

170 FERC ¶ 61,220
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Tri-State Generation and Transmission
Association, Inc.
Thermo Cogeneration Partnership, L.P.

Docket Nos. ER20-681-000
ER20-682-000

ORDER GRANTING MARKET-BASED RATE AUTHORIZATION

(Issued March 20, 2020)

1. In this order, we grant Tri-State Generation and Transmission Association, Inc. (Tri-State) and Thermo Cogeneration Partnership, L.P. (Thermo Cogen) (collectively, Applicants) market-based rate authorization, effective February 22, 2020.¹ Also, as discussed below, we deny Tri-State's request for certain waivers and blanket authorization and grant Thermo Cogen's request for waivers commonly granted to market-based rate sellers, except as noted herein.

2. Additionally, we find that Applicants meet the criteria for Category 2 sellers in the Northwest, Southwest, and Southwest Power Pool, Inc. (SPP) regions, and Category 1 sellers in the Southeast, Northeast, and Central regions, and are so designated.²

¹ Tri-State Generation and Transmission Association, Inc., FERC FPA Electric Tariff, Market-Based Rate Tariff; [Market-Based Rate Tariff, FERC Electric Tariff, 2.0.0](#). Thermo Cogeneration Partnership, L.P., FERC FPA Electric Tariff, Market-Based Rate Tariff; [Market-Based Rate Tariff, FERC Electric Tariff, 2.0.0](#).

² See *Refinements to Policies & Procedures for Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 816, 153 FERC ¶ 61,065, at P 320 (2015), *order on reh'g*, Order No. 816-A, 155 FERC ¶ 61,188 (2016); *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity & Ancillary Servs. by Pub. Utils.*, Order No. 697, 119 FERC ¶ 61,295, at PP 848-850, *clarified*, 121 FERC ¶ 61,260 (2007), *order on reh'g*, Order No. 697-A, 123 FERC ¶ 61,055, *clarified*, 124 FERC ¶ 61,055, *order on reh'g*, Order No. 697-B, 125 FERC

I. Background

3. On December 23, 2019, Applicants filed requests for Commission authorization to make market-based rate sales of energy, capacity, and ancillary services³ with accompanying market-based rate tariffs.⁴ Tri-State states that it is a generation and transmission cooperative that provides wholesale electricity to its 43-member electric distribution cooperatives and public power districts (Utility Members) in Colorado, Nebraska, New Mexico, and Wyoming at cost-based rates pursuant to long-term contracts.

4. According to Tri-State, it supplies power to its Utility Members through a portfolio of ownership interests in generation, tolling agreements, power purchase agreements, and open market purchases. Tri-State states that it provides transmission service to its Utility Members via Tri-State's approximately 5,665 miles of high-voltage transmission lines located in Colorado, Nebraska, New Mexico, and Wyoming, the majority of which operate as part of the Western Interconnection.

¶ 61,326 (2008), *order on reh'g*, Order No. 697-C, 127 FERC ¶ 61,284 (2009), *order on reh'g*, Order No. 697-D, 130 FERC ¶ 61,206 (2010), *aff'd sub nom. Mont. Consumer Counsel v. FERC*, 659 F.3d 910 (9th Cir. 2011).

³ Applicants requests authorization to sell ancillary services in all of the regional transmission organization or independent system operator markets for which the Commission has approved sales of specific ancillary services. Applicants also request authorization to engage in the sale of certain ancillary services as a third-party provider in other markets.

⁴ Between December 23, 2019 and February 10, 2020, Tri-State submitted multiple other filings in numerous dockets, including a Stated Rate Tariff, Wholesale Electric Service Contracts, an Open Access Transmission Tariff (OATT), rate schedules, service agreements, and applications for market-based rate authority. In addition, on December 23, 2019 in Docket No. EL20-16-000, Tri-State filed a petition for declaratory order (Petition), requesting, among other things, that the Commission find that Tri-State became subject to the Commission's jurisdiction on September 3, 2019. Orders addressing the Petition and Tri-State's Wholesale Electric Service Contracts, Stated Rate Tariff, OATT, rate schedules, and service agreements are being issued concurrently with this order.

5. Thermo Cogen states that it is a wholly owned subsidiary of Tri-State, and that it owns a 397 megawatt (MW) gas-fired electric generating facility located in Weld, Colorado, the partial output of which serves Tri-State's Utility Members' load in the Public Service Company of Colorado (PSCo) balancing authority area.⁵

6. In July 2019, Tri-State submitted a set of filings to the Commission in anticipation of becoming a public utility subject to the Commission's jurisdiction.⁶ Tri-State explained that, under FPA section 201(f),⁷ it had been exempt from the Commission's jurisdiction under Part II of the FPA⁸ because it was wholly owned by entities that were themselves exempt from the Commission's jurisdiction under FPA section 201(f). Tri-State stated that it would cease to be wholly owned by such non-jurisdictional entities on or around September 22, 2019, due to the admission of one or more new members/owners (Non-Utility Members) that will not be an electric cooperative or a governmental entity exempt under FPA section 201(f). Tri-State represented that admission of the new Non-Utility Members would cause Tri-State to become a public utility subject to the Commission's jurisdiction. On September 3, 2019, Tri-State filed an amendment to the July 2019 filings notifying the Commission that Tri-State admitted Mico, Inc. (Mico), a wholesale energy services company and subsidiary of Marubeni America Corporation, as a new Non-Utility Member. On October 4, 2019, the Commission rejected without prejudice Tri-State's filings, finding that Tri-State provided insufficient cost support for its proposed rates and had failed to comply with the Commission's rate schedule filing requirements.⁹

⁵ Thermo Cogen December 23, 2019 Application for Market-Based Rate Authority at 3.

