UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Tri-State Generation and Transmission Association, Inc.	)	Docket No. ER20-1559-000

MOTION TO INTERVENE, PROTEST AND MOTION TO REJECT LA PLATA ELECTRIC ASSOCIATION, INC.

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List of Abbreviations and Acronyms

Abbreviation or acronym	Term
2019 Rejection Order	*Tri-State Generation and Transmission Association, Inc.*, 169 FERC ¶ 61,012 (2019)
BPM	business practice manual
Colorado PUC	Colorado Public Utilities Commission
Commission	Federal Energy Regulatory Commission
CTP Filing	Tri-State filing submitted in FERC Docket No. ER20-1559
CTP Methodology	Tri-State proposed Contract Termination Payment Methodology
CTP Methodology Tariff	Tri-State proposed Rate Schedule FERC No. 281
DMEA	Delta-Montrose Electric Association
DMEA Withdrawal Agreement	Tri-State proposed Rate Schedule FERC No. 262
DMEA Withdrawal Filing	Tri-State filing submitted in FERC Docket No. ER20-1542
Exit Charge Moratorium	Tri-State Board of Directors Resolution (Sept. 4-5, 2020) [Attachment A]
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
ISO	independent system operator
Jurisdiction Order	*Tri-State Generation and Transmission Association, Inc.*, 170 FERC ¶ 61,224 (2020), *reh'g pending*
Kit Carson	Kit Carson Electric Cooperative
LPEA	La Plata Electric Association, Inc.
LTFF	Long Term Financial Forecast
RTO	regional transmission operator
Shoshone	Shoshone River Power, Inc.
Stated Rate / WESC Order	*Tri-State Generation and Transmission Association, Inc.*, 170 FERC ¶ 61,221 (2020), *reh'g pending*
Tri-State	Tri-State Generation and Transmission Association, Inc.
Tri-State Request	Request of Petitioner Tri-State Generation and Transmission Association, Inc. for Rehearing Limited to the Issue of Preemption, Docket No. EL20-16-001 (filed Apr. 14, 2020)
United Power	United Power, Inc.
Utility Member	distribution cooperative or public power district member-owner of Tri-State
Various Agreements and Bylaws Order	*Tri-State Generation and Transmission Association, Inc.*, 170 FERC ¶ 61,223 (2020), *reh'g pending*
WESC	Wholesale Electric Service Contract

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Pursuant to Federal Energy Regulatory Commission ("Commission" or "FERC") Rules of Practice and Procedure 211, 212, and 214,[1] and consistent with the *Combined Notice of Filings #1* issued on April 14, 2020[2] and the *Notice of Extension of Time* issued on April 24, 2020,[3] La Plata Electric Association, Inc. ("LPEA") respectfully files the following Motion to Intervene, Protest and Motion to Reject the "Initial Filing of Rate Schedule FERC No. 281 (Contract Termination Payment Methodology)" submitted in this proceeding by Tri-State Generation and Transmission Association, Inc. ("Tri-State") on April 13, 2020 ("CTP Filing"),[4] as amended on April 17, 2020.[5] As explained below, the CTP Filing should be rejected.

I. EXECUTIVE SUMMARY

This proceeding constitutes just the latest skirmish in Tri-State's continuing attempt to outflank its own Utility Members—through the manipulation of its internal processes, its

[1] 18 C.F.R. §§ 385.211, 385.212, and 385.214.

[2] *Combined Notice of Filings #1*, Docket Nos. EC20-43, *et al.* (Apr. 14, 2020).

[3] *Tri-State Generation and Transmission Association, Inc.*, Notice of Extension of Time, Docket No. ER20-1559 (Apr. 24, 2020).

[4] *Tri-State Generation and Transmission Association, Inc.*, Initial Filing of Rate Schedule FERC No. 281 (Contract Termination Payment Methodology), Docket No. ER20-1559, at 1 (filed Apr. 13, 2020) ("CTP Filing").

[5] *Tri-State Generation and Transmission Association, Inc.*, Errata to Filing, Docket No. ER20-1559 (filed Apr. 17, 2020).

attempts to avoid regulatory oversight by the Colorado Public Utilities Commission ("PUC"), and the manufacture of non-utility members to extinguish its exemption from rate regulation under the Federal Power Act ("FPA") and this Commission's jurisdiction. Tri-State touts "[v]oluntary and open membership" as one of its core principles.[6] Its Bylaws provide that a Utility Member may withdraw on equitable terms and conditions determined by its Board of Directors, provided that the withdrawing Utility Member satisfies its contractual obligations to Tri-State prior to withdrawing.[7] But Tri-State's assurances of voluntary and open membership, and the right to withdraw from Tri-State and terminate its Wholesale Electric Services Contract ("WESC"), are empty promises.

Tri-State has a troubling history of impeding its Utility Members' rights to withdraw by prescribing outsized exit charges intended to be non-starters for any Utility Members considering withdrawal. The history behind the withdrawal struggles of two former Tri-State Utility Members, Kit Carson Electric Cooperative ("Kit Carson") and Delta-Montrose Electric Association ("DMEA") tells the tale. Tri-State initially prescribed an exit charge of $137 million for Kit Carson,[8] but ultimately agreed that $37 million was the actual exit charge that would be

[6] *See, e.g.*, Tri-State Generation and Transmission Ass'n, *Better Together: 2019 Investor Presentation*, at 4, https://www.tristategt.org/sites/tristate/files/PDF/2019%20SEC%20filings/InvestorPresentation-070919.pdf.

[7] *See* Tri-State Rate Schedule FERC No. 259, § 4(a). In the case of Colorado members, the Colorado PUC has held, and reaffirmed, that Colorado members also have the right to seek withdrawal under Colorado's Public Utilities Law, and to ask the PUC to set an exit charge. *See* Colorado Public Utilities Law, Colo. Rev. Stat. Title 40, Articles 1-7; *see also* Decision No. C19-0297-I, Colorado PUC Proceeding No. 18F-0866E (mailed Apr. 1, 2019); Decision No. R20-0097-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (mailed Feb. 12, 2020). Indeed, as the Commission is aware, LPEA, a Tri-State Utility Member, is engaged in an ongoing proceeding at the Colorado PUC to determine a just, reasonable and non-discriminatory exit charge. *See generally* Colorado PUC Proceeding No. 19F-0620E.

[8] *See* J.R. Logan, *Taos Electric Co-Op says Tri-State Offer "Insulting"*, TAOS NEWS (Jan. 14, 2015), https://www.taosnews.com/stories/taos-electric-co-op-says-tri-state-offer-insulting,34357.

fair to Kit Carson *and* to Tri-State's remaining Utility Members.[9] This was hardly a one-off. Indeed, Tri-State's mark to market exit charge methodology—which is now recast here as the Contract Termination Payment ("CTP") Methodology—played out again with DMEA. There, Tri-State initially prescribed an exit charge of $322 million for DMEA,[10] but again ultimately agreed—after a multi-year effort by DMEA, including pursuing a formal complaint at the Colorado PUC to set an exit charge—that $62.5 million was the actual exit charge that would be fair to DMEA *and* to Tri-State's remaining members.[11] Tri-State thus treats exiting Utility Members in a consistent manner: pay lip service to Tri-State's stated core principle of "voluntary" and "open" membership, provide (grudgingly) an outsized and punitive exit charge, and relent only after years of militation and legal action with an exit number orders of magnitude lower. *But* Tri-State declares this much lower number is fair to the exiting and remaining members. It seems impossible that both figures can be just and reasonable, given the gulf between the opening demand and settled-on exit charge number.

This history is directly relevant and fundamental to this case. The CTP Methodology that Tri-State now proposes is nothing but a recapitulation of the mark to market methodology that produced the initial, bloated exit charges that Tri-State demanded from Kit Carson and DMEA—exit charges that it later agreed had to be reduced by hundreds of millions of dollars. Tri-State

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[9] Tri-State Generation and Transmission Ass'n, Inc., *Tri-State and Kit Carson Electric Cooperative Enter a separation that will serve both cooperatives well*, (July 11, 2016), https://www.tristategt.org/tri-state-and-kit-carson-electric-cooperative-enter-membership-withdrawal-agreement; *see* J.R. Logan, *Kit Carson CEO Reyes Says Tri-State Break Has Two Big Advantages*, TAOS NEWS (June 30, 2016), https://www.taosnews.com/stories/kit-carson-ceo-reyes-says-tri-state-break-has-two-big-advantages,23584.

[10] *See infra* note 32.

[11] *See supra* note 9; Katharhynn Heidelberg, *Signed, sealed, delivered: DMEA poised for $62.5M July exit from Tri-State*, MONTROSE EXPRESS (Apr. 10, 2020), https://www.montrosepress.com/signed-sealed-delivered-dmea-poised-for-62-5m-july-exit-from-tri-state-updated/article_36572b32-7b71-11ea-a59b-13d78c2b2c22.html.

publicly pronounced the actual (reduced) exit charges as "fair and equitable" and "protect[ing] the interests of all the association's members" in the case of Kit Carson;[12] similarly, in the case of DMEA, Tri-State "would not have agreed to a [*sic*] exit charge that we did not believe was fair and equitable for our members."[13] Turning a blind eye to this history, here in a new venue Tri-State simply dusts off its old calculation methodology used to determine its initial "opening offers" to Utility Members and seeks to enshrine it in a tariff on file with the Commission—a move designed to keep captive its Utility Members and shut the door on any more exits.

In LPEA's case, it has not been able to obtain *any* exit charge from Tri-State, not even an outsized one. Nearly a year ago, LPEA formally requested an exit charge from Tri-State to consider withdrawing from membership and terminating its WESC. LPEA seeks an exit charge that will fairly satisfy its contractual obligations to Tri-State and constitute fair withdrawal terms—both for LPEA and for Tri-State's remaining Utility Members.

When Tri-State refused to provide LPEA an exit charge, LPEA filed a complaint against Tri-State with the Colorado PUC in November 2019.[14] The following month, Tri-State filed a Petition with FERC, seeking to undermine the Colorado PUC's jurisdiction to set an exit charge for LPEA, requesting a declaratory order that (a) Tri-State is a non-exempt public utility under Part II of the Federal Power Act ("FPA") and has been since September 3, 2019, and (b) because the Commission has exclusive jurisdiction over the electric services provided by Tri-State to its

[12] *See supra* note 9.

[13] *See* Robert Walton, *Tri-State Files for FERC Regulation, Delta-Montrose to Exit in 2020*, UTILITY DIVE (July 24, 2019), https://www.utilitydive.com/news/tri-state-files-for-ferc-regulation-delta-montrose-to-exit-in-2020/559397/.

[14] *See supra* note 7.

members, the Colorado PUC is preempted from making determinations related to the complaints filed by LPEA, and also United Power, Inc ("United Power"), related to exit charges.[15]

On March 20, 2020, the Commission issued an order in response to Tri-State's Petition for Declaratory Order ("Jurisdiction Order"), finding "that Tri-State became a jurisdictional public utility under Part II of the FPA … on September 3, 2019."[16] However, the Jurisdiction Order also found that the Colorado PUC is not preempted from ruling on the complaints filed by LPEA and United Power requesting that the PUC determine a just and reasonable exit charge if LPEA and United Power withdraw from Tri-State membership and terminate their WESCs "until such ruling conflicts with a Commission-approved tariff or agreement that establishes how Tri-State's exit charges will be calculated."[17]

[15] Subsequent to LPEA, United Power filed its own exit charge complaint at the Colorado PUC, and that proceeding was consolidated into the LPEA complaint proceeding. *See generally* Colorado PUC Proceeding Nos. 19F-0620E (LPEA) and 19F-0621E (United Power).

[16] *Tri-State Generation and Transmission Ass'n, Inc.*, 170 FERC ¶ 61,224 at P 82 (2020), *reh'g pending* ("Jurisdiction Order"). The Jurisdiction Order stated: "we decline to resolve the Colorado law issues raised by various protesters, which we believe are more appropriately handled in state fora. As a result, however, we note that the resolution of the pending Colorado PUC proceedings, or other litigation concerning Colorado law issues, could be relevant to Commission proceedings in the future, and we would consider relevant findings at the time." *Id.* at P 76.

LPEA does not concede that Tri-State is no longer exempt from the Commission's rate jurisdiction under Part II of the FPA, as the Colorado law issues referenced in the Jurisdiction Order remain very much at issue, both at the Colorado PUC and in a lawsuit recently filed by United Power in Adams County District Court in Colorado, alleging that Tri-State facilitated the addition of its new non-utility members through fraudulent behavior. *See United Power, Inc. v. Tri-State Generation and Transmission Association, Inc., et al.*, Case No. [TBD], Adams County District Court, Colorado (May 4, 2020). To the extent this pleading discusses or addresses laws, regulations, or requirements applicable to jurisdictional public utilities, such references are for convenience and do not constitute a concession or acknowledgement that Tri-State is no longer exempt from Commission jurisdiction under FPA section 201(f). *See* 16 U.S.C. § 824(f).

[17] Jurisdiction Order at P 121.

Accordingly, while FERC has issued its Jurisdiction Order and accepted various tariffs and agreements for filing, the Colorado PUC proceedings have continued. An evidentiary hearing is currently scheduled in the PUC complaint proceedings for May 18-22, 2020.[18]

Notwithstanding the upcoming evidentiary hearing before the PUC, Tri-State seeks to "place matters regarding its exit charges before the Commission,"[19] attempting to effectively oust the Colorado PUC of jurisdiction over the currently pending exit charge complaints. On April 13, 2020, Tri-State submitted to the Commission what it identifies as an "initial filing of its Contract Termination Payment Methodology ("CTP Methodology"), designated as Rate Schedule FERC No. 281 ("CTP Methodology Tariff"), and requested an effective date the next day—April 14, 2020 (collectively, "CTP Filing").[20] Tri-State claims that it worked "as expeditiously as practicable to submits its CTP Methodology such that the methodology would be in place for any future withdrawal requests from Utility Members."[21] More bluntly, Tri-State rushed to put together the CTP Methodology Tariff and file it with the Commission with a request for an essentially immediate effective date in order to claim that the Colorado PUC is preempted from acting on LPEA's and United Power's complaints.[22] The fact that the

[18] *See* Decision No. R20-0266-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (Apr. 16, 2020).

[19] *See* Jurisdiction Order at P 121.

[20] *See* CTP Filing, Docket No. ER20-1559. Tri-State's CTP Filing requests that the Commission waive the 60-day notice period, pursuant to 18 C.F.R. § 35.11, to allow the CTP Tariff to become effective on April 14, 2020.

[21] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 8.

[22] It is clear that Tri-State believes that the Colorado PUC is or should be preempted when the CTP Methodology Tariff becomes effective. *See Request of Petitioner Tri-State Generation and Transmission Association, Inc. for Rehearing Limited to the Issue of Preemption*, Docket No. EL20-16-001, at 3, 6, 23 (Apr. 14, 2020) ("Tri-State Request"). Thus, Tri-State rushed to file its CTP Methodology Tariff with the Commission, with a request for an immediate effective date. LPEA, for its part, believes the Commission was clear in the Jurisdiction Order when it stated the Colorado PUC is not preempted until there is a "Commission-approved tariff or agreement that establishes how Tri-State's exit charges will be calculated." Jurisdiction Order at P 121.

preparation of the CTP Methodology Tariff was rushed is clear. The CTP Filing suffers from numerous deficiencies and should be rejected, as set forth below.

In Part II, LPEA sets forth the relevant background to this proceeding. In recent years other Utility Members (Kit Carson and DMEA) have withdrawn from Tri-State, ultimately agreeing to pay exit charges that bear no resemblance to the CTPs that will be produced by the CTP Methodology Tariff now proposed by Tri-State. Furthermore, it is important to understand the steps LPEA has taken as it seeks an exit charge from Tri-State, and Tri-State's response—or lack thereof.

Part III constitutes LPEA's Motion to Intervene in this proceeding. This proceeding is a direct response to LPEA's (and United Power's) efforts to obtain a just and reasonable exit charge from Tri-State. Therefore, LPEA has a direct and vital interest in this proceeding that cannot be adequately represented by any other party.

In Part IV, LPEA protests the CTP Methodology Tariff and moves the Commission to reject the CTP Filing including the CTP Methodology Tariff. As a threshold matter, Tri-State's characterization of the CTP Methodology Tariff as an "initial rate" is improper. The CTP Filing constitutes a change in rates because it is only available to existing customers of Tri-State.[23] This important distinction is explained in Part IV.A, as the requirements on Tri-State and the Commission's powers under the FPA are different depending on whether a tariff filing constitutes an initial rate or a changed rate.

[23] *See Otter Tail Power Co. v. FERC*, 583 F.2d 399, 406 (8th Cir. 1978); *Southwestern Electric Power Co.*, 31 FERC ¶ 61,389 (1985).

The CTP Methodology Tariff and the entire CTP Filing are patently deficient and should be rejected, as explained in Part IV.B. Tri-State's CTP Filing fails to satisfy the Commission's filing requirements and the CTP Methodology Tariff itself omits material provisions.

Part IV.C demonstrates why the proposed CTP Methodology and Tariff are unlawful. The CTP Methodology is not just and reasonable and its implementation would permit undue prejudice and disadvantage contrary to the requirements of FPA section 205. First, the structure of the CTP Methodology reserves too much discretion—the right to ultimately and unilaterally veto any Utility Member's requested exit, even after an exit charge is determined by Tri-State's "tariffed" CTP Methodology—to Tri-State and its Board of Directors. Second, the CTP Methodology Tariff will produce rates that are unduly prejudicial to Utility Members seeking to withdraw from Tri-State in the future. Third, Tri-State has not demonstrated that the proposed "mark to market" methodology that forms the basis of the CTP Methodology has been shown to satisfy FPA section 205's requirements.

As noted above, Tri-State has requested that the Commission grant a waiver of the 60-day notice period to permit an effective date of April 14, 2020. Tri-State has not shown good cause to grant this request, and the request should be denied for the reasons set forth in Part IV.D.

Finally, in Part IV.E, LPEA illustrates how application of the CTP Methodology to LPEA would be unjust and unreasonable and subject LPEA to an unduly prejudicial and disadvantageous practices.

II. BACKGROUND

A. Overview of LPEA and Tri-State

Tri-State is a wholesale generation and transmission cooperative headquartered in Westminster, Colorado.[24] Tri-State provides generation and transmission service to its electric distribution cooperative and public power district Utility Members under Rate Schedule A-40 and each Utility Member's *de facto* all requirements WESC.[25] Each Utility Member of Tri-State has an identical WESC, and these contracts provide that the Utility Member is required to purchase at least 95 percent of its power from Tri-State.

LPEA was founded in 1939 as a nonprofit rural electric cooperative providing services to homes and businesses in southwestern Colorado. LPEA serves more than 33,000 individuals, families, and business members in La Plata and Archuleta Counties, as well as in portions of Hinsdale, Mineral, and San Juan Counties, all in the State of Colorado. LPEA is currently a Utility Member and owner of Tri-State, as well as a Tri-State generation and transmission customer. LPEA currently purchases electric services from Tri-State pursuant to a WESC that is set to expire at the end of 2050.[26]

[24] Tri-State is a nonprofit corporation and a public utility under Colorado law. Tri-State is organized under Colorado law and provides generation and transmission services to member cooperatives in Colorado, Nebraska, New Mexico, and Wyoming, including LPEA. Until recently, Tri-State has claimed that under FPA section 201(f), 16 U.S.C. § 824(f), it is exempt from the Commission's jurisdiction under Part II of the FPA because it is wholly-owned by entities that are themselves exempt from Commission jurisdiction. *See Tri-State Generation and Transmission Ass'n, Inc.*, 169 FERC ¶ 61,012 (2019); *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238, *order on reh'g*, 153 FERC ¶ 61,028 (2015).

[25] Rate Schedule A-40 was filed with the Commission as Tri-State's "Stated Rate Tariff," Tri-State FERC Electric Tariff Volume No. 1, in Docket No. ER20-676. The Utility Members' WESCs were filed with the Commission in Docket No. ER20-683.

