become FERC jurisdictional. Tri-State concealed those communications from its members.

67. United Power justifiably relied on Tri-State's representations that it did not intend to attempt to become FERC jurisdictional and that the purpose of the Bylaw amendment was to allow for existing Tri-State members to explore options to become partial requirements members.

68. Relying on Tri-State's misrepresentations that Tri-State did not plan to seek to become FERC jurisdictional, and that the Bylaw amendment was intended to provide for a partial requirements class of membership for existing members, Tri-State members, including United Power, voted in favor of the Bylaw amendment at the April 3, 2019 annual meeting. United Power believes, and therefore alleges, that its support for the Bylaw amendment was crucial to its passage. The amendment gave the Board the power "to establish one or more classes of membership in addition to the existing all-requirements class of membership."¹¹

69. The full text of the amended Bylaw provision is as follows:

Section 2: Additional Membership Classes. Notwithstanding any other provision of these Bylaws to the contrary, the Board of Directors may establish one or more classes of membership in addition to the existing all-requirements class of membership. Such additional membership classes

¹⁰ The false and misleading nature of Tri-State's representations to United Power is confirmed by a privilege log Tri-State prepared in connection with litigation involving DMEA, which details the hundreds of communications Tri-State had with its inside and outside counsel about FERC jurisdiction.

¹¹ Exhibit 1, Bylaws, ¶ 2.

may include, without limitation, one or more partial requirements membership classes whereby a member who chooses to be a member of that class shall assume responsibility for meeting a portion of its load requirements. Members may choose their class of membership subject to any terms and conditions of membership and rights and preferences and limitations on the rights and preferences of the members of each additional class of membership as the Board of Directors establishes from time to time. Such rights and preferences and limitations on the rights and preferences may differ between membership classes and may be different for individual members within an additional class of membership. Provided however, that representation on the Board of Directors of any additional class of membership will be determined by a vote of the members of this Corporation at a meeting of the members of this Corporation.

IV. TRI-STATE CONSPIRES WITH MIECO, OLSON’S, AND ELLGEN TO INTERFERE WITH THE PUC’S JURISDICTION OVER EXIT CHARGE DISPUTES INVOLVING COLORADO COOPERATIVES.

70. Shortly after passage of the Bylaw amendment, Tri-State announced that it would convene its Contract Committee to consider the establishment of new membership classes in Tri-State. Based on Tri-State’s prior representations, United Power reasonably understood this to be a partial requirements membership option for Tri-State’s 43 existing member-owners.

71. In connection with that announcement, Tri-State represented that the change in its Bylaws would allow the Board to create “additional classes of membership and contracts for our members *as well as those entities interested in power and services from* Tri-State.” Tri-State’s Board Chairman identified the potential additional classes of membership as “partial-requirements contracts, municipal memberships or memberships from other utilities.”¹²

¹² Tri-State Press Release, 4/5/19 (<https://www.tristategt.org/tri-state-highlights-strong-financial-and-operational-performance-67th-annual-meeting>).

72. Although there was no mention in Tri-State’s announcement of possibly adding a non-utility member or a member that was a vendor *to* Tri-State, at the same time and unbeknownst to United Power, however, Tri-State was hard at work, trying to identify one or more non-utility members that would facilitate its secret plan to try to become FERC rate regulated.¹³

73. Some companies contacted by Tri-State rejected the invitation to join Tri-State’s scheme to obtain FERC jurisdiction under false pretenses. Three companies, however, who were aggressively recruited by Tri-State accepted its invitation to interfere with United Power’s contractual right to exit Tri-State by purporting to become members of Tri-State for an unlawful purpose: MIECO, Ellgen, and Olson’s (collectively the “non-utility members”).

74. Each of the non-utility members had a preexisting business relationship with Tri-State. MIECO sold natural gas to Tri-State. Ellgen rented land from a wholly owned subsidiary of Tri-State (Colowyo Coal Co., L.P.) on which it grows crops and grazes cattle. And Olson’s purchased thermal energy (steam) from Tri-State for use in its greenhouse.

