

**UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION**

Tri-State Generation and	)	Docket No. ER19-2440-000
Transmission Association, Inc.	)	Docket No. ER19-2441-000
	)	Docket No. ER19-2442-000
	)	Docket No. ER19-2444-000
	)	Docket No. ER19-2470-000
	)	Docket No. ER19-2474-000
Thermo Cogeneration Partnership, L.P.	)	Docket No. ER19-2443-000

**ANSWER OF THE COLORADO PUBLIC UTILITIES COMMISSION TO  
NOTICE OF NEW MEMBER AND REQUEST FOR PARTIAL WAIVER**

Pursuant to Rules 212 and 213 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”),<sup>1</sup> the Colorado Public Utilities Commission (“CoPUC”) hereby moves for leave to answer and submits the following Answer in response to the Notice of New Member and Request for Partial Waiver submitted by Tri-State Generation and Transmission Association, Inc. (“Tri-State”) on September 3, 2019. As explained in more detail below, the Commission should not reward Tri-State’s behavior by accepting its filings and giving them effect as of September 3, thereby granting Tri-State full relief and excusing Tri-State from the consequences of its actions. Instead, the Commission should reject all of Tri-State’s filings as incomplete and require it to explain how its purported admission of a new member works to eliminate its exemption from Commission regulation under Section 201(f) of the Federal Power Act (“FPA”) and why this transaction does not require Commission approval under the FPA. In addition, the Commission should explain that if Tri-State is a jurisdictional public utility without rates on file, then Tri-State’s time-value refund obligation to all of its customers runs from September 3, 2019 (the admission of Miecoco Inc. (“Miecoco”) to Tri-State’s membership) until such

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<sup>1</sup> 18 C.F.R. §§ 385.212, 385.213.

date as the Commission eventually accepts Tri-State's re-filed tariffs and contracts (if that outcome ever occurs). The Commission is under no obligation to save Tri-State from itself.

Specifically with respect to Tri-State's waiver request, the Commission should not grant the request even if the Commission accepts the filings. Tri-State has not demonstrated the "good cause" necessary to secure a waiver, and indeed, its hasty admission of a new member appears to be an attempt to restrict the Commission's options in dealing with Tri-State's filings. Although Tri-State intimates that the admission of the new member resolves the myriad legal issues presented by its filings, that simply is not the case. If anything, the admission of Mieco only increases the legal jeopardy Tri-State's filings are in. The Commission should not reward Tri-State's brinksmanship by accelerating its consideration of these filings in order to remedy a legal problem that Tri-State itself caused.

#### **MOTION FOR LEAVE TO ANSWER**

The Commission's rules permit parties to submit answers to "any pleading" aside from protests, answers, motions for oral argument, and requests for rehearing.<sup>2</sup> The CoPUC respectfully submits that this Answer responds to Tri-State's pleading seeking a partial waiver, filed September 3, 2019, and provides information that will assist the Commission in its decision-making process.<sup>3</sup> Specifically, this Answer explains that Tri-State has not articulated good cause for the waiver it seeks, and that Tri-State's unilateral actions do not deprive this Commission of its authority, ability, and responsibility to properly resolve these proceedings on the timetable that Congress intended. The remedies that the CoPUC and others have requested remain fully available. In light of these contributions, the CoPUC respectfully requests that the Commission accept this Answer.

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<sup>2</sup> 18 C.F.R. § 385.213.

<sup>3</sup> *New York Indep. Sys. Operator, Inc.*, 108 FERC ¶ 61,231 at P 18 (2004) (accepting answers "because they provide information that assists us in our decision-making process").

## ANSWER

### I. INTRODUCTION

Tri-State's choice to admit its new member during the pendency of the statutory 60-day notice period applicable to its filings represents an attempt to force the Commission to accept those filings on limited information and on an abbreviated timeframe. Simply put, Tri-State chose to act first and seek forgiveness later. This is an extraordinarily poor start to Tri-State's relationship with its regulator, and it should not be condoned, let alone rewarded.

To be clear: Tri-State's purported admission of its new member as of September 3 was entirely voluntary. Tri-State claims that the protests filed by the parties to this proceeding "compelled" it to admit a new member.<sup>4</sup> But its cry that "the protesters made me do it," simply fails the laugh test. Rather, Tri-State took this rash action, potentially putting itself in violation of the Federal Power Act, because it desperately hopes to inveigle the Commission into not dismissing its filings.

Tri-State has asked the Commission to accept its filings effective as of September 3rd in order to insulate Tri-State from the consequences of its own actions. The Commission should not condone that decision, nor fix Tri-State's self-inflicted problem.

The Commission's options are not as constrained as Tri-State's request for waiver implies—Tri-State's claimed admission of a new member does not prevent the Commission from rejecting all of Tri-State's filings along with its waiver request. Rather, by taking the following straightforward steps, the Commission can resolve the issues presented by these proceedings. First, the Commission should require Tri-State to demonstrate that Mico holds an ownership interest in

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<sup>4</sup> *Notice of New Member and Request for Partial Waiver of Tri-State Generation and Transmission Association, Inc.* at 3, Docket Nos. ER19-2440-000, et al. (filed Sept. 3, 2019) ["Tri-State September 3rd Notice"].

