

151 FERC ¶ 61,238
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. EL15-43-000

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued June 18, 2015)

1. On February 9, 2015, Delta-Montrose Electric Association (Delta-Montrose) filed a petition for a declaratory order.¹ Delta-Montrose requests that the Commission find that: (1) Tri-State Generation and Transmission Association, Inc. (Tri-State) is a public utility pursuant to Federal Power Act (FPA) sections 201(e) and (f)² making Delta-Montrose's wholesale requirements contract with Tri-State subject to sections 205 and 206 of the FPA;³ (2) Delta-Montrose's obligation to purchase power from qualifying facilities (QFs) under the Public Utility Regulatory Policies Act of 1978 (PURPA)⁴ supersedes any conflicting provisions in Delta-Montrose's requirements contract with Tri-State; and (3) 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.
2. In this order, we find that Delta-Montrose is obligated to purchase power from QFs offering available energy and capacity under section 292.303(a) of the Commission's regulations,⁵ and that such sales may be at negotiated rates. Furthermore,

¹ 18 C.F.R. § 385.207(a)(2) (2014).

² 16 U.S.C. §§ 824e and 824f (2012).

³ 16 U.S.C. §§ 824d and 824e (2012).

⁴ 16 U.S.C. § 824a-3 (2012).

⁵ 18 C.F.R. § 292.303(a) (2014).

we find 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 FPA by application of section 201(f) of the FPA.

I. Background

3. Delta-Montrose is a rural electric cooperative based in Montrose, Colorado. Tri-State is a generation and transmission cooperative based in Westminster, Colorado and has facilities located in Arizona, Colorado, Nebraska, New Mexico, and Wyoming. Tri-State provides electric service to its forty-four member cooperatives, including Delta-Montrose. Tri-State retired all of its RUS debt on November 5, 2014.

4. In 2001, Delta-Montrose executed a wholesale electric service contract with Tri-State that is in effect until December 31, 2040. Under the contract, Tri-State is responsible for meeting at least ninety-five percent of Delta-Montrose's needs for capacity and energy.⁶ Delta Montrose may elect to obtain up to five percent of its requirements from generation owned or controlled by Delta-Montrose.⁷ The contract does not, however, expressly address Delta-Montrose's right to purchase electric energy from sources that it does not own or control (including the right to purchase from QFs or other third parties), but states that Tri-State and Delta-Montrose are committed to meeting electric utility market challenges in a competitive environment.⁸

5. Delta-Montrose states 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).⁹ Delta-Montrose states that Percheron's QF will consist of three generating units utilizing a low-head hydroelectric technology with a net power production capacity of 990 kW, and will interconnect to the Delta-Montrose system at 34.5 kV.¹⁰ Delta-Montrose explains that its existing purchases from third parties do 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 will put Delta-

⁶ Delta-Montrose Petition at 6.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 4.

¹⁰ *Id.* at 5.

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.¹¹

II. Notice of Filing and Responsive Pleadings

6. Notice of Delta-Montrose's filing was published in the *Federal Register*, 70 Fed. Reg. 8639 (2015), with interventions and protests due on or before March 11, 2015. The Appendix to this order lists the timely and untimely motions to intervene and protests. It also lists individuals and entities that filed comments but did not file motions to intervene.

7. Seventy-three individuals and entities filed comments in support, generally arguing that approving Delta-Montrose's petition would encourage further development of local and renewable generation projects, including additional methane and hydro projects, and support local economic development. Fifteen entities filed comments in opposition, arguing that Delta-Montrose's petition is premature because Delta-Montrose has not yet followed Tri-State's dispute resolution procedures, specifically Board Policy 316, and that the Commission has no legal basis to assert jurisdiction over Tri-State because Tri-State is statutorily exempt from FPA jurisdiction.

III. Discussion

8. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2014), the timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. We will grant Otero County Electric Cooperative, Inc., Carbon Power & Light, Inc., and National Rural Electric Cooperative Association's 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 the proceeding.¹²

9. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. Tri-State and Delta-Montrose filed answers. We will accept these answers because they have provided information that assisted us in our decision-making process.

¹¹ *Id.* at 6-7.

¹² 18 C.F.R. § 385.211(a)(2) (2014).

A. FPA Jurisdictional Issue,

1. Delta-Montrose Petition

10. Delta-Montrose requests that the Commission declare that Tri-State is a jurisdictional public utility under Part II of the FPA. Delta-Montrose explains that under the FPA the Commission has jurisdiction over public utilities, except for those public utilities under section 201(f) of the FPA. Delta-Montrose states that under section 201(f) the Commission is precluded from regulating, among other public utilities, any “electric cooperative that receives financing under the Rural Electrification Act of 1936 or that sells less than 4,000,000 megawatt hours of electric power per year.”¹³

11. Delta-Montrose argues that Tri-State no longer qualifies as an exempt electric cooperative since it owns and operates interstate transmission facilities that it uses to sell 18,600,000 MWh annually of wholesale power across four states,¹⁴ and it has recently retired all of its RUS debt. As such Delta-Montrose asserts that the Commission should regulate Tri-State as a jurisdictional public utility.