75. Tri-State began negotiations with Olson’s in May 2019, well before revealing to Tri-State members its plan to use the April 2019 Bylaw amendment to obtain FERC jurisdiction. During those negotiations, Tri-State told Olson’s that the purpose of it becoming a Tri-State member was for Tri-State to become FERC rate regulated.

¹³ Indeed, it was not until months into the PUC Proceeding that Tri-State disclosed these communications for the first time in discovery.

76. Tri-State began negotiations with MIECO in June 2019. During those negotiations, Tri-State told MIECO that the purpose of it becoming a Tri-State member was for Tri-State to become FERC rate regulated.

77. Tri-State began negotiations with Ellgen in September 2019. During those negotiations, Tri-State told Ellgen that the purpose of it becoming a Tri-State member was for Tri-State to become FERC rate regulated.

78. MIECO, Ellgen, and Olson's were aware of United Power's Bylaw Agreement and WESC with Tri-State.

79. MIECO, Ellgen, and Olson's agreements ("Membership Agreements") to become members of Tri-State caused Tri-State to breach the Bylaw Agreement and WESC with United Power by taking actions to prevent United Power's withdrawal from Tri-State.

80. MIECO, Ellgen, and Olson's knew that Tri-State's breach of the Bylaw Agreement and WESC with United Power was certain or substantially certain to occur as a result of their unlawful purported membership in Tri-State.

81. MIECO, Ellgen, and Olson's conduct was improper and wrongful because their membership was essential to Tri-State's false claim of FERC jurisdiction, they joined as part of a conspiracy to obtain FERC jurisdiction under false pretenses, and Tri-State is using its false claim of FERC jurisdiction to try to imprison United Power in Tri-State.

82. After purporting to become Tri-State members, the responsibilities of the non-utility members did not change. MIECO continued to sell natural gas to Tri-State.

Ellgen continued to rent land from a wholly owned subsidiary of Tri-State. Olson’s continued to purchase steam from Tri-State for its own use. Each, however, received additional payment from Tri-State for engaging in the scheme to deprive the Colorado PUC of its jurisdiction over Tri-State through purported “patronage capital” and, in the case of Olson’s, an increased discount in the price it paid for steam. United Power believes, and therefore alleges, that even after substantial questions were raised publicly about the lawfulness of their membership in Tri-State, the non-utility members failed to take steps to determine whether their transactions with Tri-State violated Colorado law, or Tri-State’s Articles of Incorporation and Bylaws.

83. The Membership Agreements reveal the sole purpose of the non-utility members’ additions to Tri-State—each Membership Agreement is terminable if Tri-State does not obtain FERC jurisdiction. The non-utility members are members only to obtain FERC jurisdiction under false pretenses, and to deprive the Colorado PUC of its jurisdiction over exit fees charged by Tri-State to Colorado cooperatives. In other words, the purpose of their membership is to assist Tri-State in its efforts to prevent United Power from withdrawing as a Tri-State member-owner.

84. On June 3-4, 2019, Tri-State’s staff first revealed its plans to attempt to become FERC jurisdictional in Strategic Planning sessions with Tri-State’s Board of Directors. Tri-State staff indicated at that time, contrary to what Tri-State expressly told its members just a few months earlier, that it intended to recommend that the Board vote in July to pursue FERC regulation by adding a non-utility member.¹⁴ On June 13,

¹⁴ Tri-State’s conversations with potential non-utility members commenced, at the latest, in May 2019.

2019, Tri-State's Chief Executive Officer, Duane Highley, and General Counsel, Ken Reif, made a similar presentation to Tri-State's members, including United Power.