Tri-State. Second, the Commission should require Tri-State to explain why it does not need approval under the Federal Power Act to admit Mico as a member. Third, the Commission should dismiss Tri-State's rate and contract filings because they remain incomplete in many material respects. Fourth, the Commission should find Tri-State's request for a waiver moot because its filings are not acceptable in the form presented, and cannot be given any effective date, let alone one that is now in the past. Finally, the Commission should make clear that Tri-State will have to provide refunds for any amounts that it unlawfully collects during the entire period that it operates as a jurisdictional public utility without approved rates on file.

## **II. TRI-STATE HAS NOT DEMONSTRATED THAT IT IS NO LONGER EXEMPT FROM COMMISSION REGULATION UNDER SECTION 201(F).**

Section 201(f) provides that an electric cooperative is exempt from Commission regulation if the cooperative: (1) has outstanding Rural Utilities Service ("RUS") debt; (2) sells less than 4,000,000 MWh of electricity per year; or (3) is wholly owned by entities that are themselves exempt under Section 201(f).<sup>5</sup> Historically, Tri-State has been exempt from Commission jurisdiction either because it held RUS debt itself, or because all of its members have been cooperatives that are exempt under Section 201(f).<sup>6</sup>

Tri-State claims that Mico is not exempt, and as a result, that Tri-State is "no longer wholly-owned" by entities that are themselves exempt from Commission jurisdiction.<sup>7</sup> In other words, Tri-State's allegation that it is subject to Commission jurisdiction rests entirely on the premise that Mico is an owner of Tri-State. However, Tri-State's pleadings contain no information concerning the mechanism by which Mico gained "admission" to Tri-State's

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<sup>5</sup> 16 U.S.C. § 824(f); *see also Delta-Montrose Elec. Ass'n*, 151 FERC ¶ 61,238 at P 26 (2015).

<sup>6</sup> Transmittal Letter in Docket No. ER19-2440-000, at 1-2 n.5; *Delta-Montrose*, 151 FERC ¶ 61,238 at P 27.

<sup>7</sup> Tri-State September 3rd Notice at 2.

membership. In particular, there is nothing supporting a conclusion that Mieco owns Tri-State for purposes of Section 201(f).

In other circumstances, the Commission has found that Tri-State's member cooperatives are owners of Tri-State, such that Tri-State was "wholly owned" by cooperatives that are exempt under Section 201(f).<sup>8</sup> In *Delta-Montrose*, the Commission concluded that the cooperative in question was both a member and an owner of Tri-State, based on a finding that, like all other members, the cooperative had "a patronage account representing each member's financial ownership interest in the corporation, *i.e.*, the amount a member pays for energy which exceeds Tri-State's cost of service, and upon dissolution each member is entitled to an equitable share of the assets, and each member has a vote in Tri-State's operations."<sup>9</sup> The Commission thus looked at three indicia of ownership in *Delta-Montrose* – 1) the existence of an equity stake in Tri-State; 2) a claim on assets after any dissolution; and 3) a vote on the Board of Directors.

The record presented in these dockets includes no evidence whatsoever on any of these points. Tri-State provides no information about Mieco's patronage account, its right to claim Tri-State's assets on dissolution, or its voting rights. Indeed, the most detailed information concerning Mieco's alleged admission as a Tri-State member appears in the industry press, rather than filings before the Commission.<sup>10</sup> In a September 3, 2019, press release touting the admission of Mieco and the resultant "move to FERC rate regulation," Tri-State's Chairman Rick Gordon is quoted

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<sup>8</sup> *Delta-Montrose*, 151 FERC ¶ 61,238 at PP 26, 29.

<sup>9</sup> *Id.* at P 29.

<sup>10</sup> Tri-State, *Press Release: Tri-State adds MIECO as a new cooperative member*, (Sept. 3, 2019; accessed Sept. 10, 2019), available at [www.tristategt.org/tri-state-adds-mieco-new-cooperative-member](http://www.tristategt.org/tri-state-adds-mieco-new-cooperative-member) ['Tri-State Press Release']; see also R. Walton, *Utility Dive*, "Tri-State subject to FERC regulation as it adds non co-op member," (Sept. 4, 2019), available at [www.utilitydive.com/news/tri-state-comes-under-ferc-regulation-as-it-adds-non-co-op-member/562188/](http://www.utilitydive.com/news/tri-state-comes-under-ferc-regulation-as-it-adds-non-co-op-member/562188/).

explaining that “MIECO will be eligible for patronage capital allocations and have voting rights at all membership meetings, *but will not have a seat on the Tri-State Board of Directors.*”<sup>11</sup>

It appears that all three indicia identified in *Delta-Montrose* are absent here. *First*, Miecoco’s current “financial ownership interest” appears to be minimal (if not zero) and will remain at that level for the foreseeable future. Miecoco may have a patronage account, but under Tri-State’s bylaws, that account can only be funded through payments for electricity.<sup>12</sup> As a new member, Miecoco has certainly not funded its patronage account via excess *historic* payments to Tri-State for electric service. Furthermore, given the nature of Miecoco’s business—supplying natural gas to entities including Tri-State—it appears that Miecoco will not pay Tri-State for electric generation or transmission service in the *future* such that excess payments could populate a patronage account. Notably, unlike all its other members, Tri-State has not sought Commission approval to make sales of electricity to Miecoco. Thus, even accepting Tri-State’s position that it is now a public utility, it cannot make the necessary sales to Miecoco to fund its patronage account.

