

UNITED STATES OF AMERICA  
BEFORE THE  
FEDERAL ENERGY REGULATORY COMMISSION

Northwest Power Pool Members' Market  
Assessment and Coordination Committee

Docket No. EL15-100-000

**MOTIONS TO INTERVENE AND COMMENTS OF  
THE AMERICAN PUBLIC POWER ASSOCIATION,  
THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION,  
THE NORTHWEST REQUIREMENTS UTILITIES,  
PACIFIC NORTHWEST GENERATING COOPERATIVE,  
AND THE PUBLIC POWER COUNCIL**

The Northwest Power Pool Members' Market Assessment and Coordination Committee (MC) has submitted a petition for a declaratory order, pursuant to Commission Rule 207(a)(2), 18 C.F.R. § 385.207(a)(2) (2015), on limited threshold issues critical to the development of a sub-hourly energy market in the footprint of the Northwest Power Pool (NWPP).

The American Public Power Association (APPA), the National Rural Electric Cooperative Association (NRECA), the Northwest Requirements Utilities (NRU), Pacific Northwest Generating Cooperative (PNGC Power), and the Public Power Council (PPC) each move to intervene as a party to this proceeding under Commission Rule 214, 18 C.F.R. § 385.214 (2015), and jointly submit the comments below in support of the petition for a declaratory order.

The requested declaratory order is appropriate to “remove uncertainty,” 18 C.F.R. § 385.207(a)(2), around four important, generally applicable, but narrowly circumscribed legal issues of concern to utilities and the public in connection with the development of a sub-hourly energy market in the NWPP footprint. The petition

describes these issues in detail and supports the need for the targeted declaratory relief. The Commission should grant the petition and issue the requested declaratory order.

### **MOTIONS TO INTERVENE**

APPA is the national service organization representing the interests of not-for-profit, state, municipal, and other locally owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kWh sales to ultimate customers, and do business in every state except Hawaii. APPA utility members' primary goal is providing customers in the communities they serve with reliable electric power and energy at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of APPA-member electric utilities with the long-term interests of the residents and businesses in their communities. Collectively, public power systems serve over 48 million persons.

NRECA is the national service organization for more than 900 not-for-profit rural electric utilities that provide electric energy to approximately 42 million consumers in 47 states, or 13 percent of the nation's population. Kilowatt-hour sales by rural electric cooperatives account for approximately 11 percent of all electric energy sold in the United States. NRECA's members also include approximately 65 generation and transmission (G&T) cooperatives, which supply wholesale power to their distribution cooperative owner-members. Both distribution and G&T cooperatives were formed to provide reliable electric service to their owner-members at the lowest reasonable cost.

NRU is a non-profit trade organization that represents the common interests of 54 consumer-owned electric utilities in the Pacific Northwest that are entitled to purchase wholesale power from the Bonneville Power Administration (BPA) on a preferential

basis pursuant to section 5(b) of the Northwest Power Act. 16 U.S.C. § 839c(b). NRU's members are primarily non-generating electric distribution utilities serving end-use electric consumers that rely on BPA as their primary supplier of wholesale power and transmission services.

PNGC Power is a wholesale electric cooperative based in Portland, Oregon, with 14 retail member cooperatives serving mostly rural electricity customers in seven Western states. PNGC Power is a Joint Operating Entity and a statutory preference customer of BPA under section 5(b) of the Northwest Power Act. PNGC Power holds both a power sales contract and a Network Integration Transmission Service Agreement with BPA and meets the power needs of its members with a combination of purchases from BPA and the market.

PPC is a non-profit trade organization representing the common interests of approximately 100 consumer-owned electric utilities in the Pacific Northwest that are preference customers of BPA. PPC's members range from small rural distribution utilities that do not own generation to very large urban utilities that own both generation and transmission facilities, but they all purchase requirements power, or transmission services, or both, from BPA under the rates, terms and conditions set out in BPA's rate schedules.

APPA, NRECA, NRU, PNGC Power, and PPC each have utility members that are load-serving entities in the NWPP footprint. Indeed, the petition's Sponsoring Parties, *see* Pet. at 1 n.1, include members of APPA and PPC. The outcome of this proceeding could directly affect members of APPA, NRECA, NRU, PNGC Power, and PPC—both those members participating and not participating in the MC's effort to develop a sub-hourly

energy market—as well as the consumers they serve. The participation of APPA, NRECA, NRU, PNGC Power, and PPC in this proceeding is in the public interest. Accordingly, APPA, NRECA, NRU, PNGC Power, and PPC each move to intervene as a party in this proceeding.

