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United States District Court,
 D. Nebraska.
 CHIMNEY ROCK PUBLIC POWER DISTRICT,
 Midwest Electric Cooperative Corporation, North-
 west Rural Public Power District, Panhandle Rural
 Electric Members IP Association, and Roosevelt
 Public Power District, Plaintiffs,
 v.
 TRI-STATE GENERATION AND TRANSMIS-
 SION Association, Inc., and Harold “Hub” Thomp-
 son, Defendants.

No. 7:09-CV-5008-LES-FG3.
 July 13, 2010.

[Adam M. Peters](#), [Philip J. Roselli](#), [Raymond L. Gif-
 ford](#), Wilkinson, Barker Law Firm, Denver, CO, for
 Plaintiffs.

[Brian G. Eberle](#), [Michael B. Carroll](#), [Robert E.
 Youle](#), Sherman, Howard Law Firm, [Daniel M.
 Reilly](#), [Eric Fisher](#), [Marisa B. Hudson-Arney](#), Reilly,
 Pozner Law Firm, Denver, CO, [Joseph K. Meusey](#),
[Patrick S. Cooper](#), Fraser, Stryker Law Firm,
 Omaha, NE, for Defendants.

FINDINGS AND RECOMMENDATION

[F.A. GOSSETT](#), United States Magistrate Judge.

*1 This matter is before the magistrate judge pursuant to [28 U.S.C. § 636](#) and the referral of Judge Strom on the motions to transfer venue pursuant to [28 U.S.C. 1404\(a\)](#) filed by defendants, Harold “Hub” Thompson (Docs. 34, 35 & 36) and Tri-State Generation and Transmission Association, Inc. (“Tri-State”) (Docs. 40, 41 & 42). The court has considered the plaintiffs’ response (Docs. 53 & 54), the movants’ reply briefs (Docs. 57 & 59), and evidentiary materials submitted in conjunction with the defendants’ motions to dismiss (Docs. 39 & 45). The court recommends that the motions be granted and that this matter be transferred to the District of Colorado, as requested.

I. BACKGROUND

The plaintiffs are rural Nebraska non-profit elec-

trical distribution cooperatives, public power districts or electrical membership associations that provide electricity to member-consumers in Nebraska. Plaintiffs are also members and owners of defendant Tri-State. Tri-State is a Colorado cooperative association (a Generation and Transmission Association or “G & T”) organized under Colorado law with its headquarters located in Westminster, Colorado. Defendant Thompson resides in the State of Wyoming and is the President and Chairman of the Board of Tri-State.

Tri-State provides power to the plaintiffs pursuant to separate “All Requirements” power supply contracts. Under these contracts, Tri-State must provide all of the power that each plaintiff may require to serve its customers, but each plaintiff may provide up to five percent of its energy needs with renewable energy or distributed generation.

The power that Tri-State supplies to the plaintiffs is generated by either the Western Area Power Administration (“WAPA”) ^{FN1}, a United States governmental entity that provides cost-based hydroelectric power, or Basin Electric Power Cooperative (“Basin”), a North Dakota-based G & T. Each plaintiff then distributes the power to its end-user customers within the state of Nebraska.

^{FN1}. WAPA is an agency of the U.S. Department of Energy. Its headquarters and principal place of business is in Lakewood, Colorado and WAPA’s operations are managed from locations in Colorado. WAPA has small maintenance offices in Nebraska for purposes of physically maintaining power transmission lines. It has no administrative or management offices in Nebraska.

Plaintiffs and Tri-State entered into the All Requirements contracts in 2001. Plaintiffs allege in the Complaint, ¶ 143, that “[t]he All Requirements Contracts between Tri-State and each of the plaintiffs are governed by Colorado law.” *See also* Doc. 45 at pp. 17 & 32. The contracts were initially effective through December 31, 2040 (Doc. 45 at p. 17 ¶ 12); however, in 2007 Tri-State received extensions of the All Requirements contracts between Tri-State and each of the plaintiffs through December 31, 2050

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(Doc. 45 at p. 32 ¶ 12). Plaintiffs contend they executed the contract extensions under duress or coercion due to threats by Tri-State and/or Thompson. *See* Complaint ¶¶ 96-99.

