

170 FERC ¶ 61,221
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. Docket Nos. ER20-676-000
ER20-683-000
ER20-683-001
EL20-26-000

ORDER ACCEPTING STATED RATE TARIFF AND WHOLESALE SERVICE
CONTRACTS, INSTITUTING SECTION 206 PROCEEDING, AND ESTABLISHING
HEARING AND SETTLEMENT JUDGE PROCEDURES

(Issued March 20, 2020)

1. On December 23, 2019, and December 26, 2019, as amended and supplemented on January 10, 2020, January 14, 2020, January 24, 2020, and February 10, 2020, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed, pursuant to Federal Power Act (FPA)¹ section 205 and Part 35 of the Commission's regulations:² (1) Rate Schedules No. 1 through No. 43, representing long-term, wholesale power supply contracts (Wholesale Service Contracts) between Tri-State and each of its 43 electric distribution cooperative and public power district members (Utility Members); and (2) a Stated Rate Tariff, which establishes rates for the service Tri-State provides to its 43 Utility Members pursuant to the terms of the Wholesale Service Contracts.³

¹ 16 U.S.C. § 824d (2018).

² 18 C.F.R. pt. 35 (2019).

³ Between December 23, 2019 and February 10, 2020, Tri-State submitted multiple filings in numerous dockets, including a Stated Rate Tariff, Wholesale Electric Service Contracts, an Open Access Transmission Tariff, rate schedules, service agreements, and applications for market-based rate authority. For purposes of this order, at times we refer to Tri-State's collective filings as Tri-State's Tariff Filings. 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. An order

2. As discussed below, we accept the Stated Rate Tariff and Wholesale Service Contracts, effective February 22, 2020, and February 25, 2020. We also institute an investigation pursuant to FPA section 206⁴ in Docket No. EL20-26-000 to determine whether Tri-State's proposed Stated Rate Tariff and Wholesale Service Contracts are just and reasonable. In addition, we establish a refund effective date, and we establish hearing and settlement judge procedures.

I. Background

3. Tri-State is a generation and transmission cooperative that provides wholesale electricity to its 43 Utility Members in Colorado, Nebraska, New Mexico, and Wyoming at cost-based rates pursuant to long-term contracts. A 43-seat Board of Directors (Board) controls Tri-State, with each of Tri-State's 43 Utility Members occupying one seat on the Board.

4. Tri-State 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 provides transmission service to its Utility Members via Tri-State's approximately 5,665 miles of high-voltage transmission lines, the majority of which operate as part of the Western Interconnection.⁵

5. 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

addressing the Petition is being issued concurrently with this order. *Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,224 (2020) (Declaratory Order). Orders addressing Tri-State's Open Access Transmission Tariff (OATT), rate schedules, service agreements, and applications for market-based rate authority are also being issued concurrently with this order.

⁴ 16 U.S.C. § 824e (2018).

⁵ Tri-State notes that a portion of its transmission facilities supports its load centers in the Eastern Interconnection and is under the functional control of Southwest Power Pool, Inc.

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 a stated rate tariff; Utility Member Wholesale Service Contracts; an OATT; and an application for market-based rate authority.

⁷ 16 U.S.C. § 824(f) (2018).

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 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. Tri-State represented that admission of the new Non-Utility Members would cause Tri-State to cease to be wholly owned by entities that are themselves exempt under FPA section 201(f), and that Tri-State will then 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

II. Tri-State's Filings

A. Introduction

6. On December 23, 2019, in Docket No. ER20-676-000, Tri-State filed a proposed Stated Rate Tariff, which it states establishes just and reasonable rates for the service Tri-State provides to its 43 Utility Members.¹⁰ On December 26, 2019, Tri-State submitted, in Docket No. ER20-683-000, 43 rate schedules, representing existing Wholesale Service Contracts, which Tri-State explains represent existing, long-term wholesale power supply contracts between Tri-State and each of its Utility Members.¹¹

7. Tri-State states that it became subject to the Commission's jurisdiction on September 3, 2019, when it admitted Mico as a Non-Utility Member.¹² Tri-State

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).

¹⁰ Tri-State December 23, 2019 Stated Rate Transmittal (Tri-State Stated Rate Transmittal) at 1.

¹¹ Tri-State December 23, 2019 Wholesale Service Contracts Transmittal (Tri-State Wholesale Service Contracts Transmittal) at 1.

¹² 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 Stated Rate Transmittal at 8 n.18.

represents that Mico supplies natural gas to purchasers throughout the United States, and currently provides natural gas to Tri-State's generation facilities across Tri-State's multi-state region. 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 Tri-State accepted Mico as a Non-Utility Member on September 3, 2019.¹³ 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).¹⁴

8. Tri-State states that Mico earns patronage capital in Tri-State pursuant to Mico's Non-Utility Member Agreement with Tri-State. Tri-State explains that Mico's patronage account represents an ownership interest in Tri-State that entitles it to a share of the proceeds if Tri-State is dissolved. Tri-State represents that like Tri-State's Utility Members, Mico has a vote as a Member on important matters relating to Tri-State's governance, such as amendments to Tri-State's Articles of Incorporation, amendments to its Bylaws, and any sale, mortgage, lease, disposition, or encumbrance of any substantial portion of the cooperative's property. Tri-State states that the admission of Mico as a Non-Utility Member will not affect the rates paid by Tri-State Utility Members or any other parties.¹⁵

B. Stated Rate Tariff and Wholesale Service Contracts

9. According to Tri-State, the purpose of the Stated Rate Tariff is to establish a comprehensive cost-of-service for the service provided to Tri-State's Utility Members pursuant to service obligations specified in their Wholesale Service Contracts. Tri-State states that the Stated Rate Tariff consists of two schedules: (1) Rate Schedule A-40, a standard wholesale firm power service rate (Wholesale Rate) that applies to the general purchase of firm power by its Utility Members;¹⁶ and (2) Rate Schedule S, a standby

¹³ *Id.* at 8-9 (citing Tri-State Bylaws at art. I, §§ 1 and 2); Tri-State, Tri-State Wholesale Service Contracts, Rate Schedule No. 259, art. I – Membership, (3.0.0, § 1).

¹⁴ Tri-State Stated Rate Transmittal at 8-9.

¹⁵ *Id.* at 9-10.

¹⁶ *See* Ex. TS-0001 (Testimony of Patrick L. Bridges) at 13.

service rate (Standby Rate)¹⁷ that reflects the valuation of standby service provided to Tri-State's Utility Members that have customers who operate self-generation for the purpose of serving their own load.¹⁸ The Wholesale Rate and Standby Rate are collectively referred to as the Stated Rates in this order.

10. Tri-State states that, consistent with its cooperative governance model, the Stated Rates were developed through a collaborative budget process with its Utility Members and are designed to recover Tri-State's cost-of-service at rates that are equitable, stable, and just and reasonable. Tri-State notes that the existing Stated Rates were approved by Tri-State's Board and have been in effect since 2017. Tri-State further explains that it is not proposing a rate increase or a change in terms and conditions of service that Tri-State currently provides to Utility Members. According to Tri-State, the Wholesale Rate is designed to recover Tri-State's net revenue requirement for the operation of its wholesale power service to its Utility Members, and Tri-State explains that the 2019 and 2020 net revenue requirement is over \$1.2 billion.¹⁹

11. Tri-State states that it has supplied the necessary cost support to validate its Stated Rates in order to comply with the requirements of 18 C.F.R. § 35.12(b), including estimates of transactions and revenues, an explanation of the development and rate design of its Wholesale Rate and Standby Rate, cost support underlying the Wholesale Rate and net revenue requirement, cost support underlying the Standby Rate, relevant cost-of-service statements and various related supporting documentation. Tri-State states that it has no other rates comparable to the Stated Rates, and that its Wholesale Rate is a major source of revenue, providing about 93 percent of Tri-State's total revenue in 2018. Tri-State also states that service under the Stated Rate Tariff is provided pursuant to preexisting contracts between Tri-State and its Utility Members.²⁰

12. Tri-State asserts that the Stated Rate Tariff is just and reasonable. Tri-State notes that it has submitted evidence on the Wholesale Rate's actual performance for 2019 and on its projected performance for 2020 to demonstrate whether or not the Wholesale Rate would over- or under-recover Tri-State's actual and projected cost-of-service for those two years, respectively.²¹ According to Tri-State, it expects to over-recover its cost-of-

¹⁷ Tri-State notes that only one Utility Member is currently subject to the Standby Rate. Tri-State Stated Rate Transmittal at 1.

¹⁸ *Id.* at 1, 23.

¹⁹ *Id.* at 2; Ex. TS-0001 at 14.

²⁰ Tri-State Stated Rate Transmittal at 16-18.

²¹ *See* Ex. TS-0012 and Ex. TS-0014.

service for the Wholesale Rate for 2019 by about \$1.678 million and to under-recover its cost of service for 2020 by about \$6.725 million.²² Tri-State reasons that the expected over-recovery for 2019 is negligible, as it represents just under 0.14 percent of Tri-State's 2019 cost-of-service and about 3.25 percent of the margin needed to meet its debt service ratio for 2019.²³

13. Tri-State states that the Board established the Standby Rate in 2017 based on the recommendations of a rate design committee. Tri-State also states that the process for developing the Standby Rate included a review of federal and state regulatory requirements and various standby service rate designs approved by state-regulatory commissions and self-regulated utilities. Tri-State notes that the Standby Rate design objectives include development of a rate that (1) aligns with the Wholesale Rate; (2) fairly recovers the cost of standby service; (3) considers industry best practices; and (4) reflects cost of service differences associated with dispatchable and non-dispatchable generation technologies. Tri-State argues that, based on these rate design objectives, the Standby Rate reflects an appropriate service charge, demand charge, back-up charge, and scheduled maintenance charge components.²⁴

14. Tri-State represents that each Wholesale Service Contract establishes the obligation that Tri-State sell and deliver to the Utility Member, and that the Utility Member shall purchase and receive from Tri-State no less than 95 percent of all electric service (including capacity and energy required to operate the member's system).²⁵ According to Tri-State, each Utility Member voluntarily executed each contract with Tri-State more than a decade ago, and service under each Wholesale Service Contract has been provided for many years.²⁶

15. Tri-State states that the Wholesale Service Contracts and the Stated Rate Tariff serve two independent purposes: the Wholesale Service Contracts tell Tri-State and Utility Members what they must do, and the Stated Rate Tariff tells Utility Members how

²² Tri-State explains that any surplus over margin from sales of wholesale power will be deferred, and any under-recovery of margin will be recognized from the deferral account for the benefit of Tri-State's members to maintain stable rates. *See* Ex. TS-0001 at 25.

