



701 Fifth Avenue, Suite 5100
Seattle, WA 98104-7036
PHONE 206.883.2500
FAX 206.883.2699
www.wsg.com

February 5, 2016

VIA ETARIFF FILING

The Honorable Kimberly D. Bose, Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, D.C. 20426

Re: **Smith Creek Hydro, LLC,
Application for Market-Based Rate Authority and Granting of Waivers and
Blanket Authorizations
Docket No. ER16-___-000**

Dear Secretary Bose:

Enclosed for filing is an Application for Market Based Rate Authority and Granting of Waivers and Blank Authorizations (“Application”) submitted by Smith Creek Hydro, LLC a Delaware limited liability company (“Applicant”). The Application requests acceptance of Applicant’s FERC Electric Tariff, which is attached to the Application as Attachment A, under which Applicant will engage in wholesale sales of electricity, capacity, and certain ancillary services at market-based rates. Applicant also requests the granting of certain blanket approvals and certain waivers from Federal Energy Regulatory Commission (“Commission”) regulations.

Applicant respectfully requests that the Commission accept this Application for filing and implement Applicant’s market-based rate authority effective April 1, 2016. Applicant respectfully requests that the Commission waive Part 35 of its regulations to the extent necessary to permit an effective date for the Tariff of April 1, 2016.

Respectfully submitted,

/s/ Todd G. Glass

Todd G. Glass
Keene M. O’Connor
WILSON SONSINI GOODRICH & ROSATI, P.C.

Smith Creek Hydro, LLC

FERC ELECTRIC TARIFF, Volume No. 1

1. Availability: Smith Creek Hydro, LLC (“Seller”) makes electric energy and/or capacity and ancillary services available under this FERC Electric Tariff to any purchaser for resale, except as prohibited below.
2. Rates: All sales shall be made at rates established by agreement between purchaser and Seller.
3. Seller Category: Seller is a Category 1 seller, as defined in 18 C.F.R. § 35.36(a), in all regions.
4. Compliance with Commission Regulations: Seller shall comply with the provisions of 18 C.F.R. Part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning Seller’s market-based rate authority, including orders in which the Commission authorizes Seller to engage in affiliate sales under this FERC Electric Tariff or otherwise restricts or limits Seller’s market-based rate authority. Failure to comply with the applicable provisions of 18 C.F.R. Part 35, Subpart H, and with any orders of the Commission concerning Seller’s market-based rate authority, will constitute a violation of this FERC Electric Tariff.
5. Limitations and Exemptions Regarding Market-Based Rate Authority: Seller has received waiver of: Subparts B and C of Part 35, except for sections 35.12(a), 35.13(b), 35.15 and 35.16; Part 41, Part 101, and Part 141, except sections 141.14 and 141.15.; and received blanket approval under Part 34. *Smith Creek Hydro, LLC*, ER16-[____]-000 (2016).
6. Ancillary Services:

California ISO: Seller offers regulation service, spinning reserve service, and non-spinning reserve service to the California Independent System Operator Corporation (“CAISO”) and to others that are self-supplying ancillary services to the CAISO.

Third-party ancillary services: Seller offers Regulation and Frequency Response Service, Reactive Supply and Voltage Control Service, Energy and Generator Imbalance Service, Operating Reserve-Spinning, and Operating Reserve-Supplemental. Sales will not include the following: (1) sales to an RTO or an ISO, *i.e.*, where that entity has no ability to self-supply ancillary services but instead depends on third parties; and (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier. Sales of Operating Reserve-Spinning and Operating Reserve-Supplemental will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except where the Commission has granted authorization. Sales of Regulation and Frequency Response Service and Reactive Supply and Voltage

Control Service will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except at rates not to exceed the buying public utility transmission provider's OATT rate for the same service or where the Commission has granted authorization.

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Smith Creek Hydro, LLC)
) Docket No. ER16-____-000
)

**APPLICATION OF SMITH CREEK HYDRO, LLC
FOR MARKET BASED RATE AUTHORITY AND
GRANTING OF WAIVERS AND BLANKET AUTHORIZATIONS**

Pursuant to Section 205 of the Federal Power Act (“FPA”), 16 U.S.C. § 824d, Rules 205 and 207 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (the “Commission” or “FERC”), 18 C.F.R. § 385.205 and 10 C.F.R. § 385.207, Part 35 of the Commission’s regulations, 18 C.F.R. Part 35, and Commission Order No. 697,¹ Smith Creek Hydro, LLC, a Delaware limited liability company (“Applicant”), hereby submits this application (“Application”) for an order accepting Applicant’s proposed market-based rate tariff (“FERC Electric Tariff, Volume No. 1” or “Tariff”), attached as **Attachment A**. Applicant requests that the Commission issue an order: (1) accepting the Tariff; (2) granting blanket authorization for Applicant to make sales of electric energy, capacity, and ancillary services at market-based rates; (3) granting certain waivers of, and authorizations under, the Commission’s regulations; and (4) determining that Applicant is a Category 1 seller in all regions.