⁶ *Tri-State Generation & Transmission Ass'n, Inc.*, Docket No. ER19-2440-000, et al. (July 2019 filings). Tri-State's July 2019 filings included, but were not limited to, a Stated Rate Tariff; Wholesale Electric Service Contracts; and an OATT. Tri-State and Thermo Cogen also submitted individual applications for market-based rate authority.

⁷ 16 U.S.C. § 824(f) (2018).

⁸ 16 U.S.C. § 824-824w (2018).

⁹ *Tri-State Generation & Transmission Ass'n, Inc.*, 169 FERC ¶ 61,012, at P 22 (2019) (October 2019 Order).

7. Tri-State states that, consistent with its representations in its July 2019 filings, Tri-State became subject to the Commission's jurisdiction on September 3, 2019, when it admitted Mico as a Non-Utility Member.¹⁰ Tri-State represents that Mico supplies natural gas to purchasers throughout the United States and that Mico currently provides natural gas to Tri-State's generation facilities in New Mexico and Colorado. Tri-State also states that Mico is not an electric cooperative or governmental entity, and it is not owned by electric cooperatives or governmental entities in the United States. Tri-State represents that Mico followed the application procedure for membership set forth in Tri-State's Bylaws and that Tri-State accepted Mico as a Non-Utility Member on September 3, 2019. Tri-State states that, accordingly, as of September 3, 2019, Tri-State is a public utility subject to the Commission's jurisdiction and is no longer exempt from Part II of the FPA because it is no longer wholly owned directly or indirectly by entities that are: (1) states/political subdivisions of a state; or (2) electric cooperatives that are exempt public utilities under FPA section 201(f).¹¹

II. Notice of Filings and Responsive Pleadings

8. Notice of Applicants' December 23, 2019 market-based rate filings were published in the *Federal Register*,¹² with interventions and protests due on or before January 21, 2020.

9. On February 3, 2020, Kit Carson Electric Cooperative, Inc. (Kit Carson) submitted a motion to intervene out-of-time and protest in certain of the Tri-State's Tariff Filings dockets.¹³

10. On February 18, 2020, Tri-State submitted an objection to Kit Carson's motion to intervene out-of-time and a motion for leave to answer and answer to Kit Carson's protest. Tri-State asserts that Kit Carson's motion to intervene out-of-time is

¹⁰ Tri-State notes that, effective November 14, 2019, Tri-State added two additional Non-Utility Members — Ellgen Ranch Company and Olson's Greenhouse of Colorado, LLC. Tri-State December 23, 2019 Application at 4 & n.7.

¹¹ *Id.* at 4.

¹² 84 Fed. Reg. 72,350, 72,351 (Dec. 31, 2019). See Notice of Extension of Time, Docket No. EL20-16-000, et al. (Jan. 10, 2020) (extending comment date to January 21, 2020).

¹³ Kit Carson submitted its motion in Docket Nos. EL20-16-000, ER20-676-000, ER20-681-000, ER20-683-000, ER20-686-000, ER20-687-000, ER20-688-000, ER20-689-000, ER20-690-000, ER20-691-000, ER20-693-000, ER20-694-000, ER20-695-000, ER20-726-000, ER20-728-000, and ER20-682-000.

unsupported and does not satisfy the requirements of Rule 214.¹⁴ Tri-State claims that Kit Carson's legitimate interests are not at issue in any of the Tri-State proceedings except Docket Nos. ER20-686-000 and ER20-688-000.

11. The Appendix to this order lists the entities that filed notices of intervention, motions to intervene, motions to intervene out-of-time, motions to lodge, protests, comments, and answers.

12. Notice of Applicants' requests for blanket authorization under Part 34 of the Commission's regulations were separately published in the *Federal Register*,¹⁵ with interventions or protests due on or before March 3, 2020. None was filed.

III. Discussion

A. Procedural Matters

13. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to the proceedings in which they filed them.¹⁶ Pursuant to Rule 214(d) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d), the Commission grants the late-filed motions to intervene given the filers' interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay.

14. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept the answers because they have provided information that assisted us in our decision-making process.

15. Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record.¹⁷ Here, we find that the evidence

¹⁴ 18 C.F.R. § 385.214(d).

¹⁵ 85 Fed. Reg. 9470-71 (Feb. 19, 2020).

¹⁶ The entities that filed comments or protests but did not file motions to intervene are not parties to these proceedings. See 18 C.F.R. §§ 385.102(c)(3), 385.214(a)(3) (2019).

¹⁷ See, e.g., *Cal. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,072, at P 8 (2012).

contained in the motion to lodge jointly submitted by La Plata and United Power has assisted us in our decision-making process, and we, therefore, grant their motion to lodge.

B. Substantive Matters

16. As a threshold matter, we note that several entities filed, in most or all of the dockets of the Tri-State Filings, the same comments and/or protests asserting that Tri-State is not subject to the Commission's jurisdiction. We are addressing this issue in an order on Tri-State's Stated Rate Tariff in Docket No. ER20-676-000 that is being issued concurrently with this order and is not addressed separately herein.¹⁸

1. Comments, Protests and Answers

17. The Colorado Public Utilities Commission (Colorado PUC) states that Tri-State's existing contracts prohibit its members from purchasing more than five percent of their power from qualifying facilities (QF) as defined by the Public Utility Regulatory Policy Act of 1978,¹⁹ but concedes that it is unsure how this limitation affects Tri-State's member's supply decisions or how the Commission should consider it when analyzing Tri-State's market power. Nonetheless, it urges the Commission to closely examine any potential market effects this limit may have.²⁰

18. In its protest, Sierra Club asserts that Tri-State's stated rate tariff filing is patently deficient and, because the Commission must approve the proposed stated rate tariff in order to assess Tri-State's vertical market power, the Commission must reject Tri-State's market-based rate application as they did in the October 2019 Order.²¹

19. In its answer, Tri-State argues that assertions raised by Colorado PUC and Sierra Club – that Tri-State's five percent cap on purchases of QF power creates a market-distorting supply limitation or that its stated rate filing may or may not be patently deficient – are irrelevant to the Commission's review of Tri-State's market-based rate application. Tri-State asserts that its application satisfies the Commission's market-based rates standard of review because it demonstrates a lack of both market power and barriers to entry and raises no cross-subsidization concerns. Relatedly, Tri-State notes that market-based rate applications rely on the OATT rather than the stated rate to

¹⁸ See *Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,221 (2020) (Tri-State Stated Rate Order).

