170 FERC ¶ 61,264
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 No. EL16-101-000

ORDER GRANTING REQUEST FOR PARTIAL WAIVER

(Issued March 27, 2020)

1. On July 15, 2016, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a petition for declaratory order on behalf of itself and 30 of its electric distribution cooperative owner-members (Participating Members),[1] requesting partial waiver of certain obligations imposed on Tri-State and its Participating Members under sections 292.303(a) and 292.303(b) of the Commission's regulations implementing section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).[2] Specifically, Tri-State seeks waiver of the Participating Members' obligations to purchase energy and capacity from qualifying facilities (QF) and Tri-State's obligation to sell energy and capacity to QFs.[3] As discussed below, we grant the request for partial waiver.

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[1] Petition at 1. See the Appendix for a list of Participating Members.

[2] 16 U.S.C. § 824a-3 (2018).

[3] 18 C.F.R. § 292.402 (2019) (allowing nonregulated electric utilities to apply to the Commission for waiver of arrangements between electric utilities and QF under PURPA section 210 of, as listed in 18 C.F.R. §§ 292.301-.314 (2019), with the exception of 18 C.F.R. § 292.302. *See* 18 C.F.R. § 292.303(a) ("[e]ach electric utility shall purchase, in accordance with § 292.304 . . . . any energy and capacity which is made available from a qualifying facility"); *id.* § 292.303(b) ("[e]ach electric utility shall sell to any qualifying facility, in accordance with § 292.305. . . energy and capacity requested by the qualifying facility").

I. Background

2. Tri-State states that it is a consumer-owned, non-regulated electric utility serving 43 member systems located in the states of Colorado, Nebraska, New Mexico, and Wyoming. Tri-State states that it supplies the requirements of its members; however, its members may exercise the option to self-supply up to five percent of their requirements but are obligated to purchase the remaining 95% from Tri-State.[4]

II. Petition

3. Tri-State asks for two waivers. First, Tri-State requests a waiver of the Participating Members' obligations to purchase power directly from QFs as required by the Commission's regulations.[5] Tri-State states that it and the Participating Members drafted a Joint PURPA Implementation Plan (Plan),[6] which provides that Tri-State will purchase capacity and energy from QFs at Tri-State's avoided cost and that no QF will be subject to duplicative charges for interconnection or wheeling as a result of selling to Tri-State (rather than to a Participating Member) and buying from a Participating Member (rather than from Tri-State).[7] Tri-State claims the Plan is consistent with PURPA because it reflects the commitment to encourage cogeneration and small power production by ensuring QFs will have a market to sell their power at Tri-State's avoided cost.[8]

4. Tri-State states that, because it meets the power supply needs of the Participating Members, Tri-State is in a better position than the Participating Members to purchase energy and capacity directly from QFs.[9] According to Tri-State, waiver of the purchase obligation will enable Tri-State to coordinate power supply decisions on behalf of the Participating Members, while maintaining a functional and efficient division of power supply responsibility.[10]

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[4] Petition at 2.

[5] 18 C.F.R. § 292.303(a).

[6] Petition at Exhibit A.

[7] *Id*. at 5.

[8] *Id*. at 6.

[9] *Id*. at 7.

[10] *Id*. at 4, 7.

5. Second, Tri-State requests waiver of its own obligation to sell energy and capacity directly to QFs pursuant to section 292.303(b) of the Commission's regulations. Tri-State explains that, because the Participating Members are retail utilities, they are in a better position than Tri-State to provide the interconnection and retail service required by QFs.[11] Tri-State states that the Participating Members are committed to provide supplementary, back-up, and maintenance power to QFs as requested, on either a firm or interruptible basis, at rates that are nondiscriminatory, just and reasonable, and in the public interest.[12] Therefore, Tri-State states that a separate sales requirement for Tri-State is not necessary to encourage cogeneration or small power production.[13]

III. Notices and Responsive Pleadings

6. Notice of the Petition was published in the *Federal Register*, 81 Fed. Reg. 49,644 (2016), with interventions and protests due on or before August 5, 2016. Palmer Wind, LLC (Palmer Wind)[14] filed a timely motion to intervene and protest. Tri-State filed an answer.

A. Palmer Wind Protest

7. Palmer Wind opposes the partial waiver, arguing that granting Tri-State's waiver request will increase transaction costs for QFs and therefore discourage QF development.[15] Palmer Wind states that, prior to Tri-State filing the waiver request, CNMEC notified Palmer Wind that "[CNMEC] is electing to transfer [Palmer Wind's] purchase obligation to Tri-State."[16] Palmer Wind explains that granting Tri-State's waiver request would prevent Palmer Wind from obtaining a legally enforceable obligation for its Enchanted Winds QF at the state level because New Mexico does not

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[11] *Id*. at 10.

[12] *Id*. at 9.

