Decision No. C20-0304

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19R-0408E

IN THE MATTER OF THE PROPOSED RULES IMPLEMENTING SENATE BILL 19-236 REGARDING INTEGRATED OR ELECTRIC RESOURCE PLANS FOR WHOLESALE ELECTRIC COOPERATIVES.

DECISON ADDRESSING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION OF DECISION NO. C20-0155 AND ADOPTING RULES

Mailed Date: April 28, 2020
Adopted Date: April 22, 2020

TABLE OF CONTENTS

I. BY THE COMMISSION

A. Statement

1. By Decision No. C20-0155, issued March 10, 2020, the Colorado Public Utilities Commission adopted amendments to the provisions in the rules governing Electric Resource Planning (ERP Rules) at 4 *Code of Colorado Regulations* (CCR) 723-3-3600, *et seq.,* as they apply to wholesale electric cooperatives. The proposed amendments fulfill the requirement in Senate Bill (SB) 19-236, codified at § 40-2-134, C.R.S., that requires the Commission to adopt rules that address application filings from wholesale electric cooperatives for Commission approval of their integrated or electric resource plans (ERPs).

2. On March 30, 2020, Tri-State Generation and Transmission Association, Inc. (Tri-State) filed an application for rehearing, reargument, or reconsideration of Decision No. C20-0155 (Application for RRR).

3. As discussed below, we grant, in part, and deny, in part, Tri-State's Application for RRR. We also adopt further rule revisions as attached to this Decision in legislative format (Attachment A) and in final format (Attachment B).

B. Sierra Club Motion for Leave to Reply to Tri-State's RRR

4. In its Application for RRR, Tri-State explains that, in general, the ERP Rules adopted by the Commission are "a reasonable implementation" of SB 19-236. Tri-State suggests that its Application for RRR is limited to a small number of discrete issues.

5. Tri-State requests that the Commission further modify the ERP Rules to: (1) establish a reasonable time limit for discovery related to Tri-State's June 1, 2020 initial filing; (2) afford Tri-State the same exemptions and exclusions from ERPs that are applicable to

investor-owned electric utilities; (3) ensure "appropriate treatment" of Tri-State's out-of-state resources; and (4) clarify that Tri-State may include energy storage systems in its ERP.

6. On April 7, 2020, Sierra Club filed a motion for leave to respond to Tri-State's RRR in two areas: the proposed six weeks of discovery related to Tri-State's June 1, 2020 initial filing and Tri-State's request to exclude out-of-state resources from Colorado ERP proceedings.

7. We deny Sierra Club's motion for leave to respond to Tri-State's Application for RRR. Pursuant to the Commission's Rules of Practice and Procedure, 4 CCR 723-1, replies to applications for RRR are not generally allowed; however, the Commission also has discretion on whether to accept replies to such pleadings upon consideration of a proper motion for leave to reply. In this instance, the Commission requires no additional information or argument from Sierra Club to rule on Tri-State's Application for RRR.

C. Discovery Related to June 1, 2020 Filing

8. Decision No. C20-0155 explains that Tri-State will be the first of Colorado's three electric utilities to submit an application for approval of an ERP subject to the Commission's revised ERP Rules. In recognition of both the time Tri-State will need to complete its full ERP filing and the calls for prompt action, the Commission requires Tri-State's initial ERP application to be submitted in two parts. No later than June 1, 2020, Tri-State must file an assessment of its existing resources pursuant to the requirements in Rule 3605(c). The application for approval of Tri-State's full ERP then would be filed no later than December 1, 2020.

9. In its Application for RRR, Tri-State states that it appreciates the structure under which it will file an assessment of existing resources in June 2020 followed by the remainder of the full application in December 2020. Tri-State states that this approach is reasonable in light of the timing suggested by the other rulemaking participants.

10. Tri-State explains that while the Commission will allow parties to conduct discovery on Tri-State's June 1 filing, it has not indicated the last date on which such discovery may be propounded. Tri-State is concerned that without an associated "cutoff date" during the period between June 1, 2020 and December 1, 2020, Tri-State could be inundated with discovery requests continuing through the filing of answer testimony sometime in 2021. Tri-State states that such a long discovery period would be burdensome and could compromise Tri-State's ability to timely prepare and file its full ERP application in December of this year.

