

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

PROCEEDING NO. 19M-0460E

IN THE MATTER OF TRI-STATE’S NEW MEMBER(S) AND THE PUBLIC
UTILITIES COMMISSION’S JURISDICTION.

TRI-STATE’S RESPONSES TO COMMISSION QUESTIONS

Tri-State Generation and Transmission Association, Inc. (“Tri-State”), through its undersigned legal counsel, pursuant to Colorado Public Utilities Commission (the “Commission”) Decision No. C19-0708 (the “Decision”), hereby submits its responses to the Commission’s questions set forth in the Decision.

RESPONSES

1. *Identify and describe the new member referenced in Tri-State’s FERC filings. What steps has Tri-State taken to develop, design, or create an entity that will become a member? Within the last six months from the date of this Decision, has Tri-State negotiated with an existing entity to become a member? If so, identify that entity and whether negotiations are currently ongoing.*

On September 3, 2019, Mieco, Inc. (“Mieco”) joined Tri-State as a Member. Mieco, a wholesale energy services company and subsidiary of Marubeni Corporation, is a Delaware corporation headquartered in California with offices throughout the United States. Mieco supplies natural gas to purchasers throughout the nation, including Tri-State, for which it currently provides natural gas to Tri-State’s power generation facilities located in New Mexico and Colorado. Consistent with Tri-State’s previous Federal Energy Regulatory Commission (“FERC”) filings,

Mieco is not an electric cooperative or governmental entity, and it is not owned by electric cooperatives or governmental entities in the United States.

Although Tri-State has considered creating an energy services entity that would become a Tri-State Member, it has not taken steps to develop, design, or create such an entity at this time.

Within the six months preceding August 21, 2019, Tri-State has negotiated with a wholesale agricultural company that currently buys non-electric services from Tri-State. The identity of this potential new member and the status of any negotiations is subject to a non-disclosure agreement between Tri-State and the entity, which agreement prohibits Tri-State from disclosing such information at this time. Tri-State has also had conceptual discussions with other existing entities regarding potential membership in Tri-State. None of those discussions reached the negotiations stage and no negotiations with prospective members are currently ongoing.

2. Describe the process and transactions(s) by which the new member will accede to Tri-State membership.

In April 2018, the Tri-State membership approved a revision to Tri-State's Bylaws to authorize the addition of one or more classes of membership in addition to the existing all-requirements class. Pursuant to that revision, in July 2019 the Tri-State Board created a new membership class for non-utility members. Mieco became the first such new member on September 3, 2019. The process to implement this new membership included the Tri-State Board of Directors authorizing Tri-State's Chief Executive Officer to execute all agreements necessary

to admit the new member, and the new member entering into a membership agreement with Tri-State setting forth the terms of its membership.

3. *How does the new member Tri-State seeks to add affect Tri-State's revenues and expenses and the revenue requirement used to set rates?*

Tri-State's revenues, expenses, and revenue requirement are not materially affected by the admission of Mieco as a new Member. Tri-State already does business with Mieco and, therefore, revenues and expenses associated with Mieco are already included in Tri-State's corporate accounting. As a result, Tri-State's revenues will not increase, and expenses and revenue requirements may decrease slightly. The amount of patronage capital allocated to Tri-State's existing Members will decrease slightly, however, the amount of patronage capital returned to Tri-State's Members will not be impacted.

4. *Describe, providing a legal and factual basis for your position, whether Tri-State or the "New Member(s)" must make any filing with the PUC regarding, or seeking PUC approval for, any part of the membership accession process or any transaction related thereto.*

No PUC approval is required for a new Member to join Tri-State because no statute, Commission rule, or Commission decision requires Tri-State or a New Member to seek such approval. Where Commission approval is required for a transaction, statutes and regulations provide the appropriate standards for the Commission's review. For example, Commission approval is required for certain securities matters¹ under C.R.S. § 40-1-104, which explains the circumstances

¹ Note that a membership interest in a cooperative is not a security. See C.R.S. § 7-55-115 (cooperative membership interest not a security); *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 858 (1975) (same); *Distribution Cooperatives*, 1974 WL 7238, at *4 (S.E.C. No - Action Letter June 1, 1974) (non-transferrable membership certificates in nonprofit distribution cooperatives are not securities and are instead evidence of membership in a joint business arrangement for power supply); *Associated Elec. Coop. Inc.*, 1975 WL 10826, at *2 (S.E.C. No - Action Letter Feb. 17, 1975)

under which approval is and is not required. Similarly, C.R.S. § 40-5-105 provides the basis for Commission review of public utility asset transfers and mergers.

