

170 FERC ¶ 61,223  
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. ER20-689-000  
ER20-690-000  
ER20-691-000  
ER20-691-001  
ER20-693-000  
ER20-694-000  
ER20-694-001  
ER20-695-000  
ER20-695-001  
ER20-772-000  
ER20-782-000  
ER20-872-000  
ER20-970-000

ORDER ACCEPTING FILINGS AND REJECTING  
FILINGS WITHOUT PREJUDICE

(Issued March 20, 2020)

1. On December 27, 2019, 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) section 205<sup>1</sup> and Part 35 of the Commission's regulations,<sup>2</sup> various agreements and contracts between Tri-State and its member electric distribution cooperatives and public power districts (Utility Members), Article I (Membership) of its Bylaws which governs the Utility Member withdrawal process and termination of Wholesale Electric Service Contracts (Wholesale Service Contracts), and Board Policy No. 115 which describes the implementation of each Utility Member's option, under its Wholesale Service Contract, to use self-owned or controlled

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<sup>1</sup> 16 U.S.C. § 824d (2018).

<sup>2</sup> 18 C.F.R. pt. 35 (2019).

distributed or renewable generation resources to serve up to five percent of that Utility Member's requirement.<sup>3</sup>

2. As discussed below, we reject Board Policy No. 115 and certain related rate schedules without prejudice to Tri-State refiling these rate schedules. In addition, we accept Tri-State's Bylaws and the other rate schedules for filing, effective 61 days after filing, as discussed below.

### **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.<sup>4</sup>

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<sup>3</sup> Between December 23, 2019 and February 10, 2020, Tri-State submitted multiple filings in numerous dockets, including a Stated Rate Tariff, Wholesale Service Contracts, an Open Access Transmission Tariff (OATT), 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 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 Stated Rate Tariff, Wholesale Service Contracts, OATT, service agreements, and applications for market-based rate authority are also being issued concurrently with this order.

<sup>4</sup> 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.

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.<sup>5</sup> Tri-State explained that, under FPA section 201(f),<sup>6</sup> it had been exempt from the Commission's jurisdiction under Part II of the FPA<sup>7</sup> because it was wholly owned by entities that are 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 Miecoco, Inc. (Miecoco), 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.<sup>8</sup>

## II. Tri-State's Filings

6. On December 23, 26, and 27, 2019, as well as January 10, 14 and 24, 2020, and February 10, 2020, Tri-State submitted a package of filings, including those in the instant dockets. Tri-State states that it became subject to the Commission's jurisdiction on September 3, 2019, when it admitted Miecoco as a Non-Utility Member.<sup>9</sup> Tri-State represents that Miecoco supplies natural gas to purchasers throughout the United States and that Miecoco currently provides natural gas to Tri-State's generation facilities across

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<sup>5</sup> *Tri-State Generation & Transmission Ass'n, Inc.*, Docket No. ER19-2440-000, *et al.* (July 2019 filings). Tri-State's July 2019 filings included, but were not limited to, a stated rate tariff; Utility Member Wholesale Service Contracts; an Open Access Transmission Tariff; and an application for market-based rate authority.

<sup>6</sup> 16 U.S.C. § 824(f) (2018).

<sup>7</sup> 16 U.S.C. §§ 824-824w.

<sup>8</sup> *Tri-State Generation & Transmission Ass'n, Inc.*, 169 FERC ¶ 61,012, at P 22 (2019) (October 2019 Order).

<sup>9</sup> 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. *E.g.*, Tri-State, Transmittal, Docket No. ER20-689-000, at 7 n.15.

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 that Tri-State accepted Mico as a Non-Utility Member on September 3, 2019.<sup>10</sup> 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.<sup>11</sup>

7. Tri-State states that Mico earns patronage capital<sup>12</sup> 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 on important matters relating to Tri-State's governance, such as amendments to Tri-State's Articles of Incorporation, amendments to Tri-State's 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.<sup>13</sup>

8. On December 27, 2019, in Docket Nos. ER20-689-000, ER20-690-000, ER20-691-000, ER20-693-000, ER20-694-000, and ER20-695-000 (collectively, December 27 filings), Tri-State filed 216 pre-existing agreements and contracts between Tri-State and its Utility Members, designated as Rate Schedule Nos. 44 through 258, and 261.<sup>14</sup> In addition, Tri-State filed Article I (Membership) of its Bylaws, designated as Rate Schedule No. 259, which Tri-State asserts governs, among other things, the Utility Member withdrawal process and termination of Wholesale Service Contracts. Lastly, Tri-State filed Board Policy No. 115, designated as Rate Schedule No. 260, which describes the implementation of each Utility Member's option, under its Wholesale

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<sup>10</sup> *E.g.*, Tri-State, Transmittal, Docket No. ER20-689-000 at 7 (citing Tri-State Bylaws at art. I, §§ 1 and 2). Tri-State Generation and Transmission Association, Inc., FERC FPA Electric Tariff, Tri-State Wholesale Electric Service Contracts, [Rate Schedule No. 259, Article I-Membership, 3.0.0](#).

<sup>11</sup> *E.g.*, Tri-State, Transmittal, Docket No. ER20-689-000 at 7-9.

<sup>12</sup> Patronage capital is excess revenue, after operating expenses and costs, returned to members of cooperatives.

<sup>13</sup> *E.g.*, Tri-State, Transmittal, Docket No. ER20-689-000 at 7.

<sup>14</sup> On January 9, 2020, Tri-State filed an *errata* to correct footnote 20 in the transmittal letters for the December 27 Filings.

Service Contract, to use self-owned or controlled distributed or renewable generation resources to serve up to five percent of that Utility Member's requirement. On January 10, 2020, Tri-State filed an amendment in Docket Nos. ER20-691-001, ER20-694-00,1 and ER20-695-001 to make corrections to the tariff records for several rate schedules. On January 14, 2020, Tri-State supplemented the December 27 filings to include clean copies of all of the rate schedules as required by section 35.1(a) of the Commission's Regulations<sup>15</sup> and Rule 203 of the Commission's Rules of Practice and Procedure.<sup>16</sup>

9. On January 10, 2020, in Docket No. ER20-772-000, Tri-State filed notices of cancellation of two rate schedules that were inadvertently included in its December 27 filings. On January 14, 2020, in Docket No. ER20-782-000, Tri-State filed one rate schedule that was inadvertently omitted from its December 27 filings. On January 24, 2020, in Docket No. ER20-872-000, Tri-State filed a new rate schedule with one of its Member Utilities. On February 10, 2020, in Docket No. ER20-970-000, Tri-State filed two rate schedules that were inadvertently omitted from its December 27 filings.

