

170 FERC ¶ 61,263
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. EL16-39-001

ORDER DISMISSING REHEARING AND VACATING PRIOR ORDER

(Issued March 27, 2020)

1. On June 16, 2016, the Commission denied Tri-State Generation and Transmission's (Tri-State) petition (Petition) for a declaratory order, which sought guidance whether it would be consistent with section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA)¹ and the Commission's implementing regulations for Tri-State to recover from its member-customers alleged fixed cost losses associated with its customers' purchases of electricity from Qualifying Facilities (QFs).² On July 18, 2016, Tri-State and Old Dominion Electric Cooperative (ODEC)³ separately filed requests for rehearing.⁴ As discussed below, we dismiss Tri-State's pending rehearing request and vacate the *Tri-State* 2016 Declaratory Order.

¹ 16 U.S.C. § 824a-3 (2018).

² *Tri-State Generation and Trans. Ass'n, Inc.*, 155 FERC ¶ 61,269 (2016) (*Tri-State* 2016 Declaratory Order).

³ ODEC is one member of a group of cooperatives that collectively filed a timely rehearing request. *See infra* P 5 and note 19. Because, as discussed *infra* P 14, only ODEC is party to this proceeding, we will treat the rehearing request as ODEC's.

⁴ Request for Rehearing of Tri-State, Docket No. EL16-39-001 (filed Jul. 18, 2016) (*Tri-State* Rehearing Request).

I. Background

2. On February 17, 2016, as supplemented on March 10, 2016, Tri-State filed a Petition pursuant to Rule 207 of the Commission's Rules of Practice and Procedure,⁵ asking the Commission to find that Tri-State's proposed revised Board Policy 101 (Board Policy 101) is consistent with PURPA and the Commission's regulations implementing PURPA.⁶ Board Policy 101 added a new provision stating that, in circumstances where the member purchases energy or capacity from a QF, resulting in the member purchasing less than 95% of its requirements from Tri-State, "Tri-State will bill that Member System an amount equal to Tri-State's lost revenue minus Tri-State's avoided cost that is associated with the Member System purchasing less than 95% of its requirements from Tri-State."⁷ Tri-State asserted that Board Policy 101 is necessary to ensure that it does not lose revenue due to its members' QF purchases.⁸ Tri-State asserted such lost revenues would have to be allocated to its other members, increasing their rates.⁹

3. Tri-State argued that Board Policy 101 is consistent with what it refers to as the "fixed cost equalization" provision in Order No. 69,¹⁰ the Commission's 1980 Final Rule adopting its QF regulations to implement PURPA. Order No. 69 states that, where a full-requirements supplier has losses due to its full-requirements customer's QF purchases, the supplier should allocate those losses to its customer. The customer, in turn, is expected to

⁵ 18 C.F.R. § 385.207(a)(2) (2019).

⁶ *Id.* P 5; Petition at 2-4.

⁷ Petition at 4 & n.7 (citing Proposed Revised Board Policy 101, at 2).

⁸ *Id.* at 3-4.

⁹ *Id.* at 3.

¹⁰ *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,870 (crossed-reference at 10 FERC ¶ 61,150), *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶ 30,160 (1980), *aff'd in part & vacated in part on other grounds sub nom. Am. Elec. Power Serv. Corp. v. FERC*, 675 F.2d 1226 (D.C. Cir. 1982), *rev'd in part on other grounds sub nom. Am. Paper Inst. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

pass those losses on to the QF.¹¹ Tri-State also asserted that its Board Policy 101 is akin to the billing procedures the Commission accepted in 1989 in *Carolina Power & Light Co.*,¹² despite similar concerns that those billing procedures would make QFs uneconomical or were intended to prevent purchases from QFs at negotiated rates.