¹ *Market-Based Rates for Wholesale Sales of Elec. Energy, Capacity and Ancillary Servs. by Pub. Utils*, Order No. 697, FERC Stats. & Regs. ¶ 31,252, *order clarifying final rule*, 121 FERC ¶ 61,260 (2007), *order on reh’g and clarif.*, Order No. 697-A, FERC Stats. & Regs ¶ 31,268, *order on reh’g and clarif.*, 124 FERC ¶ 61,055, *order on reh’g and clarif.*, Order No. 697-B, FERC Stats. & Regs. ¶ 31,285 (2008), *order on reh’g and clarif.*, Order No. 697-C, 127 FERC ¶ 61,284 (2009); *order on reh’g and clarif.*, Order No. 697-D, FERC Stats. & Regs. ¶ 31,305 (2010).

I. PROPOSED EFFECTIVE DATE AND REQUEST FOR EXPEDITED CONSIDERATION

Applicant respectfully requests that the Commission permit the Tariff to become effective as soon as possible, but in any event not later than April 1, 2016, which is 55 days after the date of this filing, and further requests that the Commission waive Part 35 of its regulations to the extent necessary to permit an effective date for the Tariff of April 1, 2016.

II. COMMUNICATION

All communications and service related to this Application should be directed to the following persons:

Thom Fischer, Manager*
Smith Creek Hydro, LLC
1800 James Street, Ste. 201
Bellingham, WA 98225
Fax: 360-733-3056
Phone: 360-738-9999
Email: thom@tollhouseenergy.com

Todd G. Glass*
Keene M. O'Connor*
Wilson Sonsini Goodrich & Rosati, P.C.
701 Fifth Avenue, Suite 5100
Seattle, WA 98104
Fax: 206-883-2699
Phone: 206-883-2500
Email: tglass@wsgr.com
kmoconnor@wsgr.com

* The persons denoted by asterisks are designated for service pursuant to 18 C.F.R. § 385.2010.

III. DESCRIPTION OF THE TRANSACTION, APPLICANT, AND RELEVANT AFFILIATES

As required by Order Nos. 697 and 697-A (Appendix B),² the generation and transmission assets of Applicant and its affiliates are set forth in **Attachment B-1** (generation) and **Attachment B-2** (transmission). Below, Applicant provides a description of itself and its affiliates.

A. Transaction

² *Id.*

Applicant is a limited liability company organized under the laws of the State of Delaware. Applicant was formed to acquire, own and operate the 37.8 MW (net) Smith Creek Hydroelectric Facility and associated interconnection equipment located in Boundary County, Idaho (the “Project”). Subject to the receipt of all necessary regulatory approvals, Applicant will acquire the Project from Eugene Water & Electric Board (“EWEB”) pursuant to an Asset Sales Agreement, dated December 1, 2015, with an expected closing date of April 1, 2016 (the “Transaction”).

On January 20, 2016, Applicant and EWEB submitted a Joint Application for Approval of Transfer of License requesting approval from the Commission to transfer EWEB’s license for the Project, as Project No. 8436 (the “License”), to Applicant, pursuant to Section 8 of the FPA.³ Applicant is concurrently herewith filing with the Commission an application seeking authorization for disposition and consolidation of jurisdictional facilities and acquisition of an existing generation facility, pursuant to Section 203 of the FPA, 16 U.S.C. § 824b.⁴ Applicant will also submit to the Commission a Form 556 Certification of Qualifying Facility (“QF”) Status for Small Power Production Facility for the Project (“Self-Certification”). Because the Project is a QF with a capacity of greater than 20 MW, the Project must file both a Self-Certification as well as this Application.⁵

Applicant will sell the entire electrical output of the Project to EWEB for an initial period of three years pursuant to a power purchase agreement that EWEB and Applicant have agreed to enter into in conjunction with the closing of the Transaction. In the future, Applicant intends to

³ *Joint Application for Approval of Transfer of License*, Docket No. P-8436-153 (filed January 20, 2016).

⁴ Application for Authorization for Merger and Consolidation of Jurisdictional Facilities, Acquisition of an Existing Generation Facility, and Request for Expedited Action, Docket No. EC16-_____-000 (filed February 5, 2016).

⁵ *New PURPA Section 210(m) Regulations Applicable to Small Power Production and Cogeneration Facilities*, Order No. 688, 71 FR 64342 (Nov. 1, 2006), FERC Stats. & Regs. ¶ 31,233 (2006).

sell the entire electrical output to an unaffiliated, third-party, long-term off-taker under a power purchase agreement at a price agreed to after arm's length negotiations.