¹⁹ 16 U.S.C. §§ 2601-2645 (2019).

²⁰ Colorado PUC January 21, 2020 Protest at 11.

²¹ Sierra Club January 21, 2020 Protest at 54.

demonstrate a lack of vertical market power, further making commenters' protests irrelevant for purposes of the Commission's market-based rate application review.²²

2. Commission Findings

20. Regarding Sierra Club's concerns, the Commission's rejection of Applicants' market-based rate applications in the October 2019 Order was not due to deficiencies in the stated rate tariff filing but to its rejection of Tri-State's proposed OATT, citing the vertical market power requirement in 18 C.F.R. § 35.37(d) (2019) that "a Seller that owns, operates or controls transmission facilities, or whose affiliates own, operate or control transmission facilities, must have on file with the Commission an Open Access Transmission Tariff."²³

21. Regarding the Colorado PUC's concerns, we find that the contractual relationship and sales between Tri-State and its members are not governed by Tri-State's market-based rate tariff and do not factor into the Commission's market power analysis, which examines Tri-State's horizontal and vertical market power, as addressed below.

3. Market-Based Rate Authorization

22. The Commission allows power sales at market-based rates if the seller and its affiliates do not have, or have adequately mitigated, horizontal and vertical market power.²⁴ As discussed below, we grant Applicants' request for authorization to make wholesale sales of electric energy, capacity, and ancillary services at market-based rates, and we accept their market-based rate tariffs effective February 22, 2020.²⁵ We also deny Tri-State's request for certain waivers and blanket authorization and grant Thermo Cogen's request for certain waivers and blanket authorization.

²² Tri-State February 5, 2020 Answer at 66-67.

²³ October 2019 Order, 169 FERC ¶ 61,012 at P 27 & n.34.

²⁴ Order No. 697, 119 FERC ¶ 61,295 at PP 62, 399, 408, 440.

²⁵ We note that Applicants are not being granted authority to make third-party sales of operating reserves to a public utility that is purchasing ancillary services to satisfy its own OATT requirements to offer ancillary services to its own customers. If Applicants seek such authority, it must make the required showing and receive Commission authorization prior to making such sales. *See Third-Party Provision of Ancillary Services; Accounting & Fin. Reporting for New Electric Storage Technologies*, Order No. 784, 144 FERC ¶ 61,056, at PP 200-202 (2013), *order on clarification*, Order No. 784-A, 146 FERC ¶ 61,114 (2014).

a. **Horizontal Market Power**

i. **Indicative Screens**

23. The Commission has adopted two indicative screens for assessing horizontal market power: the pivotal supplier screen and the wholesale market share screen.²⁶ The Commission has stated that passage of both screens establishes a rebuttable presumption that the applicant does not possess horizontal market power, while failure of either screen creates a rebuttable presumption that the applicant has horizontal market power.²⁷ An applicant that fails one or more of the indicative screens is provided with several procedural options including the right to challenge the market power presumption by submitting a delivered price test (DPT) analysis.²⁸

24. Applicants prepared the pivotal supplier and wholesale market share screens for the SPP market, as well as the PSCo, Public Service Company of New Mexico (PNM), and Western Area Colorado-Missouri (WACM) balancing authority areas. Additionally, Tri-State submitted screens for Tucson Electric Power Company (TEPC) balancing authority area. We have reviewed those screens and find that Applicants pass the pivotal supplier and wholesale market share screens for the SPP market, as well as the PSCo²⁹ and PNM balancing authority areas, and that Tri-State passes the pivotal supplier and wholesale market share screens for TEPC balancing authority area. Accordingly, we find that Applicants satisfy the Commission's requirements for market-based rate authority regarding horizontal market power in the SPP market and in these balancing authority areas.

25. With respect to the WACM balancing authority area, Applicants pass the pivotal supplier screen, but fail the wholesale market share screen. Applicants represent that they pass the wholesale market share screen with 18.9% market share in the fall season;

²⁶ *Id.* P 62.

²⁷ *Id.* PP 33, 62-63.

²⁸ *Id.* P 63.

²⁹ Applicants pass both the pivotal supplier and wholesale market share screens in the PSCo balancing authority area, when the Commission-accepted SIL values for this area are applied. *See Avista Corp.*, Docket No. ER10-2290-007 (Jan. 28, 2020) (delegated order).

however, Applicants fail the wholesale market share screen in the winter, spring, and summer seasons, with market shares ranging from 21.1 to 21.6%.³⁰

26. The Commission has stated that an applicant that fails one or more of the indicative screens has several procedural options, including the right to challenge the market power presumption by submitting a DPT analysis, or alternatively, sellers can accept the presumption of market power and adopt some form of cost-based mitigation. Accordingly, Applicants submitted a DPT analysis for the WACM balancing authority area.

ii. Delivered Price Test

27. As the Commission has previously explained, the DPT analysis identifies potential suppliers based on market prices, input costs, and transmission availability, and calculates each supplier's economic capacity and available economic capacity³¹ for each season/load period.³² The results of the DPT are used for pivotal supplier, market share, and market concentration analyses.³³ Under the DPT, applicants must calculate market concentration using the Hirschman-Herfindahl Index (HHI).³⁴ An HHI of less than 2,500 in the relevant market for all season/load periods in combination with a demonstration that the applicants are not pivotal and do not possess more than a

³⁰ Tri-State December 23, 2019 Application for Market-Based Rate Authority, Appendix A: Standard Screen Format, Part II-Market Share Analysis.