12. Delta-Montrose argues that, if the Commission finds that Tri-State is a public utility, the Commission would have jurisdiction over Tri-State’s contract with Delta-Montrose ensuring Tri-State’s rates are just and reasonable and not unduly discriminatory. Delta-Montrose further argues that, with jurisdiction over the contract, the Commission can enforce its regulations implementing PURPA so that Percheron can interconnect its QF with Delta-Montrose and negotiate the energy sale directly with Delta-Montrose.

2. Tri-State Protest

13. In its protest, Tri-State argues that it is not a public utility and, therefore, not subject to Commission jurisdiction. Tri-State states that it is a “nonregulated electric utility” as that term is defined in section 3(9) of PURPA.¹⁵ Tri-State claims that Delta-Montrose’s petition failed to mention the third criterion of section 201(f) of the FPA;

¹³ Delta-Montrose Petition at 8.

¹⁴ *Id.* at 9 n.20 (referencing Attachment D to Delta-Montrose Petition at 4, the Tri-State 2013 Annual Report).

¹⁵ Tri-State cites 16 U.S.C. § 2602(9) (2006) (“[t]he term ‘nonregulated electric utility’ means any electric utility other than a State regulated electric utility”).

Tri-State provides the complete text of section 210(f) of the FPA, as amended by the Energy Policy Act of 2005,¹⁶ as follows:

No provision in this subchapter shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one of more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

14. Tri-State explains that it is exempt from Commission regulation under section 201(f) of the FPA, including regulation under sections 205 and 206 of the FPA, because its member-owners are public power districts, electric cooperatives that have RUS debt, or electric cooperatives that sell less than 4,000,000 MWh of electricity per year.¹⁷ Each of its owners, Tri-State claims, is exempt from the FPA pursuant to section 201(f) of the FPA. Tri-State argues that it is therefore an exempt utility according to statute, because it is wholly owned by exempt utilities.¹⁸

3. Delta-Montrose Answer

15. In its answer, Delta-Montrose states that Tri-State is not eligible for the exemption based on its members' status. First, Delta-Montrose claims that the Commission regulates at least five similar generation and transmission cooperatives. Delta-Montrose argues that like Tri-State each of these five cooperatives have retired their RUS debt and have membership cooperatives with less than 4,000,000 MWh in annual sales.¹⁹

¹⁶ Tri-State Protest at 4 (citing Energy Policy Act of 2005, Pub. L. No. 109-58, 119 Stat. 594 (EPAAct 2005)).

¹⁷ Tri-State Protest at 5 (referencing Attachment A to Protest, Summary of Members Meters and Sales for 2013).

¹⁸ *Id.*

¹⁹ Delta-Montrose Answer at 12 (listing Deseret Power Electric Cooperative (Deseret), Golden Spread Electric Cooperative, Inc. (Golden Spread), PNGC Power, Wabash Valley Power Association (Wabash Valley), and Wolverine Power Supply Cooperative (Wolverine)).

Furthermore, Delta-Montrose argues that Commission jurisdiction is not voluntary and, because Tri-State has retired its RUS debt, it is now a jurisdictional public utility.²⁰

16. Delta-Montrose argues that it is Tri-State's position that, when Congress added language to section 201(f) of the FPA it expressly provided that large cooperatives would become public utilities once they retired their RUS debt, it actually meant the opposite – that all generation and transmission cooperatives could retire their RUS debt and no longer be regulated as public utilities.²¹ Delta Montrose argues that since there are only four other rural electric cooperatives that sell more than 4,000,000 MWh annually Congress would have been more explicit in excluding these cooperatives from FERC jurisdiction than the current statutory language.²²

17. In further support, Delta-Montrose argues that Congressional testimony given in 2008 by then-General Counsel Ms. Cynthia Marlette demonstrates the Commission's interpretation of the EPAct 2005 amendments. Delta-Montrose argues that Ms. Marlette testified that the amendments and the new 4,000,000 MWh floor were intended to allow the Commission to regulate electric cooperatives that have paid off their RUS debt, and not to allow them to avoid regulation because their members are smaller cooperatives.²³ Delta-Montrose argues that this testimony supports the Commission's longstanding and, until now, uncontested interpretation of FPA section 201(f) in which the Commission has jurisdiction over larger electric cooperatives once they retire their RUS debt.