The Project is interconnected to the transmission system (and balancing authority area ("BAA")) operated by Bonneville Power Administration ("BPA"). As set forth in Attachment B-2, the Transaction includes the sale by EWEB and purchase by Applicant of the 30.5 mile, 115 kV transmission line used to interconnect the Project to the existing substation and transmission grid owned and operated by BPA (the "Smith Creek Project Line"). In addition to connecting the Project to the BPA transmission grid, EWEB currently allows Northern Lights, Inc., an Idaho cooperative association ("Northern Lights") to use the Smith Creek Project Line pursuant to a Power Transfer Agreement between EWEB (as successor-in-interest to Smith Falls Hydropower, a Utah general partnership) and Northern Lights, dated January 1, 2000, as amended January 1, 2010 (the "Power Transfer Agreement"). The Power Transfer Agreement permits Northern Lights to utilize the Smith Creek Project Line to transfer power from the BPA Bonners Ferry substation back up to a tie-in point along the Smith Creek Project Line (short of the Project itself). Northern Lights takes its power off the Smith Creek Project Line at this tie-in and distributes the power to a small group of retail customers using distribution lines and other equipment owned by Northern Lights. As part of the Transaction, the Applicant is assuming EWEB's rights and responsibilities under the Power Transfer Agreement for its remaining term, through January 1, 2020.⁶ Under the Power Transfer Agreement, Northern Lights is subject to a demand limit of 3 MW and, to Applicant's knowledge, has never exceeded this limit. Applicant

⁶ In connection with its assumption of the Power Transfer Agreement, Smith Creek Hydro is assuming EWEB's rights and responsibilities under a Lease for Joint Use of Transmission Poles for Distribution Attachments, by and among Northern Lights, Smith Falls Hydropower, and the City of Eugene (acting by and through EWEB), dated as of January 1, 2000.

believes Northern Lights will continue to transmit energy up to but not exceeding this limit over the remaining term of the Power Transfer Agreement.

As a result of this *de minimis* use by Northern Lights, the Smith Creek Project Line is not used solely as a gen-tie line and therefore will be subject to the Commission's jurisdiction once it is owned by Applicant, at and after the closing of the Transaction.⁷

B. Description of Applicant and its Affiliates

Applicant is a joint venture, owned 25% by Smith Creek Management, LLC, a Washington limited liability company ("Smith Creek Management") and 75% by Smith Creek Holdings, Inc., a Washington corporation ("Smith Creek Holdings"). Smith Creek Holdings is a wholly owned subsidiary of JAVA Hydro Electric, Inc., a Washington corporation ("JAVA"), which is in turn a wholly owned subsidiary of JAVA Holdings Ltd., a company formed under the laws of Alberta, Canada ("JAVA Holdings"). JAVA Holdings is wholly-owned by 1428802 Alberta Ltd., a company formed under the laws of Alberta, Canada. 1428802 Alberta Ltd. is wholly-owned by the Budzinski Family Trust of which Victor Budzinski⁸ is the sole trustee. Smith Creek Management is majority-owned and controlled by Thom Fischer, owning 90%, with the minority owner, Steve Marmon, owning the remaining 10%.

Thom Fischer is the sole owner of Tollhouse Energy Company, a Washington corporation ("Tollhouse"). Tollhouse is a private, Washington-based corporation engaged in the development, ownership, and operation of green, environmentally friendly, renewable energy projects. Currently, Tollhouse is developing projects within the states of Washington and

⁷ As it has been (and will be, prior to the closing of the Transaction) owned and operated by municipal utility EWEB, the Smith Creek Project Line is currently exempt from the Commission's jurisdiction pursuant to 16 U.S.C. § 824(f).

⁸ Mr. Budzinski is the Chief Executive Officer of Valard Construction Ltd., a utility contractor providing engineering, procurement, construction, and maintenance services, and is a shareholder of publicly-traded energy companies, in each case holding less than 10% of the outstanding publicly-traded shares of such companies.

Montana. The following is a list of examples of the hydroelectric projects developed, redeveloped, or otherwise operated by Tollhouse and its affiliates:

- Black Canyon Hydro, LLC. Black Canyon Hydro, LLC (“Black Canyon”), holds a FERC preliminary permit for the Black Canyon Hydroelectric Project (“Black Canyon Project”).⁹ Black Canyon is owned 33% by Tollhouse, 33% by Thom Fischer as an individual and 33% by Steve Marmon as an individual. The Black Canyon Project has a nameplate capacity of 25 MW and is located in the Puget Sound Energy (“PSE”) BAA.
- Gibson Dam Hydroelectric Company, LLC. Gibson Dam Hydroelectric Company, LLC (“Gibson”), holds a FERC original license for the Gibson Dam Hydroelectric Project (“Gibson Dam Project”).¹⁰ Gibson is owned 50% by Tollhouse and 50% by Greenfield Irrigation District. The Gibson Dam Project has a nameplate capacity of 15 MW and is located in the Western Area Power Administration BAA. Gibson is in the process of obtaining approvals from various government agencies for the construction of the Gibson Dam Project and related transmission infrastructure. Gibson has not begun construction on the Gibson Dam Project and at this point there is no definitive timeline to begin or complete construction.
- Electron Hydro, LLC. Electron Hydro, LLC (“Electron Hydro”) owns and operates the Electron Hydroelectric Project (the “Electron Hydro Project”). Electron Hydro is owned 25% by Electron Management, LLC (“Electron

⁹ *Order Issuing Preliminary Permit and Granting Priority to File License Application*, 137 FERC ¶ 62,049 (2011).

¹⁰ *Order Issuing Original License*, 138 FERC ¶ 62,019 (2012).

