

**BEFORE THE WASHINGTON
UTILITIES AND TRANSPORTATION COMMISSION**

WASHINGTON UTILITIES AND)	DOCKET NO. UE-161123
TRANSPORTATION COMMISSION,)	
)	
Complainant,)	
)	
v.)	PETITION FOR ADMINISTRATIVE
)	REVIEW OF AN INTERLOCUTORY
PUGET SOUND ENERGY,)	ORDER DENYING INTERVENTION
)	OF THE NORTHWEST AND
Respondent.)	INTERMOUNTAIN POWER
)	PRODUCERS COALITION
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To The Commission:

I. INTRODUCTION

1. Pursuant to Washington Administrative Code (“WAC”) 480-07-810, the Northwest and Intermountain Power Producers Coalition (“NIPPC”) petitions the Washington Utilities and Transportation Commission (the “Commission”) to review the presiding officer’s initial order¹ (“Order 04”) denying NIPPC’s petition to intervene. Because NIPPC’s participation in this proceeding has been terminated by Order 04, interlocutory review is warranted.

2. Under WAC 480-07-355, the Commission grants petitions to intervene, if the intervenor has a substantial interest in the proceeding or if its participation is within the public interest. NIPPC’s intervention should be granted because it has a unique and substantial interest in the proceeding, and its expertise in competitive electricity markets

¹ Wash. Utils. & Transp. Comm’n v. PSE, Docket No. UE-161123, Order 04 (Nov. 22, 2016).

² Wash. Utils. & Transp. Comm’n v. Pac. Power & Light Co., Docket No. UE-152253, Order 04 at ¶ 11 (Feb. 4, 2016).

³ Re Petition of PSE For an Order Authorizing the use of the Proceeds from the Sale of RECs and Carbon Financial Instruments, Docket No. UE-070725, Petition

and retail wheeling will benefit the public interest and help develop a record that more fully informs the Commission on key issues than would be the case without NIPPC's participation. The Commission, PSE, Staff, Public Counsel, other intervenors, and eligible customers will all benefit from NIPPC's expertise, which may be invaluable in creating a successful program. Schedule 451 (Large Customer Retail Wheeling) cannot be successful without entities willing and able to sell power to eligible customers, and it would behoove the Commission to take advantage of the knowledge and experience of the organization that represents many of these potential power suppliers.

3. NIPPC's expertise dovetails perfectly with the issues raised by PSE's filing, which means that NIPPC's participation will benefit the public interest and assist the Commission to ultimately approve tariffs that are fair, just and reasonable. NIPPC identifies the key issues in this proceeding as: 1) determining the eligibility criteria under which customers shall arrange to purchase supplied power from one or more third party power suppliers; 2) the jurisdictional and regulatory consequences of approval; and 3) calculating the appropriate stranded costs. These are within the issues already identified by Commission staff ("Staff") as what should be addressed in this proceeding, and NIPPC commits not to unduly broaden Staff's proposed scope of issues.

4. NIPPC is a non-profit trade association which is committed to developing rules and policies that help achieve a competitive electric power supply market in the Pacific Northwest, including retail wheeling programs. NIPPC and its members are active in regulatory proceedings regarding competitive markets in numerous states, which provides NIPPC with extensive knowledge and familiarity in developing well functioning retail wheeling programs. In addition, NIPPC's members could be "power suppliers" under

Schedule 451 because some of them already are third party power suppliers that directly sell power to end use consumers. No other party has this familiarity and knowledge regarding competitive markets and retail wheeling. As NIPPC and its members have extensive experience and will provide a unique perspective on these issues, the Commission has a strong interest in seeing that the record is fully developed relative to the changes PSE proposes.

5. While NIPPC does not advocate on behalf of any specific company, its members' ability to participate in any Commission approved Schedule 451 and sell power to eligible customers may be directly impacted by this proceeding. This provides NIPPC a substantial interest in the outcome of this proceeding that warrants granting NIPPC's petition to intervene. NIPPC's members are generally competitors of PSE in wholesale and retail markets, but they will not be directly competing with PSE under Schedule 451 because end use customers will stop buying from PSE and purchase power from third parties. The Commission will set the terms and conditions of this retail wheeling program, which, depending on how they are designed, could significantly harm any NIPPC member whose ability to sell power is limited.

6. NIPPC also understands that the issue of whether any power supplier that sells power to a customer under PSE's Schedule 451 will be subject to Commission regulation as an electric utility may be an issue in this proceeding. NIPPC's members should not be deprived of the opportunity to participate in a proceeding in which a tariff may require them to subject themselves to the Commission's jurisdiction in order to sell power to end use consumers. An order that sets the conditions for selling power to end use consumers in a manner that precludes the ability of many eligible companies to sell power under

Schedule 451 could harm NIPPC's members as well as eligible customers whose options to purchase power could be severely constrained if insufficient power suppliers can qualify to participate in the program.