18. Delta-Montrose also argues that this position is consistent with Congress' and the Commission's position that it had exempted electric cooperatives with RUS debt because those entities were regulated by the Rural Utility Services which reviewed energy

²⁰ *Id.* at 13 (citing *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 923-25 (9th Cir. 2005) (citing *Columbia Gas Transmission Corp. v. FERC*, 404 F.3d 459, 462-63 (D.C. Cir. 2005); *New W. Energy Corp.*, 83 FERC ¶ 61,004, at 61,015 (1998))).

²¹ *Id.* at 13-14.

²² *Id.* at 13 (listing Kenergy Corporation, Middle Tennessee Electric Membership Corporation, Jackson Electric Membership Corporation, and Rappahannock Electric Cooperative).

²³ *Id.* at 14-15 (citing statement of Cynthia Marlette at 3, General Counsel, FERC, before the Committee on Agriculture, Subcommittee on Conservation, Credit, Energy, and Research, United States House of Representatives (July 30, 2008) available at <http://www.ferc.gov/EventCalendar/Files/20080730104611-Marlette.pdf>).

purchase and sales, and now that the debt is retired, Tri-State's energy sales are no longer federally reviewed or regulated.²⁴

19. Secondly, Delta-Montrose argues that the relationship between Tri-State and its member cooperatives is not an ownership relationship. Delta-Montrose argues that Tri-State is a Colorado corporation whereby entities become members by entering into contracts in which Tri-State becomes the requirements supplier. Delta-Montrose argues that it is not an owner of Tri-State; it, like the other member cooperatives, is a requirements customer of Tri-State. Delta-Montrose argues that, unlike typical owners, it does not have the right to sell its ownership interest, nor is it liable for any of Tri-State's debts, and that Tri-State makes investment decisions backed by its own assets. Delta-Montrose argues that Tri-State uses its contract to limit the ability of Delta-Montrose and other members from acquiring lower cost power.

20. Delta-Montrose asserts that, even though Tri-State's Board consists of representatives from its member cooperatives, Tri-State's policy requires Board members to consider the fiduciary interests of Tri-State, not the interests of their own cooperatives.

21. Delta-Montrose argues that Commission precedent provides for it to look past the form of ownership in determining jurisdiction and consider the substance of the relationship between Tri-State and its member cooperatives.²⁵ Delta-Montrose argues that looking at the substance of Tri-State's ownership structure would lead to the conclusion that Tri-State's member cooperatives are not truly owners of Tri-State.

4. Tri-State Response

22. Tri-State argues that Delta-Montrose's arguments ignore the plain language of the statute. Tri-State argues that, prior to the enactment of EAct 2005, in 1967 the Commission found that it lacked jurisdiction over cooperatives with RUS debt.²⁶ Tri-State asserts that Congress codified this exemption in EAct 2005. Tri-State reiterates that, since it is wholly-owned by exempt cooperatives, it is itself exempt from Commission regulation under sections 205 and 206 of the FPA.

²⁴ *Id.* at 16-17.

²⁵ *Id.* at 20 (citing *Town of Highlands, N.C. v. Nantahala Power & Light Co.*, 37 FERC ¶ 61,149, at 61,356 (1986), *reh'g denied*, 38 FERC ¶ 61,052 (1987); *Pac. Power & Light Co.*, 3 FERC ¶ 61,119, at 61,337, *amended on other grounds*, 3 FERC ¶ 61,156 (1978) and *Cent. Vt. Pub. Serv. Corp.*, 39 FERC ¶ 61,295, at 61,960 (1987)).

²⁶ *Dairyland Power Coop.*, 37 FPC 12 (1967).

23. Tri-State contends that Delta-Montrose mischaracterizes the other electric cooperatives which are subject to Commission jurisdiction. Tri-State argues that Deseret became subject to FERC jurisdiction in 1996 after it eliminated its RUS debt and before EPC Act 2005 was amended. Similarly, Wolverine and Golden Spread become subject to Commission jurisdiction from 1987 to 1997 before EPC Act 2005 was amended. Tri-State also clarifies that Wabash Valley became jurisdictional after it changed its ownership structure by adding two power marketers that were subject to the Commission's jurisdiction.²⁷

24. Tri-State dismisses Delta-Montrose's arguments regarding Tri-State's ownership structure, asserting that nothing in section 201(f) of the FPA provides for a particular ownership structure.²⁸ Tri-State asserts that it is a corporation wholly owned and controlled by its members and operated for their benefit.

5. Percheron Comments

25. Percheron states that the Commission need not address the jurisdictional status of Tri-State in order to interpret Delta-Montrose's obligations under PURPA.