85. United Power and some of the other members attempted to delay the vote to allow for further due diligence, and Colorado's legislative leaders also requested a delay. Nonetheless, on July 9, 2019, over the objections of United Power and two other members, without allowing the Contract Committee to consider or recommend a class of membership for non-utility members, Tri-State's Board of Directors rushed the decision through and voted to seek FERC regulation by adding a non-utility member. Tri-State then passed an unlawful resolution purporting to give its CEO the authority to enter into contracts to add new, non-utility members.¹⁵

V. THE PUC PROCEEDING AND TRI-STATE'S EFFORTS TO OBTAIN FERC JURISDICTION.

86. United Power filed its Formal complaint with the PUC on November 6, 2019, which began Proceeding No. 19F-0621E. In that proceeding, United Power seeks a just, reasonable, and non-discriminatory exit charge to withdraw from Tri-State.¹⁶ The adjudication of what amount United Power should pay as an exit charge is not at issue in this lawsuit.

87. On December 20, 2019, the parties filed briefs with the PUC addressing the PUC's jurisdiction to hear exit charges. Tri-State argued that its purported addition

¹⁵ United Power is presently challenging the impropriety of this resolution specifically and of adding the non-utility members in the PUC proceeding.

¹⁶ The PUC subsequently consolidated United Power's Proceeding with a Proceeding filed by La Plata Electric Association, Inc., that also seeks a just, reasonable, and non-discriminatory exit charge to end its membership in Tri-State. The Joint Proceedings are Nos. 19F-0620E and 19F-0621E.

of MIECO, Ellgen and Olson’s preempted the PUC’s jurisdiction over member withdrawals.

88. On December 23, 2019, Tri-State requested that FERC enter a declaratory order confirming Tri-State’s contentions that (a) it was FERC jurisdictional, (b) FERC had exclusive jurisdiction over exit charge disputes, and (c) United Power’s PUC proceeding was preempted. Tri-State subsequently moved the PUC to stay the proceeding pending a FERC decision on its motion for a declaratory order.

89. On February 12, 2020, the PUC’s Hearing Commissioner rejected Tri-State’s preemption argument because she was “unpersuaded that the MIECO transaction was proper under Colorado law, that it resulted in MIECO becoming a member of Tri-State, and that MIECO’s membership results in the Complaints being preempted by federal law.”¹⁷ The Hearing Commissioner held that jurisdiction was proper in the PUC.¹⁸

90. On March 20, 2020, FERC issued its Order on Tri-State’s request for a declaration that the Commission’s jurisdiction over United Power’s PUC proceeding had been preempted. FERC declined to issue that declaration. It deferred to Colorado state tribunals the question whether MIECO’s membership in Tri-State was proper, stating that it was “more appropriately handled in state fora” and that “resolution of the pending Colorado PUC proceedings, or other litigation concerning Colorado law issues,

¹⁷ *La Plata Elec. Ass’n, Inc., Complainant*, No. 19F-0620E, ¶ 28, 2020 WL 837750, at *6 (Feb. 12, 2020)).

¹⁸ *Id.* at §§ 23, 27, 2020 WL 837750, at *5.

could be relevant to [FERC] proceedings in the future.”¹⁹ FERC further held that “the Colorado PUC’s jurisdiction over complaints regarding such exit charges is not *currently* preempted,” and “would not be preempted *unless and until* such ruling conflicts with a Commission-approved tariff or agreement that establishes how Tri-State’s exit charges will be calculated.”²⁰ FERC noted that “Tri-State has not yet filed, and the Commission has not yet approved, a methodology for determining Tri-State’s exit charges.”²¹

91. As alleged, FERC deferred to a Colorado tribunal the question whether Tri-State complied with Colorado statutes, its Articles of Incorporation, and its Bylaws in adding the non-utility companies as members, and United Power is asking the PUC to decide those questions in connection with determining a just, reasonable, and non-discriminatory exit charge. The other Colorado law issues mentioned by FERC are addressed in this Complaint.

VI. THE APRIL 9, 2020 BOARD RESOLUTIONS AND SUBSEQUENT TRI-STATE FERC FILINGS.

92. On April 9, 2020, Tri-State’s Board approved two resolutions (collectively the “Board Resolutions”) further underscoring that Tri-State never had any intention of providing United Power a right to select a partial requirements membership class. Nor did it have any intention of establishing an equitable methodology for Tri-State members who wished to buy out of their WESC. The Board Resolutions were passed for

¹⁹ *Tri-State Generation & Transmission Ass’n, Inc.*, 170 FERC ¶ 61224, P 76, 2020 WL 1321788, at *19 (Mar. 20, 2020).

