UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Tri-State Generation and Transmission	**)**	**Docket No.**	**ER21-2818-000**
Association, Inc.	**)**		**EL22-4-000**

BRIEF ON EXCEPTIONS OF UNITED POWER, INC.

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Pursuant to Rule 711(a)(1) of the Federal Energy Regulatory Commission's (FERC or Commission) Rules of Practice and Procedure, 18 C.F.R. § 385.711(a)(1) (2022), United Power, Inc. (United Power) submits its Brief on Exceptions to the Presiding Administrative Law Judge's Initial Decision issued September 29, 2022 in these Dockets (Initial Decision or ID).[1] The ID correctly rejected Tri-State's Modified Contract Termination Payment Methodology (MCTP) as unjust, unreasonable, and unduly discriminatory because it does not comply with Commission directives and would produce facially excessive exit fees. Although it correctly adopted an exit fee methodology based on United Power's Balance Sheet Approach (BSA), the ID injects certain adjustments to that methodology that were proposed by FERC Trial Staff (Trial Staff). The Commission should not adopt these alterations because they would cause the BSA to deviate from established Commission precedent, including cost causation. United Power therefore takes exception to the ID's alterations to the BSA, and urges the Commission to instead adopt the BSA in the form proposed by United Power.

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[1] *Tri-State Generation and Transmission Ass'n, Inc.*, 180 FERC ¶ 63,034 (2022) (Initial Decision).

I. BACKGROUND AND STATEMENT OF THE CASE

A. Summary of Argument

Tri-State is a FERC-jurisdictional public utility that serves 42 distribution members over a four-state footprint spanning the Eastern and Western interconnects.[2] Tri-State owns and controls about $5 billion in critical electric transmission and generation assets. As a jurisdictional public utility, Tri-State's rates and charges must be just and reasonable and not unduly discriminatory, and Tri-State must comply with the Federal Energy Regulatory Commission (FERC or Commission) precedent and orders.

Tri-State serves each of its distribution members under substantively identical Wholesale Electric Service Contracts (WESCs) that contemplate a member's right to withdraw. The current WESCs were executed in 2007 before Tri-State was subject to this Commission's jurisdiction.[3] At that time, Tri-State gave its members two options: (1) sign a contract extension to support Tri-State's financing of a planned 895 MW coal-fired plant,[4] or (2) pay higher rates as a punitive measure for electing not to extend.[5] Lacking meaningful choice, all of Tri-State's current distribution members signed the agreements. In signing these service extensions, Tri-State's members did not relinquish their established right to exit. As Tri-State itself explained to the Colorado Public Utilities Commission (CoPUC) nearly a decade ago, the right to exit is fundamental: it is "[a] Member System's right to exit Tri-State [that] prevents a majority of the

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[2] As described further below, two other distribution members exited Tri-State and paid exit fees in magnitudes consistent with the BSA. Tri-State also has three non-utility members, added for the specific purpose of making Tri-State jurisdictional to this Commission, rather than the State Commissions in states Tri-State serves.

[3] FERC has determined that the WESCs are not subject to the *Mobile-Sierra* public interest standard of just and reasonable review. *Tri-State Generation and Transmission Ass'n, Inc.*, 170 FERC ¶ 61,221, at P 44 (2020) ("We find that the...Wholesale Service Contracts are not eligible for the Mobile-Sierra 'public interest' presumption."). Successive substantively identical WESCs have been in place with distribution members since Tri-State's formation in 1952.

[4] That coal-fired plant was never built. Ex. UP-0025 REV at 19.

[5] Ex. UP-0103A.

Board of Directors from disadvantaging the interests of the minority with respect to rates."[6] More pertinent to this Commission's review, the right to exit serves to further Commission policies in favor of competition and open access: structural protections Congress and FERC have deployed for decades to protect utility ratepayers and the national public interest.

Yet Tri-State has recurrently asked regulators—including this Commission—to eliminate the right to exit or to make its exercise so difficult and expensive as to functionally negate it, thus trapping its members in "the bad old days" where captive customers purchased exclusively bundled service from monopoly providers on terms imposed at the provider's choosing.[7] By proposing a methodology that always calculates a wildly excessive exit fee, designed not to *facilitate* exit, but instead to *block* it, Tri-State sought to eliminate its members' access to the competitive environment favored by Commission policy for nearly 30 years. FERC declined to be an accessory.[8] The Presiding Judge also declined.[9]

The Presiding Judge's ID is well-reasoned in nearly every respect. It correctly and categorically rejects Tri-State's MCTP proposal and properly, with full record support, adopts United Power's BSA framework (albeit with certain adjustments discussed below). The ID also addresses and rejects various participants' attempts to recraft Tri-State's MCTP while not correcting its unreasonable results. The ID agreed that the appropriate exit fee standard is the one

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[6] Ex. UP-0103D at 61 (emphasis added).

[7] "In the bad old days, utilities were vertically integrated monopolies; electricity generation, transmission, and distribution for a particular geographic area were generally provided by and under the control of a single regulated utility. Sales of those services were 'bundled,' meaning consumers paid a single price for generation, transmission, and distribution. As the Supreme Court observed, with blithe understatement, '[c]ompetition among utilities was not prevalent.'" *Midwest Indep. Transmission Sys. Operator Transmission Owners v. FERC*, 373 F.3d 1361, 1363 (D.C. Cir 2004) (citing *New York v. FERC*, 535 U.S. 1, 5 (2002)). By raising unreasonable barriers to exit, Tri-State seeks to hinder or eliminate competition through restricting members' access to other suppliers. Tri-State has also devised numerous programs external to the WESC that make uneconomic the miserly 5% of load that the WESCs allow for member self-supply.

[8] *Tri-State Generation and Transmission Ass'n, Inc.*, 177 FERC ¶ 61,059 (2021) (Hearing Order).

[9] Initial Decision at P 189.

FERC directed: net costs Tri-State has already incurred or has an obligation to incur to serve the exiting member.[10] It also properly rejected *all* "lost revenues" variations proposed by Tri-State or other parties in defiance of the Commission's directive to identify "the appropriate set of calculation inputs, credits, and offsets" to accomplish the same.[11] The ID recognizes that a member adhering to the terms of Rate Schedule No. 281 is simply exercising its tariffed right to access competitive suppliers by (1) providing two years' notice and (2) paying a cost-based exit fee on the date of departure.[12] The ID is well-reasoned on all of these points, following FERC's directive that such lost revenues approaches are "not appropriate in these types of contract termination situations."[13] FERC should uphold all of these determinations.

While the ID is sound in most respects, it errs in failing to adopt United Power's BSA as-filed, instead adopting several Trial Staff adjustments largely derived from lost revenues approaches. Like the lost revenues approaches themselves, these adjustments are conceptually unsound and unworkable in implementation. The BSA as-filed consistently renders non-discriminatory exit fees of reasonable magnitude, readily calculable in a workable formulaic template without the need for negotiation. But by mixing and matching a handful of adjustments that are influenced by the rejected "lost revenues"-based models, the ID adjustments subvert the ID's own intention to consistently, across all inputs, implement the appropriate standard: that the

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10 *Id.* P 241.

11 Hearing Order at P 125.

12 *Id.* P 123 ("if a Tri-State utility member departs using the Modified CTP Methodology, there would be no breach of contract between Tri-State and the departing utility member, because such action would be taken pursuant to Tri-State's tariff, and, therefore, no damages should be due.").

13 *Id.*

exit fee must measure "the costs [Tri-State] has incurred or has an obligation to incur in the future" to serve the departing member.[14]

Trial Staff did not submit a complete or calculable model, but largely introduced their proposed adjustments in exemplary calculations. As proposed, those example calculations lacked the extensive practical and analytical support underlying United Power's model.[15] Unlike Trial Staff's adjustments, United Power tested what *actually occurs* from an economic perspective when the BSA is implemented. Instead, Trial Staff's adjustments introduce volatility into the otherwise stable calculations that resulted from United Power's BSA, and the adjustments embed known cross-subsidies through the introduction of key inputs that Trial Staff—and the ID itself—recognize as faulty.[16] Regarding transmission, Trial Staff's position would resurrect the rejected "revenues lost" standard, saddle exiting members with far greater transmission obligations than they have today, and by requiring members to negotiate bespoke transmission agreements with Tri-State, provide Tri-State with recurrent opportunities to obstruct.[17]

The Commission should not adopt the alterations to the BSA, or any other exit fee methodology that extracts from an exiting member more than Tri-State's net costs incurred to serve it. Doing so would violate bedrock cost causation/beneficiary pays principles.[18] The Commission should instead adopt the BSA in its original form, which follows sound cost causation by:

1. Apportioning Tri-State's net long-term liabilities to serve each member based on a member's share of accrued patronage capital, which reflects a member's long-term service

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[14] *Tri-State Generation and Transmission Ass'n, Inc.*, 172 FERC ¶ 61,173, at P 32 (2020).

[15] Section V.A, *infra*.

[16] Section V.A.1, *infra*.

[17] Section V.A.3, *infra*.

[18] As noted in United Power's briefing and pre-filed testimony, the Commission should likewise avoid ordering an exit fee that is too low. However, United Power has no reason to raise exceptions on this basis, as no exit fee under consideration presented results that would have been unreasonably low.

profile over the initial capital funding and construction of assets, and the decades-long useful lives of Tri-State's balance sheet assets;

2. Avoiding the incorporation of known cross-subsidies into any input to the calculation;
3. Making reasonable, objective formulaic adjustments; and
4. Adopting reasonable expectations with respect to an exited member's future transmission service from Tri-State.

The ID instead creates flawed results because it:

1. Uses a small, non-cost-causative sample of recent member revenues to allocate billions in long-term liabilities that Tri-State has incurred over decades;
2. Embeds known unjust and unreasonable cross-subsidization using the unlawful A-40 Rate as a key input, even though it is to be replaced before any exit occurs;[19]
3. Rejects simple formulaic adjustments designed to avoid double recovery[20] and address generation-related obligations associated with recent retirements; and
4. Saddles an exiting member with unreasonable transmission obligations that guarantee a double-recovery of transmission costs by Tri-State.

Although United Power disagrees conceptually with Trial Staff's adjustments, Trial Staff correctly calculated a United Power exit fee reflecting a magnitude nearly identical to the BSA's. Trial Staff tested those exemplary calculations against the suite of indicative benchmarks on the record.[21] However, because the calculations were only exemplary and did not provide a consistent basis for adoption, the ID's adjustments altered Trial Staff's calculation in a manner that produces excessive and unduly discriminatory end results in circumstances having nothing to do with any costs caused or benefits received by the exiting member. Therefore, the BSA should be adopted as filed, instead of as-adjusted by the ID.

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[19] Under the settlement among the parties, Tri-State must propose a new wholesale rate to members not later than September 2023, whereas no exit will occur until May 2024. The ID in the stated rate docket, already before the Commission on exceptions, requires significant changes to Tri-State's A-40 Rate.

[20] *E.g.*, where payment of Springerville debt by both Salt River Project and Tri-State's departing members will create a windfall for Tri-State. *See* Section V.A.2.b, *infra*.

[21] Section V.B, *infra*.

B. The BSA Calculations and ID's Alterations

The outrageously excessive magnitude of the MCTP (*$1.6 billion* for United Power *alone*) invites one to become desensitized to unreasonable inflations of the just and reasonable exit fee. This is apparent in the otherwise well-reasoned ID, which adopted improper alterations and therefore reached an inflated end result. Trial Staff's BSA alterations may have been well-intentioned, but they were created as exemplary calculations rather than as part of a consistent methodology. Because the ID adopted a calculation that was never tested on an end-results basis, the ID creates aggregate exit fees that are far too high. This result harms all Tri-State members, who would face undesirable barriers to exit that would impede access to competitive markets. As shown below for United Power, the ID-altered total exit fee represents 175% of the BSA's end results, with a cash payment over $100 million higher as-altered for just United Power. Similar results prevail for the other Tri-State members as well.[22] In settlement (and even in certain litigated cases where parties approach the case from reasonable limits), a compromise position in end result may be expected. That should not be the case here.

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[22] For all members, under the BSA, cash exit fees are approximately **$1 billion**, exclusive of the value of relinquished patronage capital and compensation for PPAs. Appendix A, Sequencing Analysis, cell N426. Trial Staff's exemplary calculations show aggregate exit fees across the membership of **$741 million**, Ex. S-0022, Sheet "Option 1," Cell N53, assuming members commit to 100% transmission for 10 years. Assuming the same 10-year transmission commitment, the adjustments made in the ID lead to aggregate cash exit fees that are over **$2.1 billion, three times the amount Trial Staff calculated and presented as just and reasonable**, (Appendix B, Sheet B12, Setting Cell O17 to 10 years, result in Cell O51), again excluding the value of relinquished patronage capital and compensation for PPAs. On an end-results basis, the ID yields a windfall to Tri-State and results in exit fees that are excessive. Further detail on this windfall can be found in Section V.C.

The BSA as-filed renders the stable, just, and reasonable results as shown in Table 1 below.[23] FERC should promptly[24] issue an order directing Tri-State to adopt Appendix A as a template for the formulaic rate under Rate Schedule No. 281 without modification.

Table 1: Appendix A - BSA (United Power Example)[25]

Component	Total	Cost-based Adjustments	Adjusted Total	United Power
Patronage Capital Allocator (Excludes East)				13.3%
Tri-State Debt, Excluding Springerville	$2,952	62.5%	$1,845	$246
Springerville Debt	293	76.1%	223	30
Debt	3,245		2,069	276
Other Obligations	174	62.5%	109	15
(-) Membership Withdrawal Regulatory Liability	(143)		(143)	(19)
(-) Relinquished Patronage Capital	(995)		(995)	(125)[26]
Cash Exit Fee	**$2,281**		**$1,039**	**$146**
(-) Relinquished Patronage Capital				125
Total Exit Fee[27]				**$271**

**All figures in millions of dollars*

United Power also attaches Appendix B, a spreadsheet calculating the BSA incorporating the four alterations endorsed in the ID. Appendix B is provided as a technical appendix to

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23 Table 1 reproduces the summary page from Appendix A for United Power. Appendix A is the BSA template populated with inputs derived from Tri-State's 2021 Form 10-K.

24 Prompt action by the Commission is important – United Power has given an unconditional notice to exit Tri-State, effective May 1, 2024, only 18 months away. Proper implementation of the exit arrangements must include determination of the exit fee, and any required financing arrangements.

25 Reflects Sheet A1 of Appendix A. Appendix A modifies Ex. UP-0021 in two respects: (1) Appendix A relies on 2021 data rather than 2020 data, and (2) Appendix A updates the assignment of members to the Eastern and Western Interconnections (and provides a simple input vector for any further updates).

26 Ex. TGT-0141, Sheet "WP-4 PatCap Balances." The patronage capital credit equals the actual amount of patronage capital carried on Tri-State's books for the departing member. A member's actual patronage capital will not equal the liabilities allocator times Tri-State's total patronage capital because the allocator is calculated excluding patronage capital for Eastern members.

27 Excludes PPAs.

reference the adjustments' defects, and the Commission should not adopt it over Appendix A. Table 2 below reproduces the main summary page of Appendix B.[28]

[28] Appendices A and B both calculate exit fees for all Tri-State members. The summary tables show United Power's exit fees for demonstrative purposes.

Table 2: Appendix B - ID's Altered BSA (United Power Example)

Component	Total		Proration		Member Obligation	
	(1)		(2)		(3)	
					(2)*(3)	
United Power Cash Exit Fee, Before Trans. Credits						
Tri-State Debt	$3,245	29	18.6%	30	$604	
Tri-State Other Obligations	174	31	18.6%		32	
Tri-State Debt and Other Obligations[32]	3,419		18.6%		636	
(-) Discounted Patronage Capital					(83)	33
Cash Exit Fee, Before Transmission Credits					$553	
Less: United Power Transmission Credits[34]						
(-) OATT Transmission Credit	(422)	35	49.2%	36	(207)	
(-) Debt Attrib. to 3rd-Party OATT Customers	-	37	18.6%		-	
(-) Delivery Trans. Credit (Asset Purchase)	(498)	38	18.6%		(93)	
(-) Delivery Trans. Credit (Delivery Commitment)	-	39	49.2%		-	
Transmission Credits					(300)	
United Power Exit Fee						
Cash Exit Fee					**$253**	
(+) Relinquished Patronage Capital					125	40
Total Exit Fee					**$378**	41

**All figures in millions of dollars*

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29 *See* Ex. UP-0120 at 60 (Tri-State 2021 10-K, page 54). Includes long-term debt, current maturities of long-term debt, and short-term debt.

30 *See* Sheet B2 of Appendix B. Reflects the 3-year average share of Western member billings. Section V.A discusses the inappropriateness using recent member billings to allocate Tri-State's debt and other obligations.

31 *See* Sheet B3 of Appendix B. Represents other long-term obligations on Tri-State's balance sheet.

32 For Tri-State Debt and Other Obligations, Trial Staff's Ex. S-0022 exemplary calculations erroneously combine (a) Tri-State long-term debt and (b) Tri-State current liabilities—ignoring Tri-State's non-debt long-term liabilities. Appendix B instead corrects the error and includes all forms of Tri-State debt and most long-term liabilities, consistent with the BSA.

The cash exit fees that United Power would pay under the ID range from $253 million[42] to $553 million[43]—up to *$401 million in excess* of what the BSA calculates as just and reasonable. Unless United Power contracts for significant transmission commitments well beyond any reasonable measure, the magnitude of the cash exit fee eclipses United Power's and Trial Staff's as-filed cash exit fee calculations of $152 million[44] and $154 million,[45] respectively, and grossly exceeds the benchmarks on the record that establish an observable zone of reasonableness for a member's full transition to OATT service. This over-calculation occurs for all members' exit fees.

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[33] *See* Sheet B4 of Appendix B for detailed supporting calculations. Section V.A.4 discusses the inappropriateness of discounting patronage capital.

[34] *See* Sheet B4 of Appendix B for detailed supporting calculations. Section V.A.3 addresses the Transmission Credit.

[35] *See* Sheet B4 of Appendix B. In the case of United Power, the $422 million NPV represents a commitment to take 5,184,324 TPP/MCP/kW per year (trailing 3-year average) of OATT transmission service for 26.7 years at a price of $5.20/TPP/MCP/kW. Section V.A.3 describes this implementation of the ID OATT Transmission Credit.

[36] *See* Sheet B5 of Appendix B. Reflects the transmission service operating cost exclusion adjustment, based on Worksheets B and C of the Western and Eastern transmission rate settlements.

[37] Reflects $0 to reflect the ID's erroneous contention that departing members should not be credited for the debt attributable to third-party OATT customers, leading to a double-recovery of transmission-related debt. A proper credit replaces this $0 value with $325 million credit for debt attributable to third-party OATT customers, as calculated in Sheet B6 of Appendix B.

[38] *See* Sheet B7 of Appendix B. Reflects delivery transmission-related debt. Sheet B9 of Appendix B calculates the transmission share of debt (41.1% of $3,245 million). Then B10 of Appendix B calculates the delivery transmission share (37.4%). Thus, $3,245 million * 41.1% * 37.4 = $498 million. Section V.A.3 describes the appropriateness and implementation of the Delivery Transmission Credit.

[39] Reflects $0, in this example, under the assumption that the departing member elects to purchase the delivery transmission assets rather than make a commitment to annually purchase a specified amount of delivery service transmission from Tri-State. Should a member elect to make an annual purchase commitment, Sheet B4 of Appendix B provides inputs for the calculation. Section V.A.3 describes the appropriateness and implementation of the Delivery Transmission Credit.

[40] *See* Sheet B4 of Appendix B. Reflects the member's current level of patronage capital (as credited by Tri-State's accountants in response to member exits).

[41] Excludes PPAs.

[42] Assumes United Power elects to take 100 percent transmission service from Tri-State through 2050.

[43] Assumes United Power elects to take zero transmission service from Tri-State.

[44] Ex. UP-0021, Sheet "UP-0012 Member BalSht Exit Fee" Cell R25. Appendix A updates the BSA calculations with 2021 data, resulting in a cash exit fee of $146 million.

[45] Ex. S-0022, Sheet "Option 1" Cell N47.

The ID therefore fails to calculate an end result within the zone of reasonableness in all circumstances, fails the "end-results" test, and is therefore not just and reasonable. As United Power explains in Section IV, *infra*, the Commission should instead adopt the BSA in its original form and direct Tri-State to make a compliance filing containing the exact methodology included as Appendix A to this Brief.

C. Tri-State's Exit Fee Proceedings

This case represents the fourth time that Tri-State's exit fee methodology has been set for hearing in the past five years:

The CoPUC heard Tri-State's exit fee cases twice:

1) The first resolved a negotiated transaction rendering an exit fee for Delta Montrose Electric Association (DMEA) that all agree was just and reasonable (and was approved by this Commission as such), aligns with that exited member's *pro rata* share of debt and other obligations at the time it exited, and according to Tri-State's CFO in a sworn certificate provided to Tri-State's indenture-holder, objectively reflected DMEA's WESC's "fair value" under the Trusts Indentures Act (TIA).[46]

2) The second CoPUC proceeding resulted in an ID from the state ALJ on United Power's exit fee, and determined an appropriate measure would be based on a member's *pro rata* share of debt and other obligations.[47] The ALJ after a full evidentiary hearing before the CoPUC ordered an exit fee for United Power of $235 million, inclusive of PPA obligations. FERC assumed jurisdiction over Tri-State as of September 3, 2019, and thereby pre-empted the Colorado Commission's consideration of the ID.