[26] LPEA's WESC is designated as Tri-State Rate Schedule FERC No. 16.

B. Prior Tri-State Utility Member Withdrawals

As Tri-State notes in the CTP Filing, Utility Members have withdrawn from Tri-State and terminated their WESCs prior to the stated expiration date. Tri-State has traditionally addressed requests to withdraw and terminate on a case-by-case basis.[27]

As relevant here, two Utility Members successfully negotiated their exits from Tri-State. In 2016, New Mexico-based Utility Member Kit Carson withdrew from Tri-State after paying a $37 million exit charge.[28] Tri-State initially demanded a $137 million exit charge from Kit Carson.[29] However, Tri-State publicly endorsed Kit Carson's ultimate $37 million exit charge as "fair and equitable" and claimed the payment would "protect[] the interests of all [Tri-State's remaining] members."[30]

In 2019 (effective in 2020), Colorado-based Utility Member DMEA and Tri-State agreed to an exit by DMEA. DMEA will withdraw from Tri-State and pay an exit charge of $62.5 million.[31] Tri-State has filed the DMEA Membership Withdrawal Agreement with the Commission as Rate Schedule FERC No. 262 and stated that the agreement is "just and

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[27] *See* CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 3.

[28] *See supra* note 9. This $37 million net cash consisted of $49.5 million as an early termination fee offset by $12.5 million for the retirement of Kit Carson's patronage capital. *See Quarterly Report*, Tri-State Generation and Transmission Ass'n, Inc., at 8 (Nov. 4, 2016), https://www.tristategt.org/sites/tristate/files/PDF/2016%20SEC%20filings/10Q-093016.pdf. Tri-State's summary of the exit can be found in its 2016 10-K filed with the SEC. *Annual Report (Form 10-K)*, TRI-STATE GENERATION AND TRANSMISSION ASS'N, INC., at 39, 64 (Mar. 10, 2017), *available at* https://www.tristategt.org/sites/tristate/files/PDF/2016%20SEC%20filings/10K-EOY-123116.pdf.

[29] *See supra* note 8. With respect to the initial $137 million exit charge, Kit Carson's CEO stated that "Tri-State calculated its exit formula by multiplying the annual revenue it collects from Kit Carson and multiplying it by the number of years remaining in the contract, then subtracting Tri-State's costs." *Id.*

[30] *See supra* note 9.

[31] *See Tri-State Generation and Transmission Association, Inc.*, Docket No. ER20-1542, Initial Filing of Rate Schedule FERC No. 262 (Membership Withdrawal Agreement), (April 10, 2020) ("DMEA Withdrawal Filing"). This $62.5 million net cash consists of $110.5 million as an early termination fee offset by $48.0 million for the retirement of DMEA's patronage capital. DMEA will also pay an additional $26 million for the purchase of certain assets and facilities from Tri-State.

reasonable" as required by FPA. Tri-State's initial exit charge offer to DMEA was $322.0 million, an unreasonable figure that Tri-State fought to keep secret until Friday, May 8, 2020.[32]

In both cases, following its script, Tri-State initially prescribed bloated, unreasonable exit charges, requiring the Utility Member to then work through Tri-State's labyrinthine internal processes to try to obtain a reasonable exit charge figure. Both Kit Carson and DMEA spent years working through the Tri-State process, making almost no headway. Only the potential for regulatory intervention and litigation enabled these Utility Members—particularly DMEA—to finally extract themselves from Tri-State. For example, DMEA filed a complaint with the Colorado PUC in Proceeding No. 18F-0866E and was only able to successfully negotiate a settlement with Tri-State after its complaint appeared headed to an evidentiary hearing. The proceeding had begun in earnest and the Colorado PUC issued a decision determining, among other things, that: (1) it possesses subject matter jurisdiction over the setting of exit charges; (2) setting an exit charge falls within the Commission's complaint authority; and (3) discriminatory exit charges such as those Tri-State has historically attempted to set constitute cognizable discrimination claims under the Colorado Public Utilities Law.[33]

[32] The initial DMEA exit charge offer was confidential as part of the resolution of Colorado PUC Proceeding No. 18F-0866E. Although DMEA was amenable to permitting this figure to be public, Tri-State objected. On April 27, 2020, LPEA and United Power filed a Notice in Colorado PUC Proceeding Nos. 19F-0620E and 19F-0621E pursuant to PUC Rule 1101(f), 4 Code of Colorado Regulations (CCR) 723-2-1101(f), seeking to have the initial DMEA exit charge offer included in the public record. Although Tri-State represented to LPEA and United Power that Tri-State opposed the requested relief, Tri-State did not respond with a pleading stating the grounds for treating the information as confidential within ten days, as required by PUC Rule 1101(f)(III). On May 8, 2020, LPEA and United Power filed an additional Notice, requesting a decision by the administrative law judge ("ALJ") on the request in the Notice. Tri-State responded thereafter, indicating that it no longer requests that the initial DMEA exit charge offer be treated as confidential. On May 8, 2020, the ALJ granted the Notice and request to declare the initial DMEA exit charge offer public. The applicable pleadings (April 27, 2020 Notice by LPEA and United Power; May 8, 2020 Notice by LPEA and United Power; and May 8, 2020 Response by Tri-State) are attached hereto as Attachments B-1, B-2, and B-3, respectively; and the ALJ's decision is attached as Attachment B-4.

[33] Decision No. C19-0297-I, Colorado PUC Proceeding No. 18F-0866E (mailed Apr. 1, 2019).

C. LPEA's Attempts to Negotiate with Tri-State and Colorado PUC Complaint

Like Kit Carson and DMEA, LPEA seeks an exit charge that will satisfy its obligations related to Tri-State's debts and resources acquired on LPEA's behalf, while at the same time allowing LPEA to best serve its own customer-members by minimizing retail rates and maximizing opportunities to transition to a diversified electric generation portfolio. After LPEA's attempts to secure permission from Tri-State to acquire a higher percentage of power from resources other than those owned by Tri-State were rebuffed, on July 2, 2019, LPEA formally requested that Tri-State determine an exit charge should LPEA seek to withdraw from Tri-State membership. LPEA's request is consistent with section 4(a) of the Tri-State Bylaws, now on file with the Commission as Rate Schedule FERC No. 259, which provides:

> A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation.

However, Tri-State refused to determine an exit charge for LPEA. Tri-State initially just ignored LPEA's request for an exit charge. But at a meeting of Tri-State's Board of Directors on September 4-5, 2019, the Board passed a resolution suspending consideration of and negotiations regarding any full or partial exits by Tri-State Utility Members, including providing exit charges to requesting members (which Tri-State characterizes as "Make-Whole Numbers") until the next Tri-State Annual Meeting in April 2020 ("Exit Charge Moratorium"), while Tri-State established a Contract Committee to investigate alternatives.[34] The Exit Charge Moratorium was designed to hold Utility Members captive, while Tri-State undertook to overhaul its regulatory status to

[34] Tri-State Generation and Transmission Association, Inc., Board of Directors Resolution, that "suspends the policy and practice of providing Member Systems with Make-Whole Number of Shopping Letters," (Sept. 4-5, 2019) ("Exit Charge Resolution") [Attached hereto as Attachment A].

become subject to FERC's rate jurisdiction—in order to eliminate (in Tri-State's view) the Colorado PUC's jurisdiction over Utility Member withdrawal issues.

Given Tri-State's intransigence regarding the request for a determination of an exit charge, LPEA and United Power separately filed complaints against Tri-State with the CPUC in early November 2019.[35] Tri-State's Exit Charge Moratorium prevented LPEA from potentially exercising its withdrawal rights leaving, LPEA no other recourse than to ask the Colorado PUC to set a just, reasonable and nondiscriminatory exit charge. LPEA's complaint asks the Colorado PUC to determine that Tri-State's refusal to provide an exit charge to LPEA is unjust, unreasonable, and discriminatory in contravention of the Colorado Public Utilities Law,[36] and also requests that the Colorado PUC establish an exit charge for LPEA that is just, reasonable, and nondiscriminatory. An evidentiary hearing is currently scheduled in these proceedings for May 18-22, 2020.[37]

D. Tri-State's Efforts to Become Subject to FERC's Jurisdiction under FPA Part II

Just three weeks after LPEA formally requested an exit charge determination from Tri-State, on July 23, 2019, as amended in part on July 26, 2019, Tri-State filed tariffs and related agreements with this Commission, claiming that Tri-State would cease to be exempt from Commission jurisdiction under FPA section 201(f) in September 2019, when it would admit one or more new non-utility members.[38] Tri-State submitted a further amendment to its filings on

[35] *See La Plata Electric Association, Inc. v. Tri-State Generation and Transmission Association, Inc.*, Formal Complaint, Colorado PUC Proceeding No. 19F-0620E (filed November 5, 2019); *United Power, Inc. v. Tri-State Generation and Transmission Association, Inc.*, Formal Complaint, Colorado PUC Proceeding No. 19F-0621E (filed November 6, 2019).

[36] Articles 1-7 of Title 40, Colo. Rev. Stat.; *see* Col. Rev. Stat. § 40-1-101, *et seq.*

[37] *See* Decision No. R20-0266-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (Apr. 16, 2020).

[38] *See Tri-State Generation and Transmission Ass'n, Inc.*, 169 FERC ¶ 61,012 at P 6 (2019) ("2019 Rejection Order").

September 3, 2019, informing the Commission that it had purportedly added MIECO, Inc. (MIECO) to its membership—an event that Tri-State claims terminates its exemption from Part II of the FPA because Tri-State is no longer wholly owned by entities that are themselves exempt under section 201(f). This action was taken just days before the Tri-State Board adopted the Exit Charge Moratorium, holding its Utility Members captive while Tri-State endeavored to undermine its exemption from FERC jurisdiction.

The Commission rejected Tri-State's filings as patently deficient on October 4, 2019 without addressing whether Tri-State was, in fact, subject to FERC's FPA rate jurisdiction ("2019 Rejection Order").

Further to its attempt to circumvent the pending Colorado PUC proceedings concerning the exit charges requested by LPEA and United Power, on December 23, 2019, Tri-State filed a Petition with the Commission seeking a declaratory order that (a) Tri-State is a non-exempt public utility under Part II of the FPA and has been since September 3, 2019, and (b) because the Commission has exclusive jurisdiction over the electric services provided by Tri-State to its members, the Colorado PUC is preempted from making determinations related to the complaints filed by LPEA and United Power related to exit charges. On or about the same date, Tri-State also submitted for filing certain tariffs and related agreements pursuant to which Tri-State would provide jurisdictional services to its Utility Members and other wholesale customers.

As relevant here, on March 20, 2020, the Commission issued the Jurisdiction Order, finding "that Tri-State became a jurisdictional public utility under Part II of the FPA upon its admission of MIECO as a member on September 3, 2019."[39] In addition, the Commission found that it has jurisdiction over the determination of Tri-State's exit charges, but that such

[39] Jurisdiction Order at P 82.

jurisdiction is *not* exclusive.[40] Because jurisdiction over the exit charges is not exclusive to FERC, the Colorado PUC's "jurisdiction over complaints regarding such exit charges is not currently preempted."[41] FERC explained:

> A ruling by the Colorado PUC on those complaints would not be preempted unless and until such ruling conflicts with a Commission-approved tariff or agreement that establishes how Tri-State's exit charges will be calculated. We note that Tri-State has not yet filed, and the Commission has not yet approved, a methodology for determining Tri-State's exit charges. If Tri-State seeks to place matters regarding its exit charges before the Commission, it should make an appropriate filing at the Commission, which could include a filing setting forth a methodology for determining such charges.[42]

Thus, the mere filing with FERC of a tariff that contains a methodology for calculating exit charges or a payment to terminate a Utility Member's WESC is not sufficient to oust the Colorado PUC of jurisdiction over disputes concerning exit charges. The Commission explained that it must issue an order *approving* the tariff—in other words, finding that the tariff and exit charge methodology or calculation satisfies the FPA's requirement that rates and charges must be just and reasonable—in order to preempt the Colorado PUC's jurisdiction over the exit charge complaints.[43]

Accompanying the Jurisdiction Order, FERC also accepted for filing Tri-State's Stated Rate Tariff containing Tri-State's Rate Schedule A-40 and the Utility Members' WESCs

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[40] *Id.* at PP 116-121.

[41] *Id.* at P 116.

[42] *Id.* at P 121.

[43] Acceptance of a tariff for filing is not the same as a substantive determination that the rate or methodology employed is just and reasonable. *Alabama Power Co. v. FERC*, 993 F.2d 1557, 1565 n.4 (D.C. Cir. 1993) (citations omitted). The FPA requires jurisdictional public utilities to place their rates on file with FERC. *See* 16 U.S.C. § 824d(c). FERC's regulations provide that permission for a tariff or agreement "to become effective shall not constitute approval by the Commission of such rate schedule or tariff." 18 C.F.R. § 35.4.

("Stated Rate / WESC Order").[44] The Commission also accepted Tri-State's Bylaws and various other agreements between Tri-State and its Utility Members ("Various Agreements and Bylaws Order").[45]

E. Tri-State's CTP Filing

On April 13, 2020, Tri-State submitted to the Commission what it identifies as an "initial filing of its CTP Methodology Tariff, designated as Rate Schedule FERC No. 281, and requested an effective date of April 14, 2020.[46] In support of the CTP Methodology Tariff, Tri-State submitted two testimonies, Tri-State's 2019 Audited Financial Statement, a resolution of the Board of Directors adopting the CTP Methodology, and a Long Term Financial Forecast ("LTFF") (collectively, the CTP Filing). Tri-State states that the Jurisdiction Order "instructed" Tri-State to submit an exit charge methodology.[47]

In Part IV, below, LPEA explains that the CTP Filing is patently deficient, and that the CTP Methodology Tariff is not just and reasonable; the structure and functioning of the Tariff is similarly unjust and unreasonable, and may permit treatment that is unduly preferential or otherwise unlawful. Moreover, the Jurisdiction Order did not "instruct" Tri-State to submit an exit charge methodology, but merely pointed out that there was not currently an effective tariff on file that established such a methodology.

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[44] *Tri-State Generation and Transmission Association, Inc.*, 170 FERC ¶ 61,221 (2020), *reh'g pending* ("Stated Rate / WESC Order").

[45] *Tri-State Generation and Transmission Association, Inc.*, 170 FERC ¶ 61,223 (2020), *reh'g pending* ("Various Agreements and Bylaws Order").

[46] *See* CTP Filing, Docket No. ER20-1559. Tri-State's CTP Filing requests that the Commission waive the 60-day notice period, pursuant to 18 C.F.R. § 35.11, to allow the CTP Tariff to become effective on April 14, 2020.

[47] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 4.

Soon after submitting the CTP Filing, Tri-State filed a pleading in Docket No. EL20-16-001 seeking rehearing of the Jurisdiction Order "only as to the Commission's denial of Tri-State's request that the Commission declare that the … exit charge proceedings against Tri-State before the Colorado [PUC] are currently preempted."[48] More specifically, Tri-State stated that "the Commission should amend and clarify its Order to declare that preemption is effective as of Tri-State's April 13, 2020 filing (if not earlier, as argued above), and need not await the Commission's ultimate approval."[49] LPEA filed an Answer opposing that request because the Jurisdiction Order makes clear that the Colorado PUC may proceed with adjudicating the complaints already before it concerning the calculation of Tri-State exit charges and that such action is not preempted until FERC issues an order *approving* an exit charge methodology or calculation filed by Tri-State.[50] Commission approval is quite different than initial effectiveness of the CTP Methodology Tariff through filing, which does not gauge the justness or reasonableness of the filed tariff.

III. MOTION TO INTERVENE

A. Description of LPEA and Statement of Interest

LPEA is a member-owned, not-for-profit electric distribution cooperative founded in 1939 which services homes and businesses in southwestern Colorado. LPEA serves more than 33,000 individual, family, and business members in La Plata and Archuleta Counties, as well as

[48] Tri-State Request at 1 (citing Jurisdiction Order at PP 116-18, 121). According to the time-stamp on the Tri-State Request, the document was filed after 5:00 PM (Eastern) on April 13, 2020; accordingly, the Request is deemed to be filed on April 14, 2020. *See* 18 C.F.R. § 375.101(c); *Filing Via the Internet*, Order No. 703, 72 Fed. Reg. 65,659, 65,663 at PP 30-31 (Nov. 23, 2007)

[49] Tri-State Request at 23; *see also id.* at 24 n.73 ("Alternatively, at the very least, the Commission should accept the CTP Methodology filing with an expedited effective date (April 14, 2020, as requested in that filing) and clarify that preemption applies as of that effective date.").

[50] *Answer of La Plata Electric Association, Inc. to Tri-State Generation and Transmission Association, Inc.*, Docket No. EL20-16-001 (April 21, 2020).

in segments of Hinsdale, Mineral and San Juan, Counties in Colorado. LPEA operates and maintains 3,521 miles of distribution lines and 204 miles of transmission lines that are interconnected with the Tri-State transmission system.

LPEA's interests will be directly impacted by these proceedings. LPEA is currently a Utility Member and owner of Tri-State, as well as a Tri-State generation and transmission customer. LPEA purchases services from Tri-State pursuant to its WESC that is currently set to terminate in 2050. Nearly a year ago, LPEA requested an exit charge figure from Tri-State. Faced with Tri-State's stonewalling, LPEA initiated a proceeding at the Colorado PUC to determine a just and reasonable exit charge. An evidentiary hearing in that proceeding is due to commence in one week and that process is close to a final decision with all pre-filed testimony already submitted. Tri-State's CTP Filing in this proceeding attempts to forestall a determination by the Colorado PUC. In any event, if the CTP Methodology Tariff becomes effective and an operative rate schedule, this proceeding may impact LPEA's rights vis-à-vis Tri-State. LPEA's participation will further the public interest by providing the Commission with information and a perspective that cannot be provided by Tri-State or any other party.

B. Motion

Accordingly, pursuant to Rules 212 and 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §§ 385.212 and 214, LPEA respectfully moves to intervene in this proceeding. For the reasons stated above, LPEA's intervention is in the public interest because LPEA has a direct and substantial interest in the outcome of this proceeding that cannot be adequately represented by any other party.

C. Communications and Correspondence

LPEA requests that the following individuals be placed on the official Service List maintained by the Secretary in this proceeding, and be served with any notices, orders, pleadings, correspondence, and other documents or materials:

Jessica Matlock
Chief Executive Officer
La Plata Electric Association, Inc.
45 Stewart Street
P.O. Box 2750
Durango, Colorado 81302
970.867.5309
jmatlock@lpea.coop

Raymond L. Gifford
Matthew S. Larson
Michael Keegan
Wilkinson Barker Knauer LLP
1800 M Street NW, Suite 800N
Washington, DC 20036
202.783.4141
rgifford@wbklaw.com
mlarson@wbklaw.com
mkeegan@wbklaw.com

*Persons designated to receive service pursuant to Rule 2010 of the Commission's Rules of Practice and Procedure. *See* 18 C.F.R. § 385.2010.

IV. PROTEST AND MOTION TO REJECT

Tri-State has failed to demonstrate that the CTP Methodology Tariff is just and reasonable in satisfaction of the FPA. As an initial matter, the CTP Filing constitutes a changed rate under FPA section 205(d)[51]—not an "initial rate" as stated by Tri-State.[52] Whether the CTP Methodology Tariff is an initial rate or a changed rate, Tri-State's CTP Filing does not comply with the applicable filing regulations and the CTP Methodology Tariff is missing material terms. For these reasons the CTP Methodology Tariff is patently deficient.

To the extent the Commission does not reject the CTP Methodology Tariff and CTP Filing outright as patently deficient for failing to comply with the applicable rules and

[51] 16 U.S.C. § 824d(d).