*Second*, the equitable share of the assets that Miecoco could claim upon dissolution is also zero for the same reason. Article II, Section 1 of Tri-State’s Bylaws outlines the dissolution process and states that “the remaining property and assets of this Corporation shall be distributed among the members in the proportion which the aggregate patronage of each bears to the total patronage

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<sup>11</sup> See Tri-State Press Release (emphasis added).

<sup>12</sup> *Delta-Montrose Elec. Ass’n*, FERC Docket No. EL15-43-000, Tri-State Generation & Transmission Ass’n Motion to Intervene and Protest, Attachment B at 8 (Articles of Incorporation and Bylaws) (filed March 11, 2015) (“It is expressly understood that amounts paid for electric power and energy in excess of the cost of service are furnished by members as capital and each member shall be credited with capital so furnished as provided in these Bylaws.”); *id.* at 20 ([T]he Corporation is obligated to account on a patronage basis to all its members for all amounts received and receivable from the furnishing of electric power and energy in excess of the sum of (a) operating costs and expenses properly chargeable against the furnishing of electric power and energy, (b) amounts required to offset any losses incurred during the current or any prior fiscal year, and (c) adjustments to reserves or deferred credit accounts for the purpose of stabilizing margins and rate increases from year to year. All such amounts in excess of operating costs and expenses at the moment of receipt by the Corporation are received with the understanding that they are furnished by the members as capital.”).

of all members and former members.”<sup>13</sup> If Mico’s patronage account is empty, its equitable share under this accounting method is also zero.

*Third*, unlike all other Tri-State members, Mico lacks “a vote in Tri-State’s operations.”<sup>14</sup> As the press release makes clear, Mico does not have a seat on the Board of Directors. Thus, whatever the terms of Mico’s “admission” to Tri-State, Mico is not equivalent to other members which have funded patronage accounts, rights to equitable shares of assets upon dissolution, and rights to nominate members of Tri-State’s board of directors. In the absence of further evidence, the Commission should not simply assume that Mico’s membership in Tri-State means that it is an “owner” within the meaning of Section 201(f).

Requiring Tri-State to clarify the record and provide additional evidence of Mico’s “ownership” interest is consistent with long-standing Commission precedent on this statutory provision. While the current version of Section 201(f) was enacted with the Energy Policy Act of 2005, the relevant language long predates that statute. In *Nebraska Power Company*,<sup>15</sup> the Federal Power Commission considered whether a corporation was “wholly owned” by a political subdivision of a state. There the common stock was entirely held by the government entity but some preferred stock was in private hands.<sup>16</sup> The Commission refused to read the statute woodenly and looked to the economic substance of the interest. It recognized that it “appears impossible for the preferred stockholders at any time to control the management and operation of the applicant corporation” and that Congress “had in mind the usual understanding that the owner of the

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<sup>13</sup> *Id.* at 10.

<sup>14</sup> *Delta-Montrose*, 151 FERC ¶ 61,238 at P 29.

<sup>15</sup> 5 F.P.C. 8, *reh’g denied*, 5 F.P.C. 408 (1946)

<sup>16</sup> *Id.* at 20.

common capital stock is the owner of the corporation.”<sup>17</sup> The same rule should apply here. Whatever interest Miecoco holds in Tri-State, it looks nothing like the type of “ownership” the Commission has recognized as relevant in *Nebraska Power* and *Delta-Montrose*.

Thus, at the very least, investigation is required to determine whether Miecoco “owns” Tri-State for purposes of determining whether the Section 201(f) exemption continues to apply to Tri-State. Indeed, if the Commission were to act in any way *other* than opening such an investigation or dismissing all of Tri-State’s filings, it would risk taking action that it may not have the Congressionally-granted jurisdiction to take.

### **III. SECTION 203 AND 205 APPROVAL MAY BE REQUIRED BEFORE THE TRANSACTION WITH MIECO IS EFFECTIVE.**

Tri-State claims that it has unilaterally admitted Miecoco as a member and merely needs to provide “notice” to the Commission of that fact. Tri-State and Miecoco, though, have not explained why they may enter into this transaction without Commission approval. Indeed, the Federal Power Act may require *two* separate sets of approvals for this transaction—approvals that have not been sought or obtained. *First*, Section 205 approval may be required for any agreement between Miecoco and Tri-State that creates any ownership interest that results in Commission-jurisdictional rates. *Second*, Section 203 approval may be required here before Miecoco can acquire any interest in Tri-State. The failure to seek approval under these provisions (or clearly explain why approval is not required) provides an additional basis to simply reject Tri-State’s filings out of hand.