### **SERVICE AND COMMUNICATIONS**

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## COMMENTS

The petition describes plans for a Centrally Cleared Energy Dispatch Market (CCED Market), which would provide a means for voluntary energy trading over 15-minute intervals in a defined market zone at a transparent, market-clearing price. A Market Administrator would oversee the CCED Market, operate as a central counterparty, clear the bids and offers of buyers and sellers, facilitate scheduling under existing transmission tariffs, and perform financial settlements with market participants.<sup>1</sup> Market participants are expected to include both “public utilities” under section 201(e) of the Federal Power Act (FPA),<sup>2</sup> which are subject to plenary regulation under the Act, and entities described in section 201(f) of the Act,<sup>3</sup> which are not public utilities and are exempt from plenary regulation under the Act.<sup>4</sup>

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<sup>1</sup> See Pet. at 11–14.

<sup>2</sup> 16 U.S.C. § 824(e).

<sup>3</sup> 16 U.S.C. § 823(f).

<sup>4</sup> See Pet. at 1, 26–28.

The petition requests four declarations by the Commission, which these comments address in turn.

**I. Participation in the CCED Market should be voluntary.**

The petition requests a declaration that participation in the CCED Market is voluntary, so that entities may freely decide (1) to participate in or withdraw from the CCED Market and (2), if they participate, to offer to sell energy or bid to purchase energy in the CCED Market in any amount in any time interval.<sup>5</sup> The Commission should grant this requested declaration.

The energy trading in the CCED Market as described in the petition would constitute unbundled wholesale coordination transactions between the market participants. The offers and bids of market participants, which would form the basis for all CCED Market transactions, would be voluntary; the agreements between market participants and the Market Administrator would not require market participants to sell or buy energy from one another.<sup>6</sup> The Commission and the courts have long recognized that wholesale energy coordination sales by public utilities are voluntary under the FPA.<sup>7</sup> A fortiori, wholesale energy coordination sales by entities described in section 201(f) are also voluntary under the FPA.

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<sup>5</sup> See Pet. at 15–23.

<sup>6</sup> See 18 C.F.R. § 35.28(b)(2) (2015) (defining, for purposes of unbundling requirements, an economy energy coordination agreement as “a contract, or service schedule thereunder, that provides for trading of electric energy on an ‘if, as and when available’ basis, but does not require either the seller or the buyer to engage in a particular transaction”).

<sup>7</sup> See, e.g., *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973); *S.C. Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 60 (D.C. Cir. 2014); *Central Iowa Elec. Power Coop. v. FERC*, 606 F.2d 1156, 1167 (D.C. Cir. 1979).

Granting the requested declaration does not diminish the Commission's authority to regulate the rates, terms, and conditions of voluntary wholesale sales transactions by public utilities under sections 205 and 206 of the Act,<sup>8</sup> or the Commission's authority to enforce its rule proscribing market manipulation under section 222 of the Act.<sup>9</sup>

**II. An evaluation of whether an entity intended to manipulate the CCED Market or other wholesale electric markets in the NWPP footprint must take into account factors affecting operation of hydroelectric power facilities.**

The petition requests a declaration that a decision by generation owner or operator not to offer to sell generation in any trading interval in the CCED Market will not *by itself* demonstrate an intent to manipulate the market, and in evaluating whether such intent existed, the Commission will consider the various factors that affect the operations of and marketing of power from hydroelectric resources.<sup>10</sup>

A violation of the Commission's anti-market-manipulation rule requires a showing of scienter, which requires knowing, intentional, or reckless misconduct.<sup>11</sup> A finding that an entity acted with the intent to manipulate a wholesale electric market must perforce account for the relevant facts, such as the market structure, market conditions, generator operating characteristics, and the governing laws and regulations.

The NWPP region is unique among the regional power markets in the United States because of the large amount of hydroelectric power. According to the

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<sup>8</sup> 16 U.S.C. §§ 824d, 824e.

<sup>9</sup> 18 C.F.R. § 1.1c.2 (2015); *see* 16 U.S.C. § 824v.

<sup>10</sup> *See* Pet. at 23–26.

<sup>11</sup> Prohibition of Market Manipulation, Order No. 670, 71 Fed. Reg. 4244, 4253–54 (Jan. 26, 2006).