³¹ "Economic capacity" is the total generation capacity of a potential supplier that can compete in the destination market, given its costs and transmission availability. "Available economic capacity" is derived by subtracting each potential supplier's native load obligation from its total capacity and adjusting transmission availability accordingly. See Order No. 697, 119 FERC ¶ 61,295 at P 96 n.78.

³² The seasons/load periods are as follows: super-peak, peak, and off-peak, for winter, shoulder, and summer periods and an additional highest super-peak for the summer.

³³ See Order No. 697, 119 FERC ¶ 61,295 at P 106.

³⁴ The HHI is the sum of the squared market shares. For example, in a market with five equal size firms, each would have a 20% market share. For that market, $HHI = (20)^2 + (20)^2 + (20)^2 + (20)^2 + (20)^2 = 400 + 400 + 400 + 400 + 400 = 2,000$.

20% market share in any of the season/load periods, would constitute a showing of a lack of horizontal market power, absent compelling contrary evidence from interveners.³⁵

28. As with the indicative screens, applicants and interveners may present evidence, such as historical sales and transmission data, which may be used to calculate market shares and market concentration and to refute or support the results of the DPT analysis. In Order No. 697, the Commission encouraged applicants to present the most complete analysis of competitive conditions in the market as the data allow.³⁶

29. Applicants' DPT analysis for the WACM balancing authority area indicates that when the economic capacity measure is used, Applicants are pivotal in eight of the ten season/load periods,³⁷ have market shares above 20% in all season/load periods, and the market HHIs exceed the 2,500 HHI threshold in only one season/load period (winter-off peak season) with an HHI of 2,596.³⁸ However, when the available economic capacity measure is used, Applicants are pivotal in two of the ten season/load periods (summer super peak 1 and winter-off peak seasons), have market shares under 20 percent in all season/load periods, and the market HHIs exceed the 2,500 HHI threshold in five season/load periods (summer super peak 1, summer super peak 2, summer-off peak, winter peak and winter-off peak seasons), ranging from 2,810 to 4,938.³⁹ Applicants state that the available economic capacity metric is more relevant in markets, such as the WACM balancing authority area, where there is no retail access and the market is unlikely adopt retail access in the foreseeable future.⁴⁰ Applicants also filed two sensitivity analyses with prices increased and decreased by 10%. The results of these sensitivity analyses change very little under both the economic capacity and available economic capacity measures.

³⁵ A detailed description of the mechanics of the DPT analysis is provided in Order No. 697. Order No. 697, 119 FERC ¶ 61,295 at PP 104-117.

³⁶ *Id.* PP 71, 111.

³⁷ Applicants are not pivotal in shoulder super peak and shoulder peak seasons.

³⁸ Applicants' HHIs range from 1,460 to 2,596 under the available economic capacity measure.

³⁹ Applicants' HHIs are below 2,500 in all other season/load periods.

⁴⁰ Tri-State December 23, 2019 Application for Market-Based Rate Authority, Att. 5, Affidavit of Julie Solomon at 3.

30. Applicants further present an analysis of Electric Quarterly Report (EQR) data as alternative evidence that they have modest market shares in the WACM balancing authority area and that historically Applicants are not dominant in that balancing authority area.

iii. Commission Determination

31. The results of Applicants' DPT analysis vary depending on whether the economic capacity or available economic capacity measure is used. The Commission has stated that the DPT does not function like the initial screens – i.e., failure of either the economic capacity or available economic capacity analyses does not result in an automatic failure of the test as a whole.⁴¹ The Commission weighs the results of the economic capacity and the available economic capacity analyses and considers the arguments of the parties.⁴² In the DPT analysis, available economic capacity accounts for native load requirements. As the Commission explained in Order No. 697:

[I]n markets where utilities retain significant native load obligations, an analysis of available economic capacity may more accurately assess an individual seller's competitiveness, as well as the overall competitiveness of a market, because available economic capacity recognizes the native load obligations of the sellers. On the other hand, in markets where the sellers have been predominantly relieved of their native load obligations, an analysis of economic capacity may more accurately reflect market conditions and a seller's relative size in the market.⁴³

32. Because the WACM balancing authority area is a market where Tri-State and its affiliates have load-serving obligations, we find that the available economic capacity measure of the DPT more accurately captures conditions in the relevant market than the economic capacity measure.⁴⁴ Under the available economic capacity measure, Applicants pass the market share screens. Applicants' market shares are zero,

⁴¹ *AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018, *order on reh'g*, 108 FERC ¶ 61,026, at P 26 (2004); *Kansas City Power & Light Co.*, 113 FERC ¶ 61,074, at P 30 (2005).

⁴² Order No. 697, 119 FERC ¶ 61,295 at P 112.

⁴³ *Id.*

⁴⁴ *New Brunswick Energy Mktg. Corp.*, 153 FERC ¶ 61,254, at P 26 (2015); *Idaho Power Co.*, 148 FERC ¶ 61,182, at P 19 (2014).

except summer peak and winter super peak season/load periods with 4.2% and 1.3% respectively. The DPT analysis shows that while Applicants fail the pivotal supplier test in two periods (summer super peak and winter off-peak), their corresponding market shares are zero, which indicates that Applicants have no available economic capacity in the market and, thus, have no ability to influence market prices. Although the HHIs are above the Commission-established 2,500-point threshold in all summer and winter load/time periods, Applicants are not driving the HHIs. Applicants' market shares are 4.2% in summer peak and 1.3% in winter off-peak when the HHIs are above 2,500 points and their contributions to market concentration are only approximately 18 points and 2 points respectively. In addition, Applicants have provided additional evidence detailing the competitive conditions in the WACM balancing authority area, including information concerning sales in the market and Applicants' position in the market. Specifically, the historical sales data Applicants presented are consistent with the available economic capacity results for the DPT, indicating that Applicants have modest market shares and are not dominant suppliers in the WACM balancing authority area.