6. Discussion

26. We find that Tri-State is not subject to Commission regulation under sections 205 and 206 of the FPA because the exemption contained in section 201(f) of the FPA is applicable to Tri-State. The FPA provides that an electric cooperative is not subject to Commission regulation if the cooperative: (1) has outstanding RUS debt; (2) sells less than 4,000,000 MWh of electricity per year; or (3) is wholly owned by entities that are themselves exempt under this section. Specifically, section 201(f) of the FPA provides:

No provision in this subchapter [*i.e.*, part II of the FPA] shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, *or any corporation which is wholly owned, directly or indirectly, by any one of more of the*

²⁷ Tri-State Response at 4-5. Wabash Valley became subject to Commission regulation under the FPA as a public utility as of July 1, 2004, upon repurchase of its RUS debt. *See Wabash Valley Power Assoc., Inc*, 107 FERC ¶ 61,327 (2004).

²⁸ *Id.* at 5.

foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.²⁹

27. Tri-State provided a list of its forty-four member cooperatives and their respective 2013 annual MWh sales figures. The annual sales range from 26,912 MWh for Garland Light and Power Company to 1,410,521 MWh for United Power, Inc.³⁰ Therefore, since each member-owner is a cooperative with annual sales less than 4,000,000 MWh, each of Tri-State's forty-four owners is an exempt public utility and not subject to Commission regulation pursuant to sections 205 and 206 of the FPA. Because Tri-State is owned by forty-four exempt public utilities, the plain language of section 201(f) of the FPA provides that Tri-State, too, is also an exempt public utility and not subject to Commission regulation pursuant to sections 205 and 206 of the FPA.³¹

28. Regarding the other cooperatives that the Commission does regulate, we note that there are differences from Tri-State in their membership structure.³² Other cooperatives that Delta-Montrose references in its answer are owned by individual members, and not cooperatives.³³ Therefore, under the statute, once those cooperatives retire their RUS debt, they will become jurisdictional public utilities. In any event, what is relevant here is that, as discussed above, Tri-State is owned by cooperatives that are exempt public utilities; therefore, under the plain language of the statute, Tri-State is an exempt public utility.

29. We disagree with Delta-Montrose's argument that, as a member it is not an owner of Tri-State. Tri-State is a non-profit cooperative corporation and, under the membership agreements, each member has a patronage account representing each member's financial

²⁹ 16 U.S.C. § 824f (2012) (*emphasis added*).

³⁰ Tri-State Answer, Attachment A.

³¹ We find the language of the statute clear and thus we need not look to extrinsic evidence such as Ms. Marlette's Congressional testimony.

³² Wabash Valley has two power marketers as members, thus not qualifying for the exemption. However, we note that Wabash Valley became subject to Commission regulation under the FPA as a public utility as of July 1, 2004, upon repurchase of its RUS debt. *See Wabash Valley Power Association, Inc.*, 107 FERC ¶ 61,327.

³³ Kenergy Corporation, Middle Tennessee Electric Membership Corporation, Jackson Electric Membership Corporation, and Rappahannock Electric Cooperative.

ownership interest in the corporation, i.e., the amount a member pays for energy which exceeds Tri-State's cost of service, and upon dissolution each member is entitled to an equitable share of the assets, and each member has a vote in Tri-State's operations.³⁴

B. PURPA Obligation

1. Delta-Montrose Petition

30. Delta-Montrose also requests that the Commission declare that Delta-Montrose is obligated to purchase the output of the Percheron QF despite contractual limitations in the contract. Delta-Montrose cites Order No. 69, where the Commission explained that PURPA section 210(a) "impose[s] on electric utilities an obligation to purchase all electric energy and capacity made available from [QFs] with which the electric utility is directly or indirectly interconnected...."³⁵

31. Delta-Montrose states that the Commission has found that contractual provisions may not limit an electric utility mandatory PURPA purchase obligation.³⁶ Delta-Montrose points to the following statement in Order No. 69:

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 purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a [QF].³⁷

³⁴ Tri-State Protest, Attachment B, Articles of Incorporation and ByLaws, Article 1 § 1, Article II, § 1, and Article VII § 2.

³⁵ *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, *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).

³⁶ Petition at 10-14.

³⁷ Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870.

