

155 FERC ¶ 61,269
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

Tri-State Generation and Transmission
Association, Inc.

Docket No. EL16-39-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued June 16, 2016)

1. On February 17, 2016, as supplemented on March 10, 2016, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed a petition for a declaratory order,¹ requesting that the Commission find that Tri-State's fixed cost recovery proposal is consistent with section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA).² As discussed below, we deny Tri-State's petition.

I. Background

2. Tri-State is a generation and transmission cooperative corporation wholly owned by its 44 member distribution cooperatives located in the states of Colorado, Nebraska, New Mexico, and Wyoming. Tri-State explains that it is party to a wholesale power supply agreement with each of its members, which provides that each member may self-supply up to 5 percent of its requirements and is obligated to purchase the remaining 95 percent from Tri-State.³

3. In February 2015, Delta-Montrose Electric Association (Delta-Montrose) filed a petition for a declaratory order requesting that the Commission find, in relevant part, that

¹ 18 C.F.R. § 385.207(a)(2) (2015).

² 16 U.S.C. § 824a-3 (2012).

³ Tri-State Petition at 2.

Delta-Montrose's obligation to purchase power from QFs under PURPA supersedes any conflicting provisions in Delta-Montrose's requirements contract with Tri-State limiting such purchases to 5 percent of Delta-Montrose's requirements, and that Delta-Montrose can negotiate with a QF for a purchase price based on its own avoided cost, thus reducing the amount of energy it purchases from Tri-State.

4. In *Delta-Montrose*, the Commission found that Delta-Montrose is obligated to purchase power from QFs offering available energy and that such sales may be at negotiated rates.⁴

II. Petition

5. Tri-State requests that the Commission find that its Board Policy 101 (Board Policy) adopted March 2, 2016, i.e., after the Commission issued *Delta-Montrose*, is consistent with the requirements of PURPA and the Commission's regulations.⁵ Tri-State explains that, under the newly-adopted Board Policy, member cooperatives, such as Delta-Montrose, must pay Tri-State for all unrecovered fixed costs associated with a member's QF power purchases that exceed the 5 percent limitation.⁶

6. Tri-State states that its proposed fixed cost recovery is calculated based on the difference between Tri-State's wholesale rate to its members and Tri-State's own avoided cost rate. Tri-State argues that, if not for this cost recovery policy, Tri-State would lose revenue due to its members' purchases from QFs. Tri-State also argues that billing member cooperatives that exceed the 5 percent limitation for Tri-State's lost revenues prevents Tri-State from having to allocate these costs to its other members, which would increase the other members' rates.

7. Tri-State asserts that Order No. 69 recognizes the right of a power supplier to recover lost revenue directly from a power supply customer when that customer purchases power from a QF and reduces the amount of power it is otherwise obligated to purchase from the supplier.⁷ Tri-State also argues that its policy is similar to the billing

⁴ *Delta-Montrose Electric Assoc.*, 151 FERC ¶ 61,238, at PP 54-56, *reh'g denied*, 153 FERC ¶ 61,028 (2015) (*Delta-Montrose*).

⁵ Tri-State Petition at 2-4.

⁶ *Id.* at 3-4 (referencing Exhibit C, Proposed Revised Board Policy 101).

⁷ Order No. 69, which adopted the regulations implementing section 210 of PURPA, discussed the revenue impact on supplying utilities of QF purchases by their all requirements customer-utilities making such purchases, and who should bear the impact

procedures accepted by the Commission in *Carolina Power*, despite similar concerns that the billing procedures at issue would make purchases from QFs uneconomical, or were intended to prevent purchases from QFs at negotiated rates.⁸

III. Notice and Responsive Pleadings

8. Notice of Tri-State's filing was published in the *Federal Register*, 81 Fed. Reg. 9,182 (2016). Notice of Tri-State's supplemental filing was published in the *Federal Register*, 81 Fed. Reg. 15,098 (2016), with interventions and protests due on or before March 25, 2016. Delta-Montrose, Renewable Forest Energy, LLC filed motions to intervene and protests. Palmer Wind Power, LLC (Palmer Wind), the Southern Environmental Law Center and other environmental organizations (Southern Environmental)⁹ along with approximately 120 various individuals and other entities¹⁰ (collectively, Protesters) also filed protests. Old Dominion Electric Cooperative filed a motion to intervene and comments in support. Sustainable FERC Project and Natural Resources Defense Council filed motions to intervene out-of-time. Tri-State and Delta-Montrose filed answers.

