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Via HAND DELIVERY

Office of Coal & Power Im/Ex (FE-27)
Office of Fossil Energy
U. S. Department of Energy
1000 Independence Avenue, SW
Room 4G025
Washington, D.C. 20585-0350

Re: **Notice of Intent to Amend Presidential Permits, 64 Fed. Reg. 40586 (July 27, 1999) FE Docket Nos. 99-1, and Public Utility District No. 1 of Pend Oreille County, Washington, FE Docket No. PP-34.**

Dear Sir or Madam:

Please find enclosed for filing an original and fourteen copies of the Motion To Intervene and Comments of Public Utility District No. 1 of Pend Oreille County, Washington in the referenced proceedings.

Yours truly,

James B. Vasile

James B. Vasile
Attorney for
Public Utility District No. 1
of Pend Oreille County, Wash.

cc: Ms. Ellen Russell
Mr. Michael Skinker

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

Proposed Open Access Requirement for International Electric Transmission Facilities and Delegation to the Federal Energy Regulatory Commission	))))	FE Docket No. 99-1 and FE Docket No. PP-34

MOTION TO INTERVENE AND COMMENTS
OF
PUBLIC UTILITY DISTRICT NO. 1 OF PEND OREILLE COUNTY, WASHINGTON

Pursuant to Rule 214 of the Federal Energy Regulatory Commission's ("FERC") Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1999), and the Notice of the Department of Energy ("DOE") published July 27, 1999, 64 Fed. Reg. 40586, Public Utility District No. 1 of Pend Oreille County, Washington ("District") hereby moves for leave to intervene and submits the following comments in the captioned proceedings.

DOE proposes to amend certain Presidential Permits, including one held by the District, and Export Authorizations to add a requirement that the permittees provide open access transmission services on their international transmission lines. Simultaneously therewith, DOE issued a Delegation Order assigning to FERC the authority under the Federal Power Act and Executive Order 10485, as amended, to implement and enforce the transmission requirements imposed by DOE on those international transmission lines. For the reasons set forth herein, the District submits that it has a substantial interest that may be affected by these proceedings and thus should be granted party status. Moreover, the District submits that its Presidential Permit should not be amended to include the proposed condition.

Motion For Leave To Intervene

Pursuant to Rule 214 the District submits the following information in support of its motion to intervene.

1. Communications and Notices

All communications and notices concerning these proceedings should be directed to the following representatives:

Larry Weis
General Manager
Public Utility District No. 1 of Pend Oreille County
P. O. Box 190
Newport, Washington 99156-0160
509 447 3137

Jerry Boyd
Paine, Hamblen, Coffin, Brooke & Miller LLP
717 West Sprague Avenue, Suite 1200
Spokane, Washington 99201-3505
509 455 6000

and

James B. Vasile
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202 429 6297

2. Interest of the District

The District is a municipal corporation and a political subdivision of the State of Washington, which is governed by a three-member Board of Commissioners elected by the voters of Pend Oreille County. See Title 54 RCW. The District is primarily engaged in the generation, transmission and distribution of electric power in Pend Oreille County. The electric

transmission and distribution facilities owned and operated by the District include a 7.2 kV line, a portion of which is located at the international boundary and authorized pursuant to Presidential Permit (PP-34). The District uses this line to make sales of electric energy to retail customers in the County and to West Kootenay Power and Light Company Ltd. for residential and commercial service in British Columbia.

In the Notice DOE proposes to amend certain Presidential Permits, including PP-34 issued to the District, to include elaborate transmission service requirements, which will be implemented and enforced by FERC. 64 Fed. Reg. 40588. Accordingly, as the permittee under PP-34, the District has a substantial interest herein, which may be directly affected by the outcome of these proceedings.

3. Position of the District

The District's position is that its Presidential Permit should not be amended to include the proposed transmission service requirements. None of the authority delegated to DOE authorizes it to impose such requirements on facilities owned and operated by the District. The basis for the District's position is set forth below.

Comments on the Notice of Intent to Amend Presidential Permits

4. Location of the District's Facilities

The DOE Notice contains a table listing the Presidential Permits, which it proposes to amend. 64 Fed. Reg. 40587-88. This table incorrectly states that the location of the District's facilities subject to PP-34 is "Point Roberts, Wa.," which is in western Washington. As stated in

the attachment to the District's application for Presidential Permit, the District's facilities subject to PP-34 are located near the U.S. Nelway Custom Station, which is in Pend Oreille County. Thus, DOE's records and any final notice of DOE action herein should be revised accordingly.

5. Transmission Service Requirements Should Not Apply To Lower Voltage Facilities

DOE's proposal to amend the District's Presidential Permit is based on its agreement with the policies adopted by FERC under sections 205 and 206 of the Federal Power Act, as implemented through FERC Order 888, to require that public utilities provide open access transmission service to promote a more competitive wholesale power market. Under sections 205 and 206 of the Federal Power Act, FERC has jurisdiction to regulate the transmission of electric energy in interstate commerce by "public utilities," but does not have jurisdiction over facilities used for local distribution. 16 U.S.C. § 824 (1994).