²³ Tri-State Stated Rate Transmittal at 19.

²⁴ *Id.* at 19-20.

²⁵ Tri-State Wholesale Service Contracts Transmittal at 13.

²⁶ *Id.* at 14.

much they must pay.²⁷ Therefore, Tri-State asserts it appropriately submits each Wholesale Service Contract as a rate schedule instead of as a service agreement under the Stated Rate Tariff because: (1) the sale and purchase obligations held by Tri-State and its Members are provided under the terms of the Wholesale Service Contracts rather than the Stated Rate Tariff; (2) customers purchasing electric service from Tri-State are fully aware of the interaction between the Wholesale Service Contracts and Stated Rate Tariff; and (3) designating each Wholesale Service Contract as a rate schedule is appropriate for an entity like Tri-State that is required to operate on “cooperative, non-profit basis for the mutual benefit of its customers.”²⁸ Accordingly, Tri-State also requests, to the extent necessary, waiver of section 35.9(a) of the Commission’s regulations.²⁹

C. Standard of Review

16. Tri-State requests that, given the nature of the Stated Rate Tariff and Wholesale Service Contracts, the Commission apply the public interest standard under the *Mobile-Sierra* doctrine in its review of the filings.³⁰ Tri-State asserts that application of the public interest standard is appropriate for three primary reasons.

17. First, Tri-State asserts that the Wholesale Service Contracts are the result of arm’s-length negotiations that were voluntarily executed over a decade ago. Second, Tri-State

²⁷ *Id.* at 13.

²⁸ Tri-State explains that this structure would allow the rates charged under the Stated Rate Tariff to move up or down each year while the purchase and sale obligations under the Wholesale Service Contract rate schedules can remain stable. *Id.* at 14 (citing *Tri-State Generation & Transmission Ass’n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1359 (10th Cir. 1989)).

²⁹ 18 C.F.R. § 35.9(a) allows for filing entities to file Rate Schedules, tariffs, and service agreements either by dividing these into individual sheets or sections, or as an entire document (with certain exceptions).

³⁰ Tri-State Stated Rate Transmittal at 18; Tri-State Wholesale Service Contracts Transmittal at 15 (both citing *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) (together, *Mobile-Sierra*)). Under the *Mobile-Sierra* doctrine, the Commission must presume that the rate established in a freely negotiated wholesale-energy contract meets the “just and reasonable” requirement imposed by the FPA. The presumption may be overcome only if the Commission concludes that the contract seriously harms the public interest. *NRG Power Mktg., LLC v. Maine Pub. Util. Comm’n*, 558 U.S. 165, 167 (2010) (*NRG Power*) (citation omitted); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008) (*Morgan Stanley*)).

asserts that the Wholesale Service Contracts further Tri-State's ability to operate on a cooperative, non-profit basis under a rate structure that is not designed to recover a return on equity, but rather designed to collect the required cost of service and create a firm equity base, which is mutually beneficial for Tri-State and its Utility Members.³¹

18. Finally, Tri-State asserts that application of the public interest standard is consistent with Commission precedent. Specifically, Tri-State asserts that in *Northern Virginia Electric Cooperative, Inc. v. Old Dominion Electric Cooperative*, the Commission applied the public interest standard and rejected a complaint by Northern Virginia Electric Cooperative, Inc. (NOVEC) alleging that the terms of its wholesale power agreement with Old Dominion Electric Cooperative were no longer just and reasonable.³² Tri-State points out that the Commission stated that there was no evidence that the contract "caused financial distress sufficient to threaten [NOVEC's] ability to continue service, that the contract casts an excessive burden on its customers, or that the contract is unduly discriminatory."³³

D. Request for Waiver of the Prior Notice Requirement and Effective Date

19. Tri-State requests that the Commission accept the Stated Rate Tariff and Wholesale Service Contracts without suspension or condition and grant waiver of the prior notice requirements³⁴ to allow an effective date of September 3, 2019, the date on which Tri-State states that it became subject to the Commission's jurisdiction under the FPA. In the alternative, Tri-State requests that the Commission accept its filings effective one day after the date of filing.³⁵

20. Tri-State states that it has made a good faith effort to comply with the Commission's prior notice requirements, noting that it made its July filings 60 days before it expected to

³¹ Tri-State Stated Rate Transmittal at 18; Tri-State Wholesale Service Contracts Transmittal at 15.

³² Tri-State Stated Rate Transmittal at 18-19; Tri-State Wholesale Service Contracts Transmittal at 15 (both citing *N. Va. Elec. Coop., Inc. v. Old Dominion Elec. Coop.*, 114 FERC ¶ 61,240, *reh'g denied*, 116 FERC ¶ 61,173 (2006) (*NOVEC*)).

³³ Tri-State Stated Rate Transmittal at 19; Tri-State Wholesale Service Contracts Transmittal at 15 (both quoting *NOVEC*, 114 FERC ¶ 61,240 at P 18).

³⁴ 16 U.S.C § 824d(e); 18 C.F.R. § 35.11 (2019).

³⁵ Tri-State Stated Rate Transmittal at 2; Tri-State Wholesale Service Contracts Transmittal at 16.

become subject to the Commission's jurisdiction after admitting Mieco. Tri-State further states that it refiled its tariffs and agreements as soon as possible while meeting the cost support requirements of the Commission's October 4, 2019 Order. Tri-State asserts that denial of waiver in this context would be inequitable and have a significant adverse impact on Tri-State and its members.³⁶

21. Tri-State further states that the grant of waiver will not have adverse effects on the purchasers of power, because there is no change to its existing rates. Tri-State also states that, to the extent the Commission seeks to penalize Tri-State to protect Tri-State customers, the Commission should take into account that the majority of Tri-State's customers are Utility Members/owners under its ownership structure.³⁷ Finally, Tri-State notes that the Commission has exercised its discretion in numerous cases to waive the prior notice requirements where there have been extenuating circumstances, including where previously non-jurisdictional cooperatives have transitioned to FERC jurisdiction.³⁸

III. Notice and Responsive Pleadings

22. Notice of the Stated Rate Tariff filing was published in the *Federal Register*, 84 Fed. Reg. 72,350 (Dec. 31, 2019) with interventions and protests due on or before January 13, 2020. Notice of the Wholesale Service Contracts filing was published in the *Federal Register*, 85 Fed. Reg. 87 (Jan. 2, 2020), with interventions and protests due on or before January 16, 2020.

23. Notice of the amendment to the Wholesale Service Contracts filing was published in the *Federal Register*, 85 Fed. Reg. 2733 (Jan. 16, 2020), with interventions and protests due on or before January 21, 2020.

³⁶ Tri-State Stated Rate Transmittal at 23; Tri-State Wholesale Service Contracts Transmittal at 19.

³⁷ Tri-State Stated Rate Transmittal at 23; Tri-State Wholesale Service Contracts Transmittal at 19.

³⁸ For example, Tri-State notes that the Commission waived prior notice and assigned an effective date of July 26, 2002 to an agreement Sussex Rural Electric Cooperative filed on January 27, 2003. Tri-State Stated Rate Transmittal at 21 (citing *Sussex Rural Elec. Coop.*, 102 FERC ¶ 61,335 (2003)).

24. 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.³⁹

25. 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 unsupported and does not satisfy the requirements of Rule 214. 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.

26. 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.

IV. Discussion

A. Procedural Matters

27. 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.⁴⁰ 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 their interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay.

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

³⁹ 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.

⁴⁰ The entities that filed comments or protests but did not file motions to intervene are not parties to these proceedings. 18 C.F.R. §§ 385.102(c)(3), 385.214(a)(3) (2019).

29. Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record.⁴¹ Here, we find that the evidence 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

1. Jurisdiction and Standard of Review

a. Tri-State's Jurisdictional Status

i. Comments

30. Empire Electric Association, Inc. (Empire), K.C. Electric Association (K.C. Electric), High West Energy, Inc. (High West Energy), Highline Electric Association (Highline), and Midwest Electric Cooperative (Midwest) assert that Tri-State became a public utility subject to the Commission's exclusive jurisdiction under Part II of the FPA on September 3, 2019.⁴²

31. United Power, Inc. (United Power) states that the Commission determines ownership for a cooperative on the basis of three criteria under the precedent established in *Delta-Montrose Electric Association*:⁴³ (1) an equity interest represented by patronage capital allocated based on a member's payments for energy; (2) a claim on assets after dissolution; and (3) a vote as a member of the Board.⁴⁴ United Power argues that none of these conditions of ownership are satisfied by Mieco. Sierra Club similarly asserts that Tri-State has not demonstrated that Mieco is a Tri-State owner based on these criteria. Likewise, the Colorado PUC asserts that the terms of Mieco's admission to Tri-State is not equivalent to other members which meet the criteria under *DMEA*.⁴⁵ Gladstone New Energy, L.L.C. (Gladstone) contends that, at the time it issued the *DMEA* order, the Commission did not have before it the question of whether a Tri-State member that does not pay for any energy may still have a patronage account that, for the purpose of determining ownership interest, is the legal equivalent of all of Tri-State's members that

⁴¹ See, e.g., *Cal. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,072, at P 8 (2012).

⁴² Empire Comments at 1; K.C. Electric Comments at 1; High West Energy Comments at 1; Highline Comments at 1; Midwest Comments at 1.

⁴³ 151 FERC ¶ 61,238, *reh'g denied*, 153 FERC ¶ 61,028 (2015) (*DMEA*).

⁴⁴ United Power Protest at 6-7 (citing *DMEA*, 151 FERC ¶ 61,238 at P 26).