²⁰ *Id.* at P 121, 2020 WL 1321788, at *32 (emphasis added).

²¹ *Id.*

the specific purpose of trying to prevent United Power from withdrawing as a Tri-State member, in direct contravention of the Bylaws.

A. The Buy Down Payment Formula Board Resolution.

93. On April 9, 2020, Tri-State’s Board adopted the first resolution at issue here, known as the “Buy Down Payment Formula.” That formula identifies a methodology by which a full requirements member can become a partial requirements member.²²

94. The methodology is illusory, because the payment is so punitive that no member can achieve a reasonable financial benefit by transitioning to partial requirements membership. By way of example only, United Power would not achieve any financial benefit from selecting Tri-State’s partial requirements option until *after* its WESC had already expired. And even if it made any financial sense, Tri-State reserves to its Board the discretion to preclude a member from selecting a partial requirements membership:

BE IT FURTHER RESOLVED, that any change by a Utility Full Requirements (Class A) Member to a Utility Partial Requirements (Class B) Member shall be subject to the approval of the Board of Directors and *no such Member shall be permitted to change, if, in the reasonable business judgement of the Board such change would have a material adverse effect on Tri-State Generation and Transmission Association, Inc.*²³

95. United Power believes, and therefore alleges, that Tri-State planned, through Blue Sky II and otherwise, to make a partial requirements membership

²² Exhibit 3, Tri-State Buy Down Payment Formula Board Resolution and Attachment (April 9, 2020) (emphasis added). The term “material adverse effect” is not defined.

²³ *Id.* at 2.

economically impracticable and illusory, and Tri-State concealed this fact from United Power while at the same time encouraging United Power to promote the April 2019 Bylaw amendment for the ostensible purpose of facilitating United Power's request to transition to partial requirements membership.

96. The Buy Down Payment Formula Board resolution conflicts with Colorado law because it reserves to the Board the discretion to discriminate among members.

97. Because the Buy Down Payment Formula Board resolution conflicts with Colorado law and was not passed in good faith, the Resolution is ultra vires, void, and a legal nullity.

B. The Contract Termination Payment Formula.

98. On April 9, 2020, Tri-State's Board also adopted a resolution purporting to provide an exit charge methodology (the "Contract Termination Payment Formula" or "CTP").²⁴ The CTP methodology was adopted in bad faith because it ignores Tri-State's governing documents, is subject to bias and manipulation, and can be applied discriminatorily. The CTP reserves to the Tri-State Board discretion to prohibit members from withdrawing, contrary to the Bylaws:

BE IT FURTHER RESOLVED, that any withdrawal by a Utility Member shall be subject to the approval of the Board of Directors and ***no Utility Member shall be permitted to withdraw, if, in the reasonable business judgement of the Board such withdrawal would have a material adverse effect on Tri-State Generation and Transmission Association, Inc.***²⁵

²⁴ Exhibit 4, Tri-State Contract Termination Payment Formula Board Resolution and Attachment (April 9, 2020).

²⁵ *Id.* at 2 (emphasis added).

99. The CTP also allows “adjustment” based on “individual Member commitments, and Tri-State’s financial position at the time of the Utility Member’s proposed withdrawal.” There is no definition in Tri-State’s Bylaws, Board Policies, Board Resolutions, or the CTP methodology of “material adverse effect,” “individual Member commitments,” or “financial position,” leaving the implementation of the CTP to the discretion of Tri-State’s Board.

100. The CTP Board resolution also conflicts with Section 4(a) of the Bylaws, which provides that a member may withdraw “upon compliance with such equitable terms and conditions as the Board of Directors may prescribe.”²⁶ The discretion Tri-State attempted to reserve to itself cannot be conferred by Board resolution but, instead, requires a Bylaw amendment. As such, the CTP Board resolution is a legal nullity.