11. Tri-State requests that the Commission modify the rules to specify that parties may serve discovery related to Tri-State's June 1, 2020 filing during the six-week period following the effective date of the Commission's decision regarding interventions. Tri-State argues that this timeline will allow interested parties time to intervene and propound discovery related to the June 1 filing while also ensuring that they do so in a reasonable and timely manner.

12. It is premature to limit discovery by rule in the specific manner that Tri-State seeks in its Application for RRR. We are reluctant to incorporate a rule outside our Rules of Practice and Procedure directly related to discovery standards. Rather, we are confident our discovery rules at Rule 1405 are adequate to address any discovery disputes that may arise as part of Tri-State's ERP process. Nonetheless, Tri-State raises a valid concern that excessive discovery could hinder Tri-State from meeting the deadline for its complete ERP filing of December 1, 2020.

13. The Commission will establish provisions governing discovery pursuant to Rule 1405, by procedural interim decisions rendered in the proceeding that is initiated by Tri-State's June 1, 2020 filing. We are mindful of Tri-State's concerns regarding potentially

burdensome discovery and will endeavor to ensure that Tri-State can meet the December 1, 2020 full ERP filing without being impaired by excessive discovery.

D. Exemptions from an Electric Resource Plan

14. Rule 3615 of the ERP Rules that apply to the investor-owned electric utilities in Colorado that states the following resources "need not be included in an approved resource plan prior to acquisition": (1) emergency maintenance or repairs; (2) newly-constructed, utility-owned, supply-side resources with a nameplate rating of not more than 20 MW; (3) capacity and/or energy from other utilities or from non-utility generators pursuant to agreements for not more than a two-year term (including renewal terms) or for not more than 20 MW of capacity; (4) improvements or modifications to existing generation that change production capability by not more than 20 MW and have an estimated cost of not more than $30 million; (5) interruptible service; (6) modifications to, existing power purchase agreements provided the modification or amendment does not extend the agreement for more than four years, does not add more than 20 MW of capacity to the utility's system; (7) emission control equipment at existing generation plants; and (8) demand-side programs.[1]

15. Decision No. C20-0155 declines to adopt a similar rule for Tri-State.

16. In its Application for RRR, Tri-State requests that the Commission either include the proposed Rule 3611 exemptions in the ERP Rules for Tri-State or clarify that Tri-State will be allowed to make "small acquisitions" outside of an ERP process.

17. Tri-State argues that while provisions in Rule 3605 do not mandate competitive bidding for Tri-State, the lack of a mandate for competitive bidding does not mean that Tri-State

[1] Rule 3615 is under review for modifications in Proceeding No. 19R-0096E as "Proposed Rule 3611." Decision No. C19-0197, issued February 27, 2019, Proceeding No. 19R-0096E.

should not be allowed to acquire certain resources outside the ERP as provided for investor-owned utilities in proposed Rule 3611. Tri-State argues that the rules adopted by Decision No. C20-0155 provide only two paths for Tri-State to acquire resources: through the quadrennial ERP filing or through an interim ERP filing justified by changed circumstances. Tri-State states that without the exceptions provided to the investor-owned utilities in proposed Rule 3611, Tri-State would be dramatically constrained in its ability to flexibly acquire small resources in the periods between ERPs. Tri-State further states that it is occasionally presented with t ime-sensitive opportunities to acquire resources that would fall under the 20 MW exemptions provided for the investor-owned utilities in proposed Rule 3611. These resources generally represent one-off opportunities that would not otherwise be available and that would be difficult, and are likely impossible to integrate into a four-year ERP cycle.

18. We conclude that it is impractical and premature to identify what exemptions and exclusions are appropriate for Tri-State with respect to its future ERP filings without first completing an initial ERP proceeding pursuant to the new rules developed in this Proceeding. Nevertheless, Tri-State makes a valid point that it would be cumbersome and potentially problematic to require all resource acquisitions to be reviewed through the lens of the ERP Rules for Tri-State.