II. Tri-State 2016 Declaratory Order

4. On June 16, 2016, the Commission denied the Petition, finding that Tri-State's proposed cost recovery mechanism would contravene the Commission's holdings that, under PURPA, Delta-Montrose Electric Association (Delta-Montrose) must purchase power from QFs despite the 5 Percent Limit and that a QF may sell its power to Delta-Montrose at negotiated rates.¹³ The Commission dismissed Tri-State's claim that Order No. 69 supported Board Policy 101, noting that Order No. 69 was "issued in 1980, in the wake of the enactment of PURPA" and its discussion of this issue was in the context of pre-existing, pre-PURPA all-requirements contracts between supplying-utilities and their customer-utilities, who could not have anticipated PURPA or Order No. 69.¹⁴ The Commission pointed out that, in contrast, the wholesale power supply agreement (Contract) at issue here was executed in 2001, post-dates PURPA, as well as the Commission's 1998 rejection of a similar cost recovery proposal in *Public Service Company of New Hampshire v. New Hampshire Electric Cooperative*,¹⁵ and expressly provides for QF purchases.¹⁶ The Commission was not persuaded by Tri-State's claim that the 1989 *Carolina Power* case was dispositive because, "[u]nlike in 1989, Tri-State has easier access to energy markets

¹¹ Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,871 ("[R]ather than allocating its loss in revenue among its customers, in this situation the supplying utility should assign all of these losses to the all-requirements utility. The utility should, in turn, deduct these losses from its previously calculated avoided costs, and pay the qualifying facility accordingly.").

¹² *Tri-State 2016 Declaratory Order*, 155 FERC ¶ 61,269 at P 7 & n.9 (citing *Carolina Power & Light Co.*, 48 FERC ¶ 61,101 (1989) (*Carolina Power*)).

¹³ *Id.* P 17 (citing *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238 (2015) (*Delta-Montrose*)).

¹⁴ *Id.* P 20.

¹⁵ *Id.* PP 18-19 & nn.22-23 (citing *Pub. Serv. Co. of N.H. v. N.H. Elec. Coop., Inc.*, 83 FERC ¶ 61,224 (*PSNH I*), *reh'g denied*, 85 FERC ¶ 61,044 (1998) (*PSNH II*) (together, *PSNH*)).

¹⁶ *Id.* P 20.

where it can, and currently is, selling its excess power.”¹⁷ The Commission also determined that Tri-State failed to show that it will not recover its fixed costs, if, due to Delta-Montrose’s QF purchases, Delta-Montrose exceeds the 5 Percent Limit.¹⁸

III. Requests for Rehearing and Other Pleadings

5. On July 18, 2016, requests for rehearing were separately filed by (1) Tri-State; and (2) Basin Electric Power Cooperative (Basin), ODEC, North Carolina Electric Membership Corporation (NCEMC), and Central Iowa Power Cooperative (CIPCO) (collectively, Cooperatives).¹⁹ Basin, NCEMC and CIPCO moved to intervene-out-of-time in the above-captioned proceeding, stating their willingness to accept the record as it stands and asserting their later intervention will not prejudice any party to the proceeding. On July 21, 2016, South Mississippi Electric Power Association (SMEPA) filed a motion to intervene out-of-time and a request for reconsideration. On November 7, 2016, East Kentucky Power Cooperative, Inc. (East Kentucky) filed a motion to intervene out-of-time. On January 30, 2018, San Juan Citizens Alliance and Local First (together, Alliance and Local First) filed a motion to intervene out-of-time. And, on February 6, 2018, Tri-State filed a motion opposing the late intervention of Alliance and Local First.

6. On August 2, 2016, Delta-Montrose filed a motion for leave to answer and answer to the requests for rehearing. On August 3, 2016, the Sustainable FERC Project and Natural Resources Defense Council (Sustainable FERC and NRDC) filed a motion for leave to answer and answer to Tri-State’s and Cooperatives’ rehearing requests. On August 16, 2016, Tri-State filed an answer opposing the motions to file answers to its rehearing request, or, in the alternative, a motion for answer and reply to answers to its rehearing request. On August 16, 2016, Renewable Forest Energy, LLC (Renewable Forest) filed a motion for leave to answer and answer to rehearing requests. On August 17, 2016, Tri-State filed an answer opposing Renewable Forest’s motion to answer its rehearing request.