FERC heard Tri-State's exit fee cases twice:[48]

3) The exit fee has been set for hearing by FERC twice, and remains subject to two section 206 actions. In the third proceeding Tri-State took its exit disputes to FERC, filing its "Original CTP" on April 13, 2020. Two Section 206 proceedings against the Original CTP followed:[49]

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46 Ex. UP-0151 at 2-3.

47 Ex. UP-0083 at P 231.

48 Additionally, two other Section 206 actions concerning the exit fee remain pending.

49 *See* Docket Nos. EL21-53 (member complaint requesting FERC to order Tri-State to calculate member exit fees); EL21-75 (*sua sponte* section 206 proceeding investigating the just and reasonableness of Tri-State's exit procedures). Both dockets remain open.

- First was a member complaint, filed largely on the basis that Original CTP was incalculable by design, its implementation was left to Tri-State's unfettered discretion, and the methodology calculated preposterous results.

- Second, the Commission *sua sponte* issued a Notice of Order to Show Cause (Show Cause Order) and instituted a Section 206 proceeding against Tri-State.[50] The Show Cause Order directed Tri-State to either (1) show cause as to why its Tariff remained just and reasonable, or (2) explain what changes to its Tariff it believed would remedy the Commission's concerns.[51]

4) In response to the Commission's Section 206 investigation that directed an exit fee must be calculable, transparent and non-discretionary, Tri-State abandoned the Original CTP and filed the MCTP in Docket No. ER21-2818 as a purportedly calculable and transparent alternative, calculating contract damages on a lost-revenues based framework. On October 29, 2021 the Commission accepted Tri-State's filing, to be effective November 1, 2021, subject to refund, instituted a Section 206 proceeding, declined to set the matter for settlement proceedings, and established hearing procedures.[52]

D. The Initial Decision

The hearing took place from May 3, 2022 through May 17, 2022.[53] The ID was issued on September 29, 2022. In the ID, the Presiding Judge made findings with regard to the following questions:

1. Has Tri-State met its burden to demonstrate that its Modified CTP Methodology is just, reasonable, and not unduly discriminatory under Section 205 of the Federal Power Act?

2. If Tri-State has not met its burden to demonstrate that Rate Schedule 281 is just, reasonable, and unduly discriminatory under Section 205 of the Federal Power Act, has United Power met its burden to demonstrate its Balance Sheet Approach is a just, reasonable, and not unduly discriminatory replacement under Section 206 of the Federal Power Act?

3. If neither Tri-State nor United Power have met their burden, is there an alternative approach that is just, reasonable, and not unduly discriminatory?

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50 *Tri-State Generation and Transmission Ass'n Inc.*, 175 FERC ¶ 61,229 (2021).

51 *Id*. PP 1, 15.

52 Hearing Order.

53 Initial Decision at PP 39, 42.

First, the ID found that Tri-State failed to demonstrate its proposed rate was just and reasonable under Section 205 of the Federal Power Act. Specifically, the ID determined that Tri-State's Revenue Stream Estimate (RSE),[54] Debt Covenant Obligation (DCO) (both as a standalone and as a floor to the RSE calculation),[55] and treatment of patronage capital were unjust, unreasonable, and unduly discriminatory.[56] According to the ID, Tri-State did meet its burden to show that the non-rate terms and conditions that define the process for the exercise of Rate Schedule No. 281 were just, reasonable, and not unduly discriminatory.[57]

Second, the ID found that United Power did not meet its Section 206 burden to demonstrate that the BSA's treatment of (1) generation-related assets, debt, and other obligations;[58] (2) transmission-related assets, debt, and other obligations;[59] and (3) patronage capital upon members' withdrawal are just, reasonable, and not unduly discriminatory.[60] The ID also found that United Power's proposed treatment of departing members' PPA obligations was consistent with the Commission's directives, and its treatment of transmission was inconsistent with the Commission's directives in the instant proceeding.[61]

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54 *Id*. P 109.

55 *Id*. P 257.

56 *Id*. P 298.

57 *Id*. P 323. That determination is significant. Among the non-rate terms is a two year notice period before exiting. United Power gave its unconditional two-year notice in April 2022, and pursuant to the filed tariff, will exit as of May 1, 2024. Given that schedule, the Commission should issue a final order promptly given the longstanding nature of these disputes, arising formally in 2019 (and informally years earlier).

58 *Id*. P 338.

59 *Id*. P 399.

60 *Id*. P 425.

61 *Id*. P 450. United Power's PPA proposal contemplated buyout or sleeving of Tri-State's PPA obligations held on behalf of the exiting member (including renewable power purchase agreements and power purchase agreements with Basin Electric appropriately allocated between East and West) and a sleeve or direct allocation of members' entitlements to federal preference power from the Western Area Power Administration.

Third, the ID evaluated the Indicated Tri-State Members' (Indicated Members) and Trial Staff's alternative proposals. The ID found that the Indicated Members, who proposed adjustments to the MCTP, did not meet their Section 206 burden.[62] The ID determined that Trial Staff's four proposed adjustments to the BSA met its burden.[63] The ID found that Trial Staff's (1) treatment of generation-related liabilities, (2) treatment of transmission, and (3) treatment of patronage capital were just, reasonable, and not unduly discriminatory.[64]

II. LIST OF EXCEPTIONS

1. While the ID correctly adopts United Power's exit fee framework, it errs in adopting adjustments that defy cost causation standards, lead to perverse results, and violate the Federal Power Act.

   A. The ID errs in finding the BSA's treatment of generation-related assets, debt, and other obligations is not just and reasonable. P 384.

      i. The ID errs in holding that United Power's use of patronage capital to prorate members' shares of Tri-State debt and obligations is not just and reasonable. P 387. The ID:

         1. incorrectly claims that Tri-State incurs debt based on members' current load. P 387.

         2. incorrectly determines that a patronage capital allocator underestimates long-term investment for rapidly growing members like United Power. P 387.

         3. incorrectly finds that a patronage capital allocator would cause a cost shift when a rapidly growing member exits. P 387.

         4. errs in finding patronage capital is not an appropriate allocator of Tri-State's PPA obligations. P 388.

      ii. The ID incorrectly declines to adopt the BSA's principled adjustments to its generation-related debt calculation. P 389. The ID:

         1. does not dispute the validity of these adjustments, yet incorrectly characterized them as subjective and unverifiable. P 389.

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[62] *Id*. P 467.

[63] *Id*. P 500.

[64] *Id*.

2. incorrectly claims that these adjustments would increase the risk of further litigation. P 389.

iii. The ID incorrectly rejects United Power's proposal to require Tri-State to account for exit payment cash as either for immediate debt repayment, debt defeasance, and/or creation of an escrow account dedicated to debt service. P 398.

B. The ID errs in holding that the BSA's approach to transmission-related assets, debt, and other obligations is not just and reasonable. PP 418-419.

i. The ID incorrectly rejects the BSA's stranded cost transmission charge on the basis of (a) the insufficiency of its 10-year cap and (b) its requirement that Tri-State make a showing that it was unable to remarket excess transmission capacity. PP 420-421, 446.

C. The ID errs in finding that the BSA's full crediting of a member's patronage capital balance against the cash exit fee is unjust and unreasonable. PP 425, 441, 445. The ID:

i. incorrectly ignores Tri-State's full crediting of forfeited patronage capital in past member exits. P 442.

ii. incorrectly finds that full patronage capital credits could impair the financial condition of Tri-State. P 443.

iii. incorrectly finds discrimination against remaining members in the event a departing member receives a full patronage capital credit. P 444.

iv. misconstrues the relevance of Tri-State's patronage capital accounting practices, which enable Tri-State to use the entirety of departing members' patronage capital balances for its own revenue benefit. PP 446-448.

v. inappropriately omits reference to the Certificate of Fair Value signed by Tri-State's CFO, attesting that the value of departing members' forfeited patronage capital is equal to its full book value.

2. The ID errs by accepting Trial Staff's alterations to certain components of the BSA, thereby making the outcome unjust and unreasonable. PP 488, 500.

A. Trial Staff merely proposed demonstrative exhibits, yet the ID treats those illustrative examples as a fully-fledged methodology.

B. The ID incorrectly accepts Trial Staff's proposal to use three-year member billing shares to allocate Tri-State debt and other obligations among the members. PP 502-503, 505-506. The ID:

i. incorrectly claims that Tri-State incurs debt based on members' current load instead of historical ownership. P 503.

ii. fails to acknowledge that the three-year timeframe is arbitrary and is not reflective of the long life of Tri-State's generation and transmission assets.

C. The ID incorrectly adopts Trial Staff's proposal to remove the BSA's adjustments to Tri-State's generation-related debt calculation. P 508.

D. The ID incorrectly accepts Trial Staff's proposal to include transmission-related debt in the exit fee calculation. PP 511-512.

E. The ID similarly errs by creating a credit for future transmission revenue credits. P 511.

i. The transmission revenue credit would incorrectly reintroduce lost revenues into the exit fee calculation.

ii. The transmission revenue credit does not comply with the Commission's policies on future transmission purchases.

iii. The transmission revenue credit incorrectly carves out the share of transmission revenues that are not attributable to Tri-State's debt or debt service. P 512.

F. The ID errs by adopting Trial Staff's proposal to discount a member's patronage capital credit, lowering the credit against the exit fee. PP 515-518.

G. The ID's suggestion that "rate neutrality" could be an appropriate standard is wrong. The proper standard is cost-based. P 521.

3. The ID errs in incorrectly sidestepping the relevance of facts informing a just, reasonable, and not unduly discriminatory exit fee.

A. The ID errs in disregarding the relevance of the WESC's *Shoshone* Provision. P 226.

B. The ID errs in disregarding highly relevant benchmarks for testing the just and reasonableness of the exit fees.

i. The ID incorrectly deems past member exits to be inappropriate benchmarks. PP 235-236.

ii. The ID incorrectly omits the BDP Settlement as a relevant benchmark.

iii. The ID incorrectly ignores the relevance of the CoPUC exit fee ID. P 237.

III. POLICY CONSIDERATIONS WARRANTING FULL COMMISSION REVIEW

This case presents important policy considerations that warrant Commission review of the ID. The Commission's review of the ID will provide necessary clarity and create important precedent regarding a Tri-State member's just and reasonable exit fee from its jurisdictional G&T cooperative supplier. The Commission's review and resulting clarification of a just and reasonable exit fee will ensure that Tri-State cannot hold its 42 member-owners captive and raise unreasonable impediments to competition.[65] The Commission's prompt actions are necessary to assure United Power's exit from Tri-State in May 2024, and an orderly exit process for exiting and remaining members thereafter.

A just and reasonable exit fee will, for the first time, foster competition across Tri-State's four-state footprint—a key policy objective in the Federal Power Act that is intended to ensure customers pay the lowest price for reliable service.[66] Indeed, a just and reasonable exit fee will

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[65] *Tri-State Generation and Transmission Ass'n, Inc.*, 175 FERC ¶ 61,114, at P 52 (2021). FERC directed that procedures that place barriers to members assessing their exit options were unjust and unreasonable; it follows that exit fee terms that erect barriers to members acting on their exit rights are similarly not just or reasonable.

[66] FERC has determined that "[c]ompetition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service." *Reg'l Transmission Orgs.*, Order No. 2000, 89 FERC ¶ 61,285, at 3 (1999), *order on reh'g*, Order No. 2000-A, 90 FERC ¶ 61,201 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001); *see also Otter Tail Power Co. v. United States,* 410 U.S. 366, 374 (1973) ("[T]he history of Part II of the Federal Power Act indicates an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest."); *Gulf States Utilities Company v. FPC,* 411 U.S. 747, 758-759 (1973) (The Commission must "consider, in appropriate circumstances, the anticompetitive effects of regulated aspects of interstate utility operations" pursuant to the Federal Power Act requirements in sections 205 and 206.); *Reg'l Transmission Orgs.*, Order No. 2000, 89 FERC ¶ 61,285, at 3 (1999), *order on reh'g*, Order No. 2000-A, 90 FERC ¶ 61,201 (2000), *aff'd sub nom. Pub. Util. Dist. No. 1 v. FERC*, 272 F.3d 607 (D.C. Cir. 2001) ("Competition in wholesale electricity markets is the best way to protect the public interest and ensure that electricity consumers pay the lowest price possible for reliable service."); *Wholesale Competition in Regions with Organized Electric Markets*, Order No. 719, 125 FERC ¶ 61,071, at P 1 (2008), *order on reh'g*, Order No. 719-A, 128 FERC ¶ 61,059 (2009), *order on reh'g*, Order No. 719-B, 129 FERC ¶ 61,252 (2009) ("Effective wholesale competition protects consumers by providing more supply options, encouraging new entry and innovation, spurring deployment of new technologies, promoting demand response and energy efficiency, improving operating performance, exerting downward pressure on costs, and shifting risk away from consumers. National policy has been, and continues to be, to foster competition in wholesale electric power markets. This policy was embraced in the Energy Policy Act of 2005 [ ], and is reflected in Commission policy and practice."); *Pac. Gas & Elec. Co.*, 38 FERC ¶ 61,242, at 61,790 (1987) ("[C]ompetition is valuable because it encourages utilities to make efficient decisions with a minimum of regulatory intervention. Ultimately, consumers

allow a distribution cooperative to access competitive suppliers, benefiting exiting and remaining members through the introduction of competition, while avoiding harm to utility member-owners who choose to remain in Tri-State. With the introduction of competition, Tri-State will be greatly incentivized to respond to its remaining member-owners' objectives and concerns. As Tri-State explained to the CoPUC, it is the cooperative member's "right to leave" that can preserve competitive benefits within the cooperative construct. That same right to leave protects members' critical access to (1) competitive generation supply and (2) open access transmission, in furtherance of the public interest.

The ID's adoption of Trial Staff's adjustments saddles exiting members with excessive obligations that will hinder members' transition to open access and competitive markets. The Commission should closely review the cost obligations and implementation issues identified herein, as they show the Trial Staff adjustments as-applied disturb the cost-causative calculations within the BSA. The adjustments violate the bedrock principle that "require[s] that all approved rates reflect to some degree the costs actually caused by the customer who must pay them."[67] To preserve longstanding Commission policies in favor of open access transmission, competition in the electric markets, and cost causation/beneficiary pays principles, Commission review of the ID is warranted.

IV. <u>UNITED POWER'S REQUEST FOR RELIEF</u>

To correct the ID's incorporation of limited errors introduced by Trial Staff's adjustments[68] and to ensure that the rates and terms for United Power's exit from Tri-State are just and

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should benefit from lower prices as competition improves efficiency. Any restraints of trade could worsen efficiency and increase prices.").

[67] *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,213, at P 84, n.24 (2007) (quoting *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)).

[68] The Commission should also correct the ID's further changes to Trial Staff's adjustments, namely the exclusion of non-debt-related OATT costs from the transmission credit.

reasonable, the Commission should direct Tri-State to make a compliance filing calculating members' 2022 exit fees (and annually recalculate thereafter) under the methodology adopted by the Commission, in the form of Appendix A hereto.[69] Pursuant to procedural terms of Rate Schedule No. 281 that are not in dispute, the 2022 compliance filing must contain a populated version of the CTP formula rate calculating fees to be paid by Tri-State members that provide their two-year advance notice of departure between April 1, 2022 and March 31, 2023.[70]

Under present circumstances, time is of the essence. United Power and NRPPD have submitted notices of intent to withdraw from Tri-State, effective May 1, 2024.[71] It is imperative that United Power and NRPPD know the definitive amount of the exit fee with as much advance notice as possible and, in any event, well before the date of withdrawal in May 2024. If the exit fee remains in dispute near the departure date, financing uncertainty could likely jeopardize exiting members' access to replacement suppliers, and hundreds of millions of dollars could remain in jeopardy *after* the date that United Power and NRPPD will depart.

For the same reason, it is critical that the ruling order with specificity "the appropriate set of calculation inputs, credits, and offsets" for the proposed methodologies.[72] As discussed *infra*, the ID endorses several specific adjustments to the BSA. Even if those adjustments were proper (as shown below, they are not), the ID leaves the arithmetic for implementing these adjustments open to Tri-State's interpretation. Without a definitive Commission directive for Tri-State to adopt a specific workable template for the exit fee rate, United Power fears a scenario where Tri-State uses flawed interpretations of FERC's directives in its compliance filings to generate further

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[69] *See Louisville Gas and Elec. Co.*, 114 FERC ¶ 61,282 (2006) (accepting a proposed exit fee methodology subject to the applicants submitting their final exit fee in a compliance filing conforming to the Commission order).

[70] Ex. TGT-0018 at 1.

[71] Ex. TGT-0166; NRPPD April 29, 2022 Notice of Intent to Withdraw.

[72] Hearing Order at P 125.

disputes and delays.[73] The Commission need only review Section I.B, *supra*, to understand that this is a significant risk. Accordingly, United Power urges the Commission to reflect its directives by incorporating, or directing limited specific changes to, the model of the BSA set forth in Appendix A.

V. ARGUMENT

A. While the ID correctly adopts United Power's exit fee framework, it errs in implementation by adopting adjustments that defy cost causation standards and violate the Federal Power Act.

The ID errs in finding that United Power has not met its Section 206 burden to show the BSA as-filed is just and reasonable and, relying on that error, by not adopting it in full. Although the ID correctly adopts the BSA's cost-based framework and most of its elements, the ID errs in endorsing the following Trial Staff adjustments:

1. Replacing the BSA's patronage capital debt allocator with one that apportions billions in long-term liabilities based on only a three-year historical share of member billings while relying on a 10-year historical average for other key inputs;[74]

2. Omitting straightforward debt adjustments and revenue credits to reflect cost causation;[75]

3. Adopting an unworkable and unlawful transmission crediting approach that saddles members with excessive obligations in transitioning to OATT service;[76] and

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[73] Ex. UP-0001 REV at 23-24 (noting Tri-State erroneously characterized the Hearing Order as "rejecting" United Power's protest of the MCTP); Initial Decision at P 121 (noting Tri-State erroneously interprets the Hearing Order as not precluding a lost revenues approach).

[74] Section V.A.1, *infra*. *See* Initial Decision at P 515 for relying on 10-year historical average of Tri-State's debt costs.

[75] Section V.A.2, *infra*. These adjustments include (a) an increase in Tri-State generation debt recoverable from departing members associated yet-to-be-recovered plant balances for retired coal-fired generation facilities that were built to serve departing members, (b) a decrease in generation debt recoverable from departing members owing to known contracts for recovery from non-members of the debt cost associated with Tri-State's substantial Springerville Unit 3 interest, and (c) a deferred revenues credit for departing members. Salt River Project pays Tri-State for 100 MW of the Springerville 3 unit under a 30-year PPA. Tr. 1537:19-25 (Strunk). Accordingly, the exit fee must credit back the debt already paid by Salt River Project. The ID's placement of 100 percent of Springerville 3 debt on departing members leads to an unjust and unreasonable double-recovery.

[76] Section V.A.3, *infra*.

4. Discounting the value of an exiting member's patronage capital for purposes of the patronage capital credit rather than crediting the full value that Tri-State's remaining members will immediately access on a dollar-for-dollar basis.[77]

The changes to the BSA introduced by Trial Staff lead the ID to calculate unjust and unreasonable fees based on flawed reasoning.[78] The adjustments introduce discriminatory impacts, raise complex and unworkable implementation barriers, and disregard the cost causation framework that the ID elsewhere correctly endorses. In adopting the alterations, the ID also ignores the relevance of the WESC's "*Shoshone* Amendment"[79] and downplays the probative value of extensive benchmarking analyses on the record, both of which corroborate the just and reasonableness of the BSA's end result.[80] Accordingly, the Commission should adopt the BSA as proposed by United Power and decline to adopt the ID's alterations thereto.

1. The Commission should adopt United Power's BSA patronage capital debt allocator and reverse the ID's adoption of a "member billings" debt allocator.

The ID erred in determining that the BSA's treatment of generation-related assets, debt, and other obligations is not just and reasonable. The ID correctly adopted a methodology that calculates exit fees by assigning a portion of Tri-State's long-term liabilities to each member pursuant to an *allocator,* but it adopted Trial Staff's incorrect calculation of that allocator. United Power's BSA proposes to allocate Tri-State's debt and obligations to each member based on the member's *pro rata* share of Tri-State's aggregate patronage capital. A patronage capital allocator

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77 Section V.A.4, *infra*.

78 While Trial Staff appeared to recognize that the end result of the BSA was reasonable, it sought a different path to avoid contradicting positions it had separately taken in a different docket, ER20-1041. *See Wabash Valley Power Ass'n, Inc.*, 178 FERC ¶ 63,005, at PP 91-96 (2022) (accepting Dr. Golino's proposed adjustments to Wabash's transmission revenues credit). The transmission revenues credit Dr. Golino endorsed in the *Wabash* proceeding is very similar to what Dr. Golino sought to incorporate into the BSA formula in the present proceeding.

79 Section V.B.1, *infra*.

80 Section V.B.2, *infra*.

aligns with the Commission's cost causation principles, avoids volatility, mitigates the impacts of Tri-State's known discriminatory practices, and renders consistent, non-discriminatory exit fees as an end result, every time. By contrast, the ID's "member billings" allocation method, because of its very short-term test period, apportions all of Tri-State's outstanding balance sheet debt based on each member's average share of Tri-State's past three years of member billings. First introduced by Tri-State, the member billings allocator violates cost causation principles by introducing demonstrable and extreme year-to-year volatility in exit fees, embedding known cross-subsidization in the exit fee, and rendering inconsistent, unduly discriminatory results that the ID acknowledges prejudice certain Tri-State members.[81] Table 3 below displays the key flaws inherent to using a member billings approach to allocate Tri-State's outstanding balance sheet liabilities.

