UNITED STATES OF AMERICA

FEDERAL ENERGY REGULATORY COMMISSION

Docket No. EL16-39-000

COMMENTS OF THE SOUTHERN ENVIRONMENTAL LAW CENTER, COALITION FOR CLEAN AFFORDABLE ENERGY, CONSERVATION COLORADO, EARTHJUSTICE, ENVIRONMENTAL DEFENSE FUND, ENVIRONMENTAL LAW AND POLICY CENTER, NATURAL RESOURCES DEFENSE COUNCIL, RENEWABLE TAOS, THE SIERRA CLUB, THE SIERRA CLUB: RIO GRANDE CHAPTER, SUSTAINABLE FERC PROJECT, UTAH CLEAN ENERGY, VOTE SOLAR, WESTERN GRID GROUP, WESTERN RESOURCE ADVOCATES

Pursuant to Rule 211 of the Federal Energy Regulatory Commission's ("Commission" or "FERC") Rules of Practice and Procedure,[1] the Southern Environmental Law Center, Coalition for Clean Affordable Energy, Conservation Colorado, Earthjustice, Environmental Defense Fund, Environmental Law and Policy Center, Natural Resources Defense Council, Renewable Taos, the Sierra Club, the Sierra Club: Rio Grande Chapter, Sustainable FERC Project, Utah Clean Energy, Vote Solar, Western Grid Group, and Western Resource Advocates (collectively, "Commenters") submit these comments on the Petition for Declaratory Order of Tri-State Generation and Transmission Association, Inc.

The Commenters include national, regional, and state environmental, renewable energy, and public interest advocacy organizations and coalitions from across the United States that collectively work to promote renewable energy, energy efficiency, and demand-side resources, and to protect natural resources, the environment, and public health. The Commenters offer comments in this proceeding because we are concerned that the Tri-State Generation and Transmission Association, Inc. ("Tri-State") "fixed cost recovery proposal" ("Proposal"), if approved, will have a chilling effect on the opportunities for qualifying facilities to sell

[1] 18 C.F.R. § 385.211.

renewable energy to nonregulated electric utilities across the country and will curtail the continued development of renewable energy, in violation of Federal law and policy.

We urge the Commission to declare that the Tri-State Proposal contained in revised Board Policy 101 is inconsistent with the Public Utility Regulatory Policy Act of 1978 ("PURPA").[2]

I. Introduction

On June 18, 2015, FERC issued an order declaring that Delta-Montrose Electric Association ("DMEA"), a Tri-State member distribution cooperative, was obligated to purchase power from a qualifying facility ("QF") under PURPA, and that DMEA was permitted to purchase said QF power at a negotiated rate.[3] The 2015 Order re-affirmed prior Commission precedent that an electric utility is required to purchase QF power despite any conflicting provisions in a wholesale contract through which the electric utility purchases most or all of its power requirements.[4]

The 2015 Order also emphasized that an electric utility such as DMEA may only *voluntarily* seek a waiver of its obligation under PURPA to purchase QF power; it cannot be forced to do so.[5] The Order clarified that a nearby hydropower facility was permitted to sell energy to the cooperative, providing the opportunity for DMEA to meet a portion of its load requirements from local, renewable generation rather than fossil-fuel generation.[6] The Order furthered PURPA's policy of promoting alternative sources of generation, and it supported

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[2] 16 U.S.C. § 2601 *et seq.*
[3] *Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61238; *affirmed on reh'g*, 153 FERC ¶ 61,028 (2015)(hereinafter "*Delta-Montrose*").
[4] *Id.*
[5] *Id.* at 62,585; 18 C.F.R. § 292.402.
[6] The Commenters do not take a position on the environmental merits of the QF involved in this proceeding.

DMEA's ability to exercise its right as an electric utility under PURPA to purchase power from QFs.

Tri-State's Proposal in this proceeding, EL16-39-000, responds to the Commission's 2015 Order by establishing a fixed cost recovery mechanism – effectively, a penalty – that DMEA and other member distribution cooperatives must pay if, by purchasing QF power, the member cooperative exceeds the contractually-permitted 5% allocation of power from suppliers other than Tri-State. Tri-State's wholesale contracts with its forty-four member cooperatives require that members purchase at least 95% of their power from Tri-State, permitting members to obtain up to 5% of their requirements from other sources of generation.[7]

The Proposal requires a member cooperative to pay Tri-State a penalty equal to the revenue that Tri-State would have received from the member, above Tri-State's avoided cost, but for that amount of power the member purchases from the QF in excess of the 5% allotment.[8] Tri-State's Proposal purports to prevent cost-shifting to other member cooperatives that "may result" from the purchase of QF power.[9] However, contrary to Tri-State's purported rationale, Tri-State seeks to impose this penalty without any demonstration that such cost-shifting is actually occurring. The result is that this charge will limit the ability of Tri-State's member cooperatives to purchase QF power and will stifle the development of QF generation, contrary to the goals of PURPA.