Management”) and 75% by Electron Holdings, Inc. (“Electron Holdings”).

Electron Holdings is a wholly owned subsidiary of JAVA, which, as noted above, is in turn a wholly owned subsidiary of JAVA Holdings. Electron Management is 90% owned by Thom Fischer and the remaining 10% is owned by Steve Marmon. The Electron Hydro Project has a nameplate capacity of 25.8 megawatts and is located in Pierce County, Washington. The Commission has acknowledged that Electron Hydro Project is exempt from the Commission’s hydropower licensing jurisdiction.¹¹

- Black Creek Hydro, Inc. Black Creek Hydro, Inc. (“Black Creek”) owns and operates the 3.8 MW Black Creek Hydroelectric Project (the “Black Creek Project”). Black Creek is wholly owned by Valtec Power, LLC. Valtec Power, LLC is 45% owned by Tollhouse and 55% owned by JAVA Holdings. The Black Creek Project is a small power production QF in King County, Washington, in the PSE BAA.

JAVA Holdings is an investment company that, in addition to its ownership of JAVA, holds non-controlling interests in public securities and interest bearing instruments, a real estate company in Canada, and less than 10% interest in Syntaris Power Corporation Ltd, an independent power producer in Canada that currently has no operating facilities. Except as described herein, none of Applicant or any of its affiliates is engaged in any other business in the energy industry and none of Applicant, any of its affiliates, or any individual owners thereof, sits

¹¹ See *Order Granting Market-Based Rate Authorization and Request for Waivers*, 144 FERC ¶ 61,161 (2013) n 21 citing *Puget Sound Power & Light Co. v. Federal Power Commission*, 557 F.2d 1311, 1316 (9th Cir. 1977) (finding that because the Federal Power Commission’s 1935 authorizing statute was not retroactive, the Project, built in 1904, was exempt from the Commission’s licensing jurisdiction).

on the board of any other energy companies and none holds interests in any other energy related companies.

Except for Black Creek and Electron Hydro, none of Applicant or any of its affiliates owns or controls any electric generation facilities currently in operation in the United States. None of Applicant's affiliates owns or controls interests in transmission or distribution facilities in the United States, except for the limited equipment necessary to interconnect a generating facility to the transmission grid. Applicant does not own or control interests in such transmission or distribution facilities except, upon closing of the Transaction, Applicant will own the Smith Creek Project Line. As noted above, but for its *de minimis* use by Northern Lights, the Smith Creek Line would constitute only the limited gen-tie equipment necessary to interconnect the Project to the transmission grid. Moreover, none of Applicant or any of its affiliates owns or controls any inputs to electric power production, as defined in Section 35.36 of the Commission's regulations, in the United States. Finally, none of Applicant or any of its affiliates is a franchised public utility in the United States.

Applicant also respectfully requests authorization to sell the ancillary services the Commission has authorized utilities with market-based rate authority to sell in the markets administered by the California Independent System Operator Corporation ("CAISO").¹² In accordance with the Commission's requirements, Applicant has listed in its Tariff the applicable provisions including specific ancillary services it may sell in such markets. Applicant's proposed Tariff contains the standard applicable tariff provisions regarding the sales of ancillary services by a third-party supplier pursuant to the Commission's policy, as detailed in Order Nos.

¹² See *AES Redondo Beach, L.L.C.*, 83 FERC ¶ 61,358, *order on reh'g*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208, *order on reh'g*, 88 FERC ¶ 61,096 (1999), *order on reh'g and clarification* 90 FERC ¶ 61,036 (2000) (granting market-based rate authorization for specified ancillary services in markets administered by the California ISO).

697 and 697-A. The proposed Tariff likewise includes the required restrictions on sales of ancillary services by a third-party supplier.¹³

IV. REQUEST FOR BLANKET AUTHORIZATION TO PURCHASE AND RESELL ENERGY, CAPACITY, AND ANCILLARY SERVICES AT NEGOTIATED, MARKET BASED RATES

A. Authorization Requested

Applicant requests authorization to sell energy, capacity, and related services and products (including ancillary services) at market-based rates pursuant to the FERC Electric Tariff, Volume No. 1 to any purchaser that is not a franchised public utility affiliate.¹⁴ The Commission has granted market-based rate authority to similarly situated power marketers when it has determined that the marketer and its affiliates: (1) do not have, or have adequately mitigated, market power in both generation and transmission; (2) cannot engage in anticompetitive practices through preferential affiliate transactions or reciprocal dealing; and (3) cannot otherwise erect barriers to market entry by competing suppliers through the control of inputs to electric power production.¹⁵ Under the approach adopted in Order No. 697, which Applicant follows here, the Commission will grant market-based rate authority to a seller that demonstrates that it lacks horizontal and vertical market power (including a lack of barriers to entry) and will not engage in affiliate abuse.

B. No Horizontal Market Power

There is a rebuttable presumption that a seller lacks horizontal market power if it passes two indicative market power screens: the Pivotal Supplier Analysis and the Market Share

¹³ Order No. 697 at P 1061.