Table 3: Key Issues with Using a Member Billings Allocator

Section	Location
The ID Draws a False Distinction Between Patronage Capital Share and Historic Load Share	V.A.1.a.i
A Member Billings Allocator is Volatile, Unjust, Unreasonable, and Discriminatory	V.A.1.a.ii
A Member Billings Allocator Violates the Cost-Causation Principle	V.A.1.a.iii
A Member Billings Allocator Ignores Tri-State's Refusal to Fund Capital Investments for "Indeterminate" Loads	V.A.1.a.iv

As explained in more detail in section V.A.1.a.i *infra*, United Power is uniquely and disproportionately prejudiced by the use of a member billings allocator on account of recent aberrations in its historic load profile. *Solely* on account of the ID's adopted allocator, United Power would pay approximately $100 million more than the BSA as-proposed.[82]

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[81] Further, use of a three year member billings allocation method would encourage gaming the system on the part of Members, allowing them to strategically exit Tri-State with minimal exit fees based on short-term projected load.

[82] Appendix A, Sheet A1. Replacing the 13.34% patronage capital-based allocator in Cell R13 with the 18.6% 3-year-member-billings-based allocator increases the cash exit fee from $146 million to $254 million.

a. The patronage capital allocator measures a member's share of Tri-State's outstanding balance sheet liabilities; the ID's member billings allocator does not.

i. The ID's error rests on Trial Staff's false distinction drawn between patronage capital share and historic share of load.

Patronage capital is the appropriate allocator to measure a member's share of the *long-term* liabilities on Tri-State's balance sheet, as it directly represents and is solely based on each member's *long-term* requirements purchases from Tri-State. Patronage capital is a unique form of equity distinct to the cooperative structure, reflecting each wholesale customer's status as a cooperative owner *in proportion to* its role as a purchaser from Tri-State over the long-term. Under the third "cooperative principle,"[83] surplus revenues received by a cooperative must "benefit[] members *in proportion to* their transactions with the cooperative."[84] Over many years, members like United Power pay rates exceeding Tri-State's costs, and Tri-State's annual excess revenues (margin) collected above its cost of service convert into an equity interest allocated to and held by each contributing member.[85] Critically, this margin-to-equity conversion occurs year by year in *direct proportion* to the member's then-current share of Tri-State's overall member billings.[86] Thus, each member's long-term *pro rata* equity stake in Tri-State will be directly proportional to—and reflective of—that member's *pro rata* share of Tri-State's costs incurred to serve its members over time. Accordingly, the balance of patronage capital that each Tri-State member accrues over time is specifically a calculation of each member's long-term economic participation

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83 The third cooperative principle is "Members' Economic Participation." Tri-State purports to highly value all seven cooperative principles in conducting its business affairs. Ex. TGT-0001 REV2 at 18.

84 *Understanding the Seven Cooperative Principles*, NAT'L RURAL ELEC. COOPERATIVE ASS'N (Dec. 1, 2016), https://www.electric.coop/seven-cooperative-principles%E2%80%8B (emphasis added).

85 Ex. UP-0010 REV2 at 31-32.

86 Ex. TGT-0016 REV2 at 10-11; Ex. TGT-0140 at 28, 56.

(*i.e.*, its "patronage") in the overall enterprise. In turn, the patronage is proportional to the costs Tri-State incurred over that period to serve each member. Upon exit, it therefore makes sense that a departing member must be responsible for paying a *pro rata* share of Tri-State's debt and obligations that corresponds to its demonstrated purchases over the long term, and thus its contribution to the overall enterprise via patronage capital.

The ID errs in finding that the use of patronage capital as an allocator "runs contrary to sound economic principles."[87] Patronage capital is simply economic shorthand for the cumulative margin above costs that each member has contributed to Tri-State through its proportionate share of service over the long-term.[88] The ID instead adopted Trial Staff's mistaken reasoning that Tri-State incurs debt based on each member's current "share of service (load)—not percentage of ownership."[89] This reasoning is plainly wrong, as it misconstrues the role of patronage *capital* in G&T cooperatives as distinct from a member's *patronage*. That reasoning disregards that, at Tri-State, each member's patronage capital (percentage of ownership) is by definition a reflection of its long-term "share of service (load)…"[90] As a result, the most recent billings measure an arbitrary, short-term sample of recent operations reflecting a host of external factors over an anomalous test period,[91] rather than the appropriate measure of capital costs associated with the long-term plant built to serve the exiting member.

Based on the error of construing patronage capital as disconnected from each member's patronage, the ID erroneously adopts an allocator based on each member's last three years of

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87 Initial Decision at P 387.

88 Less the amount Tri-State has returned to the members through patronage capital retirements.

89 Initial Decision at P 387.

90 *Id.*

91 The three-year member billings period occurs during the atypical demand conditions of the pandemic.

member billings, defending it on the basis that Tri-State's debt issuances are made on a "forward looking" basis to cover "recent costs and expected trends in individual members' load growth."[92] The analysis violates basic economic principles, as demonstrated below.

Tri-State's *recent* costs are not a reliable indicator of its *forward-looking* costs today or, more importantly, at the time Tri-State's debt was issued.[93] For example, supply chain and fuel price volatility can vary drastically with immediate impacts on the utility's costs. The past three years of a given member's billings do not accurately predict their billings for next year; and, in any event, the BSA is not designed to recover speculative, "forward-looking" costs, only "costs incurred." Second, members' very recent load growth is not a reliable indicator of expected future load growth. Load growth is "lumpy" as large industrial customers enter or exit the system—growth or decline over the past three years, without more, is not indicative of "expected trends" two years in the future, when the member would leave. Tri-State has a two-year notice period precisely to mitigate the very costs associated with "recent costs" that a member billings allocator seeks to extract. In other words, Tri-State is going to recover any debt issued for near-term service through the two years of rates paid by the exiting member during the notice period.

The member billings method violates cost causation and beneficiary pays principles. Under these principles, there must be an articulable and plausible reason to believe the assigned benefits are at least roughly commensurate with the costs; claims of generalized system benefits are not enough.[94] Tri-State's owned generation assets were put into service an average of 33 years

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92 Initial Decision at P 387.

93 The evidentiary record makes clear that Tri-State did not anticipate United Power's load to grow as fast as it has, just as Tri-State did not anticipate other members' loads to remain flat or decline. Ex. UP-0102 at 22; Ex. UP-0111B REV at 41.

94 *Ill. Com. Comm'n v. FERC*, 576 F.3d 470, 475-77 (7th Cir. 2009).

ago[95] and clearly were not developed to respond to any reasonably current growth projections.[96] In terms of Tri-State's owned generation capacity—the *only* capacity tied to balance sheet obligations—Tri-State is "capacity long." Tri-State has not needed new capacity to meet load growth *since 2006* and does not plan to build new capacity for growth until 2029.[97] A just and reasonable allocator must reflect that the generation-related long-term liabilities on Tri-State's balance sheet were incurred to construct its generation fleet over decades,[98] under recurrently shifting planning and load assumptions,[99] where some members have unexpectedly grown and others unforeseeably shrank or left the system altogether.[100]

By contrast, Tri-State's recently incurred generation-related obligations are almost exclusively PPAs incurred to serve imminent member load in compliance with environmental mandates.[101] The PPAs are nowhere reflected in balance sheet liabilities—the only liabilities that the allocator apportions.[102] The off-balance sheet PPAs are treated completely separately from balance sheet liabilities under the BSA, even with the adjustments made by the ID. Yet the ID

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95 *See* Ex. TGT-0108 at 40.

96 Ex. UP-0056 REV at 14. Though Tri-State has recently purchased increasing shares of the Laramie River Station coal unit, it stated such purchase was for the value of associated transmission paths for yet-to-be built renewables. Ex. UP-0067 REV at 10-11. Tri-State's remaining owned-generation fleet was mostly constructed in the 1980s.

97 Ex. UP-0051 REV2 at 38. *See also* Ex. TGT-0108 at 40 (establishing that the most recent commercial operation date for a Tri-State-owned or leased facility is 2006).

98 Tri-State's generation assets possess useful lives of at least 30 to 50 years. One generation asset—Springerville Unit 3—has a useful life extending until 2066. Ex. TGT-0007. If the Commission finds that inclusion of transmission-related debt is also required, it is relevant to note that transmission assets take seven to ten years to construct, and have useful lives of at least 50 years. Initial Decision at P 420.

99 Ex. UP-0111B REV at 41.

100 Ex. TGT-0003 REV2 at 15-17 (explaining the recent member exits of Kit Carson and DMEA).

101 Ex. UP-0025 REV at 28; Ex. UP-0056 REV at 24; Ex. TGT-0114 at 15.

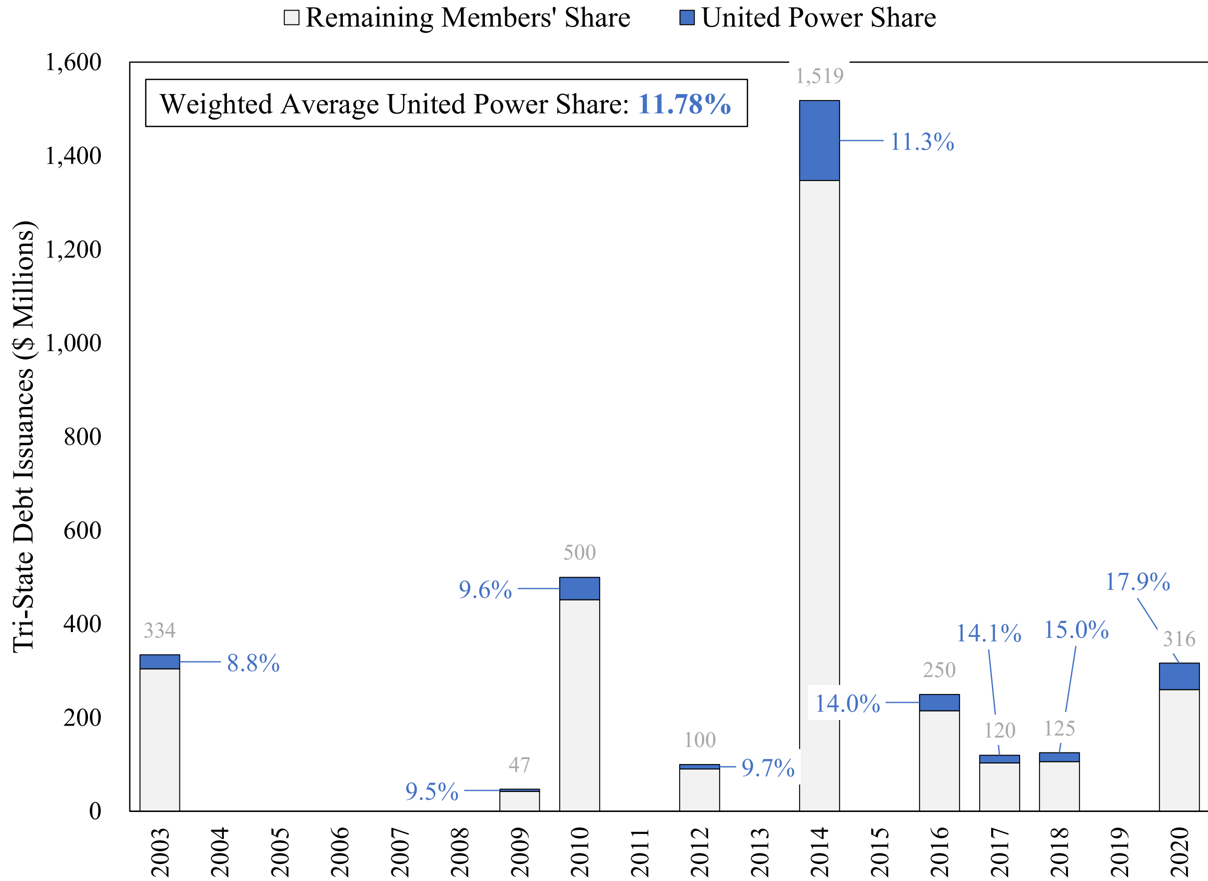
102 PPAs are addressed completely separately in both United Power's BSA and the ID's adjusted version.

improperly attributes a set of obligations—*known* to be concentrated in off-balance sheet PPAs—to the capital costs for decades-old generation facilities on Tri-State's balance sheet.

Contrary to the ID's reasoning, patronage capital reflects even the recent increases in a growing member's load share by incorporating larger allocations of patronage capital to growing members in recent years. However, using a patronage capital allocator also ensures that recent load aberrations do not impact exit fees in an unstable way. By levelizing each member's share of service over many years, a patronage capital allocator simply ensures the cost responsibility for *long-term* debt, associated with *long-lived* assets, is allocated in a cost-causative manner that reflects the *long-term* service the member has taken from Tri-State.

To illustrate the anomalous apportionments that result from the member billings allocation approach, United Power introduced Witness Kurt G. Strunk's analysis of Tri-State's currently outstanding debt and obligations. Witness Strunk calculated United Power's weighted average share of overall member billings at the time Tri-State actually incurred its debt obligations. The results, reproduced below as Figure 1, show that United Power on average constituted approximately 12 percent of Tri-State's member load at the time Tri-State incurred its current debt and obligations.

Figure 1: United Power's Member Billings Share at the Time Tri-State's Obligations Were Incurred



If only the last three years' member billings are used, United Power's *pro rata* share balloons to nearly 19 percent despite Tri-State making no generation-related capital expenditures to serve United Power's load growth in that period.[103] Indeed, Table 4 below shows that other potential allocation methods address the concerns regarding when Tri-State entered into debt, and on behalf of which members.

[103] Initial Decision at n.753 ("While it is true that much of United Power's recent load growth is due to 'indeterminate load' that has no Tri-State debt associated with it, that may not be the case for other rapidly growing Members.").

Table 4: Alternative Allocator Comparison Table[104]

Allocator Approach	Date Range	United Power Share
(1) Current Patronage Capital	2020	12.38%
(2) Long-Term Member Billings	2003 - 2020	12.01%
(3) Long-Term Share of Debt Issuance	2003 - 2020	11.78%
(4) Share of Plant at Time of Construction	Pre-2003 - 2020	8.89%
(5) Recent Member Billings Excluding Indeterminate Load	2018 - 2020	9.79%
Average		11.49%

Once Tri-State's long-term balance sheet obligations are traced over an appropriate time horizon, it becomes clear that Tri-State has actually issued debt to serve United Power's load as if United Power constitutes approximately 12 percent of Tri-State. By no coincidence, this closely correlates to United Power's 12.6 percent share of accrued patronage capital[105]—a principled outcome that confirms the proportion of a member's long-term service taken.

ii. The ID's member billings allocator introduces year-to-year volatility and unjust, unreasonable, and unduly discriminatory results based on members' exit sequence.

A just, reasonable, and not unduly discriminatory exit fee methodology should not be volatile year-to-year, nor should it discriminate on the basis of exit sequencing. Holding Tri-State's generation-related liabilities constant, the methodology should calculate exactly the same exit fee for a given member regardless of whether that member is the first to leave under Rate Schedule 281 or if that member is, for example, the fifth to leave.[106]

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104 Table is sourced from Ex. UP-0111B REV at 43. United Power discovered a minor error where the percentage shares listed in rows (3) and (5) were flipped. The table reproduced here has corrected the error without making any further changes.

105 It is not surprising that Tri-State favored a member billings approach, given its tendency to raise barriers to exit that uniquely detriment a small number of growing members to the benefit of a larger number of shrinking or stagnant members.

106 Ex. UP-0010 REV2 at 36.

The BSA as proposed by United Power produces the same exit fees regardless of member exit sequence because a departing member pays a share of Tri-State's debt that is identical to its share of equity, or patronage capital.[107] United Power represents the most extreme example of the mismatch introduced by the member billings allocator, with the ID assigning United Power 19 percent of Tri-State's long-term balance sheet liabilities, but only crediting United Power with 12.6 percent[108] of Tri-State's patronage capital. This represents a penalty for United Power and a windfall for members whose recent member billings underrepresent their historic patronage. For a member like High Plains Power, Inc., whose load has declined in recent years, the mismatch is significant. High Plains only constitutes 4.7 percent of member billings while possessing 6.5 percent of Tri-State's equity.[109] This would create a windfall for High Plains upon exit, because its exit fee would be smaller than the value of its underlying patronage interest in Tri-State.[110]

Allocation to a departing member must be done *consistently across the entire balance sheet* in order to meet the Commission's standard that the rate be based on sound economic logic.[111] Patronage capital share *and* debt share are the yin and yang of Tri-State's long-term liabilities incurred on behalf of a particular member, representing invested capital Tri-State accumulated over the long-term, in proportion to *costs incurred* to serve the exiting member. It is a mismatch

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107 Ex. UP-0013.

108 United Power's 12.6% of Tri-State's patronage capital does not correspond exactly to the allocator for debt and obligations under the BSA. Rather, the BSA apportions Tri-State's balance sheet debt and obligations exclusively to members in the Western Interconnection and does not attribute generation-related balance sheet debt to members in the East. This results in an allocator for United Power that is 13.3%.

109 Appendix B, Exh-14, Row 10 (showing High Plains comprised 4.7 percent of the past three years' member billings); Ex. TGT-0063 (showing High Plains holds 6.52 percent of Tri-State's patronage capital).

110 This mismatch raises the same issues where Tri-State members could strategically time their exits following years of short-term load declines. *Supra* n.81.

111 ` *MISO Transmission Owners v. FERC*, 45 F.4th 248, 264 (D.C. Cir. 2022) ("FERC can't ignore the basic financial principles that otherwise undergird its analysis — at least not without a compelling explanation."); *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1213 (D.C. Cir. 1991) (Thomas, J., concurring) ("At the very least, FERC was obliged to offer some convincing evidence in support of its facially implausible economic assumption").

of inputs to apportion accumulated long-term liabilities by way of an arbitrary sample of recent billings, yet credit only a fraction of the associated patronage interest.

The fair and principled approach is to align the share of debt assigned to the departing member with the patronage capital share it holds in the cooperative. The BSA, which does just that, ensures stability because (1) the order of member exits does not matter[112] and (2) the aggregated member allocations equal 100 percent.[113] On the other hand, under a member billings approach, one member's exit will cause an immediate downward shock in total Tri-State billings. In turn, this will increase remaining members' billings shares and debt responsibility. This is demonstrated in Tri-State's Exhibit TGT-0142, Sheet "WP-3(a)," which shows that its member billings calculation does not balance to 100% due to a member departure in 2020.[114] While this could be misconstrued as minor in the context of one small member exiting, a large member or multiple members exiting will cause a much more significant upward shock in remaining members' debt responsibility.

The ID affirms the BSA's appropriate balancing of debt and equity, explaining that "arguments pointing out [a] flaw in the sequencing of exits under the BSA are not persuasive."[115] Yet the ID's allocator adjustment introduces sequencing infirmities where there were none before. For instance, the recent Commission-approved departure of DMEA frustrates Trial Staff's approach. Because Tri-State's three-year member billings still capture a portion of DMEA's pre-departure revenues, Tri-State cannot recover the full 100 percent of its balance sheet liabilities

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112 While year-to-year changes in Tri-State's debt will trigger different exit fees over time, the sequencing of multiple exits under the BSA does not cause shifts in exit fees.

113 Ex. UP-0021, Sheet "Sequencing Analysis."

114 Noting that "DMEA 2020 revenue of $19.5M is included in total member revenue therefore the remaining members' pro-rata % does not add up to 100%."

115 Initial Decision at P 394.

from the remaining members since some of those liabilities are still erroneously assigned to DMEA. Although DMEA did not represent a large share of Tri-State, when a large member like United Power leaves on May 1, 2024, the cumulative member billings allocations for the remaining members will fall well short of 100 percent—thus leaving Tri-State with exit fees that are inadequate to cover its full set of liabilities. Such a problem does not exist when patronage capital is employed as the allocator, as evidenced in Ex. UP-0021, worksheet "Sequencing Analysis."

A similar mechanism would occur if the Commission approves Tri-State's Buy Down Payment settlement (BDP Settlement), to the detriment of the remaining members. On April 28, 2022, Tri-State filed a settlement in Docket No. ER20-1559, et al. that allows six Tri-State members to buy down to 50 percent requirements membership in exchange for a one-time cash payment.[116] Pursuant to the settlement terms, members must make a cash payment to compensate Tri-State for their reduced load share, but the settlement does not include any forfeiture of patronage capital. If the BDP transactions occur, then remaining Tri-State members will experience a substantial, unwarranted increase in their exit fees because some of Tri-State's largest members would reduce their member billings by *half*, causing the full-requirements members' *pro rata* shares of the reduced member billings pool to skyrocket over the following three-year period.[117] The remaining members will not experience any increase in their equity share of Tri-State (*i.e.*, patronage capital) since the BDP settlement enables participating members to retain their entire patronage capital balances. But because the BDP does not anticipate any equity reallocation, the non-participating members will be assessed much higher exit fees in the future

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[116] Ex. UP-0156. Six Tri-State members seek to buy down to partial requirements membership pursuant to the settlement terms, including Tri-State's second and fourth largest members by load share.

[117] Because the ID uses a three-year weighted average of member billings shares, it would take only three years for the full effect of a large load loss to be reflected in remaining members' allocators.

without having imposed any additional costs on the system. Table 5 illustrates how the BDP Settlement would cause United Power's exit fee alone to increase by $90 million solely due to the reallocation of member billing shares.