101. Even if the CTP Board resolution were valid, which it is not, it cannot apply to United Power retroactively.

102. Because the CTP Board resolution conflicts with Colorado law and Tri-State’s Bylaws, is illusory and subject to discriminatory application, and was passed in bad faith, it is ultra vires, void, and a legal nullity.

VII. TRI-STATE’S MULTIPLE UNILATERAL AMENDMENTS OF UNITED POWER’S WESC THROUGH BOARD POLICIES WERE UNLAWFUL AND BREACHED THE WESC.

103. Section 11.1 of United Power’s WESC provides that “all representations and agreements between the Parties covering the subject matter hereof are expressed herein and in the exhibits hereto and that no other representation of any kind or nature, whether made by the officers or agents of either of the Parties, shall be binding.”

²⁶ Exhibit 1, Bylaws, ¶ 4(a).

104. Notwithstanding the language § 11.1, the WESC also purports to incorporate unidentified Tri-State Board Policies by reference.

105. Even if one or more Tri-State member-owners votes against a particular Board Policy, Tri-State takes the position that an affirmative vote in favor of a Board Policy by the Tri-State Board allows the Policy to apply to the WESCs of all members, including the dissenting member.

106. Tri-State also takes the position that an affirmative vote in favor of a Board Policy by the Tri-State Board, without seeking or receiving input from Tri-State member-owners, allows the Policy to apply to the WESCs of all members.

107. The Board Policies thus have been used by Tri-State to modify the terms and conditions of United Power's WESC unilaterally and, on occasion, over United Power's dissent and without its agreement. Among the Board Policies that have been used to modify the terms and conditions of United Power's WESC unilaterally and without United Power's agreement are Tri-State Board Policies 101 and 115.

108. Tri-State's use of Board Policies to modify the terms and conditions of United Power's WESC unilaterally and without its agreement constitute material breaches of the WESC, including § 11.1 of the WESC.

VIII. TRI-STATE'S WRONGFUL ACTIONS DIRECTLY HARMED UNITED POWER.

109. On April 13, 2020, Tri-State filed its CTP Methodology with FERC, purportedly as a tariff, and asked FERC to declare it effective as of April 14, 2020. The comment period for Tri-State's request expires on May 11, 2020, and FERC will take at least 60 days to review the request.

110. Tri-State's filing seeks to displace the PUC's jurisdiction over an exit charge for United Power.

111. If Tri-State is successful, United Power will be deprived of its statutory right to have the PUC adjudicate the exit charge, meaning that Tri-State could imprison United Power in violation of Colorado law and the Bylaws for years, which will cost United Power and its members tens or hundreds of millions of dollars.

112. Indeed, if the PUC or this Court does not stop Tri-State from using the Bylaw amendment that was procured by fraud or implementing the Board Resolutions requiring a three-year notice period and giving the Board essentially unfettered discretion over whether to allow United Power to withdraw, United Power will be imprisoned in Tri-State through 2050, which will cause United Power hundreds of millions of dollars or more in damages.

FIRST CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to C.R.C.P. 57 and C.R.S. § 13-51-106
Concerning the April 2019 Bylaw Amendment—Tri-State Only)

113. United Power incorporates by reference the allegations set forth in all prior paragraphs as if fully set forth herein.

114. The Bylaws are an enforceable written contract between Tri-State and United Power.

115. The April 2019 amendment to the Bylaws purports to be an amendment to the written contract and to allow for the creation of new membership classes in Tri-State.

116. There is an existing and actual legal controversy that can be effectively resolved by a declaratory judgment from this Court, namely, (1) whether the April 2019 Bylaw amendment is ultra vires, void, invalid, and a legal nullity because it was passed as a result of Tri-State's fraudulent conduct as described herein.

117. Specifically, as alleged, Tri-State made material misrepresentations of fact and concealed material facts related to the purpose of the Bylaw amendment and Tri-State's intentions vis-à-vis attempting to become FERC jurisdictional. United Power relied on Tri-State's representations to its detriment when it championed the Bylaw amendment and voted in favor of it and that reliance has directly harmed United Power because Tri-State is using the Bylaw amendment it procured by fraud to prevent United Power from withdrawing from Tri-State on equitable terms and to purportedly add new members whose membership is unlawful under Colorado law, as well as Tri-State's Articles of Incorporation and Bylaws.

