

**BEFORE THE WASHINGTON UTILITIES AND
TRANSPORTATION COMMISSION**

In the matter of the Petition of)
)
Sea Breeze Pacific Juan de Fuca Cable, LP (a)
U.S. limited partnership), Olympic Converter)
Corporation (a U.S. limited partnership) and)
Victoria Converter, NSULC (a Nova Scotia)
company) for a Declaratory Order Disclaiming)
Jurisdiction Under Title 80 of the Revised Code)
of Washington)
_____)

Docket No. _____
PETITION FOR DECLARATORY
ORDER DISCLAIMING
JURISDICTION

John A. Cameron
Andrea McNamara
Davis Wright Tremaine LLP
Attorneys for Petitioners

TABLE OF CONTENTS

I. Relief Requested 1

II. The Petitioners 1

III. Relevant Statutes, Rules and Federal Executive Orders 3

IV. Statement of Facts 5

 A. The Project 5

 B. Project Services and Operations 7

 C. Required Environmental Permits 8

 D. Federal Regulation of the Project 9

V. Statement of Issues Presented for Declaratory Relief 11

 A. Petitioners Are Not “Public Service Companies” Under RCW Title 80 14

 B. Petitioners and the JdF Project are Subject To Uniform, National Regulation by The US Department of Energy, Leaving Nothing for the State to Regulate Under the Constitutional Theory of Federal Pre-emption 16

 C. The Commission Has No Authority to Regulate Foreign Commerce Relating to International Transmission Lines Because that Field Has been Occupied by Federal Regulation, Pre-empting Regulation by the State 18

VI. Conclusion 22

I. Relief Requested

1. Pursuant to RCW 34.05.240 and WAC 480-07-930, Sea Breeze Pacific Juan de Fuca Cable, LP; Olympic Converter Corporation, LP; and Victoria Converter, NSULC (collectively “Sea Breeze” or “Petitioners”) hereby petition the Washington Utilities and Transportation Commission (“Commission”) for a declaratory order disclaiming jurisdiction, under Title 80 of the Revised Code of Washington (“RCW”), over Petitioners regarding the Juan de Fuca Cable Project (the “JdF Project”), described below in Paragraph Nos. 12-18. The JdF Project is a “merchant transmission” venture to consist of a 540-MW, direct-current submarine cable extending below the Strait of Juan de Fuca, from a southern DC/AC converter station to be constructed in or near Port Angeles, Washington, across the international border to a northern DC/AC converter station to be constructed near Victoria, British Columbia, Canada.

II. The Petitioners

2. Sea Breeze Pacific Juan de Fuca Cable, LP, is a special-purpose limited partnership, organized under the laws of Delaware for the sole purpose of financing and developing the JdF Project. Aside from permitting and other developmental activities relating to the JdF Project, Sea Breeze does not conduct business in the State of Washington. It is not now subject to the Commission’s jurisdiction under RCW Title 80 or any other provision of law.
3. Because of certain tax and other business reasons relating to laws of the United States and Canada, ownership of JdF Project facilities will be divided between two Sea Breeze subsidiaries: Olympic Converter Corp. (a U.S. limited partnership) will own all U.S. facilities and permits, and Victoria Converter, NSULC (a Nova Scotia company) will own all Canadian facilities and permits.

4. The investors in the JdF Project are Boundless Energy NW, Inc., a Delaware corporation; Sea Breeze Juan de Fuca Holding Company, a Canadian corporation; and United States Power Fund, L.P., a limited partnership that invests in energy projects. None of these investors are subject to Commission jurisdiction under Title 80 RCW or any other provision of law.
5. None of the entities mentioned in Paragraph Nos. 2-4 will operate or maintain the JdF Project. Instead, operation and maintenance will be performed by a third party yet to be determined. That third party operator and Sea Breeze are not expected to have “affiliated interests,” as that term is defined by RCW 80.16.010.
6. Persons who should be listed on the official service list in this proceeding and to whom communications concerning this petition should be addressed are:

<p>John Cameron (johncameron@dwt.com) Andrea McNamara (andreamcnamara@dwt.com) Davis Wright Tremaine LLP Suite 2300 1300 SW Fifth Avenue Portland, OR 97201 Voice: (503) 778-5206 Facsimile: (503) 778-5299</p> <p>Gordon F. Grimes (Ggrimes@BSSN.com) Bernstein, Shur, Sawyer & Nelson 100 Middle Street P.O. Box 9729 Portland, ME 04104-5029 Telephone: (207) 774-1200 Facsimile: (207) 774-1127</p>	<p>Paul Manson Sea Breeze Juan de Fuca Cable, LP Suite 1400 333 Seymour Street Vancouver, BC V6B 5A6 Canada Telephone: (604) 689-2991 Facsimile: (604) 689-2990</p>
---	--

PETITION FOR DECLARATORY ORDER - 2

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
 1300 S.W. Fifth Avenue • Suite 2300
 Portland, Oregon 97201 • (503) 241-2300

III. Relevant Statutes, Rules and Federal Executive Orders

7. Washington State Statutes

RCW 34.05.240 establishes the requirements under which state agencies may issue declaratory orders. RCW 80.04.010 contains statutory definitions of “electric company” and “public service company,” to wit:

“Electrical company” includes any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad company generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others), and every city or town owning, operating or managing any electric plant for hire within this state.

“Public service company” includes every gas company, electrical company, telecommunications company, and water company.

RCW 80.04.015 provides in relevant part:

Whether or not any person or corporation is conducting business subject to regulation under this title, or has performed or is performing any act requiring registration or approval of the commission without securing such registration or approval, shall be a question of fact to be determined by the commission.

8. State Rules

WAC 480-07-930 concerns the issuance of declaratory orders by the Commission under RCW 34.05.240.

9. Federal Statute

Section 202(e) of the Federal Power Act, 16 U.S.C. § 824a(e), provides:

Transmission of electric energy to foreign country

After six months from August 26, 1935, no person shall transmit any electric energy from the United States to a foreign country without first having secured an order of the Commission authorizing it to do so. The Commission shall issue such order upon application unless, after

opportunity for hearing, it finds that the proposed transmission would impair the sufficiency of electric supply within the United States or would impede or tend to impede the coordination in the public interest of facilities subject to the jurisdiction of the Commission. The Commission may by its order grant such application in whole or in part, with such modifications and upon such terms and conditions as the Commission may find necessary or appropriate, and may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate.

Since 1978, authority to implement Section 202(e) has been delegated to the US Department of Energy, Office of Fossil Energy.

10.

Federal Executive Orders and Rules

Executive Order 12038 (1977) contains the President's delegation to the US Department of Energy of the authority, previously delegated to the Chairman of the Federal Power Commission, to issue Presidential Permits authorizing persons to construct or operate electric transmission facilities at the US international border. Such authority has been transferred within the Department of Energy to the Office of Fossil Energy. Order No. 888, Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; FERC Stats. & Regs. ¶31,036 (1996), establishes the principles of open-access and comparability required by the US Department of Energy, Office of Fossil Energy, of all recipients of Presidential Permits.

IV. Statement of Facts

A. Supporting Declaration

11. Declarations supporting the statements in Paragraph Nos. 12-29 of this petition are contained in the affidavit of Brian N. Chernack provided in *Exhibit "A."*

B. The Project

12. Presently, the only electrical interconnections between Canada and the United States in western North America are operated by Bonneville Power Administration ("BPA") and British Columbia Transmission Corporation ("BCTC"):

- Two 500-kV, alternating-current ("AC") lines connecting at the US-Canadian border North of Blaine, Washington, and
- Two 230-kV, AC lines connecting at the US-Canadian border North of Spokane, Washington.

Utilization of these facilities has reached or exceeded their respective firm transfer capabilities, both for southbound transactions and, during winter, for northbound transactions.

13. The JdF Project will augment these fully utilized international interconnections with a new direct current ("DC") submarine transmission cable, approximately 22 miles in length, extending beneath the Strait of Juan de Fuca between Washington State and the Province of British Columbia. The JdF Project will enable controlled, bi-directional exports and imports of up to 1,100 MW¹ between Port Angeles, Washington, where it will connect at its southern terminal with the BPA transmission network at a voltage of 230 KV, and Victoria, BC, where

¹ The initial line will allow bi-directional transfers of 540 MW.

it will connect at its northern terminal with the BCTC transmission network also at a voltage of 230 KV. A map showing the location of the Project is provided in *Exhibit "B."*

14. The Project facilities will be constructed on real property easements or similar rights held by Sea Breeze on land that is owned by a variety of parties, both private and governmental.