In Order 888 FERC acknowledged that its open access requirements apply to transmission only and that distribution remains subject to State regulation and beyond its authority. FERC also provided guidance on how to distinguish transmission from distribution, including the recognition that local distribution facilities will be of reduced voltage. In this regard FERC noted that while there is no uniform breakpoint between transmission and distribution, utilities account for facilities operated at greater than 30 kV as transmission and that distribution facilities are usually less than 40 kV. Order 888, *mimeo* at App. G-41.

Many of the Presidential Permits identified by DOE as "appropriate for third party transmission," including PP-34, involve facilities that are currently operated at voltages ranging from 4.8 kV to 34.5 kV and thus most likely would not be subject to Order 888's open access

requirements even if operated by a public utility, especially in circumstances where the line serves purely a distribution function. Accordingly, it is not appropriate to amend such permits to extend the reach of Order 888 to facilities that FERC concedes are beyond its jurisdiction.

The District recognizes that DOE has jurisdiction under section 202(e) of the Federal Power Act to authorize the transmission of electric energy to a foreign country by any "person." However, such jurisdiction is also subject to the limitations set forth in section 201 with respect to regulation of distribution facilities. Thus, section 202(e) does not independently authorize DOE to impose transmission service requirements in connection with the operation of low voltage facilities.

6. DOE Is Not Authorized to Impose Transmission Requirements on the District

The District is a political subdivision of the State of Washington and a "municipality" as defined in section 3 (7) of the Federal Power Act. Therefore, it is exempt under section 201 (f) of the Federal Power Act from all provisions of Part II of that Act "unless such provision makes specific reference thereto." By virtue of such status, the District is not therefore a "public utility" subject to regulation under sections 205 or 206 of the Federal Power Act. Thus, the District's transmission facilities are not subject to the requirements of Order 888. Indeed, FERC did not attempt to impose the open access obligation on municipalities under Order 888.

Since the District is a "municipality," it is not a "person" as defined in section 3 (4) of the Act, and therefore it is not subject to DOE authority under section 202 (e) of the Federal Power Act to regulate the transmission of power to a foreign country. *E.g., Power Authority of the State of New York*, PP-74, 46 Fed. Reg. 5041 (January 19, 1981). Indeed, the District's Presidential

Permit expressly recognizes that the District is not subject to section 202(e) of the Federal Power Act. Therefore, DOE may not rely on section 202 (e) to amend the District's Presidential Permit to impose an open-access transmission requirement.

The only remaining authority cited by DOE in the Notice is Executive Order 10485, as amended by Executive Order 12038. Executive Order 10485, as amended, is based upon the President's authority under the Constitution to conduct the foreign relations and to serve as Commander in Chief. The Order requires that executive permission be obtained for the construction, operation, maintenance, or connection of facilities for the transmission of electric energy between the United States and a foreign country. The terms of the District's permit authorize the United States to take possession and control of its facilities whenever the President determines that such action is necessary for the safety of the United States. Another article of the permit provides that it may be modified upon a finding that such action is "necessary in the public interest."

The Notice apparently assumes, without discussion, that DOE has sufficient authority under Executive Order 10485 alone to amend the Presidential Permits and impose the transmission requirements. The District respectfully submits, however, that the Executive Order, standing by itself, does not authorize the proposed amendment to the District's permit. The District does not believe that the President's authority to make treaties or serve as Commander in Chief includes the power to impose conditions that are designed to promote domestic regulatory policies wholly unrelated to national security or foreign affairs. *See O'Neal v. United States*, 140 F.2d 908 (6th Cir. 1944), *cert. denied*, 322 U.S. 729 (power to establish rationing and to fix prices is neither expressly nor impliedly included in any war power of the President).

Similarly, the article in the permit reserving the authority to modify it if "necessary in the public interest" does not constitute an unfettered license to impose any condition merely because DOE has determined it would promote the general welfare. Rather, the "public interest" standard takes its meaning from, and is limited by, the statutory context and regulatory purposes, which the agency is charged with carrying out. *NAACP v. FPC*, 520 F.2d 432, 440 (D.C. Cir. 1975), *aff'd*, 425 U.S. 662, 669 (1976).[1] Here, DOE's authority derives strictly from the President's authority as enumerated in the Executive Order. Thus, DOE's authority to modify a permit is properly limited to conditions reasonably related to the exercise of such authority. The District submits that there is no meaningful relationship between the proper exercise of such authority and the proposed amendment.

Finally, it is inappropriate for a federal agency to invoke inapposite executive authority to impose burdensome transmission requirements on the District, since Congress has determined that the District shall be exempt from such burdens by statute. DOE should defer to the long-standing policy determination made by Congress that State and municipally-owned utilities should not be subject to such federal regulation.

[1] Accordingly, FERC's suggestion in *Enron Power Marketing, Inc.*, 83 FERC ¶ 61,213 at 61,944 (1998), that the Executive Order places "no limitations" on the types of conditions DOE may attach to a permit is erroneous.

Conclusion

WHEREFORE, the District requests (1) that it be granted party status in these proceedings in accordance with applicable regulations; (2) that DOE correct its records to show that the District's Presidential Permit (PP-34) relates to a point on the U.S./Canadian boundary near the U.S. Nelway Custom Station in Pend Oreille County, Washington; and (3) that the proposed amendment to its Presidential Permit (PP-34) not be adopted.

Respectfully submitted,

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Attorneys for
Public Utility District No. 1 of
Pend Oreille County, Washington

September 27, 1999