More generally, as an administrative agency the Commission is constrained by the due process provisions of both the Colorado and U.S. Constitutions when it seeks to apply legal standards to particular transactions. See *Douglas Cty. Bd. of Comm'rs v. Pub. Utilities Comm'n of State of Colo.*, 829 P.2d 1303, 1307 (Colo. 1992). The due process requirement allows Commission action on a quasi-judicial question (such as the review of a new member transaction) only where there are sufficient statutory and administrative standards governing the Commission's review. *Id.* at 1311; see *Farmer v. Colorado Parks & Wildlife Comm'n*, 382 P.3d 1263, 1268 (Colo. App. 2016) ("Everyone would agree that an administrative agency cannot validly engage in quasi-judicial decision-making without sufficient standards."); see also *Elizondo v. State, Dep't of Revenue, Motor Vehicle Div.*, 194 Colo. 113, 118 (1977). Absent a standard, the Commission may act only in its legislative capacity on a prospective basis. See *Colorado Office of Consumer Counsel v. Pub. Serv. Co. of Colorado*, 877 P.2d 867, 870 (Colo. 1994) (describing the Commission's legislative authority).

(agreeing with the position that "certificates evidencing membership interests in the Cooperatives are not securities . . . but are rather certificates evidencing membership in a joint business arrangement for power supply."); *Old Dominion Elec. Coop.*, 2004 WL 2404332, at *9 (S.E.C. No - Action Letter Oct. 13, 2004) (same).

5. *Describe how Tri-State can ensure its compliance with Colorado's state energy goals reflected in House Bill 19-1261, Senate Bill 19-236, and Executive Order B 2019 002 if FERC regulates its rates.*

Tri-State will continue to comply with all valid and applicable Colorado statutes and regulations, including HB 19-1261, SB 19-236, Executive Order B 2019 002.

For example, HB19-1261 states that:

Colorado shall strive to increase renewable energy generation and eliminate statewide greenhouse gas pollution by the middle of the twenty-first century and have goals of achieving, at a minimum, a twenty-six percent reduction in statewide greenhouse gas pollution by 2025, a fifty-percent reduction in statewide greenhouse gas pollution by 2030, and a ninety-percent reduction in statewide greenhouse gas pollution by 2050 . . . relative to 2005 statewide greenhouse gas pollution levels.

Codified at C.R.S. § 25-7-102(2)(g).

This legislation directs the Colorado Air Quality Control Commission ("AQCC") to promulgate rules and regulations consistent with these emission reduction goals, encourages the development of Clean Energy Plans by electric utilities, directs the AQCC to consult with this Commission on issues related to the electric utility sector, and specifies how the AQCC is to consider utilities' Clean Energy Plans in the context of the rulemaking to implement the statewide emission reduction goals. See C.R.S. § 25-7-105(1)(e)(VIII).

Although no rules or regulations have yet been promulgated, Tri-State believes it is unlikely that implementation of this directive will implicate Tri-State's wholesale rates in such a way as to be preempted by federal law. As acknowledged by the U.S. Supreme Court, states may generally take steps to encourage the development of clean generation, so long as they do so in a way that respects

FERC's exclusive authority over wholesale rates. *See Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

Similarly, SB 19-236 directs the Commission to engage in Electric Resource Planning with Tri-State. The rulemaking implementing this directive is ongoing in Proceeding No. 19R-0408E and Tri-State is submitting comments in that Proceeding contemporaneously with this filing. Tri-State does not believe that FERC regulation of Tri-State's wholesale rates will interfere with or preempt the Commission's ability to engage in legitimate resource planning activities within the State of Colorado.

Finally, Executive Order B 2019 002 creates a transportation electrification workgroup, directs the Colorado Department of Public Health and the Environment ("CDPHE") to promulgate a Colorado Zero Emission Vehicle rule, directs CDPHE and the workgroup to revise Colorado's Beneficiary Mitigation Plan, and directs the Colorado Department of Transportation to develop a department zero emission vehicle and clean transportation plan. While Tri-State recognizes that these directives embody a state energy goal, it is not clear at this time that they will result in a compliance requirement applicable to Tri-State. To the extent that rules applicable to Tri-State are promulgated, Tri-State does not believe that FERC regulation of Tri-State's wholesale rates will interfere with or preempt this aspect of the state's carbon emission reduction policies.