Table 5: The BDP Load Loss Raises Remaining Member Exit Fees Without Any Change in the Costs those Members Cause: United Power Exit Fee Example[118]

		Pre-BDP	BDP	Post-BDP
		(1)	(2)	(3) (1)+(2)
Tri-State Revenue Loss from 300 MW BDP				
[1] BDP Energy Dollars			$106[119]	
[2] BDP Demand Dollars			35[120]	
[3] Tri-State Revenue Loss from 300 MW BDP	[1]+[2]		141[121]	
BDP Effect on Member Billings Allocators (United Power Example)				
[4] Tri-State Debt and Other Obligations			3,419	
[5] United Power Avg. Member Billings		212[122]	-	212
[6] Tri-State Avg. Member Billings	[3]	$1,141[123]	($141)	$999
[7] United Allocator	[5]/[6]	18.6%[124]	+2.6%	21.2%[125]
[8] Increase to United Power Obligation Due to BDP	[4]*[7]	-	**$90**	**-**

118 All dollars are in millions.

119 BDP Demand of 300 MW multiplied by 8,760 hours in a year, multiplied by $40.36/MWh, the Class A Generation Energy Rate.

120 BDP Demand of 300 MW multiplied by 12 months and the Class A Generation Demand Rate of $9.84/kW-mo.

121 BDP Energy Dollars + BDP Demand Dollars ($106 + $35 = $141 million).

122 United Power Average 2019-2021 Western Member Billings.

123 Tri-State Average 2019-2021 Western Member Billings.

124 United Power Member Billings / Tri-State Member Billings, Pre-BDP ($212 / $1,141 = 18.6%).

125 United Power Member Billings / Tri-State Member Billings, Post-BDP ($212 / $999 = 21.2%).

All of the unjust results discussed above can be avoided by using a patronage capital allocator. The identification of costs that Tri-State incurred (or previously committed to incur in the future) on behalf of a departing member should not rely on a volatile calculation that can lead to discriminatory cost shifts to some members and windfall benefits for others. Nor should a member's share of overall obligations increase solely due to other members' choices to exit or buy down. Accordingly, the member billings allocator should be rejected in favor of reinstating the patronage capital allocator modeled within the BSA as-filed.

iii. The ID's approach violates cost causation by incorporating cost shifts embedded in the illegal A-40 Rate, and in violation of a *Mobile-Sierra* protected settlement.

The ID's conclusion that only a very recent share of billings (*i.e.*, revenues) should be used to apportion debt responsibility contradicts the ID's own reasoned finding that Tri-State's current A-40 Rate is an indefensible exit fee input.[126] "Billings" are the direct application of effective rates; thus, cross-subsidization within the rate is inherently embedded in *any* member billings allocation. In rejecting Tri-State's MCTP proposal, which also used a three-year member billings metric, the Presiding Judge correctly acknowledges that "the problems associated with using the A-40 Rate renders it unsuitable."[127] The ID further found that "[c]ost-causation principles might dictate that the costs associated with [Tri-State's current rates] should not even receive rolled-in rate treatment in Tri-State's A-40 Rate in the first place."[128] Yet by rejecting a patronage capital allocator *in favor of* three years of member billings at the A-40 Rate, the ID ignores its own findings. The A-40 Rate has not been shown to be cost causative, cannot be used as an input

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[126] Initial Decision at P 243 ("Although using the A-40 Rate eliminates the need for forecasts of the departing Member's future electricity requirements, the problems associated with using the A-40 Rate renders it unsuitable").

[127] *Id.*

[128] *Id.* P 424.

pursuant to the terms of the A-40 Rate settlement, and incorporates cross-subsidization that should not be replicated in an exit fee.[129] The ID should not resurrect the imminently expiring A-40 Rate as one of the most consequential inputs to the exit fee methodology.[130]

One can argue that the use of member billings to determine cost-share is not inherently wrong so long as (1) the underlying rate does not embed cross-subsidies and (2) an appropriate, significantly longer timeframe is selected, mitigating the impact of known rate design defects in the current rate.[131] The three-year member billings allocator is inherently problematic both because it is too short to smooth year-to-year load aberrations and also because it embeds known cross-subsidization within the temporary, black-box settled A-40 Rate, which is subject to a complete overhaul in 2023 by settlement agreement.[132] Moreover, the A-40 Rate settlement was explicitly never "intended to resolve" any issues in this proceeding.[133] Yet Tri-State recurrently attempts to crystallize the cross-subsidization embedded in that rate in developing its exit fees—an approach which the ID initially rejected, but then *reincorporated* by reverting to the member billings allocator.[134]

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[129] *See Stilwell v. Ozarks Rural Elec. Coop. Corp.*, 79 F.3d 1038, 1046 (10th Cir. 1996) ("the REAct [does not] contemplate a system where rural customers are subsidized by relying on revenues generated from urban customers. We find no such intent either express or implied in the language of the REAct. The REAct subsidizes rural cooperatives by offering low-interest financing, not by making available to them more lucrative markets for electric power.").

[130] Despite the A-40 Rate's imminent demise, a member billings allocator would resurrect it "[l]ike some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried…" *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[131] *See* Section V.A.1.b, *infra* (discussing alternative billings allocators that could render a more cost causative result).

[132] Pursuant to the settlement in Docket No. ER20-676-006, Tri-State must make a come-back filing in September 2023 that proposes a FERC-compliant rate.

[133] Ex. TGT-0161 at 57.

[134] To adopt the A-40 Rate for such a consequential input will discourage future settlements for fear that temporarily settling a rate issue will legitimize it for use as an input for something else.

In addition to being illegal to incorporate as an input on account of the settlement terms themselves,[135] the actual rate design of the A-40 Rate was thoroughly and meticulously renounced as non-FERC compliant by the ID of Presiding Judge Hempling issued in May 2022.[136] As described in that decision, the A-40 Rate's automatic roll-in of facilities has been shown to incorporate impermissible cross-subsidization over exactly the three-year billings measurement period at issue here, artificially inflating some members' billings' shares in relation to its cost share, suppressing the billings of others. The result of using the A-40 Rate as a basis to allocate debt is that the allocator incorporates the same cross-subsidization, inflating some members' exit fees while suppressing others. Table 6 provides an overview of the many structural issues within the A-40 Rate.

Table 6: Tri-State's A-40 Rate is Irreparably Deficient

Deficiency	Description
Stale Rate	The rate is stale because it is derived from a 2015 cost-of-service study.
Fully Bundled	The rate does not separate components for wholesale generation, transmission, and ancillary services as required under FERC Order No. 888 and does not follow accepted Commission principles for the treatment of fuel and purchased power.
Ignores Cost Causation	The rate automatically rolls-in the costs of all facilities, arbitrarily socializing all utility costs across the Eastern and Western Interconnections irrespective of the Commission's cost causation/beneficiary pays precedent.
No Direct Assignment	Due to the lack of direct assignment, the rate embeds inter-member cross-subsidization that violates the Commission's cost causation/beneficiary pays principles.

If the A-40 Rate is unsuitable as-applied in the MCTP, it must also be deemed unsuitable for the BSA. The ID's adoption of it by way of a three-year member billings allocator would cement the A-40 Rate's cross-subsidies into place by using that rate to determine the allocation of billions in

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[135] The settlement sought to charge higher rates for any members that contested the settlement, which constitutes facial rate-based discrimination. Ex. TGT-0161 at 30.

[136] *Tri-State Generation and Transmission Ass'n, Inc.*, 179 FERC ¶ 63,019 (2022) (Stated Rate Initial Decision).

Tri-State's liabilities. Accordingly, the Commission should take special care to avoid using it as an "input, credit, [or] offset"[137] for any component of the exit fee methodology and reverse the ID's adoption of the three-year member billings allocator in favor of BSA's patronage capital allocator, which mitigates the impact of known discriminatory design flaws known to exist during the applicable test period.

iv. A patronage capital allocator is appropriate in light of Tri-State's policy of refusing to fund capital investments for "indeterminate" loads.

The ID draws incorrect conclusions regarding the appropriate assessment of exit fees for fast-growing members like United Power. The ID correctly notes that United Power's *pro rata* share of Tri-State patronage capital (about 12.6%) is lower than its most recent year's share of member billings (about 19.5%).[138] However, the ID is wrong to conclude on that basis that a patronage capital allocator would underestimate the appropriate scope of United Power's responsibility for Tri-State's debt and obligations. The BSA's use of patronage capital as an allocator reflects Tri-State's explicit choices not to incur debt or obligations to serve load it labels in its sole discretion as "indeterminate." In other words, Tri-State has absolved itself from making capital investments where Tri-State, in its opinion, deems a member's load to be at risk of leaving the system in the future.[139]

In the most extreme example of discriminatory impacts,[140] much of United Power's load growth has occurred in the past three years due to increased sales associated with a recent uptick

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137 Hearing Order at P 125.

138 Initial Decision at P 387.

139 Ex. UP-0005 at 6-7.

140 Like the strategically chosen three-year member billings allocator, it is apparent that the choice of inputs deriving from Tri-State's proposals have a disproportionate discriminatory impact on United Power. This is not surprising given Tri-State's propensity to (1) subsidize the many at the expense of the few (*see*, *e.g.*, section 0, *infra*; Ex. UP-0105 (containing member complaints alleging Tri-State's energy-only rate was designed to lower costs for

of customers in oil and gas exploration.[141] The record shows that the pace of United Power's very recent growth relative to the rest of the membership was unanticipated at the time Tri-State incurred its generation-related capital expenditures. Tri-State's last generation investment, Springerville, came online in 2006.[142] Tri-State could not have incurred Springerville costs to serve United Power's recent load growth, as United Power's actual 2020 energy demand was nearly *60 percent* larger than what Tri-State's 2012 Load Forecast had predicted for United Power in 2020.[143] Importantly, as the ID acknowledges, Tri-State did not "incur" any long-term generation-related debt to serve load growth it had not projected.[144]

Tri-State has not recently deployed balance sheet capital to serve that load growth either. Despite its purported un-absolvable role as a "full requirements" supplier,[145] Tri-State has employed its unfettered Board discretion to apply its Board Policy 110[146] to classify nearly one-third of United Power's current member billings as "indeterminate load." When load is deemed "indeterminate" under this policy, Tri-State absolves itself from responsibility for serving that load with capital upgrades and instead directly assigns the associated costs to the individual member

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low load-factor members at the expense of high load-factor members), and (2) malign members who seek regulatory relief. *See*, *e.g.*, Ex. UP-0001 REV at 21, 24 (describing the hostile reaction of Tri-State to United Power's requests for regulatory relief); Ex. UP-0084 (Tri-State press release describing United Power's protest in this docket proffering the BSA as an attempt to "undermine" and "hijack" typical FERC procedures; and threaten the "cooperative model").

[141] Ex. UP-0111B REV at 41.

[142] Ex. TGT-0108 at 40.

[143] Ex. UP-0102 at 22; Ex. UP-0111B REV at 41 ("Tri-State's 2012 Load Forecast anticipated United Power having 1.775 GWh of energy demand by 2020. In reality, United Power had 2.829 GWh of energy demand in 2020, showing **Tri-State was not counting on United's growth that has been driven by new, indeterminate oil & gas loads in constructing its owned generation fleet**, and Tri-State avoided obligations to build transmission for those loads through Board Policy 110.")

[144] Initial Decision at n.753.

[145] Ex. TGT-0003 REV2 at 7.

[146] Ex. UP-0005.

responsible for that load.[147] As a result, in both reality and codified practice, Tri-State has not made capital investments to serve nearly *one-third* of United Power's load on the grounds that the unanticipated growth may disappear in the future.[148] Thus, the record shows that Tri-State has issued no long-term generation-related debt to serve one-third of United Power's current load.[149] This indeterminate load policy contributes to the current circumstance where United Power is responsible for over 19 percent of Tri-State's recent years' member billings through increased billing determinants, but it is United Power that finances the investments needed to serve its own growth.

The ID recognizes this windfall, emphasizing as a factual finding that Tri-State's actual investment in United Power's load is far lower than United Power's share of recent years' member billings, and then puzzlingly dismisses it. It explains that "it is true that much of United Power's recent load growth is due to 'indeterminate load' that has no Tri-State debt associated with,"[150] yet disregards this salient fact on the basis that (1) the exit fee methodology must apply "equally" to all Tri-State members and (2) there is no guarantee Tri-State's indeterminate load policy has created similar underinvestment issues for *other* fast-growing members.[151] Both rationales fail. First, it is not necessary to create a special, United Power-specific exit fee methodology to remedy the proven discrimination that uniquely impacts United Power. Rather, this result is remedied with the use of a patronage capital allocator. As with the A-40 Rate defect, the patronage capital allocator mitigates the impacts of recent asymmetric capital deployment policies over the long

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147 Ex. UP-0102 at 21.

148 Ex. UP-0025 REV at 22-23.

149 Initial Decision at n.753.

150 *Id.*

151 *Id.*

term, assuring equal application of the methodology to all by mitigating the known cost causation misalignment caused by apportioning United Power a share of debt that Tri-State did not finance. Second, an unduly discriminatory policy cannot be explained away merely by stating alleging it only harms one member.[152] The undue, disproportionate inflation of one member's exit fee to the benefit of others is, in fact, "textbook discrimination" that requires remediation.[153]

Where a patronage capital allocator is used, there is no need for the Commission to inquire into **any** unique circumstances as-applied to any member, such as the demonstrable and unjustifiable shift in debt obligation to United Power through the A-40 Rate and indeterminate load policies, or unanticipated anomalies in load growth or load loss that may impact one or handful of members. Contrary to the ID's suggestion otherwise, the patronage capital allocator *incorporates* recent changes in load profiles such as United Power's growth and recent member exits—its benefit is that it does not do so to the *exclusion* of many decades of investment.[154]

b. In the event the Commission prefers a member billings allocation approach, it should adopt alternative calculations that mitigate its discriminatory impacts.

In the event the Commission does elect to adopt a member billings allocation method (it should not for the many reasons discussed in section V.A.1.a above), it should at the very least

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152 *E.g.*, Stated Rate Initial Decision at P 145 ("The [Federal Power] Act has no Board-majority exception to the just-and-reasonable standard, or to the prohibition against undue discrimination."); *Trailblazer Pipeline Co.*, 85 FERC ¶ 61,345, at 62,340 (1998), *order on reh'g*, 87 FERC ¶ 61,110 (1999) (noting that Courts have reversed settlements where "the Commission did not give sufficient consideration to the interests of the contesting parties, even if the settlement had wide support and there was only one or very few contesting parties.").

153 Stated Rate Initial Decision at P 30 (describing a "mismatch of cost borne and benefit received" as "textbook undue discrimination.")

154 Allocation of debt and obligations via patronage capital is also the only proration method contemplated within Tri-State's Bylaws. In the event of dissolution, "the remaining property and **assets** of [Tri-State] shall be distributed among the members in the proportion which the **aggregate patronage of each bears to the total patronage of all members** and former members pursuant to the provisions of applicable law." Ex. UP-0008 at Article II, Section 1. The Bylaws' use of a patronage capital allocator for allocating assets upon the dissolution of Tri-State, which dissolves *all* membership interests, is perfectly appropriate to apply in the context of the dissolution of a *subset* of member interests.

reject the ID's arbitrary three-year billings timeframe[155] to avoid distorting members' debt allocations. As discussed above, the past three years of member billings incorporate and concentrate known flaws that tend to accumulate to the detriment of a few members, by (1) replicating the discriminatory impacts of the A-40 Rate, (2) overemphasizing the cost effect of recent load aberrations, and (3) charging growing members for investments to serve indeterminate load for which Tri-State did not commit capital. As demonstrated *supra*, the look-back period is far too short to fairly encapsulate the share of costs Tri-State incurred to serve each member over the long term, and has a demonstrably unduly discriminatory impact on United Power, a member that has already committed to leave Tri-State. Dr. Golino himself acknowledged the arbitrariness of his three-year billings selection[156] and offered an alternative to mitigate the allocation issues that would more closely reflect cost causation based on the record. In its discretion, the Commission could select one of the two other averaging methods on the record:

1. Retain a member billings allocator to apportion Tri-State's PPA obligations, but use a patronage capital allocator for Tri-State's debt as endorsed by both Dr. Golino and Witness Strunk;[157] or

2. Adopt a weighted average of ten years of member billing shares, which smooths input aberrations and aligns with Tri-State's transmission planning horizon and aligns with other key inputs adopted in the ID.[158]

While these approaches are less cost-causative than the BSA's patronage capital allocator, they would substantially mitigate the issues created by the ID's three-year member billings allocator.

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155 *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 295 (2016), as revised (Jan. 28, 2016) ("Our important but limited role is to ensure that the Commission engaged in reasoned decisionmaking—that it weighed competing views, selected a compensation formula with adequate support in the record, and intelligibly explained the reasons for making that choice.").

156 Tr. 1986:8-16 (Golino).

157 Ex. S-0011 REV2 at 33.

158 Initial Decision at P 238.

i. If the Commission adopts a member billings allocator, it should mitigate discriminatory impacts by adopting Dr. Golino's proposal to apportion PPAs by member billings and apportion long-term debt by patronage capital.

A more reasonable alternative would be to adopt the hybrid approach proposed by Dr. Golino and affirmed as cost causative by Witness Strunk. Under such an approach, Tri-State members would bear responsibility for patronage capital share of Tri-State's long-term balance sheet liabilities, but the member would bear its member billings share responsibility for Tri-State's off-balance sheet PPAs. Dr. Golino and Witness Strunk agree on the cost causation alignment of this approach. Dr. Golino opined this would be "[a]nother reasonable solution."[159] Witness Strunk similarly acknowledged that this hybrid approach could reflect cost causation given the readily observable cost causation differences between Tri-State's long-term balance sheet liabilities and its off-balance sheet PPA obligations.[160] Importantly, this approach would mitigate the discriminatory impact of applying a member billings allocator to apportion the long-term balance sheet liabilities associated with Tri-State's legacy generation assets.[161] This approach is far more cost causative than the ID's because Tri-State's long-term generation-related balance sheet debt would be apportioned on the appropriate, backward-looking basis throughout the long lives of the assets. On the other hand, in general, Tri-State has entered into its PPAs much more recently, typically with the intention of serving members' current load in the short run to comply with state-level emissions requirements[162]—*not* because Tri-State had insufficient owned generation capacity.

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159 Ex. S-0011 REV2 at 28.

160 Ex. UP-0111B REV at 73.

161 *Id.*

162 Ex. TGT-0003 REV2 at 27-28 (explaining Tri-State entered into its PPAs to comply with emissions standards).

ii. If the Commission applies a member billings allocator to Tri-State's long-term balance sheet liabilities, it should alternatively mitigate discriminatory impacts by adopting a ten-year weighted average of billings.

If the Commission were to retain the ID's member billings allocator, it would endorse a proposal that is inherently misaligned with cost causation. However, in the event the Commission deems this a reasonable outcome (it is not), FERC could substantially mitigate its discriminatory impacts by broadening the billings sample and expanding the timescale to capture a weighted average of each member's last ten years of member billings shares, instead of the three-year period that incorporates known anomalies such as the effects of a pandemic. The longer billings period more accurately reflects the long-term nature of the capital investments Tri-State has made on behalf of the membership than does the ID's approach.

Importantly, Trial Staff and Tri-State admitted that their respective three-year samples were selected arbitrarily, simply to produce more normalized data than would a single year of billings data. According to Tri-State, "an average over three years prevents an aberration in a single year from unduly skewing [the revenues] estimate,"[163] and "a rolling three-year historical average…provides a more stable representation of economic conditions."[164] Trial Staff witness Dr. Golino testified similarly, explaining that "using the three-year average [of member billings] will help smooth [year-to-year volatility] out to give a more reasonable number."[165] Member billings proponents therefore agree there is nothing magic about using a three-year timeframe to calculate member billing shares.[166] Indeed, consistent with fundamental statistics principles, Dr.

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[163] Ex. TGT-0033 REV3 at 19.

[164] Ex. TGT-0140 at 12.

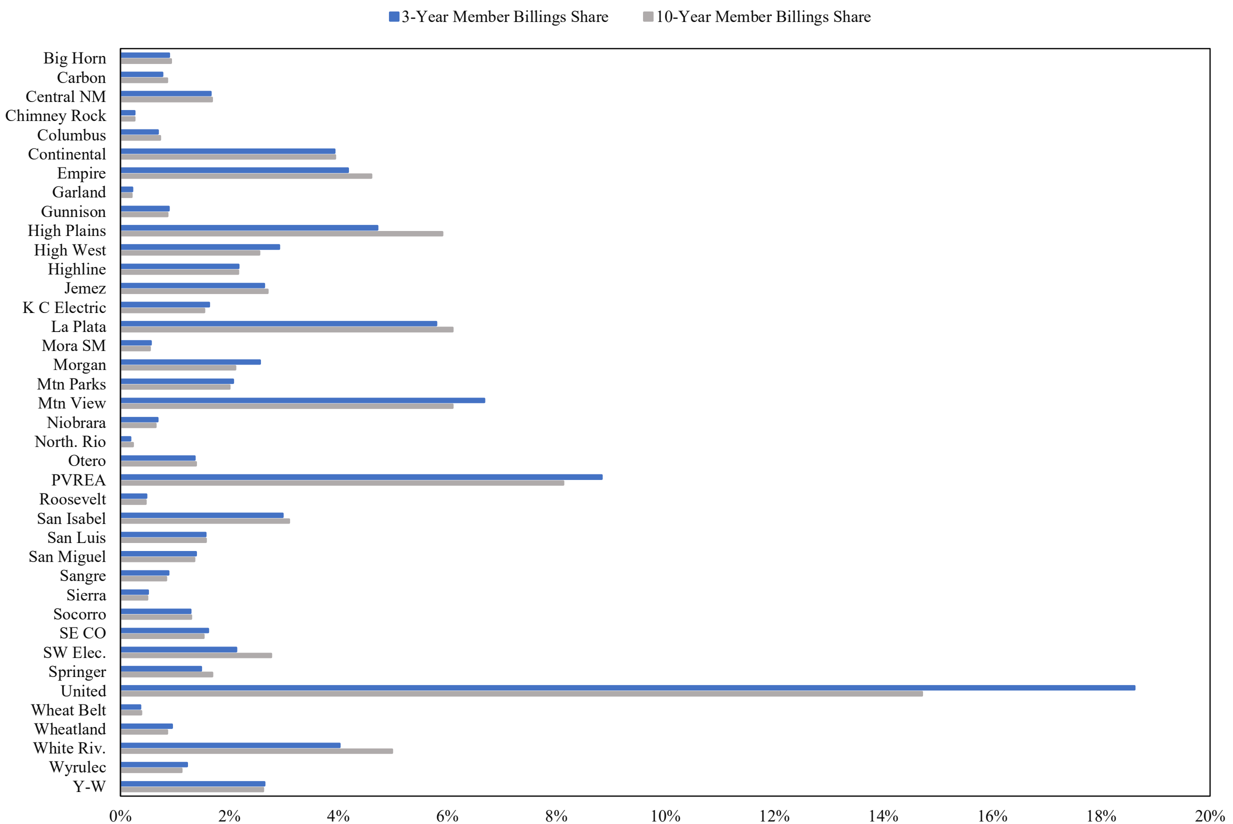
[165] Tr. 1986:8-10 (Golino).