II. REVIEW OF ORDER 04

1. Legal Standard

7. Under WAC 480-07-810(2) the Commission has discretion to review an interlocutory order if: 1) the ruling terminates a party's participation in the proceeding and the party's inability to participate could cause substantial and irreparable harm; 2) review is necessary to prevent substantial prejudice to a party that would not be remediable by post-hearing review; or 3) review could save the Commission and parties substantial effort or expense, or some other factor is present that outweighs the costs in time and delay of exercising review.
8. Review is warranted under any of these criteria. First, Order 04 terminates NIPPC's participation. Setting onerous terms and conditions for selling power to Schedule 451 customers or unnecessarily subjecting power suppliers to regulation as electric utilities could substantially and irreparably harm the competitive power industry generally and NIPPC members. Second, this substantial prejudice cannot be remedied in post-hearing review because this is the proceeding in which the terms and conditions for selling power under Schedule 451 will be set. Finally, NIPPC's participation will save the Commission and parties' effort and expense, because as Staff and Public Counsel have suggested, NIPPC's experience and unique perspective makes NIPPC well suited to address the key issues in this proceeding. The Commission and the parties will be saved

substantial effort and expense due to the valuable experience and perspectives that NIPPC and its members bring to this proceeding.

2. NIPPC's Participation is Within the Public Interest Because NIPPC Can Assist the Commission in Developing a Robust Record

9. NIPPC's participation in this case will benefit the Commission and the public interest because NIPPC has experience and expertise in all of the key issues that will be addressed in this proceeding. The success of Schedule 451 depends on the active participation of independent power producers and retail wheeling power suppliers operating under the new tariff. The public interest and PSE's current customers eligible for Schedule 451 will be harmed by a more limited record that fails to fully inform the Commission on these matters than would be the case with NIPPC's participation.
10. The Commission should also grant NIPPC's intervention because NIPPC is a non-profit trade association whose goals and purposes are to foster healthy electricity markets and not the specific commercial interests of any particular members. Non-profit trade associations, including those whose members are utility competitors and independent power producers, frequently intervene in Commission proceedings.
11. Finally, Order 04's characterization of the legal standard for intervention is unduly narrow, which does not address much of the precedent allowing the intervention of entities and companies whose primary purpose was to address potentially anti-competitive utility actions that harmed their business interests. The Commission has repeatedly allowed utility competitors in proceedings in which their intervention benefited the public interest, including cases that directly addressed retail wheeling.

A. NIPPC’s Purpose Is to Ensure the Competitive Electricity Markets and Retail Direct Access Programs Function Properly and Are Consistent with State Regulatory Law and Policy

12. NIPPC’s primary purpose in intervening is not to advocate on behalf of its members as PSE’s competitors, but to ensure that whatever retail access program is ultimately adopted is successful. The Commission often looks to the broad public policy goals of particular organizations when justifying the intervention and full participation of particular parties. For example, the Commission recently allowed the late-filed intervention and full participation of the Northwest Energy Coalition in part because it has a broad and diverse membership including “environmental groups and utilities, low-income advocates and clean energy businesses” and it offered a “unique perspective that isn’t otherwise replicated among the current intervenors.”² The Commission has also allowed the intervention of unions, environmental advocates, and independent power producer trade associations.

13. Both Renewable Northwest and the Renewable Energy Coalition are trade associations that include independent power producers that have participated in Commission proceedings. Renewable Northwest, which is also a non-profit, has overlapping members with NIPPC, and “supports expanded development of renewable energy and energy efficiency programs in Washington.”³ The Renewable Energy Coalition is a trade association of independent power producers comprised of mostly

² Wash. Utils. & Transp. Comm’n v. Pac. Power & Light Co., Docket No. UE-152253, Order 04 at ¶ 11 (Feb. 4, 2016).

³ Re Petition of PSE For an Order Authorizing the use of the Proceeds from the Sale of RECs and Carbon Financial Instruments, Docket No. UE-070725, Petition to Intervene of Renewable Northwest Project at ¶ 4 (Nov. 24, 2009).

small entities selling power to Northwest utilities as qualifying facilities.⁴ In addition, the Commission has allowed publicly owned utility competitors in PSE proceedings to raise issues related to competition and retail wheeling.⁵ These organizations include utility competitors and have previously established a substantial interest and that their participation was in the public interest in utility proceedings.

14. NIPPC is a non-profit trade association whose primary purpose is to promote market competition and retail access. NIPPC, like Renewable Northwest and the Renewable Energy Coalition, supports expanded development of competitive markets, independent power producers, and retail access and wheeling. NIPPC also competes with and sell powers to PSE, as do the publicly owned utilities that have been allowed intervention. Similar to the Northwest Energy Coalition, NIPPC offers a unique perspective that is not replicated among the current intervenors. Order 04 does not explain why it was in the public interest to allow these groups' participation, but it is not in the public interest to allow NIPPC's participation.

15. NIPPC also intervenes and participates routinely in other states. For example, NIPPC has been a party without opposition in numerous proceedings in Oregon and Idaho, and before the Bonneville Power Administration.⁶ Since its incorporation in 2002, NIPPC has never been denied intervention in a regulatory proceeding.