118. United Power has legal rights that are affected by Tri-State's use of a Bylaw amendment, the passage of which was procured by fraud and thus is invalid. Because the Bylaw amendment is invalid, any use of the amendment by Tri-State is likewise null, void, and invalid.

119. An actual and justiciable controversy exists regarding the parties' respective rights under Colorado law, and a declaratory judgment will terminate the controversy giving rise to this aspect of the proceeding.

120. United Power is requesting an interpretation of the rights, legal status, and relationships of the parties under the above law and facts.

121. United Power is entitled to a declaratory judgment pursuant to C.R.C.P. 57 and Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.*, declaring that the April 2019 amendment to the Bylaws providing the Tri-State Board of Directors authority to create new membership classes is ultra vires, void, and a legal nullity because it was procured through fraud and in bad faith.

SECOND CLAIM FOR RELIEF
(Civil Conspiracy—All Defendants)

122. United Power incorporates by reference the allegations set forth in all prior paragraphs as if fully set forth herein.

123. Defendants conspired for the express purpose of depriving the PUC of jurisdiction over exit charge disputes involving Colorado cooperatives, including United Power's, which would interfere with United Power's contractual right to exit Tri-State, and they agreed to accomplish that purpose by execution of the Membership Agreements.

124. Defendants used unlawful means to accomplish the object of their conspiracy including, *inter alia*, Tri-State's use of fraud, misrepresentation, and material non-disclosure to procure the passage of the 2019 Bylaw amendment as alleged in United Power's First Cause of Action, the recruitment and unlawful purported addition of MIECO, Ellgen and Olson's as non-utility members in violation of Colorado law and Tri-State's Articles of Incorporation and Bylaws, and the non-utility members' intentional interference with United Power's contractual rights as alleged in United Power's Third Cause of Action.

125. As a direct and proximate result of Defendants' unlawful conspiracy, United Power has suffered actual and compensatory damages far in excess of this Court's jurisdiction, in an amount to be proved at trial.²⁷

THIRD CLAIM FOR RELIEF
(Intentional Interference with Contract—MIECO, Ellgen & Olson's only)

126. United Power incorporates by reference the allegations set forth in all prior paragraphs as if fully set forth herein.

127. The Bylaws are an enforceable contract between Tri-State and United Power.

128. The Bylaws between Tri-State and its members provide that a member may withdraw "upon compliance with such equitable terms and conditions as the Board of Directors may prescribe."

129. The Bylaws and WESC are inextricably intertwined because executing the WESC was a condition of United Power's membership in Tri-State. The "equitable terms and conditions" required by the Bylaws for withdrawal therefore includes termination of the member's WESC with Tri-State.

130. MIECO, Ellgen, and Olson's were aware of United Power's Bylaw Agreement and WESC with Tri-State.

131. MIECO, Ellgen, and Olson's agreement to become members of Tri-State caused Tri-State to breach the Bylaw Agreement and WESC with United Power by taking actions to prevent United Power's withdrawal from Tri-State.

²⁷ Because Defendants' conduct was intentional and malicious, United Power will amend this Complaint at an appropriate time to seek punitive damages against all Defendants.

132. MIECO, Ellgen, and Olson's knew that Tri-State's breach of the Bylaw Agreement and WESC was certain or substantially certain to occur as a result of their unlawful purported membership in Tri-State.

133. Tri-State materially breached the Bylaw Agreement and WESC by, *inter alia*, refusing to allow United Power to withdraw from Tri-State on equitable terms and conditions proportionately similar to the terms and conditions on which Kit Carson and DMEA were permitted to withdraw and terminate their WESCs. Tri-State's breach is continuing.

134. MIECO, Ellgen, and Olson's conduct was improper and wrongful because their unlawful purported membership was essential to Tri-State's false claim of FERC jurisdiction, they joined as part of an unlawful conspiracy to claim FERC jurisdiction under false pretenses, and Tri-State is using its false claim of FERC jurisdiction to try to imprison United Power in Tri-State.