[13] *Id*. at 10.

[14] Palmer Wind is a wind project developer. In Docket No. QF16-446-001, its affiliate, Enchanted Wind LLC, self-recertified the 20 MW Enchanted Wind QF, which is under development and expected to interconnect with Central New Mexico Electric Cooperative, Inc. (CNMEC), one of the Participating Members in the Petition.

[15] Palmer Wind Protest at 5.

[16] *Id*. at 4, Ex. 2.

have jurisdiction over Tri-State.[17] Palmer Wind argues that bringing such a proceeding before the Commission under a formal complaint is so costly, compared to state level costs, that it discourages QF development in Tri-State's service territory.[18]

8. Palmer Wind asserts that granting the partial waiver will also increase QF transaction costs by requiring QFs to deal with both a Participating Member for interconnection and sales and Tri-State for QF power purchases, as opposed to QFs interacting with the Participating Member for all power sales and purchase needs.[19]

9. Palmer Wind adds that Tri-State has previously acted in bad faith to avoid making QF purchases by attempting (1) to prevent its members from entering into purchase agreements with QFs and (2) to financially penalize members purchasing QF power.[20] Palmer Wind claims that, when Tri-State acted in this manner with Central Iowa Power Cooperative (Central Iowa) regarding QFs, the Commission denied Central Iowa's waiver request for transfer of its members' PURPA purchase obligations based on its actions to avoid making QF purchases.[21] Palmer Wind also claims that the partial waiver is discriminatory because QFs connected to the Participating Members will not be charged wheeling and transmission charges for their QF power, while a QF that sells to any one of the remaining non-participating members will be charged for wheeling power across Tri-State's system.[22]

10. Palmer Wind disagrees with Tri-State's assertion that, as a full-requirements supplier, the avoided cost of the Participating Members is the same as Tri-State's avoided cost. Palmer Wind argues that the facts here differ from the facts in *Western Farmers Electric Cooperative*, where the supplier's avoided cost was substituted for its wholesale customer's avoided cost for all-requirements customers.[23] Palmer Wind contends that

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[17] *Id*. at 6.

[18] *Id*.

[19] *Id*.

[20] *Id.* at 3 (citing *Delta Montrose Elec. Ass'n*, 151 FERC ¶ 61,238 (2015); Tri-State Petition for Declaratory Order, Docket No. EL16-39-000 (filed February 17, 2016)).

[21] *Id*. (citing *Cent. Iowa Power Coop.*, 105 FERC ¶ 61,239 (2003) (*Central Iowa*)).

[22] *Id*. at 8.

[23] *Id.* at 4 (citing *Western Farmers Elec. Coop.*, 115 FERC ¶ 61,323, at P 27 (2006) (*Western Farmers*)).

Western Farmers is inapplicable here because Tri-State is a partial requirements supplier, not a full requirements supplier, because its members have an option to procure up to five percent of their own power supply needs.[24] Therefore, Palmer Wind asserts that Tri-State should not be permitted to substitute its avoided cost for the Participating Members' avoided cost.[25] Palmer Wind also claims that Tri-State intends to use the "lowest possible benchmark" for avoided cost to discourage the development of QFs.[26]

11. Palmer Wind argues that there is no material planning or operational advantage to transferring the Participating Members' purchase obligations to Tri-State because Tri-State is not responsible for load and resource balancing in New Mexico.[27] Palmer Wind also contends that the only purpose for transferring Tri-State's sales obligation to the Participating Members is to avoid Tri-State's providing retail services.[28]

B. **Tri-State Answer**

12. Tri-State responds that Palmer Wind's argument about increased transaction costs for QFs is irrelevant to the waiver request and speculative.[29] Tri-State states that the Plan would not increase transaction costs. Tri-State also states that the Plan will keep the Participating Members and interconnecting developers in the same position as if they were dealing with each other, instead of Tri-State.[30]

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[24] *Id*. at 4.

[25] *Id*.

[26] *Id*. at 6-7.

[27] *Id*. at 8.

[28] *Id*. at 7.

[29] Answer at 10-11.

[30] *Id*. (citing *N. Carolina Elec. Membership Corp.,* 137 FERC ¶ 62,009 (2011); *Western Farmers*, 115 FERC ¶ 61,323; *Soyland Power Coop., Inc.*, 50 FERC ¶ 62,072 (1990); *Seminole Elec. Coop., Inc.*, 39 FERC ¶ 61,354 (1987) (*Seminole*); *Oglethorpe Power Corp.*, 32 FERC ¶ 61,103 (1985), *reh'g granted in part and denied in part*, 35 FERC ¶ 61,069 (1986), *aff'd sub nom. Greensboro Lumber Co. v. FERC*, 825 F.2d 518 (D.C. Cir. 1987)).