15. At its southern terminus, the Project will end at an AC/DC converter station, which will be connected to the BPA Port Angeles substation. From the converter station, the line will be laid on the sea floor or buried beneath the City of Port Angeles' rights of way for approximately one mile to a bluff overlooking Port Angeles Harbor. From there, the cable will be horizontally deep drilled to about one-half mile offshore, where it will transition to a submarine cable buried to a depth required by the relevant permitting agencies under the Strait of Juan de Fuca for a distance of about 18 miles. At its northern terminus, the Project will end at another AC/DC converter station, which will be connected to the BCTC Pike substation near McCauley Point in Esquimalt, B.C.

16. The JdF Project will utilize the HVDC Light[®] transmission technology developed for commercial application by ABB in the 1990s. Because HVDC Light uses underground and undersea cables, it can be installed with fewer environmental consequences than conventional overhead transmission technology.

17. Interconnection studies and agreements are required to interconnect to the transmission networks of BPA and BCTC. A JdF Project interconnection study is now being finalized by BPA. A Regional Plan Study is underway to satisfy the Western Electricity

PETITION FOR DECLARATORY ORDER - 6

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

Coordinating Council's standards regarding path rating, reliability, and impact on the regional grid.

18. Depending on the outcome of the studies now being performed by BPA, BCTC and others, the Project will likely provide opportunities for upgrades to either, or both, the AC networks of BPA and BCTC. Such upgrades could make the JdF Project part of the solution to existing transmission constraints, such as BPA's need to reinforce its transmission on the Olympic Peninsula, constraints along BPA's so-called "I-5 transmission corridor," constraints north of Seattle relating to BPA's obligation to return Canadian Entitlement power to Canada, and/or transmission constraints affecting the reliability of electrical service on Vancouver Island. However, any such upgrades would be separate from the Project, and owned and operated by the relevant network operator.

C. Project Services and Operations

19. The JdF Project is essentially a portal into the international market for electric energy. The Project will serve foreign or international commerce, but cannot by itself serve interstate or intrastate commerce. The Petitioners will not offer any transmission services beyond the Project termini either within the U.S. or Canada. In this regard, it is important to note that while Sea Breeze has applied for interconnections to the networks of BPA and BCTC, it has not applied for transmission service from either of these transmission providers. In order to utilize the capacity of the JdF Project for the purposes of transmitting power beyond project termini either within the U.S. or Canada, a customer, lessee, or other user must have secured additional transmission rights on the system of either, or both, BPA or BCTC.

20. Petitioners do not intend to operate or maintain the JdF Project upon completion. Instead, Petitioners intend to transfer these responsibilities via contract to a responsible third party. One alternative might involve a lease of the Project to a network transmission owner, such as BPA and/or BCTC, under an arrangement comparable to that considered by the Commission in the declaratory order issued at the request of BPA for a disclaimer of jurisdiction. *Bonneville Power Administration*, Docket No. UE-040088, order issued February 20, 2004. A second alternative might involve a lease or other contract with an operator other than a network transmission owner. In either event, JdF Project capacity would be made available under the Project operator's Open-Access Transmission Tariff. See Paragraph Nos. 26-29, below.

D. Required Environmental Permits

21. An Environmental Impact Statement to satisfy National Environmental Policy Act ("NEPA") requirements is currently being prepared by BPA.² Applications were filed in the spring of 2005 regarding other U.S. and Canadian federal permits and approvals dealing with fisheries, wildlife, navigation, defense and cultural and historic resources. Washington State permitting under the State Environmental Policy Act has commenced with the City of Port Angeles as lead agency; it is being coordinated with the NEPA process.³ Washington State natural resource agencies, the Army Corps of Engineers, and other U.S. natural resource agencies will coordinate issuance of numerous environmental and construction-related permits under a Joint Aquatic Resources Permit Application. Municipal approvals for

² See Notice of Intent to Prepare an EIS, 70 Fed. Reg. 23855 (2005).