⁴ Wash. Utils. & Transp. Comm'n. v. Pac. Power & Light Co., Docket No. UE-144160, Order 02 at ¶ 4 (Apr. 23, 2015).

⁵ Re Proposal of Puget Sound Power & Light Co. to Transfer Revenues from PRAM Rates to General Rates, Docket Nos. UE-951270 and UE-960195 (consolidated) Third Suppl. Order at 7 (June 10, 1996).

⁶ Re Investigation Regarding Competitive Bidding, OPUC Docket No. UM 1182, Ruling at 1 (Mar. 31, 2005); Re PacifiCorp, dba Pac. Power, Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol, OPUC Docket No. UM 1050, Ruling at 1 (Apr. 11, 2016); Re PGE Petition for Partial Waiver of

B. The Commission Frequently Grants the Intervention of Organizations and Specific Utility Competitors When It Benefits the Public Interest and the Development of the Record

16. Order 04 denied NIPPC’s intervention recognizing that “issues raised within regulatory proceedings may, occasionally, necessitate the participation of trade associations such as NIPPC”⁷ and that there are some Commission “decisions in which we granted nonregulated competitors party status.”⁸ Order 04, however, did not discuss most of these proceedings and orders, including those in which the Commission granted the intervention of nonregulated competitors to address retail wheeling and competition issues for PSE. Instead, Order 04 described these as a “minority” of cases and concluded that NIPPC had not proven “that this proceeding will involve issues making NIPPC’s participation necessary or in furtherance of the public interest.”⁹

17. NIPPC urges the Commission to conclude otherwise, because it offers a unique perspective that no other party provides and benefits the public interest. This is entirely consistent with long standing Commission precedent that entities representing general competitors as well as specific competitors should be granted intervention when they

Competitive Bidding Guidelines and Approval of RFP Schedule, OPUC Docket No. UM 1773, Ruling at 1 (May 24, 2016); Re PacifiCorp, dba Pac. Power, Application to Reduce QF Contract Term and Lower the QF Standard Contract Eligibility Cap, OPUC Docket No. UM 1734, Ruling at 1 (June 12, 2015); Re Investigation of Competitive Bidding Guidelines Related to Senate Bill 1547, OPUC Docket No. UM 1776, Ruling at 1 (June 20, 2016); Re Joint Petition of Idaho Power Co., Avista Corp., and PacifiCorp, dba Rocky Mountain Power to Address Avoided Cost Issues and to Adjust the Published Avoided Cost Rate Eligibility Cap, IPUC Case No. GNR-E-10-04, Order No. 32143 at 1 (Dec. 22, 2010); Bonneville Power Administration 2016 Rate Adjustment Proceeding, BPA Docket No. BP-16, Order Granting Intervention and Amending Service List at 1 (Feb. 3, 2015).

⁷ Order 04 at ¶ 23.

⁸ Id. at ¶ 21.

⁹ Id. at ¶ 24.

“bring an expertise to the table that may assist the Commission” regarding the key issues in the proceeding, including how the case “will affect the Commission policy favoring a competitive model in the electric industry.”¹⁰

18. Order 04 relies upon Cole v. Washington Utilities and Transportation Commission,¹¹ but only considers one of the many various subsequent cases that have limited Cole’s application and does not recognize that there is a different and more current legal standard for granting interventions. To begin with, Cole was decided in 1971 under a different legal standard for granting petitions to intervene.¹² As such, the Commission has repeatedly and explicitly stated that Cole no longer controls when determining whether to allow competitors to intervene in Commission proceedings. In 2001, the Commission succinctly explained,

We disagree with Commission Staff and PacifiCorp that the *Cole* decision controls our decision in this case. The *Cole* case was decided in 1971, and precedes the adoption of the Administrative Procedure Act. *RCW 34.05.443* governs intervention and provides broad discretion in granting a petition for intervention.¹³

Washington courts have also concluded that the APA standard, which governs modern interventions, should be liberally construed to favor interventions.¹⁴

19. Order 04 specifically cites Cole’s reliance on an antiquated test for establishing the public interest:

¹⁰ Docket Nos. UE-951270 and UE-960195 (consolidated), Third Suppl. Order at 7.

¹¹ Cole v. Wash. Utils. & Transp. Comm’n, 79 Wn2d 302, 485 P.2d 71 (1971).

¹² Order 04 at ¶ 20.

¹³ Wash. Utils. & Transp. Comm’n v. PacifiCorp, dba Pac. Power & Light Co., Docket No. UE-001734, Second Suppl. Order at ¶ 29 (July 9, 2001); Wash. Utils. & Transp. Comm’n v. PacifiCorp dba Pac. Power & Light Co., Docket No. UE-130043, Order 03 at ¶ 6 (Feb. 14, 2013).

¹⁴ Columbia Gorge Audubon Soc. v. Klickitat Cty, 98 Wash. App. 618, 623, 989 P.2d 1260 (1999) (citing Fritz v. Gorton, 8 Wash. App. 658, 660, 509 P.2d 83 (1973)).

