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FEDERAL ENERGY
REGULATORY COMMISSION

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Avista Corporation,)
Bonneville Power Administration,)
Idaho Power Company,)
Montana Power Company,)
Nevada Power Company,)
PacifiCorp,)
Portland General Electric Company,)
Puget Sound Energy, Inc.,)
Sierra Pacific Power Company)

Docket No. RT01-35-000

Avista Corporation,)
Montana Power Company,)
Nevada Power Company,)
Portland General Electric Company,)
Puget Sound Energy, Inc.,)
Sierra Pacific Power Company)

Docket No. RT01-15-000

MOTION TO INTERVENE OUT-OF-TIME AND
REQUEST FOR REHEARING
OF THE ARIZONA PUBLIC SERVICE COMPANY

On October 16, 2000, as supplemented on October 23, 2000, and amended on December 1, 2000, Avista Corporation ("Avista"), Bonneville Power Administration, Idaho Power Company, Montana Power Company ("Montana Power"), Nevada Power Company ("Nevada Power"), PacifiCorp, Portland General Electric Company ("Portland General"), Puget Sound Energy, Inc. ("Puget Sound"), and Sierra Pacific Power Company ("Sierra Pacific") (collectively, "RTO West Applicants") filed with the Federal Energy Regulatory Commission ("FERC" or "Commission") in Docket No. RT01-35-000 a proposal to form a regional transmission organization ("RTO"), RTO West.

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In addition, on October 16, 2000, Avista, Montana Power, Nevada Power, Portland General, Puget Sound, and Sierra Pacific (collectively, "TransConnect Applicants") filed in Docket No. RT01-15-000 a proposal to establish an independent transmission company, TransConnect, LLC, which will be organized as a for-profit limited liability company. On April 26, 2001, the Commission issued an order granting, with modification, the RTO West Applicants' petition for declaratory order and granting TransConnect Applicants' petition for declaratory order. *Avista Corp. et al.*, 95 FERC ¶ 61,114 (2001) ("April 26 order").

Pursuant to Rule 214(d) and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § § 385.214(d) and 385.713, Arizona Public Service Company ("APS") submits this Motion to Intervene Out-of-Time and Request for Rehearing in Docket Nos. RT01-35-000 and RT01-15-000.

I. COMMUNICATIONS

Communications regarding this proceeding should be directed to the following persons, and the Secretary is requested to place the following individuals on the official service list established for this proceeding:

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II. MOTION TO INTERVENE OUT-OF-TIME

APS is a public service corporation organized under the laws of the State of Arizona. APS is a wholly-owned subsidiary of Pinnacle West Capital Corporation and is engaged in the business of generating, transmitting, and distributing electricity in all or part of eleven of Arizona's fifteen counties. APS is authorized to sell wholesale power and energy at market-based rates. *See Arizona Public Service Co.*, 79 FERC ¶ 61,022 (1997).

APS currently has on file with the Commission a proposal to participate in an RTO, Desert Star, Inc. ("Desert Star"); however, certain issues have been raised in this proceeding that relate to the liability of transmission owning entities that participate in the formation of an RTO. These issues could have a major impact on APS as it moves toward's full participation in an RTO that complies with Order No. 2000.1/^{1/} APS, therefore, has an interest that may be directly affected by the outcome of this proceeding, which cannot adequately be represented by any other party. APS represents that its participation in this proceeding is in the public interest and that as such its Motion to Intervene Out-of-Time should be granted.

APS's intervention is warranted under the standards enunciated in Rule 214(d)(1) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(d)(1). Because APS has focused its attention on participation in the formation of Desert Star, it did not foresee a need to intervene in the above-captioned proceedings until the liability issues were raised by the Commission in its April 26 order. Since the proceeding is still in its early stages, it will not be

^{1/} Regional Transmission Organizations, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), order on reh'g, Order No. 2000-A, 65 Fed. Reg. 12,088 (Mar. 8, 2000), FERC Stats. & Regs. ¶ 30,092 (2000), review pending sub nom., Public Utility District No. 1 of Snohomish County, Washington v. FERC, Nos. 00-1174, et al. (D.C. Cir.).

disrupted by APS's participation, and no party will be prejudiced as a result of this untimely intervention. Additionally, APS agrees to take the record in this proceeding as it exists.