**A. Board Policy No. 115 and Generation Contracts**

10. Under the Wholesale Service Contracts,<sup>17</sup> a Utility Member can serve up to five percent of its load requirements from distributed or renewable generation owned or controlled by that Utility Member, pursuant to Board Policy No. 115.<sup>18</sup> Tri-State states that Board Policy No. 115 describes the implementation of the Utility Member's option of using distributed or renewable generation resources it owns or controls to serve up to five percent of its system's requirement. Tri-State explains that Board Policy No. 115

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<sup>15</sup> 18 C.F.R. § 35.1(a) (2019).

<sup>16</sup> 18 C.F.R. § 385.203 (2019) (Rule 203).

<sup>17</sup> Tri-State filed its Wholesale Contracts with each of its Utility Members as Rate Schedule Nos. 1 through 43 in Docket No. ER20-683-000, which are the subject of an order being issued concurrently on Tri-State's Stated Rate Tariff and Wholesale Contracts. *See Tri-State Generation & Transmission Ass'n, Inc.*, 170 FERC ¶ 61,221 (2020) (Stated Rate Order). Each Wholesale Service Contract establishes the obligation that Tri-State sell and deliver to the Utility Member, and the Utility Member purchase and receive from Tri-State, no less than 95% of all electric service, including capacity and energy, that the Utility Member requires to operate its system.

<sup>18</sup> In Docket No. ER20-691-000, Tri-State filed Board Policy No. 115, designated as Rate Schedule No. 260. Tri-State notes that Board Policy No. 115 was last revised on July 10, 2019.

relates to the Wholesale Rate<sup>19</sup> in two distinct ways: (1) under the Net Metering with Backup and Ancillary Service Charges Option, Tri-State will assess backup and ancillary service charges associated with the costs it incurs to reserve transmission capacity required for Utility Member projects that include energy storage/batteries; and (2) under the Bill Crediting Option, Tri-State will provide the Utility Member a credit on its monthly bill based on each MWh of energy generated by the Utility Member.<sup>20</sup> Tri-State states that Board Policy No. 115 is deemed to be a contract between Tri-State and each Utility Member.

11. Tri-State states that, pursuant to the Wholesale Service Contracts, each Utility Member that elects to serve up to five percent of its load requirements must enter into a Generation Contract with Tri-State. In Docket Nos. ER20-691-000 and ER20-691-001, Tri-State filed 43 Generation Contracts as Rate Schedule Nos. 200 through 242.<sup>21</sup> Tri-State explains that, for each billing period during the term of a Generation Contract, Tri-State provides the Utility Member an energy credit which is applied against its general purchase of firm power from Tri-State under the Wholesale Rate. Each Generation Contract also includes Board Policy No. 115 as an exhibit.<sup>22</sup>

## **B. Bylaws**

12. In Docket No. ER20-691-000, Tri-State filed Articles I through XIII of its Bylaws, designated as Rate Schedule No. 259. Tri-State states that Article I (Membership) of its Bylaws governs the Utility Member withdrawal process and termination of a Wholesale Contract. Tri-State states that Article I, section 4(a) provides, in relevant part, “[a] [Utility [M]ember may withdraw from membership upon compliance with such equitable terms and conditions as [Tri-State’s] Board of Directors may prescribe provided, however, that no Utility [M]ember shall be permitted to withdraw until it has met all its

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<sup>19</sup> Tri-State filed a Stated Rate Tariff in Docket No. ER20-676-000, which consists of two stated rate schedules, including 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.

<sup>20</sup> Tri-State, Transmittal, Docket No. ER20-691-000 at 14.

<sup>21</sup> The 43 Generation Contracts are between Tri-State and 15 of its Utility Members. Some Utility Members have multiple Generation Contracts, one for each generation project that may contribute to that five percent.

<sup>22</sup> Many of the Generation Contracts have prior versions of Board Policy No. 115 attached, depending on when those contracts were executed. For example, Rate Schedule No. 200, executed in 2017, has the version dated 2014; Rate Schedule No. 206, executed in 2009, has the version dated 2006.

contractual obligations on this Corporation.”<sup>23</sup> Tri-State explains that upon withdrawal, a Utility Member’s membership terminates, but that termination does not release a Utility Member from any debts due to Tri-State or impair the Utility Member’s obligations under any contract with Tri-State. The Bylaws provide that the Articles of Incorporation and Bylaws are a contract between Tri-State and each Utility Member.<sup>24</sup>

13. Article VII (Operation as a Cooperative Corporation) establishes how the Utility Members agree to operate on a cooperative non-profit bases under the laws of Colorado. Section 3 (Patronage Capital in Connection with Furnishing Electric Energy) of Article VII requires Tri-State to account on a patronage basis to all its Utility Members for all amounts received and receivable from the furnishing of electric power and energy in excess of the sum of: (a) operating costs and expenses properly chargeable against the furnishing of electric power and energy; (b) amounts required to offset any losses incurred during the current or any prior fiscal year; and (c) adjustments to reserves or deferred credit accounts for the purpose of stabilizing margins and rate increases from year to year. The provision states that all other amounts will be used to offset any losses incurred during the current or any prior fiscal year; and to the extent not needed for that purpose, allocated to its Utility Members on a patronage basis. The rest of the Articles contain various general provisions related to the operation of a cooperative corporation, including meetings and officers and directors.

### C. Other Rate Schedules

14. In Docket No. ER20-690-000, Tri-States filed ten Load Retention Agreements as Rate Schedule Nos. 246 through 255, which provide for discounted rates below the Wholesale Rate to Tri-State Utility Members that meet certain criteria in order to retain specific existing loads or to attract new loads. Specifically, Tri-State explains that the discounts are for specific loads of 500 kW peak demand or more, and are intended for three circumstances: (1) Utility Member loads at risk to being lost to competition; (2) for economic development purposes to attract new loads that have possible alternative locations for construction or expansion of facilities; and (3) to compete for existing loads that are able to competitively bid for supply.<sup>25</sup>

15. In Docket No. ER20-689-000, Tri-State filed several other contracts that also involve discounts or credits against the Wholesale Rate. Specifically, Rate Schedule Nos. 182 through 198 are Benefit Crediting Contracts which provide for passing the benefit of an allocation of power from Western Area Power Administration to the Utility

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<sup>23</sup> Tri-State, Transmittal, Docket No. ER20-691-000 at 13.