19. We therefore adopt new provisions in a new paragraph 3605(i) that allows Tri-State to engage in certain resource acquisitions without having to file an interim or amended ERP. The proposed rule addition will not require interim or amended plans for: (1) emergency maintenance or repairs made to utility-owned generation and energy storage facilities; (2) capacity and/or energy from newly-constructed, utility-owned, supply-side resources with a nameplate rating of not more than 20 MW; (3) capacity and/or energy from the generation

facilities of other utilities or from non-utility generators pursuant to agreements for not more than a two-year term (including renewal terms) or for not more than 20 MW of capacity; (4) improvements or modifications to existing utility generation and energy storage facilities that change the production capability of the generation facility site in question, by not more than 20 MW, based on the utility's share of the total power generation at the facility site and that have an estimated cost of not more than $30 million; and (5) modification to, or amendment of, existing power purchase agreements provided the modification or amendment does not extend the agreement more than four years, does not add more than 20 MW of capacity to the utility's system, and is cost effective in comparison to other supply-side alternatives available to the utility.

20. The new provisions in paragraph 3605(i) are intended for effect after the completion of the first ERP proceeding conducted pursuant to these new ERP Rules for Tri-State.

E. Out-of-State Resources

21. Decision No. C20-0155 briefly addresses Tri-State's request to exclude out-of-state resources in one sentence: "We also are not persuaded that the proposed exemption that Tri-State has advanced in Proceeding No. 19R-0096E for resources not located in Colorado has merit."[2]

22. In its RRR, Tri-State faults the Commission for not addressing whether and to what extent the Commission proposes to regulate Tri-State resources located outside Colorado through the ERP process. Tri-State argues that without a limitation with respect to state boundaries, provisions in the ERP Rules could put the Commission in the position of issuing

[2] Decision No. C20-0155 at ¶ 91.

determinations regarding out-of-state facilities that are infrequently used to serve Tri-State's wholesale customers in Colorado and over which the Commission has no underlying facilities jurisdiction. Tri-State further argues that requiring the inclusion of Tri-State's non-Colorado resources in the ERP may implicate economic protectionism with respect to Colorado-based resources. Tri-State points to subparagraph 3605(h)(II)(B) that requires the Commission to consider, among other factors, "employment and long-term economic viability of Colorado communities" in making its Phase II decision. Tri-States explains that while this requirement makes sense for in-state facilities, its application to non-Colorado facilities is problematic. Tri-State concludes that without a rule limiting the application of the ERP to in-state facilities, planned or existing non-Colorado facilities could receive "unfavorable regulatory treatment due exclusively to their out-of-state location."[3]

23. Tri-State thus requests that the Commission reconsider Tri-State's proposed exemption for out-of-state resources. Tri-State argues that this request relates specifically to the General Assembly's express instruction in SB 19-236 that the Commission consider Tri-State's "multistate operational jurisdiction" in drafting these ERP Rules for Tri-State.

24. We recognize that consideration of Tri-State's out-of-state resources will be one of the most challenging aspects of its ERP proceedings conducted pursuant to the rules promulgated here pursuant to SB 19-236. We conclude that it will be necessary to address such challenges by considering evidence and policy testimony put forward by Tri-State and the intervening parties to the ERP proceedings.

25. Tri-State's proposal to designate out-of-state resources off-limits to a Colorado ERP proceeding is also unhelpful, because it would likely not alleviate any controversies

[3] Tri-State RRR at p. 6.

surrounding such issues as projected carbon emission reductions and overall resource portfolio costs and benefits. Tri-State's advocacy has also been inconsistent on this issue both in this case and in Proceeding No. 19R-0096E, where Tri-State proposed that the Commission declare that one purpose of Tri-State's ERP is to minimize the net present value of revenue requirement on a system basis including all states in which the cooperative operates.

26. We further disagree with Tri-State that the rules adopted by the Commission through Decision No. C20-0155 fail to take into account Tri-State's multi-state operations. To the contrary, the rules promulgated by Decision No. C20-0155 include procedures that foster deliberate and extensive consideration of Tri-State's existing resources to determine, based on evidence, what plants in Tri-State's fleet serve its Colorado members and what plants do not regardless of their location inside or outside state boundaries. In our view, Tri-State's proposal for a blanket exclusion of out-of-state resources runs counter to the directive in SB 19-236 that the Commission consider its multi-state operations when promulgating ERP Rules applicable to Tri-State. We find Tri-State's concern of economic protectionism in considering its resource plan juxtaposed with out of state generation resources to be without merit. We are well aware of the Dormant Commerce Clause standards and have no intention of violating those provisions. The granting of Tri-State's RRR by excluding out-of-state resources from consideration in an ERP review would further cause Tri-State's ERP proceedings to be far less substantive than what the General Assembly likely intended by passing SB 19-236.

