

153 FERC ¶ 61,028  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;  
Philip D. Moeller, Cheryl A. LaFleur,  
Tony Clark, and Colette D. Honorable.

Delta-Montrose Electric Association

Docket No. EL15-43-001

ORDER ON REHEARING

(Issued October 15, 2015)

1. On June 18, 2015, the Commission issued a declaratory order<sup>1</sup> finding that Delta-Montrose Electric Association (Delta-Montrose) is obligated to purchase power from qualifying facilities (QFs) offering available energy and capacity under section 292.303(a) of the Commission's regulations,<sup>2</sup> notwithstanding any conflicting contractual provisions between Delta-Montrose and Tri-State Generation and Transmission Association, Inc. (Tri-State), and that such purchases from QFs may be at negotiated rates.<sup>3</sup>
2. Kit Carson Electric Cooperative (Kit Carson) filed a request for clarification, or in the alternative rehearing, of the Delta-Montrose Declaratory Order. Kit Carson requests that the Commission clarify that the holdings in the Delta Montrose Declaratory Order extend to any Tri-State policy, procedure or activity that serves to limit Kit Carson's obligation under section 210 of the Public Utility Regulatory Policies Act of 1978

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<sup>1</sup> *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238 (2015) (Delta-Montrose Declaratory Order).

<sup>2</sup> 18 C.F.R. § 292.303(a) (2015).

<sup>3</sup> We also found that, although Tri-State meets the statutory definition of a public utility, Tri-State is exempt from the requirements of sections 205 and 206 of the Federal Power Act (FPA), 16 U.S.C. §§ 824d, 824e (2012), by application of section 201(f) of the FPA. 16 U.S.C. § 824f (2012).

(PURPA)<sup>4</sup> to purchase power from a QF.<sup>5</sup> In the alternative, Kit Carson requests that the Commission grant rehearing and find that Delta-Montrose, and other Tri-State member cooperatives, such as Kit Carson, are obligated under the Commission's PURPA regulations to purchase power from a QF, regardless of the contractual terms of PPAs between Tri-State and its member cooperatives, or of any Tri-State board policies or procedures limiting such purchases.<sup>6</sup>

3. As we explain below, we deny Kit Carson's request for clarification or rehearing.

### **I. Background**

4. Delta-Montrose is a rural electric cooperative. Tri-State is a generation and transmission cooperative that provides electric service to its forty-four member cooperatives, including Delta-Montrose and Kit Carson.

5. Delta-Montrose filed a petition for a declaratory order<sup>7</sup> requesting that, as relevant here, the Commission find that: (1) Delta-Montrose's obligation to purchase power from QFs under PURPA supersedes any conflicting provisions in Delta-Montrose's requirements contract with Tri-State; and (2) Delta-Montrose can negotiate with a QF for a purchase price based on its own avoided cost and reduce the amount of energy it purchases from Tri-State.<sup>8</sup>

6. In 2001, Delta-Montrose executed a wholesale electric service contract with Tri-State. Under the contract, Tri-State is responsible for meeting at least ninety-five percent of Delta-Montrose's needs for capacity and energy.<sup>9</sup> Delta-Montrose may elect to obtain up to five percent of its requirements from generation owned or controlled by Delta-Montrose.<sup>10</sup> The contract does not, however, expressly address Delta-Montrose's

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<sup>4</sup> 16 U.S.C. § 824a-3 (2012).

<sup>5</sup> Kit Carson Rehearing at 7.

<sup>6</sup> Kit Carson Rehearing at 8.

<sup>7</sup> See 18 C.F.R. § 385.207(a)(2) (2015).

<sup>8</sup> Delta-Montrose also asked that the Commission find that Tri-State is a public utility, making Delta-Montrose's wholesale requirements contract with Tri-State subject to sections 205 and 206 of the FPA. 16 U.S.C. §§ 824d, 824e (2012).

<sup>9</sup> Delta-Montrose Declaratory Order, 151 FERC ¶ 61,238 at P 4 (referencing Delta-Montrose Petition at 6).

<sup>10</sup> *Id.*

right to purchase capacity and energy from sources that it does not own or control (including the right to purchase from QFs or other third parties), but stated that Tri-State and Delta-Montrose are committed to meeting electric utility market challenges in a competitive environment.<sup>11</sup>

7. Delta-Montrose stated that it received a request to interconnect with and purchase power from an as-yet unbuilt small hydroelectric project known as the South Canal Drop 2 Project owned by Percheron Power, LLC (Percheron).<sup>12</sup> Delta-Montrose explained that its existing purchases from third parties did not exceed the contractual limitation on the quantity of generation that it is permitted to own or control under its contract with Tri-State; however the anticipated purchase of power from the Percheron QF would put Delta-Montrose over the limit for the first time, raising the question of whether the contract with Tri-State may affect its obligation to purchase from a QF under PURPA.<sup>13</sup>