¹⁷ *Id.* P 21.

¹⁸ *Id.* P 21 & n.25 (pointing out that Tri-State acknowledged in its 2015 Annual Report that *Delta-Montrose* would not have a material adverse effect on Tri-State’s finances) (citation omitted).

¹⁹ Request for Rehearing of Basin, ODEC, NCEMC and CIPCO and Motion to Intervene Out-of-Time, at 2 (filed Jul. 18, 2016) (ODEC Rehearing Request).

7. Additionally, various parties filed comments supporting²⁰ or opposing²¹ Tri-State's rehearing request.

IV. Tri-State and ODEC Rehearing Requests

8. On rehearing, Tri-State and ODEC each argue, in pertinent part, that the Contract is a full-requirements contract and the Commission erred by limiting fixed cost equalization to pre-PURPA full-requirements contracts, contrary to Order No. 69 and subsequent PURPA orders.²²

9. Tri-State and ODEC also contend that, by limiting the availability of fixed cost recovery to situations where contracts were entered into before the enactment of PURPA, the *Tri-State* 2016 Declaratory Order is contrary to Congress's express intent in PURPA to avoid utility ratepayers subsidizing QFs (an intent not limited to situations arising under pre-PURPA contracts).²³ According to Tri-State, the *Tri-State* 2016 Declaratory Order requires Tri-State's other full-requirements members to subsidize Delta-Montrose's QF purchases and fosters the inefficient use of generation resources by providing incentive for surplus capacity, directly contrary to Congressional intent.

10. ODEC states that the Commission may not modify the binding policy of Order No. 69 in an adjudication, rather than rulemaking, proceeding.²⁴ Tri-State and ODEC add that requiring Tri-State to first demonstrate that it will not recover fixed costs before implementing fixed cost equalization improperly modified the binding policy of Order No. 69 without first establishing a rulemaking proceeding.²⁵ ODEC further objects to the Commission's conclusion that fixed cost equalization undermines the

²⁰ For a list of commenters supporting the Tri-State Rehearing Request, *see* app. A.

²¹ For a list of commenters opposing the Tri-State Rehearing Request, *see* app. A.

²² Tri-State Rehearing Request at 8-20; ODEC Rehearing Request at 10-13.

²³ Tri-State Rehearing Request at 9 & n.24 (quoting H.R. Conf. Rep. No. 95-1750, at 98 (1978)); ODEC Rehearing Request at 2-3.

²⁴ ODEC Rehearing Request at 14.

²⁵ *Id.* at 9, 14-18; Tri-State Rehearing Request at 21.

Commission's determination in Docket No. EL15-43-000 that Delta-Montrose is obligated to purchase power from QFs and may do so at negotiated rates.²⁶

11. Finally, Tri-State also argues that the Commission's pre-PURPA/post-PURPA distinction will have significant negative impacts on the entire generation and transmission cooperative sector. According to Tri-State, the certainty of fixed cost recovery assured by Tri-State's and other cooperatives' power supply agreements has been key to generation and transmission cooperatives' ability to provide power at low-cost to the rural communities they serve.

V. Change in Facts

12. On December 27, 2019, pursuant to section 205 of the FPA,²⁷ Tri-State filed 216 pre-existing agreements and contracts between Tri-State and its member-customers, based on Tri-State's argument that it had become a non-exempt public utility.²⁸ As relevant here, in Docket No. ER20-691-000, Tri-State filed Board Policy No. 115, designated as Rate Schedule No. 260, which describes the implementation of each member-customer's option, under its contract with Tri-State, to use self-owned or controlled distribution or renewable generation resources to serve up to 5% of that member's requirements. As a companion to those filings, Tri-State also submitted a petition for declaratory order, in Docket No. EL20-16-000, seeking, among other things, a declaration that Tri-State is now, and, since September 3, 2019, has been, a non-exempt jurisdictional "public utility" for purposes of Part II of the FPA.²⁹

13. On March 19, 2020, in Docket No. EL20-16-000, the Commission concluded that Tri-State became a jurisdictional public utility under Part II of the FPA upon its admission of Mico, Inc. as a member on September 3, 2019.³⁰ Additionally, in Docket

²⁶ ODEC Rehearing Request at 19 & n.36 (citing *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238 at Ordering Paragraphs (A) and (B), *reh'g denied*, 153 FERC ¶ 61,028 (2015)).