13. Tri-State contends that it encourages QF development in its territory and accepts its obligation to interconnect with, and purchase power from, QFs at a avoided cost rate.[31] Tri-State claims that Palmer Wind's attempt to compare the conduct with regard to QFs in *Central Iowa* to Tri-State's conduct is unfounded. Tri-State argues that a disagreement between itself and its members about whether fixed cost equalization can legally be bypassed is not evidence of bad faith dealing.[32] Tri-State states that it could not have acted in bad faith towards Palmer Wind because Palmer Wind has not contacted Tri-State to discuss interconnecting the Enchanted Winds QF.[33]

14. Tri-State also argues that Palmer Wind misunderstands how the Plan handles transmission charges. Tri-State explains that the Plan prohibits duplicative interconnection or wheeling charges resulting from a QF's selling to Tri-State instead of a Participating Member.[34] Tri-State claims that the Plan ensures that QFs interconnecting to Participating Members are in the same position as QFs interconnecting to non-participating members and that there is no penalty for QFs interconnecting with non-participating members.[35]

15. Tri-State claims that Palmer Wind's argument regarding Tri-State's avoided cost is beyond the scope of the waiver request.[36] Tri-State adds that Palmer Wind's estimation of Tri-State's avoided cost does not accurately reflect Tri-State's avoided cost and that Palmer Wind has not requested any avoided cost information from Tri-State.[37] Tri-State also argues that Palmer Wind's assertion that Tri-State is not a full requirements supplier is incorrect. Tri-State contends that a contract does not need to supply 100% of a member's load to qualify as a full requirements contract.[38]

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[31] *Id*. at 3.

[32] *Id*. at 5.

[33] *Id*. at 3.

[34] *Id*. at 9.

[35] *Id*.

[36] *Id*. at 11.

[37] *Id*. at 11-12.

[38] *Id*. at 6 (citing *Carolina Power & Light Co.*, 48 FERC ¶ 61,101, at 61,389 (1989)).

16. Tri-State argues that Palmer Wind misunderstands Tri-State's role relative to QF purchases and system balancing. Tri-State claims that its members specifically formed the generation and transmission cooperative to efficiently and economically coordinate system resources.[39] Tri-State contends that, by centralizing QF purchases and integrating QF resources into Tri-State's power supply function, it can better coordinate and plan resources to meet its members' needs.[40]

IV. Discussion

17. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2019), the timely, unopposed motion to intervene serves to make Palmer Wind a party to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure,18 C.F.R. § 385.213(a)(2) (2019), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We accept Tri-State's answer because it has provided information that assisted us in our decision-making process.

18. Under section 292.402(b) of the Commission's regulations, the Commission may grant waivers of sections 292.303(a) and (b), where compliance with these sections is not necessary to encourage cogeneration and small power production and is not otherwise required under PURPA section 210.[41] The Commission has previously granted waivers of sections 292.303(a) and (b) where the generation and transmission cooperative utility agreed to purchase QF power at its avoided cost on behalf of its distribution cooperative utilities and the distribution cooperative utilities agreed to offer supplementary, interruptible, back-up, and maintenance power to QFs at rates that are nondiscriminatory, just and reasonable.[42]

19. As discussed below, we grant the partial waiver of certain obligations imposed on Tri-State and its Participating Members under sections 292.303(a) and 292.303(b) of the Commission's regulations. Specifically, we grant waiver of the Participating Members' obligations to purchase energy and capacity from QFs and Tri-State's obligation to sell energy and capacity to QFs. Waiver is appropriate for these utilities that have agreed (1) to allow Tri-State, as their requirements supplier, to purchase power from the QFs interconnecting to their systems; and (2) to sell back-up and other power to such QFs because the QFs will remain in essentially the same position as they currently stand. QFs

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[39] *Id*. at 8.

[40] *Id*.

[41] 18 C.F.R. § 292.402(b).

[42] *E.g.*, *Seminole*, 39 FERC at 62,112; *accord Heartland Consumers Power District*, 154 FERC ¶ 61,203, at PP 26, 28 (2016) (*Heartland*).

that would have sold to a Tri-State member cooperative that purchased its requirements from Tri-State, and thus were eligible for an avoided cost rate based on Tri-State's costs, will continue to receive an avoided cost rate based on Tri-State's costs.[43] Granting waiver of the Participating Members' purchase obligation will not frustrate the PURPA mandate to encourage power production by QFs because no QF will be deprived of an avoided cost sale of its power and each QF will receive the avoided cost rate. Similarly, granting waiver of Tri-State's sales obligation will not frustrate the PURPA mandate because each Participating Member will offer supplementary, back-up and maintenance power on a firm or interruptible basis to QFs at rates that are nondiscriminatory, just and reasonable, and in the public interest.[44]

20. In 2015, Tri-State originally sought to adopt policies essentially requiring *all* members to transfer their QF purchase obligations to Tri-State, and the Commission denied that request.[45] The Commission noted that the Commission had granted waivers when requested by distribution cooperative utilities but that the Commission would not impose an obligation to file for a waiver at another party's request.[46] Now, unlike in 2015, Tri-State's waiver request is associated with just those distribution cooperative utilities that support the waiver, not the others.