[a]lthough RCW 80.01.040(3) demands regulation in the public interest, that mandate is qualified by the following clause “as provided by the public service laws” Appellants fail to point out any section of title 80 which suggests that nonregulated fuel oil dealers are within the jurisdictional concern of the commission.¹⁵

There are, however, numerous analogous cases in which utilities have placed competitive markets at issue and the Commission has repeatedly stated that the public interest is served by including diverse perspectives from nonregulated parties.¹⁶

20. The Commission has also distinguished between typical rate cases and cases that involve issues of competition when considering whether to allow competitors to intervene in Commission proceedings. The Commission rejected PSE’s reliance upon Cole to bar the intervention of the Public Utility District No. 1 of Snohomish County (“Snohomish PUD”), Public Power Council, and Washington Public Utility District Association (“WPUD”) in a consolidated proceeding regarding retail wheeling and the merger of Washington Energy Company and Washington Natural Gas Company with and into Puget Sound Power & Light Company (“PSP&L”).¹⁷ Snohomish PUD asserted an interest as a competitor of the merged company and sought to address “retail wheeling”.¹⁸ The WPUDA consisted of non-regulated competitors of PSP&L and argued its intervention should be granted, in part, because it “would bring a unique perspective to

¹⁵ Order 04 at ¶ 20.

¹⁶ This is in addition to the Commission repeatedly allowing the full participation of unions, environmental advocates, and similarly-situated trade organizations like Renewable Northwest and the Renewable Energy Coalition.

¹⁷ Docket Nos. UE-951270 and UE-960195 (consolidated), Third Suppl. Order at 6-7.

¹⁸ Id. at 2.

this case concerning the impact of the merger on competition.”¹⁹ The Commission granted the interventions reasoning,

This proceeding raises significant competitive issues beyond those involved in a typical rate case. **The transition from monopoly to retail competition in the electric industry is a basic issue in this proceeding.** In this transitional environment, the Commission believes that it is in the public interest for it to be generous in allowing issues on the table. **WPUDA and other competitors can bring an expertise to the table that may assist the Commission in determining how the merger will affect the Commission policy favoring a competitive model in the electric industry.**²⁰

21. Another illustrative example is when the Commission twice denied PacifiCorp’s attempts, in two different proceedings and over a decade apart, to bar the intervention of Columbia Rural Electric Association, Inc. (“CREA”) in its rate cases by citing Cole.²¹ CREA and PacifiCorp did not have an exclusive service territory agreement, and the cooperative is a direct competitor of PacifiCorp for end use consumers. Despite the fact that CREA’s primary interest in the cases was the competitive impact of PacifiCorp’s tariffs, which were designed to charge net removal costs upon departing customers, the Commission allowed its intervention on the grounds of it benefiting the public interest. Judge Moss explained:

CREA is a competitor of PacifiCorp in Washington. CREA’s concern in this proceeding stems from PacifiCorp’s proposed changes to Schedule 300. . . . [T]he Commission has a strong interest in seeing that the record is fully developed relative to changes PacifiCorp proposes. CREA’s participation, limited to this issue, may result in a record that more fully informs the Commission on this matter than would be the case without CREA’s participation. The Commission determines for this reason that

¹⁹ Id. at 4.

²⁰ Id. at 7 (emphasis added).

²¹ Docket No. UE-001734, Second Suppl. Order at ¶ 29; Docket No. UE-130043, Order 03 at ¶ 6.

CREA's participation is in the public interest, which establishes sufficient grounds for allowing it to intervene.²²

22. Order 04 did not specifically address the PSP&L merger case or PacifiCorp net removal cases in which the issue of retail competition was directly at issue. Despite this, these cases illustrate that it is well within the Commission's discretion to allow intervention of electric utility competitors, especially when the utility's filing places the issue of competition directly at issue. In the PSP&L case, the Commission allowed the participation of utility competitors and their trade associations when one of the issues specifically addressed the issues of competition and retail direct access. Similarly, in CREA's example, PacifiCorp placed at issue the utility's tariff provisions that could limit the ability of its customers to choose to take service from PacifiCorp's competitor.

23. In this proceeding, retail access and competition are not just one of a number of relevant issues, but they are the central, if not only, issues. However, unlike the PSP&L merger, this proceeding is not generally focused on the transition from monopoly regulation to retail access, but on the approval of a specific utility proposed tariff. NIPPC does **not** intend to address the potential transition from monopoly to retail competition in the electric industry and is generally supportive of PSE's proposed Schedule 451. Instead, NIPPC's intends to ensure that (if approved) Schedule 451 works, has the right eligibility criteria for customer participation, and does not result in jurisdictional or regulatory consequences that either harm the program's success or remaining ratepayers. The more limited nature of this proceeding focusing on the nuts and bolts of an actual retail wheeling tariff provides greater support for the need to have NIPPC in this

²² Docket No. UE-130043, Order 03 at ¶ 6.

proceeding because it is the only party with a depth of experience with both successful and failed retail wheeling programs.