33. After weighing all the relevant factors discussed above, we find that, on balance, Applicants have rebutted the presumption of market power in the WACM balancing authority area. Therefore, we find that Applicants satisfy the Commission's requirements for market-based rates regarding horizontal market power.

b. Vertical Market Power

34. In cases where a public utility, or any of its affiliates, owns, operates, or controls transmission facilities, the Commission requires that there be a Commission-approved OATT on file, or that such entity has received waiver of the OATT requirement under 18 C.F.R. § 35.28(d)(1) (2019) or satisfies the requirements for blanket waiver under 18 C.F.R. § 35.28(d)(2) (2019).⁴⁵

⁴⁵ See *Open Access & Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, 150 FERC ¶ 61,211, at P 57, *order on reh'g*, Order No. 807-A, 153 FERC ¶ 61,047 (2015) (waiving the OATT requirements of 18 C.F.R. § 35.28, the Open Access Same-Time Information System requirements of Part 37, and the Standards of Conduct requirements of Part 358, under certain conditions, for entities that own interconnection facilities). See also *Balko Wind Transmission, LLC*, 152 FERC ¶ 61,011, at PP 24-25 (2015).

35. Tri-State states that it filed a request for approval of a stand-alone OATT for service across its Commission-jurisdictional transmission facilities.⁴⁶ Thermo Cogen represents that it owns interconnection facilities that qualify for the blanket OATT waiver under Order No. 807.⁴⁷ We note that the Commission concurrently is issuing an order on Tri-State's OATT in Docket No. ER20-686-000.⁴⁸

36. The Commission also considers a seller's ability to erect other barriers to entry as part of the vertical market power analysis.⁴⁹ The Commission requires a seller to provide a description of its ownership or control of, or affiliation with an entity that owns or controls, intrastate natural gas transportation, storage or distribution facilities, and physical coal supply sources and ownership of or control over who may access transportation of coal supplies (collectively, inputs to electric power production).⁵⁰ The Commission also requires sellers to make an affirmative statement that they have not erected barriers to entry into the relevant market and will not erect barriers to entry into the relevant market.⁵¹ The Commission adopted a rebuttable presumption that the ownership or control of, or affiliation with any entity that owns or controls, inputs to electric power production does not allow a seller to raise entry barriers but will allow intervenors to demonstrate otherwise.⁵²

⁴⁶ Tri-State's OATT filing, Docket No. ER20-686-000 (filed December 26, 2019). As noted above, Tri-State has also stated that a portion of its transmission facilities is in the Eastern Interconnection and is under the functional control of SPP.

⁴⁷ Thermo Cogen December 23, 2019 Market-Based Rate Application at 14.

⁴⁸ See *Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,222 (2020) (accepting proposed OATT and service agreements, instituting section 206 proceeding, and establishing hearing and settlement judge procedures).

⁴⁹ Order No. 697, 119 FERC ¶ 61,295 at P 440.

⁵⁰ Order No. 697-A, 123 FERC ¶ 61,055 at P 176. See also Order No. 816, 153 FERC ¶ 61,065 at PP 207-212.

⁵¹ Order No. 697, 119 FERC ¶ 61,295 at P 447. See also Order No. 816, 153 FERC ¶ 61,065 at PP 354, 356.

⁵² Order No. 697, 119 FERC ¶ 61,295 at P 446.

37. Applicants represent that Tri-State owns and controls certain limited intrastate natural gas transportation facilities, coal mines, and rail infrastructure for the transportation of coal supplies.⁵³ Applicants further represent that neither they nor any of their affiliates own or control any inputs to electric power production other than described above.⁵⁴

38. Finally, Applicants affirmatively state that they and their affiliates have not erected, and will not erect, barriers to entry into any relevant market.⁵⁵

39. Based on the Applicants' representations, we find that Applicants satisfy the Commission's requirements for market-based rate authority regarding vertical market power.

4. Other Waivers, Approvals, and Authorizations

40. Applicants request the following waivers and authorizations: (1) waiver of the filing requirements of subparts B and C of Part 35 of the Commission's regulations, except sections 35.12(a), 35.13(b), 35.15, and 35.16; (2) waiver of the accounting and other requirements of Parts 41, 101, and 141 of the Commission's regulations, except sections 141.14 and 141.15; and (3) blanket authorization under FPA section 204⁵⁶ and Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability.

⁵³ Tri-State December 23, 2019 Market-Based Rate Application at 21, and Thermo Cogen December 23, 2019 Market-Based Rate Application at 15-16.

⁵⁴ Tri-State December 23, 2019 Market-Based Rate Application at 21, and Thermo Cogen December 23, 2019 Market-Based Rate Application at 15-16.

⁵⁵ Tri-State December 23, 2019 Market-Based Rate Application at 22, and Thermo Cogen December 23, 2019 Market-Based Rate Application at 16.

⁵⁶ 16 U.S.C. § 824c (2018).