²⁷ 16 U.S.C. § 824d (2018).

²⁸ *Tri-State Generation and Transmission Ass'n, Inc.*, 170 FERC ¶ 61,223, at P 8 & n.14 (2020) (*Tri-State Rate Schedules Order*). We note that Tri-State submitted various updates and amendments to these filings in January 2020. *See id.* PP 8-9.

²⁹ Tri-State Petition for Declaratory Order, Docket No. EL20-16-000 (filed Dec. 27, 2019) (*Tri-State 2019 Jurisdictional Declaratory Order Petition*).

³⁰ *Tri-State Generation and Transmission Ass'n, Inc.*, 170 FERC ¶ 61,224, at P 81 (2020) (*Tri-State Jurisdictional Declaratory Order*).

No. ER20-691-000, the Commission rejected Tri-State's Board Policy 115 and associated wholesale power supply contracts, without prejudice to Tri-State refiling those rate schedules.³¹ Tri-State had not filed Board Policy 101 and the Commission found that Tri-State's Board Policy 115 and contracts that reference Board Policy 101 are deficient without Board Policy 101 on file.³² The Commission required Tri-State to file Board Policy 101 with the Commission because it significantly affects wholesale rates, terms and conditions of service.³³

14. In reaching its determination, the Commission explained that, under the "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 recitations superfluous."³⁴ The Commission found 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 5% allowance reflected in Board Policy No. 115 and incorporated into the Generation Contracts."³⁵

VI. Discussion

A. Procedural Matters

15. In ruling on a motion to intervene out-of-time, we apply the criteria set forth in Rule 214(d) of the Commission's Rules of Practice and Procedure, and consider, *inter alia*, whether the movant had good cause for failing to file the motion within the time prescribed.³⁶ When late intervention is sought after the issuance of a dispositive order, the prejudice to other parties and burden upon the Commission of granting the late

³¹ *Tri-State Rate Schedules Order*, 170 FERC ¶ 61,223 at P 46. *See also id.* PP 47-49.

³² *Id.* P 46 & n.83 (citations omitted).

³³ *Id.* P 8.

³⁴ *Id.* P 48 & n.88 (citing *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985); *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 rate, 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.")).

³⁵ *Id.* P 48.

³⁶ *See* 18 C.F.R. § 385.214(d) (2019).

intervention may be substantial. It is generally Commission policy to deny late intervention at the rehearing stage, including when the petitioner claims that the decision establishes a broad policy of general application.³⁷ Neither Basin, NCEMC, CIPCO, SMEPA, East Kentucky, nor Alliance and Local First have met their burden to justify granting late intervention and we therefore deny the motions.³⁸ As Basin, NCEMC, CIPCO, SMEPA, East Kentucky, and Alliance and Local First are not parties to this proceeding, they may not seek rehearing of the Declaratory Order,³⁹ and we reject their respective pleadings on that basis. Because ODEC is a party to this proceeding,⁴⁰ we address the requests for rehearing ODEC made as one of the Cooperatives.⁴¹

16. Rule 713(d)(1) of the Commission's Rules of Practice and Procedure⁴² prohibits answers to a request for rehearing. Accordingly, we reject the answers filed by Delta-Montrose, Sustainable FERC and NRDC, and Renewable Forest.