24. The Commission recently allowed the intervention of PSE’s competitors, the Washington State Heating, Ventilation, and Air Conditioning Contractors Association and the Western Washington Chapter of the Sheet Metal and Air Conditioning Contractors National Association despite PSE’s same Cole argument.²³ The Commission concluded “that both of the HVAC associations have a substantial interest in the subject matter of the proceeding and that their participation is in the public interest.”²⁴ The Commission concluded that PSE’s filing implicated the market for HVAC equipment and “PSE has placed the HVAC equipment market at issue in this proceeding.”²⁵

25. Order 04 distinguished this case on the grounds that “[n]either NIPPC nor PSE claim that the Company wishes to enter the independent power producer market or that the Company has raised any issue with the adequacy of the independent power producers’ service.”²⁶ The most important question is not whether PSE wants to enter the independent power producers’ market, but the impact on eligible customers and the ability of power suppliers to serve them. PSE’s customers will be entering the competitive market, and Schedule 451 must be correctly designed to ensure that power suppliers can appropriately serve eligible customers under the Commission’s laws and policies. Contrary to Order 04, NIPPC is raising concerns about the adequacy of

²³ Wash. Utils. & Transp. Comm’n. v. PSE, Dockets UE-151871 and UG-151872 (consolidated), Order 02 at ¶ 9 (Jan. 7, 2016).

²⁴ Id.

²⁵ Id. at ¶ 11.

²⁶ Order 04 at ¶ 22.

independent power producers service because, if not properly designed, then power suppliers will be unable to serve Schedule 451 customers.

26. NIPPC would expect that the Commission would encourage and invite to participate in a regulatory proceeding to set the terms and conditions for this particular retail wheeling program those very parties whose participation is **required** to ensure that it will actually be successful. In short, PSE's filing has placed at issues competition and the adequacy of the competitive market related to its customers' needs, which is what NIPPC is uniquely qualified to address.

27. A careful review of the specific issues raised by PSE in its Advice Letter, the direct testimony of PSE witness Jon Piliaris, and the direct testimony of Microsoft witness Irene Plenefisch identifies issues related to retail access, alternative power suppliers, retail and wholesale markets, transmission service, and stranded costs front and center of the proceeding. For example, a key issue raised by PSE's Advice Filing is "Alternative Power Suppliers and Supplied Power."²⁷ Service under Schedule 451 will occur when the eligible customer arranges to purchase power from non-PSE power suppliers in specific amounts and consistent with the terms and billing arrangements specified in the rate schedule.²⁸ As explained by PSE witness Jon Piliaris "Power supply is arranged directly between the customer and their supplier."²⁹ There is no party that represents the interests of alternative power suppliers or who better understands how or whether PSE's Schedule 451 can be successfully used to provide alternative supplied power to eligible customers than NIPPC.

²⁷ Advice Letter at 2.

²⁸ Id.

²⁹ Prefiled Direct Testimony of Jon A. Piliaris Exhibit No. ____ (JAP-1CT) at 16.

28. NIPPC could provide unique elucidation on nearly all the other issues in this case. PSE has proposed specific eligibility of service requirements,³⁰ and NIPPC’s members have worked on direct access eligibility criteria in numerous states and can bring invaluable perspectives. Other issues identified by PSE and Microsoft include the risk of market prices and stranded costs.³¹ As the only parties in this case that own significant amounts of non-utility generation that has survived the vagaries of the power market, NIPPC’s members endow NIPPC with specialized and relevant knowledge on these topics.

29. Microsoft’s testimony also illustrates the ways in which NIPPC’s participation will benefit both customers and the Commission. Microsoft witness Irene Plenefisch explains that Microsoft engages with “independent power producers to identify sources of reliable, affordable, sustainable energy” and wants to continue those efforts in Washington.³² Ms. Plenefisch further explained that: “Microsoft, however, is capable of and wishes to select its own suppliers, enter into contracts with them, and assume the related risks and benefits”³³ and “wants more certainty in its pricing and can achieve more certainty by conducting its own procurement process”³⁴ As representing the interests of independent power producers and marketers in promoting competitive markets, NIPPC has unique knowledge about whether and how Microsoft and other eligible customers’ goals can be achieved.

³⁰ Id. at 2.

³¹ Id. at 4.

³² Direct Testimony of Irene Plenefisch Exhibit No. ____ (IP-IT) at 3, 5.

³³ Id. at 6

³⁴ Id. at 7.

3. NIPPC's Participation is Within the Substantial Interest Because Schedule 451 Invokes NIPPC's Purpose and Could Directly Impact NIPPC's Members

30. PSE has placed the retail market at issue in this proceeding and has designed a tariff upon which the participation of alternative power suppliers is required, which provides NIPPC and its members a substantial interest. NIPPC also has standing because its members could be directly harmed by the terms and conditions of Schedule 451 if the tariff allows only certain participants, unlawfully discriminates between particular non-utility power suppliers, or if it is designed in a way that subjects NIPPC's members to the Commission's jurisdiction. It is well established that independent power producers can participate in Commission proceedings when their substantial interest is impacted. The Commission has explained that "public policy favors the inclusion of individuals and organizations in administrative matters affecting their interests."³⁵

31. While it is a different legal standard than the Commission's substantial interest test, a person whose interests may be adversely affected by an order has standing to obtain or to participate in an adjudicative proceeding. An order is "a written statement of particular applicability that finally determines the legal rights, duties, privileges, immunities, or other legal interests of a specific person or persons."³⁶ A party has standing to challenge an order when it directly impacts their interest, they are within the statute's zone of interest and they have sufficient facts to demonstrate an injury in fact.³⁷

³⁵ Re Joint Application of Verizon Corp. Inc. and Frontier Commc'ns Corp., Docket No. UT-090842, Order 05 at ¶ 12 (Sept. 10, 2009). WAC 480-07-355(3) also allows the presiding officer discretion to limit an intervenor's participation in accordance with RCW 34.05.443(2).