<sup>24</sup> See Bylaws at art. VII (Operation as a Cooperative Corporation) § 3.

<sup>25</sup> Tri-State, Transmittal, Docket No. ER20-690-000 at 13.

Members through credits.<sup>26</sup> Rate Schedule Nos. 179 through 181 involve compensation for losses, product incentive payments, and reimbursing a Utility Member for network upgrade costs.

16. The rest of the rate schedules filed in these dockets consist of executed agreements providing for various services including: (1) interconnection and/or operating agreements; (2) agreements involving the construction of new transmission-related facilities; (3) agreements for the modification of existing transmission-related facilities; (4) engineering and procurement agreements; (5) reserve capacity agreements; and (6) operation and maintenance agreements.

17. As noted above, Tri-State filed several other rate schedules that were omitted from its December 27 filings, and submitted notices of cancellation for ones that were inadvertently filed. Specifically, in Docket No. ER20-772-000, Tri-State filed notices of cancellation of Rate Schedule Nos. 172 and 173, which it states were inadvertently filed in Docket No. ER20-689-000. Tri-State explains that Rate Schedule No. 172 is a transmission service agreement which was properly filed as a service agreement under its OATT in in Docket No. ER20-688-000, and that Rate Schedule No. 173 is a Demand Response & Energy Shaping Master Agreement with Big Horn Rural Electric Company, which was previously terminated. In Docket No. ER20-782-000, Tri-State filed Rate Schedule No. 130, a construction related letter agreement with High West Energy, Inc. that was inadvertently omitted from its filing in Docket No. ER20-695-000. In Docket No. ER20-970-000, Tri-State filed two letter agreements designated as Rate Schedule Nos. 265 and 266 with Mountain Parks Electric, Inc. that were inadvertently omitted from its filings in Docket Nos. ER20-695-000 and ER20-693-000.

18. On January 24, 2020, in Docket No. ER20-872-000, Tri-State filed Rate Schedule No. 263, a letter agreement dated January 21, 2020 with Mountain View Electric Association, Inc., providing for the modification of a delivery point.

#### **D. Standard of Review**

19. Tri-State requests that, given the nature of the rate schedules, the Commission apply the public interest standard under the *Mobile-Sierra* doctrine in its review of each agreement.<sup>27</sup> Tri-State asserts that application of the public interest standard is

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<sup>26</sup> Tri-State, Transmittal, Docket No. ER20-689-000 at 13-14.

<sup>27</sup> *Id.* at 14 (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)). 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*



appropriate for three primary reasons. First, Tri-State asserts that the Agreements were the result of arm's-length negotiations that were voluntarily executed, in some cases many years ago. Second, Tri-State asserts that these agreements support Tri-State's ability to operate on a cooperative, non-profit basis, and are mutually beneficial for Tri-State and the Utility Members.

20. 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.<sup>28</sup> 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."<sup>29</sup>

**E. Request for Waiver of the Prior Notice Requirement and Effective Dates**

21. With the exception of several rate schedules listed below, Tri-State requests that the Commission accept its filings without suspension or condition and grant waiver of the prior notice requirements<sup>30</sup> to allow an effective date of September 3, 2019, the date on which Tri-State argues that it became subject to the Commission's jurisdiction under the

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*v. Maine Pub. Util. Comm'n*, 558 U.S. 165, 167 (2010) (citation omitted); *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 530 (2008). Tri-State makes the same requests in each of its filings except for the cancellations of two agreements inadvertently filed in Docket No. ER20-772-000 and the new agreement filed in Docket No. ER20-872-000.

<sup>28</sup> Tri-State, Transmittal, Docket No. ER20-689-000 at 15 (citing *N. Va. Elec. Coop., Inc. v. Old Dominion Elec. Coop.*, 114 FERC ¶ 61,240, *reh'g denied*, 116 FERC ¶ 61,173 (2006) (*NOVEC*)).

<sup>29</sup> *Id.* (quoting *NOVEC*, 114 FERC ¶ 61,240, at P 18).

<sup>30</sup> 16 U.S.C § 824d(d); 18 C.F.R. § 35.11 (2019).

FPA. In the alternative, Tri-State requests that the Commission accept its filings effective one day after the date of filing.<sup>31</sup>

22. Tri-State requests that the Commission accept Rate Schedule Nos. 255 and 258 with effective dates of December 17, 2019 and November 1, 2019, respectively, the dates on which those contracts were executed.<sup>32</sup> Tri-State requests that the Commission accept Rate Schedule Nos. 97, 98, and 115 with effective dates of November 25, 2019, December 11, 2019, and September 4, 2019, respectively, the dates on which those contracts were executed.<sup>33</sup> With respect to the letter agreement filed in Docket No. ER20-872-000, Tri-State requests waiver of prior notice to allow an effective date of January 24, 2020, the date of filing, or in the alternative, January 25, 2020, one day after filing. Tri-State requests that the Commission accept Rate Schedule No. 180 with an effective date of 61 days after filing, or February 26, 2020.<sup>34</sup>

23. Tri-State argues that it has made a good faith effort to comply with the prior notice requirements, noting that it made its July filings 60 days before it expected to become subject to the Commission's jurisdiction. Tri-State argues that it refiled its tariffs and agreements as soon as possible while meeting the cost support requirements of the Commission's October 4 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 Utility Members.<sup>35</sup>

24. Tri-State also states that, to the extent the Commission seeks to penalize Tri-State by requiring refunds to protect Tri-State's customers, the Commission should take into account that the majority of Tri-State's customers are Utility Members/owners under its ownership structure.<sup>36</sup> In addition, Tri-State asserts that the grant of waiver will not have adverse effects on the purchasers of power, because there is no rate change and the only thing that has changed is Tri-State's jurisdictional status. 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

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<sup>31</sup> Tri-State, Transmittal, Docket No. ER20-689-000 at 17. Tri-State makes the same requests in each of its filings.

<sup>32</sup> Tri-State, Transmittal, Docket No. ER20-690-000 at 21.

<sup>33</sup> Tri-State, Transmittal, Docket No. ER20-694-000 at 15-16.

<sup>34</sup> Tri-State, Transmittal, Docket No. ER20-689-000 at 17.