Tri-State sets the rates and assesses charges for the power it provides to the plaintiffs. TriState's policy is to charge "postage stamp" rates, i.e., members pay the same rates regardless of TriState's actual disparate costs to serve each member. *See* Complaint ¶¶ 111-113. Tri-State was formed in 1952 to mutually benefit all members by serving as a central source of wholesale power and to provide a reliable, cost-based supply of electricity. Complaint ¶ 73. While the plaintiffs continue to serve rural areas that have not changed much since 1952, other members of Tri-State have grown dramatically and cost significantly more to serve than do the Nebraska plaintiffs. In this lawsuit, plaintiffs allege that Tri-State now charges them excessive and inequitable rates and has refused plaintiffs' requests to evaluate the rates and develop cost-based rates to replace the "postage stamp" rates. Plaintiffs contend that for the past several years, the revenues they contributed to Tri-State have been almost double Tri-State's cost to acquire the power from WAPA and Basin. Plaintiffs complain that they have wrongfully been forced to subsidize other members of Tri-State. by paying excessive rates and underwriting significant capital investments that benefit only those other systems *See* Complaint ¶¶ 115-119.

*2 Tri-State and Thompson allegedly prevented the plaintiffs from withdrawing from Tri-State. In July 2009, defendant Thompson chose persons to serve on a "Nebraska Withdrawal Committee." None of the chosen committee members were from the plaintiff systems. The committee's recommendations on the matter of withdrawal were addressed in an executive session during TriState's September 1, 2009 Board meeting. Plaintiffs' individual representative directors were excluded from the executive session and the vote. At the end of the executive session, plaintiffs' directors were recalled to the Board room and given "buy-out packets" expressing the terms and conditions upon which the plaintiffs would be allowed to withdraw from Tri-State. Plaintiffs allege that the buy-out figures and other conditions were allegedly "so unreasonable ... as to ensure that withdrawing on those terms and conditions would not be a viable option for any of the Plaintiffs." *See* Complaint ¶¶ 36 & 123.

Plaintiffs assert the following claims for relief:

1. Against Tri-State for breach of the All Requirements contracts in setting plaintiffs' rates,
2. Against Tri-State for breach of the covenant of good faith and fair dealing implied in each of the All Requirements contracts, based on the manner in which Tri-State has set rates under the contracts,
3. Against Tri-State for breach of its common law obligation to fairly set rates,
4. Against Tri-State for failure to establish equitable terms and conditions to allow plaintiffs to withdraw from Tri-State,
5. Against Thompson for breach of fiduciary duty, as a member of the Nebraska Withdrawal Committee, in failing to provide equitable terms and conditions that would allow plaintiffs to withdraw from Tri-State,
6. Against Thompson, as Chairman and President of the Board of Tri-State, for breach of fiduciary duty owed to plaintiffs through his various actions in violation of Colorado law, Tri-State's Articles of Incorporation and Bylaws, and Tri-State's Board policies,
7. For a declaratory judgment that, in the event plaintiffs withdraw from Tri-State, any allocations of WAPA power belong to the plaintiffs and plaintiffs are entitled to retain their respective allocations of WAPA power, and
8. Against Tri-State for inflating or "marking up" its rates for WAPA power allocations, in breach of its contract with WAPA.

II. LAW

The statute governing transfers of venue provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." [28 U.S.C. § 1404\(a\)](#). "The statute 'was drafted in accordance with the doctrine of forum non conveniens, permitting transfer to a more convenient forum, even though the venue is

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proper.’ “ *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir.2010) (quoting *Van Dusen v. Barrack*, 376 U.S. 612, 634 n. 30 (1964)). “ ‘Congress, in passing § 1404(a), was primarily concerned with the problems arising where, despite the propriety of the plaintiff’s venue selection, the chosen forum was an inconvenient one.’ “ *Id.* (quoting *Van Dusen*, 376 U.S. at 634).

*3 In general, the party seeking transfer bears the burden of establishing that the transfer should be granted. See *Terra Int’l, Inc. v. Mississippi Chem. Corp.*, 119 F.3d 688, 695 (8th Cir.), cert. denied, 522 U.S. 1029 (1997); *Nelson v. Bekins Van Lines Co.*, 747 F.Supp. 532, 535 (D.Minn.1990). The movant must make a clear showing that the balance of interest weighs in favor of the movant. See *General Comm. of Adjustment v. Burlington N. R.R.*, 895 F.Supp. 249, 252 (E.D.Mo.1995); *BASF Corp. v. Symington*, 50 F.3d 555, 557 (8th Cir.1995). A transfer should not be granted if the effect is to merely shift the inconvenience from one party to the other. *Nelson*, 747 F.Supp. at 535 (citing *Van Dusen v. Barrack*, 376 U.S. at 646); *General Comm. of Adjustment*, 895 F.Supp. at 252; see generally *Ferens v. John Deere Co.*, 494 U.S. 516, 522-23 (1990). In order to prevail, the party seeking the change of venue must show that its inconvenience strongly outweighs the inconvenience the opposing party would suffer if venue were transferred. See *Nelson*, 747 F.Supp. at 535.