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[7] FERC Docket No. EL16-39-000, Petition for Declaratory Order of Tri-State Generation and Transmission Association, Inc., filed February 17, 2016 (hereinafter "Tri-State Petition"), Exhibit B, Typical Tri-State Member Wholesale Electric Service Contract, at 2.

[8] In other words, for each kWh purchased by the member cooperative from a QF beyond the 5% allocation, the Proposal allows Tri-State to obtain the difference between the wholesale rate and Tri-State's avoided cost rate.

[9] Tri-State Petition at 3.

II. Tri-State member cooperative contracts are partial-requirements contracts.

Tri-State's Proposal is contrary to Commission precedent. Tri-State bases its Proposal on prior Commission orders addressing cost-recovery mechanisms applied to distribution utilities that have *all-requirements* contracts with their supplier utility.[10] However, Tri-State's wholesale contract with DMEA and its other member cooperatives are *partial-requirements* contracts. As a result, Tri-State's application of these orders is misplaced.

In *Pub. Serv. Co. of N.H.*, 85 FERC ¶ 61044 (Oct. 6, 1998), the Commission denied an attempt by the Public Service Company of New Hampshire ("PSNH") to apply a revenue recovery mechanism substantially the same as Tri-State's Proposal.[11] The Commission recognized that because the distribution utility subject to the potential charge was not contractually required to purchase *all* power from PSNH, and was specifically permitted to purchase power from other sources of generation, including QFs from which the distribution utility was obligated to purchase power under PURPA, the distribution utility had a partial-requirements contract. As such, the type of revenue recovery mechanism that had previously been applied to all-requirements utilities was inapplicable to the partial-requirements contract at issue in that proceeding.[12]

Similarly, Tri-State member cooperatives are contractually permitted to own or purchase up to 5% of their requirements from generation sources other than Tri-State, and in addition, are

[10] Tri-State relies on FERC Order No. 69 and *Carolina Power & Light Co.*, 48 FERC ¶ 61101 (July 25, 1989).
[11] *See Pub. Serv. Co. of N.H.*, 85 FERC ¶ 61,044 at 61,131- 61,132 (hereinafter "*Pub. Serv. Co. of N.H.*"). Under PSNH's proposed billing methodology "the QF [selling power to the distribution cooperative] would receive PSNH's avoided cost, while [the distribution utility] would compensate PSNH for its loss of load by paying the difference between the state determined avoided cost and PSNH's avoided cost. Where PSNH's avoided cost is 2.5 cents per kWh…and the [wholesale contract] rate is 8 cents per kWh, PSNH argues that the QF should ultimately receive 2.5 cents per kWh, while [the distribution utility] would pay PSNH the difference between the 8 cents and the 2.5 cents per kWh." This is the same type of revenue recovery mechanism in Tri-State's Proposal.
[12] *Id.* at 61,135-36.

required to purchase power from QFs with nameplate capacities less than 25 kW.[13] Tri-State's wholesale contracts are substantially the same as the partial-requirements wholesale contract at issue in *Pub. Serv. Co. of N.H.* Thus, DMEA is a partial-requirements customer of Tri-State. As such, Tri-State's cost recovery penalty, like the revenue recovery mechanism in *Pub. Serv. Co. of N.H*, is improper.

We urge the Commission to apply its precedent in *Pub. Serv. Co. of N.H.* and declare that the member cooperative contracts to which Tri-State's Proposal will apply are partial-requirements contracts, and as such, the Proposal is contrary to Commission precedent.

III. Tri-State's justifications for its Proposal are unfounded and are a thinly veiled attempt to stifle renewable energy development in contravention of PURPA.

Even if the Commission determines, contrary to its precedent in *Pub. Serv. Co. of N.H.*, that the Tri-State member cooperatives are all-requirements customers, the Commission should find that the Proposal is impermissible because it would stifle QF development, it does not accurately reflect modern electricity markets in which Tri-State and other similar utilities operate, and it is contrary to the policy goals of PURPA. Tri-State's Proposal undermines its member cooperatives' ability to enter into power purchase agreements with QFs and to negotiate rates for those purchases. The Proposal would require members either to purchase QF power at Tri-State's self-determined avoided cost rate or waive their purchase requirements altogether, ensuring that Tri-State will continue to curb QF development. We urge the Commission to acknowledge the harmful implications of Tri-State's Proposal and declare the proposed charge impermissible.