[52] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 1, 6.

regulations, the Commission should nonetheless find that the proposed Tariff is unlawful because it not just and reasonable[53] and because the Tariff would result in undue prejudice and disadvantage to Utility Members seeking to withdraw from Tri-State in the future and the Tariff would produce unreasonable differences in exit charges (or CTPs).[54]

Furthermore, Tri-State has not shown that a waiver of the advance notice requirement is warranted. Finally, Tri-State's conduct in the development of the CTP Methodology has subjected LPEA to undue prejudice and disadvantage in violation of the FPA.

Accordingly, LPEA respectfully moves that the Commission reject the CTP Methodology Tariff and protests the CTP Filing—both because of the deficiencies set forth in more detail below, as well as because the CTP Methodology Tariff is unlawful and fails to comply with the FPA.

A. Tri-State's Proposed CTP Methodology Tariff Constitutes a Change in Rates

Tri-State does not currently have on file an approved exit charge methodology and the CTP Filing is the first time Tri-State has filed an exit charge methodology with the Commission. However, under established court and Commission precedent, the CTP Methodology Tariff constitutes a change in rates subject to paragraphs (d) and (e) of FPA section 205[55] and section 35.13 of the Commission's regulations.[56] Accordingly, the Tariff is subject to FERC's suspension and refund authority under FPA section 205(e).[57] Tri-State describes the CTP Filing

[53] *See* 16 U.S.C. § 824d(a).

[54] *See id.* at § 824d(b).

[55] *Id.* § 824d(d) and (e).

[56] 18 C.F.R. § 35.13.

[57] 16 U.S.C. § 824d(e); *Otter Tail Power Co.,* 583 F.2d at 406 ("[I]f a rate schedule purports to change any 'rate, charge, classification, or service,' it would presumably constitute a rate change that would be subject to the Commission's suspension and refund authority.").

as an initial rate filing,[58] but does not offer any explanation for why this is an initial rate rather than a changed rate.[59] FERC is not bound by the filer's designation of a filing as an initial rate pursuant to section 35.12; the Commission can determine that the filing constitutes a change in rates pursuant to section 35.13.[60]

The FPA "nowhere defines initial rates or changed rates."[61] However, courts have found that "initial rates" are those that "cover new services rendered to new customers."[62] FERC has "expressly [held] that an initial rate filing is one which provides for a new service to a new customer, and that both the service *and* the customer must be new. Thus, where the service is new, but the customer is not, such filings will be deemed to be changes in rates, as has been the Commission's practice."[63] The Commission has explained that this definition of a changed rate "is consistent with and serves to further the policies which underlie the FPA," which "is the protection of customers from excessive rates and charges,"[64] like the exit charges that would be produced by Tri-State's proposed CTP Methodology Tariff. Making filings subject to the

[58] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 1, 6.

[59] It is possible Tri-State recognizes that the CTP Methodology Tariff is a changed rate, as Tri-State states that it seeks a waiver of the 60-day notice period in FPA section 205(d), 16 U.S.C. § 824d(d). *See* CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 8. Section 205(d) applies to *changes* in rates, not initial rates.

[60] *See Central Louisiana Electric Co.*, 19 FERC ¶ 61,337, at 61,660 (1982).

[61] *Otter Tail Power Co.*, 583 F.2d at 405; *see also Florida Power & Light Co. v. FERC*, 617 F.2d 809, 814 (D.C. Cir. 1980).

[62] *Otter Tail Power Co.*, 583 F.2d at 406; *see also Southwestern Electric Power Co.*, 31 FERC ¶ 61,389 (1985) (finding that the addition of a new transmission customer is similar to the addition of a new service agreement to a filed rate schedule and is treated as a change in rates).

[63] *Southwestern Electric Power Co.*, 39 FERC ¶ 61,099, at 61,293 (1987); *see also Gulf States Utilities Co.*, 45 FERC ¶ 61,246, at 61,725 (1988) (finding that where Gulf States made a filing that "simply provides for an additional service to current customers, [it] constitutes a change in rates").

[64] *Southwestern Electric Power Co.*, 39 FERC at 61,293 (citing *Towns of Alexandria v. FPC*, 555 F.2d 1020, 1028 (D.C. Cir. 1977); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971)).

Commission's suspension and refund authority under FPA section 205(e) protects consumers of electricity from excessive or exploitative rates.[65]

Under FERC's regulations, a tariff that "proposes to supersede, cancel or otherwise change any of the provisions of a rate schedule, tariff, or service agreement required to be on file with the Commission (such as providing for other or additional rates, charges, classifications or services, or rules, regulations, practices or contracts for a particular customer or customers) shall be filed as a change in rate in accordance with § 35.13 … ."[66] In this case, the CTP Methodology Tariff would change the provisions of both the Tri-State Bylaws and the Utility Members' WESCs.[67] The WESCs do not specifically contain a provision for early termination. However, Tri-State's Bylaws, on file with the Commission, provide:

> A member may withdraw from membership upon compliance with such equitable terms and conditions as the Board of Directors may prescribe provided, however, that no member shall be permitted to withdraw until it has met all its contractual obligations to this Corporation.[68]

The CTP Methodology Tariff would effectuate this provision of the Bylaws. Thus, the proposed Tariff would change both the WESCs and the Bylaws.

The fact that the CTP Methodology Tariff is a "new" tariff does not prescribe that it constitutes an initial rate. FERC has found that the filing of new tariffs that will offer services to existing customers constitutes a rate change filing.[69] The Commission recently accepted as a

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[65] *Southwestern Electric Power Co.*, 39 FERC at 61,293 (citation omitted).

[66] 18 C.F.R. § 35.1(c).

[67] As noted above, the Utility Members' WESCs were filed by Tri-State in Docket No. ER20-683. LPEA's WESC was accepted for filing as Tri-State Rate Schedule FERC No. 16.

[68] Tri-State Rate Schedule FERC No. 259, § 4(a),

[69] *See Public Service Company of Indiana, Inc.*, 51 FERC ¶ 61,367, at 62,217, 62,228 (1990) (finding that the filing of a tariff that would permit sales pursuant to market-type rates is a change in rates because the seller may enter into such sales with some of its current customers).

changed rate pursuant to FPA section 205 and section 35.13 of the Commission's regulations, the filing of a "new" agreement for the early termination of a wholesale power supply contract between a generation and transmission cooperative and a member utility that functioned as an amendment to a filed tariff.[70] In a similar vein, if a utility applies for authority to transact at market-based rates and files a market-based rate tariff, that filing constitutes a change in rates.[71] In this case, the CTP Methodology Tariff does not currently have any customers, but would permit Tri-State and Utility Members to engage in a termination and withdrawal transaction under the Tariff's terms.

For these reasons, the CTP Methodology Tariff constitutes a change in rates under FPA section 205(d) and section 35.13 of the Commission's regulations and is subject to FERC's suspension and refund authority under section 205(e).[72]

B. The CTP Filing Is Patently Deficient and Should Be Rejected

The Commission should reject Tri-State's CTP Filing as patently deficient—whether it is considered an initial filing or a change in rates. When a utility files a rate schedule with FERC, the Commission may reject the filing outright, "a prerogative … assumed by FERC regulation, 18 C.F.R. § 35.5" and approved by the federal courts of appeals.[73] A patently deficient filing may be rejected by FERC in a Commission order,[74] or by the Commission's Secretary or the

[70] *See Wabash Valley Power Association, Inc.*, 171 FERC ¶ 61,053 at P 1 (2020).

[71] *See Market-Based Rates for Wholesale Sales of Electric Energy, Capacity and Ancillary Services by Public Utilities*, Order No. 697, 72 Fed. Reg. 39,904 at P 962 (Jul. 20, 2007) (subsequent history omitted).

[72] 16 U.S.C. § 824d(e); *Otter Tail Power Co. v. FERC*, 583 F.2d at 406; 18 C.F.R. § 35.13.

[73] *Cities of Anaheim, et al. v. FERC*, 723 F.2d 656, 657 (9th Cir. 1984); *see Papago Tribal Utility Authority v. FERC*, 628 F.2d 235, 241 (D.C. Cir.), *cert. denied*, 449 U.S. 1061 (1980); *Municipal Light Boards v. FPC*, 450 F.2d 1341, 1345-46 (D.C. Cir. 1971) (noting the "sound use, and indeed requirement, of an agency 'rejection' of a party's filing"), *cert. denied*, 405 U.S. 989 (1972).

[74] *See* 2019 Rejection Order at PP 2, 22, 25, 26.

Director of the Office of Energy Market Regulation pursuant to delegated authority.[75] FERC is not required to accept filings merely because they have been filed with the Commission.[76] FERC has "broad discretion to determine the adequacy of a filing to satisfy the objective of affording notice to the Commission and the public," and may reject the filing either at the time of filing or at a later time.[77]

Under FERC's regulations promulgated under the FPA, a filing shall be rejected "which patently fails to substantially comply with the applicable requirements" of the Commission's regulations and rules of practice and procedure.[78] Courts have described a "rejection" of a rate filing as similar to granting a motion to dismiss a complaint in a court proceeding on the face of the pleading.[79] Rejection of a filing is not a disposition "of a matter on the merits, but rather [is] a technique for calling on the filing party to put its papers in proper form and order."[80]

FERC should reject the CTP Methodology Tariff both because Tri-State has not filed sufficient information to support the proposed Tariff as required by FERC's regulations and because the Tariff itself is deficient. "As a threshold matter, all rate applicants have an affirmative obligation to adequately support their rate applications."[81] The Commission will reject a filing if it is patently deficient because it fails to substantially comply with the all

[75] *See* 18 C.F.R. §§ 35.5, 375.307(a)(1)(ii).

[76] *United Gas Pipe Line Co. v. FERC*, 707 F.2d 1507, 1512 (D.C. Cir. 1983) (citing *Papago Tribal Utility Authority*, 628 F.2d 235).

[77] *See City of Groton v. FERC*, 584 F.2d 1067, 1070 (D.C. Cir. 1978) (internal quotation omitted); *United Gas Pipe Line Co.*, 707 F.2d at 1512; 2019 Rejection Order at P 22 n.26.

[78] *See Municipal Light Boards*, 450 F.2d at 1345; *United Gas Pipe Line Co. v. FERC*, 707 F.2d at 1512; 18 C.F.R. § 35.5(a).

[79] *See Municipal Light Boards*, 450 F.2d at 1346.

[80] *Id.*; *Borough of Lansdale v. FPC*, 494 F.2d 1104, 1110 n.33 (D.C. Cir. 1974) (citation omitted).

[81] *PP&L, Inc.*, 95 FERC ¶ 61,160, at 61,519 (2001).

applicable requirements.[82] The possibility that an evidentiary record will be developed at a subsequent hearing is not an appropriate substitute for substantial compliance with the Commission's filing requirements.[83]

1. Tri-State Has Failed to Comply with Applicable Filing Requirements

Tri-State's CTP Filing does not comply with the Commission's regulations or filing requirements. Tri-State claims that the CTP Methodology Tariff constitutes the filing of an initial rate.[84] However, as explained above, the CTP Filing is a changed rate filing under FPA section 205(d).[85] In either event, Tri-State fails to comply with the Commission's filing requirements—that is, section 35.12 of the Commission's regulations for initial rates, and section 35.13 for changed rates.[86] Tri-State does not attempt to explain how its filing would satisfy section 35.12's requirements (or those of section 35.13, for that matter); instead, the CTP Filing merely lists the attachments to the filing without attempting to explain how the filing complies with the Commission's regulations.

In the 2019 Rejection Order, the Commission rejected Tri-State's filing of its stated rate tariff and its open access transmission tariff ("OATT").[87] The Commission found that the filings were patently deficient because they failed to comply with the applicable filing requirements.[88] In those filings, Tri-State did not file estimates of transactions and revenues for the 12 months immediately following the filing in which the services will commence, and did not submit a

[82] *See Municipal Light Boards*, 450 F.2d at 1346; 18 C.F.R. § 35.5; *PP&L, Inc.*, 95 FERC at 61,519.

[83] *PP&L, Inc.*, 95 FERC at 61,519.

[84] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 6.

[85] *See* 16 U.S.C. § 824d(d).

[86] *See* 18 C.F.R. §§ 35.12, 35.13.

[87] 2019 Rejection Order at PP 22-24 (2019).

[88] *Id.* at P 22 (citing *Kentucky Utilities Co.*, 689 F.2d at 211; *City of Groton*, 584 F.2d at 1070).

summary statement of all cost computations involved in deriving the rate.[89] Importantly, the Commission noted that the deficiencies prevented interested parties from determining how the proposed rates might affect them, and the Commission could not assess whether the proposed rate was just and reasonable.[90] Furthermore, the Commission noted that its policy on formula rates requires that both the formula and its inputs be transparent.[91] A formula rate's inputs, including supporting materials, should be taken directly from publicly available data, or be reconcilable to publicly available data.[92] The Commission and interested parties should be able to replicate the output of the formula rate as implemented by the utility.[93] Tri-State's 2019 open access transmission tariff filing was deficient in part because the formula rate templates were filed in a non-workable format and the formula rate was derived from data that was not reconcilable by clearly supported and identifiable documentation provided in the record.[94]

Tri-State's CTP Filing similarly fails to comply with applicable filing requirements. LPEA will not enumerate the materials and cost of service Statements that Tri-State failed to provide, as these are set forth in sections 35.12 and 35.13, and Tri-State did not claim to satisfy a single requirement. As an illustrative example, LPEA notes that for initial rates, section 35.12(b)(2)(ii) requires the submission of "[a] summary statement of all cost (whether fully distributed, incremental or other) computations involved in arriving at the derivation of the level of the rate, in sufficient detail to justify the rate."[95] For the CTP Filing, Tri-State's summary

[89] *Id.* at P 23.

[90] *Id.*

[91] *Id.* at P 24 (citation omitted).

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *See* 18 C.F.R. § 35.12(b)(2)(ii).

statement of all cost computations should show what *each* utility member would pay if it requested a contract termination payment. This would assist the Commission in evaluating whether the CTP Methodology Tariff will result in just and reasonable rates. Tri-State has not shown what any CTPs would actually be or provided any computations to reach an actual CTP. (However, as explained in Part IV.C.3 below, if calculations were performed assuming that all Utility Members sought to terminate their WESCs at the same time, the value of their CTPs would collectively be a multiple of Tri-State's current balance sheet, a result that cannot be just and reasonable.)

For changes in rates, section 35.13(d) and (g) requires the filing of cost of service data and cost of service statements AA through BM.[96] Tri-State did not file any cost of service statements or explain why these statements were not filed. As noted, these are merely illustrative examples and are not intended to constitute an exhaustive list of missing items.

2. Tri-State's CTP Methodology Tariff is Deficient under FPA Section 205 and the Commission's "Rule of Reason" Because the Tariff Omits Practices that Significantly Affect the Rate

Tri-State's proposed CTP Methodology Tariff fails to satisfy the FPA's requirements because it omits material terms, including the LTFF (which is not included in the filed Tariff), the required advance notice period, and the fact that the Tri-State Board of Directors retain ultimate control over whether a Utility Member is permitted to withdraw. The Tariff consists of a single page, with two additional pages that illustrate a sample CTP calculation. FPA section 205(c) requires public utilities to file with the Commission "all rates and charges for any transmission or sale subject to" FERC's jurisdiction.[97] It also requires such rate schedules "to

[96] *See* 18 C.F.R. § 35.13(d) and (g).

[97] 16 U.S.C. § 824d(c).

recite 'the … practices … affecting such rates and charges.'"[98] The Commission's "regulations go even further, requiring that rate schedules set forth 'clearly and specifically'" all "classifications, practices, rules and regulations affecting" such rates.[99] Thus, even though the CTPs are not subject to FERC's *exclusive* jurisdiction,[100] and, therefore, a CTP Methodology is not required to be on file with FERC,[101] if such a tariff is filed, it must recite those practices that significantly affect the rates contained therein and "that are realistically susceptible of specification, and that are not so generally understood in any contractual arrangement as to render recitation superfluous."[102]

FERC has rejected rate schedules that are deficient because they do not include the terms and conditions that significantly affect the filed rates. For example, in March 2020, the Commission rejected Tri-State's filing of Board Policy No. 115 as a rate schedule, as well as associated bilateral agreements with utility members because both Board Policy No. 115 and the agreements were "deficient without Board Policy No. 101 on file."[103] Board Policy No. 115 governs how Tri-State purchases excess energy from its Utility Members if a Utility Member owns or controls a resource that produces more than the five percent contemplated by the Utility Member's WESC—i.e., at Tri-State's avoided cost as described in Board Policy No. 101, which was not filed with FERC.[104] The Commission found that Board Policy No. 101 was a practice

[98] *Id.*; *City of Cleveland v. FERC*, 773 F.2d 1368, 1376 (D.C. Cir. 1985).

[99] *City of Cleveland v. FERC*, 773 F.2d at 1376; 18 C.F.R. §§ 35.1(a), 35.2(b).

[100] Jurisdiction Order at PP 116-121.

[101] *Id.* at PP 118, 121.

[102] *City of Cleveland v. FERC*, 773 F.2d at 1376; Various Agreements and Bylaws Order at P 49.

[103] Various Agreements and Bylaws Order at PP 47-50 (quoted language at P 47 (citing *Kentucky Utilities Co. v. FERC*, 689 F.2d at 211; *City of Groton v. FERC*, 584 F.2d at 1070)).

[104] *Id.* at P 48.

that significantly affects a filed rate and service—specifically, Board Policy No. 115—because Board Policy No. 101 "comprises specific rate mechanisms, terms, and conditions that significantly affect the rates … reflected in Board Policy No. 115" and referenced in the applicable agreements.[105] Therefore, Board Policy No. 115 was rejected as deficient.

In this case, Tri-State's proposed CTP Methodology Tariff consists of a single page of substantive tariff provisions that describe four steps to calculate a CTP, but the actual methodology is contained in the unfiled LTFF, which, as discussed below, can be amended at will by Tri-State.[106] The current LTFF was submitted with the CTP Filing, but does *not* constitute part of the CTP Methodology Tariff—that is, the regulated rate on file with the Commission. The LTFF constitutes the substance of the methodology to calculate CTPs and Tri-States states it "proposes to use the LTFF as the basis for forecasting the Member revenue requirement and corresponding Class A rates under the Base and Changes Cases."[107] As such, the LTFF significantly affects the CTP Methodology Tariff.[108] The LTFF cannot be described as a document of practical insignificance or a mere implementation detail that is not required to be included as part of the filed rate.[109] Because the LTFF was not filed as part of the CTP Methodology Tariff, the Tariff should be rejected as deficient.

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[105] *Id.* at P 49.

[106] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-JAM (Prepared Direct Testimony of Joseph A. Mancinelli), 25:6-8 ("The LTFF modeling process just described is under continuous review and refinement. Tri-State may modify, change or add to specific components of the process as appropriate.").

[107] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-JAM (Prepared Direct Testimony of Joseph A. Mancinelli), 37:15-16.

[108] *See City of Cleveland v. FERC*, 773 F.2d at 1376; *Energy Storage Ass'n*, 162 FERC ¶ 61,296 at P 103; Various Agreements and Bylaws Order at P 49.

[109] *See Public Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448, 454 (D.C. Cir. 1987); *Southwest Power Pool, Inc.*, 169 FERC ¶ 61,048 at P 62 (2019); *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,049 at P 140 (2019); *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,214 at P 204 (2011); *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,212 at P 121 (2011).

The question of whether the LTFF should be included as part of the CTP Methodology Tariff is similar to issues concerning which practices need to be included in the filed tariffs of an independent system operator ("ISO") or regional transmission operator ("RTO"), or can be placed in an unfiled business practice manual ("BPM"). The Commission has stated that resolution of this question is guided by its rule of reason policy.[110] Under the rule of reason, practices or provisions that "significantly affect rates, terms and conditions" of the regulated rate and that are readily susceptible of specification must be filed.[111] However, policies or practices that related only to matters of "practical insignificance" to providing service to customers or that are mere "implementation details" may be included in business practice manuals rather than included as part of the filed rate.[112] For example, with respect to PJM Interconnection's proposed tariff revisions regarding the participation of demand response resource in the markets, the Commission found that the determination of demand resource product saturation must be filed in the PJM Tariff because the "Tariff needs to do more than merely refer to a methodology in the [BPMs]."[113]

The CTP Methodology Tariff is missing other material provisions. As noted in the CTP Filing, the CTP Methodology was approved by a Board Resolution.[114] The Board Resolution

[110] *See, e.g., PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,049 at P 140 (2019) (citing *City of Cleveland*, 773 F.2d at 1376; *Public Serv. Comm'n of N.Y. v. FERC*, 813 F.2d 448, 454 (D.C. Cir. 1987) (other citations omitted)).