Commission’s July 2015 *Energy Primer*, the NWPP has 80 gigawatts (GW) of generation capacity, of which 43 GW are hydroelectric resources.<sup>12</sup> As the *Energy Primer* explains:

The NWPP has unique resource mix. Hydro generation is more than 50 percent of power supply, compared to the U.S. average of only 6 percent of power supply. The hydro generation is centered around many dams, mostly on or feeding the Columbia River. The largest dam, Grand Coulee, can produce as much power as six nuclear plants.<sup>13</sup>

The *Energy Primer* also notes that the region’s hydroelectric resources are subject to a number of physical and legal operating requirements that affect the amount of hydro power output:

The amount of hydropower produced depends on a number of factors, some natural and some controllable. On a seasonal basis, the intensity and duration of the water flow is driven by snowpack in the mountains, the fullness of the reservoirs, and rainfall. On a short-term basis, the power generation is influenced by decisions to release water locally and upstream to generate power, as well as local water-use decisions that have nothing to do with the economics of power generation, but are made for recreation, irrigation and wildlife considerations.<sup>[14]</sup>

Because of these unique operational characteristics, the Commission has recognized that hydroelectric facilities are subject to particular operating and environmental restrictions that constrain their generation of electric power.<sup>15</sup> As the petition notes, the marketing of hydroelectric power may properly account for the inherent limits of water supply, which

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<sup>12</sup> Division of Energy Market Oversight, *Energy Primer* 69 (July 2015).

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

<sup>14</sup> *Id.* at 70. See also Pet. at 21-23 (outlining statutory and regulatory restrictions applicable to BPA and the Western Area Power Administration).

<sup>15</sup> See, e.g., *Cal. Indep. Sys. Operator Corp.*, 149 FERC ¶ 61,042 at P 100 (2014) (“Hydroelectric resources and other use-limited resources are constrained by environmental conditions as well as other obligations”); *Cal. Indep. Sys. Operator Corp.*, 131 FERC ¶ 61,149 at P 14 (2014) (“Hydroelectric facilities are constrained by responsibilities beyond electric generation, such as water management and other environmental objectives ...”); *Cal. Indep. Sys. Operator Corp.*, 127 FERC ¶ 61,293 at P 122 (2009) (“hydroelectric facilities are unique in that they are unable to operate continuously on a daily basis”).

make it appropriate to consider the opportunity cost of generating hydroelectric power in one time interval versus another.<sup>16</sup>

Accordingly, in the NWPP footprint, the analysis of whether an entity acted with the intent to manipulate the CCED Market or the bilateral wholesale market must take into account the unique physical and legal factors affecting operation of hydroelectric power facilities. It follows that a withholding of output from a hydroelectric facility during a trading interval in the CCED Market, *by itself*, would not support a finding of intent to manipulate a market in connection with a Commission-jurisdictional sale.

**III. Entities described in section 201(f) of the Federal Power Act will not become subject to the Act's provisions by participating in the CCED market.**

The petition also requests a declaration that participation in the CCED Market by an entity described in section 201(f) of the FPA will not diminish the scope of that entity's exemption from the FPA's provisions.<sup>17</sup>

As the petition notes, the Sponsoring Parties include Commission-jurisdictional public utilities as well as utilities that are exempt from plenary regulation under the FPA by virtue of section 201(f) of the Act.<sup>18</sup> Given the large number of section 201(f) entities in the NWPP footprint, it can be expected that other section 201(f) entities might become active market participants in the NWPP's CCED Market.

Although the details of the CCED Market and the exact duties and responsibilities of the Market Administrator have not yet been spelled out, it is conceivable that the Market Administrator may be a Commission-jurisdictional public utility and would have

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<sup>16</sup> See Pet. at 25–26.

<sup>17</sup> See Pet. at 26–28.

<sup>18</sup> Pet. at 1 & n.1.

to file a tariff with the Commission under section 205 of the FPA.<sup>19</sup> In that instance, all market participants, including section 201(f) entities, would have to follow the Market Administrator's tariff.<sup>20</sup>

While the Market Administrator's tariff would establish the market-clearing price paid to all sellers, including section 201(f) entities, those entities would not lose their status as section 201(f) entities as a result of following the Market Administrator's tariff.<sup>21</sup> Their exempt status under the FPA, and the exact contours of the exemption from the FPA's provisions, derive from the statute. The Market Administrator's tariff would not, and could not, affect that statutory exemption. A section 201(f) entity would not waive its statutory exemption—and the Commission would not acquire jurisdiction over a section 201(f) entity that it otherwise would not have—if the section 201(f) entity enters into an agreement with the Market Administrator to make wholesale sales at prices determined by the Market Administrator's tariff.<sup>22</sup>

Accordingly, the Commission should grant the requested declaration that the status of section 201(f) entities and the scope of their exemption afforded by section 201(f) will be unaffected if they become participants in the CCED Market.