F. Energy Storage

27. In its Application for RRR, Tri-State states that it has a pumped storage resource and generally includes energy storage in its modeling exercises. Tri-State explains that it expects to continue to model energy storage in its resource planning process and may seek to include

energy storage as an option in its ERP filings with the Commission. Tri-State thus requests that the ERP Rules for Tri-State include language specifically allowing Tri-State to consider energy storage systems in its ERP consistent with what was provided for the investor-owned electric utilities in Decision No. C18-1124 issued in the rulemaking in Proceeding No. 18R-0623E issued on December 12, 2018.

28. Specifically, Tri-State asks the Commission to make the following three changes to Rule 3605 that apply exclusively to Tri-State: subparagraph 3605(c)(I) should mirror paragraph 3607(a) by referring to "generation facilities and energy storage systems," as necessary; subparagraph 3605(f)(II) should include a subpart (C) consistent with subparagraph 3610(b)(III); and subparagraph 3605(h)(II)(B) should include energy storage systems on the list of considerations for the Commission in its Phase II decision, consistent with what is provided in Rule 3613.

29. We agree with Tri-State that the energy storage-related modifications to the Commission's ERP Rules implemented in Proceeding No. 18R-0623E should be reflected, as appropriate, in the ERP Rules for Tri-State. We therefore modify the rules adopted by Decision No. C20-0155 as set forth in the attachments to this Decision, including: (1) subparagraph 3605(c)(I) that sets forth the requirements for the assessment of Tri-State's existing resources; subparagraph 3605(a)(IV) that defines the components of Tri-State's initial Phase I filing; subparagraph 3605(f)(II) that addresses the assessment of Tri-State's resource need; and paragraph 3605(g) requiring provisions for energy storage systems in the request for proposals for competitive bidding filed in Phase I of Tri-State's ERP.

30. We further clarify that Tri-State is authorized to consider energy storage systems in its ERPs.

G. Conclusion

31. The statutory authority for the rules adopted by this Decision is found at §§ 24-4-101 *et seq.,* 40-2-108, 40-2-123, 40-2-124, 40-2-127, 40-2-134, and 40-2-129, C.R.S.

32. In light of our decision to grant, in part, Tri-State's Application for RRR, we adopt the rule revisions shown in legislative (*i.e.*, strikeout/underline) format (Attachment A) and final format (Attachment B) attached to this Decision, consistent with the discussion above.

II. ORDER

A. The Commission Orders That:

1. The application for rehearing, reargument, or reconsideration of Decision No. C20-0155 filed by Tri-State Generation and Transmission Association, Inc. on March 30, 2020 is granted, in part, and denied, in part, consistent with the discussion above.

2. The Rules governing Electric Resource Planning as applied to wholesale electric cooperatives in the *Rules Regulating Electric Utilities* in 4 *Code of Colorado Regulations* 723-3-3605 are adopted by this Decision. The adopted rules are set forth in legislative format (Attachment A) and final format (Attachment B) and are available in the Commission's Electronic Filing System at:

https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=19R-0408E

3. Subject to a filing of an application for rehearing, reargument, or reconsideration, the opinion of the Attorney General of the State of Colorado shall be obtained regarding constitutionality and legality of the rules as finally adopted.

4. A copy of the final adopted rules shall be filed with the Office of the Secretary of State. The rules shall be effective 20 days after publication in *The Colorado Register* by the Office of the Secretary of State.

5. The 20-day time period provided by § 40-6-114, C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the effective date of this Decision.

6. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING April 22, 2020.

(S E A L)

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

Commissioners

ATTEST: A TRUE COPY

COMMISSIONER MEGAN M. GILMAN NOT PARTICIPATING.

Doug Dean,
Director