8. As to whether Delta-Montrose's obligation to purchase power at negotiated rates from QFs under PURPA supersedes any conflicting provisions in Delta-Montrose's requirements contract with Tri-State, the Commission found that Delta-Montrose is obligated to purchase power from the Percheron QF and may make that purchase at negotiated rates.<sup>14</sup> We stated that section 210 of PURPA and section 292.303(a) of the Commission's regulations require an electric utility to purchase any energy and capacity made available by a QF.<sup>15</sup> The Commission pointed to Order No. 69 where the Commission explained that, if contractual devices were permitted to allow electric utilities to avoid the purchase obligation, those contractual devices could be used to hinder the development of QFs:

in general, if it permitted such contractual obligations to override the obligation to purchase from [QFs], these contractual devices might be used to hinder the development of cogeneration and small power production. The Commission believes that the mandate of PURPA to encourage cogeneration and small power production requires that obligations to

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* P 5 (referencing Delta-Montrose Petition at 4).

<sup>13</sup> *Id.* (referencing Delta-Montrose Petition at 6-7).

<sup>14</sup> *Id.* P 56.

<sup>15</sup> *Id.* P 52.

purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a [QF].<sup>16</sup>

9. The Commission also pointed to *PSNH*, where the Commission had found that, notwithstanding provisions in a contract between New Hampshire Electric Cooperative, Inc. and Public Service Company of New Hampshire that purported to limit New Hampshire Electric Cooperative, Inc.'s obligation to purchase from QFs, New Hampshire Electric Cooperative, Inc. and Public Service Company of New Hampshire could not lawfully bargain away any of the rights QFs enjoy under PURPA, or New Hampshire Electric Cooperative's statutory purchase obligation under PURPA or the Commission's implementing regulations under PURPA.<sup>17</sup> In addition, while the Commission acknowledged cases where it waived the purchase obligation of distribution cooperative utilities, the Commission noted that the waivers were granted at the request of the utilities that had the purchase obligation; the Commission added that the Commission would not impose an obligation to file for a waiver at another party's request.<sup>18</sup>

10. Accordingly, in the Delta-Montrose Declaratory Order, we found that Delta-Montrose is obligated by section 210 of PURPA and section 292.303(a) of the Commission's regulations to purchase power from *any* QF that can deliver its power to Delta-Montrose, regardless of the terms of Delta-Montrose's contract with Tri-State. Furthermore, we stated that the terms of the contract cannot control the rights of a third party QF to sell power to any electric utility that it can deliver its electric energy to.<sup>19</sup> We further found that nothing in the Commission's regulations concerning calculation of avoided costs limits the authority of any electric utility, such as Delta-Montrose, and any QF, such as the Percheron QF, to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by the Commission's regulations.<sup>20</sup>

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<sup>16</sup> *Id.* (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870).

<sup>17</sup> *Id.* P 53 (citing *Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 83 FERC ¶ 61,224, at 61,998-99 (1998) (*PSNH*)).

<sup>18</sup> *Id.* at 62,000 (citing *PSNH*, 83 FERC ¶ 61,244 at 62,000, explaining that “[New Hampshire Electric Cooperative, Inc.] has no obligation to seek a waiver and we would not impose one upon it at another party's request”).

<sup>19</sup> Order No. 69, FERC Stat. & Regs. ¶ 30,128 at 30,870.

<sup>20</sup> 18 C.F.R. § 292.302 (2015).

## II. Kit Carson Request for Rehearing

11. Kit Carson states that, like Delta-Montrose, it is a member cooperative of Tri-State with a substantially similar PPA under which it is required to purchase ninety-five percent of its requirements for capacity and energy from Tri-State.<sup>21</sup> Kit Carson states that, under the terms of that PPA and implementing policies and procedures, its own generation and/or purchases of power from a QF cannot exceed five percent of its requirements.

12. Kit Carson states that Tri-State has adopted Board Policy Nos. 115 and 117 to implement the five percent limitation in the PPA. Board Policy No. 115 states:

[f]or each Member System, the total Member-owned or controlled generation shall not exceed 5% of that Members System's annual energy requirements, and the total installed generation nameplate capacity shall not exceed 10% of the Member System's annual peak demand. The 5% energy threshold will be based on the maximum of the prior three calendar year period for Member Systems energy sales, and the 10% demand threshold will be based on the maximum half-hour integrated Member System demand over the same three year period.<sup>22</sup>

Pursuant to Tri-State's Policy No. 117, Tri-State provides its member cooperatives a "performance payment for such projects based on the qualifying renewable attributes generated by the project for which the member can claim ownership and which are eligible for renewable portfolio standard compliance," which payments are not netted against Kit Carson's wholesale power bill.<sup>23</sup> Kit Carson states that such payments are made to member cooperatives based "on maximum participation by any member cooperative's projected obligation of a percentage of kWh retail sales on a schedule ranging from one percent to ten percent over time."<sup>24</sup> Kit Carson explains that under Tri-State's board policies it has had to execute two contracts, one for each of Policy Nos. 115 and 117 for each QF purchase.

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<sup>21</sup> Kit Carson Rehearing at 3-4 (referencing Tri-State Board Policy Nos. 115, and 117), Attachments 1 and 2.