Section 210 of PURPA, 16 U.S.C. § 824a-3, was enacted to "encourage the development of cogeneration and small power production facilities" and to "reduce the demand for traditional

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[13] Tri-State Board Policy No. 109, 2.n.

fossil fuels." *FERC v. Mississippi*, 456 U.S. 742, 750 (1982). FERC issued Order No. 69 in 1980, implementing Section 210.[14] PURPA requires electric utilities to purchase QF power either at the utility's avoided cost or at a negotiated rate.[15] The Commission's regulations explicitly permit an electric utility and a QF to negotiate rates.[16] In prior orders FERC has held that an all-requirements distributor should apply its supplier's avoided cost rate when purchasing QF power.[17] Conversely, partial-requirements customers may determine their individual avoided cost rate.[18] Further, as the Commission recognized most recently in its 2015 *Delta-Montrose* order, a distribution utility may also purchase QF power at a negotiated rate.[19]

Prior to the June 2015 Order, DMEA sought to negotiate a rate for the purchase of energy from a local hydropower QF based on its own avoided cost methodology.[20] In its petition, Tri-State claims that its Proposal "places no restrictions on the right of a QF to sell power to Tri-State or a Tri-State member. Nor does the [Proposal] limit the right of a Tri-State member to

[14] *Small Power Production and Cogeneration Facilities; Regulations Implementing Section 210 of the Public Utility Regulatory Policies Act of 1978*, Order No. 69, FERC Stats. & Regs. ¶ 30,128 at 30,871, *order on reh'g*, Order No. 69-A, FERC Stats. & Regs. ¶30,160 (1980), *aff'd in part and vacated in part, American Electric Power Service Corp. v. FERC, 675 F.2d 1226 (D.C. Cir. 1982), rev'd in part, American Paper Institute, Inc. v. American Electric Power Service Corp.*, 461 U.S. 402 (1983)(hereinafter "Order No. 69").
[15] 16 U.S.C. § 824a-3; 18 C.F.R. §§ 292.301(b) and 292.304.
[16] 18 C.F.R. § 292.301(b) (2014) ("Nothing in this subpart: (1) Limits the authority of any electric utility or any qualifying facility to agree to a rate for any purchase, or terms or conditions relating to any purchase, which differ from the rate or terms or conditions which would otherwise be required by this subpart; or (2) Affects the validity of any contract entered into between a qualifying facility and an electric utility for any purchase.")
[17] The Commission first made this determination in Order No. 69. The Commission has consistently followed this determination in subsequent orders. *See, e.g., Carolina Power & Light Co.*, 48 FERC ¶ 61,101 at 61,390 (1989) (citing *City of Longmont*, 39 FERC ¶ 61,301 (1987)) (in the case of a QF selling to a full requirements customer instead of selling to that customer's supplying utility, the Commission will measure "the avoided cost of the full requirements customer as the avoided cost of the full requirements supplier since it is the supplier that avoids generation when the full requirements customer purchases from a QF").
[18] *Compare, e.g., N. Little Rock Cogen., L.P.*, 72 FERC ¶ 61,263 at 62,172-73 (1995) (the Commission's regulations "do not establish or prohibit any particular rate treatment for partial requirements sales," and avoided costs are determined "by all alternatives available to the purchasing utility") with *W. Farmers Elec. Coop.*, 115 FERC ¶ 61,323 at 62,152 (2006) (Commission "has consistently held the avoided cost of an all-requirements customer to be those of its all requirements supplier").
[19] *Delta-Montrose* at 62,585.
[20] FERC Docket No. EL 15-43-000, Petition for Declaratory Order and Request for Expedited Action of Delta-Montrose Electric Association, February 9, 2015, p. 2.