A. Where the actions “might have been brought”

The majority of plaintiffs’ claims arise under Colorado law. There is diversity of the parties, as the plaintiffs reside in Nebraska and the defendants reside in Colorado. The matter in controversy exceeds the \$75,000 jurisdictional amount, and the federal district court has subject matter jurisdiction pursuant to [28 U.S.C. § 1332](#).

Under the venue statute, [28 U.S.C. § 1391](#),

(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in

(1) a judicial district where any defendant resides, if all defendants reside in the same State,

(2) a judicial district in which a substantial part of the events or omissions giving rise to the claim oc-

curred, or a substantial part of property that is the subject of the action is situated, or

(3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

The court finds that this action could have been brought in the District of Colorado.

B. Convenience of Parties & Witnesses

The Eighth circuit has “declined to offer an ‘exhaustive list of specific factors to consider’ in making the transfer decision.” *In re Apple, Inc.*, 602 F.3d at 912 (quoting *Terra Int’l*, 119 F.3d at 691). This court should, however, “weigh any ‘case-specific factors’ relevant to convenience and fairness to determine whether transfer is warranted.” *Id.*

In this case, Tri-State is a Colorado entity. Its headquarters and principal place of business has always been in Colorado, and its records are maintained in Colorado. According to Tri-State’s general counsel, Kenneth V. Reif, about 81% of Tri-State’s employees were located in Colorado and about 2.5% of Tri-State’s employees were located in Nebraska as of 2009. The employees responsible for assisting the Board of Directors in determining and implementing rates live and work in Colorado. The documents explaining Tri-State’s costs, revenues, growth projections, regulatory environment and related issues are all located in Colorado. The Board of Directors sets the member rates at board meetings that occur only in Colorado. All of the meetings and votes of the Board of Directors and the Nebraska Withdrawal Committee at issue in this action occurred in Colorado. All of Tri-State’s documents relating to rate-making cases that were litigated before the Colorado Public Utilities Commission are located at its corporate headquarters in Colorado. Since Tri-State’s bylaws do not permit proxy or absentee voting, all board members must travel to Tri-State’s headquarters in Colorado to attend monthly board meetings.

*4 Mr. Reif specifically identified eight potential former-employee witnesses who live in Colorado. These individuals are retired, and Tri-State cannot compel them to travel to Nebraska as a condition of their employment. If Tri-State’s motion for dismissal is denied, Tri-State will have at least 20 current em-

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ployees and at least 20 former employees, who live in Colorado, who are likely to provide evidence.

Defendant Thompson states that he has homes in Wyoming and Colorado. As President and Chairman of the Board of Tri-State, he spends about two thirds of his time in Colorado. Most of his work for Tri-State occurs in Colorado, and he presides over monthly board meetings and executive committee meetings in Colorado. (Doc. 36, Affidavit of Harold Thompson).

In claims Nos. 7 and 8, plaintiffs seek relief as third-party beneficiaries of the contract between Tri-State and the Western Area Power Administration ("WAPA"). Tri-State's Transmission Policy Administrator, Ronald W. Steinbach, advises that WAPA's headquarters is located in Lakewood, Colorado. WAPA's Rocky Mountain Region, which handles various issues relating to the administration of the Tri-State/WAPA contract, is located in Loveland, Colorado. Although WAPA has small maintenance offices in Nebraska, it has no administrative or management offices in Nebraska. All of WAPA's employees with knowledge of, and documents relevant to, the issues raised in the complaint are located in Colorado. Mr. Steinbach worked for WAPA from 1982 through March 2008. He specifically identified five retired WAPA employees (two of whom were also identified by Mr. Reif) who currently live in Colorado, have knowledge of the events alleged in the complaint, and would be called to provide relevant evidence in this litigation.