17. The various comments filed in support or in opposition to Tri-State's Rehearing Request are essentially answers to Tri-State's Rehearing Request.⁴³ Accordingly, we reject them pursuant to Rule 713(d)(1).⁴⁴

³⁷ See, e.g., *Seminole Elec. Coop., Inc.*, 153 FERC ¶ 61,037, at P 11 & n.14 (2015) (citing *PáTu Wind Farm LLC v. Portland General Elec. Co.*, 151 FERC ¶ 61,223, at P 39 & n.85 (2015) (citing *Columbia Gas Transmission Co.*, 113 FERC ¶ 61,066, at 61,243 (2005))).

³⁸ 18 C.F.R. § 385.214(d) (2019).

³⁹ 16 U.S.C. § 825l (2018); 18 C.F.R. § 385.713(b) (2019).

⁴⁰ See *Tri-State* 2016 Declaratory Order, 155 FERC ¶ 61,269 at P 15.

⁴¹ 16 U.S.C. § 825l; 18 C.F.R. § 385.713(b).

⁴² 18 C.F.R. § 385.713(d)(1) (2019).

⁴³ For the list of commenters, see app. A.

⁴⁴ 18 C.F.R. § 385.713(d)(1).

B. Dismiss and Vacate

18. We dismiss Tri-State's and ODEC's pending rehearing requests in the *Tri-State* 2016 Declaratory Order proceeding as overtaken by events and vacate the *Tri-State* 2016 Declaratory Order, as explained below.

19. Declaratory orders are advisory⁴⁵ and based on "specific facts and circumstances" presented to the Commission.⁴⁶ Acting on the Tri-State 2019 Jurisdictional Declaratory Order Petition, the Commission concluded that Tri-State became a Commission-jurisdictional public utility under Part II of the FPA on September 3, 2019.⁴⁷ Now that Tri-State is a non-exempt public utility, this change in status substantially changes the circumstances underlying Tri-State's Petition. As the Commission determined in the *Tri-State* Rate Schedules Order, Tri-State's proposed revised Board Policy 101, which includes the new fixed cost equalization provision described above, affects the wholesale rate that Tri-State charges its member-customers.⁴⁸ Now that Tri-State has become a non-exempt public utility, instead of evaluating only whether the fixed cost equalization approach accords with PURPA, the Commission must also consider whether the fixed cost equalization approach is just and reasonable and not unduly discriminatory or preferential under section 205 of the FPA.⁴⁹ Accordingly, we dismiss Tri-State's and ODEC's pending rehearing requests as overtaken by events because Tri-State's new status as a non-exempt "public utility" constitutes a material change in the facts and circumstances the Commission relied on in issuing the *Tri-State* 2016 Declaratory Order, and the record contains no substantial evidence or argument on the relevance or effect of the recent changes on the original request and on the *Tri-State* 2016 Declaratory Order.⁵⁰

⁴⁵ See, e.g., *Xcel Entergy Servs. Inc. v. FERC*, 407 F.3d 1242, 1246 (D.C. Cir. 2014); *Stowers Oil and Gas Co.*, 27 FERC ¶ 61,001 (1984).

⁴⁶ *ITC Grid Development LLC*, 154 FERC ¶ 61,206, at P 45 & n.72 (2016) (collecting cases).

⁴⁷ *Tri-State* Jurisdictional Declaratory Order, 170 FERC ¶ 61,224 at P 81.

⁴⁸ *Tri-State* Rate Schedules Order, 170 FERC ¶ 61,223 at PP 48; see also *City of Cleveland v. FERC*, 773 F.2d at 1376.

⁴⁹ 16 U.S.C. § 824d.

⁵⁰ See, e.g., *Exelon Wind 1, LLC, et al.*, 155 FERC ¶ 61,066, at P 11 (2016) (denying requests for reconsideration because avoided cost issue had been "overtaken by events"); see also *ISO New England, Inc.*, 161 FERC ¶ 61,100, at P 7 (2017) (dismissing request for rehearing as moot in light of changes to capacity market design); *Nevada Power Corp.*, 156 FERC ¶ 61,004, at P 6 (2016) (dismissing rehearing request as moot

20. In addition to dismissing Tri-State's and ODEC's pending rehearing requests, we vacate the underlying *Tri-State* 2016 Declaratory Order. The determination to vacate an order is an equitable one, requiring exceptional circumstances.⁵¹ We find exceptional circumstances here, where fairness to the parties warrants vacating the *Tri-State* 2016 Declaratory Order.