choose to negotiate a purchase rate with a QF that is other than Tri-State's avoided cost."[21] While this may be technically accurate—nothing stated in the Proposal expressly establishes the limitations Tri-State mentions—the Proposal functionally limits a QF's ability to sell power to a member cooperative. By imposing an additional charge over its avoided cost on member cooperatives that purchase power from QFs, Tri-State inflates the price of QF power for purchasing members, thereby limiting the purchase price that the QF is able to obtain for its power. The end result is that member cooperatives are obligated to pay the Tri-State penalty *in addition to* the rate they negotiate with a QF, which makes QF power more expensive. This is no accident. Under the Proposal, if a member cooperative sought to negotiate a competitive purchase price with a QF that was higher than Tri-State's avoided cost, the electric cooperative would have to pay more than the negotiated price in the form of the penalty imposed by the Proposal. Tri-State's policy would further its ability to discourage QF purchases by its members, a practice directly contrary to PURPA's intent to "encourage the development of cogeneration and small power production facilities" and to "reduce the demand for traditional fossil fuels."[22]

Tri-State justifies its Proposal by stating that the penalty is necessary to avoid cost-shifting to other member cooperatives. In Order No. 69, the Commission discussed transactions in which an all-requirements distribution utility purchases QF power. Order No. 69 indicated that while an all-requirements customer must purchase QF power notwithstanding an all-requirements contract, the all-requirements supplier should be compensated for the revenue that the supplier would have earned had the all-requirements customer purchased the power from the supplier instead of the QF.[23]

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[21] Tri-State Petition at 6.
[22] *FERC v. Mississippi*, 456 U.S. at 750.
[23] Order No. 69 at 30,871.

Order No. 69 justified this provision by reasoning that the all-requirements supplier's resultant lost revenues would remain unrecovered and would therefore be allocated to other all-requirements customers.[24] Indeed, FERC stated in Order No. 69 that "one commenter noted that, with regard to all-requirements rural electric cooperatives, any impairment of the obligation to obtain all of the cooperative's requirements from a generation and transmission cooperative might affect the financing ability of the generation and transmission cooperative."[25]

Relying on this reasoning, Tri-State argues that its Proposal "insure[s] [*sic*] that other Tri-State members…do not subsidize the purchasing member's purchase of QF power that causes it to exceed the 5% limit on self-supply of power."[26] Tri-State appears to reason that when a member cooperative purchases QF power beyond the 5% contractual allocation, Tri-State is left with excess power and insufficient revenues to cover its fixed charges that would have otherwise been covered by the revenue generated from the member cooperative. While, on its face, this reasoning appears consistent with Order No. 69 as applied to all-requirements contracts, Tri-State's claim does not account for the reality of modern electricity markets in 2016.[27]

Tri-State sells power to its member cooperatives and <u>also</u> sells power to non-members in the region under long-term contracts and market sale arrangements. In 2014, Tri-State's non-member sales—sales to entities *other than its member cooperatives*—totaled $197.5 million.[28] In fact, over 17 percent of Tri-State's sales are to non-member customers.[29] This quantity of non-member sales reflects the modern electricity market in which large power suppliers such as Tri-

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[24] *Id.*
[25] *Id.*
[26] Tri-State Petition at 6.
[27] Tri-State relies heavily in its Petition on *Carolina Power & Light Co.*, 48 FERC ¶ 61101 (1989).
[28] Tri-State Generation and Transmission Association, 2014 Annual Report at 18 (2014), available at http://www.tristategt.org/Financials/documents/Tri-State-2014-1-annual-report.pdf (hereinafter "2014 Annual Report").
[29] *Id.* at 4. Tri-State lists its member sales at 15.4 million MWh and its non-member sales at 3.3 million MWh.

State have access to markets in which to sell their power—markets that have matured significantly since the orders upon which Tri-State relies were issued.

Congress recognized these changed market conditions when it amended PURPA in the Energy Policy Act of 2005.[30] In those amendments, Congress simultaneously acknowledged changes in the electricity market that reduce barriers to wholesale power markets for large utilities and QFs, while also recognizing that smaller QFs still lack nondiscriminatory access to such markets.[31] Thus, while Tri-State is able to take advantage of wholesale markets, FERC has acknowledged that small QFs like the hydropower facility at issue in *Delta-Montrose* likely do not have the same access to such markets.[32]

While Tri-State claims that its Proposal is necessary to avoid lost revenues, Tri-State's petition appears to ignore the fact that any purported "lost revenues" will likely be recovered by selling that same power on the wholesale market. Tri-State has even stated in its 2014 Annual Report that, with regard to possible outcomes of the 2015 *Delta-Montrose* order, "[Tri-State] does not believe [FERC's decision in docket No. EL15-43-000] is likely to have a material adverse effect on the Association's financial condition, future results of operations or cash flows."[33] If approved, rather than simply recovering lost revenue, Tri-State could charge this penalty to its member cooperatives and then sell that power on the open market, in effect recovering its wholesale rate *plus* the lost revenue penalty for that same power. If Tri-State does not suffer the financial harm it claims as a result of QF sales to member cooperatives, Tri-State

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[30] *See* 16 U.S.C. § 824a-3(m).