[166] Tr. 1986:13-16 (Golino).

Golino agreed that further stability could be achieved by using an even longer timeframe.[167] If Dr. Golino's rationale is accepted, then an allocator based on a ten-year weighted average of member billings shares would be preferable to a three-year weighted average.

Further, United Power—which has experienced exactly three years of explosive growth after many years of relative stability[168]—is uniquely prejudiced by the ID's short member billings timeframe. As Figure 2 shows, the use of a three-year member billings timeframe would increase United Power's exit fee by 21 percent when compared to a ten-year timeframe.

Figure 2: A Three-Year Allocator is Uniquely Harmful to United Power



167 Tr. 1986:11-12 (Golino) ("Q: Would five years smooth [year-to-year volatility] out further? A: Yes, five years would smooth it out further.").

168 Figure 1, *supra*.

This is the largest exit fee increase experienced by any Tri-State member on percentage terms, and is far and away the largest increase of any member in dollar terms. The Commission can remedy much of this undue discrimination by adopting a ten-year timeframe for member billings. In fact, a ten-year billings period operates quite similarly to a patronage capital allocator in many ways. While members' patronage capital accounts date back to the foundation of Tri-State in 1952, the amount of "patronage" in the account does not reflect seventy years of member billings. Because Tri-State routinely retires patronage capital, starting with the oldest entries, the current patronage capital balances instead reflect members' load and billing shares in a manner that is heavily weighted toward recency rather than history. Much as ten years of member billings smooths the volatility of a three-year timeframe, patronage capital further smooths the results produced by ten years of billings. For all Tri-State members, the ten-year billings timeframe creates allocators that move towards their respective *pro rata* shares of accrued patronage capital—a result that confirms patronage capital functions as an anchor for each member's financial contribution to Tri-State.

Finally, adopting a ten-year weighted average would reconcile the member billings allocator with other findings within the ID that indicate ten years is the appropriate timeline to smooth aberrations. For one, the ID adopted Dr. Leonard's proposal to use a *ten-year* weighted average cost of debt to normalize interest rate shocks in calculating his discount rate employed throughout Trial Staff's alterations.[169] By using a weighted average rate over a decade, this proposal would "smooth out interest rate shocks" to the benefit of the model's stability.[170] A ten-year member billings timeframe accomplishes the same, while rationally conforming to the scope of Tri-State's 10-year long-term planning horizon.[171] Aligning the allocator with Tri-State's own

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[169] Initial Decision at P 515.

[170] *Id.*

[171] *Id.* P 185.

planning timeline more appropriately allocates debt and obligations to each member in accordance with the long-term investment timeline Tri-State actually made to serve their load. This is especially important in the case of United Power, where the record shows that Tri-State's ten-year forecasts in 2012 severely underestimated the growth United Power would experience between 2012 and 2021.[172] Using a ten-year weighted average of member billing shares would reflect the reality that United Power's load outpaced Tri-State's anticipated *and* actual investment in generation assets to serve United Power's load.

2. The ID incorrectly declined to adopt the BSA's principled cost-based adjustments to its generation-related debt calculation and by doing so ensures double recovery of Tri-State's debt costs.

The BSA proposes three objective adjustments to Tri-State's generation-related debt calculation to ensure members pay for the debt Tri-State "incurred or has an obligation to incur"[173] to serve them. Specifically, the BSA as-proposed (1) isolates debt associated with retired but undepreciated generation facilities to increase the total debt figure used to set the exit fees; (2) attributes to Salt River Project (SRP) a portion of Tri-State's Springerville Unit 3 debt because SRP committed to pay that debt for 30 years under a PPA; and (3) a credit for amounts in Tri-State's deferred revenues account.[174] The ID rejects these "one-off" adjustments. All three of these adjustments are objective, economically principled, and serve only to more closely align the exit fee with the debt and obligations Tri-State actually incurred to serve its members.

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172 Ex. UP-0107; Ex. UP-0111B REV at 41.

173 *Tri-State*, 172 FERC ¶ 61,173 at P 32.

174 Ex. UP-0010 REV2 at 13-15; Tr. 1537:14-1538:5 (Strunk).

a. The ID errs in rejecting the Nucla/Escante regulatory asset adjustment.

The first adjustment reflects that Tri-State recently retired the Nucla and Escalante coal-fired plants in 2019 and 2020, respectively; before the end of their expected useful lives. Although these assets are no longer in service, the BSA upwardly adjusts Tri-State's long-term debt figure to account for the fact that these plants were in service when most of Tri-State's debt was issued, but remain undepreciated on Tri-State's financial statements. In other words, the adjustments reflect remaining debt associated with costs incurred to serve the members—these costs are related to retired plant. The BSA proposed to take the $305.6 million regulatory asset Tri-State booked for these plants at year-end 2020 and instead treat this asset as generation plant for purposes of identifying a member's generation-related debt.[175] This adjustment aligns the BSA's exit fees to cost causation to the benefit of Tri-State and remaining members, is objective, and does not require any novel calculations—it applies the allocator to an adjusted debt share, aligning with the broader rule that the exit fee should measure costs Tri-State incurred to serve the exiting member. This adjustment is *extremely favorable* to Tri-State, given that Tri-State currently has no ability to charge its members for these costs, and would require Commission authorization before they would be able to amortize them in rates.[176]

b. The ID errs in rejecting the Springerville Unit 3 adjustment.

The Springerville Unit 3 (Springerville) adjustment similarly makes an adjustment to the total debt figure to reflect the reality of Tri-State's investment in Springerville Unit 3, which, unlike Tri-State's other debt, is readily identifiable on the balance sheet as tied to a specific project.

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175 Ex. UP-0010 REV2 at 14.

176 *See*, *e.g.*, *GridLiance West Transco LLC*, 160 FERC ¶ 61,003 (2017) (requiring Section 205 approval before an applicant may amortize regulatory assets).

The adjustment measures the members' share of debt attributed to Tri-State's Springerville Unit 3 coal-fired plant, reflecting firm offtake arrangement between Tri-State and Salt River Project. Under the agreement, Tri-State retains 320 MW of Springerville's capacity to serve member load, but also sells 100 MW of Springerville's capacity under a long-term agreement Salt River Project. As a result, the BSA attributes 76.2 percent of Tri-State's Springerville-related debt to the Tri-State membership to reflect the fact that nearly a quarter of the facility's output is contractually committed to serve Salt River Project instead of the members, and Salt River pays the cost of the debt associated with the capacity it buys from Tri-State under a PPA.[177]

Although the ID took no position on the substantive merits of these cost-causative adjustments, the Decision incorrectly rejected the adjustments on administrative efficiency grounds, repeating Trial Staff's concerns that they are "subjective, difficult to verify, and prone to increase the chance of future litigation.[178] "An exit fee without these one-off changes," according to the ID, "would be more efficient to administer."[179] Administrative efficiency is certainly a relevant consideration, but (1) no party substantively engaged with these simple calculations in a credible manner to show they are complicated or wrong, and (2) administrative efficiency is no justification for deviating from the cost causation principle as applied to hundreds of millions of dollars in debt and revenues. The Commission therefore should reverse the ID's rejection of these adjustments and approve them with the rest of the BSA.

c. The ID errs in rejecting a credit for deferred revenues balances.

Numerous intervenors (ITM, United Power, NRPPD) appropriately proposed to offset Tri-State's debt balances by the amount of deferred revenues that Tri-State held on its books for future

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177 Ex. UP-0015.

178 Initial Decision at P 389.

179 *Id.*

crediting to reduce member obligations. The deferred revenues on Tri-State's books largely resulted from Kit Carson's and DMEA's withdrawal payments and the attendant relinquished equity in Tri-State.[180] Ultimately, those withdrawal payments were designed to cover Kit Carson's and DMEA's *pro rata* shares of Tri-State's debt, and the Kit Carson and DMEA's relinquished equity in Tri-State (upon exiting) must logically accrue to remaining members. As shown extensively at hearing, Tri-State exercises accounting discretion to place both (1) the exit fee and (2) an undiscounted patronage capital credit to its "deferred revenues" account, which it discretionarily uses to meet its debt covenants during periods where it charges less than its actual cost of service. Any exit fee model that does not credit the amounts of debt pre-paid by former members against the debt owed from remaining members to Tri-State will embed a cost shift. The ID does just that, embeds a cost shift that results from Tri-State's discretionary accounting of the exit fees received.

The ID reasons that crediting deferred revenue would function as a double credit:

> "If a withdrawing Member … [were to] claim its share of deferred revenue as part of withdrawal payment, which will be made two years later, and Tri-State uses the deferred revenue during those two years, that Member would receive the benefit of its share of the deferred revenue twice—once when it is utilized for current operations (thereby lowering the cost to the Member), and again when it is paid out on withdrawal."[181]

However, this logic fails on several counts. First, the same is true of Tri-State's debt. An amount is attributed to the departing member two years in advance of withdrawal, but the departing member continues to pay Tri-State for debt service in rates for two whole years. Tri-State therefore will over-collect its debt costs, given that there is no credit against the exit fee for debt service paid by the departing member during the two-year notice period. Second, and perhaps more

[180] Ex. UP-0024 REV2 at 217.

[181] Initial Decision at n.885.

importantly, Tri-State has no obligation to apply any deferred revenues to reduce rates during the two-year notice period. Under the ID, the departing member could both receive no credit for its deferred revenue balance (the debt prepaid by former members and their relinquished equity in Tri-State that should be redistributed) *and* not see any benefit of the deferred revenue balance in rates during the two-year notice period.

United Power remains concerned that Tri-State, a jurisdictional utility, is permitted to price its services to members at rates that are far below the cost of service by relying on deferred revenue balances in a discretionary fashion to offset cash operating expenses. Although United Power does not believe the Commission should meddle in Tri-State's financing decisions, to establish a just and reasonable exit fee, it is appropriate and necessary that the Commission treat the past member withdrawal revenues as an offset to Tri-State's debt as United Power suggests.[182]

d. The ID errs in adopting Trial Staff's superficial critiques.

Despite the ID's repetition of Trial Staff's complaint of "one-off" adjustments, these are objective, appropriate allocations of a highly consequential amount of debt—over $115 million for the retired Nucla and Escalante assets and $80 million for the Springerville offtake arrangement with Salt River Project. The ID adopts Trial Staff's criticism that these adjustments are not "easily codified into a rule," ignoring that formulaic rates routinely approved by this Commission accommodate company-specific circumstances in precisely the same manner contemplated here, reflecting FERC's statutory rule requiring that rates be just and reasonable.[183] By brushing over

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[182] Ex. UP-0010 REV2 at 47-48.

[183] *E.g.*, *PJM Interconnection, LLC et al.*, 139 FERC ¶ 61,068 (accepting non-standard formulaic adjustments to accommodate the transmission owner's transition from one RTO to another); *Constellation Mystic Power, LLC*, 165 FERC ¶ 61,267, at n.303 (2018) ("As a general rule, the equitable treatment of costs *vis-à-vis* revenue credits is as follows: if certain costs are included (or excluded) in the revenue requirement, then revenue credits associated with those costs should be included (or excluded) as well (and *vice versa*). If costs are included but related revenue credits are excluded, then the resulting rate results in double-recovery. If costs are excluded but related revenue credits are included, then the resulting rate is not fully compensatory to the utility. *See, e.g.*, *Minnesota Mun. Power*

these important adjustments in the name of administrative efficiency, the ID misstates the costs Tri-State actually incurred to serve its members by hundreds of millions of dollars in aggregate, and exaggerates the extent to which one could argue about their calculation—in fact, no one did. Although cost causation does not require a perfect allocation of costs and benefits,[184] the dollars at stake from these adjustments are plainly too substantial to be ignored. These "one-off" balance sheet adjustments are no more idiosyncratic than the ID's distinct treatment of PPAs in recognition that Tri-State has liabilities that are not reflected on Tri-State's balance sheet, or the bifurcation of the Eastern and Western grids in recognition that resources in one interconnection do not benefit members in the other. Likewise, United Power's limited adjustments serve to avoid missing major obligations or misstating the extent to which a member contributed to Tri-State's costs.

Neither the ID nor Trial Staff substantively engaged with these BSA rate design elements besides claiming they are complicated. Yet contrary to their characterization, a cursory look confirms they are transparent and easily verifiable. United Power witness Kurt G. Strunk provided ample evidentiary support for the method used to calculate both adjustments, which like all other BSA inputs, involves only straightforward arithmetic and inputs from Tri-State's annual Form 10-K.[185] The BSA's adjustments are therefore easily derived, easily applied, and akin to run-of-the-mill revenue credits and allocation adjustments reflected in formulaic rates filed and approved by

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Agency, 68 FERC ¶ 61,060, at 61,208 n.3 (1994) ('Typically, a utility allocates all of its costs among its firm customers and then reduces the allocated transmission cost-of-service by the amount of revenues related to nonfirm transmission services. If the utility excludes a firm customer from the cost allocation and simply credits the firm service revenues to the cost-of-service, other customers will subsidize the transaction if the revenues credited are less than the cost responsibility that should be allocated to that service.')").

[184] *Ill. Com. Comm'n v. FERC*, 576 F.3d 470, 477 (7th Cir. 2009) (noting that the assignment of benefits from new investments must be "roughly commensurate" with the costs incurred to create those benefits).

[185] Ex. UP-0014 (showing the mechanics of the generation-related debt adjustment to account for the Nucla and Escalante plants); Ex. UP-0015 (showing the same for the Springerville offtake arrangement).

the Commission every day.[186] Where similar circumstances arise in the future (*e.g.*, early retirements); the BSA model readily accommodates them. It is both important and practical for the Commission to incorporate such credits and offsets any exit fee calculations under the BSA.

3. The ID errs in replacing the BSA's reasonable treatment of transmission-related assets with Trial Staff's unworkable "crediting" approach.

United Power has met its burden to demonstrate that the BSA's proposed treatment of transmission-related debt is just and reasonable. United Power proposed to (1) omit transmission-related debt from the exit fee calculation in recognition of the high likelihood that the exiting member will have to take Tri-State transmission service; and (2) develop a backstop payment, applicable for 10 years post-exit, in the unlikely circumstance that the exited member bypasses Tri-State's transmission system in favor of an alternative transmission provider (the Stranded Cost Transmission Charge, or SCT Charge). The ID erroneously rejected the SCT Charge based on narrow aspects of the proposal, apparently influenced by mischaracterizations of United Power's proposal by other parties.[187] In reality, the very circumstances under which the SCT Charge would arise are highly improbable to begin with.

The ID's adopted approach creates an unjustifiable windfall for Tri-State. Though the ID correctly determines that the exit fee should not extract lost revenues amounting to a revenue

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[186] The Commission has long found that "accounting does not drive ratemaking." *ITC Holdings Corp*., 139 FERC ¶ 61,112, at P 52 (2012); *Kern River Gas Transmission Co.*, 123 FERC ¶ 61,056, at P 30 (2008) ("accounts do not drive ratemaking"); *United Gas Pipe Line Co*., 32 FERC ¶ 63,080, at 65,242 (1985) (holding that the USOA "do[es] not control ratemaking situations"); *accord Public Service Comm'n of New Mexico,* 13 FERC ¶ 63,041 (1980) (*citing Tennessee Gas Pipeline Co. v. FPC*, 561 F.2d 955 (D.C. Cir.1977) and *Alabama-Tennessee Natural Gas Co. v. FPC*, 359 F.2d 318 (5th Cir. 1966) for the proposition that "[a]lthough relevant, . . . accounting principles are not to be blindly followed . . .for ratemaking purposes")), *aff'd*, 17 FERC ¶ 61,123, at 61,245 (1981); *Transcontinental Gas Pipeline Corp*., 55 FPC 635 (1976) (the "fact that an agency treats an item a certain way for purposes of its uniform system of accounting does not mark the end of judicial scrutiny; on the contrary, a reviewing court must assure itself that the accounting practice is consistent with underlying substantive principles of public utility law.").

[187] Initial Decision at PP 402, 405, 417.

guarantee, the ID then eschews that logic. Adopting Trial Staff's approach, the ID requires a departing member to either (a) pay 100 percent of its *pro rata* share of Tri-State's transmission- and delivery-related debt and make no contractual commitments to Tri-State for ongoing transmission and/or delivery service; or (b) commit to taking an annual dollar amount of transmission and/or delivery service over a defined term and receive a discounted credit ("Transmission Credit") to reduce the amount of the exit fee.

This approach fails to make any type of assessment that the transmission payment comports with cost causation or other important Commission policies. Tri-State holds about $1.2 billion in net transmission assets that it is legally required to make available to all transmission customers on a non-discriminatory basis to members and non-members alike.[188] Yet the ID assumes Tri-State cannot remarket available transmission on its thoroughly congested transmission network,[189] instead burdening an exiting member with a "take or pay" obligation.[190] But legal precedent does not permit the type of transmission arrangements the ID seeks to impose—neither the bespoke bilateral transmission arrangements contracted outside of the OATT,[191] nor a "member billings" portion of transmission debt allocated to members upfront as if they were the only possible transmission users on an open access system.[192] The ID's transmission approach is antithetical to

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[188] *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540, 21,541 (1996) ("Order No. 888"), *order on reh'g*, 62 Fed. Reg. 12,274 (1997) ("Order No. 888-A"), *order on reh'g*, 81 FERC ¶ 61,248 (1997) ("Order No. 888-B"), *order on reh'g*, 82 FERC ¶ 61,046 (1998) ("Order No. 888-C"), *aff'd in relevant part sub nom. Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sum nom. New York v. FERC*, 535 U.S. 1 (2002).

[189] *See infra* n.212-213.

[190] The ID's requirement that departing members either (1) take a particular level of transmission service at a to-be-negotiated contracted price and term, or (2) pay a *pro rata* share of transmission debt, falls within the classic definition of a "take-or-pay" contract.

[191] *See*, *e.g.*, Order No. 888-A at 12,278 ("[T]ransmission service must be provided through the pro forma tariff . . . bilateral agreements for transmission service provided by a public utility will not be permitted.")

[192] As explained *infra*, the ID seeks to allocate 100 percent of Tri-State's transmission debt to members, where Tri-State's open access system is devoted about 25% to non-member use.

cost causation and guarantees an excessive windfall to other transmission users at the expense of the exiting member.

a. Trial Staff's Transmission Credit proposal contravenes cost causation policy because it assumes any shifts in transmission costs due to a member's exit are *per se* unjust and unreasonable.

The ID assumes, without expressly stating, that any member departure from Tri-State will result in the incurrence of stranded transmission costs. This assumption is incorrect for at least two reasons. First, longstanding Commission precedent places the burden of proof on the utility seeking recovery of alleged stranded costs.[193] Neither Tri-State nor Trial Staff has made a showing that any of its transmission assets will be stranded when a member departs. In fact, quite the opposite: Tri-State has conceded that it has no knowledge of any plans by United Power to take transmission service from a third-party provider,[194] and it repeatedly emphasizes the scarcity of unreserved capacity on its system.[195] Trial Staff's approach assumes that anytime a member departs from Tri-State before its WESC expires, the *pro rata* share of Tri-State's transmission-related debt attributable to that member is stranded. On that basis, the ID would charge the member for its member billings share of Tri-State's debt whether or not the exiting member will take transmission service from Tri-State. This runs afoul of Order No. 888 principles[196] and the Hearing Order. Charging the member for costs of service it may not need, by default, does not follow from

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[193] *Transmission Access Policy Study Grp. v. FERC*, 225 F.3d 667, 701 (D.C. Cir. 2000) ("To recover stranded costs, a utility must demonstrate its continued expectation of service at an evidentiary hearing.").

[194] Tr. 1239:19-1240:6, 1250:9-1251:13, 1255:23-1256:6 (Bladow).

[195] *Infra* n.212-213.

