

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

LA PLATA ELECTRIC ASSOCIATION,)

COMPLAINANT,)

V.)

TRI-STATE GENERATION AND)
TRANSMISSION ASSOCIATION, INC.,)

PROCEEDING NO. 19F-0620E

RESPONDENT.)

UNITED POWER, INC.,)

COMPLAINANT,)

V.)

TRI-STATE GENERATION AND)
TRANSMISSION ASSOCIATION, INC.,)

PROCEEDING NO. 19F-0621E

RESPONDENT.)

REBUTTAL TESTIMONY AND ATTACHMENTS OF JASON R. WIENER

ON BEHALF OF

UNITED POWER, INC. AND LA PLATA ELECTRIC ASSOCIATION, INC.

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

March 16, 2020

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Attachment JRW-2	March 13, 2020 Memorandum from Jason Wiener and Linda Phillips regarding Tri-State's Purported Admission of Three Non-Utility Companies

1 **I. INTRODUCTION AND SUMMARY**

2 **Q. PLEASE STATE YOUR NAME AND BUSINESS ADDRESS.**

3 A. Jason R. Wiener. My business address is 1919 14th Street, Suite 700, Boulder, CO 80302.

4 **Q. ON WHOSE BEHALF ARE YOU TESTIFYING?**

5 A. I am testifying on behalf of United Power, Inc. (“United Power”) and La Plata Electric
6 Association, Inc. (“La Plata”), in this consolidated proceeding at the Colorado Public
7 Utilities Commission (“Commission”) regarding their respective complaints against Tri-
8 State Generation and Transmissions Association, Inc. (“Tri-State”).

9 **Q. PLEASE SUMMARIZE YOUR PROFESSIONAL QUALIFICATIONS.**

10 A. I have been licensed to practice law since 2005. I served as the General Counsel to a
11 worker-owned cooperative Namaste Solar for 5.5 years. I formed an eponymous law firm
12 in 2014 to focus on cooperative law. In the last 6 years, I have worked with more than 50
13 cooperatives across North America. I advise cooperatives on a broad range of issues
14 including but not limited to their charter documents, governance, patronage, financing,
15 securities, outside general counsel, and other compliance aspects. I have written more than
16 six scholarly published law review articles, dozens of blog articles relating to cooperatives,
17 and presented to more than one thousand people about cooperative law topics. I was invited
18 to speak about cooperative law to the Harvard Law Forum in 2018. I have attached my
19 CV to my testimony as **Attachment JRW-1**.

20 **Q. WHAT QUESTIONS HAVE YOU BEEN ASKED TO ADDRESS IN**
21 **THIS PROCEEDING?**

22 A. I have been asked to assess whether Tri-State’s purported admission of MIECO,
23 Inc. (“MIECO”), Olson’s Greenhouses of Colorado, LLC (“Olson’s Greenhouses”),

1 and Ellgen Ranch Company (“Ellgen Ranch”) (collectively, the “Non-Utility Companies”)
2 as members of the Tri-State cooperative was proper and valid under Colorado law
3 governing cooperatives (particularly C.R.S. Title 7, Articles 55 and related provisions),
4 Tri-State’s Articles of Incorporation, as amended (“Articles”), Corporate Bylaws
5 (“Bylaws”), and its membership agreements with the Non-Utility Companies.

6 **Q. WHAT, IF ANYTHING, DID YOU CONCLUDE?**

7 A. The opinions I have formed in this case are completely set forth in the memorandum
8 (the “Wiener Memorandum”) attached hereto as **Attachment JRW-2**. In the interest of
9 efficiency and not repeating that analysis, I adopt **Attachment JRW-2** in full as my
10 opinions as if fully set forth herein, in response to this specific question and my responses
11 to the specific questions below.

12 As set forth more fully in **Attachment JRW-2**, the chain of corporate acts taken
13 by Tri-State does not have just one weak link, it has many. Several links in the chain are
14 void or voidable. Some of the links are voidable on more than one ground. Tri-State’s
15 actions purporting to admit MIECO, Olson’s Greenhouses, and Ellgen Ranch are improper,
16 unlawful, and void because the actions were taken without authority under, and in
17 contravention of, C.R.S. Title 7, Article 55, Tri-State’s Articles, and Bylaws.

18 **Q. ARE YOU SPONSORING ANY ATTACHMENTS TO YOUR TESTIMONY?**

19 A. Yes, attachments **JRW-1 – JRW-2**.

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II. INFORMATION RELIED UPON TO DEVELOP OPINIONS

Q. WHAT INFORMATION HAVE YOU RELIED UPON TO GUIDE YOU IN THE DEVELOPMENT OF YOUR OPINIONS?

A. In my analysis of Tri-State’s purported addition of the Non-Utility Companies in light of Colorado cooperative law, Tri-State’s Articles, and Tri-State’s Bylaws, I principally considered the following materials, as more particularly described in Section A of

Attachment JRW-2:

- The Colorado Revised Statutes (including, in particular, Title 7, Article 55, and related statutory provisions);
- Selected opinions issued by Colorado courts that involve relevant provisions of the Colorado Revised Statutes or other issues relating to corporate and cooperative organization under Colorado law;
- Un-stamped Tri-State Amended and Restated Articles of Incorporation, effective as of June 30, 2000 (“Articles”);
- Amended and Restated Bylaws of Tri-State, dated April 3, 2019;
- Membership Agreements between Tri-State and the three Non-Utility Companies, MIECO (dated August 15, 2019, and including Amendment No. 1 dated September 3, 2019), Ellgen Ranch (dated November 14, 2019), and Olson’s Greenhouses (dated November 14, 2019);
- Indemnity Agreement between Tri-State and Olson’s Greenhouses, dated October 1, 2019;

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- The transcript of the deposition of Bradford Nebergall dated March 3, 2020;
- The transcript of the deposition of Ricky Gordon dated March 6, 2020;
- The transcript of the deposition of Kenneth Reif dated March 3, 2020; and
- Any other documents referenced herein and in the Wiener Memorandum.