¹⁴ 18 C.F.R. § 35.39 requires separate Commission authorization under Section 205 of the FPA for the sales of energy or capacity to a franchised public utility affiliate. Applicant currently is not affiliated with any public utility with a franchised electric service territory.

¹⁵ See Order No. 697, *supra* note 1; see also *Heartland Energy Services, Inc.*, 68 FERC ¶ 61,223, at ¶ 62,060-63 (1994); *Enron Power Enterprise Corp.*, 52 FERC ¶ 61,193, at 61,708 (1990); *FirstEnergy Servs., Inc.*, 94 FERC ¶ 61,052 (2001).

Analysis screens.¹⁶ The Market Share Analysis determines whether the applicant and its affiliates have a combined market share of 20% or less in each season in the geographic market.¹⁷ The Pivotal Supplier Analysis determines whether there is sufficient generation capacity owned by entities other than the applicant and its affiliates in the geographic market to meet peak demand without the applicant and its affiliates' assets.¹⁸ Under each analysis, the Commission examines all of the generation owned or controlled by an applicant and its affiliates in the relevant market. As demonstrated below Applicant lacks horizontal market power in any relevant market.

Applicant does not own or control any wholesale power generation facilities in North America other than the proposed purchase of the Project. As discussed above, the only other power generating facilities owned by any affiliates of Applicant are the Black Creek Project and the Electron Hydro Project, which are both located in the PSE BAA. The Project, however, will be located in the BPA BAA. For purposes of both screens, the Commission has stated that the relevant market area is the seller's BAA, or the regional transmission operator/independent system operator market, as applicable, where the seller's generation is physically located.¹⁹ The Project is located in the BPA BAA, thus the BPA balancing authority is the relevant market for the Pivotal Supplier and Market Screen analyses. The Project will be the only generation or transmission asset owned by Applicant or any of its affiliates in the BPA BAA.

The Commission consistently grants market-based rate authority based on an applicant's representation that the output of its facility is fully committed.²⁰ Even though these projects are

¹⁶ 18 C.F.R. § 35.37(c)(1).

¹⁷ See Order No. 697-A, at P 37.

¹⁸ See 18 C.F.R. Part 35, Subpart H, Appendix A.

¹⁹ Order No. 697 at PP 215, 231; see also *AEP Power Mktg., Inc.*, 107 FERC ¶ 61,018 at P 41, *order on reh'g*, 108 FERC ¶ 61,026 at P 31 (2004).

²⁰ See e.g., *Campbell County Wind Farm, LLC*, Docket No. ER15-2653 (Oct. 21, 2015) (unpublished letter order). See also *Nevada Sun-Peak Limited Partnership, et al.*, 97 FERC ¶ 62,017 (2001); *American Ref-Fuel Company of Essex County, et al.*, 94 FERC ¶ 62,113 (2001). See also *Morgan Stanley Capital Group, Inc.*, 69 FERC

in a different BAA, Applicant notes that the entire capacity for both the Electron Hydro Project and the Black Creek Project is fully committed under long-term power purchase agreements for run-of-river power delivery to PSE. Thus, none of Applicant's affiliates have or will have any uncommitted capacity.

In the near- to middle-term, Applicant will sell the full output produced by the Project to EWEB for an initial period of three (3) years. Applicant intends to enter into a long-term contract for the sale of the full output produced by the Project to a separate, non-affiliated purchaser, pursuant to arm's length negotiations and an agreed market-based price. Thus, in the near- to middle-term, Applicant will not have any uncommitted capacity, and Applicant intends not to control any uncommitted capacity on a long-term basis by entering into a new long-term agreement that it will negotiate with an unaffiliated third-party purchaser.

As noted above, the total capacity for the Project is 37.8 MW, and the Project is the only generation facility Applicant or its affiliates own in the BPA BAA. Even if the full amount of Applicant's and its affiliates' generation capacity was uncommitted, this 37.8 MW represents substantially less than the net uncommitted supply in the BPA BAA and further substantially less than 20% of the uncommitted capacity of the BPA BAA.²¹ Because the generation owned by

¶ 61,175 (1994), *citing to Enron Power Marketing, Inc.*, 65 FERC ¶ 61,305 (1993) (committed power does not confer generation market power upon an applicant for market-based rate authority). Indeed, the indicative screens adopted by the Commission to assess generation market power only analyze a seller's uncommitted capacity. *See AEP Power Marketing, Inc., et al.*, 107 FERC ¶ 61,018 at P 71 (“[w]e will adopt an uncommitted pivotal supplier analysis that will evaluate the potential of an applicant (including its affiliates) to exercise market power based on the control area market's annual peak demand. We will also adopt an uncommitted market share analysis that will seasonally evaluate the market share of the uncommitted capacity of an applicant and its affiliates”); *id.* at PP 95 and 100. *See also Silver State Solar Power North, LLC*, 139 FERC ¶ 61,088, at PP 11–13 (2012) (accepting a marketbased rate filing without requiring applicant to complete the Indicative Screens where the output of the generating facility was fully committed under long-term agreement); *see also High Lonesome Mesa, LLC*, Docket No. ER09-712-000 (Apr. 1, 2009) (unpublished letter order) (same); *Palouse Wind, LLC*, Docket No. ER12-1308-000 (May 8, 2012) (unpublished letter order) (same).