[111] *City of Cleveland v. FERC*, 773 F.2d at 1376; *Energy Storage Ass'n v. PJM Interconnection, L.L.C.*, 162 FERC ¶ 61,296 at P 103.

[112] *Public Serv. Comm'n of N.Y.*, 813 F.2d at 454; *Southwest Power Pool, Inc.*, 169 FERC ¶ 61,048 at P 62 (2019); *PJM Interconnection, L.L.C.*, 169 FERC ¶ 61,049 at P 140 (2019); *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,214 at P 204 (2011); *Midwest Independent Transmission System Operator, Inc.*, 137 FERC ¶ 61,212 at P 121 (2011).

[113] *PJM Interconnection, L.L.C.*, 134 FERC ¶ 61,066 at P 69 (2011).

[114] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 4; Exhibit No. TS-PLB-3 (Board Resolution).

contains material terms that impact the Tariff, but were not contained in the Tariff, including the required notice a Utility Member must provide to Tri-State and the Board's right to veto a Utility Member's withdrawal from Tri-State.[115] Terms that have a significant effect on the Tariff, are realistically susceptible of specification, and are not so generally understood in any contractual arrangement as to render recitation superfluous, must be filed.[116] The Board Resolution states that Tri-State's CEO must "determin[e] the appropriate advance written notice" that Utility Members must provide, but that such notice must be "not less than three (3) years."[117] This term is deficient both because the advance notice period is not contained in the filed Tariff and the period has not even been determined. In addition, the fact that the Board retains ultimate control over whether a Utility Member may withdrawal is a material term that is not included in the Tariff. The Commission has found that it is inappropriate for filed tariff provisions to "be interpreted as requiring compliance with provisions that significantly affect rates or terms of jurisdictional service without being filed with the Commission."[118] Because there are material terms that significantly affect the CTP Methodology Tariff, but that are not part of the Tariff, the CTP Filing is deficient and should be rejected.[119]

[115] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-PLB-3 (Board Resolution), at 2.

[116] *See Tipmont Rural Electric Member Cooperative v. Wabash Valley Power Association, Inc.*, 171 FERC ¶ 61,059 at P 38 (2020).

[117] CTP Filing, Docket No. ER20-1559, Exhibit TS-PLB-3 (Board Resolution), at 2.

[118] *Wabash Valley Power Association, Inc.*, 171 FERC ¶ 61,073 at P 15 (2020).

[119] These terms—the LTFF, the advance notice period, and the Board's retention of control over Utility Member withdrawal—are also substantively unjust, unreasonable, and unduly discriminatory, as set forth below in Part IV.C.1.

C. The CTP Methodology Tariff Is Not Just and Reasonable, and Would Produce Rates that Are Unduly Prejudicial and Disadvantageous

To the extent the Commission does not reject the CTP Methodology Tariff as patently deficient for failing to comply with FERC's applicable rules and regulations governing rate filings, the Commission should find that the proposed CTP Methodology Tariff is unlawful because it not just and reasonable[120] and because the Tariff could subject departing Utility Members to undue prejudice and disadvantage and create an unreasonable difference in CTPs.[121]

As the proponent of a rate change, the burden is on Tri-State to demonstrate that its proposed CTP Methodology Tariff satisfies the FPA.[122] Tri-State has not done so. The problems with the CTP Methodology Tariff are manifest. As set forth below, the structure of the proposed CTP Methodology reserves too much discretion to Tri-State and its Board. In addition, the CTP Methodology will produce CTPs that are unduly prejudicial to Utility Members that seek to withdraw from Tri-State in the future under the methodology prescribed in the CTP Filing. Finally, Tri-State has not demonstrated that its proposed CTP Methodology will produce CTPs that are just and reasonable.

Because the Commission is not empowered to unilaterally impose a new exit charge methodology in place of the CTP Methodology Tariff filed by Tri-State, the CTP Filing should be rejected outright as inconsistent with the requirements of FPA section 205.[123] To the extent the CTP Filing is not rejected outright, it raises issues that cannot be resolved based on the record submitted and that are more appropriately addressed in hearing and settlement procedures.

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[120] *See* 16 U.S.C. § 824d(a).

[121] *See id.* at § 824d(b).

[122] *Id.* at § 824d(e); *City of Winnfield v. FERC*. 744 F.2d 871, 877 (D.C. Cir. 1984).

[123] *NRG Power Marketing, LLC, et al. v. FERC*, 862 F.3d 108, 114-17 (D.C. Cir. 2017).

1. The structure of the CTP Methodology mechanism reserves too much discretion to Tri-State and its Board, and is, therefore, inconsistent with the FPA.

As detailed above, the CTP Methodology Tariff is deficient because material terms of the CTP Methodology are not part of the Tariff. Assuming, *arguendo*, that the Tariff is not rejected for that reason, the provisions that are outside the Tariff would permit Tri-State to retain too much discretion. This discretion may lead to results that are not just and reasonable and may subject Utility Members to unduly prejudicial and disadvantageous practices. The Commission rejects tariff provisions that are ambiguous or permit the utility to retain too much discretion.[124] Similarly, the Commission has found that it is inappropriate for tariff provisions to "be interpreted as requiring compliance with provisions that significantly affect rates or terms of jurisdictional service without being filed with the Commission."[125] Thus, it is not permissible for the CTP Methodology Tariff to be subject to terms and conditions not contained within the Tariff itself.

First, the LTFF, which is the fundamental underpinning of the CTP Methodology, is subject to no external oversight and can be changed at will by Tri-State. The LTFF is prepared by Tri-State. The LTFF's inputs and assumptions are provided by Tri-State.[126] The proposed CTP Methodology Tariff states that the LTFF is "regularly reviewed and maintained within the organization."[127] Even within Tri-State's structure, there are no rules for the establishment and

[124] *See California Independent System Operator, Inc.*, 161 FERC ¶ 61,232 at P 55 (2017); *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at P 92 (2015); *Midwest Independent Transmission System Operator, Inc.*, 138 FERC ¶ 31,233 at P 182 (2012); *California Independent System Operator, Inc.*, 133 FERC ¶ 61,039 at PP 188-89 (2010).

[125] *Wabash Valley Power Association, Inc.*, 171 FERC ¶ 61,073 at P 15 (2020).

[126] *See* CTP Filing, Docket No. ER20-1559, Exhibit TS-PLB (Prepared Direct Testimony of Patrick L. Bridges), 24:4-17.

[127] CTP Filing, Docket No. ER20-1559, CTP Methodology Tariff, second paragraph.

review of the LTFF. In other words, the LTFF is subject only to the (ever-changing) whims of Tri-State itself. As such, it is unjust and unreasonable and may lead to unduly preferential or disadvantageous results.

Second, the discretion given to Tri-State's Board of Directors to "approve" a Utility Member's withdrawal through a determination that the proposed withdrawal will not have a material adverse effect on Tri-State is not just and reasonable and has the potential to be unduly prejudicial and disadvantageous.[128] The Board Resolution—which is not part of the filed Tariff—places ultimate control over a Utility Member's withdrawal into the hands of the Board of Directors. The only factor for the Board to consider is whether the requested withdrawal would "not have a material adverse effect on Tri-State." There are no criteria for the Board to use in judging whether a Member's withdrawal would have a material adverse effect. There is no process for appeal of the Board's decision. In short, the Board can make any decision it chooses for whatever reason it chooses, and Utility Members have no recourse. This term would permit Tri-State to implement the CTP Methodology in a manner that is unduly prejudicial and disadvantageous to its own Utility Members.

Third, the requirement—contained in the Board Resolution, but not included in the filed Tariff—that Utility Members must provide "not less than three (3) years" advance notice of the proposed withdrawal, is not just and reasonable.[129] The Board Resolution gives the CEO of Tri-State the discretion to "determin[e] the appropriate advance written notice" that must be provided by a Utility Member.[130] As explained in Part IV.B.2 above, the CTP Filing does not

[128] *See* CTP Filing, Docket No. ER20-1559, Exhibit TS-PLB-3 (Board Resolution), at 2.

[129] CTP Filing, Docket No. ER20-1559, Exhibit TS-PLB-3 (Board Resolution), at 2.

[130] *Id.*

indicate whether the CEO has actually determined "the appropriate advance written notice" period, which is, of course, a seriously deficiency itself. The CEO's failure to establish the notice period also illustrates why this practice is unjust and unreasonable: the notice period can be changed at will by the CEO; it might even be changed *after* a Utility Member has provided notice. Utility Members would never know what the notice period is.[131]

Moreover, even though the Board Resolution does not specify the notice period, it states that it will be "not less than three (3) years."[132] Tri-State's proposal requiring at least three years' notice of a withdrawing Utility Member's proposed date of withdrawal should be rejected because the proposal is unjust and unreasonable while subjecting members to undue prejudice and disadvantage. As described above, Tri-State proposes, *inter alia*, that a withdrawing Utility Member will pay a CTP designed to keep remaining Utility Members in the same financial position they would have been if the withdrawing Utility Member had remained.[133] But in addition to making remaining Utility Members whole, Tri-State would also require withdrawing Utility Members to provide Tri-State with at least three years' notice of the proposed withdrawal date. To justify this notice period Tri-State asserts that the period is necessary for it to have "adequate time to address generation and transmission planning that will be impacted by a Member withdrawal."[134]

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[131] Once Tri-State has actually established the length of the notice period, it would be consistent with Commission policy for the CTP to be calculated based on Tri-State's reasonable expectation of continuing to serve the withdrawing Utility Member for only the duration of that notice period. *See* 18 C.F.R. § 35.26(c)(3).

[132] CTP Filing, Docket No. ER20-1559, Exhibit TS-PLB-3 (Board Resolution), at 2.

[133] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-PLB (Prepared Direct Testimony of Patrick L. Bridges), at 22:15-17 ("Making Tri-State and its remaining Members 'whole' entails putting them as close as possible to the same position financially as if the withdrawing Member had fully honored its WESC commitment for the entire agreed upon term.").

[134] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-PLB (Prepared Direct Testimony of Patrick L. Bridges), at 25:9-11.

Tri-State's proposed requirement that withdrawing Utility Members must provide at least three years' notice is unjust and unreasonable because—as Tri-State and LPEA agree—any ultimate exit charge should fairly address the financial impacts of the departing Utility Member's withdrawal. In analogous contexts, the Commission has explained that a notice period is designed so that utilities can plan their systems properly and avoid the costs of overbuilding assets in reliance on all customers remaining.[135] However, the Commission recently recognized that a notice period and exit charge directly interact in that the exit charge can compensate for a shortened notice period.[136] Here, LPEA and Tri-State agree that an exit charge will make remaining Utility Members indifferent to other Utility Members' decisions to remain or withdraw. Thus, the rationale for providing a notice period of at least three years is directly undercut because any of Tri-State's investments made in reliance on Utility Members remaining will be offset by the exit charge paid by exiting Utility Members. Viewed through this lens, the three-year notice requirement operates as an unnecessary constraint and delay mechanism designed to deter Utility Members from proposing to withdraw. As a result, the notice period, operating in conjunction with the proposed make whole exit charge, is an unjust and unreasonable restraint.

[135] *See Kentucky Utilities Co.*, 23 FERC ¶ 61,317, at 61,668, *aff'd in part*, 25 FERC ¶ 61,205 (1983), *remanded on other grounds*, *Kentucky Utilities Co. v. FERC*, 766 F.2d 239 (6th Cir. 1985).

[136] *See Wabash Valley Power Ass'n*, 171 FERC ¶ 61,053, at P 30 (2020) ("[I]t may be appropriate to provide for a shorter notice period, and therefore a shorter Agreement, for example, to the extent that Tipmont's buyout amount compensates Wabash for the corresponding increase in Wabash's costs."). Although the Commission determined that it could not summarily rule on a ten-year notice period proposed in *Wabash Valley Power Ass'n*, that determination does not control here. In *Wabash Valley Power Ass'n*, the potentially exiting distribution cooperative would be required to pay its exit charge over the term of the notice period. *Id.* at P 31.

Finally, the Board Resolution states that the CEO is also "authorized, empowered and directed to implement" the CTP Methodology Tariff,[137] but does not specify what steps the CEO is required to take (or prohibited from taking) other than the establishment of the notice period. The Board Resolution seemingly authorizes the CEO to do *anything* he deems appropriate to implement the Tariff, and these actions are subject to no oversight or review. Again, the Board Resolution would empower Tri-State, through its CEO, to implement CTP Methodology in an unduly prejudicial or disadvantageous manner.

The level of discretion given to Tri-State and its CEO through the Board Resolution, and not memorialized in the Tariff, is unwarranted.[138] These practices are unjust and unreasonable, and may lead to outcomes that are unduly prejudicial and disadvantageous, and create unreasonable differences between Utility Members.[139]

2. The CTP Methodology Tariff will produce rates that unduly prejudice and disadvantage Utility Members seeking to withdraw from Tri-State in the future.

The CTP Methodology Tariff will produce results that are unduly prejudicial when compared to exit charges recently implemented for other departing Utility Members—namely, Kit Carson in 2016 and DMEA in 2020.

The proposed CTP Methodology is not the same methodology as what was used to reach the actual exit charge for DMEA—which exit charge is now memorialized in an agreement filed with the Commission in Docket No. ER20-1542. Similarly, the actual exit charge paid by Kit

[137] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-PLB-3 (Board Resolution), at 2.

[138] *See California Independent System Operator, Inc.*, 161 FERC ¶ 61,232 at P 55 (2017); *PJM Interconnection, L.L.C.*, 151 FERC ¶ 61,208 at P 92 (2015); *Midwest Independent Transmission System Operator, Inc.*, 138 FERC ¶ 31,233 at P 182 (2012); *California Independent System Operator, Inc.*, 133 FERC ¶ 61,039 at PP 188-89 (2010).

[139] *See* 16 U.S.C. § 824d(a), (b).

Carson was not produced using the CTP Methodology. Tri-State has publicly announced that these exit charges are "fair and equitable,"[140] and in the case of the exit charge for DMEA, that the exit charge is just and reasonable in compliance with the FPA.[141] Tri-State's claims that both the CTP Methodology Tariff and the DMEA Withdrawal Agreement are just and reasonable present a paradox. However, if the exit charges paid by Kit Carson and DMEA are just and reasonable (or "fair and equitable"), as opposed to Tri-State's initial offers produced from a mark to market methodology similar to the CTP Methodology, then an exit charge produced by the mark to market methodology referenced in the CTP Methodology Tariff is not.

The Table below shows the initial exit charges offered by Tri-State to Kit Carson and DMEA, alongside the actual exit charges paid (or to be paid) by Kit Carson and DMEA. The Table also shows the total annual energy sales (kWh) for each of these Utility Members for 2018.

Utility Member	Total energy sales (kWh)	Exit charge proposed by Tri-State (millions of dollars)	Actual exit charge (millions of dollars)
Kit Carson	263,931,221 (2018)	$ 137.0	$ 37.0
DMEA	515,492,487 (2018)	$ 322.0	$ 62.5
Kit Carson's $37.0 million net exit charge payment consisted of an early termination fee of $49.5 million offset by the undiscounted retirement of Kit Carson's $12.5 million of patronage capital. The Kit Carson WESC would have expired in 2040.			
DMEA's $62.5 million net exit charge payment consists of an early termination fee of $110.5 million offset by the undiscounted retirement of DMEA's $48.0 million of patronage capital. DMEA is also paying an additional $26 million for the purchase of certain assets and facilities. The DMEA WESC would have expired in 2040.			

[140] *See supra* notes 9 and 13.

[141] DMEA Withdrawal Filing, Transmittal Letter, at 4.

Tri-State's prior practice with respect to both Kit Carson and DMEA shows that Tri-State's initial offers of exit charges are nothing more than an opening offer that does not represent a just and reasonable rate. As explained by former Tri-State CEO Mike McInnes in the Colorado PUC proceeding concerning the DMEA exit charge, Tri-State would provide a Utility Member with an "indicative number" and then Tri-State and the Utility Member would "enter[] into extensive negotiations over all of the elements of that methodology. They would argue their side. We would argue our side, why we saw things, and they would argue why they saw things, and ultimately we came to a conclusion."[142] Tri-State established its initial offers to Kit Carson and DMEA using a mark to market methodology similar to what is proposed in the CTP Filing, and a calculation designed to produce an "indicative number" with subsequent negotiations is a different animal entirely than a just and reasonable exit charge methodology contained in a tariff designed to provide certainty and transparency to Utility Members considering an exit. To that point, a Tri-State witness in the DMEA complaint proceeding before the Colorado PUC acknowledged that the mark to market method is intended to produce prohibitively high exit charge calculations.[143] Tri-State's opening offer to Kit Carson was over three-and-a-half times the exit charge paid by Kit Carson. Similarly, Tri-State's initial exit charge offer to DMEA was over five times higher than the exit charge to which Tri-State and DMEA eventually agreed.[144] Thus far, Tri-State has successfully fought to keep its initial offer to DMEA secret.

Furthermore, the DMEA exit charge is now contained in an agreement that has been filed with the Commission. Tri-State claims that the exit charge is just and reasonable and that FERC

[142] Deposition of Mike McInnes, Colorado PUC Proceeding No. 18F-0866E, 39:23–40:3 (May 22, 2019) [Excerpt attached hereto as Attachment C].

[143] *See* Answer Testimony of William A. Collet, Colorado PUC Proceeding No. 18F-0866E, 25:19–28:4 (April 29, 2019) [Excerpt attached hereto as Attachment D].

[144] *See, e.g.*, *supra* note 13.

must presume that the agreement satisfies the FPA consistent with the *Mobile-Sierra* provision in the agreement.[145] Tri-State seeks for Utility Members seeking to exit Tri-State in the future to be treated differently from DMEA (and Kit Carson). Tri-State has not explained how the CTP Methodology relates to the exit charge in the DMEA Withdrawal Agreement, or why Utility Members that may seek to withdraw from membership in the future should be treated unreasonably differently from DMEA.[146]

The CTP Methodology would impose an undue prejudice and disadvantage on Utility Members who were not able to formalize their exit from Tri-State prior to the filing of the CTP Methodology Tariff, contrary to the requirements of FPA section 205.[147] For these reasons, the CTP Methodology is unlawful.

3. Tri-State has not demonstrated that the proposed CTP Methodology is just and reasonable.

As the proponent of a unilateral change in rates, the burden is on Tri-State to demonstrate that the changed rate is just and reasonable, as required by the FPA.[148] Tri-State has not made this demonstration. Tri-State describes the CTP Methodology as "a mark to market, make whole methodology."[149] Tri-State has not cited any cases where the Commission has approved a "mark to market" methodology like the one proposed for the CTP Methodology Tariff. That may be for good reason, as it is hard to fathom how any methodology that has produced the outsized initial

[145] DMEA Withdrawal Filing, Transmittal Letter, at 4 & n.11; *see United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

[146] *See* 16 U.S.C. § 824d(b).

[147] *Id.*

[148] *Id.* at § 824d(e); *City of Winnfield v. FERC*. 744 F.2d at 877.

[149] CTP Filing, Transmittal Letter, at 4; Exhibit No. TS-PLB (Prepared Direct Testimony of Patrick L. Bridges), at 21-24.

offers to Utility Members like the $137 million and $322 million for Kit Carson and DMEA, respectively, could pass muster before the Commission as consistent with the FPA.