³ Transmission projects are outside the jurisdiction of the Washington Energy Facility Site Evaluation Council under RCW Title 80.50.

building permits, Coastal Zone Management Act compliance, rights-of-way and road openings will be requested.

22. As an international transmission interconnection, the JdF Project will require a Presidential Permit, described below, from the US Department of Energy. It will also require a Certificate of Public Convenience and Necessity from the National Energy Board of Canada. These major permitting activities began in late 2004 and are expected to be completed by July 2006.

23. To the best of our knowledge, no permit is required from this Commission.

E. Federal Regulation of the Project

24. Sea Breeze now has an application pending before the US Department of Energy (“DOE”), Office of Fossil Energy in Docket No. PP-299, requesting a Presidential Permit to construct, operate, maintain and connect the Project.⁴ DOE has been delegated the authority, previously held by the Federal Power Commission (FERC’s predecessor), to issue the Presidential Permit pursuant to several Executive Orders dating back to 1953. *See* Executive Order 10485, issued September 3, 1953.

25. In addition, DOE has the statutory authority and responsibility to approve transmission of electricity to Canada under Section 202(e) of the Federal Power Act (FPA), 16 U.S.C. §824a(e) (quoted above, in Paragraph No. 9).

26. FPA Section 202(e) authorizes DOE to grant requests subject to “such terms and conditions as the Commission [DOE] may find necessary or appropriate” Since the time when FERC imposed open-access transmission obligations on US interstate transmission

⁴ *See* Notice of Application for Presidential Permit, U.S. Department of Energy, FE Docket No. PP-299, 70 Fed. Reg. 8350 (2005). A copy is provided in *Exhibit “C.”*

PETITION FOR DECLARATORY ORDER - 9

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue • Suite 2300
Portland, Oregon 97201 • (503) 241-2300

owners, standard DOE terms and conditions have included a transmission “comparability” obligation imposed on every applicant. DOE requires every holder of a Presidential Permit to provide nondiscriminatory, open-access transmission service over the permitted facility, comparable to that provided by domestic interstate transmission systems pursuant to Order No. 888 of the Federal Energy Regulatory Commission (“FERC”).⁵

27. Sea Breeze has been put on notice by DOE that it will be required to comply with this open-access requirement as a condition of receiving a Presidential Permit for the JdF Project:

Since the restructuring of the electric power industry began, resulting in the introduction of different types of competitive entities into the marketplace, DOE has consistently expressed its policy that cross-border trade in electric energy should be subject to the same principles of comparable open access and nondiscrimination that apply to transmission in interstate commerce. DOE has stated that policy in export authorization granted to entities requesting authority to export over international transmission facilities. Specifically, DOE expects transmitting utilities owning border facilities constructed pursuant to Presidential permits to provide access across the border in accordance with the principles of comparable open access and non-discrimination contained in the FPA and articulated in Federal Energy Regulation Commission Order No. 888, as amended (Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities). In furtherance of this policy, DOE intends to condition any Presidential permit issued in this proceeding on compliance with these open access principles.⁶

28. In furtherance of DOE policy, the Secretary of Energy has directed FERC to “[c]arry out such functions as are necessary to implement and enforce the Secretary’s policy requiring holders of Presidential permits authorizing the construction, operation, maintenance, or connection of facilities for the transmission of electric energy between the United States and

⁵ FERC Order No. 888, as amended (Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; FERC Stats. & Regs. ¶31,036 (1996)), as amended.

⁶ 70 Fed. Reg. at 8350-51.

PETITION FOR DECLARATORY ORDER - 10

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

foreign countries to provide non-discriminatory open access transmission services. Secretary of Energy Delegation Order No. 00-004.00 to the Federal Energy Regulatory Commission (December 6, 2001).

29. Anticipating this open-access transmission obligation as a condition of its anticipated Presidential Permit, Sea Breeze filed with FERC its “Application for Authority to Sell Transmission Rights at Negotiated Rates” in FERC Docket No. ER05-1228-000. Because the Petitioners do not intend to have operational control of the JdF Project upon its completion, Sea Breeze has committed to FERC that it will transfer such control to a third-party operator that has an Open Access Transmission Tariff (“OATT”) or comparable tariff in place, consistent with FERC requirements under Order No. 888, as amended. On September 15, 2005, FERC granted the Sea Breeze application. A copy of this FERC order is enclosed as *Exhibit “D.”*

V. Statement of Issues Presented for Declaratory Relief

30. The following three issues are presented to the Commission for declaratory relief under RCW 34.05.240, based on the facts stated in this petition. Disclaimer of jurisdiction over Petitioners and the JdF Project facilities and operations through favorable resolution of any of these three issues will satisfy Petitioners need for declaratory relief.