<sup>35</sup> *Id.* at 19.

<sup>36</sup> *Id.*

previously non-jurisdictional cooperatives have transitioned to the Commission's jurisdiction.<sup>37</sup>

### **III. Notice of Filings and Responsive Pleadings**

25. Notice of the filings in Docket Nos. ER20-689-000, ER20-690-000, and ER20-691-000 was published in the *Federal Register*, 85 Fed. Reg. 305 (Jan. 3, 2020), with interventions and protests due on or before January 17, 2020. Notice of the filings in Docket Nos. ER20-693-000, ER20-694-000, and ER20-695-000 was published in the *Federal Register*, 85 Fed. Reg. 500 (Jan. 6, 2020), with interventions and protests due on or before January 17, 2020. On January 10, 2020, the deadline for filing interventions and protests was extended to January 21, 2020. On January 17, 2020, a notice was issued denying a further extension of the deadline.

26. Notice of the filing in Docket No. ER20-694-001 was published in the *Federal Register*, 85 Fed. Reg. 2,733 (Jan. 16, 2020), with interventions and protests due on or before January 21, 2020. Notice of the filings in Docket Nos. ER20-691-001 and ER20-695-001 was published in the *Federal Register*, 85 Fed. Reg. 3,366 (Jan. 21, 2020), with interventions and protests due on or before January 21, 2020.

27. Notice of the filing in Docket No. ER20-772-000 was published in the *Federal Register*, 85 Fed. Reg. 3,366 (Jan. 21, 2020), with interventions and protests due on or before January 31, 2020. Notice of the filing in Docket No. ER20-782-000 was published in the *Federal Register*, 85 Fed. Reg. 3,365 (Jan. 21, 2020), with interventions and protests due on or before January 24, 2020. Notice of the filing in Docket No. ER20-872-000 was published in the *Federal Register*, 85 Fed. Reg. 5,655 (Jan. 31, 2020), with interventions and protests due on or before February 14, 2020. Notice of the filing in Docket No. ER20-970-000 was published in the *Federal Register*, 85 Fed. Reg. 9,467 (Feb. 19, 2020), with interventions and protests due on or before March 2, 2020. 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.

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<sup>37</sup> 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. *Id.* at 17 (citing *Sussex Rural Elec. Coop.*, 102 FERC ¶ 61,335 (2003)).

28. 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.<sup>38</sup>

29. 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.

## A. Protests and Comments

### 1. Standard of Review

30. United Power, Inc. (United Power) and La Plata Electric Association, Inc. (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.<sup>39</sup> United Power argues that the Wholesale Contracts, Bylaws, and Board Policies are not the product of bargaining, but unilaterally imposed policies and generally applicable form agreements.<sup>40</sup> Similarly, Gladstone New Energy, L.L.C. (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 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 Utility Members. United Power asserts that it is an owner-affiliate of Tri-State and that the Commission does not apply the *Mobile-Sierra* presumption in the context of contracts between affiliates,<sup>41</sup> suggesting that such contracts do not represent arm's-length transactions. Likewise, Gladstone contends that because Tri-State approaches the Wholesale Service Contracts with the interests of its Utility Members in mind rather than its own economic interest, the Wholesale Contracts lack the

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<sup>38</sup> 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.

<sup>39</sup> United Power Protest at 18-24; La Plata Protest at 7-13.

<sup>40</sup> United Power Protest at 19-23.

<sup>41</sup> *Id.* at 23-24.

characteristics of arm's-length bargaining necessary to apply the *Mobile-Sierra* protection.<sup>42</sup> 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.

31. Finally, 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 Contracts.<sup>43</sup> 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.<sup>44</sup> La Plata asserts, *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 *NOVEC*. Gladstone claims 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.<sup>45</sup>

## 2. Board Policies and Bylaws

32. Several protesters contend that Tri-State did not file all of its Board Policies and Bylaws that significantly affect rates, terms, and conditions under the rate schedules. Protesters also argue that Tri-State's Board Policies are unjust, unreasonable, and unduly discriminatory or preferential.

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<sup>42</sup> Gladstone Protest at 33 (citing *Sw. Power Pool, Inc.*, 149 FERC ¶ 61,048, at P 97 (2014)).

<sup>43</sup> United Power Protest at 19-20; La Plata Protest at 12.

<sup>44</sup> United Power Protest at 20 (citing *PJM Interconnection, L.L.C.*, 161 FERC ¶ 61,262 (2017)).

<sup>45</sup> Gladstone Protest at 28 (citing *Wabash Valley Power Ass'n, Inc.*, 107 FERC ¶ 61,327, at P 11 (2004)).

33. San Miguel Power Association, Inc. (San Miguel Power) states that Tri-State should file Board Policy No. 101, which goes hand-in-hand with Board Policy No. 115.<sup>46</sup> San Miguel Power states that Board Policy No. 101 defines the parties' rights to purchase capacity and energy from qualifying facilities (QFs) as required by the Public Utility Regulatory Policies Act of 1978 (PURPA),<sup>47</sup> and the method by which Tri-State calculates the price for QF capacity and energy, including what amounts to a monetary penalty for purchases over five percent of a Utility Member's requirements. San Miguel Power argues that 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.<sup>48</sup>

34. Sierra Club argues that Board Policy No. 115 discriminates against non-Tri-State generation and forces Tri-State Utility Members to subsidize generation that would otherwise be uneconomic by requiring Utility Members to forgo distributed energy alternatives at lower costs than Tri-State's coal-heavy resources.<sup>49</sup> Sierra Club also contends that the Commission has already rejected Tri-State's justification of the five percent cap as being necessary to prevent Tri-State from losing revenue due to its Utility Members' purchases from QFs.<sup>50</sup> Sierra Club and United Power argue that Board Policy No. 115 unduly discriminates against electric storage resources by charging Utility Members twice for the same service by first requiring Utility Members to pay for the energy used to charge the device and then charging Utility Members when they use the stored power. Sierra Club and United Power contend that this double charging contravenes Order No. 841, where the Commission found that duplicative charges in this context are unacceptable.<sup>51</sup> Sierra Club argues that both rate options offered under Board

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<sup>46</sup> San Miguel Power Protest at 9-10.

<sup>47</sup> 16 U.S.C. § 796(17)-(18) (2018).

<sup>48</sup> San Miguel Power Protest at 10-11.

<sup>49</sup> Sierra Club Protest at 55-57.