There are several problems with Tri-State's proposed use of a mark to market methodology. First, the method is fundamentally flawed because it depends materially on assumptions about how the electric industry will unfold over the next 30 years. Although multi-decadal forecasts are used for planning purposes or may establish an asset's valuation, they are generally not used for cost-based ratemaking. That distinction may be rooted in the intrinsic uncertainty that affects the results of forecasts covering such a long period of time. Reliance on 30-year forecasts will not establish a just and reasonable CTP. There are many variables that illustrate why long-term forecasts are not well suited to establish cost-based rates. For example, demand forecasts for retail load—including those of the Utility Members—are in a period of great change. Customers are changing their end uses of electricity, both through new technologies (e.g., on-site solar, electric vehicles, smart appliances) and the use of advanced meters and time-of-use rates. There will be new uncertain factors that will arise over the next 30 years, including economic conditions, electrification needs, and power market developments that will introduce variation and volatility in forecasts of demand and generation.

In addition, the portfolio of resources that Tri-State may rely on in future years is itself unknown, and those resources' performance and operation and maintenance expenses will vary. Prices for fuels and the costs and performance of new utility-scale renewable and storage technologies will differ, depending on unknown factors including changes in use and import/export of natural gas, constraints on gas production, climate change policies and strategies, and the pace of retirement of fossil fuel-fired facilities. Other factors that introduce variability into a long-term forecast include: Tri-State's and the Western Area Power

Administration's participation in the Southwest Power Pool's Western Energy Imbalance Service market; prices in wholesale power markets generally; macroeconomic conditions affecting all the variables noted above; interest rates and financial markets conditions; changes in climate in the Rocky Mountain region; and changes in law and public policy, among others.

But perhaps the most important deficiency in Tri-State's proposed mark to market approach is the failure to take into account Utility Members' ownership interest in Tri-State. This omission is inappropriate because a just and reasonable CTP would need to reflect the Utility Member's standing as an owner. Instead, the proposed CTP Methodology treats Utility Members as if they were simply customers under a long-term contract, rather than an owner that has a stake in Tri-State's assets and liabilities.

The CTP Methodology (mark to market) is designed to be prohibitively expensive and punitive to a departing Utility Member. The CTP Methodology formula is the same mark to market approach that Tri-State has used for years to produce a bloated initial proposed exit charge to a requesting Utility Member (when it provides an exit charge at all), to eliminate any chance that the requesting Utility Member might actually be able to accept the proposed exit charge and withdraw from Tri-State. As described above, the CTP Methodology compares (a) Tri-State's forecasted revenues assuming the Utility Member remains through the end of the contract term with (b) Tri-State's forecasted revenues assuming the Utility Member withdraws. The CTP then equals the net present value of the difference between (a) and (b).

This is the same framework the Tri-State Board of Directors adopted as its preferred approach to calculating exit charges in 2014—indeed, the Attachment to the Board Resolution approving the CTP Methodology states "the Contract Termination Payment shall be computed

using the following formula *mark to market*, make whole ….”[150] In short, the CTP Methodology is the same mark to market methodology that Tri-State has been using for the last six years and that produced the outsized initial exit charge offers provided to Kit Carson and DMEA and that Tri-State advocated the Colorado PUC adopt in calculating a withdrawal charge for DMEA in 2019.[151] As noted above, Kit Carson’s actual 2016 exit charge of $37 million, which Tri-State declared to be “fair and equitable,” was only twenty-seven percent (27%) of Tri-State’s initial 2014-15 proposed exit charge of $137 million. Although Tri-State refused until May 8, 2020 to permit disclosure of the initial proposed exit charge offered by Tri-State to DMEA, that figure—an astonishing $322 million—is over five times higher than the actual exit charge of $62.5 million.[152] The disparity between Tri-State’s initial proposed exit charges, based on a mark to market method, and the actual exit charges paid (or to be paid shortly) by Kit Carson and DMEA suggests that Tri-State utilizes the mark to market methodology merely to produce an “opening offer.” That a mark to market method is intended to produce prohibitively high calculations was acknowledged by Tri-State’s witness, William A. Collet in the DMEA complaint proceeding before the Colorado PUC.[153]

[150] CTP Filing, Docket No. ER20-1559, Exhibit No. TS-PLB-3 (Board Resolution), Attachment (second paragraph) (emphasis added)

[151] Answer Testimony of Patrick L. Bridges, Colorado PUC Proceeding No. 18F-0866E, 51:21-52:1 (April 29, 2019) (discussing an expert’s opinions by stating the expert offered a “‘mark-to-market’ analysis very similar to that which Tri-State recommends to determine an equitable buyout amount”); *id.* at 20:1-5 (“In my opinion, a withdrawing Member meets its contractual obligations to Tri-State only if it pays Tri-State an amount sufficient to provide Tri-State’s other Members with the net present value of the amount the withdrawing Member would have contributed if it had actually fulfilled its multi-year obligations under the Member Contract over time.”) [Excerpt attached hereto as Attachment E].

[152] *See supra* note 32.

[153] Answer Testimony of William A. Collet, Colorado PUC Proceeding No. 18F-0866E, 25:19–28:4 (April 29, 2019) [Excerpt attached hereto as Attachment D].

Tri-State's proposed CTP Methodology produces punitively high exit charges that would result in a windfall to Tri-State and the remaining Utility Members. As an example, take the DMEA initial exit charge offer of $322 million. In 2018, DMEA represented approximately 3% of Tri-State's load (calculated based on sales to Utility Members). If the DMEA exit charge were extended to all Utility Members, it would result in a total "payment" of approximately $9.5 billion. By contrast, Tri-State's total liabilities on its balance sheet in 2018 was just shy of $4 billion. This would leave Tri-State—under an application of its mark to market methodology that is essentially its CTP Methodology—with approximately $5.5 billion in cash and *all of its generation and transmission assets* owned free and clear. Tri-State has not indicated that its proposed mark to market methodology would produce CTPs that would not result in an excessive windfall to Tri-State and the remaining Utility Members of Tri-State.

Finally, Tri-State will surely argue that the CTP Methodology differs from the mark to market approach previously used and seek to distinguish the Kit Carson and DMEA circumstances, crafting some narrative as to why the dramatically lower exit charges agreed to by both Tri-State and the departing Utility Member were reasonable but somehow unique. LPEA knows this from its extensive experience grappling with Tri-State in state fora. But Tri-State cannot and should not be able to divorce itself so easily from this sordid history. The mark to market methodology has been used in the past as a drawbridge to prohibit a Utility Member's exit. The fact of the matter is that despite the vaunted Contract Committee process to develop the CTP Methodology, it was a rushed and opaque process where the actual CTP Methodology was only the subject of two meetings very late in the process (i.e., March and April 2020). Further, Tri-State used the same consultant to develop the methodology that has testified on its own behalf in administrative litigation before the Colorado PUC—including the pending proceedings

initiated by LPEA and United Power. The use of the same foundational approach to produce prohibitively high exit charge calculations—indeed, exit charge amounts that have never actually been paid by any departing member given the substantially lower amounts actually paid by Kit Carson and DMEA, respectively—coupled with the conflicted and abbreviated Contract Committee "process" to develop the CTP Methodology, shows why the Commission should reject the CTP Methodology.

The Commission should also give little weight to the fact that the Board of Directors approved the CTP Methodology. While Tri-State touts "democratic member control" as one of its core principles, the reality on the ground is much different. Tri-State is governed by its Board of Directors, and each of Tri-State's 43 Utility Members elects an individual from its own Board of Directors to serve on the Tri-State Board. These individuals are often referred to as "dual directors" since they serve both on the Utility Member Board and the Tri-State Board. Tri-State characterizes this as "democratic" governance, claiming that each member system is represented at Tri-State by its dual director: one system, one vote. The reality, however, is that these dual directors are required to represent Tri-State's interest when sitting on the Tri-State Board, as Tri-State makes clear in regular fiduciary duty presentations to its Board.[154] This conflict in the Tri-State governance model is on display here, where dual directors support a Board resolution while the very members they represent protest it. For example, Northwest Rural Public Power District's ("NRPPD") dual director (representative) on the Tri-State Board of Directors voted in favor of the resolution supporting the CTP Methodology, but NRPPD is today filing a protest of the CTP Methodology, arguing that the CTP Methodology is not just and reasonable.

[154] *See, e.g.,* Tri-State Generation and Transmission Association, Inc., "Fiduciary Duties of Cooperative Directors," (Dec. 2013) [Excerpt attached hereto as Attachment F].

Accordingly, the approval by the Board of Directors should not be construed as consent to the CTP Methodology by the Utility Members themselves.

For all these reasons, Tri-State has not demonstrated that the CTP Methodology Tariff is just and reasonable as required by the FPA.

D. The Commission Should Deny Tri-State's Request for a Waiver of the 60-Day Notice Period

The Commission should deny Tri-State's request for a waiver of the 60-day notice requirement[155] (as well as FPA section 205d(d)'s 60-day notice period for changes in rates[156]) because Tri-State has failed to make any showing of good cause for the waiver. The Commission does not waive its notice requirement unless the applicant shows good cause for the requested waiver.[157]

The Commission generally does not find good cause to waive the notice period for rate changes except in the following circumstances: (1) uncontested filings that merely change non-rate terms, (2) filings that reduce rates and charges, or (3) filings that may increase rates but are prescribed through contract.[158] None of these conditions is met here. First, the CTP Filing is vigorously protested by multiple parties and constitutes a change to actual rates. Next, Tri-State's CTP Filing represents a rate *increase* over the results of its previous *ad hoc* practice for establishing exit charges, as explained above in Part IV.C.2.[159] Under the proposed CTP

[155] *See* 18 C.F.R. § 35.3(a)(1).

[156] 16 U.S.C. § 824d(d) (applying to changes in rates).

[157] 16 U.S.C. § 824d(d); 18 C.F.R. § 35.11; *see Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338-39, *reh'g denied*, 61 FERC ¶ 61,089, at 61,354 n.3 (1992).

[158] *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,338-39.

[159] Tri-State has not attempted to demonstrate that the CTP Methodology would reduce rates of its members. In fact, the opposite is true because Tri-State has explained that its method is meant to realize the same value of its WESCs that would have occurred had the member not exited. *See* CTP Filing,

Methodology, the exit charges for Kit Carson and DMEA would be substantially higher than the actual exit charges Tri-State negotiated with them, and Utility Members seeking to terminate their WESCs would pay substantially more under the CTP Methodology than what was paid by Kit Carson and DMEA to terminate their respective WESCs. Finally, Tri-State's unilateral filing does not implement an increase that is prescribed by a contract requirement.

For other rate changes the Commission requires "a strong showing of good cause" to waive the notice requirement.[160] Because Tri-State's filing falls into this category, it must make a strong showing of good cause to receive a waiver. Yet Tri-State neither acknowledged that a strong showing of good cause would be required, nor attempted to make such a showing. Furthermore, the Commission does not grant a waiver of the prior notice requirement for contested filings, even if the filings do not have an impact on rates.[161] Accordingly, the Commission should deny Tri-State's requested waiver as it has done in other instances where the filings at issue were contested.[162]

Alternatively, if the Commission concludes that the CTP Methodology Tariff constitutes an initial rate, Tri-State still has not shown good cause to waive the notice period. For initial rate filings, the Commission "balances the requirement that utilities promptly file their rates as embodied in the Federal Power Act and the need of utilities to transact business on short

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Docket No. ER20-1559, Exhibit No. TS-PLB (Prepared Direct Testimony of Patrick L. Bridges), at 22:15-17 (explaining that Tri-State's CTP is meant to reflect full payment under the WESC).

[160] *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 FERC ¶ 61,139, at 61,975 (1993) (citing *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339). Such rate changes include rate increases that do not implement a contract requirement.

[161] *PacifiCorp*, 131 FERC ¶ 61,043, at P 25 (2010) (denying waiver of 60-day notice period because the filing was contested), *reh'g denied*, 134 FERC ¶ 61,099 (2011); *Michigan South Central Power Agency v. Michigan Electric Transmission Co.*, 157 FERC ¶ 61,176 at P 5 (2016).

[162] *See, e.g., ISO New England, Inc.*, 162 FERC ¶ 61,058, at P 67 (2018) (denying waiver of 60-day notice period where filing parties failed to provide good cause and filing was contested).

notice."[163] On one side of this balancing inquiry, Tri-State delayed developing, and then filing, its CTP Methodology and Tariff. The Commission found that Tri-State became subject to FERC's jurisdiction on September 3, 2019, as Tri-State has maintained since that date.[164] In anticipation of becoming subject to the Commission's jurisdiction, Tri-State filed other tariffs with the Commission on July 23, 2019 in Docket No. ER19-2440,[165] and after those tariffs and agreements were rejected,[166] Tri-State filed hundreds of tariffs and related service agreements in December 2019 and beyond. Notwithstanding Tri-State's fervent belief that it was subject to the Commission's rate jurisdiction under the FPA, and its initiation of multiple proceedings in order to secure the Commission's jurisdiction over exit charges, Tri-State waited more than seven months after it claims it became jurisdictional (and nine months after its first set of FERC tariff filings) to file its CTP Methodology Tariff with the Commission.

Additionally, it was not unknown to Tri-State that Utility Members might seek to terminate their WESCs and exit membership. When Kit Carson reached an agreement to exit Tri-State in 2016, Tri-State could have developed an exit charge methodology to accommodate its Utility Members' needs, but it made no effort to establish a uniform exit charge methodology. Another member, DMEA, sought exit from Tri-State membership and termination of its WESC in 2017 and was forced to initiate litigation before the Colorado PUC because of Tri-State's intransigence. After Tri-State agreed to an exit charge with DMEA in 2019 and as Tri-State was preparing its initial set of tariff filings, it could have memorialized an exit charge methodology. It did not do so. When LPEA and United Power requested an indicative exit charge from Tri-

[163] *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339.

[164] *See generally* Jurisdiction Order.

[165] *See* 2019 Rejection Order at P 1.

[166] *Id.* at PP 2, 22, 25-27.

State, Tri-State could have attempted to formalize a uniform exit charge methodology. Again, it did not do so. Instead, it waited until after the original hearing dates for the Colorado PUC complaint cases were suspended[167] to establish the CTP Methodology Tariff and seek Board approval.[168] In no way can Tri-State's filing of the CTP Filing be considered prompt; nor can Tri-State's delay be excused.

Tri-State's past behavior belies any notion that it is concerned with "transact[ing] business on short notice."[169] Tri-State delayed when LPEA sought an exit charge—indeed, Tri-State has never provided one to LPEA. Tri-State then declared its "Exit Charge Moratorium" on September 4-5, 2019.[170] It was only after a hearing was scheduled before the Colorado PUC and subsequently suspended on March 13, 2020, and the Commission issued its Jurisdiction Order on March 20, 2020 that Tri-State began "working as expeditiously as practicable to submit its CTP Methodology" to the Commission.[171] Furthermore, Tri-State's (at least) three-year waiting period prior to a Utility Member being able to terminate its WESC and its membership (discussed above in Parts IV.B.2 and IV.C.1[172]) shows that Tri-State is not interested in

[167] *See* Decision No. C19-1001-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (Dec. 13, 2019). Decision No. C19-1001-I established a procedural schedule in which an evidentiary hearing would have been held March 23-27, 2020 before a Hearing Commissioner. *Id.* at ¶ 12. By order issued on March 13, 2020, the evidentiary hearing was suspended and the proceedings were returned to the PUC. *See* Decision No. R20-0175-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (Mar. 13, 2020). The complaint cases were subsequently assigned to an administrative law judge and an evidentiary hearing was scheduled for May 18-22, 2020. *See* Decision No. R20-0266-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (Apr. 16, 2020).

[168] *See* CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 4, 8.

[169] *Central Hudson Gas & Elec. Corp.*, 60 FERC ¶ 61,106, at 61,339.

[170] *See* Exit Charge Moratorium [Attached hereto as Attachment A].

[171] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 8.

[172] The notice period is an unjust and unreasonable provision, as explained above in Part IV.C.1. The notice period was not filed as part of the CTP Methodology Tariff, thereby rendering the CTP Methodology Tariff patently deficient, as explained above in Part IV.B.2.

transacting business on short notice. Moreover, denial of the requested waiver should not mean that Utility Members are precluded from exiting Tri-State. The *ad hoc*, case-by-case process employed by Tri-State up until now would continue. For LPEA and United Power, that means that their complaints filed with the Colorado PUC would be adjudicated. Tri-State attempts to claim that the Jurisdiction Order "instructed Tri-State" to submit a CTP Methodology.[173] But the Commission did nothing of the sort. The Jurisdiction Order merely recognized that without an applicable tariff on file, and approved by FERC, Tri-State was not able to "place matters regarding its exit charges before the Commission."[174]

Consideration of both the need for the prompt filing of applicable rate schedules and any need of Tri-State to transact business on short notice counsels against granting Tri-State's requested waiver of the 60-day notice period. Tri-State has given no reason why it could not have timely filed the CTP Methodology Tariff,[175] or how the 60-day notice period and suspension will prejudice any party. Accordingly, the Commission should deny Tri-State's request, as it has done in other exit charge proceedings.[176]

Moreover, the authorities Tri-State cites for support do not reflect the circumstances of this case. In *Southwest Power Pool, Inc.*, the Commission noted that the tariff filings at issue

[173] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 8.

[174] Jurisdiction Order at P 121. However, the Commission recognized in the Stated Rate / WESC Order that that Tri-State's Utility Members could file a "complaint with the Commission under FPA section 206" if they "believe that any practice by Tri-state regarding its exit charges is unjust, unreasonable, unduly discriminatory or preferential." Stated Rate / WESC Order at P 84.

[175] *See Michigan South Central Power Agency v. Michigan Electric Transmission Co.*, 157 FERC ¶ 61,176 at P 5 (2016). The Commission has found that circumstances such as extended negotiations do not excuse parties from the prior notice requirement. *Id.* (citing *Midcontinent Independent System Operator, Inc.*, 155 FERC ¶ 61,146 at P 53 (2016)).

[176] *See, e.g., Midwest Independent Transmission System Operator, Inc.*, 138 FERC ¶ 61,141 at P 26 (2012) (denying waiver of notice period for an exit charge filing when the filing party had ample notice of parties' forthcoming withdrawal).

would help clarify the tariff,[177] but Tri-State has not explained how its CTP Methodology Tariff clarifies anything when there are material provisions omitted from the Tariff itself and, as Tri-State would have it, these terms are subject to revision without Commission approval at the whim of the Tri-State Board. In *New England Power Co.*, the filing party's amendment implemented a commitment it had made in another proceeding to provide customers an option to terminate contracts early, and it allowed the customer terminating its contract to leave on its desired date.[178] Neither of those circumstances is present here. Finally, whereas LPEA protests Tri-State's filing, the Commission's orders in the two proceedings noted above did not reference any protests; and in *Avista Corp.*, the third order cited by Tri-State, the two parties to a bilateral agreement both agreed to the filed rate.[179]

For these reasons, Tri-State has not demonstrated good cause for the Commission to grant a waiver of the 60-day notice period and make the CTP Filing effective April 14, 2020.[180]

[177] 113 FERC ¶ 61,014 at P 8 (2005).

[178] 83 FERC ¶ 61,174 at 61,722 (1998).

[179] *See Avista Corp.*, Docket No. ER20-473-000 (delegated letter order, Dec. 27, 2019).

[180] Tri-State submitted the CTP Filing on April 13, 2020. However, it is unclear whether Tri-State's filing of the CTP Methodology Tariff should be deemed to have been filed on April 13, 2020. On April 17, 2020, Tri-State submitted an errata to the CTP Filing. Under FERC's regulations, an amendment to a tariff that has not become effective and upon which no Commission or delegated order has been issued will toll the notice period in FPA section 205(d) for the original filing and establish a new date on which the entire filing may become effective. *See* 18 C.F.R. § 35.17(b). For amendment filings that do not revise the tariff itself, the filing date is not automatically tolled, but such filings, like Tri-State's April 17, 2020 errata filing, are considered on an individual basis. *See Sierra Pacific Power Co.*, 141 FERC ¶ 61,266 at P 39 (2012); *Mississippi Power Co.*, 137 FERC ¶ 61,241 at P 23 (2011) (citing *Electronic Tariff Filings*, Order No. 714, 73 Fed. Reg. 57,515, at 57,524-25 at PP 80-82 (Oct. 3, 2008) (subsequent history omitted)). Accordingly, to the extent the Commission does not reject Tri-State's filing outright, the Commission should consider whether the filing date should be deemed to be April 17, 2020.