21. Palmer Wind also objects to CNMEC seeking to transfer the purchase obligation to Tri-State before Palmer Wind can obtain a legally enforceable obligation, relying on Commission precedent under PURPA section 210(m) and section 292.310 of the Commission's regulations that it claims grandfather its right to sell to CNMEC rather than Tri-State.[47] However, the grandfathering provisions of PURPA section 210(m) and section 292.310 of our regulations do not apply to a petition filed pursuant to section 292.402 of the Commission's regulations. Moreover, while a generation and transmission cooperative's avoided cost would typically be the same as its member cooperatives' avoided cost, Commission precedent does not require that a generation and transmission cooperative's avoided cost rate, such as Tri-State's avoided cost rate, must

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[43] *See*, *e.g.*, *Seminole*, 39 FERC at 62,112.

[44] We note that our granting the requested waiver does not indicate our acceptance or rejection of Tri-State's PURPA Implementation Plan.

[45] *Delta-Montrose Elec. Coop.*, 151 FERC ¶ 61,238.

[46] *Id.* P 53.

[47] *See* 16 U.S.C. § 824a-3(m); 18 C.F.R. § 292.310; *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 117 FERC ¶ 61,078, at P 213 (2006), *order on reh'g*, Order No. 688-A, 119 FERC ¶ 61,305, at PP 137-38 (2007).

be exactly the same as its member cooperatives' avoided cost rates as a prerequisite to granting waiver. As long as the avoided cost rates paid to a QF reflects the purchasing utility's avoided cost, the QF is recovering the appropriate rate.[48]

22. We also disagree with Palmer Wind's argument that Tri-State's proposal is discriminatory by penalizing QFs selling to non-participating members with additional wheeling charges. As Tri-State explains, duplicative interconnection or wheeling charges for QFs are not allowed under the Plan; QFs are treated similarly whether they choose to connect to a Participating Member or a non-participating member. Furthermore, we disagree with Palmer Wind's statement that granting waiver will increase QFs' transaction costs. Palmer Wind's claim of increased transaction costs is speculative and is not a part of the analysis the Commission has long employed when considering waiver requests such as this one.

23. Palmer Wind's further argument that there is no planning or operational advantage for Tri-State or the Participating Members to transfer their purchase/sales obligations is not relevant to our determination. Tri-State and the Participating Members believe there is an advantage; therefore, the Participating Members agreed to, and Tri-State filed, this request for partial waiver.

24. Finally, to the extent that Palmer Wind challenges the adequacy of Tri-State's avoided cost rate to be paid for purchasing electric energy from the Enchanted Wind QF, we find that challenge premature. Once Tri-State calculates its avoided cost of purchasing electric energy from the Enchanted Wind QF, Palmer Wind (or its affiliate Enchanted Wind LLC) may contest that determination pursuant to PURPA section 210(h), if Palmer Wind then believes that Tri-State has calculated its avoided cost inconsistently with the requirements of PURPA and our regulations.

The Commission orders:

Tri-State's petition is hereby granted, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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[48] *E.g.*, *City of Longmont, Colo.*, 39 FERC ¶ 61,301, at 61,974 (1987).

Appendix

Tri-State Generation and Transmission Association, Inc.
Participating Members for which Waivers are Granted

Big Horn Rural Electric Company
Carbon Power and Light, Inc.
Central New Mexico Electric Cooperative, Inc.
Chimney Rock Public Power District
Continental Divide Electric Cooperative, Inc.
Garland Light and Power Company
High Plains Power, Inc.
High West Energy, Inc.
Highline Electric Association
Jemez Mountains Electric Cooperative, Inc.
K.C. Electric Association, Inc.
The Midwest Electric Cooperative Corporation
Mora-San Miguel Electric Cooperative, Inc.
Morgan County Rural Electric Association
Mountain Parks Electric, Inc.
Mountain View Electric Association, Inc.
Niobrara Electric Association, Inc.
Northern Rio Arriba Electric Cooperative, Inc.
Otero County Electric Cooperative, Inc.
Panhandle Rural Electric Membership Association
Roosevelt Public Power District
San Luis Valley Rural Electric Cooperative, Inc.
Sierra Electric Cooperative, Inc.
Socorro Electric Cooperative, Inc.
Southeast Colorado Power Association
Southwestern Electric Cooperative, Inc.
Springer Electric Cooperative, Inc.
Wheatland Rural Electric Association, Inc.
Wyrulec Company
Y-W Electric Association, Inc.