- A. Whether the Commission should disclaim RCW Title 80 jurisdiction over Petitioners and the JdF Project facilities, operations and services because none of the Petitioners is, or will become, a “public service company” within the contemplation of Title 80.

- B. Whether the Commission should disclaim RCW Title 80 jurisdiction over Petitioners and the JdF Project facilities, operations and services because the Petitioners and all aspects of the Project are subject to the comprehensive, uniform and exclusive national regulation by the US Department of Energy (DOE), acting pursuant to the constitutional authority of the president and pursuant to federal statute.
- C. Whether the Commission should disclaim RCW Title 80 jurisdiction over Petitioners and the JdF Project facilities, operations and services because the JdF Project will be utilized exclusively in foreign or interstate commerce and not in intrastate commerce.

VI. Requisite Demonstration Under RCW 34.05.240

31. In this section of our petition, Petitioners address each of the five “circumstances” enumerated in RCW 34.05.240(1) as threshold demonstrations required of any applicant seeking declaratory relief:

Any person may petition an agency for a declaratory order with respect to the applicability to specified circumstances of a rule, order, or statute enforceable by the agency. The petition shall set forth facts and reasons on which the petitioner relies to show:

- (a) That uncertainty necessitating resolution exists;
- (b) That there is actual controversy arising from the uncertainty such that a declaratory order will not be merely an advisory opinion;
- (c) That the uncertainty adversely affects the petitioner;
- (d) That the adverse effect of uncertainty on the petitioner outweighs any adverse effects on others or on the general public that may likely arise from the order requested; and

PETITION FOR DECLARATORY ORDER - 12

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue • Suite 2300
Portland, Oregon 97201 • (503) 241-2300

- (e) That the petition complies with any additional requirements established by the agency under subsection (2) of this section.

32. Regarding RCW 34.05.240(1)(a), Petitioners raise two uncertainties that necessitate resolution. First, if the Commission were to determine under RCW 80.04.015 that Petitioners have “engaged in any activity without first complying with the requirements of this title [80]” after the JdF Project was constructed, then petitioners could be subjected to remedial actions, including possible penalties. Second, regulatory requirements imposed on the JdF Project by the Commission might well conflict with the Order No. 888 open-access transmission requirements imposed on the project by the US Department of Energy, thereby creating regulatory confusion, making the project uneconomic and frustrating the development of this international interconnection.

33. Regarding RCW 34.05.240(1)(b), the three uncertainties stated in Paragraph No. 30 are material and could threaten the Petitioners ability to finance the JdF Project.

34. Regarding RCW 34.05.240(1)(c), any uncertainty adversely affecting the ability to finance the JdF Project, almost by definition, adversely affects Petitioners.

35. Regarding RCW 34.05.240(1)(d), Petitioners are aware of no “adverse effects on others or on the general public that may likely arise from the order requested.” To the contrary, Petitioner believes that its interests and those of the general public are aligned. Petitioners intend to construct much needed transmission infrastructure that is not being built by network operators due a combination of financial and institutional difficulties. The JdF Project will serve the dual goals of increasing bi-directional, electrical transfer capability across the US/Canada border and, together with possible network upgrades, relieving serious

PETITION FOR DECLARATORY ORDER - 13

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue • Suite 2300
Portland, Oregon 97201 • (503) 241-2300

network transmission constraints on both sides of the international border. The uncertainties stated above in Paragraph No. 33 threaten the economic viability of this project development.

36. RCW 34.05.240(1)(e) relates to the procedural rules in WAC 480-07-930 under which the Commission handles petitions for declaratory orders. This pleading conforms to those procedural requirements.