*First*, Section 205(c) imposes a broad filing requirement for jurisdictional agreements. Entities must file “all contracts which in any manner affect or relate to such rates, charges,

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<sup>17</sup> *Id.* See also *Enron Power Marketing v. PJM Interconnection*, 83 FERC ¶ 61,032 at 61,066-67 (1998) (concluding that Amtrak was not “wholly owned” by the United States where significant common stock was held by a non-governmental entity).



classifications, and services.”<sup>18</sup> Any agreement with Mico to admit it to Tri-State’s membership appears to meet this test. The Commission has recently held that an agreement that established the *termination* date of jurisdictional service under another agreement is required to be filed.<sup>19</sup> Under Tri-State’s theory, its agreement with Mico *initiated* FERC-jurisdictional service under all of the other agreements it filed in these dockets. As a result, the agreement is likely subject to the requirements of Section 205 and has to be filed for Commission approval.

*Second*, under Section 203, Commission approval is required for a wide range of corporate transactions where an entity takes an ownership stake in a company subject to FERC jurisdiction. In particular, Section 203(a)(2) requires Commission authorization before a “holding company in a holding company system that includes a transmitting utility or an electric utility” acquires “any security with a value in excess of” \$10 million in “an electric utility company” or merges or consolidates with such an entity.<sup>20</sup>

This provision consciously uses broad terms that have meanings far more expansive than the more narrowly-defined term “public utility” used elsewhere in the statute. Tri-State, even though exempt from federal regulation as a cooperative, is an “electric utility company” under Section 203(a)(2) because it is a “company that owns or operates facilities used for the generation [or] transmission . . . of electric energy for sale.”<sup>21</sup> The Commission has been quite clear that, while cooperatives and public power entities do not have filing obligations under Section 203(a)(2),

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<sup>18</sup> 16 U.S.C. § 824d(c).

<sup>19</sup> *Arizona Public Serv.*, 156 FERC ¶ 61,006 at PP 31-32 (2016), *reh’g denied* 161 FERC ¶ 61,022 (2017), *rev’d APS v. FERC*, No. 17-73244 (9th Cir. Jun. 14, 2019). While the Court of Appeals concluded that the Commission did not establish that the agreement in that case set the termination date as a factual matter, it did not alter the Commission’s legal conclusion that such an agreement would need to be filed. Here, Tri-State’s own position is that the agreement initiated jurisdictional services. *See also Entergy Mississippi, Inc.*, 117 FERC ¶ 61,200 at PP 24-27 (2006) (finding agreement jurisdictional).

<sup>20</sup> 16 U.S.C. § 824b(a)(2).

<sup>21</sup> *Transactions Subject to FPA Section 203*, Order No. 669, 113 FERC ¶ 61,315 at P 51 (2005).

entities that *acquire* those non-jurisdictional entities are not exempt. When those assets are sold and transformed “into a private company subsidiary, then section 203(a)(2) should apply[.] ... While no section 203 filing requirement would be imposed on the governmental entity, it would be imposed on the private entity” seeking to make the acquisition.<sup>22</sup>

Thus the only questions here are a) whether Miecoco or its parent, Marubeni Corporation, qualifies as a “holding company” and b) whether the transaction is the type covered by Section 203. Tri-State has not provided the necessary information to determine the answers to these questions. However, Marubeni is a large conglomerate whose “activities. . . extend to power projects and infrastructure, plants and industrial machinery, finance, logistics and information industry, and real estate development and construction.”<sup>23</sup> These holdings stretch around the globe, and include power assets on multiple continents, including in the United States.<sup>24</sup> Indeed, Marubeni Power International, Inc. is listed as a generation-owning affiliate member of PJM Interconnection, LLC,<sup>25</sup> and owns or has been involved in developing or purchasing power generation and transmission assets across the United States.<sup>26</sup> These assets even include generation resources located in a relevant balancing authority for Tri-State’s market power analysis.<sup>27</sup> As such, it may qualify as a “holding company” under the statute.

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<sup>22</sup> Order No. 669, 113 FERC ¶ 61,315 at P 58.

<sup>23</sup> MIECO Inc., *About Miecoco* (accessed September 5, 2019), available at <http://www.miecoco.com/about-miecoco/>.

<sup>24</sup> See Marubeni Corp., *Integrated Report 2018* at 120-21 (2018) (describing, at a high level, the affairs and holdings of Marubeni’s Energy & Metals and Power Business & Plant Groups), available at [https://www.marubeni.com/en/ir/reports/integrated\\_report/pdf/ir2018\\_en\\_all.pdf](https://www.marubeni.com/en/ir/reports/integrated_report/pdf/ir2018_en_all.pdf).

<sup>25</sup> PJM Interconnection, LLC, *Member List – PJM Membership as of September 5, 2019* (accessed September 6, 2019), available at <https://www.pjm.com/about-pjm/member-services/member-list.aspx>.

<sup>26</sup> See Marubeni Power International, Inc., *Recent News* (accessed September 5, 2019), available at <https://marubeni-power.com/news.html>.