<sup>50</sup> *Id.* at 57-58 (citing *Tri-State Generation & Transmission Ass'n, Inc.*, 155 FERC ¶ 61,269, at P 21 (2016)).

<sup>51</sup> *Id.* at 60-62; United Power Protest at 26-27 (citing *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019)).

Policy No. 115—net metering and bill crediting—violate cost causation and PURPA for various reasons.<sup>52</sup>

35. San Miguel Power and United Power state that Tri-State refers only to Article I of its Bylaws which governs the Utility Member withdrawal process, but omits any discussion of Article II which governs the financial obligations for transferring Utility Members.<sup>53</sup> San Miguel Power contends that Tri-State should file all of its Articles of Incorporation because they set forth the classifications, practices, rules, and regulations affecting rates for Commission review.<sup>54</sup> United Power contends that Tri-State has implemented Article I of the Bylaws in an unjust and discriminatory manner by unilaterally prohibiting Utility Members from exiting Tri-State by refusing to provide an exit charge to its Utility Members, and that, if the Commission concludes that it has jurisdiction over Tri-State, the Commission should set the calculation of United Power's exit charge for hearing and settlement judge procedures.<sup>55</sup>

36. Protesters also argue that some of Tri-State's remaining rate schedules contain references to various unfiled Board Policies that affect rates, terms and conditions of service.<sup>56</sup> For example, the Colorado Public Utilities Commission (Colorado PUC) states that Rate Schedule No. 173, a Demand Response & Energy Shaping Master Agreement with Big Horn Rural Electric Company, and Rate Schedule No. 181, a Large Commercial/Industrial Energy Shaping Product Agreement with Wheatland Rural Electric Association, refer to Board Policy No. 120 – Demand Response Policy and/or Board Policy No. 121 – Energy Shaping Policy.<sup>57</sup> The Colorado PUC states that Rate Schedule No. 245, an agreement concerning a metering and improvement project with White River Electric Association, Inc. categorizes the entire load as “Indeterminate

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<sup>52</sup> Sierra Club Protest at 72-79.

<sup>53</sup> San Miguel Power Protest at 7-8; United Power Protest at 17.

<sup>54</sup> San Miguel Power Protest at 7-8. San Miguel Power notes that Tri-State filed its Articles of Incorporation as Rate Schedule No. 259, but that Tri-State's Transmittal letter states that Tri State is submitting Article I of the Bylaws.

<sup>55</sup> United Power Protest at 24-26.

<sup>56</sup> Sierra Club Protest at 35-38; San Miguel Power Protest at 8-12; United Power Protest at 16; Colorado PUC Protest at 14-17.

<sup>57</sup> Colorado PUC Protest at 14-15 & n.40. In Docket No. ER20-772-000, Tri-State filed a notice of cancellation of Rate Schedule No. 173, explaining that it was previously terminated and inadvertently filed.

Load” as defined in Tri-State’s Board Policy No. 110 – Transmission Extension Policy.<sup>58</sup> The Colorado PUC states that Rate Schedule No. 246, an agreement for resale with Southeast Colorado Power Association, provides that adjustments to the town’s meter readings shall be determined pursuant to Board Policy No. 109 – Member System Transmission Service Policy, and that disputes are to be resolved in accordance with Board Policy No. 316 – Non-Rate Dispute Resolution Policy.<sup>59</sup>

## **B. Answers**

### **1. Standard of Review**

37. Tri-State asserts that protesters incorrectly argue that the Wholesale 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 on 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.<sup>60</sup> Tri-State asserts that the 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 protesters’ 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.<sup>61</sup> 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.<sup>62</sup> Further, Tri-State argues that each Wholesale Service Contract has a separate set of schedules and related obligations unique to each

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<sup>58</sup> *Id.* at 15 & n.42.

<sup>59</sup> *Id.* at 15 & nn.43-44.

<sup>60</sup> 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.”)).

<sup>61</sup> *Id.* at 29.

<sup>62</sup> *Id.*



Utility Member party thereto. Thus, Tri-State reiterates that the Wholesale Service Contracts are not generally applicable form agreements.<sup>63</sup>

38. Sierra Club claims that nearly all of Tri-States' 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; and, even if the presumption applies, (2) 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 seriously violate the public interest.<sup>64</sup> United Power asserts that, with respect to Tri-State's terse generalizations regarding the applicability of the *Mobile-Sierra* doctrine, Tri-State emphasizes trivial differences among its Utility Members' Wholesale Service Contracts to argue the agreements are not form agreements.<sup>65</sup>

## 2. Board Policies and Bylaws

39. Tri-State disagrees with Sierra Club's and United Power's protests alleging that Board Policy No. 115 allows for it to double charge battery devices deployed by a Tri-State Utility Member for peak-shaving. Tri-State explains that there is no double charging for battery storage under Board Policy No. 115. According to Tri-State, there is no demand charge when batteries are charged off-peak; but, when the battery discharges during the on-peak period for a given month, the generation demand charge is reduced and the Utility Member must pay a transmission demand charge based on gross load. Effectively, Tri-State contends, this represents payment for capacity that Tri-State must nonetheless reserve for United Power in case its battery is not available, asserting that this charge for reservation of capacity is a reasonable and common practice amongst utilities like Tri-State.<sup>66</sup>

40. Tri-State asserts that the Commission's regulations are designed to allow for a scheme of voluntary filings where the necessary filings mirror how the party conducts its

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<sup>63</sup> *Id.*

<sup>64</sup> Sierra Club February 19, 2020 Answer at 36.

<sup>65</sup> United Power February 12, 2020 Answer at 8.