VII. Reasons for Granting the Substantive Relief Requested by Petitioners

A. Petitioners Are Not “Public Service Companies” Under RCW Title 80.

37. Petitioners’ analysis closely follows the Commission’s declaratory order in *Bonneville Power Administration*, Docket No. UE-040088, order issued February 20, 2004, which also dealt with a company that was to have no operational or maintenance responsibility for a transmission line it was to own. As observed in that order of the Commission, the Washington Supreme Court has established a long-standing test to determine whether an entity is subject to the jurisdiction of the Commission, with the controlling factor being whether the company holds itself out as serving, or ready to serve, the general public. *West Valley Land Co. v. Nob Hill Water Ass’n*, 107 Wn.2d 359, 365, 729 P.2d 42 (1986); *Inland Empire Rural Elec., Inc. v. Department of Public Serv.*, 199 Wash. 527, 537, 92 P.2d 258 (1939).

38. *Inland Empire* dealt with an electric cooperative. The court held that merely generating, purchasing and distributing electricity over transmission lines to customers did not necessarily make a corporation into a “public service company” under Washington law. More was required in order to subject that corporation subject to Commission jurisdiction:

A corporation becomes a public service corporation, subject to the regulation by the department of public service, only when, and to the extent that, its business is dedicated or devoted to a public use. The test to be applied is whether or not the corporation holds itself out, expressly or impliedly, to supply its service or product for use either by the public as a class or by that portion of it that can be served by the utility; or whether, on the contrary, it merely offers to serve only particular individuals of its own selection. [199 Wash., at 537.]

39. Building on this holding in *Inland Empire*, the court found in its subsequent *West Valley* decision that a corporation providing water service to over 3,700 shareholder members did not come within the Commission's regulatory jurisdiction because that corporation served only particular individuals of its own selection and did not serve the public as a class or that portion of the public that could be served. 107 Wn.2d, at 367.

40. Petitioners will not themselves use the JdF Project to serve the public or any portion thereof. They will neither operate nor maintain the Project and, thus, Petitioners will not be providing any service to the public at all. See Paragraph No. 20. Instead, such responsibility will be transferred via contract to a responsible third-party operator, leaving Petitioners with the limited role of developing, owning and financing the Project. In *Bonneville Power Administration*, Docket No. UE-040088, Declaratory Order (2004), the Commission found, as a matter of law, that the owners of transmission facilities being leased to and operated by BPA are not "public service companies." *Bonneville*, Declaratory Order at paragraph 32.

41. Moreover, any service provided by use of the JdF Project will be pursuant to the third-party operator's Open-Access Transmission Tariff. Eligible customers will include only those: (a) who meet the eligibility requirements specified by FERC, (b) execute a transmission contract on terms acceptable to the third-party operator, and (c) satisfy credit-support and other contractual requirements specified by that operator. Clearly, even such

PETITION FOR DECLARATORY ORDER - 15

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

services as may be provided by the third-party operator are not ones that are made generally available to the public -- at least not to end-users who purchase electricity at rates regulated by the Commission. Indeed, the very nature of direct-current transmission makes it inapplicable to service of end-users who universally take service from alternating-current systems.

42. In summary, Petitioners have satisfied all substantive and procedural requirements to warrant issuance of a declaratory order under RCW 34.05.240 holding, as a matter of fact and law, that none of the Petitioners is, or will become, a “public service company” under RCW Title 80.

B. Petitioners and the JdF Project are Subject To Uniform, National Regulation by The US Department of Energy, Leaving Nothing for the State to Regulate Under the Constitutional Theory of Federal Pre-emption.

43. In *Bonneville Power Administration*, Docket No. UE-040088, Declaratory Order (2004), the Commission declined to rule on BPA’s request for a declaration that the proposed Schultz-Wautoma 500-kV transmission line in central Washington was subject to the exclusive jurisdiction of FERC. It’s reluctance was based on a concern that such a sweeping declaration might detract from its “exclusive jurisdiction over the distribution portion of unbundled delivery service ... ,” citing *Detroit Edison Company, v. FERC*, 333 F.3d 48 (D.C. Cir. 2003). While it is true that domestic transmission lines may have dual interstate and intrastate functions, this case is different. The JdF Project relates solely to foreign or interstate commerce; it has no intrastate function. See Paragraph No. 19.