of the loss in revenue to the supplying-utility as a result of the customer-utility's now purchasing from a QF. That discussion contemplated that the supplying utility would recover the loss in revenue from the customer-utility, who could in turn include those amounts in its calculation of its avoided costs (reducing the avoided costs) and then pay the QF accordingly. *Final Rule Regarding the Implementation of Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128, at 30,871, *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., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402 (1983).

⁸ *Carolina Power & Light Co.*, 48 FERC ¶ 61,101 (1989) (*Carolina Power*).

⁹ A protest collectively submitted by 15 organizations and coalitions including: the Southern Environmental Law Center, Coalition for Clean Affordable Energy, Conservation Colorado, Earthjustice, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Renewable Taos, the Sierra Club, the Sierra Club: Rio Grande Chapter, Sustainable FERC Project, Utah Clean Energy, Vote Solar, Western Grid Group, and Western Resources Advocates (collectively, Southern Environmental).

¹⁰ Approximately 120 various individuals and entities filed protests without filing a motion to intervene. *See Appendix.*

9. Delta-Montrose argues that Tri-State's proposal is a collateral attack on, and inconsistent with, the Commission's decision in *Delta-Montrose*, effectively undermining the Commission's prior order.¹¹ Delta-Montrose states that it signed an agreement to purchase power from a QF after the Commission issued *Delta-Montrose*, but before Tri-State adopted the revised Board Policy.

10. Delta-Montrose asserts that Order No. 69 provided that, if contractual devices were permitted to allow electric utilities to avoid the QF purchase obligation, those contractual devices could be used to hinder the development of QFs.¹² Delta-Montrose argues that the Commission emphasized this point in *Delta-Montrose*.¹³ Delta-Montrose adds that Tri-State's proposed billing adjustment would only apply to Delta-Montrose; Delta-Montrose states that currently neither Tri-State nor any of its other members purchase power from a QF.

11. Protesters argue that Tri-State's fixed cost proposal will negatively impact QF development and limit opportunities for QFs to sell renewable energy to nonregulated electric utilities.¹⁴ Protesters also agree that Tri-State's petition is a collateral attack on the Commission's previous order in *Delta-Montrose*.¹⁵

12. In its answer, Tri-State argues that: (1) the Board Policy is consistent with PURPA and is supported by Commission precedent, allowing power suppliers to limit rate impacts due to QF purchases; (2) Tri-State members are all-requirements customers; and (3) Tri-State's petition is not a collateral attack on the *Delta-Montrose* order.

13. Tri-State argues that its petition is not a collateral attack on *Delta-Montrose* because *Delta-Montrose* involved whether: (1) Tri-State is a public utility under the Federal Power Act; (2) Delta-Montrose's obligation to purchase power from a QF under PURPA superseded any contractual provisions with Tri-State; and (3) Delta-Montrose can purchase QF power at negotiated rates. In the instant filing, Tri-State asserts that the issue is Tri-State's proposed fixed cost recovery mechanism contained in the Board

¹¹ Delta Montrose Protest at 5-6.

¹² Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870-71.

¹³ Delta-Montrose Protest at 7 (citing *Delta-Montrose*, 151 FERC ¶ 61,238 at P 52).

¹⁴ Southern Environmental Protest at 1-2.

¹⁵ See e.g., Palmer Wind Protest at 4.

Policy, which, Tri-State claims, neither limits any QF from selling, nor limits any member from purchasing power from a QF.¹⁶

14. In its answer, Delta-Montrose responds, disagreeing with Tri-State's claim that the proposed pricing provision is to prevent re-allocation of fixed costs to other members.¹⁷ Delta-Montrose argues that no such cost shifting is necessary since Tri-State can, and is, making off-system sales and could take other cost reduction measures, which Delta-Montrose claims that Tri-State has not rebutted.¹⁸

IV. Discussion

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant the unopposed motions to intervene out-of-time given the parties' interests, the early stage of the proceeding and the lack of undue prejudice or delay. The individuals and entities that filed protests or comments but did not file motions to intervene are not parties to this proceeding.¹⁹

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2015), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. Tri-State and Delta-Montrose filed such answers. We will accept these answers because they have provided information that assisted us in our decision-making process.