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<sup>19</sup> See, e.g., *Automated Power Exchange, Inc. v. FERC*, 204 F.3d 1144 (D.C. Cir. 2000) (upholding Commission assertion of jurisdiction over Automated Power Exchange).

<sup>20</sup> See *United Distribution Cos. v. FERC*, 88 F.3d 1105, 1154 (D.C. Cir. 1996).

<sup>21</sup> See *Bonneville Power Admin. v. FERC*, 422 F.3d 908 (9th Cir. 2005).

<sup>22</sup> See *id.*

**IV. The envisioned agreement between the Sponsoring Parties and the Market Administrator relating to the CCED Market should be treated as a *Mobile-Sierra* contract.**

The petition finally requests a declaration that certain fundamental features of the CCED Market and the Market Administrator's authority, to be set forth in an agreement between the Market Administrator and the CCED Market's Sponsoring Parties or their designee, can be protected by the *Mobile-Sierra* doctrine<sup>23</sup> or its equivalent against a later change: (1) participation in the CCED Market (entry, exit, and offers and bids when participating) will be voluntary; (2) the Market Administrator will only administer a sub-hourly energy market and no other wholesale electricity market, and it will not undertake transmission operations or offer transmission service.<sup>24</sup>

If the Market Administrator and the Sponsoring Parties or their designee agree to structure their arrangement in this fashion and agree to limit their individual rights to seek changes to these features of their arrangement by filing a new agreement under section 205 of the FPA or a complaint against the existing agreement under section 206, then the Commission should respect the contracting parties' desires and treat the agreement as a contract protected by the *Mobile-Sierra* doctrine.

Under *Mobile-Sierra*, the parties' agreement governs the ability of the parties to amend it by filing an amendment under section 205 or a complaint under section 206. The legality of a filing to amend the agreement can be determined by the agreement; the contracting parties are free to restrict and condition the terms under which their

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<sup>23</sup> See *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956).

<sup>24</sup> See Pet. at 28–33.

agreement or particular provisions of their agreement can be modified.<sup>25</sup> This protection applies to changes sought not only by the contracting parties, but also by the non-contracting parties, including the Commission itself.<sup>26</sup> “The ‘venerable *Mobile-Sierra* doctrine’ rests on ‘the stabilizing force of contracts.’”<sup>27</sup>

The petition contemplates that the agreement between the Market Administrator and the Sponsoring Parties would be a Commission-jurisdictional agreement that must be filed under section 205 of the FPA, because at least one of the parties would be a Commission-jurisdictional public utility. It is appropriate for the Sponsoring Parties and the Market Administrator to stabilize the fundamental scope of the CCED Market by means of a formal agreement to be filed with the Commission that cannot lightly be changed unless the Commission determines it is contrary to the public interest under section 206 of the FPA. The agreement specifying the scope of the Market Administrator’s tariff authority would be negotiated at arm’s length by the Market Administrator and the Sponsoring Parties and would be appropriate for treatment as a contract rate schedule under *Mobile-Sierra*. Accordingly, the agreement would be subject to the *Mobile-Sierra* doctrine, and its provisions would govern the ability of any party or parties to amend the agreement.

In this regard, it should be emphasized that those Sponsoring Parties that are section 201(f) entities and signatories to the agreement are just as entitled to the

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<sup>25</sup> See *Richmond Power & Light v. FPC*, 481 F.2d 490, 493 (D.C. Cir. 1973) (“The contract between the parties governs the legality of the filing. Rate filings consistent with contractual obligations are valid; rate filings inconsistent with contractual obligations are invalid.”).

<sup>26</sup> *NRG Power Mktg., LLC, v. Me. Pub. Utils. Comm’n*, 558 U.S. 165 (2010).

<sup>27</sup> *Id.* (quoting *Morgan Stanley Capital Group Inc. v. Pub. Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 548 (2008)).

protection afforded by *Mobile-Sierra* as the public utility Sponsoring Parties and signatories. All are making a substantial joint commitment to the CCED Market.

## CONCLUSION

The petition for a declaratory order should be granted.

Respectfully submitted,

s/ Paul M. Breakman

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October 5, 2015

**CERTIFICATE OF SERVICE**

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

Dated at Arlington, Virginia, this 5th day of October 2015.

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