<sup>22</sup> Kit Carson Rehearing, Attachment 1.

<sup>23</sup> Kit Carson Rehearing at 4 (quoting Tri-State Policy No. 117), Attachment 2 at 1-4.

<sup>24</sup> Kit Carson Rehearing at 5.

13. Kit Carson argues that it is separately required to meet New Mexico's renewable energy portfolio standards which require a yearly increase of 1 percent of total retail sales up to 10 percent by January 1, 2020. Kit Carson asserts that the 5 percent contract limitation in its PPA with Tri-State frustrates this end.

14. Kit Carson requests that the Commission clarify that the holding in the Delta-Montrose Declaratory Order, issued in response to the Delta-Montrose petition and to the PPA between Delta-Montrose and Tri-State, equally applies to any Tri-State policy or procedure, including Tri-State Board Policies 115 and 117; those policies implement the contractual limitations contained in the Tri-State PPAs including the Kit Carson PPA, and limit Kit Carson's PURPA obligation. In the alternative, to the extent the Commission determines that the clarification requested by Kit Carson is inconsistent with the holding in the Delta-Montrose Declaratory Order, Kit Carson requests rehearing and requests that the Commission find that its holding regarding Delta-Montrose's obligation to purchase power from any QF, regardless of the terms of its contract with Tri-State limiting purchases to five percent of its requirements, also equally applies to any Tri-State member cooperative, and extends to Tri-State policies, procedures, or activities that Tri-State may impose or undertake that conflicts with the Commission's regulations governing QFs purchases under PURPA.

### **III. Answers**

15. Tri-State responds that Kit Carson's request is beyond the scope of Delta-Montrose's petition and the Commission's jurisdiction.<sup>25</sup> Tri-State asserts Delta-Montrose presented a limited request which did not include resolving issues pertaining to Tri-State's board policies. Tri-State argues that the Commission limited its findings to the bilateral agreement between Tri-State and Delta-Montrose, and the board policies were not at issue in the proceeding. Finally, Tri-State argues that since the Commission affirmed Tri-State is not a public utility, internal contractual matters, such as board policies, are not subject to Commission jurisdiction under sections 205 and 206 of the FPA.<sup>26</sup>

16. Delta-Montrose argues that both it and Tri-State addressed Tri-State's board policies in their briefs. Further, Delta-Montrose asserts that the Delta-Montrose Declaratory Order rejected any contractual devices or obligations that frustrated QF development.<sup>27</sup> Delta-Montrose explains that, in its original petition, it argued that

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<sup>25</sup> Tri-State Answer at 3.

<sup>26</sup> Tri-State Answer at 4.

<sup>27</sup> Delta-Montrose Answer at 4 (citing Delta-Montrose Declaratory Order, 151 FERC ¶ 61,238 at P 52).

Tri-State utilized its board policies, along with the PPA, to restrict member cooperatives from purchasing from QFs.<sup>28</sup> Furthermore, Delta-Montrose asserts that Tri-State itself argued that Delta-Montrose was contractually obligated to comply with its board policies. Consequently, Delta-Montrose argues that the Tri-State board policies and procedures were squarely before the Commission and were within the Commission's determination as an impermissible contractual device that hindered QF development.

#### **IV. Discussion**

17. The Commission's Rules of Practice and Procedure do not permit answers to requests for rehearing.<sup>29</sup> Accordingly, we will reject the answers filed by Tri-State and Delta-Montrose in response to Kit Carson's request for rehearing.

18. We do not view our earlier order as needing further clarification, and thus we deny Kit Carson's request for clarification or rehearing. In the Delta-Montrose Declaratory Order, the Commission explained that Order No. 69 provided that, "if contractual devices were permitted to allow electric utilities to avoid the purchase obligation, those contractual devices could be used to hinder the development of QFs."<sup>30</sup> Accordingly, the Delta-Montrose Declaratory Order provided that, notwithstanding objections by Tri-State, Delta Montrose was obligated to purchase power from any QF that can deliver its power to Delta-Montrose regardless of conflicting contract terms found in the PPA between Delta-Montrose and Tri-State. The terms of a PPA, the Delta-Montrose Declaratory Order stated, "cannot control the rights of a third party QF to sell power to any electric utility that it can deliver its electric energy to."<sup>31</sup> Tri-State's members, in short, are obligated to purchase from QFs offering available energy and capacity under PURPA and section 292.303(a) of the Commission's regulations. Neither rehearing nor clarification of the Delta-Montrose Declaratory Order are necessary.

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<sup>28</sup> *Id.* (referencing Delta-Montrose Petition for Declaratory Order at 26-27).

<sup>29</sup> 18 C.F.R. § 385.713(d) (2015).

<sup>30</sup> Delta-Montrose Declaratory Order, 151 FERC ¶ 61,238 at P 52 (citing Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870).

<sup>31</sup> *Id.* P 54.

The Commission orders:

Kit Carson's request for clarification or rehearing is hereby denied, as discussed in the body of this order.

By the Commission.

( S E A L )

Nathaniel J. Davis, Sr.,  
Deputy Secretary.