32. Delta-Montrose argues that *PSNH*³⁸ is in accord with Order No. 69 and supports its assertion that it is obligated to purchase power from the Percheron QF, despite provisions in its contract with Tri-State which Tri-State argues limit Delta-Montrose's obligation to purchase pursuant to PURPA. In *PSNH*, New Hampshire Electric Cooperative, Inc. was a requirements customer of Public Service Company of New Hampshire and wished to purchase power from a local QF, which would violate the terms of its requirements contract. The Commission held that, even if a requirements contract restricts the general obligation to purchase from a QF, contracting parties "cannot lawfully bargain away any portion of the rights QFs enjoy under PURPA or [New Hampshire Electric Cooperative, Inc.'s] statutory purchase obligation under PURPA, our implementing regulations, or any rights QFs may subsequently have obtained in the context of...the open transmission access requirements of Order No. 888."³⁹ In *PSNH*, the Commission rejected Public Service Company of New Hampshire's argument that, because the utility obligated to make a QF purchase may, instead, transmit the QF's power to another utility that would make the purchase, New Hampshire Electric Cooperative, Inc. was not itself obligated to purchase power from the QF.⁴⁰ The Commission stated that "a utility obligated to purchase power from a QF may seek, with the QF's consent, to transmit the energy to another utility,"⁴¹ and that New Hampshire Electric Cooperative's "desire or lack thereof to purchase a QF's power in no way affects the QF's right to sell power."⁴²

33. Delta-Montrose also requests that the Commission declare that it has no obligation to seek a waiver of its PURPA mandatory purchase obligation,⁴³ consistent with *PSNH*, in which the Commission clarified that an electric utility need not seek a waiver of its obligation to purchase QF power. The Commission rejected as inapposite cases cited by Public Service Company of New Hampshire in which cooperatives and their members

³⁸ *Public Service Co. of New Hampshire v. New Hampshire Electric Cooperative, Inc.*, 83 FERC ¶ 61,224, at 61,999 (1998) (*PSNH*).

³⁹ *Id.* at 61,998-99.

⁴⁰ *Id.* at 61,999.

⁴¹ *Id.*

⁴² *Id.* at 62,000.

⁴³ A "nonregulated electric utility may . . . apply for a waiver from the application of any of the requirements" for purchases from QFs. 18 C.F.R. § 292.402.

had obtained waivers of the members' obligation to purchase QF power.⁴⁴ Those cases, the Commission explained, involved voluntary filings.⁴⁵ The Commission stated that the fact that Public Service Company of New Hampshire was willing, like the cooperatives in the cited cases, to purchase on New Hampshire Electric Cooperative Inc.'s behalf was irrelevant because the waivers in those cases "were requested by the entities with a purchase obligation and mutual interests."⁴⁶ Delta-Montrose states that its contract with Tri-State – which was drafted well after PURPA was passed, Order No. 69 was adopted, and the Commission's decision in *PSNH* was issued – lacks a provision requiring Delta-Montrose to seek a waiver.⁴⁷

34. Finally, Delta-Montrose requests that, if relevant, the Commission find that the contract with Tri-State is a partial requirements contract, rather than a full requirements contract. Delta-Montrose states that the Commission has held that if the applicable contract is a full requirements contract then the avoided cost associated with a QF purchase are those of the supplier, whereas if it is a partial requirements contract then the avoided costs are instead those costs that the customer avoids when it purchases QF power.

35. Delta-Montrose cites Order No. 69, where the Commission explained that, when a QF wishes to sell power to a full requirements customer, the transaction should "take into account the effect of reduced revenue to the supplying utility as a result of the substitute of the [QF's] output for energy previously supplied by the supplying utility."⁴⁸ The Commission further explained that "rather than allocating its loss in revenue among all of its customers, in this situation the supplying utility should assign all of these losses to the all-requirements utility. That utility should, in turn, deduct these losses from its previously calculated avoided costs, and pay the [QF] accordingly."⁴⁹ Delta-Montrose cites *PSNH* as an instance where the contract at issue allowed the customer to procure less than all of its requirements from the supplier, and the Commission found the contract to be a partial requirements contract.

⁴⁴ *PSNH*, 83 FERC ¶ at 62,000.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Delta-Montrose Petition at 16.

⁴⁸ Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,871.

⁴⁹ *Id.*

2. Tri-State Protest

36. Tri-State responds that Delta-Montrose failed to comply with its contractual obligation to resolve its issues directly with Tri-State. Tri-State explains that, under the contract between Delta-Montrose and Tri-State, Delta-Montrose agreed to comply with Tri-State's rules and regulations. Tri-State explains that Board Policy 316 requires Delta-Montrose to seek to resolve its disputes with Tri-State directly before bringing them to the Commission. Tri-State argues that Delta-Montrose has not attempted to comply with these requirements.

37. Further, Tri-State argues that Delta-Montrose failed to comply with Board Policy 109, which Tri-State claims requires Delta-Montrose to file a request for waiver of its obligation to purchase power from QFs larger than 25 kW, and failed to seek transfer of its purchase obligation to Tri-State.⁵⁰ Tri-State argues that the Commission should thus find Delta-Montrose's petition is premature.