44. The delegated authority of the US Department of Energy to issue a Presidential Permit authorizing the construction and operation of the JdF Project derives from the constitutional

power of the federal executive to protect the territorial integrity of the United States. This power was first exercised in Executive Order 8202, issued by President Roosevelt in 1939, prohibiting the construction or operation of any transmission facility at the US border without first receiving a permit from the President. This constitutional authority applies to the interconnection in its entirety without distinction as to foreign, interstate, or intrastate function or purpose.

45. Once constructed, Congress intended service on international transmission lines to be governed by Section 202(e) of the FPA. *Enron Power Marketing, Inc. v. El Paso Electric Company*, 77 FERC ¶61,013 at 61,049 (1996), *order on reh'g* 83 FERC ¶61,213 (1998). Under the Department of Energy Organization Act, 42 U.S.C. §7101 *et seq.*, the Department of Energy, rather than FERC, administers sections 202(e) and (f) of the FPA. Under these federal statutes, DOE has sole authority to authorize such international transmission activity.

46. DOE's authority to regulate the JdF Project under FPA Section 202(e) is continuing over the life of the Project. Once it issues a Presidential Permit, DOE thereafter "may from time to time, after opportunity for hearing and for good cause shown, make such supplemental orders in the premises as it may find necessary or appropriate." Section 202(e). As part of this continuing regulation, DOE may require the Project to update its open-access transmission tariff and related practices so that they remain "comparable" to the changing requirements that FERC uniformly imposes on transmission systems in interstate commerce.

47. In its order authorizing the sale of Project transmission rights at negotiated rates, FERC has held that ownership or operation of the Project will make Sea Breeze a "public utility" within the meaning of the Federal Power Act. See Exhibit "D," Paragraph Nos. 15

PETITION FOR DECLARATORY ORDER - 17

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue • Suite 2300
Portland, Oregon 97201 • (503) 241-2300

and 37. By asserting “public utility” jurisdiction, FERC indirectly held that the Project would involve the transmission of electricity in interstate commerce, despite the fact that the Project, as owned and operated by Petitioners between its northern and southern terminals, would merely involve the transmission of electricity across the international boundary with Canada. FERC rejected Sea Breeze’s assertion that international transmission was outside the scope of all provisions of Part II of the Federal Power Act except for FPA section 202(e).

48. There is no “regulatory gap” that Commission regulation might fill – either at the time a Presidential Permit is issued or any time thereafter over the life of the JdF Project. Comprehensive, uniform federal regulation of the Project pre-empts any state regulatory role. “We will find preemption where it is impossible for a private party to comply with both state and federal laws” *Crosby v. National Foreign Trade Council*, ___ U.S. ___, ___ (2000), citing *Florida Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963).

49. Petitioners have satisfied all substantive and procedural requirements to warrant issuance of a declaratory order holding, as a matter of fact and law, that Petitioners and the JdF Project facilities, operations and services are subject to comprehensive, uniform and exclusive federal regulation, leaving nothing for the Commission to regulate.

C. The Commission Has No Authority to Regulate Foreign Commerce Relating to International Transmission Lines Because that Field Has been Occupied by Federal Regulation, Pre-empting Regulation by the State.

50. As of the date of this submission, Sea Breeze has yet to decide whether to seek rehearing of FERC’s assertion of FPA “public utility” jurisdiction over Petitioners on grounds that the Project will involve in interstate commerce. *See* Paragraph No. 47, above. However, even if FERC were later to reverse its jurisdictional finding on rehearing and rule instead that

the Project relates exclusively to foreign commerce, that reversal of position would not create any basis for jurisdiction by this Commission.

51. Under the US Constitution, a state's authority to regulate foreign commerce is even more tightly limited than its authority to regulate interstate commerce. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448 (1979). In *United States v. Locke*, 529 U.S. 89 (2000), the US Supreme Court struck down a Washington State law regulating the maritime safety of oil tankers at state ports. The Court held that state law and regulation was preempted by federal law and regulation in an area where Congress intended uniform, national regulation of maritime commerce. When reviewing state laws affecting foreign commerce, "there is no beginning assumption that concurrent regulation by the State is a valid exercise of its police powers." 529 U.S. at 108. This is true in all areas where there has been a history of significant federal presence, and particularly true in the context of federal regulatory schemes which have as one of their objectives a uniformity of regulation of commerce. *Id.*