²¹ Net uncommitted supply in the BPA BAA is calculated at 18,661 MW (assuming an imported power amount of 1,165 MW that would not apply to Applicant), *see* Exhibit JRS-5 of Attachment A to December 31, 2013 Updated Market Power Analysis for the Northwest Region, Docket ER10-3297-003 (as included in the Amendment

Applicant and its affiliates represents less than the net uncommitted supply and less than 20% of the uncommitted capacity for the BPA BAA, Applicant would meet both indicative screen tests even if the full amount of its and its affiliates' generation was considered uncommitted.

C. No Vertical Market Power

Pursuant to the Commission's policies and consistent with 18 C.F.R. § 35.37(d), Applicant herein demonstrates that it lacks vertical market power. Applicant has not erected barriers to entry into any relevant market and will not erect barriers to entry into any relevant market. First, none of Applicant's affiliates own or control any commercial electric transmission and distribution facilities in North America other than the limited equipment necessary to interconnect their individual generating facilities to the transmission grid. Applicant will own only the Smith Creek Project Line, which is used primarily to interconnect the Project to the BPA substation but, as noted above, is also used by Northern Lights on a *de minimis* basis to enable Northern Lights to serve a limited number of Northern Lights' retail customers. As discussed in more detail in Part VI.A. below, Applicant is requesting a waiver of the open access transmission tariff requirements with respect to the Smith Creek Project Line because of this *de minimis* use by Northern Lights.

Accordingly, subject to approval of the waivers requested below, Applicant lacks transmission market power and as described below, will not bar entry to the market by virtue of transmission market power. Second, consistent with 18 C.F.R. § 35.37, Applicant also lacks vertical market power because none of Applicant, or any affiliate owns or controls intrastate natural gas transportation, storage or distribution facilities; any sites for the construction of generation capacity, sources of coal supplies and the transportation of coal supplies; or other

and Supplement filed July 25, 2014); uncommitted capacity in the BPA BAA ranges from 15,240 to 15,817 MW, *see Id.* at Exhibit JRS-6 to Attachment A.

essential resources or inputs that could be used to restrict market entry by competing power suppliers in North America. Accordingly, Applicant lacks vertical market power.

D. Ancillary Services

Applicant requests authority to sell specified ancillary services that the Commission has authorized entities with market-based rate authority to sell in the organized markets operated by CAISO.²² In accordance with Order No. 697, Applicant has listed in FERC Electric Tariff, Volume No. 1 the Commission's standard tariff provisions for the proposed sale of ancillary services and the markets where Applicant will be authorized to offer such products. Applicant agrees to be bound by the relevant conditions that the Commission has imposed on such market-based sales of ancillary services.

V. REPORTING REQUIREMENTS

The Applicant will comply with the Commission's reporting and updating requirements, both existing requirements and new requirements, when they become effective, including:

1. the Applicant will submit Electric Quarterly Reports regarding its electricity transactions or such other reports or documents as may be required by the Commission for other entities with market-based rates consistent with the Commission's procedures. The Applicant understands that it must file its first Electric Quarterly Report no later than 30 days after the end of the first quarter that its Tariff is in effect. The Applicant agrees to submit such reports even if no transactions occurred during a particular calendar quarter;
2. the Applicant, consistent with Commission requirements, will report to the Commission within 30 days after any change in status that would reflect a departure from the characteristics relied upon by the Commission in granting the Applicant's request for market-based rate authority;

²² With respect to sales of ancillary services in the markets operated by CAISO that the Commission has previously authorized, Applicant relies on the studies submitted and accepted by the Commission. For CAISO, *see, e.g., AES Redondo Beach, L.L.C.*, 83 FERC ¶ 61,358, *order on reh'g*, 85 FERC ¶ 61,123 (1998), *order on reh'g*, 87 FERC ¶ 61,208, *order on reh'g*, 88 FERC ¶ 61,096 (1999), *order on reh'g and clarification* 90 FERC ¶ 61,036 (2000) (granting market-based rate authorization for specified ancillary services in markets administered by the CAISO).

3. the Applicant will also submit quarterly reports providing information on site control activities pursuant to Order Nos. 697-C and 697-D if sites have been acquired during the previous quarter;²³ and
4. Applicant will comply fully with the Commission's market behavior rules, as codified at 18 C.F.R. § 35.41 and as amended by Order Nos. 768 and 768-A. In accordance with such rules, the Applicant hereby notifies the Commission that, as of the effective date of its Tariff, the Applicant will not report transactions to publishers of electricity or natural gas price indices. If, at any point, the Applicant begins to report price data to any index publishers, the Applicant will notify the Commission as described in the market behavior rules.