E. Tri-State's actions vis-à-vis LPEA have been unduly prejudicial and disadvantageous in violation of the FPA

Tri-State's conduct during the development of the CTP Methodology Tariff renders the CTP Methodology and Tariff unduly prejudicial and disadvantageous to LPEA, in violation of the FPA.[181] Tri-State's Bylaws, now on file with the Commission as Rate Schedule FERC No. 259, provide that a member may withdraw on equitable terms and conditions determined by its Board of Directors, provided that the withdrawing member satisfies its contractual obligations to Tri-State prior to withdrawing.[182] But the Bylaws' guarantee of a Utility Member's right to withdraw from Tri-State has been nothing more than an empty promise to LPEA. For the past year, Tri-State has evaded LPEA's request for an exit charge calculation. Tri-State has gone to great lengths—even subjecting itself to the jurisdiction of this Commission—to avoid providing LPEA a just and reasonable exit charge.

Assuming *arguendo* that the proposed CTP Methodology Tariff is a valid rate schedule that will be accepted by the Commission, the Tariff should not be applied to LPEA. LPEA formally began the process of considering withdrawal from Tri-State membership on July 2, 2019—when there was no suggestion that Tri-State was, or would become, subject to FERC's rate regulation. There was no formal process for a Utility Member to exit from Tri-State membership and terminate its WESC. As Tri-State explained in the CTP Filing, and consistent with the Tri-State Bylaws, "Tri-State previously addressed such requests on a case-by-case basis."[183] LPEA understood the nature of the *ad hoc* process and requested an exit charge calculation. Tri-State has never provided an exit charge calculation.

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[181] *See* 16 U.S.C. § 824d(b).

[182] Tri-State Rate Schedule FERC No. 259, § 4(a).

[183] CTP Filing, Docket No. ER20-1559, Transmittal Letter, at 3.

Three weeks after receiving LPEA's request, Tri-State submitted its first set of tariff filings with the Commission, declaring that Tri-State would shortly become subject to FERC's jurisdiction. Prior to the Commission acting on these filings,[184] Tri-State: (1) purported to add a non-utility member so that Tri-State was no longer exempt from FERC's jurisdiction under the FPA, and (2) approved an Exit Charge Moratorium, precluding Utility Members from seeking to withdraw from membership or to terminate their WESCs. Tri-State still refused to supply LPEA an exit charge calculation, notwithstanding the fact that LPEA had requested an exit charge calculation over two months prior to the implementation of the Exit Charge Moratorium. The Exit Charge Moratorium thereby indefinitely suspended any discussion regarding an LPEA exit charge and prevented LPEA from exercising its withdrawal rights.

Faced with Tri-State's obstinacy, and still possessing no exit charge calculation, LPEA had no recourse except to seek for the Colorado PUC to establish a just, reasonable and nondiscriminatory exit charge. Accordingly, LPEA filed its complaint with the PUC on November 5, 2019 in Proceeding No. 19F-0620E. This was consistent with the case-by-case regime for establishing exit charges that existed under the Bylaws, past practice such as where DMEA was required to file a complaint with the Colorado PUC in order for Tri-State to provide a fair and equitable exit charge to DMEA, and Colorado PUC precedent determining the PUC had jurisdiction to establish a just, reasonable, and nondiscriminatory exit charge from Tri-State.[185]

In LPEA's complaint proceeding at the Colorado PUC, LPEA has proposed an exit charge methodology and calculated a just and reasonable exit charge. Throughout that

[184] FERC ultimately rejected Tri-State's 2019 tariff filings in October 2019. *See* 2019 Rejection Order.

[185] *See* Decision No. C19-0297-I, Colorado PUC Proceeding No. 18F-0866E (mailed Apr. 1, 2019).

proceeding Tri-State refused to offer its own exit charge methodology for the Colorado PUC to consider. Although Tri-State claims that FERC has possessed exclusive jurisdiction over Utility Member exit charges since September 3, 2019, Tri-State refused to establish an exit charge methodology or to provide an exit charge calculation to LPEA, which would have been provided to the Colorado PUC.

The foregoing narrative demonstrates that Tri-State has done everything in its power to sidestep its responsibilities and to unilaterally abrogate LPEA's rights to withdraw from membership in Tri-State and to terminate its WESC. To the extent Tri-State was a non-exempt public utility subject to the Commission's jurisdiction as of September 3, 2019, Tri-State's refusal to provide LPEA an exit charge calculation, its decision to impose an Exit Charge Moratorium, and its failure to establish an exit charge methodology were unduly prejudicial and disadvantageous actions that violated the FPA. Because the process that led to the establishment of the CTP Methodology Tariff were unduly prejudicial and disadvantageous to LPEA, it would be unjust, unreasonable, and unlawful for the CTP Methodology Tariff to apply to LPEA.

Furthermore, the CTP Methodology Tariff should not apply to LPEA because LPEA commenced the process of seeking an exit charge calculation prior to the (as-yet undetermined) effectiveness of the CTP Methodology—regardless of if or when Tri-State may have become subject to the Commission's rate jurisdiction. In the Jurisdiction Order, the Commission found that it has jurisdiction over the determination of Tri-State's exit charges, but that such jurisdiction is *not* exclusive.[186] As such, "a ruling by the Colorado PUC on those complaints would not be preempted unless and until such ruling conflicts with a Commission-approved tariff

[186] Jurisdiction Order at PP 116-121.

or agreement that establishes how Tri-State's exit charges will be calculated."[187] There is no currently-effective, Commission-approved exit charge methodology. Moreover, the CTP Methodology, through the Board Resolution, purports to impose a notice period of no less than three years on a Utility Member seeking to withdraw from Tri-State. This notice period cannot take effect until *after* the date of the Board Resolution (which has already occurred), *after* when the CEO of Tri-State implements a notice period (which is unknown), and *after* the approval of the CTP Methodology Tariff (which has yet to occur). In short, Utility Members are not yet able to trigger the CTP Methodology mechanism. It would be unduly prejudicial and disadvantageous if the filing of the CTP Methodology Tariff actually prevents LPEA from continuing to seek its exit charge calculation.

During the pendency of the CTP Filing, the *status quo ante* is preserved for the duration of the suspension period.[188] In this instance, the *ad hoc*, case-by-case process employed by Tri-State under its Bylaws (a rate schedule on file with FERC) continue and the complaints filed by LPEA and United Power with the Colorado PUC will be adjudicated. This result gives effect to LPEA's longstanding efforts (that pre-date both Tri-State's purported conversion to the Commission's jurisdiction and the filing of the CTP Methodology Tariff) to establish an exit charge while recognizing the existing lack of an effective exit charge tariff on file with the Commission.

[187] *Id.* at P 121.

[188] *See Cities of Anaheim*, 723 F.2d at 658 (citing *Kansas City Power & Light Co.*, 12 FERC ¶ 61,118 (1980)); *see also* 18 C.F.R. § 2.4(e) ("During suspension, the prior existing rate schedule continues in effect and should not be changed during suspension.").

V. CONCLUSION

WHEREFORE, for the reasons set forth above, the Commission should grant LPEA's Motion to Intervene in this proceeding and reject Tri-State's filing of its CTP Methodology Tariff; alternatively, to the extent the Commission does not reject the CTP Methodology Tariff as patently deficient or otherwise find that the Tariff is unjust, unreasonable, and unduly discriminatory and reject the Tariff outright, the Commission should find that the CTP Filing constitutes a rate change. Because the rate has not been demonstrated to be just and reasonable, and the proposed CTP Methodology Tariff may result in rates that are substantially excessive, the Commission should order a hearing and suspend the rate change for the full five-month period permitted by the FPA—so that it is not effective (or accepted for filing) until November 13, 2020[189]—and if the changed rate goes into effect before any hearing concludes, rates established under the CTP Methodology Tariff would be subject to refund.[190]

[189] 16 U.S.C. § 824d(e).

[190] *Id.*; *Cities of Anaheim*, 723 F.2d at 657-58; *Trans Bay Cable LLC*, 169 FERC ¶ 61,138 at P 28 (2019); *West Texas Utilities Co.*, 18 FERC ¶ 61,189, at 61,374-75 (1982). FERC's discretion to suspend rates is unreviewable. *Otter Tail Power Co. v. FERC*, 583 F.2d at 408.

Alternatively, if the Commission finds that the CTP Methodology Filing is an initial rate, the Commission should institute an investigation under FPA section 206 to determine a just and reasonable CTP.[191]

Respectfully submitted,

La Plata Electric Association, Inc.

By: */s/ Michael Keegan*
Raymond L. Gifford
Matthew S. Larson
Michael Keegan
Wilkinson Barker Knauer LLP
1800 M Street NW, Suite 800N
Washington, DC 20036

Its Attorneys

Dated: May 11, 2020

[191] *See* 16 U.S.C. § 824e(a); Stated Rate / WESC Order at PP 2, 80, 85.

LPEA Attachment A

Tri-State Generation and Transmission Association, Inc., Board of Directors Resolution, that “suspends the policy and practice of providing Member Systems with Make-Whole Number of Shopping Letters,” (Sept. 4-5, 2019).

RESOLUTION

WHEREAS, TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. is comprised presently of 43 Class A Member Systems and one non-utility class member; and

WHEREAS, one Member System, Kit Carson Electric Cooperative, withdrew from Tri-State in 2016 and a second Member System, Delta-Montrose Electric Association, is scheduled to withdraw from Tri-State on May 1, 2020; and

WHEREAS, in both instances Tri-State worked with the Member System seeking to withdraw by providing initial estimates of amounts that the Member System would be required to pay to meet its contractual obligations to Tri-State ("Make-Whole Number"), negotiating the final amount to be paid, and establishing equitable terms and conditions for the Member System's withdrawal from Tri-State; and

WHEREAS, in both instances Tri-State provided the Member System a "Shopping Letter" which authorized the Member System to investigate the cost of obtaining an alternative supply of power in the event that it withdrew from Tri-State; and

WHEREAS, Tri-State has established a Contract Committee to investigate and consider recommending to the Tri-State Board that Tri-State offer alternative contracts, including Partial Requirements Contracts, to its Member Systems; and

WHEREAS, additional Members Systems have requested that Tri-State provide Make-Whole Number and/or Shopping Letters in conjunction with a potential withdrawal and/or a conversion to a Partial Requirements Contract; and

WHEREAS, the Tri-State Board must consider numerous factors in establishing such equitable terms and conditions for the withdrawal of a Member System including, but not limited to, the effect of the Member System's withdrawal on the financial health and stability of Tri-State, compliance with applicable restrictions in Tri-State's various financing documents and agreements, the effect of the Member System's withdrawal on Tri-State's Class A Rate, and the avoidance of cross-subsidization among Member Systems; and

WHEREAS, the Tri-State Board must also consider contemporaneous external factors that could have a bearing on the equitable terms and conditions for the withdrawal of a Member System including, but not limited to, compliance with state statutes and regulations concerning generation resource planning and greenhouse gas emission reductions, as well as various federal environmental requirements; and

WHEREAS, these factors must also be considered, and are being considered by the Contract Committee in investigating and considering

whether to recommend that Tri-State offer alternative contracts, including Partial Requirements Contracts, to its Member Systems; and

WHEREAS, it is necessary for the Contract Committee and the Tri-State Board to consider all of the implications discussed herein before Tri-State provides additional Make-Whole Number or Shopping Letters; and

WHEREAS, it is in the best interest of Tri-State for the Contract Committee to also consider alternative methods to determine Make-Whole Number and establishing equitable terms and conditions for a Member System's withdrawal from Tri-State, should the Board agree to such withdrawal; and

WHEREAS, it would be useful to work with a consultant in considering such alternatives.

NOW, THEREFORE, BE IT RESOLVED by the Board of Directors of TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., that pursuant to Tri-State Bylaws, Article I, Section 4, the Tri-State Board hereby suspends the policy and practice of providing Member Systems with Make-Whole Number or Shopping Letters; and

BE IT FURTHER RESOLVED, that such suspension is temporary and shall continue until such time as the Contract Committee has completed its work and provided any recommendations for the Board's consideration and possible action; the Board has had the opportunity to consider and act, as appropriate, upon any such recommendations of the Contract Committee; and the Board has fully assessed the financial impacts of past, present, and potential future Member System withdrawals and/or the offering of alternative contracts, including Partial Requirements Contracts, and the implications of federal and state regulatory requirements that may have a bearing on issues related to Member System withdrawals and/ or the offering of alternative contracts, including Partial Requirements Contracts; and

BE IT FURTHER RESOLVED, that the Contract Committee shall consider alternative methods to determine Make-Whole Number and establishing equitable terms and conditions for a Member System's withdrawal from Tri-State, should the Board agree to such withdrawal, and to make recommendations to the Tri-State Board, and that the Contract Committee shall have the goal of making such a recommendation prior to the next Tri-State Annual Meeting in April, 2020; and

BE IT FURTHER RESOLVED, that the Chief Executive Officer shall hire a consultant to assist the Contract Committee and the Tri-State Board in considering these issues; and

BE IT FURTHER RESOLVED, that the Board shall periodically report to the membership on the status of its assessment of the implications of Member System withdrawals.

CERTIFICATE

I hereby certify that I am the Secretary of TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., and that the foregoing is a true and correct copy of a Resolution adopted by the Board of Directors of TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC. at its regular meeting held September 4-5, 2019.

(CORPORATE SEAL)

Secretary

LPEA Attachment B

B-1: LPEA and United Power's Highly Confidential Joint Rule 1101(f) Notice and Request to Declare Initial DMEA Exit Charge Public, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (Apr. 27, 2020).

B-2: LPEA and United Power's Joint Rule 1101(f)(III) Filing Requesting an Order Declaring Initial DMEA Exit Charge Public, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (May 8, 2020).

B-3: Tri-State Generation and Transmission Association's Response to LPEA and United Power's Highly Confidential Joint Rule 1101(f) Notice and Request to Declare Initial DMEA Exit Charge Public, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (May 8, 2020).

B-4: Decision No. R20-0357-I, Colorado PUC Proceeding Nos. 19F-0620E, 19F-0621E (May 8, 2020).

NOTICE OF CONFIDENTIALITY:
A PORTION OF THIS DOCUMENT HAS BEEN FILED UNDER SEAL
Highly Confidential Material: Page 3

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

*** * * * ***

LA PLATA ELECTRIC ASSOCIATION, INC.,	)	
COMPLAINANT,	)	
V.	)	**PROCEEDING NO. 19F-0620E**
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
RESPONDENT.	)	
UNITED POWER, INC.,	)	
COMPLAINANT,	)	
V.	)	**PROCEEDING NO. 19F-0621E**
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
RESPONDENT.	)	

LPEA AND UNITED POWER'S HIGHLY CONFIDENTIAL JOINT RULE 1101(f) NOTICE AND REQUEST TO DECLARE INITIAL DMEA EXIT CHARGE PUBLIC

Pursuant to Colorado Public Utilities Commission (Commission) Rules of Practice and Procedure 1101(f), La Plata Electric Association, Inc. (LPEA) and United Power, Inc. (United Power) file this notice and request that the Commission declare that Tri-State Generation and Transmission Association, Inc.'s (Tri-State's) initial Mark-to-Market exit charge offered to Delta-Montrose Electric Association (DMEA) may be included in the public record.

RULE 1101(f)(I) CONFERRAL

1. Counsel for LPEA and United Power have conferred with counsel for Tri-State in keeping with Rules 1101(f)(I),[1] and are authorized to state that Tri-State opposes the requested relief.

BACKGROUND

2. On April 13, 2020, Tri-State filed an exit charge methodology tariff with the Federal Energy Regulatory Commission (FERC), with a requested effective date of April 14, 2020 and a request for expedited consideration by FERC.[2] Tri-State refers to its exit charge methodology as a "Contract Termination Payment" formula (CTP). Tri-State's CTP tariff filing attempts to bind all future Tri-State exit charges to Tri-State's so-called "Mark-to-Market" methodology.[3]

3. Tri-State's historic exercise of its "Mark-to-Market" methodology, however, demonstrates just how unfair and unreasonable this approach is. For instance, when Kit Carson Electric Cooperative (Kit Carson) sought to withdraw from Tri-State, Tri-State's initial Mark-to-

[1] Rule 1101(f)(I) ("A person seeking to challenge a claim of confidentiality shall first contact counsel for the providing person and attempt to resolve any differences by stipulation.").

[2] Tri-State Generation and Transmission Association, Inc. Initial Filing of Rate Schedule FERC No. 281 (Contract Termination Payment Methodology), FERC Docket No. ER20-1559-000 (filed Apr. 13, 2020), https://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=15508957.

[3] The Attachment to the Tri-State Board Resolution that adopts the CTP Formula describes it as a "mark to market formula," and it follows the same methodological approach that Tri-State advocated the Commission adopt in calculating a withdrawal charge for DMEA in 2019, in Proceeding No. 18F-0866E.

Market exit charge figure to Kit Carson totaled $137 million.[4] Kit Carson ultimately reached an agreement with Tri-State to withdraw for $37.5 million—a figure Tri-State described as "fair and equitable" and "protect[ing] the interests of all [Tri-State's remaining] members."[5]

4. This $100 million difference between what Tri-State initially calculated, and what Tri-State eventually declared to be fair to the remaining non-exiting members, is not unique. Tri-State similarly initially provided DMEA an extremely inflated Mark-to-Market exit charge of $322 million (Initial DMEA Exit Charge)—which Tri-State currently wrongly claims must remain confidential[6]—before ultimately agreeing to a fair DMEA exit charge of $62.5 million. The Initial DMEA Exit Charge is the focus of this notice.

[4] *See, e.g.*, J.R. Logan, *Taos Electric Co-Op Says Tri-State Offer 'Insulting'*, TAOS NEWS (Jan. 14, 2015, 7:15 PM), https://www.taosnews.com/stories/taos-electric-co-op-says-tri-state-offer-insulting,34357 ("Kit Carson Electric Cooperative is officially seeking another power supplier after being told it would cost $137 million to get out of its existing contract.").

[5] *Tri-State and Kit Carson Electric Cooperative Enter Into Membership Withdrawal Agreement*, TRI-STATE GENERATION AND TRANSMISSION ASS'N, INC. (June 27, 2016), https://www.tristategt.org/tri-state-and-kit-carson-electric-cooperative-enter-membership-withdrawal-agreement.

[6] The Initial DMEA Exit Charge was actually treated as highly confidential in the DMEA exit charge proceeding, but only because DMEA, out of an abundance of caution, filed a motion for extraordinary protection (*i.e.*, highly confidential treatment) of that figure when it filed its complaint. DMEA did so only to ensure that the Initial DMEA Exit Charge was protected at that time, as Tri-State claimed that figure to be confidential. In that motion, however, DMEA stated that it believed that the Initial DMEA Exit Charge should likely not be considered confidential, and reserved the right to challenge Tri-State's assertion of confidentiality at a later time in the proceeding. Because that proceeding was settled, the question of whether the Initial DMEA Exit Charge was entitled to confidential treatment was not further considered, let alone resolved. Here, LPEA and United Power ask that the Commission resolve this issue. Put simply, there is no basis now, if ever there was one, for Tri-State to assert that an exit charge figure it provided to DMEA in 2017, now superseded by an agreed exit charge of $62.5 million, must remain confidential. *See generally* Unopposed Motion of Delta-Montrose Electric Association for Extraordinary Protection of Highly Confidential Information, Proceeding No. 18F-0866E, ¶ 5 (filed Feb. 4, 2019) ("DMEA notes it is aware of inadvertent disclosures of this exit charge figure by Tri-State during a July 10, 2018 meeting attended by third parties, in an email to all Tri-State member system managers, and in an email to La Plata Electric Association. DMEA believes that as a result of these disclosures this exit charge figure may no longer be confidential, let alone highly confidential, and therefore reserves the right to assert that this exit charge figure should be deemed non-confidential information in this proceeding. Nevertheless, DMEA files this Motion to initially obtain a protective order for the exit charge so that DMEA may include this exit charge figure in the highly confidential version of the DMEA Response being filed today. DMEA will also file today on a standalone basis a highly confidential version of Attachment L to its Complaint, which includes the exit charge, and is referenced in DMEA's Response.").