<sup>27</sup> See Triennial Report of Spindle Hill Energy LLC, Docket No. ER10-2135 at 5, n.12 (dated Dec. 23, 2016) (listed Marubeni Corporation as an indirect owner of Spindle Hill, a gas-fired generator located in the Public Service Company of Colorado balancing authority area).

Moreover, Tri-State needs to clarify the value of Mieco's stake. Tri-State's ownership structure is opaque and the value of each "membership" is unclear. However, Tri-State is a company with billions of dollars in assets<sup>28</sup> and hundreds in millions of revenue in each quarter.<sup>29</sup> Thus, it is possible that any ownership interest acquired by Mieco meets the statutory threshold and Section 203 approval may be required before the acquisition is effective.

#### **IV. DISMISSAL REMAINS THE APPROPRIATE REMEDY IN THESE PROCEEDINGS.**

Even if Tri-State's action to admit its new member were otherwise valid, it does not resolve the numerous other legal flaws in Tri-State's filings, which necessitate that the Commission dismiss or reject Tri-State's filings.

First, large components of Tri-State's filings are simply missing, including the policies of its Board of Directors that dictate its ratemaking process and the rates themselves.<sup>30</sup> In the absence of this information, dismissal is the appropriate remedy. Certainly, filings with such a glaring omission should not be accepted *early* via waiver. Second, as noted in the Sierra Club's protest, major revisions of Tri-State's wholesale electric contracts may be necessary in order to ensure that they comply with PURPA.<sup>31</sup> In prior proceedings, Tri-State itself has emphasized the importance of those contracts, and in particular, the provision capping members' procurement of power from other sources at 5%.<sup>32</sup> Because the changes necessary to bring these contracts into compliance with

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<sup>28</sup> *Tri-State Generation and Transmission Ass'n*, Form 10-Q for the Quarter Ended June 30, 2019 at 1, available at <https://www.tristategt.org/sites/tristate/files/PDF/2019%20SEC%20filings/Q2-Form10Q-080919.pdf>.

<sup>29</sup> *Id.* at 2.

<sup>30</sup> *See, e.g.*, United Power Protest at 5 & Exhibit B (noting Tri-State's failure to file all relevant Board Policies and enclosing several such policies in an exhibit).

<sup>31</sup> Protest of Sierra Club, Docket No. ER19-2440-000 et al., at 16-20 (Aug. 23, 2019) ['Sierra Club Protest'].

<sup>32</sup> Request for Rehearing of Tri-State Generation and Transmission Association, Inc., Docket EL16-39, at 3 (July 18, 2016). Tri-State argued that a Commission order finding this term violated PURPA "could have a disruptive effect on the entire United States rural electric cooperative program, creating uncertainty regarding the enforceability of contracts with member electric cooperatives, threatening the financing and

PURPA are not the sort of minor changes that the Commission may pursue consistent with *NRG Power Marketing LLC v. FERC*,<sup>33</sup> the appropriate remedy is to dismiss so that Tri-State may return to the negotiating table and work with its members to modify them. Again, contracts that do not comply with federal law should not be accepted early via waiver.

## **V. THE COMMISSION SHOULD DENY THE REQUESTED WAIVER.**

The September 9, 2019, notice issued by the Office of Energy Market Regulation concludes, in light of Tri-State's Notice of New Member, that the filing date for six of the seven Tri-State proceedings was September 3, 2019.<sup>34</sup> This conclusion aligns with the Commission's long-standing practice of considering each amendment or supplemental filing after the initial filing to establish a new filing date, and is appropriate here.<sup>35</sup> If the Commission does not simply dismiss Tri-State's filings for all the reasons discussed above, it should reject Tri-State's request for waiver of the full statutory notice period.

The Commission grants waivers for "good cause shown" when the utility makes an initial filing prior to the commencement of service, and the filing is not a "patent nullity."<sup>36</sup> For all the reasons discussed above, Tri-State's initial filing is insufficient, and the identification of Mieco as the alleged new member does not resolve those insufficiencies. Even if these insufficiencies do

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creditworthiness of wholesale electric cooperatives like Tri-State, and promoting disputes with and among wholesale electric cooperatives, their member distribution electric cooperatives and QFs." *Id.* at 2.

<sup>33</sup> *NRG Power Marketing LLC v. FERC*, 862 F.3d 108, 116 (D.C. Cir. 2017).

<sup>34</sup> Office of Energy Market Regulation, *Notice Issued to Tri-State Generation and Transmission Association, Inc.*, Docket No. ER19-2440-000 et al. (Sept. 9, 2019).

<sup>35</sup> *See Duke Power Co.*, 57 FERC ¶ 61,215 at 61,713 (1991).