52. There can be no doubt that the Presidential Permit authority entrusted by the President to DOE touches upon the constitutional authority of the federal government in the fields of foreign commerce and foreign affairs. The preamble to Executive Order 10485, includes the following recital:

WHEREAS the proper conduct of the foreign relations of the United States requires that executive permission be obtained for the construction and maintenance at the borders of the United States of facilities for the exportation or importation of electric energy and natural gas⁷

⁷ Parallel authority was delegated to DOE in Executive Order 10485 regarding international

53. In exercising the authority delegated to it under Executive Order 10485, the Secretary of Energy is required by Section 1(a) to consult with the Secretary of State and the Secretary of Defense. In instances where these three cabinet members cannot agree on whether a permit should issue, Section 1(b) of the executive order entrusts the decision to the President.

54. In the context of electrical transmission, Congress reserved only one instance in which a state might concurrently regulate an international electrical interconnection -- under circumstances inapposite to this case, where the international facilities do not interconnect with interstate facilities. FPA Section 202(f) provides:

The ownership or operation of facilities for the transmission or sale at wholesale of electric energy which is

(a) generated within a State and transmitted from the State across an international boundary and not thereafter transmitted into any other State, or

(b) generated in a foreign country and transmitted across an international boundary into a State and not thereafter transmitted into any other State, shall not make a person a public utility subject to regulation as such under other provisions of this subchapter. The State within which any such facilities are located may regulate any such transaction insofar as such State regulation does not conflict with the exercise of the Commission's powers under or relating to subsection (e) of this section. [Emphasis supplied.]

55. The underscored passage in Section 202(f), quoted above, limits application of this provision to transmission systems that are purely intrastate, unconnected to any interstate facilities. Section 202(f) must be read in the context of the industry as it existed when the provision was drafted in 1935. Given the modern pervasiveness of interstate transmission systems across the nation, it is hard to envision an instance in which it would apply other than

natural-gas pipelines.

PETITION FOR DECLARATORY ORDER - 20

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue • Suite 2300
Portland, Oregon 97201 • (503) 241-2300

to an interconnection between Alaska and Canada. We have found no cases construing Section 202(f), perhaps because the instances in which it might apply are so rare as to be almost non-existent. FERC's order authorizing the sale of Project transmission rights at negotiated rates held that the Project did not fall within Section 202(f).

56. Moreover, even if the factual predicate for state regulation under Section 202(f) were to exist, Congress' narrow grant of authority under these exceptional circumstances is only conditional. A state could exercise authority under Section 202(f) only if its regulation did not conflict with DOE's authority under Section 202(e). This conditional grant of authority would leave nothing for the Commission to regulate regarding the JdF Project because all project capacity will be made available pursuant to the Open Access Transmission Tariff of that project's operator. As a practical matter, there is no capacity left unaccounted for under DOE's comprehensive regulation, *i.e.*, no project capacity left for the Commission to regulate. *Compare* the "saving clauses" held inapplicable to validate the Washington state regulations at issue in *United States v. Locke*, 529 U.S., *supra* at 104-07.

57. In summary, in the absence of the very rare factual circumstances specified in FPA Section 202(f) that might authorize Commission regulation over Petitioners and the JdF Project, such intrastate regulation is pre-empted by a comprehensive and complete federal regulatory scheme regarding foreign commerce and the foreign affairs of the federal government. Under the circumstances of this case, there is nothing for this Commission to regulate regarding the Petitioners and the JdF Project facilities, operations and services consistent with the US Constitution.

PETITION FOR DECLARATORY ORDER - 21

PDX 1325846v2 67597-1

DAVIS WRIGHT TREMAINE LLP
1300 S.W. Fifth Avenue · Suite 2300
Portland, Oregon 97201 · (503) 241-2300

VI. Conclusion

58. For the reasons set forth above, Sea Breeze respectfully requests that the Commission issue an order disclaiming jurisdiction, under Title 80 RCW, over each of the three Petitioners and over the JdF Project facilities, operations and services.

DATED this 23rd day of September, 2005.

Respectfully submitted,

Davis Wright Tremaine LLP
Attorneys for Petitioners

By: 

John A. Cameron
Andrea McNamara