41. Regarding Thermal Cogen, we grant the requested waivers and authorizations consistent with those granted to other entities with market-based rate authorizations.⁵⁷ Notwithstanding the waiver of the accounting and reporting requirements, the Commission expects these entities to keep their accounting records in accordance with generally accepted accounting principles. The next time Thermo Cogen makes a market-based rate filing with the Commission, it must include a revised tariff in compliance with Order Nos. 697 and 697-A to include a citation to this order in the Limitations and Exemptions section of its tariff.⁵⁸

42. With respect to Tri-State, while we grant it market-based rate authority in this order, we deny its request for the requested regulatory waivers and blanket authorizations. The Commission typically does not grant the requested waivers of Parts 41, 101, 141, and 35 where the seller makes sales at cost-based rates.⁵⁹ As noted

⁵⁷ We note that the Commission has examined and approved the continued applicability of the waiver of its accounting and reporting requirements in Parts 41, 101, and 141 of the Commission's regulations, as well as the continued applicability of the blanket authorization for the issuance of securities and the assumption of liabilities in Part 34 of the Commission's regulations. *See* Order No. 697, 119 FERC ¶ 61,295 at PP 984-985 (regarding waiver of Parts 41, 101, and 141) and PP 999-1000 (regarding blanket approval under Part 34). However, waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Hydropower licensees are required to comply with the requirements of the Uniform System of Accounts pursuant to 18 C.F.R. pt. 101 (2019) to the extent necessary to carry out their responsibilities under Part I of the FPA. We further note that a licensee's status as a market-based rate seller under Part II of the FPA does not exempt it from its accounting responsibilities as a licensee under Part I of the FPA. *See* Order No. 816, 153 FERC ¶ 61,065 at PP 345-350; *Seneca Generation, LLC*, 145 FERC ¶ 61,096, at P 23 n.20 (2013) (citing *Trafalgar Power, Inc.*, 87 FERC ¶ 61,207, at 61,798 (1999) (noting that "all licensees are required to comply with the requirements of the Uniform System of Accounts to the extent necessary to carry out their responsibilities under [s]ections 4(b), 10(d) and 14 of the FPA")). *See also* Order No. 697, 119 FERC ¶ 61,295 at P 983 & n.1126 (granting waiver of subparts B and C of Part 35 of the Commission's regulations requiring the filing of cost-of-service information, except for 18 C.F.R §§ 35.12(a), 35.13(b), 35.15 and 35.16)).

⁵⁸ *See* Order No. 697, 119 FERC ¶ 61,295 at P 916; Order No. 697-A, 123 FERC ¶ 61,055 at P 384. *See also* *Niagara Mohawk Power Corp.*, 121 FERC ¶ 61,275, at P 8 (2007).

⁵⁹ *See* Order No. 697, 119 FERC ¶ 61,295 at PP 984-985 (regarding waiver of Parts 41, 101, and 141) and P 983 & n.1126 (regarding waivers of Part 35).

above, the Commission is concurrently issuing the Tri-State Stated Rate Order related to cost-based tariffs Tri-State filed with the Commission. Because Tri-State will have cost-based rates on file, we deny its request for waiver of Parts 41, 101, 141, and 35.

43. The Commission traditionally has granted blanket authorization for the issuance of securities and assumptions of liability to power sellers not subject to cost-based rate regulation, i.e., power sellers that have market-based rate authority.⁶⁰ As the Commission has explained in previous cases involving market-based rate authority in which the sellers sought blanket authorization of issuances of securities or assumptions of liability, the purpose of section 204 of the FPA, which Part 34 implements, is to ensure the financial viability of public utilities obligated to serve consumers of electricity.⁶¹ Accordingly, where the seller does not provide electric service to customers under cost-based rates and has market-based rate authority, the Commission's practice is to grant the blanket authorization, subject to consideration of objections by an interested party.⁶² As noted above, Tri-State has sought authorization to serve customers at cost-based rates and has not shown that it meets the requirements for this blanket authorization; thus, we deny Tri-State's request. Tri-State must amend its market-based rate tariff within 30 days of the date of this order to remove references to the waivers and blanket authorizations that we are denying in this order.

5. Waiver of the Prior Notice Requirement and Refunds

44. We deny Applicants' request for waiver of the prior notice requirement. Section 205 of the FPA explicitly requires that proposed rates be filed with the Commission at least 60 days in advance of their proposed effective date.⁶³ While the statute and the Commission's regulations give the Commission the discretion to grant waiver of the 60-day prior notice requirement for good cause shown,⁶⁴ the Commission has explicitly

⁶⁰ *Id.* P 999.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 16 U.S.C. § 824d(d) (2018). *See also El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

⁶⁴ 16 U.S.C. § 824d(d); 18 C.F.R. §§ 35.3(a), 35.11 (2019).

stated that, absent extraordinary circumstances, it would not grant waiver of notice when an agreement for new service is filed on or after the day service has commenced.⁶⁵

45. Applicants have not demonstrated extraordinary circumstances warranting waiver of the prior notice requirement. Thus, the Commission denies Applicants' request for waiver of the 60-day prior notice requirement and an effective date of either September 3, 2019 or December 24, 2019. Applicants' market-based rate tariffs are accepted effective February 22, 2020, 61 days after filing.

46. The Commission has noted that, if a utility files a market-based rate tariff less than 60 days prior to the proposed effective date of new service, and waiver is denied, the Commission will require the utility to refund to its customers the time-value of the gross revenues collected, calculated pursuant to 18 C.F.R. § 35.19(a) of the Commission's regulations,⁶⁶ for the entire period that the rate was collected without Commission authorization.⁶⁷ In addition to returning the time value of the revenues collected for the period the rate was charged without Commission authorization, when dealing with market-based rates that are not timely filed, the Commission has stated that:

The utility will be required to refund all revenues resulting from the difference, if any, between the market-based rate and the cost-justified rate. . . . The late-filing utility will receive the equivalent of a cost-based rate, less the time value remedy applicable to the unauthorized filing of cost-based rates, until the date of Commission authorization.⁶⁸

47. Although we are not granting Tri-State's request for waiver of the prior notice requirement, we will not require refunds given the unique facts in this case.⁶⁹ Specifically, in light of the unique circumstance of Applicants becoming subject to

⁶⁵ *Central Hudson Gas & Elec. Co.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

⁶⁶ 18 C.F.R. § 35.19(a).

⁶⁷ *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, at 61,980 (1993), *order on reh'g*, 65 FERC ¶ 61,081 (1993).