⁴⁵ Colorado PUC Protest at 25.

do pay Tri-State for energy. Gladstone argues that the Mico Membership Agreement significantly departs from, and subverts, Tri-State's Bylaws, and Tri-State has not established that the Mico Membership Agreement affords Mico a valid ownership interest in Tri-State.⁴⁶

32. United Power, Gladstone, and La Plata Electric Association, Inc. (La Plata) assert that Tri-State remains wholly owned by its Utility Members, and therefore continues to qualify for its exemption from the Commission's jurisdiction under FPA section 201(f).⁴⁷ La Plata argues that an exempt entity cannot simply waive this restriction and volunteer to become subject to the Commission's jurisdiction.⁴⁸ Sierra Club claims that Tri-State has not demonstrated that Mico was validly admitted as a member of Tri-State under Colorado law.⁴⁹ The Colorado PUC asserts that Tri-State's failure to demonstrate that it is subject to the Commission's jurisdiction is reason enough for the Commission to reject Tri-State's Tariff Filings outright.⁵⁰

33. Gladstone also asserts that Tri-State's claim that it is no longer an exempt entity pursuant to FPA section 201(f) is based upon its flawed reading of the Commission's previous finding that ownership of common stock by private companies was sufficient to demonstrate that an entity is not exempt under FPA section 201(f).⁵¹ Gladstone notes that Tri-State does not issue stock to any of its members, and thus asserts that admitting Mico as a new member does not confer any common stock to a private company that is sufficient to compel a finding that Tri-State is no longer exempt under FPA section 201(f) under that precedent.⁵² Gladstone also contends that the Mico Membership Agreement significantly departs from Tri-State's Bylaws by, among other things, characterizing the parties' relationship as that of "independent contractors," rather than of "cooperative corporation and member"⁵³ and affording Tri-State the option of distributing all or a

⁴⁶ Gladstone Protest at 26.

⁴⁷ *Id.* at 5; United Power Protest at 13-16; La Plata Protest at 6.

⁴⁸ La Plata Protest at 6.

⁴⁹ Sierra Club Protest at 12.

⁵⁰ Colorado PUC Protest at 2.

⁵¹ Gladstone Protest at 17-18 (citing *Enron Power Marketing, Inc. v. PJM Interconnection*, 83 FERC ¶ 61,032 (1998)).

⁵² *Id.* at 5, 18.

⁵³ *Id.* at 19 (citing Petition, Ex. G, Mico Membership Agreement, § 5.1).

portion of Tri-State's net margins deemed allocated to Mico as cash, instead of capital credits.⁵⁴ Gladstone therefore argues that Tri-State has not met the Commission's standards to show private ownership or control of the utility to support a finding that an otherwise exempt entity no longer qualifies for exemption under FPA section 201(f).

34. United Power, La Plata, and Gladstone claim that Tri-State admitted Mico as a new member for the express purpose of avoiding Colorado PUC jurisdiction.⁵⁵ United Power states that the Supreme Court has denied agencies jurisdiction when parties have engaged in a sham business transaction to manufacture jurisdictional authority.⁵⁶

ii. Answers

35. In an answer filed on February 5, 2020 in response to protests to its Tariff Filings, Tri-State references its answer submitted on that same day in the Petition proceeding, in which it disputes protesters' assertions that Tri-State is not subject to the Commission's jurisdiction. In its answer to protests of the Petition, Tri-State maintains that the Commission has jurisdiction over Tri-State because Mico is a co-owner of Tri-State, and argues that Mico is not exempt under FPA section 201(f).⁵⁷

36. In its answer to Tri-State, Sierra Club maintains that Tri-State did not provide documents concerning both the nature and activities of Mico or Mico's ownership structure, resulting in an incomplete factual record.⁵⁸ United Power maintains that Tri-State has not made a showing that the Mico Membership Agreement with Mico would cause Tri-State to lose its FPA section 201(f) exemption, and that the Commission should rule that it has no jurisdiction over Tri-State's rates, terms, and charges. Further, United Power argues that the Mico Membership Agreement is a jurisdictional agreement that should be on file with the Commission. United Power avers that the Mico Membership Agreement alters the method by which patronage capital is allocated.⁵⁹

⁵⁴ *Id.* at 25.

⁵⁵ *Id.* at 6; United Power Protest at 8 (citing Ex. No. UPC-0001, June 5, 2019); La Plata Protest at 6.

⁵⁶ United Power Protest at 8 (citing *Marin Cty. v. United States*, 356 U.S. 412, 415-416 (1958)).

⁵⁷ *E.g.*, Tri-State, Answer, Docket No. EL20-16-000, at 8 (filed Feb. 5, 2020).

⁵⁸ Sierra Club Answer at 4.

⁵⁹ United Power Answer, Attachment A at 9-10.

iii. Determination

37. Protesters argue that Tri-State did not lose its FPA section 201(f) exemption because Mico has not been proven to not be exempt under FPA section 201(f). As discussed in the Declaratory Order, we find that Tri-State has sufficiently demonstrated that Mico itself is not exempt under FPA section 201(f) and, therefore, Tri-State became a public utility subject to the Commission's jurisdiction under Part II of the FPA on September 3, 2019, when it admitted Mico as a member.⁶⁰

38. As discussed in detail in the Declaratory Order, eligibility for the FPA section 201(f) exemption is conferred by statute—either Tri-State is “wholly owned” by exempt entities that fall within the scope of FPA section 201(f)'s exemption from the Commission's jurisdiction under Part II of the FPA or it is not.⁶¹ Given the commonality of the FPA section 201(f) issues raised here and in the Declaratory Order, we will not repeat our detailed discussion here.

b. Standard of Review

i. Comments

39. United Power and La Plata assert that if the Commission were to rule that it has jurisdiction over Tri-State, the Commission should find that the *Mobile-Sierra* presumption does not apply to Tri-State's various filings and should apply the just and reasonable standard of review.⁶² United Power argues that the Wholesale Contracts, Bylaws, and Board Policies are not the product of bargaining, but unilaterally imposed

⁶⁰ Declaratory Order, 170 FERC ¶ 61,224 at P 84 (2020).

⁶¹ FPA section 201(f) states that:

No provision in this subchapter [i.e., part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one of more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. (Emphasis added.)

⁶² United Power Protest at 18-24; La Plata Protest at 7-13.

policies and generally applicable form agreements.⁶³ Similarly, Gladstone argues that Tri-State has not demonstrated that the Stated Rate Tariff and Wholesale Service Contracts were freely negotiated. United Power and La Plata assert that the Wholesale Service Contracts bear all the marks of form agreements to which the *Mobile-Sierra* doctrine does not apply. United Power notes that the terms and conditions, including contract length and incorporation of Tri-State policies, are nearly identical among Tri-State's Members. United Power also asserts that the Commission does not apply the *Mobile-Sierra* presumption in the context of contracts between affiliates,⁶⁴ suggesting that such contracts do not represent arm's-length transactions. Similarly, Wheat Belt Public Power District (Wheat Belt) argues that Tri-State's Wholesale Service Contracts are "not [] routine arm's-length requirements contract between unrelated, private for-profit parties."⁶⁵ Likewise, Gladstone contends that because Tri-State approaches the Wholesale Service Contracts with the interests of its members in mind rather than its own economic interest, the Wholesale Service Contracts lack the characteristics of arm's-length bargaining necessary to apply the *Mobile-Sierra* protection.⁶⁶ La Plata also argues that a corporation's ability to operate as a cooperative or on a non-profit basis has no bearing on whether the *Mobile-Sierra* presumption applies to an agreement to which that corporation is a party.

40. United Power and La Plata disagree with Tri-State that the Commission's *NOVEC* order supports the finding that the public interest presumption should be applied to the Wholesale Service Contracts.⁶⁷ United Power argues that *NOVEC* did not establish broad *Mobile-Sierra* protections for all full requirements contracts. United Power asserts that Tri-State ignores more recent precedent declining to apply *Mobile-Sierra* in very similar circumstances to those in this proceeding. United Power contends that Commission precedent supports that, even in the context of bilateral agreements, form agreements and generally applicable agreements with limited room for negotiation are not negotiated freely, and thus not subject to the *Mobile-Sierra* presumption.⁶⁸ La Plata asserts,

⁶³ United Power Protest at 19-23.

⁶⁴ *Id.* at 23-24.

⁶⁵ Wheat Belt January 21, 2020 Protest at 13 (quoting *Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d at 1359).

⁶⁶ Gladstone Protest at 33 (citing *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048, at P 97 (2014)).

⁶⁷ United Power Protest at 19-20; La Plata Protest at 12.

⁶⁸ United Power Protest at 20 (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262 (2017)).

inter alia, that there is no indication in *NOVEC* that Old Dominion employed a tariff-and-service-agreement-type arrangement to provide service to its members or that Old Dominion could unilaterally change the rate charged to Northern Virginia Electric Cooperative. Similarly, Wheat Belt argues that Tri-State’s Wholesale Service Contracts are more akin to OATT service agreements than to separate rate schedules, and Wheat Belt asserts that *NOVEC* does not support a broad finding that the *Mobile-Sierra* presumption governs review of cooperatives’ long-term, all-requirements, wholesale agreements.⁶⁹ Gladstone states that Tri-State’s Wholesale Service Contracts have never been filed for review by the Commission, and the Commission has previously stated that it will not apply a public interest standard in cases where it has not previously determined the contracts to be just and reasonable.⁷⁰

41. Finally, several Utility Members in support of Tri-State’s Tariff filings state that each Wholesale Service Contract is a pre-existing long-term all-requirements contract that was freely negotiated at arm’s-length and entered into with Tri-State. As such, they agree with Tri-State that the Commission should review each Wholesale Service Contract under the *Mobile-Sierra* “public interest” standard.⁷¹

ii. Answers

42. Tri-State asserts that protesters incorrectly argue that the Wholesale Service Contracts are not subject to the *Mobile-Sierra* presumption. Tri-State claims that protesters fail to recognize that the fundamental principle upon which the *Mobile-Sierra* presumption is based—the need for certainty and stability in the performance of contractual obligations—is essential to an orderly market and therefore requires that contracting parties be held to the benefit of their bargains.⁷² Tri-State asserts that the

⁶⁹ Wheat Belt January 21, 2020 Protest at 16-17, 21-22.