³⁶ RCW 34.05.010(11)(a).

³⁷ City of Burlington v. Wash. State Liquor Control Bd., 187 Wash. App. 853, 876-77, 351 P.3d 875 (2015); see also Seattle Bldg. & Constr. Trades Council v.

32. The Supreme Court of Washington, following the United States Supreme Court, “routinely recognizes probable economic injury resulting from agency actions that alter competitive conditions as sufficient to satisfy” standing.³⁸ The Commission has likewise applied the federal “zone of interest” test to determine standing and to inform its substantial interest test. The zone of interest test addresses whether the interest sought to be protected was within the zone of interest protected by the statute. This test, however, is “not meant to be especially demanding” and has been broadly construed to apply unless expressly negated.³⁹
33. PSE’s Schedule 451 is specifically designed to set the conditions for which alternative power suppliers can sell power to eligible customers, providing NIPPC and its members a substantial interest in the outcome of this proceeding. PSE has decided to no longer sell power to otherwise eligible customers, and allowing alternative power suppliers to fulfill this need.⁴⁰
34. NIPPC’s members could be directly harmed by Schedule 451’s terms, conditions, and requirements that may allow some, but not other, alternative power suppliers to sell power to Microsoft and other eligible customers. Thus, the Commission’s decision in this case will not have just a generic impact on market competition, but will directly determine the rights and responsibilities of specific companies. If these alternative power supplies or their regional industry representative are unable to participate in this case,

Washington State Apprenticeship & Training Council, 129 Wn.2d 787, 804, 920 P.2d 581 (1996).

³⁸ Seattle Bldg. & Const. Trades Council, 129 Wash.2d at 795 (citations omitted).

³⁹ Clarke v. Securities Industry Ass’n, 479 U.S. 388, 399, 107 S.Ct. 750 (1987); see also Bennett v. Spear, 520 U.S. 154, 0, 117 S.Ct. 1154 (1997) (concluding the Endangered Species Act did not expressly preclude protection of the “recreational, aesthetic, and commercial interests” alleged by petitioners).

⁴⁰ See generally Advice Letter.

then they will have no ability to challenge or otherwise participate in a proceeding that directly impacts their interest and causes an injury in fact.

35. An example is the Renewable Energy Coalition's intervention Docket No. UE-144160 when Pacific Power & Light ("Pacific Power") proposed major revisions to its methodology for calculating avoided cost rates, including a proposal to eliminate capacity payments. Although Renewable Energy Coalition is comprised of small power producers selling power to Pacific Power as qualifying facilities, the Commission determined it had established a substantial interest in the proceeding.⁴¹ This is analogous to the instant case, where the ability of independent power producers to sell power to direct access customers could be impacted by this proceeding.

36. In PSE's HVAC case cited above, the Commission determined that because PSE placed the market at issue, non-customer intervenors had a substantial interest in the proceeding as well as being in the public interest. PSE's objected to the interventions of its competitors making substantially the same arguments it relies on here.⁴² The Commission, however, determined that the associations had a substantial interest, reasoning, "PSE has placed the HVAC equipment market at issue in this proceeding" and that market would directly impact its competitors. As explained in more detail above, PSE proposed direct access program similarly places the competitive power market at issue and directly impacts its competitors.

37. Thus, independent of how NIPPC's participation will benefit customers and the public interest, NIPPC itself has a substantial interest in this proceeding because the

⁴¹ Docket No. UE-144160, Order 02 at 2.

⁴² See Wash. Utils. & Transp. Comm'n. v. PSE, Dockets UE-151871 and UG-151872 (consolidated), Order 02 at ¶ 8 (Jan. 7, 2016).

Commission is setting terms and conditions for them to sell power under PSE's direct access program. These terms and conditions of PSE's direct access program will govern whether NIPPC's members can participate in PSE's direct access program.

38. In addition to wheeling concerns, this proceeding is also of interest to NIPPC because it may to address whether its members may be subjected to Commission jurisdiction. Uncertainty remains as to whether any of NIPPC's members who may be selling power to end-use consumers should be considered "power suppliers" under PSE's Schedule 451. The Commission has already been asked to consider whether PSE's direct access program could subject independent power suppliers to Commission regulation and may do so again in this proceeding. As such, it hardly seems equitable to prevent parties who may ultimately be regulated by this proceeding from participating in it.