[196] *See* Order No. 888 at 21,658 (indicating transmission and distribution costs should be removed in stranded cost calculations).

the express Commission directive that the exit fee anticipate the likelihood of future transmission use by the exiting member. [197]

Network transmission assets cannot be stranded in a rolled-in rate structure like the Tri-State OATT rate. Tri-State uses the same criteria for its system in the Western Interconnection as SPP's Attachment AI, which means that any looped transmission lines operated at 60 kV at above and any radial lines that serve two or more Eligible Customers qualify for inclusion in the Tri-State OATT rate.[198] If a departing member were to bypass the Tri-State transmission system (such as for delivery points directly interconnected to third-party providers),[199] the Tri-State facilities would not be stranded—rather, Tri-State's concern is inherently that the transmission billing units would go down, and the costs of those lines would increase rates for Tri-State's transmission customers.[200]

Thus, the issue before the Commission is not whether Tri-State should recover costs for "stranded" transmission assets—there are none shown. Instead, the issue is whether any *cost shifts* would result from a departing member that bypasses the Tri-State transmission system, as a result of lowered billing determinants caused by the departure. The correct inquiry is: (1) whether there is any "cost shift" in the first place and, (2) if there is, is it a just and reasonable one? To resolve this issue, the Commission need only look to its well-established precedent on cost causation.

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[197] Hearing Order at P 125 ("The exit fee calculation method should assess how to address this likelihood that the exiting member will continue to contribute to the fixed and variable costs of Tri State's transmission assets via payments under Tri State's OATT.").

[198] Tr. 1223:5-16 (Bladow).

[199] It would be extremely difficult for any Tri-State member to completely bypass Tri-State's transmission system. Departed members instead would become significant OATT customers. *See* Order No. 888-A at 12,322-12,324.

[200] Tr. 1272:7-1273:20 (Bladow) (conceding that assets that qualify for inclusion in the OATT rolled-in rate "won't be stranded" if a departing member no longer takes service among those facilities).

The cost causation principle "require[s] that all approved rates reflect to some degree the costs actually caused by the customer who must pay them."[201] Cost causation is not "an exact science" but is applied on a case-by-case basis after considering "a myriad of facts."[202] Recently, in a decision upholding the placement of Tri-State's Eastern Interconnection facilities in SPP Zone 17, the Commission affirmed that "shifting cost responsibility for some degree of legacy costs is not *per se* unjust and reasonable," but found that the shifted costs must be accompanied by commensurate benefits.[203]

The Trial Staff approach to transmission-related debt violates this well-established precedent by assigning costs for transmission-related debt to departing members without first even considering the following: (1) whether the exited member has bypassed Tri-State's system; (2) if it has, whether other transmission users have correspondingly *increased* their usage of the Tri-State system, such that no costs are "shifted" as a result of the departed load; or (3) whether any cost shift is just and reasonable due to accompanying benefits.[204] Of course, there is no record in this proceeding as to speculative cost shifts, nor to competitive benefits. Based on applicable law, the Commission could even decline to set a transmission charge at this time and deal with the unlikely event of cost shifts due to exited member bypass if it occurs.

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201 *K N Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992).

202 *Midwest Indep. Transmission Sys. Operator, Inc.*, 118 FERC ¶ 61,213, at P 84, n.24 (2007) (quoting *Colo. Interstate Gas Co. v. FPC*, 324 U.S. 581, 589 (1945)).

203 *Sw. Power Pool, Inc.*, 163 FERC ¶ 61,109, at P 191 (2018); *see also Indicated SPP Transmission Owners v. Sw. Power Pool, Inc.*, 162 FERC ¶ 61,213, at P 62 (2018) (finding that deeming cost shifts *per se* unjust and unreasonable "would prevent the Commission from considering the 'myriad of facts' that must be evaluated to determine if a particular cost allocation is just and reasonable").

204 Determination of benefits is not "an exact science" and only "require[s] that all approved rates reflect to *some degree* the costs actually caused by the customer who must pay them." The cost causation principle does not, however, require that the Commission "allocate costs with exacting precision." *Indicated SPP Transmission Owners v. Sw. Power Pool, Inc.*, 162 FERC ¶ 61,213, at PP 61-62, *reh'g den.*, 165 FERC ¶ 61,005 at PP 23, 33 (internal footnotes omitted); *Ill. Commerce Comm'n v. FERC*, 576 F.3d 470 at 477 (7th Cir. 2009).

But if the Commission decides to address transmission in this proceeding, it must develop a just and reasonable exit fee, consistent with its cost causation policies, that will avoid future litigation and provide some degree of certainty to departing members so they can assess their options. The BSA is the only proposal in the record that achieves these goals. The BSA omits transmission-related debt from the exit fee, assuming reasonably that the exited member will continue to take transmission service from Tri-State. As the departing member takes OATT service going forward, it will more than cover the debt costs Tri-State has incurred in constructing and operating the transmission system passed through the transmission formula rate.[205] The BSA's proposed SCT Charge offers a balanced approach that provides certainty, is easy to implement, and consistent with Commission precedent.

b. United Power's BSA Stranded Cost Transmission Charge Proposal is Just and Reasonable.

To the extent the Commission is inclined to address concerns of transmission system bypass, United Power proposed to incorporate a transparent and fair mechanism for a 10-year term of protection against an exiting member's bypass of Tri-State's system. The following three-part test codifies the mechanism, requiring payment of the stranded cost transmission charge only if:

- The former member had, when it was a Class A member of Tri-State, been served by transmission assets for which Tri-State incurred cost;
- The former member had in fact bypassed the Tri-State system in favor of an alternative transmission provider and stopped taking service under the Tri-State OATT; and

[205] Importantly, because Tri-State's current member transmission rate is not FERC-compliant, it attempts to recover the costs of both transmission and delivery assets. Stated Rate Initial Decision at P 36. To the extent Tri-State argues OATT revenues are insufficient to cover its "transmission" costs, this is merely because Tri-State seeks to have the transmission customer subsidize costs associated with delivery facilities exclusively used to serve other members. Further, when United Power departs in May 2024, it will repurchase the delivery facilities used to serve its load and indeed structured the transfer of its delivery facilities to Tri-State in a manner to permit simple identification and book cost. Tr. 1709:2-12 (Hubbuck). This eliminates any concern about stranded delivery facility costs with respect to United Power.

- Tri-State was unable to remarket the released transmission capacity to other users of its transmission system.

The charge is limited to apply during the earlier of 10 years after the date of withdrawal, or the date that Tri-State joins a Regional Transmission Organization (RTO).

The ID errs in rejecting United Power's transmission approach on two narrow aspects of the SCT Charge proposal, both reflecting other participants' repeated mischaracterizations of the record. The ID *agrees* with United Power that it would be inappropriate for a departing member to pay twice for Tri-State's transmission debt,[206] and does not reject the basic calculation to exclude transmission-related debt from the exit fee.[207] The ID defended the BSA against a number of critiques of its transmission proposal, refuting parties' claims that the BSA shifts costs by not *requiring* departing members take OATT service from Tri-State upon exiting. The ID also expressly refuted the erroneous claim that the OATT rate paid by withdrawn members would not fully cover the costs incurred by Tri-State to operate its transmission system.[208] Yet the ID then erroneously rejects the BSA's entire transmission approach, assuming at face value Trial Staff's quibbles with two narrow points on the SCT Charge proposal: (1) that the 10-year cap on the SCT Charge does not benchmark to future transmission *revenues*, and (2) that the criteria to determine whether the charge should apply would place an "undue burden" on Tri-State. The ID erred on both points.

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206 Initial Decision at P 295.

207 Instead, the ID takes limited issue with certain details in the application of United Power's stranded cost transmission charge. *Id.* PP 419-421.

208 *Id.* PP 422-424.

i. The ID Erred in rejecting the SCT Charge because of the reasonable 10-year cap for its application.

The ID erroneously found the BSA's proposed ten-year cap on the SCT Charge is insufficient based on Trial Staff's inapt criticism that the length of the commitment is not tied to the "remaining economic life of the assets or the present value (*i.e.*, capitalized value) of the revenues these assets would generate."[209] Neither economic life nor revenues is an appropriate measure, and no participant provided a persuasive rationale for why they would be. This criticism cuts against the cost-based framework endorsed in the ID and wades back into the "revenues lost" morass the ID properly rejects.

Like the BSA generally, United Power's transmission proposal is designed to ensure Tri-State recovers *net* costs incurred to serve the exited member under the WESC; *not* to provide a revenue guarantee through the end of the WESC or longer—*e.g.*, the 50-plus-year useful life of any particular transmission facility. Tri-State's members never committed to take transmission service beyond their WESC terms, nor did they commit to service debt for transmission service that is taken by others. It is well established that those who benefit from transmission investments are said to have "caused" their costs.[210] Assessing exit fees as if members are responsible for service beyond the limit of their actual WESC commitments, or for service taken by others, results in an inappropriate windfall for Tri-State by ignoring the legal expectation that Tri-State will make its available transmission capacity accessible to third parties and plan for transmission customer loads *whether or not* they are members. In essence, the ID's view reflects Tri-State's "revenues

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209 *Id.* P 420 (quoting Ex. S-0011 REV2 at 29).

210 *See supra* n. 201-204.

lost" theory of exit fees, implying a take or pay transmission obligation that the ID rejects for all other purposes.[211]

Rejecting the SCT Charge based on the 10-year cap also ignores the facts on the record, emphasized by Tri-State throughout the proceeding, that the Tri-State transmission system is heavily congested[212] (including and especially Tri-State's reservation on the TOT 3 line proximal to United Power, used to serve United Power load points).[213] By adopting the BSA and declining to place exited members on the hook for transmission costs beyond a reasonable 10-year term,[214] the Commission can support competition by opening up transmission capacity for reservation and generator interconnections by competitive suppliers, and can encourage efficient transmission investment by allowing exited members to access less congested systems where the engineering of the system and economics of investments deem it prudent.[215] Tri-State may also sell transmission assets to former members[216] or other interested buyers,[217] again ensuring double recovery of transmission debt if a departing member is required to pre-pay a member billings share of transmission debt under the ID's alterations.

In contrast, the BSA adopts Tri-State's own ten-year transmission planning timeline as an appropriate benchmark to assure debt associated with transmission planned for the exited member

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[211] Tr. 1261:13-15 (Bladow).

[212] Ex. TGT-0003 REV2 at 21-22.

[213] *Id.* at 38-39 (discussing Tri-State's point-to-point transmission paths); Tr. 1268:20-1269:1 (Bladow).

[214] Tr. 1269:2-12 (Bladow).

[215] Proper cost reallocation and loss of business caused by the introduction of competition is not a harm to be remedied, but a result "to be expected in a fully competitive market," in service of FERC's "policy of fostering a vigorously competitive open-access transportation market." *Texas Gas Transmission Corp.*, 50 FERC ¶ 61,291, 61,937 (1990)." Although *Texas Gas* a Natural Gas Act case, "[i]t is well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed *in pari materia*." *Ky. Utils. Co. v. FERC*, 760 F.2d 1321, 1325 n.6 (D.C. Cir. 1985).

[216] Ex. UP-0042 REV at 35-36; Tr. 1276:24-77:5 (Bladow).

[217] Ex. UP-0042 REV at 35-36; Ex. UP-0102 at 31; Tr. 1286:24-1287:4 (Bladow).

is serviced by the exited member.[218] Transmission planners understand the difficulty in planning beyond a ten-year horizon because one cannot predict the distant future with a high degree of accuracy.[219] For example, when the West integrates into a formal RTO, there will be no concern of system bypass—the concern will resolve on its own.[220] Tri-State has admitted it is seeking to join a Western RTO in the future.[221] The longer the assumed member transmission commitment, the higher the likelihood that members will be subject to charges for facilities that bear no relation to costs Tri-State actually incurred to serve the exited member.[222]

The ID appears to wrongly accept Tri-State's unsupported claims of an inability to remarket its released transmission capacity.[223] The argument goes, because Tri-State cannot *know* whether any new OATT customer is displacing the exited member's released capacity or just taking up available capacity that had not been reserved yet,[224] the departing member should just pay for it. The argument is facially flawed and ought not to have informed the ID's rejection of the BSA transmission proposal. Like other providers, Tri-State's transmission investments are "lumpy" and are built to accommodate more than the loads in existence at any given time—this is a reality of Tri-State's status as a FERC-jurisdictional transmission provider that is required to

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[218] Ex. TGT-0009 REV at 14.

[219] Tr. 1208:22-1209:4 (Bladow).

[220] UP-0111B REV at 69 (Strunk).

[221] Tr. 1277:23-1278:20 (Bladow).

[222] *See Policy Statement on Hold Harmless Commitments*, 155 FERC ¶ 61,189, at PP 82-84 (2016) ("[A]s time passes . . . it becomes more difficult to determine which costs share a nexus with the transaction and should thus be subject to an offered hold harmless commitment.").

[223] *E.g.*, Ex. TGT-0140 at 44 ("Any assumption that Tri-State can remarket United Power's load at these high prices is mistaken…Tri-State cannot sell all its available power due to market constraints, and this situation will only worsen upon United Power load loss."); Ex. TGT-0069 at 26 ("Put simply, unlike generation capacity that may be remarketed to other purchasers, transmission capacity simply does not work this way.").

[224] Ex. TGT-0069 at 26-27.

plan its system for *both* member and non-member loads under its OATT.[225] Further, as noted above, Tri-State undermines its own argument by claiming concomitantly that congestion across the Tri-State system is a barrier to its ability to remarket its generation resources. The BSA's proposed ten-year period for recovery of the stranded transmission charge is cost-causative by aligning the length of the exited member's commitment not to bypass Tri-State with Tri-State's transmission planning horizon—not saddling members with commitments to subsidize costs for service that it does not take, guaranteeing Tri-State's double recovery for transmission.

ii. The ID erred in finding the conditions placed on the BSA's approach to future transmission usage to be unduly burdensome.

The ID also erroneously finds that adopting the stranded cost transmission charge would place an undue burden on Tri-State to demonstrate that it had attempted, and failed, to remarket the transmission capacity released by the departing member.[226] The ID, relying on Dr. Golino, expressed concerns that this aspect of the BSA would lead to future litigation.[227] These concerns are misplaced. As explained by Witness Strunk, OATT ratemaking is simply an exercise in long division.[228] Tri-State's only "burden" is a simple showing that its transmission billing determinants have decreased. These data are publicly posted on Tri-State's OASIS and are not subject to dispute except through a challenge to Tri-State's annual update of its formula rate. The circumstances that can trigger stranded transmission charges are clear and subject to easy

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[225] *Id.* at 15-16.

[226] Initial Decision at P 421.

[227] *Id.* (citing Ex. S-0011 REV2 at 31-32 ('there will be a powerful incentive to argue over these types of adjustments and litigation is a likely result.")).

[228] Tr. 1543:21-25 (Strunk) ("You take a revenue requirement and you divide by billing determinants."); *see also* Ex. UP-0020.

verification; the flaws are in other parties' repeated mischaracterizations of the record and United Power's proposal, not the stranded transmission obligation parameters.

But even assuming the BSA's proposal to measure Tri-State's billing determinants is flawed, the ID errs by not simply striking that requirement and accepting the BSA without it. Under the Commission's Section 206 authority, the Commission has discretion to fashion a just and reasonable rate.[229] If the record shows that a proposal would be just and reasonable but-for complications associated with a small portion of a proposal not to be triggered save for an unlikely set of circumstances (*i.e.*, a member *literally* building around Tri-State's existing transmission network to bypass it), the Commission may exercise its authority to direct specific revisions to the proposal and strike it.[230] By striking this requirement, the remaining criterion would be that Tri-State shows a departing member bypassed the Tri-State transmission system—an obvious engineering reality impossible to reasonably dispute—in order to collect an SCT payment.

c. The ID erred in adopting Trial Staff's unsupported Transmission Credit proposal to account for future transmission usage.

i. The ID inappropriately relied on Trial Staff's flawed methodology to calculate the Transmission Credit.

The ID's adopted Transmission Credit approach suffers from two flaws: (1) it relied in part on Trial Staff's flawed methodology, and (2) it did not include the express arithmetic applied to

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229 *City of Redding v. FERC*, 693 F.3d 828, 838 (9th Cir. 2012) (Section 206(a) provides that whenever FERC finds a rate to be unjust and unreasonable, FERC 'shall determine the just and reasonable rate . . . to be thereafter observed and in force.'" (quoting 16 U.S.C. § 824e(a)); *see also* Order No. 888 at 21,570 ("It would be ironic indeed to interpret the Energy Policy Act as eliminating our long-standing, broad authority to remedy undue discrimination, given the pro-competitive purpose of the statute.").

230 *See Transmission Planning & Cost Allocation by Transmission Owning & Operating Pub. Utils.*, Order No. 1000, 136 FERC P 61,051, at PP 78, 99 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC P 61,132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC P 61,044 (2012), *aff'd sub nom. S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41 (D.C. Cir. 2014) (The Commission used its broad authority in under section 206 of the FPA in adopting regional transmission planning reforms to ensure just and reasonable rates and prevent undue discrimination.).

implement the ID's further adjustment to Trial Staff's "transmission crediting" approach. United Power believes that the first error warrants adoption of the BSA over the ID's approach, and offers Appendix B to demonstrate how the ID's adjustments introduce defects into the otherwise sound BSA calculations. Trial Staff's transmission crediting approach fails first in premise, assuming Tri-State *will* face stranded costs for both transmission facilities and delivery facilities under all circumstances. On this mistaken assumption, Trial Staff calculated the Transmission Credit to be equal to the net present value (NPV) of the annual dollar amount of transmission and delivery service committed to by the departing member over the term of that commitment.

Trial Staff's calculations were meant to be exemplary, not prescriptive. Thus, Trial Staff improperly constructed its example calculation assuming transmission revenues would be calculated under the current A-40 Rate, which bundles network transmission and delivery service. However, the ID elsewhere recognizes that OATT transmission service the member will take upon exit excludes costs associated with delivery facilities, and members may choose to purchase their delivery assets under existing policies rather than pay for continued delivery services from Tri-State.[231] The Commission approved a similar construct in approving Tri-State's exit tariff for DMEA (Rate Schedule No. 262).[232]

Although not explicitly stated, the ID clearly contemplates that, to the extent a departing member purchases its delivery facilities from Tri-State, it will have no further obligation to pay a *pro rata* share of Tri-State's debt related to delivery facilities.[233] Otherwise, the result would be a

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[231] Initial Decision at P 466 ("United Power persuasively argues that Tri-State's transmission assets could be straightforwardly identified and assigned to departing Members since many of these assets were identified as part of the implementation of Board Policy 109.").

[232] DMEA is now an OATT customer and does not take delivery service from Tri-State as it acquired the delivery-related assets Tri-State used to serve it.

[233] *See* Initial Decision at PP 511-512 (adopting Trial Staff's proposal "to offset future revenue from the withdrawing Member for transmission services against Members' total pro rata share of debt on the balance sheet.").

clear-cut double recovery for Tri-State's delivery facilities. If the departing member elects not to purchase delivery facilities,[234] then the departing member would presumably be responsible for paying its *pro rata* share of Tri-State's debt related to delivery facilities that serve it and would be eligible for a Transmission Credit associated with delivery service revenues if it elects to commit to purchasing a dollar amount of delivery service in the future.[235]

Second, the ID modifies the size of the Transmission Credit that will be applied to reduce the exit fee from what is shown in Trial Staff's example calculation, but fails to describe the arithmetic required to make that adjustment.[236] Although Trial Staff had credited 100 percent of the transmission and delivery revenues committed to be paid by the departing member, the ID limits the size of the Transmission Credit by requiring an exclusion of operational items. The ID finds a potential "windfall" would accrue to departing members if operating costs are included in the Transmission Credit.[237] The ID thus requires transmission operating costs to be excluded from the Transmission Credit.

United Power has implemented the Transmission Credit prescribed by the ID by focusing on two components to the credit: (i) the Transmission Credit for networked transmission (OATT

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[234] In narrow circumstances, purchase of delivery facilities may be impractical due to service complications. For example, Tri-State has complained that certain delivery facilities service more than one member. In such circumstances, Tri-State retains those delivery facilities and charges the exiting member a cost-based wholesale distribution rate.

[235] Importantly, Tri-State's delivery facilities should be directly assigned in the first place. Under Commission precedent, radial lines are directly assigned to the customer that benefits from those assets. *See Tex-La Elec. Coop. of Tex., Inc.*, 69 FERC ¶ 61,269, at 62,036 (1994).

[236] Initial Decision at P 512.

[237] *Id.* ("This windfall could result because transmission rates 'necessarily include amounts for operational items not associated with debt or debt service." (quotation omitted)).

Transmission Credit),[238] and (ii) the Transmission Credit for non-networked transmission (Delivery Transmission Credit).[239]

United Power calculates the **ID OATT Transmission Credit** to be as follows:

- **OATT Revenue Commitment.** Identify the annual level of transmission revenues that the departing member has committed to contract for. Consistent with the Trial Staff approach, United Power takes the average transmission demand for each member during the three most recent calendar years and multiplies that by the OATT rate prevailing in the interconnection where the departing member takes service. For departing members that take service in both the Eastern and Western interconnections, the OATT rates are weighted to reflect the share of service taken at each OATT rate. The OATT Revenue Commitment is defined to be the annual OATT revenue (transmission demand times rate) held constant in each year for the term of the departing member's commitment to Tri-State to take OATT service.[240]

- **NPV of OATT Revenue Commitment.** United Power takes the NPV of the stream of committed OATT revenues over the term of the departing member's commitment. The discount rate is 4.53 percent (as mandated in the ID).[241]

- **OATT Operating Cost Exclusion.** As prescribed by the ID, United Power reduces the revenue commitment to account for the fact that OATT transmission revenues include the recovery of operational items that are unrelated to debt and debt service. United Power splits the OATT rate into those elements that are capital-cost related (depreciation and the utility's return on capital)[242] and those that recover "operational items" such as labor and out-of-pocket maintenance expenses. For the Western OATT, United Power excludes 51 percent of the OATT revenues as being related to "operational items." For the Eastern OATT, United Power excludes 67 percent of the OATT revenues as being related to "operational items."[243]

- **OATT Transmission Credit** equals the **Net Present Value of OATT Revenue Commitment** multiplied by the **Operating Cost Exclusion.**

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[238] Appendix B, Sheet B1, Line 14.