⁷⁰ Gladstone Protest at 28 (citing *Wabash Valley Power Ass’n, Inc.*, 107 FERC ¶ 61,327, at P 11 (2004)).

⁷¹ Empire Comments at 3-4; KC Electric Comments at 3-4; High West Energy Comments at 4; Highline Comments at 4; Midwest Comments at 3-4 (all noting that Tri-State’s Board of Directors consists entirely of representatives from Tri-State Utility Members).

⁷² Tri-State February 5, 2020 Answer at 27 (citing *Pub. Serv. Co. of N.M.*, 43 FERC ¶ 61,469, at 62,153-54 (1988) (explaining that the “certainty and stability which stems from contract performance and enforcement is essential to an orderly bulk power market” such that, “[i]f the integrity of contracts is undermined, business would be transacted without legally enforceable assurances” and, therefore, the Commission will “enforce the bargain which the parties struck and executed.”)).

Commission's general policy is to apply the *Mobile-Sierra* presumption where the circumstances of a particular contract provide some assurance of its justness and reasonableness. Tri-State contends that protestors' arguments against applying the *Mobile-Sierra* presumption to the Wholesale Service Contracts fail to appreciate the significant assurance of justness and reasonableness here. Specifically, Tri-State argues that prior to the 2000/2001 and 2007 amendments to the Wholesale Service Contracts, the Utility Members and Tri-State had many rounds of negotiation, and Utility Members were given the option of not executing the Wholesale Service Contract and keeping the pre-2007 agreement in place.⁷³ Tri-State further asserts that La Plata and United Power were in positions to determine whether it was in their best interest to join Tri-State.⁷⁴ Further, Tri-State argues that each Wholesale Service Contract has a separate set of schedules and related obligations unique to each Utility Member party thereto. Thus, Tri-State reiterates that the Wholesale Service Contracts are not generally applicable form agreements.⁷⁵

43. Sierra Club claims that nearly all of Tri-State's proposed rates and contracts impede new entrants, favor Tri-State's own generation, and force Utility Members to subsidize generation that would otherwise be uneconomic, which are outcomes that violate the public interest by stifling competition. Sierra Club argues that the Commission should therefore conclude that (1) the *Mobile-Sierra* presumption does not apply; (2) even if the presumption applies, the five percent contractual cap on self-procurement violates FPA section 205 because it unlawfully discriminates against non-Tri-State resources; and (3) in so doing, the proposed Wholesale Service Contracts violate the public interest.⁷⁶ United Power asserts that Tri-State emphasizes trivial differences among its Utility Members' Wholesale Service Contracts to argue the agreements are not form agreements.⁷⁷

iii. Determination

44. We find that the Stated Rate Tariff and Wholesale Service Contracts are not eligible for the *Mobile-Sierra* "public interest" presumption. As the Commission has

⁷³ *Id.* at 29.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ Sierra Club Answer at 36 (referring to the Wholesale Service Contract provision that a Utility Member Utility Member shall purchase and receive from Tri-State no less than 95 percent of all electric service (capping the self-procurement at five percent)).

⁷⁷ United Power Answer at 8.

explained, the *Mobile-Sierra* “public interest” presumption applies to an agreement only if the agreement has certain characteristics that justify the presumption. In ruling on whether the characteristics necessary to justify a *Mobile-Sierra* presumption are present, the Commission must determine whether the agreement at issue embodies either: (1) individualized rates, terms, or conditions that apply only to sophisticated parties who negotiated them freely at arm’s-length; or (2) rates, terms, or conditions that are generally applicable or that arose in circumstances that do not provide the assurance of justness and reasonableness associated with arm’s-length negotiations. Unlike the latter, the former constitute contract rates, terms, or conditions that necessarily qualify for a *Mobile-Sierra* presumption.⁷⁸

45. We find that the *Mobile-Sierra* presumption does not apply to Tri-State’s Stated Rate Tariff because it is generally applicable to all Utility Members and is not negotiated between Tri-State and a Utility Member on an individualized basis. Rather, as Tri-State has explained, Tri-State’s Board determined the Utility Member rates provided in the Stated Rate Tariff.⁷⁹

46. We also find that the terms and conditions of the Wholesale Service Contracts at issue here are generally applicable and, therefore, are not protected by the *Mobile-Sierra* presumption. Unlike the Stated Rate Tariff, a Wholesale Service Contract is executed between Tri-State and an individual Tri-State member. However, we agree with La Plata, Wheat Belt, and United Power and find that, based on the relationship between the Stated Rate Tariff and the Wholesale Service Contracts, the Wholesale Service Contracts are akin to service agreements under the generally applicable Stated Rate Tariff rather than separately negotiated agreements.⁸⁰ We note that section 3(a) of each Wholesale Contract states that the rates are provided by the Stated Rate Tariff: “The Member shall pay the Tri-State for all electric service furnished hereunder at the rates and on the terms and conditions set forth in the rate schedule(s) [i.e., the Stated Rate Tariff], adopted from time to time by [Tri-State’s Board].” Additionally, other than provisions regarding delivery points (i.e., Schedule B of each Wholesale Service Contract) and the contract duration for two Utility Members, the terms and conditions are substantially the same in

⁷⁸ E.g., *Linden VFT, LLC v. Pub. Serv. Elec. and Gas Co.*, 161 FERC ¶ 61,264, at P 27 (2017); *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262, at P 18; *Sw. Power Pool, Inc.*, 144 FERC ¶ 61,059, at P 127 (2013), *order on reh’g and compliance*, 149 FERC ¶ 61,048, at P 94 (citations omitted); *Midwest Indep. Transmission Sys. Operator, Inc.*, 142 FERC ¶ 61,215, at P 177 (2013), *order on reh’g and compliance*, 147 FERC ¶ 61,127, at P 108 (2014) (citations omitted).

⁷⁹ Tri-State Stated Rate Tariff Filing at 4.

⁸⁰ La Plata Protest at 9-11; Wheat Belt January 21, 2020 Protest at 16-17; United Power Protest at 20-22.

each Wholesale Contract, and all the Wholesale Service Contracts contain virtually identical language.

47. Tri-State has not supported its contention that the *Mobile-Sierra* presumption applies to the Wholesale Service Contracts. Tri-State asserts that the Wholesale Service Contracts were negotiated at arm's-length; however, Tri-State has not demonstrated that they embody individualized rates, terms, or conditions. Further, although Tri-State claims that the Wholesale Service Contracts further Tri-State's ability to operate on a cooperative, non-profit basis, we agree with La Plata that a corporation's ability to operate as a cooperative or on a nonprofit basis does not bear on whether the *Mobile-Sierra* presumption applies to an agreement to which that corporation is a party because it does not demonstrate whether the agreement has certain characteristics that justify the presumption. In addition, we find unavailing Tri-State's reliance on *NOVEC*. As La Plata observes, in *NOVEC*, Old Dominion (unlike Tri-State) did not employ a tariff-and-service agreement-type arrangement to provide service to its members. Further, *NOVEC* predates the *Morgan Stanley* and *NRG Power* decisions,⁸¹ as well as subsequent Commission orders,⁸² which refined the understanding and application of the *Mobile-Sierra* doctrine.

48. We are not persuaded by Tri-State's argument in its answer that the circumstances under which the Wholesale Service Contracts were negotiated provide sufficient assurance of their justness and reasonableness and therefore that the *Mobile-Sierra* presumption should apply. To support its position that it negotiated with its Utility Members, for example, Tri-State notes that two of its Utility Members did not agree to extend their Wholesale Service Contracts in 2007 and kept the pre-2007 agreement in place.⁸³ However, this point is not persuasive as Tri-State's arguments indicate that Utility Members were provided a binary choice: either the Utility Members could extend their respective contracts and accept amendments or decline the extension and the amendments altogether. Thus, there appeared to be little room for negotiation of individualized rates, terms, or conditions.

49. Further, we disagree with Tri-State's claim that the Wholesale Service Contracts are not generally applicable agreements because each Wholesale Contract has a set of separate schedules and related obligations unique to each Utility Member party thereto. Though each Wholesale Contract has a Schedule A and Schedule B, those schedules do not address the fundamental rates, terms, and conditions of the wholesale service

⁸¹ *Supra* note 30.

⁸² See *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048 at P 94; *Midwest Indep. Transmission Sys. Operator, Inc.*, 147 FERC ¶ 61,127 at P 108.

⁸³ Tri-State February 5, 2020 Answer at 29.

Tri-State provides to each Utility Member. Rather, Schedule A reflects a listing of operational contracts or agreements entered into between Tri-State and its Utility Member for provision of service—and are not negotiations made on an individualized basis as part of the formation of the applicable Wholesale Service Contract. Schedule B lists the delivery points for the applicable Utility Member, as well as delivery voltage and special conditions relating to service at such points. As with delivery point provisions in service agreements under a generally applicable tariff, Schedule B does not demonstrate that the terms and conditions of the Wholesale Service Contracts at issue in this proceeding are individualized.

50. Finally, we disagree with Tri-State that the fact that only a Utility Member of Tri-State has the right to enter into a Wholesale Service Contract demonstrates that such contracts are not generally applicable. To the contrary, we find that the proper scope of the inquiry of general applicability here concerns Tri-State's wholesale customers (i.e., its Utility Members),⁸⁴ not non-members.

2. Stated Rate Tariff and Wholesale Contracts

a. Requested Disposition

51. NRECA states that it does not take a position on the Commission's disposition of Tri-State's filings but requests that the Commission not establish policies applicable to all generation and transmission cooperatives that are subject to the Commission's jurisdiction but limit its review to the specific rate issues presented here. NRECA also requests that the Commission limit its rulings to Tri-State's rates and not Tri-State's corporate organization and governance.⁸⁵

52. Several commenters support Tri-State's filings and ask the Commission to accept them. For example, Alliance Power Incorporated and Colorado Highlands Wind, LLC (collectively, Alliance) asserts that approval of Tri-State's Tariff Filings would provide

⁸⁴ Section 3(a) of Tri-State's Bylaws provide that a Utility Member must enter into a contract with Tri-State to purchase electric power and energy:

Unless otherwise specified by written agreement, or by the terms of these Bylaws, each member shall purchase from [Tri-State] electric power and energy as provided in the member's contract with [Tri-State].