⁶⁸ *Id.*

⁶⁹ *See, e.g., Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153, 159 (D.C. Cir. 1967) ("the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies and sanctions, including enforcement and voluntary compliance programs in order to arrive at maximum effectuation of Congressional objectives.").

the Commission's jurisdiction, we will not require Applicants to calculate or pay refunds for sales made without market-based rate authorization during the time between September 3, 2019 and February 22, 2020. Recognizing this circumstance and noting that Applicants' customers do not ask that the Commission require Applicants to pay refunds for sales made without authorization, the Commission is exercising its discretion to not order refunds here.

6. Reporting Requirements

48. Consistent with the procedures adopted by the Commission, Applicants must file an EQR with the Commission, consistent with Order Nos. 2001⁷⁰ and 768.⁷¹ Applicants must file EQRs electronically with the Commission consistent with the procedures set forth in Order No. 770.⁷² Failure to timely and accurately file an EQR is a violation of the Commission's regulations for which Applicants may be subject to refund, civil penalties, and/or revocation of market-based rate authority.⁷³

⁷⁰ *Revised Pub. Util. Filing Requirements*, Order No. 2001, 99 FERC ¶ 61,107, *reh'g denied*, Order No. 2001-A, 100 FERC ¶ 61,074, *reh'g denied*, Order No. 2001-B, 100 FERC ¶ 61,342, *order directing filing*, Order No. 2001-C, 101 FERC ¶ 61,314 (2002), *order directing filing*, Order No. 2001-D, 102 FERC ¶ 61,334, *order refining filing requirements*, Order No. 2001-E, 105 FERC ¶ 61,352 (2003), *order on clarification*, Order No. 2001-F, 106 FERC ¶ 61,060 (2004), *order revising filing requirements*, Order No. 2001-G, 120 FERC ¶ 61,270, *order on reh'g and clarification*, Order No. 2001-H, 121 FERC ¶ 61,289 (2007), *order revising filing requirements*, Order No. 2001-I, 125 FERC ¶ 61,103 (2008).

⁷¹ *Elec. Mkt. Transparency Provisions of Section 220 of the Fed. Power Act*, Order No. 768, 140 FERC ¶ 61,232 (2012), *order on reh'g*, Order No. 768-A, 143 FERC ¶ 61,054 (2013).

⁷² *See Revisions to Elec. Quarterly Report Filing Process*, Order No. 770, 141 FERC ¶ 61,120, at P 3 (2012) (citing Order No. 2001, 99 FERC ¶ 61,107 at P 31).

⁷³ The exact filing dates for these reports are prescribed in 18 C.F.R. § 35.10(b) (2019). Forfeiture of market-based rate authority may require a new application for market-based rate authority if the applicant wishes to resume making sales at market-based rates.

49. Additionally, Applicants must timely report to the Commission any change in status that would reflect a departure from the characteristics the Commission relied upon in granting market-based rate authority.⁷⁴

50. In Order No. 697, the Commission created two categories of sellers.⁷⁵ Category 1 sellers are not required to file regularly scheduled updated market power analyses. Category 1 sellers are wholesale power marketers and wholesale power producers that own or control 500 MW or less of generation in aggregate per region; that do not own, operate, or control transmission facilities other than limited equipment necessary to connect individual generation facilities to the transmission grid (or have been granted waiver of the requirements of Order No. 888⁷⁶); that are not affiliated with anyone that owns, operates, or controls transmission facilities in the same region as the seller's generation assets; that are not affiliated with a franchised public utility in the same region as the seller's generation assets; and that do not raise other vertical market power issues.⁷⁷ Sellers that do not fall into Category 1 are designated as Category 2 sellers and are required to file updated market power analyses.⁷⁸

51. Applicants meet the criteria for Category 2 seller status in the Northwest, Southwest, and SPP regions. With regard to the Southeast, Northeast, and Central regions, Applicants represent that they do not own or control physical generation assets; they do not own, operate or control transmission facilities; and their ownership or control of assets do not raise other vertical market power issues.

⁷⁴ 18 C.F.R. § 35.42 (2019); *see also Reporting Requirement for Changes in Status for Pub. Utils. with Market-Based Rate Auth.*, Order No. 652, 110 FERC ¶ 61,097, *order on reh'g*, 111 FERC ¶ 61,413 (2005).

⁷⁵ Order No. 697, 119 FERC ¶ 61,295 at P 848.

⁷⁶ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Servs. by Pub. Utils.; Recovery of Stranded Costs by Pub. Utils. and Transmitting Utils.*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), (cross-referenced at 75 FERC ¶ 61,080) *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048, (cross-referenced at 78 FERC ¶ 61,220), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

⁷⁷ 18 C.F.R. § 35.36(a) (2019).

⁷⁸ Order No. 697, 119 FERC ¶ 61,295 at P 850.

52. Based on Applicants' representations, we designate Applicants as Category 2 sellers in the Northwest, Southwest, and SPP regions,⁷⁹ and as Category 1 sellers in the Southeast, Northeast, and Central regions. The Commission reserves the right to require an updated market power analysis at any time for any region.⁸⁰

The Commission orders:

(A) Applicants' market-based rate tariffs are hereby accepted for filing, effective February 22, 2020, as discussed in the body of this order.

(B) Tri-State must submit an eTariff filing within 30 days of the date of this order amending their market-based rate tariff, as discussed in the body of this order.

(C) Thermo Cogen must submit an eTariff filing amending its market-based rate tariff the next time it makes a market-based rate filing, as discussed in the body of this order.

(D) Waiver of the provisions of subparts B and C of Part 35 of the Commission's regulations, with the exception of sections 35.12(a), 35.13(b), 35.15, and 35.16, is hereby granted to Thermo Cogen.

(E) Waiver of Part 101 of the Commission's regulations is hereby granted to Thermo Cogen, with the exception that waiver of the provisions of Part 101 that apply to hydropower licensees is not granted with respect to licensed hydropower projects. Waiver of Parts 41 and 141 of the Commission's regulations is hereby granted to Thermo Cogen, with the exception of sections 141.14 and 141.15. Tri-State's request for waiver of Parts 41, 101, and 141 of the Commission's regulations is denied, as discussed in the body of this order. The Commission directs Tri-State to remove any provisions from its filed market-based rate tariff that are inconsistent with this waiver denial.