[239] Appendix B, Sheet B1, Lines 16-17.

[240] Appendix B, Sheet B1, Cell O28 reflects the NPV of OATT Revenue Commitment. Appendix B, Sheet B4, Lines 2-8 reflect the OATT Revenue Commitment that drives the NPV.

[241] Ex. GUZ-0001 REV at 71. Appendix B, Sheet B11 also reflects the 4.53% discount rate.

[242] For a cooperative like Tri-State, lenders require that Tri-State include a return on equity in rates. The requirement that the utility set rates to achieve a debt-service coverage ratio above unity is specifically stipulated in Tri-State's debt covenants. The debt-service coverage ratio being established above unity is what creates net income for the cooperative. As a result, the full return on capital (both debt and equity) must be attributed to "debt and debt-service."

[243] Appendix B, Sheet B5.

Hence, as directed by the ID, an OATT Transmission Credit will equal the NPV of the stream of OATT service revenues committed to by the departing member, calculated as of the day of exit at the discount rate resulting from the methodology approved in the ID, currently 4.53%. Because the ID also requires an exclusion of operating costs, the resulting NPV must be multiplied by the percentage of Tri-State's OATT service revenue requirement that is related to capital (as opposed to operating expenses), currently approximately 50 percent.[244]

United Power calculates the Delivery Transmission Credit taking into consideration whether a departing member elects to purchase Tri-State-owned delivery facilities that were built to serve that member. In the case where the departing member purchases its delivery facilities, the departing member cannot be obligated to pay a share of Tri-State's delivery-related debt. In that case, the **Delivery Transmission Credit is calculated to be as follows**:

a) **Delivery-Related Debt:** Identify the portion of Tri-State's long-term debt associated with delivery facilities that will be purchased in the event of member departure. Long-term debt related to delivery facilities is equal to Tri-State's total long-term debt multiplied by the ratio of delivery facilities net plant to aggregate net plant.[245]

b) ***Pro Rata* Share:** Identify the Departing member's *pro rata* share of Tri-State. In the ID, this is the departing member's average share of Tri-State's member billings over the three most recent calendar years.[246]

c) **Delivery Transmission Credit** equals the **Delivery-Related Debt** multiplied by the departing member's ***Pro Rata* Share**.[247]

In the event that the departing member elects not to purchase Tri-State-owned delivery facilities that were built to serve that member, the ID suggests the exit charge should be based on Tri-State's debt, inclusive of debt related to delivery facilities. In this case, consistent with the ID,

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244 Appendix B, Sheet B5.

245 Appendix B, Sheet B7.

246 2012-2020 member billings data is sourced from Ex. UP-0021, Sheet "TS Mem Bill ($M)." 2021 member billings data is sourced from Ex. TGT-0141, "Exhibit 3 – RSE Calculation," Line 137. Appendix B, Sheet B2 contains the calculation for a given member.

247 Appendix B, Sheet B1, Line 16.

the Delivery Transmission Credit will reflect any commitment to take delivery service from Tri-State's non-networked delivery facilities under a direct assignment or Wholesale Distribution Service arrangement.[248]

United Power's Appendix B anticipates that the **Delivery Transmission Credit for departing members that do not purchase delivery facilities** from Tri-State will be calculated as follows:

- **Delivery Service Revenue Commitment.** Identify the annual level of delivery-service revenues that the departing member has committed to contract for.[249]
- **NPV of Delivery Service Revenue Commitment.** Calculate the NPV of the stream of committed OATT revenues over the term of the departing member's commitment. The discount rate is 4.53 percent (as mandated in the ID).[250]
- **Delivery Service Operating Cost Exclusion.** As prescribed by the ID, reduce the revenue commitment to account for the fact that delivery service revenues include the recovery of operational items that are unrelated to debt and debt service. For the purposes of its implementation model, Appendix B relies on the OATT Operating Cost Exclusion percentage (described below) as a proxy for the Delivery Service Operating Cost Exclusion. To the extent that Tri-State's 2023 Comeback Filing incorporates detailed account-level cost information for delivery facilities, the Commission will be positioned to require Tri-State to incorporate an explicit Delivery Service Operating Cost Exclusion based on that data.[251]
- **Delivery Transmission Credit** equals the **Net Present Value of Delivery Service Revenue Commitment** multiplied by the **Delivery Service Operating Cost Exclusion**.[252]

Hence, as directed by the ID, a Delivery Transmission Credit will equal the NPV of the stream of delivery service revenues committed to by the departing member, calculated as of the

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[248] Appendix B, Sheet B1, Line 17 provides the calculation.

[249] Appendix B, Sheet B1, Cell W18 toggles whether the exiting member makes a delivery service revenue commitment.

[250] Appendix B, Sheet B1, Cell O31 reflects the NPV of the Delivery Service Revenue Commitment. Appendix B, Sheet B4, Lines 9-12 reflect the Delivery Service Revenue Commitment that drives the NPV.

[251] Appendix B, Sheet B5 determines the Delivery Service Operating Cost Exclusion, based on the Western (and Eastern) rate settlement workpapers.

[252] Appendix B, Sheet B1, Line 17.

date of exit at the discount rate that results from the methodology approved in the ID, currently 4.53%. Because the ID also requires an exclusion of operating costs, the resulting NPV must be multiplied by the percentage of Tri-State's delivery service revenue requirement that is related to capital (as opposed to operating expenses).[253]

As explained below, for many reasons, this approach is flawed from both an economic and policy perspective. However, should the Commission consider implementing the ID's approach to transmission, the resulting exit fees are located in Appendix B, Sheet B1.

ii. The Transmission Crediting approach should be rejected because it is contrary to policy.

As a policy matter, the ID eliminates the flexibility that departing members deserve after their departure. Commission policy supports "the development of competitive wholesale markets through the reduction of barriers to entry created through the control of transmission assets."[254] Indeed, the Commission has long recognized that "[t]he only way to effectuate competitive markets and remedy discrimination is through readily available, non-discriminatory transmission access."[255] The ID itself appropriately recognizes that reducing a member's options upon departure would not be "an efficient outcome" because "[r]equiring a Member to take OATT service would remove the possibility of departing members to purchase transmission from Tri-State or to take service from another transmission provider."[256]

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[253] Appendix B, Sheet B5.

[254] *Preventing Undue Discrimination and Preference in Transmission Serv.*, Order No. 890, 118 FERC ¶ 61,119, at P 624, *order on reh'g*, Order No. 890-A, 121 FERC ¶ 61,297 (2007), *order on reh'g*, Order No. 890-B, 123 FERC ¶ 61,299 (2008), *order on reh'g*, Order No. 890-C, 126 FERC ¶ 61,228, *order on clarification*, Order No. 890-D, 129 FERC ¶ 61,126 (2009); Order No 888-A, at 12,275 ("As recent events clearly demonstrate, unbundled electric transmission service will be the centerpiece of a freely traded commodity market in electricity in which wholesale customers can shop for competitively-priced power.").

[255] Order No 888-A at 12,276.

[256] Initial Decision at P 423, n.813.

However, the ID neglects that the take-or-pay scheme it imposes is equivalent to such a requirement. Departing members would either take a contrived baseline amount of OATT service from Tri-State or pay a grossly overstated allocation based on its share of current service. The ID's approach thus impairs the ability of departing members to participate meaningfully in wholesale energy markets and blocks them from "open access" to transmission. In other words, this is a different means to the same inefficient outcome the ID rejected—a take or pay, "lost revenues" requirement for a member to take 100 percent Tri-State OATT service.

Furthermore, the contracting aspect of the proposal appears to violate basic open-access principles. Third-party customers routinely take network and point-to-point transmission service under form agreements conforming to the terms and conditions of an OATT. To do so, and access competitive generation resources, is largely the point of exit. The ID asks a departed-member transmission customer, in vague terms, to execute a binding contract for a particular "level" of transmission service. Adopting Trial Staff's exemplary crediting assumptions, the "level" is set at a baseline of historic member billings and the contract rate. In reality, under an OATT like Tri-State's, the transmission customer would take network service priced based upon (1) the then-applicable OATT rate, and (2) the transmission customer's actual peak load. Requiring a contract for service at an assumed dollar level up front that will differ from OATT rates and terms in future years is contrary to public policy and law prohibiting bilateral or unduly discriminatory transmission arrangements.[257]

Due to these infirmities alone, the Commission should reverse the ID in its treatment of transmission-related debt and adopt the BSA approach instead.

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[257] *See* Order No. 888-A ("transmission service must be provided through the pro forma tariff…bilateral agreements for transmission service provided by a public utility will not be permitted.")

iii. The ID's use of a member billings allocator, applied to Transmission Debt, ensures that the exit fee will double collect transmission debt.

Moreover, the Transmission Credit proposal adopted in the ID ensures that Tri-State is paid for a level of transmission-related debt far above the exited member's actual historic use indicates as a result of the member billings allocator. Where the credit requires a member to pre-pay or pre-contract for the exited member's last-three-years *member billings* share of Tri-State's transmission-related debt up front, as the ID contemplates, it ignores that such an approach *guarantees* that Tri-State will double-collect transmission charges.

Critically, Trial Staff's proposal failed to address the fact that members are not the only users of Tri-State's transmission system and cost causation requires that other users also contribute to Tri-State's transmission-related debt through the rates they pay for OATT service, wheeling, and/or legacy transmission arrangements. Tri-State already recovers approximately 24 percent of its transmission related-debt through third-party usage of its system used to provide open access service to non-members.[258] By apportioning a "*pro rata*" member billings share of *all* Tri-State transmission debt, the ID ignores that member billings aggregated equally will equal 100% among the membership; yet usage of Tri-State's transmission assets is drastically different, with Tri-State's members accounting for only about 76% of Tri-State's Western transmission usage. The ID ignores that Tri-State, as a FERC-jurisdictional transmission provider, is required to market available capacity, make investments for, and serve third parties; just as it would for its native load.[259] Through rates, those customers are required to pay for Tri-State's transmission-related debt.

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[258] Appendix B, Sheet "B6."

[259] *Supra* n.183.

iv. Where a member pays for service it does not use, either Tri-State or third parties will be subsidized to the detriment of exiting members.

If Tri-State is pre-paid for transmission debt, and then Tri-State remarkets transmission capacity that the exited member does not actually need, Tri-State will either (1) recover transmission costs twice, in contravention of Commission policy,[260] or (2) ensure the exited member subsidizes future transmission customers. Each of these scenarios violates Commission policy and precedent:

1) ***Tri-State <u>is not required</u> to apply a revenue credit*.** The ID ensures upfront revenue for Tri-State, but does not require Tri-State to apply a revenue credit to its formula rate to reflect the repayment of its transmission debt. In this instance, Tri-State would collect its transmission debt upfront, pocket that sum as part of the exit fee, and then collect it again through the debt component of its transmission rates. Tri-State would then be free to use the proceeds from the exit fee however it wishes without using it to mitigate cost shifts, if any.

2) ***Tri-State <u>is required</u> to apply a revenue credit*.** If Tri-State were required to apply a revenue credit (a possibility not contemplated under the ID), this would subsidize transmission customers in two ways. First, it would credit debt associated with service to another transmission customer, resulting in intergenerational inequity,[261] and second, the credit would be sized to a member billings share, completely ignoring the $42 million[262] of third-party revenues Tri-State received for transmission in 2021.

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[260] *See, e.g.*, *United Airlines, Inc. v. FERC*, 827 F.3d 122, 134 (D.C. Cir. 2016) (holding that the combination of the discounted cash flow return on equity and recovery of the income tax allowance through rates results in an impermissible double recovery of taxes for partnership pipelines). Although *United Airlines* is a Natural Gas Act case, "[i]t is well settled that the comparable provisions of the Natural Gas Act and the Federal Power Act are to be construed *in pari materia*." *Ky. Utils. Co.*, 760 F.2d at 1325 n.6.

[261] Commission precedent disfavors rate structures that force present-day ratepayers to subsidize future ratepayers by paying a fixed share of the capital costs for long-lived assets, such as transmission facilities. *See, e.g.*, *Union Elec. Co.*, 40 FERC ¶ 61,046, at 61,135 (1987) ("Revenue credits should be reflected in rates over a time period consistent with the timing of related costs in order to avoid intergenerational cross-subsidization."); *Boston Edison Co.*, 18 FERC ¶ 63,059, at 65,172 (1982) ("[I]ntergenerational cross-subsidization and inequity should be avoided if rationally and legally possible."), *specifically aff'd*, Opinion No. 156, 21 FERC ¶ 61,327 (1982). Tri-State has recently addressed that such outcomes are to be avoided. *See* Tri-State, Ex. TGT-0092, Cross-Answering Testimony of Daniel T. Walter, Docket No. ER20-2441, at 11-12 (Oct. 12, 2022).

[262] Appendix B, Sheet B6, Line 7.

In either case, other transmission users (either Tri-State or third parties) are subsidized for transmission service on account of the ID's wrong presumption that Tri-State will, in all cases, face stranded costs for transmission.

4. The ID incorrectly discounts the value of departing members' accrued patronage capital.

The ID errs in declining to apply a full credit of a member's forfeited patronage capital upon departure, despite overwhelming evidence that (1) Tri-State immediately benefits from relinquished patronage capital on a dollar-for-dollar basis,[263] (2) Tri-State's CFO has attested to its indenture holders that forfeited patronage capital is immediately worth its full value as collateral, and (3) Tri-State offered DMEA 100 cents on the dollar for its relinquished patronage capital under Commission-approved Rate Schedule No. 262.[264] By holding that members are only entitled to a discounted value of their patronage capital, the Presiding Judge fundamentally misconstrued the significance of patronage capital to members of G&T cooperatives and also ignored many practical realities of how members have supported financing over the life of their memberships to enable the development of revenue-generating assets that Tri-State retains upon a member's exit.

As discussed in section V.A.1, *supra*, because Tri-State is a not-for-profit organization, any revenues from rates that it collects in excess of its costs must be returned to the paying members. As members like United Power overpay Tri-State in excess rates for decades, providing "margins," those overpayments convert into an equity interest and accrue as patronage capital. Over many years, members' overpayments accrue in proportion to their economic contribution. United Power, for example, has accrued $125 million of patronage capital through its contributions

[263] Initial Decision at PP 441-444.

[264] Ex. UP-0146 REV at 3.

to Tri-State's margins.[265] This is ownership value that undeniably belongs to the exited member, and it should be credited in full upon departure.[266] Over decades, these member revenues enabled Tri-State to make the necessary investments to become what it is today—one of the nation's largest G&T cooperatives, owning over 5,200 miles of extremely valuable transmission[267] and dozens of generation assets. It would be fundamentally unjust—and indeed, inconsistent with cost causation—to only repay the contributing members a heavily discounted value of those overpayments on the date of departure while Tri-State fully retains the revenue-generating assets the exited member financed.

Instead of applying a full patronage capital credit, the ID adjusts the BSA's patronage capital credit on the basis of how Tri-State retires and refunds patronage capital to members from time to time during a member's membership. Like other areas where Tri-State was afforded limitless discretion prior to FERC jurisdiction, Tri-State Board retained sole discretion to refund members' accrued patronage capital over time.[268] Purportedly in recognition that the member would receive an up-front credit for patronage capital that Tri-State has traditionally refunded at its sole discretion over many years, the ID instead offers exiting members two choices for return of their patronage capital: either (1) accept a lump-sum credit of patronage capital discounted over twenty years, or (2) elect to continue to receive regular patronage capital retirements from Tri-State even after leaving the membership.[269]

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[265] Appendix B, Sheet B4, Line 14.

[266] Ex. UP-0001 REV at 11.

[267] Ex. UP-0209 at 2.

[268] Ex. TGT-0016 REV2 at 10-11.

[269] Initial Decision at PP 515-516.

The ID's approach is in error, first in relying on the fact that applying the full patronage capital credit "has no basis in the Tri-State Bylaws or WESC."[270] Yet this critique is puzzling, given that the ID elsewhere minimizes the relevance of the Bylaws and the WESC in calculating exit fees.[271]

The ID next alleges that crediting full patronage capital balances upon exit would "likely impair the financial condition of Tri-State" because patronage capital is a non-cash item that cannot be disbursed by Tri-State every time a member departs.[272] Yet, this runs contrary to how Tri-State has booked forfeited patronage capital in every instance of a member departure. Instead, a full patronage capital credit merely would reduce the size of the cash payment the departing member would pay to Tri-State rather than extracting a cash payout as the ID presumes. The ID also found insufficient record evidence to demonstrate that the BSA as proposed would create financial harm to Tri-State, especially if Tri-State prudently right-sizes its cost structure.[273] Record evidence does not support the notion that the BSA's proposed patronage capital treatment would create financial harm.

The concern about a full patronage capital credit is also belied by Tri-State's own accounting treatment of previously forfeited patronage capital that reflects a dollar-for-dollar benefit Tri-State accesses immediately to support its financial metrics. The record shows that

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[270] *Id.* P 442.

[271] *Id.* P 225 ("It is undisputed that neither the Bylaws nor the WESC prescribe how CTPs should be calculated."); P 387 ("It is found that Tri-State's governing documents, including the Bylaws and the WESCs, are silent on a debt-allocation methodology.").

[272] *Id.* P 443.

[273] *Id.* P 397 ("Fourth, arguments against the BSA for its alleged adverse impacts on Tri-State's credit rating are not persuasive. Contrary to Tri-State witness Mr. Aschenbach's contentions, it has not been demonstrated that the BSA would result in reduced creditworthiness and higher borrowing costs for Tri-State."); P 392 ("the record suggests that Tri-State could, and in prudence must, downsize and rightsize to account for Member exits"); P 520 ("[t]he record suggests that some degree of rate neutrality for Tri-State's remaining Members can be achieved through methodologies other than a lost revenues approach…Therefore, Tri-State's prudent cost-mitigation efforts could allow Tri-State to achieve long-term rate neutrality for its remaining Members.").

when an exited member forfeits its patronage capital, Tri-State books the amount of patronage capital foregone as deferred revenue on its balance sheet at its full, non-discounted value.[274] Tri-State then has immediate access to the patronage capital value and will "recognize" *all* of those deferred revenues—every single dollar of forfeited patronage capital—as if it were revenues received from members for generation and transmission services.[275] Tri-State management has unfettered discretion to choose the period (e.g., Q1 2023) and amount (e.g., $10 million of additional revenue) in which it recognizes the forfeited patronage capital.

In the case of United Power's exit, for example, Tri-State and remaining members will receive a windfall where Tri-State receives an immediate, dollar-for-dollar benefit of $125 million that it can recognize in lieu of cash receipts from members in order to support its financial metrics. But at the same time, Tri-State would shave over *$40 million* off United Power's patronage capital credit[276] against the exit fee. Regarding Tri-State's dollar-for-dollar accounting treatment of forfeited patronage capital, the ID simply notes that "Tri-State's business judgment in its accounting practices is entitled to deference under these circumstances and therefore needs no Commission intervention."[277] This misses the point, however. United Power only claims that where Tri-State is entitled to $125 million in immediate value for forfeited patronage capital, exited members are entitled to a $125 million credit against their exit fees.

Further, the ID erroneously concludes—without citation—that providing full patronage capital credits for departing members could create undue discrimination for remaining members, because remaining members do not immediately realize the full credit of their patronage capital

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274 Tr. 374:21-375:4 (Bridges).

275 Ex. UP-0111B REV at 49.

276 Appendix B, Sheet B4, Line 15.

277 Initial Decision at P 448.

accounts.[278] But there is no discrimination here where remaining members choose to continue financing the Tri-State system and elect not to liquidate their *pro rata* share of Tri-State's liabilities and equity through withdrawal. When a member departs and relinquishes its patronage capital, it pays its share of Tri-State's debt and also forfeits its financial interest in all of Tri-State's infrastructure assets.[279] These assets cumulatively carry billions of dollars of book value, which will be realized to the benefit of remaining members either through continued revenue generation or proceeds of asset sales, which Tri-State may prudently choose to address impacts of a member departure.[280] Under the BSA, Tri-State's current members have the same choice: (1) elect to depart with payment of an exit fee based on Tri-State's debt and a full patronage capital credit against the exit fee, or (2) remain members at the status quo and retain their significant ownership interests in Tri-State's $5 billion in assets; receiving their patronage capital refunds in the ordinary course.

The ID further errs because it disregards the relevance of record evidence showing that Tri-State recognized the full value of its members' patronage capital balances in prior exits. First, Tri-State has fully credited the patronage capital of other members upon their departure. Tri-State admits it fully credited DMEA's patronage capital as part of DMEA's withdrawal from the membership in 2020.[281] Tri-State did the same with Kit Carson's patronage capital when it exited in 2016.[282] With respect to DMEA, Tri-State's own CFO objectively represented the value of DMEA's patronage capital to be its full, undiscounted value. In a Fair Value Certificate executed pursuant to the Trust Indenture Act of 1939 upon DMEA's departure, Tri-State was required to

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278 *Id.* P 444.

279 Ex. UP-0010 REV2 at 32.

280 *Id.* at 32-33.