[31] The 2005 EPAct amended PURPA to permit electric utilities with non-discriminatory access to wholesale power markets to petition for waivers of their purchase obligations. However, Congress also indicated the lack of such access for QFs with nameplate capacities less than 20 MW by giving such QFs a presumption against non-discriminatory access. 16 U.S.C. § 824a-3(m).

[32] *See N. States Power Co., A Minnesota Corp.*, 151 FERC ¶ 61110 (May 14, 2015)(Electric utility did not rebut presumption that a QF smaller than 20 MW did not have access to markets); *Ppl Elec. Utilities Corp.*, 148 FERC ¶ 61207 (Sept. 18, 2014).

[33] 2014 Annual Report at 50.

lacks justification for recovering its purported lost revenues from DMEA or other member cooperatives purchasing QF power beyond the 5% contractual allocation.

Tri-State's Proposal would permit Tri-State to simultaneously stifle competition from QFs while potentially earning additional revenue for power they can sell on the wholesale market. We recommend that, in light of market conditions which allow these additional sales of power, FERC consider requiring a generation and transmission supplier claiming this justification for a revenue recovery fee of the type Tri-State proposes to demonstrate with evidence that, in fact, the lost revenues from the member cooperative's purchase of QF power effectuate the detrimental financial result which the supplier claims.

IV. Tri-State essentially requires member cooperatives to waive their PURPA purchase obligations, contrary to Commission precedent.

FERC's regulations implementing PURPA permit nonregulated electric utilities, such as DMEA and other Tri-State member cooperatives, to apply to FERC for a waiver of certain PURPA obligations, including the duty to purchase QF power under 18 C.F.R. § 292.303.[34] The Commission has recognized on multiple occasions that a nonregulated electric utility cannot be compelled to petition for a waiver of its purchase requirement, even if the waiver would likely be granted.[35] In its Proposal, Tri-State indicates that any member cooperative may join Tri-State in applying to FERC for a waiver of that cooperative's purchase requirement.[36] Although Tri-State presents this as an "option" to its member cooperatives, in reality this affords the member cooperatives two unappealing choices: maintain their PURPA purchase obligation and incur the Tri-State penalty, preventing member cooperatives from purchasing QF power at a rate that will allow QFs to compete, or, alternatively, surrender their purchase obligation to Tri-State, thereby

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[34] 18 C.F.R.§ 292.402.
[35] *Pub. Serv. Co. of New Hampshire*, 83 FERC ¶ 61224, 62000 (May 29, 1998); *see also Delta-Montrose* at 62,585.
[36] Tri-State Petition, Exhibit C, Proposed Revised Board Policy 101 at 2-3.

entirely forgoing their ability to enter into contracts with QFs for the purchase of local clean energy.[37]

Both options allow Tri-State to infringe on QFs' ability to negotiate rates with member cooperatives as intended under PURPA. For a member cooperative like DMEA that wants to promote the development of QFs, a choice between two untenable options is no choice at all. As a result, Tri-State effectively ties the hands of member cooperatives that seek to encourage the development of renewable energy generation in their service territories. By waiving their purchase requirements, member cooperatives like DMEA forgo the opportunity to support local clean energy and to foster an environment in which local communities can choose the source of their electricity and provide opportunities for economic growth. This would defeat the intent of PURPA to encourage small power production facilities and would allow Tri-State to effectively circumvent the 2015 *Delta-Montrose* Order.

V. Conclusion

For the reasons stated above, the Commenters respectfully urge the Commission to issue a declaratory order that Tri-State's proposed fixed cost recovery charge is inapplicable and is in contravention of the policy of PURPA.

[37] Renewable energy QF development would also create jobs in DMEA's service territory, which includes some of Colorado's most economically impoverished areas, would support the local economy, and would foster competition and increase the amount of electricity produced from renewable resources. FERC Docket No. EL 15-43-000, Petition for Declaratory Order and Request for Expedited Action of Delta-Montrose Electric Association, February 9, 2015, at 2-3. These goals are consistent with PURPA's stated policy and FERC's declared policy in implementing PURPA. 16 U.S.C. § 2601; Order No. 69.

Respectfully submitted this 24th day of March, 2016.

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