REQUEST FOR DECLARATION THAT INITIAL TRI-STATE EXIT CHARGE OFFERED TO DMEA IS NOT CONFIDENTIAL

5. Tri-State claims the Initial DMEA Exit Charge is highly confidential. However, this figure can no longer be considered highly confidential (if it very truly was), or even confidential. Given the final, actual DMEA exit charge number is now public by Tri-State's own hand,[7] there is no reason (outside of hiding from FERC and the general public evidence of Tri-State's bullying tactics) that Tri-State's bloated initial Mark-to-Market exit charge to DMEA should remain under a protective order. This is especially true given that Tri-State now seeks to bind all member cooperatives to this unfair methodology through its CTP tariff filing with FERC, utilizing the same Mark-to-Market methodology that produced the Initial DMEA Exit Charge that Tri-State now seeks to hide.

6. Rule 1101(f) "establishes the procedure for the expeditious handling of a challenge to the claim by a person that information is confidential."[8] Rule 1101(f)(II) specifically requires, "[i]n the event the parties cannot agree as to the character of the information challenged"—as in the case of the Initial DMEA Exit Charge—that "any person challenging a claim of confidentiality shall do so by advising all parties and the Commission, in writing, that it deems information non-confidential."[9] LPEA and United Power accordingly challenge the confidentiality of the Initial DMEA Exit Charge in accordance with Rule 1101(f). Nothing about the Initial DMEA Exit Charge can be considered confidential. It was produced by the same Mark-to-Market methodology

[7] *The Delta-Montrose Electric Association Will Terminate Its Membership in Tri-State on June 30, 2020*, TRI-STATE (Apr. 10, 2020), https://www.tristategt.org/tri-state-dmea-enter-membership-withdrawal-agreement.

[8] 4 CCR 723-1-1101(f).

[9] 4 CCR 723-1-1101(f)(II). Subsequently, "[t]he person claiming confidentiality shall, within ten days of the notice required by subparagraph (II) of this paragraph, file an appropriate pleading stating grounds upon which the challenged information is claimed to be confidential. The challenging person shall have ten days to respond to the pleading. In the event the claiming person fails to file the required pleading stating grounds for treating the challenged information as confidential within ten days, the Commission may enter a decision that the challenged information may be included in the public record or subject to modified protections." 4 CCR 723-1-1101(f)(III).

that Tri-State has now filed as a *public tariff* at FERC. And it is an *initial* exit charge that no longer has any meaning or currency in the relationship between DMEA and Tri-State, given the final, agreed DMEA exit charge figure of $62.5 million is now public.

7. Manifestly, the only reason Tri-State seeks to prevent public disclosure of the Initial DMEA Exit Charge is because, just as was the case with Kit Carson, Tri-State's initial Mark-to-Market exit charge to DMEA ended up being many multiples greater than the ultimate exit charge of $62.5 million that Tri-State agreed was fair to both DMEA and Tri-State's remaining members. Tri-State may seek to avoid the embarrassment associated with having its bullying tactics so plainly laid out for the public—including Tri-State's own members. But embarrassment is not a basis for confidential or highly confidential treatment—or, for that matter, any other treatment—under the Commission's rules.

REQUEST FOR RELIEF

WHEREFORE, LPEA and United Power respectfully request that the Commission issue an order declaring that the initial Mark-to-Market exit charge offered to DMEA is not confidential, and may be included in the public record.

DATED this 27th day of April, 2020.

Respectfully submitted,

By: *__/s/ Matthew S. Larson__*

Raymond L. Gifford, #21853
Matthew S. Larson, #41305
Ethan D. Jeans, #49057
Philip J. Roselli, #20963
Wilkinson Barker Knauer LLP
1755 Blake Street, Suite 470
Denver, CO 80202
Telephone: 303.626.2350
Fax: 303.626.2351
E-mail: rgifford@wbklaw.com
mlarson@wbklaw.com
ejeans@wbklaw.com
proselli@wbklaw.com

ATTORNEYS FOR LA PLATA ELECTRIC ASSOCIATION, INC.

By: *__/s/ Peter W. Herzog III__*

Michael L. O'Donnell, #10273
Peter W. Herzog III, #19PHV5739
Joel S. Neckers, #40886
Marissa S. Ronk, #49181
Hays C. Doan, #53658
Wheeler Trigg O'Donnell LLP
370 17th Street, Suite 4500
Denver, CO 80202
Telephone: 303.244.1800
Fax: 303.244.1879
Email: odonnell@wtotrial.com
pherzog@wtotrial.com
neckers@wtotrial.com
ronk@wtotrial.com
doan@wtotrial.com

Jenna L. McGrath, #19PHV6004
Charles A. Patrizia, #19PHV6005
Paul Hastings, LLP
875 15th Street, N.W.
Washington, D.C. 20005
Telephone: 202.551.1918
Email: jennamcgrath@paulhastings.com
charlespatrizia@paulhastings.com

ATTORNEYS FOR UNITED POWER, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of April, 2020, a copy of the foregoing **LPEA AND UNITED POWER'S HIGHLY CONFIDENTIAL JOINT RULE 1101(f) NOTICE AND REQUEST TO DECLARE INITIAL DMEA EXIT CHARGE PUBLIC** was filed with the Colorado Public Utilities Commission via e-filing and a copy was served via e-mail to the following:

Name	Email	Party
Kenneth V. Reif	kreif@tristategt.org	Tri-State
Rick L. Gordon	rick.gordon@tristategt.org	Tri-State
Timothy B. Woolley	twoolley@tristategt.org	Tri-State
Thomas J. Dougherty	tdougherty@lrrc.com	Tri-State
Dietrich C. Hoefner	dhoefner@lrrc.com	Tri-State
Jennifer Buchholz	jbuchholz@lrrc.com	Tri-State
James M. Costan	james.costan@dentons.com	Tri-State
Dean Hubbuck	dhubbuck@UnitedPower.com	United Power
Bryant Robbins	brobbins@UnitedPower.com	United Power
Peter W. Herzog III	pherzog@wtotrial.com	United Power
Michael L. O'Donnell	odonnell@wtotrial.com	United Power
Joel S. Neckers	neckers@wtotrial.com	United Power
Marissa S. Ronk	ronk@wtotrial.com	United Power
Hays C. Doan	doan@wtotrial.com	United Power
Thomas J. Palazzolo	palazzolo@wtotrial.com	United Power
Debra Hindin-King	hindinking@wtotrial.com	United Power
Kecia LiCausi	licausi@wtotrial.com	United Power
Jenna L. McGrath	jennamcgrath@paulhastings.com	United Power
Charles A. Patrizia	charlespatrizia@paulhastings.com	United Power
Jessica Matlock	jmatlock@lpea.coop	LPEA
Raymond L. Gifford	rgifford@wbklaw.com	LPEA
Matthew S. Larson	mlarson@wbklaw.com	LPEA
Ethan D. Jeans	ejeans@wbklaw.com	LPEA
Michael D. Miller	mmiller@wbklaw.com	LPEA
Philip J. Roselli	proselli@wbklaw.com	LPEA
Kristin Lewis	klewis@wbklaw.com	LPEA

By: */s/ Kristin Lewis*

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

*** * * * ***

LA PLATA ELECTRIC ASSOCIATION, INC.,	)	
	)	
COMPLAINANT,	)	
	)	
V.	)	**PROCEEDING NO. 19F-0620E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	
	)	
UNITED POWER, INC.,	)	
	)	
COMPLAINANT,	)	
	)	
V.	)	**PROCEEDING NO. 19F-0621E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	

LPEA AND UNITED POWER'S JOINT RULE 1101(f)(III) FILING REQUESTING AN ORDER DECLARING INITIAL DMEA EXIT CHARGE PUBLIC

Pursuant to Colorado Public Utilities Commission (Commission) Rules of Practice and Procedure 1101(f)(III), La Plata Electric Association, Inc. (LPEA) and United Power, Inc. (United Power) request that the Commission declare that Tri-State Generation and Transmission

Association, Inc.'s (Tri-State's) initial Mark-to-Market exit charge offered to Delta-Montrose Electric Association (DMEA) may be included in the public record.

BACKGROUND AND RULE 1101(f)(III) REQUEST

1. On April 27, 2020, LPEA and United Power filed and served a Joint Rule 1101(f) Notice and Request to Declare Initial DMEA Exit Charge Public.

2. Pursuant to the Rule 1101(f) process for "the expeditious handling" of confidentiality challenges, the person challenging confidentiality makes a notice filing pursuant to Rule 1101(f)(II).

3. Rule 1101(f)(III) provides as follows:

> *The person claiming confidentiality shall, within ten days of the notice required by subparagraph (II) of this paragraph, file an appropriate pleading stating grounds upon which the challenged information is claimed to be confidential*. The challenging person shall have ten days to respond to the pleading. In the event the claiming person fails to file the required pleading stating grounds for treating the challenged information as confidential within ten days, the Commission may enter a decision that the challenged information may be included in the public record or subject to modified protections. (emphasis added)

4. The 10-day response time expired yesterday, May 7, 2020, and Tri-State did not provide any "appropriate pleading stating grounds upon which the challenged information is claimed to be confidential." Further, Tri-State did not serve LPEA and United Power such a pleading by email, correspond to indicate that Tri-State had encountered technical difficulty in attempting to file such a pleading using the Commission's e-filing system, or otherwise correspond in any way in reference to this matter.

5. Because the person claiming confidentiality has "fail[ed] to file the required pleading stating grounds for treating the challenged information as confidential within ten days," at this point "the Commission may enter a decision that the challenged information may be included in the public record or subject to modified protections."

6. LPEA and United Power therefore request that the Administrative Law Judge (ALJ) enter an order as soon as possible deeming the initial DMEA exit charge public. Tri-State refused the informal request of LPEA and United Power to consider the information public, forcing LPEA and United Power to prepare a detailed Rule 1101(f) notice. Tri-State said it would oppose the request, but did not file any opposition, and Tri-State should not be permitted to game the rules to keep this information under seal any longer.

7. This matter is particularly time sensitive as the hearing in this matter commences in ten days, on May 18, 2020, and the parties need to understand what exhibits remain, if any, that will require confidential treatment at the hearing.

DATED this 8th day of May, 2020.

Respectfully submitted,

By: */s/ Matthew S. Larson*

Raymond L. Gifford, #21853
Matthew S. Larson, #41305
Ethan D. Jeans, #49057
Philip J. Roselli, #20963
Wilkinson Barker Knauer LLP
1755 Blake Street, Suite 470
Denver, CO 80202
Telephone: 303.626.2350
Fax: 303.626.2351
E-mail: rgifford@wbklaw.com
mlarson@wbklaw.com
ejeans@wbklaw.com
proselli@wbklaw.com

ATTORNEYS FOR LA PLATA ELECTRIC ASSOCIATION, INC.

By: */s/ Peter W. Herzog III*

Michael L. O'Donnell, #10273
Peter W. Herzog III, #19PHV5739
Joel S. Neckers, #40886
Marissa S. Ronk, #49181
Hays C. Doan, #53658
Wheeler Trigg O'Donnell LLP
370 17th Street, Suite 4500
Denver, CO 80202
Telephone: 303.244.1800
Fax: 303.244.1879
Email: odonnell@wtotrial.com
pherzog@wtotrial.com
neckers@wtotrial.com
ronk@wtotrial.com
doan@wtotrial.com

Jenna L. McGrath, #19PHV6004
Charles A. Patrizia, #19PHV6005
Paul Hastings LLP
875 15th Street, N.W.
Washington, D.C. 20005
Telephone: 202.551.1918
Email: jennamcgrath@paulhastings.com
charlespatrizia@paulhastings.com

ATTORNEYS FOR UNITED POWER, INC.

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of May, 2020, a copy of the foregoing **LPEA AND UNITED POWER'S JOINT RULE 1101(f)(III) FILING REQUESTING AN ORDER DECLARING INITIAL DMEA EXIT CHARGE PUBLIC** was filed with the Colorado Public Utilities Commission via e-filing and a copy was served via e-mail to the following:

Name	Email	Party
Kenneth V. Reif	kreif@tristategt.org	Tri-State
Rick L. Gordon	rick.gordon@tristategt.org	Tri-State
Timothy B. Woolley	twoolley@tristategt.org	Tri-State
Thomas J. Dougherty	tdougherty@lrrc.com	Tri-State
Dietrich C. Hoefner	dhoefner@lrrc.com	Tri-State
Jennifer Buchholz	jbuchholz@lrrc.com	Tri-State
James M. Costan	james.costan@dentons.com	Tri-State
Dean Hubbuck	dhubbuck@UnitedPower.com	United Power
Bryant Robbins	brobbins@UnitedPower.com	United Power
Peter W. Herzog III	pherzog@wtotrial.com	United Power
Michael L. O'Donnell	odonnell@wtotrial.com	United Power
Joel S. Neckers	neckers@wtotrial.com	United Power
Marissa S. Ronk	ronk@wtotrial.com	United Power
Hays C. Doan	doan@wtotrial.com	United Power
Thomas J. Palazzolo	palazzolo@wtotrial.com	United Power
Debra Hindin-King	hindinking@wtotrial.com	United Power
Kecia LiCausi	licausi@wtotrial.com	United Power
Jenna L. McGrath	jennamcgrath@paulhastings.com	United Power
Charles A. Patrizia	charlespatrizia@paulhastings.com	United Power
Jessica Matlock	jmatlock@lpea.coop	LPEA
Raymond L. Gifford	rgifford@wbklaw.com	LPEA
Matthew S. Larson	mlarson@wbklaw.com	LPEA
Ethan D. Jeans	ejeans@wbklaw.com	LPEA
Michael D. Miller	mmiller@wbklaw.com	LPEA
Philip J. Roselli	proselli@wbklaw.com	LPEA
Kristin Lewis	klewis@wbklaw.com	LPEA

By: */s/ Kristin Lewis*

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0620E

LA PLATA ELECTRIC ASSOCIATION, INC.,

COMPLAINANT,

v.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

PROCEEDING NO. 19F-0621E

UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION'S RESPONSE TO LPEA AND UNITED POWER'S HIGHLY CONFIDENTIAL JOINT RULE 1101(f) NOTICE AND REQUEST TO DECLARE INITIAL DMEA EXIT CHARGE PUBLIC

Respondent Tri-State Generation and Transmission Association, Inc. ("Tri-State"), by and through its undersigned legal counsel, pursuant to Commission Rule of Practice and Procedure 1101(f), hereby responds to Complainants' Joint Rule 1101(f) Notice.

1. Tri-State disagrees with Complainants' characterization of Tri-State's historic use of the Mark-to-Market methodology and its relationship to the Contract Termination Payment methodology recently approved by Tri-State's Board of Directors. Tri-State further disagrees with Complainants' characterization of Tri-State's interest in maintaining as confidential certain information concerning individual Members.

2. Notwithstanding such disagreement, under the present circumstances of Delta-Montrose Electric Association, Inc.'s withdrawal from Tri-State, Tri-State no longer requests highly confidential or confidential treatment for the Initial DMEA Exit Charge.

Submitted this 8th day of May, 2020.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Thomas J. Dougherty
Thomas J. Dougherty, #30954
tdougherty@lrrc.com
Frederick J. Baumann, #12156
fbaumann@lrrc.com
Kenneth F. Rossman, #29249
krossman@lrrc.com
Douglas B. Tumminello, #27523
dtumminello@lrrc.com
1200 17th Street, Suite 3000
Denver, CO 80202
T: (303) 623-9000
F: (303) 623-9222

Attorneys for Respondent Tri-State Generation and Transmission Association, Inc.

Decision No. R20-0357-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19F-0620E

LA PLATA ELECTRIC ASSOCIATION, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

PROCEEDING NO. 19F-0621E

UNITED POWER, INC.,

COMPLAINANT,

V.

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

RESPONDENT.

INTERIM DECISION OF ADMINISTRATIVE LAW JUDGE ROBERT I. GARVEY GRANTING JOINT NOTICE AND REQUEST TO DECLARE INITIAL DMEA EXIT CHARGE PUBLIC

Mailed Date: May 8, 2020

TABLE OF CONTENTS

I. SUMMARY

1. La Plata Electric Association, Inc. and United Power, Inc. (United Power) (collectively, Complainants) filed these formal complaints against Tri-State Generation and Transmission Association, Inc. (Tri-State) on November 5 and 6, 2019, respectively, requesting that this Commission determine a just, reasonable, and non-discriminatory exit charge for Complainants.

2. The procedural history of this proceeding is set out in previous Decisions and is repeated here as necessary to put this Decision in context.

3. On November 25, 2019, by Decision No. C19-0955-I, the Commission consolidated the complaints in Proceeding Nos. 19F-0620E and 19F-0621E, designated Commissioner Frances Koncilja as the Hearing Commissioner, and required the parties to file a proposed procedural schedule by December 6, 2019.

4. On December 19, 2020, by Decision No. R19-1001-I, Hearing Commission Koncilja adopted a procedural schedule which included an evidentiary hearing from March 23 to 27, 2020.

5. Commissioner Koncilja's term expired in January 2020. She was asked and agreed to continue to serve until a new commissioner was appointed and confirmed in her stead. A new Commissioner was sworn in on March 13, 2020.

6. On March 13, 2020, by Decision No. R20-0175-I, the evidentiary hearing in this proceeding, scheduled for March 23 to March 27, 2020, was suspended and the proceeding was returned to the Commission *en banc.*

7. On March 23, 2020, United Power filed its Notice of After-Decided Authority and Request for Video or Telephonic Status Conference.

8. On March 26, 2020, by Decision No. C20-0201-I, the Commission referred the matter to an Administrative Law Judge.

9. On April 3, 2020, by Decision No. R20-0218-I, a status conference was scheduled for April 14, 2020.

10. At the status conference on April 14, 2020, an evidentiary hearing was scheduled from May18 through May 22, 2020.

11. On April 27, 2020, Complainants filed their Joint Rule 1101(f) Notice and Request to Declare Initial DMEA Exit Charge Public (Notice and Request).

12. On May 8, 2020, Tri-State filed its Response in Opposition to Complainants' Notice and Request (Response).

II. RULE 1101(F) NOTICE AND REQUEST TO DECLARE INITIAL DMEA EXIT CHARGE PUBLIC, COMPLAINANTS' ARGUMENT

13. In its Notice and Request, Complainants request that the Commission declare that the initial Mark-to-Market exit charge offered by Tri-State to Delta-Montrose Electric Association (DMEA) (Initial DMEA Exit Charge) is not highly confidential and may be included in the public record in this proceeding.

14. Complainants state that Tri-State's April 13, 2020 exit charge methodology tariff filing with the Federal Energy Regulatory Commission (FERC) attempts to bind all future exit

charges to Tri-State's Mark-to-Market methodology. Complaints argue that because the Initial DMEA Exit Charge was produced utilizing the same Mark-to-Market methodology that Tri-State has now filed as a public tariff at FERC, the Initial DMEA Exit Charge cannot be considered confidential.

15. Complainants further assert that the Initial DMEA Exit Charge should no longer be considered confidential given that the final, actual DMEA exit charge number is now public as part of the settlement in Proceeding No. 18F-0866E.