Ex. UPP-0003 at 1.

⁸⁵ NRECA Comments at 4.

consistency in rate regulation to Tri-State's Utility Members and customers.⁸⁶ Alliance explains that conflicting rules, regulations, and rate structures increase Tri-State's operating costs and ability to effectively plan for additional generation while servicing existing power purchase commitments.⁸⁷

53. Similarly, Empire, K.C. Electric, High West Energy, Highline, and Midwest assert that Tri-State has supported its filings as just and reasonable and support Tri-State's request for a waiver of the prior notice requirements in order to grant Tri-State's requested effective date. They claim that denying waiver in the context of these proceedings would be inequitable and would have a significant adverse impact on Tri-State and its Utility Members due to its cooperative ownership structure.⁸⁸

54. Conversely, several commenters argue that Tri-State's tariffs suffer from material deficiencies, fail to comply with the Commission's filing requirements, and have not been demonstrated to be just and reasonable.⁸⁹ Northwest Rural Public Power District (Northwest Rural) requests that the Commission set Tri-State's Tariff Filings for hearing and/or settlement judge procedures, and impose a refund obligation from the date Tri-State became subject to the Commission's jurisdiction, i.e., September 3, 2019. If the Commission finds that Tri-State is no longer exempt from Part II of the FPA and the Commission accepts Tri-State's Tariff Filings, La Plata and United Power request that the Commission set them for hearing and settlement judge procedures.⁹⁰

b. Stated Rate Tariff

i. Comments

55. The Colorado PUC and San Miguel state that there is ambiguity between the Stated Rate Tariff and Wholesale Service Contracts, arguing that the Wholesale Service Contracts fail to refer to the Stated Rate Tariff and instead require members to pay a rate

⁸⁶ Alliance Comments at 3.

⁸⁷ *Id.* at 4.

⁸⁸ Empire Comments at 5-6; K.C. Electric Comments at 6-7; High West Energy Comments at 6; Highline Comments at 6-7; Midwest Comments at 9.

⁸⁹ Colorado PUC Protest at 2; United Power Protest at 17; La Plata Protest at 2; Northwest Rural Protest at 4-5; Sierra Club Protest at 2.

⁹⁰ La Plata Protest at 2; United Protest at 2.

set by the Tri-State Board.⁹¹ The Colorado PUC also states that it is concerned that neither Tri-State's testimony nor the Board Policies acknowledge that, if Tri-State is subject to Part II of the FPA, Tri-State cannot alter charges set forth in the Stated Rate Tariff without first obtaining Commission approval.⁹²

56. Various protesters allege that Tri-State has not sufficiently demonstrated that its proposed Stated Rates are just and reasonable and not unduly discriminatory.⁹³ Wheat Belt submits that the Commission should accept the initial rates for filing and establish an investigation under section 206 of the FPA, which would afford customers maximum protection while also facilitating a process for developing the evidentiary record necessary to address the deficiencies and approve the filings.⁹⁴ Wheat Belt argues that Tri-State's 2017 budget does not reflect the actual cost of providing wholesale electric service,⁹⁵ and that Tri-State failed to show that it is just and reasonable to use the 2015 rate design to develop rates in 2017 that will apply in 2019 and 2020.⁹⁶ Public Service Company of New Mexico (PNM) states that further review of Tri-State's Stated Rates is warranted as it is concerned about the level of cost support provided, and that the lack of detail is inadequate in helping determine how PNM might be affected by the Stated Rates, as required by the Commission.⁹⁷

57. With respect to the Wholesale Rate, Wheat Belt contends that Tri-State's ratemaking methodology is not based on the appropriate cost factors and adjustments to demonstrate a just and reasonable revenue requirement that reflects the actual cost of providing service, and instead Tri-State uses the same approach it used to establish rates when it was not subject to the Commission's jurisdiction.⁹⁸ Sierra Club argues that Tri-

⁹¹ Colorado PUC Protest at 14; San Miguel Protest at 8.

⁹² Colorado PUC Protest at 8.

⁹³ Northwest Rural Protest at 14-15; Wheat Belt January 21, 2020 Protest at 19-20; Colorado PUC Protest at 7; Sierra Club Protest at 27-54; Wheat Belt February 6, 2020 Protest at 2-4.

⁹⁴ Wheat Belt January 21, 2020 Protest at 55-56; *see also* Wheat Belt February 6, 2020 Protest at 5.

⁹⁵ Wheat Belt January 21, 2020 Protest at 26-27.

⁹⁶ *Id.* at 28-38; Wheat Belt February 6, 2020 Protest at 4.

⁹⁷ PNM Protest at 4 (citing October 2019 Order, 169 FERC ¶ 61,012 at P 23).

⁹⁸ Wheat Belt January 21, 2020 Protest at 26-27.

State fails to define numerous key terms and charges within the Wholesale Rate,⁹⁹ and argues that the Wholesale Rate allows Tri-State, at its discretion, to increase charges related to a member system that is remote from the point of delivery, without offering clear definitions on key terms that would trigger such an increase.¹⁰⁰

58. Wheat Belt states that it is not clear that costs incurred to comply with Colorado's and New Mexico's statutes and regulations are removed from the generally applicable Wholesale Rate, and that imposing such costs on members through the Wholesale Rate is inconsistent with cost causation principles. Further, Wheat Belt explains that Tri-State fails to demonstrate that the Wholesale Rate does not require members to subsidize millions of dollars of costs avoided by members in Colorado, New Mexico, and Wyoming. Wheat Belt contends that the Commission should not approve the Wholesale Rate until Tri-State has sufficiently addressed these issues.¹⁰¹

59. Some protesters argue that Tri-State's Standby Rate is not just and reasonable because it is not fully supported and fails to resolve deficiencies identified in the October 2019 Order. Wheat Belt argues that the record contains no support for the \$2,000 per month service charge under the Standby Rate, and that the service charge is not based on Tri-State's actual experience.¹⁰² Wheat Belt further argues that Tri-State has not adequately supported the reservation demand charge or the reserve capacity for the revenue forecasting charge.¹⁰³ In addition, Wheat Belt and Sierra Club argue that Tri-State's proposed standby service adjustment should be revised to account for various inadequacies, that supporting documentation was not sufficiently filed, and that Tri-State's Stated Rates are incorrect.¹⁰⁴ Wheat Belt also contends that Tri-State did not establish a standby service revenue requirement but used the Wholesale Rate as the basis for the Standby Rate and then applied that rate to one of its standby service customers to

⁹⁹ These terms and charges include the generation demand rate, the transmission/delivery demand rate, and the rate, each of which Sierra Club asserts plays a central role in determining the amount members pay. Sierra Club Protest at 45.

¹⁰⁰ Sierra Club Protest at 45.

¹⁰¹ Wheat Belt January 21, 2020 Protest at 39-45.

¹⁰² *Id.* at 51-52.

¹⁰³ *Id.* at 52-54.

¹⁰⁴ *Id.* at 49-51; Sierra Club Protest at 46-48.

derive estimates under Rate Schedule S.¹⁰⁵ Sierra Club asserts that Tri-State's 2019 and 2020 budget estimates include explained values, and that Tri-State fails to explain significant discrepancies between the two budgets. Sierra Club also asserts that the proposed Standby Rate allows Tri-State to unilaterally change several proposed charges.¹⁰⁶

ii. Answers

60. Tri-State argues that protesters rely on unsupported assertions with regard to cost support, clarity, and components of the Stated Rate Tariff. Tri-State notes that none of the protesters challenge Exhibit TS-0012, which, it contends, demonstrates that the Wholesale Rate produced a just and reasonable result for 2019.¹⁰⁷ Tri-State responds to the Colorado PUC, Sierra Club, and Wheat Belt by asserting that it has used a reasonable basis to set the Wholesale Rate (including defining its components), and has shown that the Wholesale Rate is aligned with Tri-State's actual and expected cost of service.

61. Specifically, Tri-State argues that in filing an initial rate, it is not bound by a specific test period requirement applicable to changed rates; instead it must demonstrate that its initial rate was developed in a manner reasonably calculated to assure that it is just and reasonable at the time it went into effect. Tri-State explains that its Wholesale Rate meets the Commission's "reasonable when made" standard,¹⁰⁸ and that its budgeting process starts with actual costs for current year and adjusts them for known and measurable changes expected to occur in the forecasted year.¹⁰⁹ Next, Tri-State argues

¹⁰⁵ Wheat Belt February 6, 2020 Protest at 2-3; *see also* Wheat Belt January 21, 2020 Protest at 47.

¹⁰⁶ Sierra Club Protest at 46-48.

¹⁰⁷ Tri-State February 5, 2020 Answer at 5-6.

¹⁰⁸ Tri-State notes that the D.C. Circuit has explained that "[t]he Commission normally bases its decision on the estimates' reasonableness when made, disregarding events occurring between the filing and its own decision." *Id.* at 7-8 (quoting *Sw. Pub. Serv. Co. v. FERC*, 952 F.2d 555, 556 (D.C. Cir. 1992)). Further, Tri-State notes that in upholding the Commission's use of the "reasonable when made" standard, the D.C. Circuit has ruled that "the challengers of a utility's estimates, once the utility has shown them to be just and reasonable when made, must carry the burden of showing not only a substantial error but also that the resulting disparity would yield unreasonable results." *Id.* at 8 (quoting *Sw. Pub. Serv. Co. v. FERC*, 952 F.2d at 556) (additional citation omitted).