39. For example, in 2001, the Commission was asked whether power suppliers would be subject to the Commission jurisdiction under PSE's proposed direct access program. In Air Liquide America Corp. v. PSE,⁴³ parties asked the Commission to affirmatively declare that power suppliers were not subject to Commission jurisdiction. Parties argued that such a declaration was essential to promote competitive supply because independent power producers would otherwise be reluctant to participate. Ultimately the parties stipulated to present a more narrow question to the Commission, and the Commission declined to fully address the original broader question. Thus, to date the Commission has only clarified that "the simple act of selling power to a customer under Schedule 449 is not, by itself, sufficient to bring the seller within our jurisdiction."⁴⁴

⁴³ Air Liquide America Corp. v. PSE, Docket Nos. UE-001952 and UE-001959 Eleventh Supplemental Order at ¶¶ 47-53 (Apr. 5, 2001).

⁴⁴ Id. at ¶ 52.

40. In this proceeding, Staff has already raised the issue of jurisdictional and regulatory consequences of approval. Because the Commission declined to address whether a retail wheeling program could subject power suppliers to Commission jurisdiction, uncertainty remains as to whether NIPPC's members may be implicated by this proceeding. NIPPC does not understand how its members do not have a substantial interest in having a voice in establishing terms and conditions related to a retail wheeling program that would allow them to sell power to end use customers in a manner that does not require them to become Commission regulated entities.

41. NIPPC is not aware of any jurisdiction in which the entities that sell power and will participate in a retail access program are not permitted to participate. For example, Oregon has a retail access program that has specific administratively determined policies regarding eligibility of energy service suppliers that sell power to end use consumers, eligibility of retail customers to participate, and stranded cost and benefits calculations.⁴⁵ NIPPC and individual independent power suppliers that sell to end use customers frequently participate in those proceedings without opposition.⁴⁶

⁴⁵ Oregon has a unique and burdensome approach to valuing stranded costs and benefits in which there are annual stranded cost/benefit proceedings. Oregon customers' participation is generally on a one or five year basis, after which they can return to cost of service regulation. In contrast, PSE's proposed Schedule 451 and the existing Schedule 448/449 are permanent elections in which will not require annual re-evaluation of stranded costs for the customers that elect retail access.

⁴⁶ E.g., Re PacifiCorp, dba Pac. Power, 2017 Transition Adjustment Mechanism, OPUC Docket No. UE 307, Prehearing Conference Memorandum at 1 (Apr. 26, 2016) (Noble Solutions, a energy service supplier has "sufficient interest in the proceedings to participate and that their participation will not unreasonably broaden the issues, burden the record, or delay the proceedings."); Re PacifiCorp, dba Pac. Power, 2016 Transition Adjustment Mechanism, OPUC Docket No. UE 296, Prehearing Conference Memorandum at 1 (May 1, 2015) (Two energy service suppliers (Noble Solutions and YAM Services) were granted

42. The participation of direct access eligible customers and Staff has not been sufficient to fully address issues related to the reasonableness of Oregon's direct access program. Thus, Order 04's suggestion that Staff elect to hire a NIPPC witness is insufficient to fully protect NIPPC's interests.⁴⁷ For example, eligible retail access customers have at times been active in addressing the reasonableness of the terms of the utilities programs.⁴⁸ However, in other cases they have deferred to energy service suppliers to identify and litigate retail access issues because they have more experience and understanding regarding how the programs actually work.⁴⁹ Without the participation and expertise of entities that sell power to retail customers, it would be nearly impossible to adequately investigate and address whether the retail access programs are consistent with the law and the interest of remaining customers.

4. Confidentiality Concerns Should Not Bar NIPPC's Intervention

43. Order 04 also makes reference to a need to balance NIPPC's interest in participation against PSE and Microsoft's confidentiality concerns, which can be easily managed. The concerns were not formally raised by PSE or Microsoft in written

intervention); Re PacifiCorp, dba Pac. Power, Transition Adjustment, Five-Year Cost of Service Opt-Out, OPUC Docket No. UE 267, Ruling at 1 (May 13, 2013) (The interventions of NIPPC and three energy service suppliers (Noble, Shell Energy, and Constellation NewEnergy) were granted).

⁴⁷ Order 04 at ¶ 25.

⁴⁸ E.g., Re PacifiCorp, dba Pac. Power, Transition Adjustment, Five-Year Cost of Service Opt-Out, OPUC Docket No. UE 267, Order No. 15-060 at 1-2, 4-13 (Feb. 24, 2015) (industrial customers, NIPPC and numerous energy service suppliers litigated retail access issues); Re Investigation into Direct Access Issues for Industrial and Commercial Customers Under SB 1149, OPUC Docket No. UM 1081, Order No. 04-516 at 3-15 (Sept. 14, 2004) (eligible customers and energy service supplier litigated direct access issues).