In response, plaintiffs contend that this court should defer to their choice of forum in North Platte, Nebraska because they are residents of Nebraska and the harm alleged is exclusively felt by their customers in Nebraska. (Doc. 53, Plaintiffs' Brief at p. 3). The plaintiffs' electrical distribution systems are located in Nebraska, and they are not registered to conduct business in Colorado; however, Tri-State is registered to do business in Nebraska. Plaintiffs' documents and records are located in Nebraska. Representatives of Tri-State came to Nebraska on approximately three occasions in January 2007 to discuss the extension of the All Requirements contract. The contract extensions were mailed to the plaintiffs' offices in Nebraska. Representatives of Tri-State attended a meeting with the plaintiffs in Bridgeport, Nebraska on July 24, 2009. Plaintiffs appear to argue in their

brief that Tri-State's burden in locating and reviewing voluminous records covering a 58-year period is minor, given the present-day ability to transmit documents electronically. Plaintiffs complain that Tri-State did not identify all of its anticipated witnesses and did not identify any witness who would refuse to travel to North Platte to testify even though they are beyond the subpoena power of this court. See [Fed.R.Civ.P. 45\(b\)\(2\)](#).

*5 Tri-State advises that, if the court proceeds with a judicial rate-making as requested in claim No. 3, it is likely that all of Tri-State's other 39 members would seek to intervene since they would be directly affected by any adjustment to member rates. Thirty-eight of the 39 other members are located outside the State of Nebraska. Plaintiffs' assertion that the harm alleged is "exclusively felt by their customers in Nebraska" fails to consider the adverse effects their withdrawal from Tri-State would have on all the other members of the cooperative.

C. Other Factors

Plaintiffs appear to acknowledge that most of the legal issues in this case are governed by Colorado law, but state that the applicable Colorado law is "basic and well-established contract and corporate law." Thus, plaintiffs argue, it would be "simple" for this court to apply Colorado law in deciding the plaintiffs' claims Nos. 1, 2, 4, 5 and 6.^{FN2} While this court is certainly capable of applying Colorado law, there is an "arguable advantage" in having the District of Colorado interpret and apply Colorado law. See [Davis v. Kone, Inc., 2008 WL 2982573 at * 1, Case No. 8:07CV342 \(D .Neb. July 31, 2008\)](#).

^{FN2}. Plaintiffs contend that Nebraska law governs "at least its Third Claim for breach of the common law obligation to fairly set rates." (Doc. 53 at p. 13). Tri-State contends that claims Nos. 7 and 8 are governed by federal common law because the Tri-State/WAPA Contract involves a federal agency. (Doc. 41, TriState's Brief at p. 17 n. 7).

III. CONCLUSION AND RECOMMENDATION

The record establishes that the plaintiffs have been doing business with Tri-State, a cooperative association organized under Colorado law, for nearly 60 years. Virtually every act alleged in the complaint

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occurred in Colorado, and the majority of plaintiffs' claims are governed by the law of Colorado. The "All Requirements" power supply contracts and the contract extensions specifically provide that they are governed by the law of Colorado. WAPA is located in Colorado, as are necessary witnesses affiliated with WAPA. The relevant records maintained by Tri-State and WAPA are located in Colorado. Tri-State does not maintain any administrative facilities in Nebraska and it has satisfactorily demonstrated that any witnesses it may need to call reside in Colorado. Several witnesses identified by Tri-State are no longer employees of Tri-State or WAPA and could not be procured by subpoena if trial were held in Nebraska.

While the federal courts give considerable deference to a plaintiff's choice of forum, the general practice of according deference is based on an assumption that the plaintiff's choice will be a convenient one. See *In re Apple, Inc.*, 602 F.3d at 913. The plaintiffs' representatives travel to Colorado on a regular basis to conduct business with Tri-State. Lead counsel for all parties are from Denver, Colorado. The court is persuaded that it would be more convenient for most of the witnesses to attend trial in Colorado rather than in North Platte or Omaha, Nebraska. In this instance, the defendants have demonstrated that their inconvenience in litigating this matter in the District of Nebraska strongly outweighs the inconvenience the plaintiffs would suffer if venue were transferred to the District of Colorado. Accordingly,

***6 IT IS RECOMMENDED** that the defendants' motions to transfer venue (Docs. 34 & 40) be granted, and that this case be transferred to the District of Colorado for all further proceedings pursuant to [28 U.S.C. § 1404\(a\)](#).

A party may object to the magistrate judge's findings and recommendation by filing an "Objection to Magistrate Judge's Findings and Recommendation" within 14 days after being served with the findings and recommendation. The objecting party must comply with all requirements of NECivR 72.2.

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