16. Finally, Complainants state that in Proceeding No. 18F-0866E, the Initial DMEA Exit Charge was only treated as highly confidential out of an abundance of caution; however, that proceeding settled and Tri-State's claim of confidentiality was never challenged, let alone resolved. Complainants also argue Tri-State has no basis to assert that the Initial DMEA Exit Charge must remain confidential, citing the extraordinary protection motion filed in Proceeding No. 18F-0866E, in which DMEA noted specific "inadvertent disclosures of this exit charge figure by Tri-State."[1]

A. Tri-State's Argument

17. In its Response, Tri-State states it no longer requests highly confidential or confidential treatment for the Initial DMEA Exit Charge.

B. Discussion

18. Rule 1101(f) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, "establishes the procedure for the expeditious handling of a challenge to the claim by a person that information is confidential." It further provides that if an

[1] Notice and Request at footnote 6.

agreement cannot be reached by the parties, the party challenging a claim of confidentiality shall file a notice identifying the challenged information. Within ten days, the party asserting the challenged information is confidential shall make a filing stating grounds to support its claim of confidentiality.

19. Here, since Tri-State no longer requests that the Initial DMEA Exit Charge be treated as highly confidential or confidential it shall no longer be given such treatment and may be included in the public record in this proceeding.

20. Complainants' Request to declare Tri-State's initial Mark-to-Market exit charge offered to DMEA public will be granted.

III. ORDER

A. It Is Ordered That:

1. The Joint Rule 1101(f) Notice and Request to Declare Initial DMEA Exit Charge Public, filed by La Plata Electric Association, Inc. and United Power, Inc. on April 27, 2020, is granted.

2. This Decision is effective immediately.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

Doug Dean,
Director

LPEA Attachment C

Excerpt from:
Deposition of Mike McInnes, Colorado PUC Proceeding No. 18F-0866E (May 22, 2019).

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Case No. 18F-0866E

DEPOSITION OF MICHAEL S. McINNES
May 22, 2019

DELTA-MONTROSE ELECTRIC ASSOCIATION,
Complainant,
v.
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,

Respondent.

PURSUANT TO NOTICE, the deposition of MICHAEL S. McINNES was taken on behalf of the Complainant at 1200 17th Street, Suite 3000, Denver, Colorado 80202, on May 22, 2019, at 8:59 a.m., before Lisa B. Kelly, Registered Professional Reporter, Certified Realtime Reporter, and Notary Public within Colorado.

Page 2

A P P E A R A N C E S

For the Complainant:
MICHAEL L. O'DONNELL, ESQ.
Wheeler Trigg O'Donnell, LLP
370 17th Street
Suite 4500
Denver, Colorado 80202

For the Respondent:
THOMAS J. DOUGHERTY, ESQ.
Lewis Roca Rothgerber Christie, LLP
1200 17th Street
Suite 3000
Denver, Colorado 80202

Also Present:
Jim Heneghan

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I N D E X

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would be very specific.
Q. What was provided to the board with regard to Kit Carson's withdrawal? What information was the board provided in order to accept that exit charge proposal from the staff?
A. The results of the mark-to-market methodology and all -- all of the components of that.
Q. If mark-to-market is a snapshot in time and things are constantly changing, how can you know if they're fair?
A. Because you take that snapshot in time and you make the best projections that you can, both on load, on market pricing, financing, reduce those back to a present value. It's a shot in time.
Q. So is what's fair and equitable on the mark-to-market in 2016 could become unfair and equitable in 2020 and go back to fair and equitable in 2024?
A. If you established a number and then you would go back and look at it and try to speculate. But my experience there is you would have to have, I believe it's been referred to as a parallel universe to have the things as they were happen and things as they did happen, so I'm not sure I could make that evaluation.

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Q. What was the first proposal made by Tri-State to Kit Carson with respect to a number?
A. 115 million, 117.
Q. Does 119 million ring a bell?
A. That sounds close, yes.
Q. And did you inform Mr. Gordon or the board of that number before it was proposed --
A. No.
Q. -- to --
A. No.
Q. -- Kit Carson?
A. No.
Q. How did the staff determine that number?
A. From the mark-to-market methodology.
Q. Who performed that?
A. Brad Nebergall and his crew.
Q. Internal crew?
A. Yes.
Q. Was there any outside assistance?
A. I don't know.
Q. How did staff determine the final buyout number of 37 million?
A. After we gave them the indicative number, we entered into extensive negotiations over all of the elements of that methodology. They would argue their

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side. We would argue our side, why we saw things, and they would argue why they saw things, and ultimately we came to a conclusion.
Q. Well, what caused the buyout charge to change from 119 million to 37 million?
A. The process I just described. I gave you an example earlier where they had claimed a capacity credit. Initially, we said no, but as we evaluated that, we determined that we could reasonably do that.
Q. What cost shifts occurred to the remaining members as a result of the Kit Carson exit?
A. Well, none that I can recall because they paid an amount to leave, and I don't know that that hasn't covered their exit.
Q. What securitization of debt was lost as a result of Kit Carson's exit?
A. I don't understand the question. I'm sorry.
Q. You reviewed Mr. Nebergall's testimony?
A. Yes.
Q. And are you aware that he has said that he believes the Kit Carson exit charge was too low?
A. I recall that he said that.
Q. Okay. Do you agree or disagree with him?
A. Oh, I disagree.

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Q. Why do you disagree that the Kit Carson exit charge was too low?
A. Because those were things that we negotiated with them. We came to the conclusion -- I came to the conclusion that there was another factor involved with Kit Carson that we could take into consideration, and that's why we ultimately agreed on the capacity credit.
Q. Kit Carson's charge assumed the Clean Power Plan would be implemented?
A. Yes.
Q. And that resulting market prices would go up, correct?
A. That was a part of it.
Q. And that new generation capacity would be needed?
A. That was a part of it.
Q. Did the Kit Carson exit charge leave the remaining members of Tri-State whole?
A. I believe it did.
Q. Given the time that has passed and the assumptions used regarding the impacts of the Clean Power Plan to determine the Kit Carson exit charge, do you believe today that the Kit Carson exit charge has left the remaining members whole?

LPEA Attachment D

Excerpt from:
Answer Testimony of William A. Collet, Colorado PUC
Proceeding No. 18F-0866E (April 29, 2019).

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
	)	
COMPLAINANT,	)	
	)	
v.	)	**PROCEEDING NO. 18F-0866E**
	)	
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
	)	
RESPONDENT.	)	

ANSWER TESTIMONY AND ATTACHMENTS OF WILLIAM A. COLLET

ON BEHALF OF

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

APRIL 29, 2019

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
COMPLAINANT,	)	
v.	)	**PROCEEDING NO. 18F-0866E**
TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,	)	
RESPONDENT.	)	

ANSWER TESTIMONY AND ATTACHMENTS OF WILLIAM A. COLLET

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A. No, not directly. Each buyout calculation is unique to the departing member and can't be directly correlated by the amount of load or some other simple metric. Simply taking a Kit Carson buyout agreement number and increasing it by the difference in load does not address the unique factors relative to a Kit Carson versus a DMEA buyout calculation. When you get an initial calculation under the MTM Method for a particular member, it is unique to that member. It then must be adjusted for factors such as stranded transmission assets, special contract provisions and capacity credit values.

Q. DO YOU KNOW OF ANY COMPARABLE SITUATION WHERE THE HIGGINS APPROACH TO CALCULATING A BUYOUT AMOUNT HAS BEEN USED?

A. No, I am not aware of any situation where a liquidation analysis has been used to calculate an early termination or buyout payment amount. As I previously described, the Soyland Method combined a net equity value with a second amount that represents the present value of contributions to fixed costs through the remaining life of the contract. The Higgins analysis stops at the net equity calculation and provides no contribution to compensate the remaining members for the fixed costs through the remaining contract term.

Q. ARE YOU AWARE OF ANY SIMILAR SITUATIONS WHERE AN APPROACH LIKE TRI-STATE HAS PROPOSED HAS BEEN USED TO CALCULATE AN EARLY TERMINATION OR BUYOUT AMOUNT?

A. In researching my testimony, CA found a very similar contract buyout process that was explored by the Fort Pierce Utilities Authority (FPUA) in Florida. FPUA

is an approximately 27,000 customer municipal utility with an approximately 115 Megawatt (MW) load. FPUA contracted with a 3rd party consulting firm, WHH Enterprises (WHH), to perform an analysis on options to exit FPUA's All Requirements contract with Florida Municipal Power Agency (FMPA). The WHH analysis is provided as **Attachment WAC-2**.

WHH reviewed all competitive solicitations for bulk power supply issued by municipal electric systems in 2010 and provided the estimated prices. These prices when compared to the FPUA wholesale power cost confirmed that the existing prices from FMPA were higher than other providers.

There are essentially three ways within the contract that a municipality may withdraw from membership and modify the terms of its contract. The first is by simply providing notice of withdrawal and letting the contract expire. This process requires a 1-year notice as each October the 30-year contract renews for another year. This essentially means there are 31 years before an effective withdrawal.

The second option is a "Section 29 Immediate Withdrawal", which is a provision in the contract that allows for withdrawal (with a 3-year notice) and would require an early termination fee. This fee is a 2-part calculation. The first part is a payment which represents the pro-rata portion of the FMPA debt that the exiting municipality is responsible for at the early termination date. A calculation is performed based on the total debt of FMPA and the relative percentage of the load of the exiting member. As there is the 3-year notification period, the pro-rata share based on load is performed on both the notice date and the exit

date, and the greater number is utilized. The second part is a calculation of the present value of all additional costs, measured as the pro rata allocation of fixed O&M costs that FMPA reasonably anticipated to be incurred as a result of the withdrawing participant. The discount factor is 6%, and the term is the remaining term (from date of anticipated withdrawal) of the All Requirements Power Supply Contract. These costs are based on the assumption that FMPA was unable to make use of or sell any generating, transmission, or other resources which were anticipated to be used to supply the exiting member's load.

The third option is a Contract Rate of Delivery which allows for a member to provide a 5 year notice that they are going to exercise this option which limits their obligation to purchase capacity and energy in the future to a fixed amount. This amount is basically the current peak load of the member during the 12 months preceding the effective date less all participant owned resources or excluded resource. For this option, FPUA owned 49 MW of capacity in various generating sources, and the estimated peak load was 115 MW. This would result in a CROD of approximately 65.5 MW of capacity purchases through the remaining life of the contract.

Q. WHAT WAS THE RESULTING EARLY TERMINATION PAYMENT CALCULATED IN THE FORT PIERCE SITUATION?

A. A request was made by FPUA to calculate these costs. In 2010 the amounts were $98 million for the pro-rata allocation of debt and $207.8 million for the pro-rata allocation of future O&M costs. The exit payment total of $306 million

was viewed as unviable by FPUA staff. WHH reviewed the calculation and although didn't agree with some of the assumptions, came to the conclusion that the option is simply prohibitively expensive as it was intended to be by design.

Q. CAN YOU SUMMARIZE YOUR COMMENTS REGARDING DMEA WITNESS HIGGINS' TESTIMONY IN THIS PROCEEDING?

A. It is my opinion that the calculation of a $37.3 million to $43.7 million buyout calculation for DMEA is flawed and irreconcilable to the concept of a fair, just, and reasonable buyout calculation that is fair to the remaining members of Tri-State. There are elements of Higgins' analysis that not only validate but actually use the MTM Method for valuation purposes. Consequently, I would respectfully encourage the Commission to ignore in total the Higgins testimony and recognize that the Tri-State MTM Method is the fair, just, and reasonable approach to a DMEA buyout calculation.

III. ISSUES IMPORTANT TO THE FINANCING OF G&T COOPERATIVE ASSOCIATIONS LIKE TRI-STATE

Q. WHAT IS THE FUNCTION OF A G&T ELECTRIC COOPERATIVE ASSOCIATE LIKE TRI-STATE IN THE ELECTRIC COOPERATIVE INDUSTRY?

A. A G&T cooperative association like Tri-State is a wholesale electric supplier that acts as an aggregator of the members' distribution electric loads to provide cost effective and reliable electric power and capacity along with transmission services to satisfy the energy requirements of its member distribution

LPEA Attachment E

Excerpt from:
Answer Testimony of Patrick L. Bridges, Colorado PUC
Proceeding No. 18F-0866E (April 29, 2019).

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
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	)	
RESPONDENT.	)	

ANSWER TESTIMONY AND ATTACHMENTS OF PATRICK L. BRIDGES

ON BEHALF OF

TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.

APRIL 29, 2019

**BEFORE THE PUBLIC UTILITIES COMMISSION
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DELTA-MONTROSE ELECTRIC ASSOCIATION,	)	
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RESPONDENT.	)	

ANSWER TESTIMONY AND ATTACHMENTS OF PATRICK L. BRIDGES

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The amount that Mr. Higgins has included for long-term debt is indeed the book value of long-term debt shown on our 2018 SEC Form 10-K. However, this is not the amount that would be necessary in order to pay off all of the debt immediately. Each series of debt has different early payment terms and most require a significant premium to be paid in order to extinguish the debt prior to its maturity date. Ignoring this fact understates the exit charge – even if Mr. Higgins' flawed premise is accepted.

Q: DO YOU HAVE ANY FINAL COMMENTS REGARDING MR. HIGGINS RECOMMENDATION?

A: Yes, I think that it is interesting to note how Mr. Higgins has "valued" Tri-State's generation assets as well as its contract with Basin and our contracts to purchase renewable energy from various wind and solar projects. In these cases, he has compared the cost that he projects Tri-State will incur to operate its generating assets or to pay under these various purchase power contracts to the market price of power at Four Corners (see Attachments KCH-3, KCH-4 and KCH-5). He then calculates the difference in Tri-State's cost and the "market" cost for each year over the term of the assets or contracts, and applied a 5% discount rate to each annual amount, thereby determining a net present value of each contract.

This valuation analysis that Mr. Higgins suggest for our generation assets, the Basin contract, and the renewable contracts is a "mark-to-market" analysis very similar to that which Tri-State recommends to determine an

equitable buyout amount for DMEA. Mr. Higgins apparently believes a mark-to-market analysis is the appropriate way to value Tri-State's generation assets and purchase power contracts. However, he fails to use that same methodology to value DMEA's purchase power contract with Tri-State.

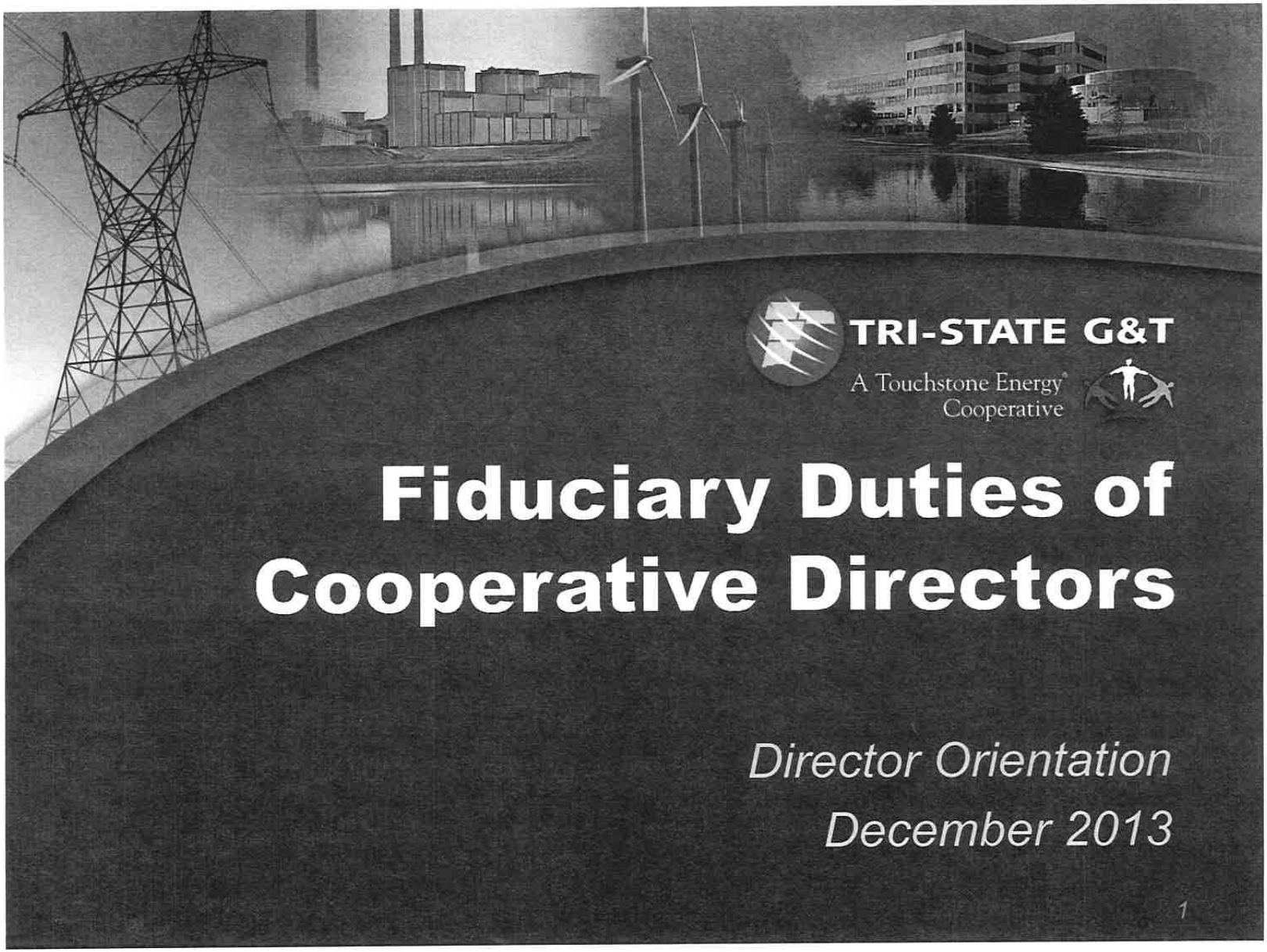
On a more minor note, Mr. Higgins utilized a "load ratio share" for DMEA of 3.07% in determining what portion of Tri-State's balance sheet is "owned" by DMEA while I have utilized a ratio of 3.17% when discussing the potential impact of a Member Triggering Event in our private placement notes. Mr. Higgins' ratio is based on kWh sales while my ratio is based on Tri-State revenue, which is a more appropriate method of determining "ownership", although the difference is relatively minor in this case.

Q: DOES THAT CONCLUDE YOUR ANSWER TESTIMONY?

A: Yes.

LPEA Attachment F

Excerpt from:
Tri-State Generation and Transmission Association, Inc., "Fiduciary Duties of Cooperative Directors," (Dec. 2013).



Fiduciary Duties of Cooperative Directors

Director Orientation

December 2013

"Dual Directors"

- When serving on the Board of a distribution cooperative, the Director's fiduciary duties are to the distribution cooperative.
- When serving on the Board of a G&T, the Director's fiduciary duties are to the G&T AND to the distribution cooperative.
- The Board of Directors of a G&T is not a representative democracy where each Director's responsibility is to represent the interests of his or her distribution cooperative.
- The G&T Director must discharge his or her fiduciary duties in the best interests of the G&T; however, the Director still owes duties to his or her distribution cooperative.
- At times, this may result in the Director taking differing positions on each Board based upon his or her good faith beliefs and the discharge of his or her fiduciary duties.
- The Dual Director must manage his or her participation on both Boards and his or her actions so as to preserve his or her ability to discharge the duties separately owed to each entity.
- A Dual Director who cannot in good faith discharge his or her fiduciary duties to both the distribution cooperative and the G&T must decide whether it is necessary to recuse himself or herself from certain Board actions or resign from one or both Boards.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service lists compiled by the Secretary in this proceeding.

Dated at Washington, D.C. this 11th day of May 2020.

By: */s/ Michael Keegan*
Michael Keegan
Wilkinson Barker Knauer LLP
1800 M Street NW
Washington, DC 20036
202.783.4141