<sup>66</sup> Tri-State February 5, 2020 Answer at 24.

business.<sup>67</sup> Tri-State argues that filed tariffs and rate schedules cannot be changed without Commission approval, and that broadly interpreting filing requirements can restrict a utility's ability to adapt its governance and operations to evolving situations.<sup>68</sup> Tri-State points out that the Commission has adopted a rule of reason, not requiring the filing of documents that do not significantly affect rates and services.<sup>69</sup> Tri-State argues that in this proceeding it has provided "thorough and voluminous filings," including, for example, Board Policy No. 115, as well as relevant portions of its Bylaws and other Board Policies.<sup>70</sup> Tri-State asserts that filing its Articles of Incorporation, as well as every single Board Policy, is not required, because they do not significantly affect rates and services, and that doing so may restrain Tri-State in the future.<sup>71</sup> Tri-State asserts that its filings are complete.<sup>72</sup>

41. United Power argues that contrary to the assertions in Tri-State's answer, the alleged double charge of battery devices under Board Policy No. 115 is not proper, and that Tri-State mischaracterizes the double charge as two distinct charges.<sup>73</sup> United Power states that the amendment to Board Policy No. 115 altered the economics of its energy storage resource project, and points out that United Power is the only Tri-State Utility Member with such a project affected by Board Policy No. 115.<sup>74</sup> United Power asserts that the alleged double charge violates Commission Orders No. 841 and 841-A, and references Tri-State's failure to refer to either order in its answer.<sup>75</sup>

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<sup>67</sup> *Id.* at 30 (citing *N. Cal Power Agency*, 38 FERC ¶ 61,195, at 61,612-13 (1987); *Ariz. Pub. Serv. Co.*, 48 FERC ¶ 61,029, at n.6 (1989)).

<sup>68</sup> *Id.* (citation omitted).

<sup>69</sup> *Id.* (citing, *inter alia*, *PacifiCorp.*, 127 FERC ¶ 61,144, at P 11 (2009)).

<sup>70</sup> *Id.* at 31.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> United Power February 12, 2020 Answer at 3.

<sup>74</sup> *Id.* at 4.

<sup>75</sup> *Id.*

42. Sierra Club reiterates that the absence of various Board Policies results in Tri-State's filings being deficient.<sup>76</sup> Sierra Club states that failing to provide documentation in support of Board Policy No. 115 renders it impossible for the Commission to find that that it is just, reasonable, and not unduly discriminatory.<sup>77</sup> Sierra Club contends that Tri-State's own description of the proposed rate for electric storage resources indicates that Tri-State is in fact charging Utility Members twice for the same service.<sup>78</sup> Sierra Club concludes that the Commission lacks the necessary information to accurately evaluate Board Policy No. 115, and that as proposed, it appears unduly discriminatory against electric storage resources.<sup>79</sup> Sierra Club additionally makes numerous arguments that Board Policy No. 115 runs afoul of PURPA.<sup>80</sup>

#### IV. Discussion

##### A. Procedural Matters

43. 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.<sup>81</sup> 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 the interest in the proceedings, the early stage of the proceedings, and the absence of undue prejudice or delay.

44. 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.

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<sup>76</sup> Sierra Club February 19, 2020 Answer at 15-17.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 32.

<sup>79</sup> *Id.* at 33.

<sup>80</sup> *Id.* at 36-41.

<sup>81</sup> 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).

45. Motions to lodge information from other proceedings may be appropriate in some instances to supplement the Commission's record.<sup>82</sup> 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**

46. As a threshold matter, we note that several entities filed, in most or all of the dockets of the Tri-State Filings, the same comments and/or protests asserting that Tri-State is not subject to the Commission's jurisdiction. We are addressing this issue in an order on Tri-State's Stated Rate Tariff in Docket No. ER20-676-000 that is being issued concurrently with this order and is not addressed separately herein.<sup>83</sup>

### **1. Board Policy No. 115 and Generation Contracts**

47. We reject Board Policy No. 115 and the associated Generation Contracts, without prejudice to Tri-State refiling these rate schedules. As discussed below, while we do not make any determinations in this order with respect to the justness and reasonableness of these rate schedules, we find that Tri-State's Board Policy No. 115 and Generation Contracts are deficient without Board Policy No. 101 on file.<sup>84</sup>

48. Section 4 of Board Policy No. 115 provides that, if a Utility Member owns or controls a resource that produces energy in excess of the five percent allowance, Tri-State will purchase the excess energy at its avoided cost, as described in the unfiled Board Policy No. 101 – Qualifying Facility Capacity and Energy Purchase Policy.<sup>85</sup> Board Policy No. 101 provides that if a Utility Member purchases capacity and/or energy from a QF that results in the Utility Member purchasing less than 95% of its requirements from

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<sup>82</sup> See, e.g., *Cal. Indep. Sys. Operator, Inc.*, 139 FERC ¶ 61,072, at P 8 (2012).

<sup>83</sup> See Stated Rate Order, 170 FERC ¶ 61,221.

<sup>84</sup> See *Kentucky Utilities Co. v. FERC*, 689 F.2d 207, 211 (D.C. Cir. 1982) (citing *City of Groton v. FERC*, 584 F.2d 1067, 1070 (D.C. Cir. 1978) (the Commission “‘retains broad discretion’ to determine the adequacy of a filing to satisfy the objective of affording notice to the Commission and the public.”)).

<sup>85</sup> Board Policy No. 101 is referenced in each Generation Contract and in Board Policy No. 115, but Tri-State has not filed or otherwise provided it in the record. However, San Miguel Power and United Power included copies of Board Policy No. 101 with their protests. See San Miguel Power Protest at Attachment B; United Power Protest, Ex. UPP-0005 at 3-5.

Tri-State,<sup>86</sup> Tri-State will bill that Utility Member an amount equal to Tri-State's lost revenue minus Tri-State's avoided cost associated with the differential.<sup>87</sup> The Generation Contracts effectuate Board Policy No. 115 and provide that Tri-State will purchase excess energy from a Utility Member's owned and controlled generation "at Tri-State's avoided cost as described in Policy 101."<sup>88</sup>

49. 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."<sup>89</sup> We find that Board Policy No. 101 describes such a practice, as it comprises specific rate mechanisms, terms, and conditions that significantly affect the rates that Utility Members must pay if they produce energy in excess of the five percent allowance reflected in Board Policy No. 115 and incorporated into the Generation Contracts. The Commission cannot evaluate whether Board Policy No. 115 is just and reasonable without Board Policy No. 101 also on file, and we therefore find that Tri-State must file Board Policy No. 101.

50. Accordingly, we reject Board Policy No. 115, without prejudice to Tri-State refiling it with Board Policy No. 101 for Commission review. Because the Generation Contracts effectuate Board Policy No. 115 and provide that Tri-State will purchase excess energy from a Utility Member's owned and controlled generation "at Tri-State's

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<sup>86</sup> As established in the Wholesale Service Contract and defined in Tri-State Board Policy No. 115.