III. REQUEST FOR REHEARING

APS respectfully requests rehearing of the Commission's April 26 order. Specifically, APS believes that the Commission erred in rejecting RTO West Applicants' proposed liability agreement by relying on its previous findings in Order No. 888 and subsequent orders. RTO West will be providing transmission service for all transmission customers served under its tariff, and the protections afforded transmission owners under state law may no longer be available to limit risk. If the Commission adopts such an approach, transmission owners will either have to pay substantially more in insurance premiums or will be unable to obtain insurance coverage. This will significantly hinder the rapid development of RTOs nationwide as transmission owners grapple with the increased risks associated with joining an RTO.

A. Background

As set out in the RTO West Applicants' proposal, the Transmission Operating Agreement requires parties to execute a multiparty Agreement Limiting Liability Among RTO West Participants ("Liability Agreement"). RTO West Applicants proposed to incorporate the Liability Agreement into the Transmission Operating Agreement. The Liability Agreement limits the liability of parties through a "no fault" liability structure for electric system property damage, a tariff limitation of liability for service interruptions, and indemnity provisions for bodily injury claims.

According to the RTO West Applicants, the limitation of liability model was adopted to preserve the status quo existing in the rate structure of Northwest utilities by continuing

voluntary limitations of liability among participants that presently exist under terms of the Western Interconnected Systems Agreement. The RTO West Applicants added that the Liability Agreement provides limitations of liability under continuity of service tariff provisions similar to what presently exists for investor-owned transmission utilities operating under tariffs approved by their respective state commissions.

In its April 26 order, the Commission stated that in Order No. 888, the Commission discussed the indemnification provision of the pro forma tariff. See April 26 order at 61,346. In Order No. 888, the Commission explained that it did not believe it appropriate to require transmission customers to indemnify transmission providers in cases of negligence or intentional wrongdoing by the transmission provider. It further explained in Order No. 888-A and 888-B that the pro forma tariff does not address, and was not intended to address, liability issues. Rather, transmission providers may rely on state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence. *Id.* at 61,347. The Commission also pointed out that in subsequent cases, it has consistently rejected liability limitation provisions in tariffs involving open access transmission service.

The Commission, therefore, rejected the proposal of the RTO West Applicants to incorporate the Liability Agreement into the Transmission Operating Agreement stating that, “there is nothing in the pro forma tariff that would preclude those entities from relying ‘on the protection of state laws, when and where applicable, protecting utilities or others from claims founded in ordinary negligence’ or intentional wrongdoing.” *Id.* (quoting Order No. 888-A at 30,301).

B. Request for Rehearing

APS believes that the Commission erred in rejecting the Liability Agreement proposed by the RTO West Applicants by relying on the liability protections afforded transmission owners under state law and its findings in Order No. 888 and subsequent orders.

Although states have traditionally protected transmission owners from the risks associated with simple negligence, such state law protections may be unavailable to transmission owners that turn over functional control of their transmission systems to an RTO. States have, in the past, provided such protection through state retail tariffs. However, such tariffs may be unavailable to protect transmission owners since all transmission service may be provided under an RTO-wide tariff.

Insurance companies could, therefore, be reluctant to provide insurance coverage to transmission owners that do not have any liability protection from risks associated with acts of simple negligence. If transmission owners are able to secure appropriate insurance coverage, it may be at a substantial premium, and the increased cost will be reflected in the rates charged to all transmission customers. Without contractual remedies to mitigate risk, transmission owners will be forced to run their systems in a highly conservative manner. Such an approach will only exacerbate current problems associated with the provision of transmission service, especially in the West.

The Commission's approach to limiting liability in an RTO context should be distinguished from the approach that the Commission took in Order No. 888. First, transmission owners will turn over functional control of their transmission assets to an RTO. Thus, transmission owners are now being asked to assume risks associated with the provision of

transmission service over facilities that they own but do not operate. Furthermore, when Order No. 888 was issued, transmission owners were afforded the protection of state law for simple negligence for the bulk of their transmission service. Such protections are unlikely to be available in an RTO context since all transmission service will be provided pursuant to an RTO's open access transmission tariff. If the Commission adopts the approach stated in the April 26 order, it could greatly hinder the development of RTOs since transmission owners will have to evaluate the substantial increase in risk associated with RTO participation. The Commission should, therefore, accept the Liability Agreement proposed by the RTO West Applicants.

IV. CONCLUSION

WHEREFORE, for the foregoing reasons, APS requests that the Commission grant its Motion to Intervene Out-of-Time and its Request for Rehearing in this proceeding.

Respectfully submitted,



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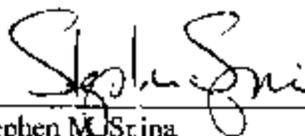
Attorneys for the
Arizona Public Service Company

Dated: May 29, 2001

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 Washington, D.C., this 29th day of May 2001.



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