⁴⁹ E.g., Re PacifiCorp, dba Pac. Power, 2017 Transition Adjustment Mechanism, OPUC Docket No. UE 307, Order No. 16-418 at 1-2 (Oct. 27, 2016) (only Noble Solutions raised retail access issues).

pleadings, but NIPPC generally understands the concern is that NIPPC or its members may view PSE's or Microsoft's confidential commercial or load information. This issue was never raised in the context of granting NIPPC's intervention, and there should be no confidentiality concerns because NIPPC's staff and members will not have access to confidential material. NIPPC frequently intervenes in cases with confidential material and these concerns have never been a problem before.

44. As a matter of principle, NIPPC's staff and members do not sign confidentiality agreements in regulatory proceedings, and NIPPC will not have any of its staff or members review any confidential information in this case. As they never will see any confidential material, there should be no concerns about this information being viewed by parties who are competitors of PSE or potential power suppliers to Schedule 451 customers.

45. NIPPC and its attorneys have been involved in numerous regulatory proceedings with both confidential and highly confidential material without any allegations of improper access or any harm or undue limitation on NIPPC's participation in the proceedings. For example, NIPPC recently actively participated with both PacifiCorp and Portland General Electric on their renewable request for proposal design cases, which included review of the highly confidential results of PacifiCorp's competitive bidding process.⁵⁰ NIPPC has also reviewed without controversy confidential and highly confidential material in numerous proceedings over the last decade.⁵¹

⁵⁰ See Re PGE Petition for Partial Waiver of Competitive Bidding Guidelines and Approval of Request for Proposal Schedule, OPUC Docket No. UM 1773, NIPPC Petition to Intervene (May 13, 2016); Re PGE Request for Proposals for Capacity Resources, OPUC Docket No. UM 1535, NIPPC Petition to Intervene (Mar. 29, 2011); Re NIPPC Request for Investigation into PacifiCorp's 2016 RFP, OPUC

46. Depending on the scope of the case, NIPPC’s attorney and any consultants may or may not need access to confidential material and NIPPC’s lawyers will not be reviewing any highly confidential material regardless of the case’s scope. The key issues that NIPPC is concerned about include the terms and conditions for power suppliers, customer eligibility requirements, regulatory consequences, and stranded costs. At this point it is unclear whether NIPPC will need to review confidential material in order to address those issues.

47. Albeit while representing other clients, NIPPC’s lead attorney has participated in numerous Commission proceedings that include “highly confidential” designations, and does not generally sign the highly confidential provisions because of concerns with the requirement that any signatory not be involved in competitive decision on behalf of any company or business organization that competes, or potentially competes, with entity that designates the material as highly confidential.⁵² This decision not to sign the highly confidential protective order in past proceedings did not have the effect of substantially

⁵¹ Docket No. UM 1771, AR 598, NIPPC Petition for Temporary Rulemaking and Investigation (Apr. 25, 2016).
Re PacifiCorp, dba Pac. Power, Petition for Approval of the 2017 PacifiCorp Inter-Jurisdictional Allocation Protocol, OPUC Docket No. UM 1050, NIPPC’s Signatory Pages (Apr. 15, 2016); Re Investigation Regarding Competitive Bidding, OPUC Docket No. UM 1182, NIPPC’s Signatory Pages (Nov. 16, 2012); Re PacifiCorp, dba Pac. Power, Transition Adjustment, Five-Year Cost of Service Opt-Out, OPUC Docket No. UE 267, Order No. 13-090 (Mar. 18, 2013) (NIPPC filed comments, but did not file Signatory Pages or access any confidential materials); Re Investigation into Qualifying Facility Contracting and Pricing, OPUC Docket No. UM 1610, Order No. 16-434 (Nov. 15, 2016) (NIPPC filed joint comments along with other parties, but did not file Signatory Pages or access any confidential materials).

⁵² Wash. Utils. & Transp. Comm’n v. PSE, Docket No. UE-161123, Order 03 Protective Order With “Highly Confidential” Provisions at ¶ 14 (Nov. 17, 2016); see Wash. Utils. & Transp. Comm’n v. PSE, Docket Nos. UE-111048 and UG-111049 (consolidated) Order 01 Protective Order With “Highly Confidential” Provisions at ¶ 14 (June 17, 2011).

limiting any participation in those proceedings. Thus, NIPPC's attorneys are not planning on signing the highly confidential protective order if NIPPC's intervention is granted.

48. Finally, NIPPC will accept any limitations deemed necessary by the presiding officer under WAC 480-07-355(3).

III. RELIEF REQUESTED

49. Order 04 harms NIPPC because it precludes NIPPC from participating in a proceeding that directly and substantially impacts NIPPC. Likewise, Order 04 harms the public interest because it inhibits the development of a robust record on the issues of competitive markets and regulatory consequences.

50. WHEREFORE, NIPPC respectfully requests the Commission grant NIPPC's petition for interlocutory review and grant the relief from Order 04 requested in this pleading.

Dated this 2nd day of December, 2016.

Respectfully submitted,



Irion A. Sanger
Sidney Villanueva
Sanger Law, PC
1117 SE 53rd Avenue
Portland, OR 97215
Telephone: 503-756-7533
Fax: 503-334-2235
irion@sanger-law.com

Of Attorneys for the Northwest and Intermountain
Power Producers Coalition