<sup>36</sup> *Cent. Hudson Gas & Elec. Corp. et al.*, 60 FERC ¶ 61,106 at 61,337, 61,339 (1992), *reh'g denied*, 61 FERC ¶ 61,089 (1992). Alternatively, when a tariff or contract for new service is filed on or after the day on which the service commenced, waiver is not granted "[a]bsent extraordinary circumstances." *Id.* at 61,339. For purposes of applying this rule, the timeliness of a utility's filing is judged according to the date of the initial submission. *See Cent. Maine Power Co.*, 57 FERC ¶ 61,083 at 61,305 (1991).

not render the filing a patent nullity, Tri-State has not shown the “good cause” necessary to obtain a waiver of the notice period.<sup>37</sup>

Tri-State’s request for waiver arises from two affirmative choices made by Tri-State: first, its choice to exclude from its initial filings any information about the identity of its new member, or the precise timing of its anticipated admission into the cooperative<sup>38</sup>; and second, its choice to proceed to admit that new member *prior* to the Commission’s acceptance of its filings and tariffs, rather than amending or supplementing its initial filings to include the missing information.<sup>39</sup> Tri-State anticipated at the time it chose to admit the new member that doing so would transform it into a jurisdictional entity, with the result that it would be providing jurisdictional service without jurisdictional rates.<sup>40</sup> Good cause is not shown where the petitioner has full knowledge that its voluntary action will violate the law without a retroactive waiver of that law, and takes action despite that knowledge.<sup>41</sup> Indeed, the very notion of granting waivers for ‘good cause’ shown suggests that equitable factors must favor the party seeking the waiver, *e.g.* that circumstances *outside* of a party’s control have necessitated that waiver. That is not the case here. In addition, as the Commission has explained before, applicants’ errors in planning, timing, or administering filings at the Commission do not constitute good cause.<sup>42</sup>

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<sup>37</sup> 16 U.S.C. § 824d(d); *see also Cent. Hudson*, 60 FERC ¶ 61,106 at 61,339.

<sup>38</sup> *See, e.g.*, Transmittal Letter in Docket No. ER19-2440-000, at 1-2 (“Tri-State will cease to be wholly-owned by [exempt] entities on or about 60 days from the date hereof, upon the admission of one or more new Members/owners . . . that will not be an electric cooperative or a governmental entity and will not directly or indirectly be wholly-owned by an electric cooperative or a governmental entity.”)

<sup>39</sup> *See* Tri-State September 3 Notice at 3. Tri-State argues that its waiver request is driven by *other parties’* concerns as to whether Tri-State is actually a jurisdictional entity. *Id.* This argument is circular and ignores that the burden of proof lies with Tri-State.

<sup>40</sup> *See* Tri-State September 3 Notice at 2-3. *See also* Tri-State Press Release.

<sup>41</sup> *Allegheny Generating Station, LLC*, 147 FERC ¶ 61,147 at P 17 (2014).

<sup>42</sup> *See, e.g., Illinois Power Co.*, 75 FERC ¶ 61,269 at 61,878 (1996); *Mississippi Power Co.*, 96 FERC ¶ 61,021 at 61,061 (2001).

Tri-State argues that the Commission has found good cause in past cases where a waiver “is limited in scope, addresses a concrete problem, and leaves ratepayers unharmed.”<sup>43</sup> Tri-State seems to be drawing a parallel to the Commission’s tariff waiver standard, under which waivers may be granted if “(2) the waiver is of limited scope; (3) a concrete problem must be remedied; and (4) the waiver does not have undesirable consequences, such as harming third parties.”<sup>44</sup> But Tri-State makes no mention of the first (and perhaps most important) criteria for granting a tariff waiver, that: “(1) the applicant has been unable to comply with the tariff provision at issue in good faith.”<sup>45</sup> Because Tri-State faced no difficulty here in complying with the notice requirement—let alone an *inability* to comply—good cause for the granting of a waiver has not been shown.

In light of that foundational problem, even if Tri-State’s preferred, limited set of waiver criteria were fulfilled, they would not constitute the requisite showing of good cause under the FPA. But these preferred criteria are not fulfilled either. The waiver Tri-State seeks will have wide-ranging impacts on other entities—potentially including ratepayers—that are not explored or justified in any Tri-State pleading. First, Tri-State’s request for waiver characterizes Mico as “its initial New Member,”<sup>46</sup> implying that additional new members may follow. Second, and relatedly, Tri-State’s request for waiver does not explain the impact of the admission of Mico on the applications of Tri-State or its affiliate, Thermo Cogeneration Partnership L.P. (“Thermo Cogen”)

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<sup>43</sup> Tri-State September 3 Notice at 4. Other criteria for good cause have been applied in other circumstances. *See, e.g., Meridian Energy USA, Inc. v. Cal. Indep. Sys. Operator Corp.*, 143 FERC ¶ 61,206 at P 24 (2013) (explaining that waiver may be appropriate when it is limited in scope, there are no undesirable consequences, and the resultant benefits to customers are evident); *see also Xcel Energy Servs. v. FERC*, 510 F.3d 314, 317 (D.C. Cir. 2007) (noting that the Commission has applied an extraordinary circumstances standard of waiver for some kinds of new service agreements); *ISO New England Inc.*, 117 FERC ¶ 61,171, at P 21 (2006) (granting limited and temporary change to tariff to correct an error).

<sup>44</sup> *Allegany*, 147 FERC ¶ 61,147 at P 15.