¹⁰⁹ *Id.* at 7-8.

that its Wholesale Rate components are well-understood in the industry and are defined and explained in various of its exhibits and testimonies.¹¹⁰ Tri-State explains the process to calculate its net revenue requirement is based on the cost of service methodology developed in the 2015 rate design study, with fixed costs being further allocated between generation demand and transmission demand, and all resulting allocated costs divided by respective billing determinants from load forecast to yield final rates.¹¹¹ Tri-State also notes that the process to develop the Wholesale Rate was one in which all of Tri-State's Utility Members (including Wheat Belt) participated and/or had complete visibility therein.¹¹² Finally, Tri-State states that the Wholesale Rate is well-aligned with its cost of service as the wholesale revenue for 2019 was less than 0.15 percent more than actual cost of service.¹¹³

62. Tri-State concludes that it has adequately supported the Wholesale Rate, fulfilling obligations under 18 C.F.R. Section 35.12 and addressing concerns of the October 2019 Order, citing the assortment of exhibits on key cost support, explanations, and testimonies attached to its filings.¹¹⁴

63. Tri-State acknowledges that cost shifts in 2013-2015, "caused by Colorado and New Mexico rate regulation resulted in unfair cost burden distribution on Utility Members in other states during that period."¹¹⁵ Tri-State explains that it shares Wheat Belt's concern about unfair economic fallout from state regulation of Tri-State's wholesale operations. However, Tri-State maintains that the 2017 budget is forward-looking, and neither the 2017 budget nor the Wholesale Rate includes any offsets for the uneven cost responsibility distribution from 2013-2015.¹¹⁶

¹¹⁰ *Id.* at 9 (citing Ex TS-0015 (2015 Rate Design Study), Ex. TS-0030 (Stated Rate Background and Cost Support), and Ex. TS-0002 (Testimony of Joseph Mancinelli)).

¹¹¹ *Id.* at 9 (citing Ex. TS-0001 at 13-17).

¹¹² *Id.* at 12.

¹¹³ *Id.* at 9 (citing Ex. TS-0012).

¹¹⁴ *Id.* at 12.

¹¹⁵ *Id.* at 16.

¹¹⁶ *Id.* (noting that the Wholesale Rate did not anticipate the retirement of two coal-fired power plants and launch of the Responsible Energy Plan mentioned by Wheat Belt). Tri-State states that, to the extent these plant retirements require changes to the Wholesale Rate, it would file such changes with the Commission.

64. In response to protests on the rate for standby service, Tri-State maintains that the rate is adequately supported. Tri-State explains that the Standby Rate does not have its own cost of service, but derives from the Wholesale Rate costs and therefore, separate cost support is not required under 18 C.F.R. Section 35.12. Tri-State asserts that the Standby Rate and the charges under it are well supported and consistent with those established by utilities across the country.¹¹⁷

65. Tri-State refutes the Colorado PUC's assertions that Tri-State has retained authority to change the Wholesale Rate by Board action without Commission approval, noting that the Board Policies and other documents affecting the Wholesale Rate on terms and changes made or adopted by its Board are not self-executing, as the contracts are subject to Commission review under FPA section 205.¹¹⁸

66. In response to Tri-State's answer, Sierra Club argues that Tri-State failed to support its proposed Standby Rate Schedule. Sierra Club contends that Tri-State does not offer concrete evidence that its proposed charges are reasonable, and that Tri-State's justifications for proposed reservation charges and backup demand charges are also suspect.¹¹⁹ With respect to energy charge for dispatchable generation, Sierra Club contends that Tri-State's request for unilateral authority to set the market price violates longstanding Commission policy and the October 4, 2019 Order, and urges that the Commission should reject proposed Rate Schedule S as unsupported and lacking necessary transparency.¹²⁰

67. Wheat Belt states that Tri-State mischaracterized and oversimplified Wheat Belt's role in developing the Wholesale Rate and Standby Rate because it fails to acknowledge that Wheat Belt's chosen Board representative also has fiduciary obligations to Tri-State as a whole, and not just to Wheat Belt.¹²¹ Wheat Belt also reiterates that Tri-State fails to

¹¹⁷ Tri-State also notes that a \$2,000/month administrative charge associated with Standby Service for dispatchable generation resources seemed reasonable at time of implementation in 2017, but based on more experience, Tri-State can evaluate the need to revisit this administrative charge. *Id.* at 16-18.

¹¹⁸ *Id.* at 6-7.

¹¹⁹ Sierra Club Answer at 24-25.

¹²⁰ *Id.* at 26. Sierra Club refutes Tri-State's statement that no Utility Member complained about the Energy Charge for Standby Service, explaining that Tri-State uses a proprietary program on system-wide purchases of power to indicate market price. Tri-State February 5, 2020 Answer at 22.

¹²¹ Wheat Belt Answer at 3-5.

comply with the Commission's rate schedule filing requirements because Tri-State failed to: (1) provide the 2017 budget; (2) explain whether an improper subsidy or cost shift was embedded in rates; (3) incorporate information on Wheat Belt's standby service; and (4) establish a separate cost-of-service for its Standby Rate.¹²²

c. Wholesale Contracts and Board Policies

i. Comments

68. Protesters state that Tri-State did not file various Board Policies, Bylaws, and Articles of Incorporation that are pertinent to, and affect Tri-State's Stated Rates and Wholesale Service Contracts. Protesters allege that these documents significantly affect rates, terms, and conditions of Tri-State's services and that Tri-State's filings are deficient as a result, and should be rejected.¹²³ For instance, the Colorado PUC, Northwest Rural, San Miguel, and Sierra Club argue that, among others, Board Policy No. 100 (Conservation, Load Management, and Renewable Resources); Board Policy No. 101 (QF Capacity and Energy Purchase Policy); Board Policy No. 110 (Transmission Extension Policy); Board Policy No. 316 (Non-Rate Dispute Resolution Policy); Board Policy No. 406 (Request for Tri-State Information); Tri-State's Load Development and Retention Program; and Tri-State's Renewable Resource Program all appear to shape the manner in which rates are calculated but were not filed by Tri-State.¹²⁴

69. San Miguel argues that, in particular, the absence of Board Policy No. 101 renders Tri-State's filings incomplete because essential terms affecting the rates, terms, and conditions of service are missing.¹²⁵ Sierra Club also asserts that the Stated Rate Tariff is deficient because Tri-State did not file the most recent version of Board Policy No. 115 that Tri-State last reviewed on July 10, 2019.¹²⁶ San Miguel also argues that Tri-State must file its Articles of Incorporation because they set forth the classifications, practices, rules, and regulations that affect rates.¹²⁷ Protesters note that Board Policy No. 109

¹²² *Id.* at 10-16.

¹²³ Sierra Club Protest at 54-57; Gladstone Protest at 6; Wheat Belt January 21, 2020 Protest at 2-3; San Miguel Protest at 3; United Power Protest at 18.

¹²⁴ Colorado PUC Protest at 8-9 and 14-16; San Miguel Protest at 4-6; Northwest Rural Protest at 14.

¹²⁵ San Miguel Power Protest at 10-11; Sierra Club Protest at 27-31.

¹²⁶ Sierra Club Protest at 34-36.

¹²⁷ San Miguel Protest at 7.

(Member Service Policy) is expressly referenced in Tri-State's Stated Rate Tariff, but is not on file. The Colorado PUC points to the Commission's September 2019 order concerning Wabash Valley Power Association as reaffirming that generation and transmission cooperatives must make complete rate and contract filings that include all policies that significantly affect rates, terms, and conditions.¹²⁸

70. The Colorado PUC argues that the Stated Rates leave many elements to the discretion of Tri-State or require member negotiation with Tri-State, and that testimony filed in support of the Stated Rates and internal policy such as Board Policy Nos. 315 (Rate Design Process Policy) and 506 (Rate Objectives Policy) fail to acknowledge the need for Commission approval of future rate changes.¹²⁹

71. Several protesters allege that Tri-State's Wholesale Service Contracts and Board Policy Nos. 101 (which Tri-State has not filed with the Commission) and 115 (which Tri-State has filed)¹³⁰ discriminate against renewable and distributed energy procurement and ultimately violate Public Utility Regulatory Policies Act (PURPA) by restricting member purchases from QFs.¹³¹ San Miguel also argues that Tri-State's five percent cap on non-Tri-State purchases forces members in Colorado to violate a Colorado law on renewable portfolio standards for cooperative electric associations.¹³² In addition, Sierra Club argues that Tri-State's policies on its Load Development and Retention Program and Renewable Resource Program, which are not on file, violate the FPA and PURPA as they threaten to chill the development of distributed energy resources, give Tri-State undue discretion over the applicable charge, and allow Tri-State to make unilateral changes to amounts members must pay.¹³³

¹²⁸ Colorado PUC Protest at 16 (citing *Wabash Valley Power Ass'n*, 168 FERC ¶ 61,189, at P 36 (2019) (*Wabash Valley*)).

¹²⁹ *Id.* at 6.

¹³⁰ See Rate Schedule No. 260, filed in Docket No. ER20-691-000.

¹³¹ Colorado PUC Protest at 17; Northwest Rural Protest at 11-13; San Miguel Power Protest at 9-11; Sierra Club Protest at 31-33.

¹³² San Miguel Protest at 15. See Col. Rev. Stat § 40-2-124, (1)(c)(V)(D) & (V.5) (requiring cooperative electric associations who are qualifying retail utilities to meet a 10-20 percent renewable portfolio standard in 2020).