VI. REQUEST FOR WAIVERS AND ADDITIONAL BLANKET AUTHORITY

A. Request for Waiver of Open Access Transmission Tariff Requirements for the Smith Creek Project Line

Applicant respectfully requests a waiver of potentially applicable requirements of Order Nos. 888, 889, and 890 with respect to the Smith Creek Project Line. Specifically, Applicant requests a waiver of the requirements of Order Nos. 888 and 890 to file an open access transmission tariff ("OATT"), and the requirement of Order No. 889 to establish an Open-Access Same Time Information Service ("OASIS"). The Commission has consistently granted waivers of the Order Nos. 888 and 890 requirements to public utilities that can show that they own, operate, or control only limited and discrete transmission facilities, i.e., facilities that do not form an integrated grid, until such time as the public utility receives a request for transmission service.²⁴ The Commission has also granted waivers of Order No. 889 requirements to a public utility: (1) if the applicant owns, operates, or controls only limited and discrete transmission facilities (rather than an integrated transmission grid); or (2) if the applicant is a small public utility that owns, operates, or controls an integrated transmission grid, unless it is a member of a

²³ Order 697-C at P18; Order 697-D at P 21 ("[I]f no sites have been acquired during a quarter, then a seller should not file a report for that quarter").

²⁴ See, e.g., *Black Creek Hydro, Inc., et al.*, 77 FERC ¶ 61,232, 61,941 (1996); *Bishop Hill Interconnection LLC*, 138 FERC ¶ 61,159 at P 27 (2012).

tight power pool, or other circumstances are present that indicate that a waiver would not be justified.²⁵

As noted above, but for the Power Transfer Agreement and its allowance for *de minimis* use of the Smith Creek Project Line by Northern Lights, the Smith Creek Project Line would constitute only the limited equipment necessary to interconnect the Project to the transmission grid. The use of the Smith Creek Project Line by Northern Lights under the Power Transfer Agreement causes the Smith Creek Project Line not to be used solely for the purpose of interconnecting the Project to the BPA grid; accordingly, Applicant cannot rely on the blanket waivers provided by the Commission in Order No. 807.²⁶ Applicant thus seeks a waiver from the Commission pursuant to its authority under 18 C.F.R. § 35.28(d) because, despite the Power Transfer Agreement, the Smith Creek Project Line still constitutes a limited and discrete transmission asset when compared to transmission assets in the geographic area.

As discussed in more detail in Applicant's Section 203 filing, the Smith Creek Project Line has previously been outside the scope of the Commission's jurisdiction because it was owned and operated by EWEB, a municipality that is exempt from Part II of the FPA.²⁷ By assuming the obligations under the Power Transfer Agreement with respect to Northern Lights' *de minimis* use of the Smith Creek Project Line, Applicant will simply continue a relationship and pattern of use that has been in place for the more than fifteen-year period that the Smith Creek Project Line has not been subject to the Commission's jurisdiction. To Applicant's

²⁵ See *Hardee Power Partners Ltd.*, 125 FERC ¶ 61,036 at PP 19-21 (2008).

²⁶ See *Open Access and Priority Rights on Interconnection Customer's Interconnection Facilities*, Order No. 807, FERC Stats. & Regs. ¶31,367 at P 57 (2015) ("Order No. 807") (outlining criteria for waiver of the OATT requirements in instances whether applicants use transmission lines for the limited purpose of interconnecting their facilities to the larger transmission grid).

²⁷ See Application for Authorization for Merger and Consolidation of Jurisdictional Facilities, Acquisition of an Existing Generation Facility, and Request for Expedited Action, Docket No. EC16-_____-000 (filed February 5, 2016). See also 16 U.S.C. § 824(f).

knowledge, Northern Lights is the only entity in the area that has any need for or interest in using the Smith Creek Project Line (other than the Applicant); Applicant has no knowledge of (and certainly no request from) any third party claiming an interest in utilizing the Smith Creek Project Line.

Furthermore, complying with the OATT requirements at this time and in light of these circumstances would be unduly burdensome to Applicant and the other parties involved in the transaction, in particular Northern Lights. The Smith Creek Project Line is the only asset that would require compliance with OATT requirements, and that only in respect of the *de minimis* use by Northern Lights for the limited period remaining under the Power Transfer Agreement. In addition to the burden on Applicant of preparing and seeking approval of an OATT for this limited use and time period, Northern Lights would be harmed by having its expectations of continued use of the Smith Creek Project Line under the Power Transfer Agreement for this remaining period upended. Applicant believes instead that its continued performance under the Power Transfer Agreement is consistent with the Commission's goals because if Applicant is unable to continue its performance under the Power Transfer Agreement, Northern Lights will not know the terms on which Applicant will be able to allow Northern Lights to continue to use the Smith Creek Project Line (including the charges Northern Lights will have to bear for such use) until Applicant has prepared and received approval of an OATT. Finally, there are no third parties other than Northern Lights that currently have an interest in use of the Smith Creek Project Line, and thus any waiver granted by the Commission would not result in undesirable consequences to third parties.

Applicant seeks Commission approval to perform under the Power Transfer Agreement for the four-year remainder of its term. In the event Applicant enters into any replacement

agreement at the end of term, Applicant will seek appropriate Commission approval or waiver under the applicable requirements at that time.