281 Ex. UP-0146 REV at 3.

282 Ex. UP-0024 REV2 at 448; Ex. UP-0111B REV at 46-47.

report the fair value of its released security—the DMEA WESC. In the Certificate, Tri-State's CFO attested with the force of law that the DMEA exit fee—expressly valuing DMEA's relinquished patronage capital at its full undiscounted value—reflected the "fair value" of that forfeited patronage capital.[283] Tri-State credited the full value of DMEA's patronage capital against its own debit in calculating the fair value of DMEA's released WESC. Given that Tri-State's own CFO attested under penalty of perjury *to Tri-State's indenture holders* that forfeited patronage capital is worth its undiscounted value, it is necessary that patronage capital be credited in full against the exit fee.

Instead of acknowledging the evidence suggesting Tri-State and the members regularly afford patronage capital its full, dollar-for-dollar value, the ID unpersuasively attempts to distinguish each of these occurrences. With respect to Tri-State's full credit of patronage capital to DMEA and Kit Carson, the ID dismisses the comparisons as irrelevant because they were "black-boxed, one-off settled Member exits" that are "unsuitable benchmarks."[284] United Power explains in Section V.B.2, *infra*, why the ID erred in discrediting the relevance of these recent member withdrawals. United Power put Tri-State's accounting treatment of patronage capital at issue not because it seeks to audit Tri-State, but instead to demonstrate that the BSA's full crediting of patronage capital is just, reasonable, and not unduly discriminatory precisely *because* it mirrors Tri-State's "sound"[285] accounting practices with respect to patronage capital. If Tri-State uses the full benefits of patronage capital dollar-for-dollar, it follows that the member actually forfeiting the patronage capital is equally entitled to receive every dollar as well. The Commission should therefore reverse the ID's finding that departing members are only entitled to a discounted value

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283 Ex. UP-0151 at 2-3.

284 Initial Decision at P 442.

285 *Id.* P 448.

of accrued patronage capital as a credit against the exit fee and leave the BSA proposal to fully credit patronage capital in place.

B. The ID errs in incorrectly sidestepping the relevance of facts informing a just, reasonable, and not unduly discriminatory exit fee.

1. The ID errs in disregarding the relevance of the WESC's *Shoshone* provision.

The ID correctly adopted a debt-and-obligations-based exit fee based on Commission guidance that the exit fee must "compensate Tri-State for the costs that it has incurred or has an obligation to incur in the future to satisfy its service obligations under the Wholesale Service Contract with the departing member."[286] However, in reaching this conclusion, the ID incorrectly and unnecessarily held that the BSA's conceptual basis in the contractual language of the member WESCs does not apply to a member exit scenario.

Tri-State's member WESCs provide that each member's obligations to Tri-State extend only as far as their *pro rata* share of Tri-State's debt and other obligations—as Tri-State readily acknowledges.[287] The WESCs, although lacking a provision directly addressing voluntary member exits,[288] provide important insight into the scope of members' obligations to Tri-State. Section 8 of the WESCs, known within Tri-State as "*Shoshone* Language,"[289] was added to the WESCs following the resolution of *Shoshone I* and *Shoshone II* before the Tenth Circuit in the 1980s. Prior to the *Shoshone* cases, Tri-State's WESCs did not include a provision governing what

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[286] *Tri-State*, 172 FERC ¶ 61,173, at P 32 (2020).

[287] Ex. UP-0009, Section 8.

[288] However, the *Shoshone* Amendment was added in contemplation of the likely effects of a voluntary member exit. Ex. UP-0034 REV at 19-21.

[289] Ex. UP-0037 at 1. It is also referred to as the "*Shoshone* provision."

would happen if a member endeavored to sell its system and thereby eliminate its "requirements."[290] WESC Section 8 resolved this question, stating in part:

> Notwithstanding the foregoing, the Member may take or suffer to be taken any steps for reorganization or dissolution or to consolidate or merge into any organization or to sell, lease or transfer (or make any agreement therefor) all or a substantial portion of its electrical system assets, whether now owned or hereafter acquired, ***so long as the Member shall pay such pro rata portion of the outstanding indebtedness on the Notes, as well as other obligations and commitments of Seller at the time existing***, as shall be determined by Seller with the prior written consent of the Administrator and shall otherwise comply with such reasonable terms and conditions as the Administrator and Seller shall require.[291]

With respect to asset transfers by a member and changes in corporate form, the WESC could not be clearer: each Tri-State member bears responsibility for its *pro rata* share of Tri-State's debt and obligations outstanding.

The ID disregards the relevance of the *Shoshone* provision by reading it too narrowly. Although the provision contemplates the debt-and-obligations-based calculation codified by the BSA, the ID erroneously holds that this contractual language "does not apply to the situation at hand" because Section 8 "only applies to reorganizations, dissolutions, consolidations or mergers," which are "fundamentally different" occurrences than are member exits.[292] But the only "fundamental" difference mentioned in the ID is that some of the voluntary types of organizational changes "do not preclude a member from remaining in Tri-State albeit in a different organizational structure,"[293] whereas a member departure does preclude remaining in the membership. In arguing this, the ID makes a distinction without significance—whether choosing to transition to open access, or sell its system to another entity, a member voluntarily terminates its WESC by paying its *pro rata* share of debt and obligations

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[290] Ex. UP-0034 REV at 17.

[291] Ex. UP-0009 at Section 8 (emphasis added).

[292] Initial Decision at P 226.

[293] *Id.*

Importantly, there is no economic basis for the payment under other withdrawal circumstances to conceptually be any different from what Section 8 requires from members that transfer their assets.[294] Regardless of the circumstances, the economic logic of the WESCs calls for a member to eliminate its full-requirements service to pay Tri-State its *pro rata* share of Tri-State's debt and other obligations. The conceptual crux of the BSA—compensating Tri-State for a member's *pro rata* share of debt and obligations—is directly rooted in Section 8 of the WESC, and the ID erred by providing no weight to the WESC's contextual directives.

2. The ID errs in disregarding highly relevant benchmarks for testing the end results of the BSA's exit fees.

As further justification for the appropriateness of the BSA, United Power presented record evidence demonstrating that the exit fees produced by the BSA align with all relevant benchmarks. Over the past decade, Tri-State has engaged in a pattern of conduct with respect to member exits that—when viewed collectively—reveals remarkably consistent insight into the amount of exit fees Tri-State truly needs in order to remain whole. The ID endorsed a modified version of the BSA, but it incorrectly downplayed the significance of these highly relevant benchmarks in validating the end results produced by the BSA in its original form. Instead, the ID's adjustments to the BSA would produce exit fees that now exceed these relevant data points, indicating that the exit fees may result in overcompensation to Tri-State. The Commission should afford more weight to these benchmarks and should use them as justification for restoring the BSA to its original form.

a. Recent member withdrawals

Two other distribution cooperatives have already terminated their WESCs and departed Tri-State via withdrawal transactions—Kit Carson in 2016, and DMEA in 2020. Both transactions

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[294] Ex. UP-0111B REV at 27.

mirrored the BSA's results both in structure and in magnitude: the departing member paid a cash exit fee to compensate Tri-State for early termination of the WESC, and also received a credit against the exit fee equal to the full value of their accrued patronage capital. Although Kit Carson and DMEA each paid lower exit fees than would United Power under the BSA, these former members were also much smaller than United Power.

Additionally, Tri-State's own CFO, Patrick Bridges, testified on multiple occasions that the exit fees paid by Kit Carson and DMEA made the remainder of the membership "whole."[295] Witness Bridges also signed a Fair Value Certificate in the wake of the DMEA withdrawal, which attested to Tri-State's lenders with the force of law[296] that the terms governing DMEA's departure—consisting of a $62.5 million cash exit fee and a full, non-discounted $48 million patronage capital credit—constituted the true value of the underlying collateral.[297] This evidence is highly probative. The BSA, calculated exactly as United Power proposed, produces end results[298] that correspond to Tri-State's own behavior regarding the true costs associated with terminating the WESC early. It therefore follows that the BSA produces exit fees correctly reflecting the underlying value of the withdrawal transaction and that provide neither a windfall nor a deficit to Tri-State or the departing member.

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[295] Ex. UP-0028 at 155; *see* Tr. 361:13-18, 363:21-364:19, 395:3-8 (Bridges) (admitting the DMEA and Kit Carson exit fees made Tri-State whole).

[296] Tri-State's indenture requires this certification under the Trust Indenture Act; 15 U.S.C §77bbb (TIA), which is a statute intended to protect bondholders by, inter alia, imposing reporting and information to borrowers. *See Ret. Bd. of the Policemen's Annuity & Benefit Fund of Chi. v. Bank of N.Y. Mellon,* 775 F.3d 154, 164 (2d Cir. 2014). In accordance with the TIA §77nnn(d), the fair value certificate represents the opinion of an expert on the fair value of the property or securities and must be furnished when property or securities are released from the lien of the indenture. 15 U.S.C.A §77nnn(d). Accordingly, Tri-State authenticated to the investment community, pursuant to a federal statute intended to protect bondholders, that DMEA's WESC termination represented the release of security with a fair value equal to DMEA's cash payment plus the book value of its undiscounted patronage capital.

[297] Ex. UP-0151 at 2-3.

[298] *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944) ("it is the end result reached, not the method employed, which is controlling.").

Instead of heeding Tri-State's own contemporaneous representations regarding the sufficiency of the Kit Carson and DMEA exit fees, the ID instead assigns no probative value to these prior transactions, resurrecting Tri-State's untenable argument that they "are merely negotiated transactions…which by their nature reflect compromise."[299] Tri-State willingly entered into negotiated transactions and had no obligation to agree to exit fees that were insufficiently compensatory. Tri-State told this Commission that the DMEA exit fee was just and reasonable and the Commission held it to be so.[300] The Commission has a long history of benchmarking rates to comparable transactions in the relevant market.[301] The ID's categorization of the agreed-upon DMEA exit fee as irrelevant ignores the most pertinent and most comparable transaction that exists in the relevant market. The Commission should not ignore that evidence.

Although Kit Carson and DMEA do not constitute legal precedents, they do provide helpful insight into the magnitude of exit fees Tri-State actually needs to receive in order to satisfy its obligations stemming from the costs it incurred to serve each member. Further, the ID's rejection of these benchmarks becomes problematic in light of the fact that the ID's adjustments to the BSA would likely push the exit fees substantially higher than what Kit Carson and DMEA paid to depart from Tri-State under similar circumstances. If the Commission adopts the ID's position on Kit Carson and DMEA, it runs the risk of endorsing a methodology that provides a windfall to Tri-State by assessing exit fees that are well in excess of the fair value of the underlying withdrawal transaction.

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[299] Initial Decision at P 236.

[300] *Tri-State Generation and Transmission Ass'n, Inc.*, 171 FERC ¶ 61,202 (2020).

[301] *Bos. Edison Co. Re: Edgar Elec. Energy Co.*, 55 FERC ¶ 61,382 (1991) (benchmarks of comparable market transactions can be used to show lack of affiliate abuse); *Ocean State Power II*, 59 FERC ¶ 61,360 (1992).

b. Buy-Down Payment Settlement

Tri-State's filed BDP settlement also provides a meaningful benchmark for the magnitude of a just and reasonable exit fee. Both Tri-State and the buying-down members asserted that the terms of the settlement—including the cash payments—are just and reasonable, providing neither a windfall nor a deficit to Tri-State. The BDP and CTP should produce roughly proportionate results in order for either to be just and reasonable.[302] Put differently, the payment members must make to Tri-State in exchange for removing 50 percent of their load from the requirements arrangement should be roughly half the amount of the payment required to fully buy out of the requirements arrangement. The BSA, as proposed by United Power, would assess cash payments for full member exits that are closely proportionate on a per-MW basis to the settled buy-down payments that Tri-State acknowledged were just and reasonable.

Table 7: BDP Extrapolated to Full Member Load (April 2022 BDP Settlement) vs Pro Rata Share of Tri-State's Indebtedness (Balance Sheet Approach)[303]

Member	Extrapolated BDP – MAX option (April 2022 BDP Settlement)	*Pro Rata* Share of Tri-State's Indebtedness (Balance Sheet Approach)[304]
La Plata Electric Assn.	$130 million	$163 million + PPAs
Poudre Valley Electric	$195 million	$183 million + PPAs
San Miguel Power Assn.	$30 million	$35 million + PPAs

The close alignment between the BDP settlement and the BSA constitutes another reason for the Commission to adopt the BSA exactly as proposed by United Power.

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302 *E.g.*, Ex. UP-0024 REV2 at 29-30. Tri-State and the Indicated Members made numerous attempts in briefing to refute the notion that CTPs and BDPs should be proportionate. These arguments were unpersuasive, most notably because "load is load" and should be priced the same regardless of whether it comes in the form of a fixed MW buy-down or a full member exit.

303 The extrapolated BDP calculation is based on 2018-2020 generation demand and energy figures sourced from Ex. TGT-0142, Sheet "Exhibit 3 – RSE Calculation," and also is based on the BDP settlement rates found in Ex. UP-0156 at 12.

304 CTP values are sourced from Ex. UP-0021.

The ID erred by declining to address the important interplay between the BDP settlement and the exit fees assessed by the BSA.[305] By adopting adjustments to the BSA that could increase exit fees significantly depending on the departing member's transmission service election, the ID created an inappropriate set of incentives where Tri-State members could buy down to partial requirements service at a much lower per-Megawatt fee than what would be required for them to fully depart from the membership. Further, the ID's misalignment of BDPs and CTPs opens the door for Tri-State members to engage in an opportunistic "two-step buyout." Under this strategy, a Tri-State member could initially buy down to 50 percent requirements service pursuant to the terms of the BDP settlement. This initial buy-down would cost the member less than half the price of a full exit due to the misalignment between the BDP settlement's rates and the BSA as altered by the ID. Then, in a later time period, the same member could elect to buy out its remaining share of Tri-State requirements service pursuant to the filed exit fee methodology. By first making a buy-down payment, a member therefore could fully exit Tri-State through two transactions while paying significantly less than the exit fees assessed under the ID's adjusted version of the BSA. Two-step buyouts are a significant issue evincing the importance of adopting proportionate methodologies for BDPs and CTPs. The ID was incorrect to adopt adjustments to United Power's BSA without at all discussing the potential incentives it would create with respect to the BDP settlement, and the Commission should consider this issue when ruling on the ID's BSA adjustments.

c. ID of the Colorado Public Utilities Commission

Finally, the ID disregards that this case was litigated before. In 2020, the Tri-State exit fee methodology proceeded to hearing before the CoPUC. In a well-reasoned ID, Presiding Judge

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[305] In fact, the ID did not address the BDP settlement at all.

Robert Garvey evaluated a robust factual record and adopted United Power's BSA in full.[306] Pursuant to the ID, United Power was ordered to pay a cash exit fee of $235 million after receiving a full, undiscounted patronage capital credit of $120 million with no ongoing obligation for Tri-State's PPAs.[307] Although Tri-State elected to unilaterally invoke FERC jurisdiction before Judge Garvey's findings were affirmed in Colorado, the ID nevertheless serves as persuasive authority that the BSA is just, reasonable, and not unduly discriminatory in its original form. Notably, Judge Garvey adopted the BSA without modification, including its use of a patronage capital allocator and provision of an undiscounted patronage capital credit against the departing member's exit fee.[308] This is especially significant because it shows that Trial Staff's adjustments to the BSA are not needed for the methodology to render appropriate results.

The ID's alterations to the BSA create an undesirable incentive: instead of litigating exit fee proceedings before a State forum where appropriate, G&T cooperatives can instead avail themselves of higher exit fees simply by invoking FERC's jurisdiction via the addition of one or more non-cooperative members. The ID errs in accepting all of Tri-State's representations at face value, attempting to factually distinguish the current proceeding from its CoPUC predecessor. Namely, the ID points to the following facts:

> The ALJ's recommended decision was vacated without review and a final decision by the Colorado Commission; there was limited participation from Tri-State in that proceeding; the State of Wyoming could not participate in that proceeding; and the ALJ did not have a proposed CTP methodology from Tri-State to consider.[309]

306 Ex. UP-0083 at 56.

307 *Id.* at 51.

308 *Id.* at 51, 53.

309 Initial Decision at P 237.

But these distinguishing features are either minimally relevant or predicated on incorrect factual premises. On the former, the State of Wyoming's inability to participate in the CoPUC proceeding is not a meaningful distinction in light of the fact that (1) parties such as Wyoming were permitted to participate as amici and brief the case but chose not to, and (2) Wyoming chose to only passively intervene in the present FERC proceeding. Similarly, while Judge Garvey's ID was vacated without review and final decision, this was solely because Tri-State elected to forum shop at FERC; indeed, the vacatur reflected the CoPUC's jurisdictional uncertainties and did not bear on the merits of Judge Garvey's thorough opinion. Finally, the Presiding Judge should not have accepted Tri-State's attempts to raise weak due process arguments regarding the manner in which the CoPUC proceeding was conducted. To the extent that the proceeding actually featured "limited participation from Tri-State" and failed to consider an exit fee methodology from Tri-State, it was due to Tri-State's own series of errors. For one, Tri-State firmly resisted the fundamental premise that it must provide exit fees to the membership at all. Tri-State took the position—since repeatedly rejected in Colorado and at FERC—that it was under no requirement to provide exit fee calculations at all, and that any attempt for a member to depart constituted a breach of contract.[310] Further, Tri-State failed to offer an exit fee methodology before the CoPUC due to its own negligence. Tri-State flat-out missed the procedural deadline to file an exit fee methodology, and its untimely attempt to circumvent the CoPUC procedural schedule weeks later was denied.[311] Tri-State's own strategic decisions before the CoPUC cannot be used two years later as grounds to disregard a relevant benchmark. The Commission should therefore view the CoPUC ID as another data point suggesting United power's BSA produces just and reasonable exit fees.

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310 Ex. UP-0083 at 26-29.

311 United Power Motion for Leave to Answer and Answer, Docket No. ER20-1559-000, at 9-11 (Jun. 4, 2020).

C. The combined effect of the ID's alterations renders exit fees that are too large to be just and reasonable.

The exit fees produced by the ID are too high because they would provide a massive windfall to Tri-State in the event numerous members exit. The just and reasonable standard requires that the exit fees be fair on an end-results basis. The evidence before the Commission demonstrates that, under the ID, if Tri-State experiences a significant load loss, then the aggregate exit fees paid by departing members will leave Tri-State with a windfall in excess of the costs it incurred to serve those members. As Figure 3 shows, if all Tri-State members leave, Tri-State will receive aggregate cash payments of $2.7 billion, leaving it with only $500 million in debt. This represents an equity ratio of 12%. At the same time, Tri-State will have a profitable portfolio of transmission and distribution assets with a book value of $1.2 billion[312] but valued in the marketplace at approximately $2.5 billion.[313] In addition, Tri-State will own nearly 2,500 Megawatts of largely unencumbered generation capacity[314] and can market that capacity and associated energy in competitive wholesale markets (including *to the exited members*), providing ample opportunity to recover billions in additional net revenues.

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312 Ex. TGT-0108 at 72.

313 Ex. UP-0042 REV at 36.

314 Ex. TGT-0108 at 40.

Figure 3: The ID Would Create a Windfall to Tri-State in the Event of Full Member Exits

		Pre-Exits	Δ	Post-Exits
Capitalization				
[1] Debt		3,245[315]	(2,701)[316]	544
[2] Equity		1,113[317]	2,701[318]	3,814
[3] Capitalization	*[1]+[2]*	4,357		4,357
Capital Structure				
[4] Debt Ratio	*[1]/[3]*	74%		12%
[5] Equity Ratio	***[2]/[3]***	**26%**		**88%**
[6] Capital	*[4]+[5]*	100%		100%

An end result from the ID that leaves Tri-State with no member load to serve, only $500 million in debt, a transmission portfolio that it can sell for $2.5 billion, and a generation fleet of nearly 2,500 Megawatts that provide ample additional opportunity to generate earnings is not a just and reasonable end result. In contrast, the BSA as proposed would leave Tri-State with $978 million in remaining generation-related debt and other obligations, $1.2 billion in transmission-related debt and obligations recovered through Tri-State's transmission rates, and $5 billion in assets.[319] The BSA yields a just and reasonable end result, while the ID leaves Tri-State with a windfall and a largely unencumbered portfolio of G&T assets that will produce billions in net revenues in the marketplace.

315 Ex. UP-0120 at 60 (Tri-State 2021 10-K, page 54).

316 Appendix B, Sheet B12, Cell O33.

317 Ex. UP-0120 at 60 (Tri-State 2021 10-K, page 54).

318 Appendix B, Sheet B12, Cell O33.

319 Ex. UP-0010 REV2 at 35.

VI. CONCLUSION

For the foregoing reasons, United Power respectfully requests that the Commission grant these exceptions to the ID. To correct these errors and ensure that the rates and terms for exits from Tri-State are just and reasonable for both the departing and remaining members, United Power requests that the Commission direct Tri-State to make a compliance filing within 30 days after the date of the Commission's order. The Commission should direct Tri-State in that filing to calculate all members' exit fees to accommodate exits noticed during the refund period. United Power further requests that the Commission issue an order that definitively instructs Tri-State to file Appendix A as Rate Schedule No. 281 in order to prevent further litigation. This process would afford finality to all parties before United Power exits Tri-State on May 1, 2024.

Respectfully submitted,

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October 31, 2022

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission's Rule of Practice and Procedure, I hereby certify that I have this day served a copy of the foregoing on all persons designated on the official service list compiled by the Secretary in this proceeding.

Dated this 31st day of October, 2022.

/s/ *Jay Schuffenhauer*
Jay Schuffenhauer