<sup>45</sup> *Id.*

<sup>46</sup> Tri-State September 3 Notice at 2 (emphasis added).

for market-based rate (“MBR”) authority.<sup>47</sup> The request for waiver describes Mieco as a “wholesale energy services company” that “supplies natural gas to purchasers throughout the nation.”<sup>48</sup> But it provides almost no meaningful information about Mieco’s assets, its corporate structure, or its organization—information that is critical to an MBR analysis.<sup>49</sup> Similar information would be required if Tri-State admits additional new members in the future.

Moreover, the prior pleadings of CoPUC and other parties have pointed to numerous other issues that will be exacerbated by a grant of Tri-State’s requested waiver. For example, Tri-State’s filings may change the jurisdictional status of Basin Electric Power Cooperative (“Basin Electric”), of which Tri-State is a member. Basin Electric’s intervention explains that it “anticipates that it will become subject to the Commission’s jurisdiction under sections 205 and 206 of the Federal Power Act on the same date that Tri-State admits a Commission-jurisdictional member,”<sup>50</sup> but it is not clear on this record what kinds of filings and approvals Basin Electric may need to also make this transition. In another example, a grant of the waiver that Tri-State seeks could impede sales by qualified facilities (“QFs”) to Tri-State’s member cooperatives.<sup>51</sup> These impacts belie Tri-State’s claim that its requested waiver is limited in scope. Instead, Tri-State’s action to admit its new member spawns numerous further questions that must also be resolved if waiver is granted.

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<sup>47</sup> See *Application of Tri-State Generation and Transmission Association, Inc. for Market-Based Rate Authority and Certain Waivers and Blanket Authorizations* at 9-16, Docket No. ER19-2442-000 (filed Jul. 23, 2019) [‘Tri-State MBR Application’].

<sup>48</sup> Tri-State September 3 Notice at 2.

<sup>49</sup> 18 C.F.R. § 35.37(a)(2).

<sup>50</sup> (doc-less) Motion to Intervene of Basin Electric Power Cooperative, Docket No. ER19-2440-000 (Aug. 13, 2019) [‘Basin Electric Motion to Intervene’]; see also (doc-less) Motion to Intervene of Mountrail-Williams Electric Cooperative, Docket No. ER19-2440-000 (Aug. 23, 2019) (intervention motion by electric distribution cooperative that is a Basin Electric member, which raised the same concern).

<sup>51</sup> See, e.g., *Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968) (“It follows that the Commission was here without authority to abrogate existing contract prices unless it first concluded that they ‘adversely affect the public interest.’”).

The 60-day notice period is important for several reasons. It gives notice to customers, and allows them time to react to proposed changes.<sup>52</sup> And it permits the Commission time to evaluate whether the rates are just and reasonable.<sup>53</sup> That is not possible here since large components of Tri-State's filings remain missing.<sup>54</sup> Accepting these incomplete filings *and* permitting them to take effect via waiver, would deny other parties of the notice required by the Federal Power Act.<sup>55</sup> In this situation, the full notice period is proving necessary in order simply to understand the full scope of issues that have arisen as a result of Tri-State's action to seek Commission-jurisdictional status at all costs. A grant of Tri-State's request for waiver would undermine these important statutory purposes, and short-circuit the Commission's and the parties' ability to address the issues Tri-State has raised.

Nor has Tri-State complied with the Commission Rule concerning an application for waiver, which requires a showing of "(a) how and the extent to which the filing public utility and purchaser(s) ... would be affected if the notice requirement is not waived, and (b) the effects of the waiver, if granted, upon purchasers under other rate schedules."<sup>56</sup> Tri-State's request for waiver only cites that rule while generically requesting "such other waivers as may be appropriate ... to allow for" Tri-State to get what it wants.<sup>57</sup> And Tri-State makes only a cursory, unsupported

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<sup>52</sup> See *Maine Pub. Svc. Co.*, 61 FERC ¶ 61,319 at 62,185 (1992) (denying waiver where the "only rationale provided" was to "ensure that the customers do not use the 60-day notice period to avoid the consequences of the rate schedule change"); *Gulf States Utils. Co. v. FERC*, 1 F.3d 288, 292-93 (5th Cir. 1993).

<sup>53</sup> See *Union Texas Prods. Corp. v. FERC*, 899 F.2d 432, 433 (5th Cir. 1990) (explaining the similar notice provisions of Section 4 of the Natural Gas Act).

<sup>54</sup> See, e.g., United Power's Motion to Intervene and Protest, Docket Nos. ER19-2444-000 and ER19-2444-001, at 3-6 (Aug. 13, 2019) ["United Power Protest"]; *id.* at 5 & n.6 and Exhibit B (noting Tri-State's failure to file all relevant Board Policies and enclosing several such policies in an exhibit).

<sup>55</sup> *NRG Power Marketing, LLC v. FERC*, 862 F.3d 108, 116 (D.C. Cir. 2017).

<sup>56</sup> 18 C.F.R. § 35.11.

<sup>57</sup> See Tri-State September 3 Notice at 2-3 & n.4.



statement that ratepayers will not be harmed.<sup>58</sup> This is insufficient, particularly in light of the numerous issues highlighted above.