¹³³ Sierra Club Protest at 28-29.

ii. Answers

72. Tri-State disputes assertions that the terms of each Wholesale Service Contract are unclear and incomplete unless Tri-State files and Commission rules on Articles of Incorporation and Board Policies. Tri-State explains that the Commission's regulations are broadly designed to accommodate filings and levels of detail in contracts, and, citing to the Commission's "rule of reason," states that over-broad interpretation of filing requirements can unduly constrain a utility's ability to adapt its governance and operations to evolving circumstances.¹³⁴

73. Tri-State also asserts that, unlike the set of filings addressed in *Wabash Valley*, in which the Commission found it could not accept certain contracts due to a lack of information directly impacting the amount and type of purchases that would take place, Tri-State's filings are sufficiently thorough.¹³⁵ Tri-State argues that it has included Board Policy No. 115 as a rate schedule, specified the self-supply capacity of five percent in its Wholesale Service Contracts, and included relevant portions of Bylaws and Board Policies as cost support and for informational purposes. Tri-State notes that it has not filed every Board Policy or its Articles of Incorporation as they would serve little purpose because they do not significantly affect jurisdictional rates and services and could unduly constrain Tri-State's flexibility in the future.¹³⁶

74. Tri-State disagrees with the allegation that the Wholesale Service Contracts force Utility Members to violate Colorado state law. According to Tri-State, the statute allows any qualifying retail utility that is limited by a requirements contract in its ability to buy the full 10 percent to acquire whatever maximum amount as allowed by the contract, provided that the utility acquire renewable energy credits, or energy savings programs to make up the shortfall.¹³⁷

75. Tri-State disputes protests regarding Wholesale Service Contract violations of PURPA, stating that any matters related to PURPA or QFs are outside the scope of this case, and have either been already decided by the Commission or are the subject of a pending rehearing request in separate dockets. Tri-State cites to two ongoing

¹³⁴ Tri-State February 5, 2020 Answer at 31 (citing *PacifiCorp.*, 127 FERC ¶ 61,144, at P 11 (2009); *ALLETE, Inc.*, 161 FERC ¶ 61,013, at P 13 (2017) (internal citation omitted)).

¹³⁵ *Id.* at 31 (citing *Wabash Valley*, 168 FERC ¶ 61,189 at P 36).

¹³⁶ *Id.*

¹³⁷ *Id.* at 32 (citing Colo. Rev. Stat. § 40-2-124(1)(c)(IV)).

Commission proceedings that address this issue,¹³⁸ and argues that there is no need for the Commission to undertake PURPA-related issues in this set of filings. Moreover, Tri-State maintains that the Load Development and Retention Program does not violate PURPA, noting that nothing in the program prevents a QF from pursuing its rights under PURPA to sell power to a Utility Member.¹³⁹ Finally, Tri-State asserts that its Standby Rate does not violate PURPA as alleged by Sierra Club, arguing that the standby service is a sale of wholesale power to Utility Members, and that Tri-State does not make retail sales of power, including sales of backup station power to QFs.¹⁴⁰

76. In response to Tri-State's answer, Sierra Club states that the Commission should not buy into Tri-State's assertions that its contracts and policies do not frustrate PURPA, specifically stating Tri-State still fails to demonstrate that Board Policy No. 115 does not impede PURPA and QF sales. Sierra Club argues that Tri-State does not explain how QFs are able to get around the five percent self-procurement cap, and that this still conflicts with the Commission determinations in *DEMA* and the 2016 Tri-State Order.¹⁴¹ United Power similarly asserts that Board Policy No. 115 is unjust, unreasonable, and unduly discriminatory because it results in a double charge on United Power for the charging and discharging of an energy storage resource. United Power asserts that the policy violates Commission Orders No. 841 and 841-A.¹⁴²

¹³⁸ *Id.* at 32-33 (citing Request for Rehearing of Tri-State Generation and Transmission, Inc., Docket No. EL16-39-001 (filed July 18, 2016); *Tri-State Generation & Transmission Ass'n, Inc.*, 155 FERC ¶ 61,269 (2016) (2016 Tri-State Order), and Tri-State Generation and Transmission Association, Inc., et al., Petition for Partial Waiver of QF Regulations Pursuant to Section 292.402, Docket No. EL16-101-000 (filed July 15, 2016)).

¹³⁹ *Id.* at 27.

¹⁴⁰ *Id.* at 23.

¹⁴¹ Sierra Club Answer at 36-38 (citing 2016 Tri-State Order, 155 FERC ¶ 61,269; *DEMA*, 151 FERC ¶ 61,238).

¹⁴² United Power Answer at 4 (citing *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Indep. Sys. Operators*, Order No. 841, 162 FERC ¶ 61,127, PP 317-318 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154, at P 127 (2019)).

d. Exit Charges

i. Comments

77. Many protesters assert that Tri-State's exit charges call into question the justness and reasonableness of the Wholesale Service Contracts and argue that Utility Members may have had constrained bargaining power if exit charges were high.¹⁴³ The Colorado PUC asserts that the significant exit charges call into question the bargaining power of Utility Members when negotiating Wholesale Service Contracts.¹⁴⁴ Protesters also state that there is generally insufficient information provided in Tri-State's filings to determine whether the exit fees are just and reasonable, stating that the charges may constitute a serious bar to membership.

78. Northwest Rural notes that two Members that recently initiated withdrawal procedures from Tri-State—Kit Carson and Delta-Montrose—were forced to go through multiple months of negotiation, and Delta-Montrose had to file a complaint before the Colorado PUC in order to obtain a reasonable exit charge from Tri-State.¹⁴⁵ United Power similarly argues that Tri-State has unilaterally prohibited Utility Members from exiting the cooperative by refusing to provide an exit charge to its members, and that this is an unjust, unreasonable, and discriminatory practice that warrants further regulatory intervention.

ii. Answers

79. Tri State refers to its Petition and answer in the Petition proceeding with regard to exit charge-related matters.¹⁴⁶ Tri-State asserts that the Commission has jurisdiction for

¹⁴³ Northwest Rural Protest at 9-10; Colorado PUC Protest at 13.

¹⁴⁴ Colorado PUC Protest at 13.

¹⁴⁵ Northwest Rural notes that Kit Carson's initial exit charge estimate of \$137 million was reduced to \$37 million, which demonstrates that Tri-State's initial estimate was exorbitant. Northwest Rural further states that Tri-State has issued a moratorium on all exit charge requests and negotiations until April 2020, effectively blocking a provision of its own bylaws by unilaterally refusing to allow its Members to even begin discussions about potential withdrawal. Northwest Rural Protest at 10-11.

¹⁴⁶ Tri-State Feb. 5, 2020 Answer at 2 n.5. Tri-State notes that it concurrently filed an answer to the comments and protests filed in Docket No. EL20-16, which concerns Tri-State's Petition for Declaratory Order on the Commission's exclusive jurisdiction over Tri-State's public utility status, related ownership issues, and exit

any charges from exiting Tri-State and associated Wholesale Service Contracts, and that this jurisdiction is exclusive.

e. **Determination**

80. Our preliminary analysis indicates that Tri-State's proposed Stated Rate Tariff and Wholesale Service Contracts have not been shown to be just and reasonable and may be unjust, unreasonable, unduly discriminatory or preferential, or otherwise unlawful. We find that Tri-State's filings raise issues of material fact that cannot be resolved based on the record before us and are more appropriately addressed through hearing and settlement judge procedures. The Stated Rate Tariff and Wholesale Service Contracts are closely linked. Though they cover distinct portions of the arrangement between Tri-State and its Member Utilities, they jointly specify rates, terms, and conditions of Tri-State's service to its Member Utility as constituent (and related) parts of a larger whole. Therefore, because we consider Tri-State's filings to be initial rates, we accept Tri-State's proposed Stated Rate Tariff and Wholesale Service Contracts to be effective February 22, 2020, and February 25, 2020, and we institute a proceeding pursuant to FPA section 206 in Docket No. EL20-26-000 to determine the justness and reasonableness of Tri-State's Stated Rate Tariff and Wholesale Service Contracts. We also establish a refund effective date and establish hearing and settlement judge procedures in Docket No. EL20-26-000.

81. With respect to certain Board Policies cited by protesters, and as addressed in greater detail in a concurrently issued order in Docket No. ER20-689-000, et al.,¹⁴⁷ we do not agree that they all need to be filed with the Commission. Under the Commission's "rule of reason," public utilities must file practices "that affect rates and service significantly, that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous."¹⁴⁸

charges for a Utility Member's withdrawal. See Tri-State's February 5, 2020 Answer in Docket No. EL20-16-000 at 5-7, which is the subject of a concurrent Commission order.

¹⁴⁷ See *Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,223, at P 51 (2020).

¹⁴⁸ *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985); see also *Demand Response Coal. v. PJM Interconnection, L.L.C.*, 143 FERC ¶ 61,061, at P 17 (2013) ("The FPA requires all practices that significantly affect rates, terms and conditions of service to be on file with the Commission, and these practices must be included in a Commission-accepted tariff rather than other documents.").

82. Generally, the Board Policies contain provisions governing practices and transactions that may occur between Tri-State and its Utility Members.¹⁴⁹ The rates, terms, and conditions of any service provided - including any governed by the Board Policies - are contained in the resulting contracts that Tri-State and its Utility Members enter into for these transactions (which Tri-State has included in its Rate Schedules Filing, along with Board Policy No. 115). With regard to Board Policies noted by protesters (except Board Policy No. 101, which we discuss further below), we find that these need not be filed by Tri-State under the Wholesale Service Contracts and Stated Rate Tariff so long as any resulting contracts or transactions significantly affecting rates and service are filed appropriately.

83. With regard to Board Policy No. 101, we disagree with protesters that the Stated Rate Tariff and Wholesale Service Contracts are incomplete or deficient without Board Policy No. 101. The Stated Rates and Wholesale Contracts do not rely on Board Policy No. 101 and do not reference Board Policy No. 101. Accordingly, we will not deem Tri-State's submittals here as materially incomplete without the filing of Board Policy 101, as protesters suggest. However, we note that, in an order being issued concurrently in Docket No. ER20-689-000, et al., the Commission finds that Board Policy No. 101 significantly affects the rates, terms, and conditions of several rate schedules filed under those dockets, and, therefore, needs to be filed with the Commission.

84. Further, we find protesters' arguments regarding exit charges to be outside the scope of these proceedings. Tri-State's Stated Rate Tariff and Wholesale Service Contracts do not contemplate an early-termination process—including the assessment of exit charges. Thus, the justness and reasonableness of the Stated Rate Tariff and Wholesale Contract do not depend on the inclusion of a methodology concerning the calculation of exit charges. We also find that the calculation of United Power's exit charge is beyond the scope of this proceeding, and therefore decline to set that issue for hearing and settlement judge procedures. If protesters believe that any practice by Tri-State regarding its exit charges is unjust, unreasonable, unduly discriminatory or preferential, protesters may raise such concerns in a complaint with the Commission under FPA section 206.