17. As discussed below, we deny Tri-State's petition. We find that Tri-State's proposal seeks to undermine the Commission's prior order in *Delta-Montrose*,²⁰ by imposing financial burdens on Delta-Montrose that could affect its purchasing from QFs

¹⁶ Tri-State Answer at 13-14.

¹⁷ Delta-Montrose Answer at 4 (citing Tri-State Petition at 1-2 and 4-5).

¹⁸ *Id.* at 4 (citing Delta-Montrose Protest at 16).

¹⁹ 18 C.F.R. § 385.211(a)(2) (2015); *accord* 18 C.F.R. §§ 385.102(c)(3), 385.214(a)(3) (2015).

²⁰ We note that Tri-State did not seek rehearing of *Delta-Montrose*.

above the contract's 5 percent limitation.²¹ This not only would undermine the Commission's prior order finding that, under PURPA, Delta-Montrose must purchase from QFs notwithstanding the Tri-State/Delta-Montrose contract's 5 percent limitation on QF purchases, but correspondingly would also limit a QF's ability to sell its output at negotiated rates.

18. In the *Pub Serv. Co. of N.H. v. N.H. Elec. Coop.*,²² on which the Commission relied in *Delta-Montrose*, the Commission held that New Hampshire Electric Cooperative (NHEC) – like Delta-Montrose – was obligated under PURPA to purchase power from any QF, and that NHEC could not bargain away that obligation in a contract with Public Service Company of New Hampshire (PSNH). PSNH then responded by seeking to change its billing to NHEC to, essentially, recover PSNH's losses resulting from NHEC purchasing QF power and correspondingly reducing PSNH's sales to NHEC.²³ On rehearing, the Commission found that PSNH's actions were inconsistent with the Commission's prior order, and rejected PSNH's billing (and ordered refunds of the overcollections that had occurred in the meantime).²⁴

19. Similarly, in the instant dispute between Tri-State and Delta-Montrose, the Commission has already ruled that Delta-Montrose has an obligation under PURPA to purchase QF power notwithstanding the contract's 5 percent limitation, and, as in *PSNH*, to vindicate that determination we find that Tri-State's proposed recovery of any resulting losses that flow from QF purchases above the 5 percent limitation should be rejected.

²¹ This is because Delta-Montrose would have to pay both for the QF power and, essentially, for Tri-State's power that the QF power replaces.

²² *Pub Serv. Co. of N.H. v. N.H. Elec. Coop. Inc.*, 83 FERC ¶ 61,224, at 61,998-99 & n.9 (1998) (*PSNH*) (finding that an all requirements contract between a cooperative and its supplying generation and transmission cooperative should not be allowed "to override the obligation to purchase from [QFs]; accord Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870-71 (stating that "the obligation to purchase . . . supersede[s] contractual restrictions on a utility's ability to obtain energy or capacity from a [QF]").

²³ *Pub Serv. Co. of N.H. v. N.H. Elec. Coop., Inc.*, 85 FERC ¶ 61,044, at 61,130, 61,131-32 (1998).

²⁴ *Id.* at 61,130-31, 61,135. The Commission noted that such charges were not authorized by the Commission's original PURPA rulemaking, Order No. 69. *Id.* at 61,135-36.

20. Furthermore, we are not persuaded by Tri-State's reliance on Order No. 69. Order No. 69 – adopting the Commission's QF regulations – 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 (i.e., pre-PURPA) all requirements contracts between supplying-utilities and their customer-utilities; those contracts could not have anticipated what Congress or the Commission would do. Here, in contrast, the Tri-State/Delta-Montrose contract at issue post-dates PURPA (and post-dates *PSNH*, as well), and that contract expressly provides for QF purchases by Delta-Montrose. Order No. 69's discussion of who should bear the impact of the loss in revenues to the supplying-utility is thus of no relevance in this case.