<sup>87</sup> In 2015, the Commission found that Tri-State Utility Member Delta-Montrose Electric Association is obligated to purchase power from QFs offering available energy and that such sales may be at negotiated rates. *Delta-Montrose Electric Assoc.*, 151 FERC ¶ 61,238, *reh'g denied*, 153 FERC ¶ 61,028 (2015). In 2016, the Commission denied Tri-State's related petition for declaratory order asking the Commission to find that its Board Policy No. 101 is consistent with the requirements of PURPA and the Commission's regulations. *Tri-State Generation & Transmission Ass'n, Inc.*, 155 FERC ¶ 61,269 (2016), *reh'g pending*.

<sup>88</sup> *E.g.*, Generation Contract for the Columbus Solar Project (Rate Schedule No. 200) between Tri-State Generation and Transmission Cooperative, Inc. and Columbus Electric Cooperative, Inc., § 8 (submitted in Docket No. ER20-691-000).

<sup>89</sup> *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.").

avoided cost as described in Policy 101,”<sup>90</sup> we also reject the Generation Contracts without prejudice to Tri-State refiling them with Board Policy No. 101.

## 2. Other Board Policies

51. Protesters identify a number of other Board Policies that they argue must be filed with the Commission. We disagree. Generally, those Board Policies contain provisions regarding Tri-State’s business practices and certain transactions that may occur between Tri-State and its Utility Members. For instance, under the Board Policies, Tri-State may enter into a contract with a Utility Member to provide for construction of transmission facilities, offer a load retention discount, or to purchase renewable energy to help Utility Members meet renewable portfolio standards or implement demand response programs. Based on our review of the contracts that result from those Board Policies—contracts that Tri-State has filed as rate schedules as part of its current package of filings—we conclude that those agreements contain the necessary rates, terms, and conditions of the services.<sup>91</sup> Therefore, we find that the remaining Board Policies identified by protesters do not need to be on file, provided that Tri-State continues to file with the Commission the contracts that effectuate the service contemplated by those Board Policies.

## 3. Bylaws

52. As a threshold matter, we find that Tri-State’s Bylaws are not eligible for the *Mobile-Sierra* “public interest” presumption. As the Commission has 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

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<sup>90</sup> See, e.g., Generation Contract for the Columbus Solar Project (Rate Schedule No. 200) between Tri-State Generation and Transmission Cooperative, Inc. and Columbus Electric Cooperative, Inc., § 8 (submitted in Docket No. ER20-691-000).

<sup>91</sup> For example, the preambles of Rate Schedule Nos. 173 and 181 which were noted by the Colorado PUC provide that implementation of the various products under Board Policy No. 120 (Demand Response) and Board Policy No. 121 (Energy Shaping) requires execution of an agreement between Tri-State and a Utility Member specifying system requirements, metering requirements, load control requirements, performance obligations of the participating Utility Member and discounts and incentive payments, as applicable. Board Policy No. 316 (Non-Rate Dispute Resolution) is a business practice that sets forth non-rate dispute resolution procedures, and does not affect rates, terms and conditions.

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.<sup>92</sup> We find that the *Mobile-Sierra* presumption does not apply to Tri-State's Bylaws because they are generally applicable to all Utility Members and they are not negotiated between Tri-State and a Member on an individualized basis.

53. Although Tri-State filed its Bylaws in the same docket as Board Policy No. 115 and the Generation Contracts, we conclude that the Bylaws are severable from them, and we therefore consider them below, notwithstanding our rejection of Board Policy No. 115 and the Generation Contracts. The Bylaws establish the membership requirements for, and obligations of, Tri-State members, as well as the corporate structure and governance of Tri-State as an organization. By comparison, Board Policy No. 115 and the Generation Contracts relate to specific power supply arrangements between Tri-State and its members.

54. With the exception of issues related to the calculation of exit charges, discussed briefly below, the Bylaws are uncontested and contain various general provisions related to the formation and operation of Tri-State as a cooperative corporation.<sup>93</sup> We have reviewed Tri-State's Bylaws and accept them as just and reasonable.

55. Certain protesters raise concerns regarding Tri-State's consideration of requests for calculation of exit charges by Utility Members that are considering withdrawing from Tri-State. As relevant here, Article I (Membership) provides that a Utility Member may withdraw from Tri-State after it has met all its contractual obligations, and that withdrawal does not release a Utility Member from any debts due to Tri-State nor impair the Utility Member's obligations under any contract with Tri-State. Article II (Rights and Liabilities of Members) provides that Utility Members are responsible for their debts. The Bylaws do not provide for a specific exit charge or describe how an exit charge will

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<sup>92</sup> *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 (2017); *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 (2014) (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).

<sup>93</sup> We note that Tri-State only discusses Article I (Membership) of its Bylaws which governs the Utility Member withdrawal process in its transmittal letter and included a cover sheet to Rate Schedule No. 259 with the title of Article I – Membership. However, Tri-State filed Articles I through XIII of its Bylaws as Rate Schedule No. 259, and we will accept them here.

be calculated. As noted above, United Power contends that Tri-State has implemented the Article I of the Bylaws in an unjust and discriminatory manner by unilaterally prohibiting Utility Members from exiting Tri-State by refusing to provide them an exit charge, and argues that the Commission should set the calculation of United Power's exit charge for hearing and settlement judge procedures.

56. As discussed in the concurrent Declaratory Order in detail, we believe that Tri-State's assessment of exit charges may be viewed as a rule or practice that directly affects Tri-State's wholesale rates.<sup>94</sup> However, we note that Tri-State has not yet filed—and the Commission has not yet approved—any methodology for determining Tri-State's exit charges. Thus, 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.<sup>95</sup>

#### **4. Other Rate Schedules**

57. Tri-State's remaining rate schedules filed in these proceedings are existing agreements between Tri-State and its Utility Members providing for various services including: (i) interconnection and/or operating agreements; (ii) agreements involving the construction of new transmission-related facilities; (iii) agreements for the modification of existing transmission-related facilities; (iv) engineering and procurement agreements; (v) reserve capacity agreements; (vi) operation and maintenance agreements. In addition, some of the agreements provide for certain discounts or credits under certain circumstances. All of the agreements were executed and agreed to by the parties, and no party raised any concerns related to their agreements. Some protesters argue that certain Board Policies referenced in some of the agreements should be filed with the Commission, but as discussed above, in applying the "rule of reason" we find that these Board Policies do not contain specific rate mechanisms, terms, and conditions that significantly affect rates and service. Accordingly, we will accept these rate schedules.

#### **5. Waiver of the Prior Notice Requirement**

58. 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

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<sup>94</sup> Declaratory Order, 170 FERC ¶ 61,224 at PP 118-120.