38. Tri-State explains that Commission policy is to decline to exercise jurisdiction where a party has brought its dispute to the Commission prematurely, citing *Niagara Mohawk Power Corp. v. New York State Reliability Council*⁵¹ in which the Commission dismissed a complaint without prejudice where the complaint brought by a utility against the New York State Reliability Council and the New York Independent System Operator, Inc. would have circumvented the New York State Reliability Council and New York Independent System Operator, Inc.'s internal procedures.

39. Tri-State further argues that Commission policy is to decline to rule on matters relating to the application of PURPA requirements to specific QFs. Tri-State argues that Delta-Montrose is requesting that the Commission rule that the applicable avoided cost should be Delta-Montrose's avoided cost rate rather than Tri-State's. Therefore, Tri-

⁵⁰ Board Policy 109 provides:

Except as provided otherwise in the Member System's WESC [Wholesale Electric Service Contract], Tri-State shall own or contract for all generation resources with greater than 25 kW nameplate capacity at any one site. Member Systems shall make purchases from generating facilities with 25 kW or less nameplate capacity which are qualifying facilities under the provisions of Section 201 of the Public Utility Regulatory Policies Act of 1978, 18 C.F.R. 292.204-205.6

⁵¹ 114 FERC ¶ 61,098 (2006) (*Niagara Mohawk*).

State asserts that Delta-Montrose is not challenging Tri-State's policy regarding the implementation of PURPA, but rather the application of its policies to a specific QF. In support, Tri-State cites the 1983 Policy Statement,⁵² where the Commission explained:

The Commission's regulations allow the States and nonregulated utilities a wide degree of latitude in establishing an implementation plan. Such latitude is necessary in order for implementation to accommodate local conditions and concerns, so long as the final plan is consistent with statutory requirements. With regard to review and enforcement, the Commission's role is generally limited to ensuring that the State regulatory authority – or nonregulated electric utility-established implementation plan is consistent with section 210 of PURPA and with the Commission's regulations. Once this is ensured, the State judicial forums are available to ensure that electric utilities and qualifying facilities are dealing in good faith and in a consistent manner with locally established regulation.⁵³

40. Tri-State also cites *Cuero Hydro Electric, Inc. v. The City of Cuero, Texas*,⁵⁴ in which the Commission stated that “established policy is to leave to state regulatory authorities or nonregulated electric utilities and to appropriate judicial fora, issues relating to the specific application of PURPA requirements to the circumstances of individual QFs.”

41. Tri-State argues that, if the Commission addresses Delta-Montrose's petition, it should require Delta-Montrose to seek a waiver of its mandatory purchase obligation and transfer its obligation to purchase power from QFs larger than 25 kW to Tri-State, according to Tri-State's Board Policy 109.⁵⁵ Tri-State argues that the Commission should also recognize that the contract with Delta-Montrose requires Delta-Montrose to purchase not less than 95 percent of its power from Tri-State. Tri-State also argues that the Commission should declare that the price of purchases from the Percheron QF should be based on Tri-State's avoided cost rather than Delta-Montrose's, because Delta-Montrose is an all-requirements customer of Tri-State. Tri-State cites *The City of*

⁵² *Policy Statement Regarding the Commission's Enforcement Rule Under Section 210 of the Public Utility Regulatory Policies Act of 1978*, 23 FERC ¶ 61,304 (1983) (1983 Policy Statement).

⁵³ *Id.* at 61,646.

⁵⁴ 85 FERC ¶ 61,124 (1998).

⁵⁵ Tri-State Protest at 8-9.

Longmont, Colorado et al.,⁵⁶ where Tri-State claims that the Commission acknowledged that, even though the supplying utility did not supply all of the customers' needs, the generation avoided by the customers when they purchased from QFs "was the energy and capacity cost avoided from the [supplying utility's] resources."⁵⁷

42. Tri-State further argues that the Commission should declare that Percheron should negotiate with Tri-State, because a negotiated rate with Delta-Montrose would be higher than Tri-State's avoided cost rate. Tri-State cites *Cedar Creek Wind*⁵⁸ in which the Commission reasoned that a contracted-for-rate would never exceed true avoided costs and would thus be consistent with PURPA.

3. Delta-Montrose's Answer

43. Delta-Montrose responded that Tri-State's contract dispute policy is irrelevant to this proceeding since it has not filed a complaint against Tri-State. Delta-Montrose reiterates that it has instead filed this request for declaratory order seeking the Commission's interpretation of the relevant Commission regulations.

44. Delta-Montrose states that Tri-State agrees that it is an electric utility subject to PURPA and that the contract with Tri-State is not a full requirements contract. However, Delta-Montrose argues that Tri-State is requesting that the Commission require Delta-Montrose to seek a waiver of its PURPA mandatory purchase obligation and to transfer its obligation to Tri-State. Delta-Montrose also asserts that, contrary to Tri-State's arguments, it is not seeking a QF specific response in this filing, but is seeking guidance as to the Commission's PURPA regulations.