21. The *Tri-State* 2016 Declaratory Order applied PURPA and Commission precedent to draw a consequential conclusion that the fixed cost equalization approach is no longer appropriate.⁵² Dismissing the pending rehearing requests and then leaving the *Tri-State* 2016 Declaratory Order in place would be fundamentally unfair to the parties who will not have the benefit of the Commission's final order on the pending rehearing requests, and therefore will not be able to seek judicial review of the substantive determinations in the *Tri-State* 2016 Declarator Order.

22. Finally, to be clear, the practical effect of vacating the *Tri-State* 2016 Declaratory Order places the parties "back at square one," as if the Commission had never rendered an opinion on the issue at all.⁵³

after acceptance of new amended agreement); *TC Ravenswood, LLC*, 150 FERC ¶ 61,142, at P 10 (2015) (dismissing request for rehearing as moot where there was no longer a live controversy); *Exelon Corp.*, 130 FERC ¶ 61,055, at P 5 (2010) (dismissing rehearing of order on FPA section 203 proceeding as moot after receiving notice that transaction would never be consummated).

⁵¹ See, e.g., *Athens Energy, LLC*, 164 FERC ¶ 61,177, at P 9 & n.11 (citing *Duke Energy Carolinas, LLC*, 131 FERC ¶ 61,246, at P 5 (2010) (citing *E. Ky. Power Coop., Inc.*, 121 FERC ¶ 61,255, at P 10 (2007); *Exelon Corp.*, 130 FERC ¶ 61,095 at P 4), *reh'g denied*, 166 FERC ¶ 61,005, at P 8 & n.21 (2019) (citations omitted)).

⁵² *Tri-State* 2016 Declaratory Order, 155 FERC ¶ 61,269 at PP 17-21.

⁵³ See *So. Cal Edison, Co.* 55 FERC ¶ 61,497, at 62,759 & n.8 (1991) (stating that in *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40 (1950), the Supreme Court held that the practice of vacating moot decisions "clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance").

The Commission orders:

(A) Tri-State's and ODEC's requests for rehearing are hereby dismissed, as discussed in the body of this order.

(B) The *Tri-State* 2016 Declaratory Order is hereby vacated, as discussed in the body of this order.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

Appendix

Comments Supporting Tri-State's Rehearing Request

Big Horn Rural Electric Company
Carbon Power & Light Inc.
Central New Mexico Electric Cooperative, Inc.
Chimney Rock Public Power District
East River Electric Power Cooperative, Inc.
Garland Light & Power Company
High Plains Power, Inc.
High West Energy, Inc.
Highline Electric Association
K.C. Electric Association
Midwest Electric Cooperative Association
Minnkota Power Cooperative, Inc.
Morgan County Rural Electric Association
Mountain Parks Electric, Inc.
Mountain View Electric Association, Inc.
New Mexico Rural Electric Cooperative Association
Northern Rio Arriba Electric Cooperative, Inc.
Niobrara Electric Association, Inc.
Otero County Electric Cooperative, Inc.
Panhandle Rural Electric Membership Association
Poudre Valley Rural Electric Association, Inc.
San Isabel Electric Association, Inc.
Southeast Colorado Power Association
Springer Electric Cooperative, Inc. and Mid-Kansas Electric Company, LLC
Sunflower Electric Power Corporation
Wheat Belt Public Power District
Wheatland Rural Electric Association
Wyrulec Company
Y-W Electric Association, Inc.

Comments Opposing Tri-State's Rehearing Request

Bradley M. Palmer II, CEO of Palmer Wind Power, LLC
Southern Environmental Law Center, et al.
Uncompahgre Valley Water Users