<sup>95</sup> 16 U.S.C. § 824e.



60 days in advance of their proposed effective date.<sup>96</sup> 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,<sup>97</sup> 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.<sup>98</sup>

59. Tri-State has not demonstrated extraordinary circumstances warranting waiver of the prior notice requirement. Thus, the Commission denies Tri-State's request for waiver of the 60-day prior notice requirement and requested effective dates. Tri-State's Bylaws and other rate schedules discussed above are accepted effective 61 days after filing. Specifically, the rate schedules filed in the December 27 filings are effective on February 26, 2020; the notices of cancellation filed on January 10, 2020 in Docket No. ER20-772-000 are effective on March 11, 2020; the rate schedule filed on January 14, 2020 in Docket No. ER20-782-000 is effective on March 15, 2020; the rate schedule filed on January 24, 2020 in Docket No. ER20-872-000 is effective on March 25, 2020; and the rate schedules filed on February 10, 2020 in Docket No. ER20-970-000 are effective on April 11, 2020.

## 6. Time Value Refunds

60. Although we are not waiving prior notice, we will not require time value refunds for late filing, in light of Tri-State's cooperative ownership structure.

61. The Commission has noted that if a utility files with less than 60 days' full notice 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,<sup>99</sup> for the entire period that the rate was collected without Commission authorization.<sup>100</sup>

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<sup>96</sup> 16 U.S.C. § 824d(d). *See also El Paso Elec. Co.*, 105 FERC ¶ 61,131, at PP 9-11 (2003).

<sup>97</sup> 16 U.S.C. § 824d(d); 18 C.F.R. §§ 35.3(a), 35.11.

<sup>98</sup> *Central Hudson Gas & Elec. Co.*, 60 FERC ¶ 61,106, at 61,339, *reh'g denied*, 61 FERC ¶ 61,089 (1992).

<sup>99</sup> 18 C.F.R. § 35.19a (2019).

<sup>100</sup> *Prior Notice & Filing Requirements Under Part II of the Fed. Power Act*, 64 FERC ¶ 61,139, at 61,979, *order on reh'g*, 65 FERC ¶ 61,081 (1993).

62. Imposition of time value refunds is the Commission's method of encouraging compliance by public utilities with the requirements of FPA 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 these rate schedules, which are agreements between Tri-State and Utility Members who are owners of Tri-State, because the objective of time-value refunds would not be served. This result is consistent with previous Commission orders in which it did not order refunds between affiliates.<sup>101</sup>

The Commission orders:

(A) Tri-State's proposed Board Policy No. 115 and Generation Contracts filed in Docket Nos. ER20-691-000 and ER20-691-001 are hereby rejected without prejudice, as discussed in the body of this order.

(B) Tri-State's Bylaws and remaining rate schedules are hereby accepted, effective 61 days after filing, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>101</sup> 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).

**Appendix**

<b>Entity</b>	<b>Docket Numbers</b>	<b>Filings<sup>102</sup></b>
Alliance Power Incorporated and Colorado Highlands Wind, LLC	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	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	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 21, 2020)
Basin Electric Power Cooperative	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001 ER20-772-000	Motion to Intervene (Jan. 13, 2020); Motion to Intervene (Jan. 21, 2020)
Colorado Independent Energy Association	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000	Motion to Intervene (Jan. 17, 2020)

<sup>102</sup> For entities that filed multiple pleadings, not all of the docket numbers listed necessarily apply to each pleading.

	ER20-695-001	
Colorado Public Utilities Commission	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Notice of Intervention and Comments in Support of Extension of Time (Jan. 8, 2020) Protest (Jan. 21, 2020)
Colorado Springs Utilities	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 16, 2020)
Delta-Montrose Electric Association	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 13, 2020)
Empire Electric Association, Inc.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Comments (Jan. 21, 2020)
Gladstone New Energy, L.L.C.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000	Motion to Intervene, Motion for Extension of Time and Request for Shortened Response Period (Jan. 6, 2020); Protest (Jan. 21, 2020);

	ER20-694-001 ER20-695-000 ER20-695-001 ER20-772-000	Reply to Tri-State Feb. 5, 2020 Answer (Feb. 10, 2020)
Guzman Energy, LLC	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 21, 2020)
Highline Electric Association	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 21, 2020)
Jemez Mountains Electric Cooperative, Inc.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene Out-of-Time (Feb. 5, 2020)
K.C. Electric Association	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Comments (Jan. 21, 2020); Motion to Intervene Out-of-Time and Comments (Jan. 22, 2020)
Kit Carson Electric Cooperative, Inc.	ER20-689-000 ER20-690-000 ER20-691-000	Motion to Intervene Out-of-Time and Protest (Feb. 3, 2020); Reply to

	ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Tri-State Feb. 18, 2020 Answer (Mar. 3, 2020)
La Plata Electric Association, Inc.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 10, 2020); Protest (Jan. 21, 2020); Motion to Lodge (Mar. 16, 2020)
McKenzie Electric Cooperative, Inc.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 13, 2020)
Midwest Electric Cooperative Corporation	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Out-of-Time Comments (Jan. 22, 2020)
National Rural Electric Cooperative Association	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 17, 2020); Comments (Jan. 21, 2020)
Nebraska Public Power District	ER20-689-000	Motion to Intervene

	ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	(Jan. 3, 2020)
Northwest Rural Public Power District	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene and Comments in Support of Extension of Time (Jan. 8, 2020); Protest (Jan. 21, 2020); Motion to Intervene (Jan. 21, 2020)
Old Dominion Electric Cooperative	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 13, 2020)
San Miguel Power Association, Inc.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 13, 2020); Protest (Jan. 21, 2020)
Sierra Club	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000	Motion for Extension of Time (Jan. 8, 2020); Motion to Intervene and Answer (Jan. 9, 2020); Protest (Jan. 21, 2020); Answer to Tri-State Feb. 5, 2020 Answer (Feb. 19, 2020)

	ER20-695-001	
Tri-State Generation and Transmission Association, Inc.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001 ER20-772-000	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.	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 9, 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	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 7, 2020)
Western Area Power Administration	ER20-689-000 ER20-690-000 ER20-691-000 ER20-691-001 ER20-693-000 ER20-694-000 ER20-694-001 ER20-695-000 ER20-695-001	Motion to Intervene (Jan. 15, 2020)