135. As a direct and proximate result of MIECO, Ellgen, and Olson's intentional interference with the Bylaw Agreement and WESC, United Power has suffered actual and compensatory damages far in excess of this Court's jurisdiction, in an amount to be proved at trial.

FOURTH CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to C.R.C.P. 57 and C.R.S. § 13-51-106
Concerning the April 2020 Board Resolutions—Tri-State only)

136. United Power incorporates by reference the allegations set forth in all prior paragraphs as if fully set forth herein.

137. The Bylaws are an enforceable contract between Tri-State and United Power. The covenant of good faith and fair dealing is implied by law into every contract, including the Bylaws. The covenant of good faith and fair dealing requires that parties to a contract, when exercising discretion, act in good faith and deal fairly and non-discriminatorily with parties like United Power that seek to withdraw from Tri-State. United Power has legal rights that are affected by the interpretation of the Bylaws and Board Resolutions.

138. On April 9, 2020, Tri-State's Board of Directors approved two Board Resolutions—the Buy Down Payment Formula Board Resolution and the Contract Termination Payment Board Resolution. Those resolutions conflict with the Bylaws and were passed in bad faith and for the purpose of discriminating against United Power.

139. There is an existing and actual legal controversy that can be effectively resolved by a declaratory judgment addressing the Board Resolutions, namely, whether the Board Resolutions apply to United Power (since they were passed subsequent to United Power's request to withdraw) and whether the Board Resolutions violate the duty of good faith and fair dealing implied into the Bylaws, conflict with Tri-State's Bylaws and thus are ultra vires, void, and a legal nullity. United Power is requesting an interpretation of the rights, legal status, and relationships of the parties under the above law and facts.

140. United Power is entitled to a declaratory judgment pursuant to C.R.C.P. 57 and Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.*, declaring that the Board Resolutions do not apply to United Power, conflict with the Bylaws, and were

passed in bad faith and for the purpose of discriminating against United Power, rendering them ultra vires, void, and a legal nullity.

FIFTH CLAIM FOR RELIEF
(Declaratory Judgment Pursuant to C.R.C.P. 57 and C.R.S. § 13-51-106
Concerning United Power's Rights and Obligations
Under the Bylaws and WESC—Tri State only)

141. United Power incorporates by reference the allegations set forth in all prior paragraphs as if fully set forth herein.

142. United Power entered into the Bylaws and WESC with Tri-State. Those two contracts are inextricably intertwined because executing the WESC was a condition of United Power's membership in Tri-State under the Bylaws. United Power has legal rights that are affected by the interpretation of the Bylaws and WESC.

143. The covenant of good faith and fair dealing is implied by law into every contract by law, including the Bylaws and WESC.

144. Tri-State materially breached the Bylaw Agreement and WESC by, *inter alia*, refusing to allow United Power to withdraw from Tri-State on equitable terms and conditions proportionately similar to the terms and conditions on which Kit Carson and DMEA were permitted to withdraw and terminate their WESCs. Tri-State's breach is continuing.

145. Tri-State materially breached the WESC by unilaterally and unlawfully purporting to amend its terms and conditions through Board Policies to which United Power did not agree, as more specifically alleged in ¶¶ 103-108, above.

146. Tri-State's material breaches of the Bylaws and WESC excuses United Power from further performance under the Bylaws and WESC.

147. There is an existing and actual legal controversy that can be effectively resolved by a declaratory judgment regarding the Bylaws and WESC, namely, whether Tri-State has materially breached the Bylaws and WESC, and whether Tri-State's prior material breaches excuse United Power from further performance under the Bylaws and WESC. United Power is requesting an interpretation of the rights, legal status, and relationships of the parties under the above law and facts.

148. United Power is entitled to a declaratory judgment pursuant to C.R.C.P. 57 and Uniform Declaratory Judgments Law, C.R.S. § 13-51-101, *et seq.*, declaring that Tri-State has materially breached the Bylaws and WESC, and due to Tri-State's prior material breaches, United Power is relieved from any obligation to further perform under those agreements.