45. Finally, Delta-Montrose reiterates that the contract with Tri-State cannot limit a QF's rights under PURPA and that, since the contract is a partial requirements contract, the applicable avoided costs should be Delta-Montrose's and not Tri-State's.

4. Tri-State's Answer

46. Tri-State again argues that Delta-Montrose is required to comply with dispute resolution procedures set forth in its Board Policy 316 before raising the questions presented before the Commission, and that the Commission does not have the jurisdiction

⁵⁶ 39 FERC ¶ 61,301 (1987).

⁵⁷ *Id.* at 61,974.

⁵⁸ 137 FERC ¶ 61,006, at n.73 (2011) (*Cedar Creek*).

to review and interpret contracts among non-jurisdictional entities. Furthermore, Tri-State reiterates its arguments that the Commission's policy is to not become involved in the review and enforcement of nonregulated utilities application of PURPA to specific QFs.

47. Tri-State argues that Delta-Montrose erroneously asserts that its compensation to the Percheron QF should be at a Delta-Montrose avoided cost rate. Tri-State argues that, under its contract with Delta-Montrose, Tri-State is contractually required and has an expectation to provide 95 to 100 percent of Delta-Montrose's power supply requirements. Tri-State argues that, if it must provide less than 95 percent of Delta-Montrose's power supply requirements, it is Tri-State, not Delta-Montrose, that will avoid the generation or purchased power costs when Delta-Montrose purchases power from the Percheron QF. Ultimately, Tri-State argues, the distinction between partial and full requirements contracts is irrelevant because the key factor is the entity that avoids costs when a customer utility purchases power from a QF.

5. Other Comments

a. Wheat Belt Public Power District, et al. Protest

48. Wheat Belt Public Power District, Empire Electric Association and Otero County Electric Cooperative argue that Delta-Montrose's petition is premature because it has not followed Tri-State's Board Policy 316 that requires Delta-Montrose to submit the issues in the petition to a dispute resolution process. Wheat Belt Public Power District and Otero County Electric Cooperative also argue that Tri-State is exempt from Commission jurisdiction because all of its members purchase less than 4,000,000 MWh from Tri-State on an annual basis.

b. Percheron Comments

49. Percheron supports Delta-Montrose's claim that PURPA obligates Delta-Montrose as an electric utility to purchase power from the Percheron QF, and that the contract between Tri-State and Delta-Montrose cannot affect Delta-Montrose's duty to implement PURPA. Percheron agrees with Delta-Montrose that Delta-Montrose does not need to obtain a waiver of its PURPA mandatory purchase obligation in order to comply with its requirements contract.

50. Percheron also argues that the contract between Tri-State and Delta-Montrose is a partial-requirements contract, and therefore Delta-Montrose must purchase power from the Percheron QF at least at its own avoided cost rate, or otherwise at a negotiated rate. Percheron also argues that, even if the Commission interprets the contract between Tri-State and Delta-Montrose as an all requirements contract, the Commission should recognize the realities of the current market system and not apply previous interpretations of Order No. 69. Percheron states that, unlike when Order No. 69 was issued, Tri-State is

now able to sell on the open market any power that might be displaced by QFs purchasing from Tri-State's cooperative members. Thus, Percheron argues that the assumptions underlying setting rates for PURPA sales from the Percheron QF at Tri-State's avoided cost rate are no longer valid.

c. Colorado Independent Energy Association's Comments

51. Colorado Independent Energy Association states that it supports Delta-Montrose's petition arguing that under PURPA Delta-Montrose can purchase power from a QF at negotiated rates, despite conflicting contractual provisions.

6. Discussion

52. 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. In Order No. 69, 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:⁵⁹

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 purchase under this provision supersede contractual restrictions on a utility's ability to obtain energy or capacity from a [QF].⁶⁰

53. In *PSNH*, the Commission found that, notwithstanding provisions in the 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 our implementing regulations under PURPA.⁶¹ In addition, the Commission acknowledged cases where it waived the purchase obligation of

⁵⁹ Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,870.

⁶⁰ *Id.*

⁶¹ *PSNH*, 83 FERC at 61,998-99.

distribution cooperative utilities, but 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.⁶²

54. Accordingly, in the instant case, 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, 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.⁶³ 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.⁶⁴

55. Finally, Delta-Montrose is not required by PURPA or the Commission's PURPA regulations to seek waiver of its purchase obligation,⁶⁵ and has not sought a waiver. If Tri-State believed that its members had transferred their purchase obligation to Tri-State, Tri-State could have filed an application with the Commission pursuant to section 292.402 of the Commission's regulations⁶⁶ seeking waiver of that purchase obligation.⁶⁷ But Tri-State has made no filing with the Commission seeking such a waiver.