1 **Q. WHAT ELSE, IF ANYTHING, HAVE YOU CONCLUDED ABOUT WHETHER**
2 **TRI-STATE’S PURPORTED ADDITION OF THE NON-UTILITY COMPANIES**
3 **COMPLIES WITH COLORADO LAW, THE ARTICLES, OR BYLAWS?**

4 A. As I discuss more fully in **Attachment JRW-2**, Tri-State’s purported admission of
5 the three Non-Utility Companies is improper and void because each was acted upon
6 without authority under and in contravention of C.R.S. Title 7, Article 55, Internal Revenue
7 Code Subchapter T, Tri-State’s Articles of Incorporation, and Tri-State’s Bylaws. Again,
8 **Attachment JRW-2** provides more detail in response to this question (and thus I
9 incorporate it by reference in response to this question as well), but here I summarize three
10 of the key deficiencies in Tri-State’s attempt to add the Non-Utility Companies as
11 members.

12 *First*, Tri-State’s attempt to admit MIECO, Olson’s Greenhouses and Ellgen Ranch
13 was improper and of no effect under Colorado law, because Article 55 requires that uniform
14 terms and conditions of membership be set forth *in the Bylaws*. The new, Non-Utility
15 Companies’ terms of purported membership are anything but uniform. Indeed, the Non-
16 Utility Companies are treated differently in at least the following ways:

- 17 • They do not elect a representative to serve on Tri-State’s board of directors or
18 have a board vote.
- 19 • They do not contribute patronage capital in the same manner as the Utility
20 Members.
- 21 • Their agreements are terminable on far different terms than the prior existing
22 members of Tri-State, all of which are electric distribution cooperatives (the
23 “Utility Members”).
- None of the Non-Utility Companies are in the same business as the Utility
 Members or follow the agreed upon purpose of the 43 Utility Members who are
 at the core of Tri-State’s business. Indeed, none of Non-Utility Companies

1 purchase electrical power from Tri-State, and none of them sell electrical power
2 to end user customers.

- 3 • Tri-State has indemnified Olson’s Greenhouses against liability associated with
4 its purported admission to Tri-State membership; none of the other Utility
5 Members or Non-Utility Companies are provided a similar indemnification.
- 6 • The three Non-Utility Companies were conferred rights and agreed to terms and
7 conditions of membership in a contract, whereas the Utility Members were
8 conferred rights and agreed to terms and conditions set forth in the Bylaws.

9 Although Tri-State attempted to establish terms and conditions in separate contracts
10 with each Non-Utility Company, it cannot waive the uniformity requirement required by
11 Article 55 in a private contract; particularly one that was never voted on by Tri-State’s
12 Board as required by Tri-State’s governing documents.

13 **Second**, it is impermissible to amend corporate bylaws for an unlawful purpose.
14 Yet, as Tri-State’s own corporate witnesses admit (including its general counsel), that is
15 precisely what Tri-State did in this case by purporting to amend the Bylaws for the express
16 purpose of defeating the Colorado Public Utilities Commission’s jurisdiction over Tri-
17 State’s rates and charges, including exit charges for members seeking to withdraw from
18 Tri-State. Thus, the purported Bylaw amendment is void since it was not accomplished for
19 a proper purpose.

20 **Finally**, even assuming that the April 2019 Bylaw amendment was accomplished
21 for a valid reason and would stand, that amendment did not go far enough to allow for the
22 new Non-Utility Companies to be added as Tri-State members. While Tri-State amended
23 Article I, Section 2 of its Bylaws to allow for new classes of membership, it failed at the
time to amend or eliminate numerous other provisions in the Bylaws that still govern
membership in Tri-State, and impose requirements on all members—requirements that the

1 **Non-Utility Companies do not, and cannot meet.** Tri-State subsequently attempted to
2 address these failures through the Non-Utility Companies' membership agreements and a
3 Board resolution. It is fundamental under well-established principles of Colorado
4 cooperative and corporate law, however, that a private contract like a membership
5 agreement cannot effectuate changes to the membership requirements specified in Tri-
6 State's Bylaws. As I noted previously, **a membership agreement cannot waive the**
7 **uniformity requirements set forth in Article 55 of Title 7.**

8 At bottom, Tri-State's actions to admit MIECO, Olson's Greenhouses, and Ellgen
9 Ranch are improper and unlawful because each was acted upon without authority under,
10 and in contravention of, C.R.S. Title 7, Article 55, Tri-State's Articles, and Tri-State's
11 Bylaws.

12 **IV. CONCLUSION**

13 **Q. DOES THIS CONCLUDE YOUR REBUTTAL TESTIMONY?**

14 **A.** Yes.

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