## **VI. TRI-STATE MAY BE REQUIRED TO PAY REFUNDS.**

As outlined above, Tri-State has not taken the necessary steps to demonstrate that it is subject to the jurisdiction of the Commission. However, if Tri-State is now a Commission-jurisdictional public utility, and the Commission denies its waiver request, Tri-State must pay refunds. The Commission has a longstanding policy that applies when a public utility begins to make jurisdictional sales based on an incorrect assumption that the Commission will approve its waiver request. If waiver is denied, “the utility [must] refund to its customers the time value of the revenues collected ... for the entire period that the rate was collected without Commission authorization.”<sup>59</sup> After the Commission denies the waiver request and rejects the proposed tariffs, refunds are appropriate for the entire period for which Tri-State was subject to the jurisdiction of the Commission without an appropriate rate on file.

Presumably, in response to a Commission order rejecting the proposed tariffs, Tri-State will seek to come into compliance with federal law and revert to its prior non-jurisdictional

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<sup>58</sup> See Tri-State September 3 Notice at 4-5. To the contrary, there may be customer problems *caused* by granting Tri-State’s waiver request. LaPlata Electric Association urged the Commission to “thoroughly investigate[] TriState’s filed WESCs,” Comments of LaPlata Electric Association, Inc. Docket No. ER19-2440-000 et al, at 12 (Aug. 23, 2019) [‘LaPlata Comments’], which includes its own wholesale electric service contract with Tri-State, *see* Transmittal Letter in Docket No. ER19-2444-000 at 9. As the D.C. Circuit has explained, whether it was “the intent of the parties” to agree on a particular effective date for their jurisdictional contract is an important consideration in determining whether the advance notice provisions of Section 205(d) should be waived. *See City of Piqua, Ohio v. FERC*, 610 F.2d 950, 954 (D.C. Cir. 1979). Not only do we not know on this record whether all of Tri-State’s WESC customers have consented to an as-soon-as-possible effective date, we also do not know whether the parties or the contracts themselves even contemplated FERC jurisdiction ever being a possibility, as the contracts were executed more than ten years ago in light of Tri-State’s non-jurisdictional debt obligations. The WESCs may not be appropriate jurisdictional contracts at all, let alone ones that should be given effect under federal law without delay and without considering the intent and wishes of their counterparties.

<sup>59</sup> *Prior Notice and Filing Requirements under Part II of the Federal Power Act*, 64 FERC ¶ 61,139 at 61,979-80 (1993), *order on clarification*, 65 FERC ¶ 61,081 (1993). *See also Southern California Edison Co.*, 116 FERC ¶ 61,287 at PP 19-20 (2006) (affirming prior decision re: prior notice and refunds).

membership structure, or re-file a more complete set of rate filings. However, if Tri-State persists in its current posture after the Commission rejects or dismisses the tariff filings here, further refunds will be appropriate. The Commission has repeatedly made clear that making sales that are subject to the jurisdiction of the Commission without a rate on file constitutes a serious violation of the Federal Power Act. Such conduct leads to time-value refunds of the *total* revenues collected.<sup>60</sup> In addition, entities have been subject to Commission enforcement actions for such conduct.<sup>61</sup>

Tri-State is likely to argue that such an outcome is overly harsh since it is merely continuing to provide service under preexisting agreements with its member cooperatives. This Commission has been clear, though, that the refund policy is not just designed to protect counterparties, but to protect the Commission itself. The harm here is not to counterparties but to “the Commission’s ability to perform its statutory mission.”<sup>62</sup> Equally important, the consequences here are entirely the result of Tri-State’s own actions. Tri-State could have chosen to receive Commission guidance prior to admitting a new member, and it knows how to file a petition for a declaratory order at the Commission.<sup>63</sup> Alternatively, it could have arranged for the change in membership to take effect upon approval of its tariffs by the Commission. Nothing required Tri-State to proceed in this fashion and it should not expect the Commission to excuse its conduct.

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<sup>60</sup> *Athens Energy LLC*, 166 FERC ¶ 61,005 at P 14 (2019); *Tucson Elec. Power Co.*, 157 FERC ¶ 61,027 at P 18 (2016) (“The Commission requires time value refunds to be calculated based on the total revenues of the contract”).

<sup>61</sup> See, e.g., *American Transmission Co.*, 160 FERC ¶ 61,030 (2017); *International Transmission Co. et al.*, 146 FERC ¶ 61,172 (2014).

<sup>62</sup> *Tucson Elec. Power Co.*, 157 FERC ¶ 61,027 at P 8.

<sup>63</sup> See *Tri-State Generation and Transmission Association, Inc.*, 155 FERC ¶ 61,269 at P 1 (2016) (denying petition for a declaratory order).

## CONCLUSION

The CoPUC appreciates the Commission's close attention to the numerous issues raised in these proceedings and requests that it reject the filings presented in the above-captioned dockets and find Tri-State's request for waiver of the full statutory notice period moot.

Respectfully submitted,

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Dated: Sept. 12, 2019

**CERTIFICATE OF SERVICE**

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

Dated: Sept. 12, 2019

By: /s/ Sudeen Kelly  

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