56. Accordingly we find that Delta-Montrose is obligated to purchase power from the Percheron QF and may make that purchase at negotiated rates.

⁶² *Id.* at 62,000 (explaining that "NHEC has no obligation to seek a waiver and we would not impose one upon it at another party's request").

⁶³ Order No. 69, FERC Stat. & Regs. ¶ 30,128 at 30,870.

⁶⁴ 18 C.F.R. § 292.302 (2014).

⁶⁵ *PSNH*, 83 FERC ¶ 61,224 at 62,000 (explaining that "NHEC has no obligation to seek a waiver and we would not impose one upon it at another party's request").

⁶⁶ 18 C.F.R. § 292.402 (2014).

⁶⁷ *See Oglethorpe Power Corp., et al.*, 32 FERC ¶ 61,103 (1985), *affirmed on reh'g*, 35 FERC ¶61,069 (1986); *Soyland Power Coop., Inc., et al.*, 50 FERC ¶ 62,072 (1990); *Western Farmers Electric Coop.*, 115 FERC ¶ 61,323 (2006).

The Commission orders:

(A) Delta-Montrose is obligated to purchase from QFs offering available energy and capacity under section 292.303(a) of the Commission's regulations, and that such sales may be at negotiated rates.

(B) Although Tri-State meets the statutory definition of a public utility contained in the FPA, it also meets the requirements for exemption pursuant to section 201(f) of the FPA.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.

Appendix - List of Commenters

Motion to Intervene and Protest:

Tri-State Generation and Transmission Association, Inc.
Wheat Belt Public Power District

Motion to Intervene:

Kit Carson Electric Cooperative, Inc.
Public Service Company of New Mexico
La Plata Electric Association, Inc.
Empire Electric Association, Inc.

Motion to Intervene and Supporting Comments:

Percheron Power, LLC
Colorado Independent Energy Association

Supporting Comments Without Motions to Intervene:

Mike Mason
Janice L. Jones
CO-OP Members Alliance
Faith Heckman
Bill Welch
Delta Conservation District
Dennis Olmstead
George E. Allen and Ella H. Allen
Community for Sustainable Energy
Ed Marston
Colorado Working Landscapes
Mountain States Hydro, LLC
Oxbow Mining, LLC
Uncompahgre Valley Water Users Association
Britt Bassett
Western Slope Conservation Center
Michael Mason
Delta Conservation District
Citizens for a Healthy Community
Montrose Economic Development Corporation
Highlander Investments LLC
Kevin Cross
Connie R. Pittenger
Sean Salaz
City of Delta

Paonia Chamber of Commerce
Margaret L. Baxter
Nancy Hovde
WildEarth Guardians
Vessels Coal Gas, Inc.
City of Montrose
Delta County Economic Development
Gunnison Energy LLC
Montrose Chamber of Commerce
David Munk
Renewable Taos
Delta County Library District
Delta Board of County Commissioners
Delta County Independent
Robin Nicholoff and Gretchen Nicholoff
Town of Paonia
Solar Energy International
Natural Resources Defense Council
Sustainable FERC Project
Western Clean Energy Campaign
Aspen Skiing Company
Community for Sustainable Energy
Sierra Club Sangre de Cristo Group
Sierra Club Rocky Mountain Chapter
Mike Sramek

Protests Without Motion to Intervene:

Poudre Valley Rural Electric Association, Inc.
Niobrara Electric Association, Inc.
Wyrulec Company
Sierra Electric Cooperative, Inc.
Wheatland Rural Electric Association, Inc.
Highline Electric Association
K.C. Electric Association

Untimely Motion to Intervene and Protest:

Otero County Electric Cooperative, Inc.

Untimely Motion to Intervene:

Carbon Power & Light Inc.
National Rural Electric Cooperative Association

Untimely Protests Without Motions to Intervene:

High West Energy
Mountain Parks Electric, Inc.
Y-W Electric Association, Inc.
Davin Montoya
High Plains Power, Inc.

Untimely Supporting Comments Without Motions to Intervene:

Don Ahern
Colorado Small Hydro Association
Renewable Forest Energy
Colorado Renewable Energy Society
Pete Kolbenschlag
Vote Solar
Colorado Forest & Energy, LLC
Sharon Kirsch
David Van Thournout
Micah Davis
Patrick Murphy
Western Colorado Congress
Western Slope Conservation Center
Cara W. Curtis
Jan Kennedy
Linda Donnelly
Karen Janssen
Susan Dumler
Maro Kieca and Jude Kieca
Town of Orchard City
Larry Fredericksen