6. If FERC regulates Tri-State's rates, describe to what extent Tri-State will be bound by Phase I or Phase II decisions as they are currently proposed in the Notice of Proposed Rulemaking in Proceeding No. 19R-0408E. Can Tri-State comply with PUC decisions that modify Tri-State's ERP?

Under Rule 3605 as presently proposed, Tri-State will demonstrate compliance with the Commission's Phase I decision through the proposed ERP

Implementation Report. The Commission may enforce the Phase I decision consistent with its authorities to enforce any other Commission decision. Likewise, Tri-State will demonstrate compliance with the Commission's Phase II decision by developing resources consistent with the decision, filing and posting information as contemplated in Rule 3605(h)(V) and (VI), and through the annual progress reports filed pursuant to Rule 3618(a). The Commission may enforce the Phase II decision consistent with its authorities to enforce any other Commission decision. Tri-State can comply with PUC decisions modifying Tri-State's proposed ERP to the extent such decisions are within the PUC's authority and are capable of implementation.

7. How can the legislative intent behind § 40-2-134, C.R.S. (requiring the Commission to approve Tri-State's ERP) be honored if FERC regulates Tri-State's rates?

While it is not entirely clear what "legislative intent" is referred to in this question, consistent with the discussion above, Tri-State does not believe that FERC's regulation of Tri-State's wholesale rates will interfere with or preempt the Commission's ability to engage in legitimate resource planning activities within the state of Colorado. As with other appropriate Commission regulatory actions, Commission decisions under C.R.S. § 40-2-134 concerning Tri-State's resource planning will be factored into the costs to be recovered through Tri-State's wholesale rates regulated by FERC.

8. What are the total costs to Tri-State of its efforts to move to FERC regulation (including amounts spent to date and planned expenditures) and how will these costs affect Tri-State's payments into Colorado's Fixed Utility Fund?

Tri-State has been considering the move to FERC regulation since 2010 and has not specifically tracked associated costs during that entire time period.

Furthermore, costs associated with Tri-State personnel working on this issue are included in annual General and Administrative budgets without specifically being assigned to this effort. In calendar year 2018 Tri-State incurred a total of approximately \$890,000 in consultant and outside legal fees in support of this effort. As of August 31, 2019, Tri-State incurred a total of approximately \$2,000,000 in consultant and outside legal fees in connection with developing the information necessary to support and to prepare the various tariff and other filings associated with Tri-State transitioning to FERC regulation. Tri-State anticipates that it will incur additional consultant and legal fees in connection with being subject to FERC rate regulation, however, the amounts of those expenditures will depend on further developments in and the outcome of the current FERC proceedings. As a public utility providing electric transmission service, Tri-State will pay to FERC an annual charge equal to Tri-State's pro-rated allocation of FERC's total annual costs to regulate such public utilities. For example, it is estimated that Tri-State's annual charge for 2018 would have been approximately \$1.4 million.

Tri-State does not believe the costs it has incurred or will incur in connection with becoming regulated by FERC with respect to its wholesale rates will affect Tri-State's payments into Colorado's Fixed Utility Fund. The Commission will continue to exercise its authority with respect to Tri-State's resource planning and facilities.

9. *Identify whether Tri-State's bylaws are part of its tariffs and if so identify where the bylaws are located in its tariff filings.*

Tri-State objects to this question because it essentially seeks discovery related to the Commission's intervention and protest of Tri-State's filings at FERC. Without waiving its objection, Tri-State's bylaws are not part of its tariffs.

Submitted this 11th day of September, 2019.

LEWIS ROCA ROTHGERBER CHRISTIE LLP

s/ Dietrich C. Hoefner

Thomas J. Dougherty, #30954

tdougherty@lrrc.com

Dietrich C. Hoefner, #46304

dhoefner@lrrc.com

1200 17th Street, Suite 3000

Denver, Colorado 80202

(303) 623-9000

F: (303) 623-9222

Kenneth V. Reif, #10666

kreif@tristategt.org

Timothy B. Woolley, #34570

twoolley@tristategt.org

Tri-State Generation and Transmission
Association, Inc.

P.O. Box 33695

Denver, CO 80233

(303) 452-6111

F: (303) 254-6067

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