(F) Blanket authorization under Part 34 of the Commission's regulations for all future issuances of securities and assumptions of liability is hereby granted to Thermo Cogen. Thermo Cogen is hereby authorized to issue securities and assume obligations or liabilities as guarantor, indorser, surety, or otherwise in respect of any security of another person; provided that such issue or assumption is for some lawful object within the

⁷⁹ Applicants must file an updated market power analysis for each region in which it is designated as a Category 2 seller in compliance with the regional reporting schedule. See Order No. 816, 153 FERC ¶ 61,065 at P 353.

⁸⁰ Order No. 697, 119 FERC ¶ 61,295 at P 853.

corporate purposes of Thermo Cogen, compatible with the public interest, and reasonably necessary or appropriate for such purposes.

(G) The Commission reserves the right to modify this order to require a further showing that neither the public nor private interests will be adversely affected by continued Commission approval of Thermo Cogen's issuance of securities or assumptions of liability.

(H) Applicants are hereby required to file EQRs in compliance with Order Nos. 2001 and 768. If the effective date of Applicants' market-based rate tariffs falls within a quarter of the year that has already expired, Applicants' EQRs for the expired quarter are due within 30 days of the date of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Entity	Docket Numbers	Filings⁸¹
Alliance Power Incorporated and Colorado Highlands Wind, LLC	ER20-681-000 ER20-682-000	Motion to Intervene Out-of-Time and Comments (Jan. 22, 2020); Motion to Accept Out-of-Time Motion to Intervene and Comments (Jan. 29, 2020)
Arkansas River Power Authority	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 21, 2020)
Basin Electric Power Cooperative	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 13, 2020); Motion to Intervene (Jan. 21, 2020)
Colorado Public Utilities Commission	ER20-681-000 ER20-682-000	Notice of Intervention and Comments in Support of Extension of Time (Jan. 8, 2020); Protest (Jan. 21, 2020)
Colorado Springs Utilities	ER20-681-000	Motion to Intervene (Jan. 17, 2020)
Delta-Montrose Electric Association	ER20-681-000	Motion to Intervene (Jan. 13, 2020)
Empire Electric Association, Inc.	ER20-681-000 ER20-682-000	Comments (Jan. 21, 2020)
Gladstone New Energy, L.L.C.	ER20-681-000 ER20-682-000	Motion to Intervene, Motion for Extension of Time and Request for Shortened Response Period (Jan. 6, 2020); Protest (Jan. 21, 2020); Answer (Feb. 10, 2020)
Guzman Energy, LLC	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 21, 2020)
Highline Electric Association	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 21, 2020)
Jemez Mountains Electric Cooperative, Inc.	ER20-681-000 ER20-682-000	Out-of-Time Motion to Intervene (Feb. 5, 2020)
K.C. Electric Association	ER20-681-000	Comments (Jan. 21, 2020);

⁸¹ For entities that filed multiple pleadings, not all of the docket numbers listed apply to each pleading.

	ER20-682-000	Out-of-Time Motion to Intervene and Comments (Jan. 22, 2020)
Kit Carson Electric Cooperative, Inc.	ER20-681-000 ER20-682-000	Out-of-Time Motion to Intervene and Protest (Feb. 3, 2020); Motion for Leave to Reply and Reply (March 3, 2020)
La Plata Electric Association, Inc.	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 10, 2020); Protest (Jan. 21, 2020); Motion to Lodge (Mar. 16, 2020)
Lincoln Electric System	ER20-681-000	Motion to Intervene (Jan. 9, 2020)
Midwest Electric Cooperative Corporation	ER20-681-000 ER20-682-000	Out-of-Time Comments (Jan. 22, 2020)
National Rural Electric Cooperative Association	ER20-681-000	Motion to Intervene (Jan. 17, 2020); Comments (Jan. 21, 2020)
Nebraska Public Power District	ER20-681-000	Motion to Intervene (Jan. 3, 2020)
Northwest Rural Public Power District	ER20-681-000 ER20-682-000	Motion to Intervene and Comments in Support of Extension of Time (Jan. 8, 2020); Protest (Jan. 21, 2020); Motion to Intervene (Jan. 21, 2020)
Old Dominion Electric Cooperative	ER20-681-000	Motion to Intervene (Jan. 13, 2020)
Public Service Company of New Mexico	ER20-681-000	Motion to Intervene (Jan. 21, 2020)
San Miguel Power Association, Inc.	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 13, 2020)
Sierra Club	ER20-681-000	Motion for Extension of Time (Jan. 8, 2020); Motion to Intervene and Answer (Jan. 9, 2020); Protest (Jan. 21, 2020); Answer (Feb. 19, 2020)
Tri-State Generation and Transmission Association, Inc.	ER20-681-000 ER20-682-000	Answer (Jan. 9, 2020); Answer (Feb. 5, 2020); Answer (Feb. 18, 2020);

		Answer (Feb. 25, 2020); Answer to Motion to Lodge (Mar. 17, 2020)
United Power, Inc.	ER20-681-000 ER20-682-000	Motion to Intervene (Jan. 9, 2020); Protest (Jan. 21, 2020); Answer (Feb. 12, 2020); Motion to Lodge (Mar. 16, 2020)
Upper Missouri Power Cooperative	ER20-681-000	Motion to Intervene (Jan. 7, 2020)
Western Area Power Administration	ER20-681-000 ER20-682-000	Motion to Intervene (Dec. 27, 2019); Motion to Intervene (Jan. 15, 2020)
Xcel Energy Services Inc.	ER20-681-000	Motion to Intervene (Jan. 6, 2020)