SIXTH CLAIM FOR RELIEF
(In the Alternative, Breach of Contract—Tri-State only)

149. United Power incorporates by reference the allegations set forth in all prior paragraphs as if fully set forth herein.

150. The Bylaws are an enforceable contract between Tri-State and United Power.

151. The Bylaws are an enforceable contract between Tri-State and United Power. The covenant of good faith and fair dealing is implied by law into every contract, including the Bylaws. The covenant of good faith and fair dealing requires that parties to a contract, like Tri-State, when exercising discretion, act in good faith and deal fairly and non-discriminatorily with parties like United Power that seek to withdraw from Tri-State.

152. United Power has performed all of its obligations under the Bylaws and the WESC.

153. The Bylaws between Tri-State and its members provide that a member may withdraw “upon compliance with such equitable terms and conditions as the Board of Directors may prescribe.”

154. The Bylaws and WESC are inextricably intertwined because executing the WESC was a condition of United Power’s membership in Tri-State under the Bylaws. The “equitable terms and conditions” required by the Bylaws for withdrawal therefore includes termination of the member’s WESC with Tri-State.

155. In August 2018, in response to United Power’s request for equitable terms and conditions to exit Tri-State, Tri-State provided an “indicative buyout calculation,” which if paid by United Power, would result in a massive windfall to Tri-State and its non-withdrawing members. Since that time, Tri-State has refused to provide equitable terms and conditions for United Power to withdraw from membership and has refused to allow United Power to withdraw on terms proportionately similar to those afforded Kit Carson and DMEA, which contravenes the Bylaws and Colorado law.

156. Tri-State’s refusal to provide equitable terms and conditions for United Power’s withdrawal is contrary to material terms of the Bylaws, the implied covenant of good faith and fair dealing, Colorado law, and the voluntary nature of cooperative membership.

157. By refusing to provide equitable terms and conditions on which United Power can withdraw as a member of Tri-State, Tri-State materially breached the Bylaws.

158. Tri-State's conduct has resulted in damages to United Power in the form of higher electricity rates, adverse impacts on the consumer-members of United Power, and adverse impacts on the economy of the areas served by United Power far in excess of this Court's jurisdiction, in an amount to be proved at trial.

PRAYER FOR RELIEF

WHEREFORE, United Power respectfully requests the following relief:

1. For an Order on United Power's First Cause of Action, pursuant to C.R.C.P. 57, declaring that the April 2019 amendment to the Bylaws providing the Tri-State Board of Directors authority to create new membership classes is ultra vires, void, and a legal nullity because it was procured through fraud, in violation of the covenant of good faith and fair dealing implied into the Bylaws, and in material breach of the Bylaws;
2. For damages on United Power's Second and Third Causes of Action in an amount to be proved at trial;
3. For an Order on United Power's Fourth Cause of Action, pursuant to C.R.C.P. 57, declaring that the April 9, 2020 Board Resolutions conflict with the Bylaws and the covenant of good faith and fair dealing implied into the Bylaws, and are thus ultra vires, void, and a legal nullity;
4. For an Order on United Power's Fifth Cause of Action, pursuant to C.R.C.P. 57, declaring that Tri-State materially breached the Bylaws and WESC, and due to Tri-State's prior material breach, United Power is relieved from any obligation to further perform the Bylaws and WESC;

5. In the alternative, for damages on United Power's Sixth Cause of Action in an amount to be proved at trial;

6. For an award of all reasonable attorneys' fees to the extent such may be allowable by law or contract;

7. For an award of allowable costs and expenses;

8. For an award of pre-judgment and post-judgment interest; and

9. For such other and further relief in law or equity as the Court deems just and proper.

DEMAND FOR JURY TRIAL

United Power demands a jury trial on all claims or aspects of claims so triable.

Dated: May 4, 2020

Respectfully submitted,

s/ Michael L. O'Donnell

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Peter W. Herzog III (*pro hac vice*
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