21. Finally, other than general assertions, Tri-State has not demonstrated that, in fact, it will not recover its fixed costs if Delta-Montrose exceeds the contract's 5 percent limitation on QF purchases. Unlike in 1989, Tri-State has easier access to energy markets where it can, and currently is, selling its excess power. Additionally, Tri-State has admitted that the Commission's ruling in *Delta-Montrose* would not have a material adverse effect on Tri-State's finances.²⁵

The Commission orders:

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

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

²⁵ See Southern Environmental Protest at 9 (referencing Tri-State Annual Report 2015 at 50).

Appendix

Motions to Intervene and Protest:

Delta-Montrose Electric Association
Renewable Forest Energy, LLC

Motions to Intervene and Supporting Comments:

Old Dominion Electric Cooperative

Protests without Motions to Intervene:

Al Ewing
Al Rozman
Alex Johnson
Allen and Carol Steele
Anthony Morgan Buxton
Auden Schendler
Barbara Corl
Ben Graves
Ben Lindsey-Wolcott
Bill and Evelyn Rosenberg
Bill Welch
Bob Beyer
Brad Wallis
Bradley Burritt
Bradley Harding
Bradley Palmer, II
Breccia Cressman
Britt Bassett
Citizens for a Healthy Community
City of Montrose, Colorado
Clean Energy Action Environment Colorado
Colorado Renewable Energy Society
Colorado Small Hydro Association
Cynthia Beach
David Frank
David Inouye
David Jones
David Knutson
David Monk
Delta Area Chamber of Commerce
Delta Conservation District
Delta County Economic Development, Inc.
Delta County Public Library District

Delta County, Colorado Board of County Commissioners
Delta-Montrose Electric Association
Dennis Olmstead
Honorable Don Coram, Colorado State Representative
Douglas Pryce
EcoAction Partners
Edwin Marston
Elizabeth McIntyre
Emily Schneider
Enno Heuscher
Erin Jameson
Eugenie McGuire
Fred Kirsch
Gail Marvel
Georgia Finnigan
Heidi Reese
Jan Petersen
Janet Chapman
Janet Reiser
Jeffrey Berman
Jill Knutson
JJ Riggs
John Baldus
John Records
Joseph Inman
Joseph Torstveit
Judith Chamberlin
Julie and Kerry Smith
Kandice Ray
Karen Ortiz
Kristen O'Brien
Les Renfrow
Leslie Glustrom
Linda Dysart
Linda Lindsey
Marilyn Stone
Michael Dennis Mason
Modern Appliance Company
Montrose Chamber of Commerce
Montrose Economic Development Corporation
Montrose Memorial Hospital
Nancy Hoganson
Nancy Hovde

Neal Schwieterman
Nicole Carpenter
Oxbow Mining, LLC
Palmer Wind, LLC
Paonia Chamber of Commerce, Colorado
Patricia Means
Paul Lewis
Paul Stockwell
Peter Mueller
Ralph Oberg
Randall Campbell
Reginald Moore
Renewable Forest Energy, LLC
Richard Ratliff
Rob Smith
Robert Bresnahan
Robert Hoshide
Rube Felicelli
San Miguel Power Association
Scott Beyer
Scott Thomason
Sierra Club Rocky Mountain Chapter
Solar Energy International
Sollos Energy LLC
Southern Environmental Law Center, et. al.
Steve Skadron
Steve Szabo
Steve Wolcott
Steven Glammeyer
Steven Schechter
Thomas and Diane Higgins
Town of Crawford, Colorado
Town of Hotchkiss, Colorado
Town of Mountain Village, Colorado
Town of Orchard City, Colorado
Town of Paonia, Colorado
Tyler Martinez
Vessels Coal Gas, Inc.
Wayne Quade
Western Colorado Congress
Western Slope Conservation Center
William and Sarah Bishop
William Weinberger

Untimely Motions to Intervene:

Sustainable FERC Project and Natural Resources Defense Council

Untimely Protests without Motions to Intervene:

Lynn Carretta

Montrose & Olathe Schools

Regions 10 LEAP

Steven Anderson