85. As discussed above, we are instituting an FPA section 206 investigation in Docket No. EL20-26-000 to determine the justness and reasonableness of Tri-State's proposed Stated Rate Tariff and Wholesale Service Contracts. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, FPA section 206(b) requires that the Commission establish a refund effective date that is no earlier than the date of publication by the Commission of notice of its intention to initiate such

¹⁴⁹ For example, Board Policy No. 316 (Non-Rate Dispute Resolution) is a business practice that sets forth non-rate dispute resolution procedures, and does not significantly affect rates, terms and conditions.

proceeding nor later than five months after the publication date. In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we do so here as well.¹⁵⁰ That date is the date of publication of notice of initiation of the section 206 proceeding in Docket No. EL20-26-000 in the Federal Register.

86. FPA section 206(b) also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. As we are setting the section 206 proceeding in Docket No. EL20-26-000 for hearing and settlement procedures, we expect that, if the proceeding does not settle, we would be able to render a decision within 12 months of the date of filing of briefs opposing exceptions to the Initial Decision. Thus, if the Presiding Judge were to issue an Initial Decision by March 19, 2021, we expect that, if the proceeding does not settle, we would be able to render a decision by May 9, 2022.

87. While we are setting this matter for a trial-type evidentiary hearing, we encourage the parties to make every effort to settle their dispute before hearing procedures commence. To aid the parties in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603 of the Commission's Rules of Practice and Procedure.¹⁵¹ If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding. The Chief Judge, however, may not be able to designate the requested settlement judge based on workload requirements which determine judges' availability.¹⁵² The settlement judge shall report to the Chief Judge and the Commission within thirty (30) days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

¹⁵⁰ See, e.g., *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013); *Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

¹⁵¹ 18 C.F.R. § 385.603 (2019).

¹⁵² If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

3. Waiver of Prior Notice and Time Value Refunds

a. Waiver of the Prior Notice Requirement

88. We deny Tri-State's request for waiver of the prior notice requirement. FPA section 205 explicitly requires that proposed rates be filed with the Commission at least 60 days in advance of their proposed effective date.¹⁵³ 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,¹⁵⁴ the Commission has explicitly 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.¹⁵⁵

89. Tri-State has not demonstrated extraordinary circumstances warranting waiver of the prior notice requirement. Thus, we deny Tri-State's request for waiver of the 60-day prior notice requirement and an effective date of September 3, 2019, or in the alternative, the date after its filing. Tri-State's Stated Rate Tariff and Wholesale Service Contracts are accepted effective February 22, 2020, and February 25, 2020, respectively, 61 days after filing.

b. Time Value Refunds

90. Although we are not granting Tri-State's request for waiver of the prior notice requirement, we will not require refunds in light of Tri-State's cooperative ownership structure.

91. The Commission has noted that if a utility files 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 revenues collected, calculated pursuant to section 35.19a of the Commission's regulations,¹⁵⁶ for the entire period that the rate was collected without Commission authorization.¹⁵⁷

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

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

¹⁵⁵ *Central Hudson Gas & Elec. Co.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

¹⁵⁶ 18 C.F.R. § 35.19a (2019).

¹⁵⁷ *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, at 61,980, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

92. Imposition of time value refunds is the Commission's method of encouraging compliance by public utilities with the requirements of section 205, and compensating customers that have been deprived of the use of their monies for the period that the rates had not been filed. The time value refund is paid, not to the Commission, but to the ratepayers who paid the rates that had not been filed. In the instance where the customer is the same entity as the owner, the objective of requiring the time value of refunds would not be served. Therefore, we will not order refunds under the Wholesale Service Contracts, which are agreements between Tri-State's Utility Members, which are owners of Tri-State, and Tri-State. This result is consistent with previous Commission orders in which we did not order refunds between affiliates.¹⁵⁸

The Commission orders:

(A) Tri-State's proposed Stated Rate Tariff and Wholesale Service Contracts are accepted for filing, effective February 22, 2020, and February 25, 2020, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by section 402(a) of the Department of Energy Organization Act and the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), a public hearing shall be held concerning the justness and reasonableness of Tri-State's Stated Rate Tariff and Wholesale Service Contracts, as discussed in the body of this order. However, the hearing shall be held in abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (C) and (D) below.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2019), the Chief Judge is hereby directed to appoint a settlement judge in this proceeding within 15 days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Chief Judge designates the settlement judge. If the parties decide to request a specific judge, they must make their request to the Chief Judge within five days of the date of this order.

(D) Within 30 days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Chief Judge on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties

¹⁵⁸ See, e.g., *AC Landfill Energy, LLC*, 127 FERC ¶ 61,112 (2009) (denying waiver of prior notice but declining to order refunds where refunds would have effectively gone from one affiliate to another).

with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 60 days thereafter, informing the Commission and the Chief Judge of the parties' progress toward settlement.

(E) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Chief Judge, shall, within 15 days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) Any interested person desiring to be heard in Docket No. EL20-26-000 must file a notice of intervention or motion to intervene, as appropriate, with the Federal Energy Regulatory Commission, 888 First Street NE, Washington, DC 20426, in accordance with Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), within 21 days of the date of issuance of this order. The Commission encourages electronic submission of interventions in lieu of paper using the "eFiling" link at <http://www.ferc.gov>. Persons unable to file electronically should submit an original and three copies of the protest or intervention to the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under FPA section 206 in Docket No. EL20-26-000.

(H) The refund effective date in Docket No. EL20-26-000 established pursuant to FPA section 206 shall be the date of publication in the Federal Register of the notice discussed in Ordering Paragraph (G) above.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix

Entity	Docket Numbers	Filings¹⁵⁹
Alliance Power Incorporated and Colorado Highlands Wind, LLC	ER20-676-000 ER20-683-000	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	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 21, 2020)
Basin Electric Power Cooperative	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 13, 2020)
Colorado Public Utilities Commission	ER20-676-000 ER20-683-000	Notice of Intervention and Comments in Support of Extension of Time (Jan. 8, 2020); Protest (Jan. 21, 2020)
Colorado Springs Utilities	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 17, 2020)
Delta-Montrose Electric Association	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 13, 2020)
Empire Electric Association, Inc.	ER20-676-000 ER20-683-000	Comments in Support (Jan. 21, 2020)
Gladstone New Energy, LLC	ER20-676-000 ER20-683-000 ER20-683-001	Motion to Intervene, Motion for Extension of Time and Request for Shortened Response Period (Jan. 6, 2020); Protest (Jan. 21, 2020); Reply to Tri-State Answer (Feb. 10, 2020)
High West Energy, Inc.	ER20-676-000	Motion to Intervene (Jan. 21, 2020)
Highline Electric Association	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 21, 2020)

¹⁵⁹ For entities that filed multiple pleadings, not all of the docket numbers listed apply to each pleading.

Jemez Mountains Electric Cooperative, Inc.	ER20-676-000 ER20-683-000	Motion to Intervene Out-of-Time (Feb. 5, 2020)
K.C. Electric Association	ER20-676-000 ER20-683-000	Comments in Support (Jan. 21, 2020); Motion to Intervene Out-of-Time and Comments (Jan. 22, 2020)
Kit Carson Electric Cooperative, Inc.	ER20-676-000 ER20-683-000	Motion to Intervene Out-of-Time and Protest (Feb. 3, 2020); Motion for Leave to Reply and Reply (Mar. 3, 2020)
La Plata Electric Association, Inc.	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 10, 2020); Protest (Jan. 21, 2020); Motion to Lodge (Mar. 16, 2020)
McKenzie Electric Cooperative, Inc.	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 13, 2020)
Midwest Electric Cooperative Association	ER20-676-000 ER20-683-000	Out-of-Time Comments in Support (Jan. 22, 2020)
National Rural Electric Cooperative Association	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 17, 2020); Comments (Jan. 21, 2020)
Nebraska Public Power District	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 3, 2020)
Northwest Rural Public Power District	ER20-676-000 ER20-683-000 ER20-683-001	Motion to Intervene and Comments in Support of Motion for Extension of Time (Jan. 8, 2020); Protest (Jan. 21, 2020)
Old Dominion Electric Cooperative	ER20-676-000 ER20-683-000 ER20-683-001	Motion to Intervene (Jan. 13, 2020)
Public Service Company of New Mexico	ER20-676-000 ER20-683-001	Motion to Intervene and Comments (Jan. 21, 2020); Motion to Intervene (Feb. 21, 2020)
San Miguel Power Association	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 13, 2020); Protest (Jan. 21, 2020)

Sierra Club	ER20-676-000 ER20-683-000	Motion for Extension of Filing Deadlines (Jan. 8, 2020); Motion to Intervene and Answer in Support of Motions for Extension of Time (Jan. 9, 2020); Protest (Jan. 21, 2020); Answer (Feb. 19, 2020)
Tri-State Generation and Transmission Association, Inc.	ER20-676-000 ER20-683-000 ER20-683-001	Answer to Motions for Extension of Time (Jan. 9, 2020); Answer to protests of various parties (Feb. 5, 2020); Answer to Motion to Intervene Out-of-Time and Protest of Kit Carson (Feb. 18, 2020); Answer to Reply of Gladstone New Energy (Feb. 25, 2020); Answer to Motion to Lodge (Mar. 17, 2020)
United Power, Inc.	ER20-676-000 ER20-683-000 ER20-683-001	Motion to Intervene (Jan. 10, 2020); Protest (Jan. 21, 2020); Answer to Tri-State Feb. 5 Answer (Feb. 12, 2020); Motion to Lodge (Mar. 16, 2020)
Upper Missouri Power Cooperative	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 7, 2020)
Western Area Power Administration	ER20-676-000 ER20-683-000	Motion to Intervene (Dec. 27, 2019)
Wheat Belt Public Power District	ER20-676-000 ER20-683-000 ER20-683-001	Motion to Intervene (Jan. 3, 2020); Protest (Jan. 21, 2020); Supplement to Protest (Feb. 6, 2020); Answer to Tri-State (Feb. 21, 2020)
White River Electric Association, Inc.	ER20-676-000 ER20-683-000	Motion to Intervene Out-of-Time (Jan. 24, 2020)
Xcel Energy Services, Inc.	ER20-676-000 ER20-683-000	Motion to Intervene (Jan. 6, 2020)