B. Request for Additional Waivers

Applicant requests waiver from the following Commission Regulations, which are traditionally granted to other power marketers. Specifically, Applicant requests:

- Waiver of the reporting requirements of Subparts B and C of Part 35, regarding the filing of rate schedules, except for the requirements set forth in 18 C.F.R. §§ 35.12(a), 35.13(b), 35.15, and 35.16;
- Waiver of the requirements of Part 41, regarding accounts, records, and memoranda;
- Waiver of the requirements of Part 101, regarding the uniform system of accounts;
- Waiver of the requirements of Part 141, regarding statements and reports, except for the requirements of 18 C.F.R. §§ 141.14 and 141.15;
- Blanket authorization under Section 204 of the FPA and Part 34 of the Commission's regulations for future issuances of securities and assumptions of obligations and liabilities; and
- Waiver of any other Commission requirement and granting of any other authorizations that may be necessary for Applicant's Tariff to be made effective as required in this Application.

VII. SELLER CATEGORY

Pursuant to the definition of Category 1 and 2 sellers in 18 CFR 35.36, Applicant submits that it is a Category 1 seller in all regions. As shown in **Attachment B**, upon the closing of the Transaction, Applicant will own generation totaling only 37.8 MW in the Northwest region, and is affiliated with entities owning an additional 29.6 MW in the aggregate in the same region.

Except with respect to the Smith Creek Project Line as described above, Applicant does not own, operate or control interests in transmission or distribution facilities in the United States, other than the limited equipment necessary to connect individual generating facilities to the transmission grid. Applicant's affiliates do not own, operate or control interests in transmission

or distribution facilities in the United States (including, for the avoidance of doubt, the Northwest region), other than the limited equipment necessary to connect individual generating facilities to the transmission grid. In each of the regions other than the Northwest region, neither Applicant nor its affiliates own or control any generation or transmission assets. Additionally, Applicant is not affiliated with a franchise public utility in any region (including, for the avoidance of doubt, the Northwest region) and does not raise any other vertical market power issues.

As demonstrated above, Applicant meets the requirements for Category 1 status in all regions. Therefore, Applicant respectfully requests that the Commission designate Applicant as a Category 1 seller.

VIII. CONCLUSION

WHEREFORE, Applicant requests the Commission to issue an order accepting the FERC Electric Tariff, Volume No. 1 and granting the waivers and authorizations requested in this Application.

Respectfully Submitted,

WILSON SONSINI GOODRICH & ROSATI, PC

/s/ Todd G. Glass

Todd G. Glass

Keene M. O'Connor

Wilson Sonsini Goodrich & Rosati, P.C.

701 Fifth Avenue, Ste. 5100

Seattle, WA 98104

Phone: 1-206-883-2571

Fax: 1-206-883-2699

Email: tglass@wsgr.com

kmoconnor@wsgr.com

Counsel for Smith Creek Hydro, LLC

Dated: February 5, 2016

Attachment A

Smith Creek Hydro, LLC

FERC ELECTRIC TARIFF, Volume No. 1

1. Availability: Smith Creek Hydro, LLC (“Seller”) makes electric energy and/or capacity and ancillary services available under this FERC Electric Tariff to any purchaser for resale, except as prohibited below.
2. Rates: All sales shall be made at rates established by agreement between purchaser and Seller.
3. Seller Category: Seller is a Category 1 seller, as defined in 18 C.F.R. § 35.36(a), in all regions.
4. Compliance with Commission Regulations: Seller shall comply with the provisions of 18 C.F.R. Part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning Seller’s market-based rate authority, including orders in which the Commission authorizes Seller to engage in affiliate sales under this FERC Electric Tariff or otherwise restricts or limits Seller’s market-based rate authority. Failure to comply with the applicable provisions of 18 C.F.R. Part 35, Subpart H, and with any orders of the Commission concerning Seller’s market-based rate authority, will constitute a violation of this FERC Electric Tariff.
5. Limitations and Exemptions Regarding Market-Based Rate Authority: Seller has received waiver of: Subparts B and C of Part 35, except for sections 35.12(a), 35.13(b), 35.15 and 35.16; Part 41, Part 101, and Part 141, except sections 141.14 and 141.15.; and received blanket approval under Part 34. *Smith Creek Hydro, LLC*, ER16-[____]-000 (2016).
6. Ancillary Services:

California ISO: Seller offers regulation service, spinning reserve service, and non-spinning reserve service to the California Independent System Operator Corporation (“CAISO”) and to others that are self-supplying ancillary services to the CAISO.

Third-party ancillary services: Seller offers Regulation and Frequency Response Service, Reactive Supply and Voltage Control Service, Energy and Generator Imbalance Service, Operating Reserve-Spinning, and Operating Reserve-Supplemental. Sales will not include the following: (1) sales to an RTO or an ISO, *i.e.*, where that entity has no ability to self-supply ancillary services but instead depends on third parties; and (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier. Sales of Operating Reserve-Spinning and Operating Reserve-Supplemental will not include sales to a public utility that is purchasing ancillary

services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except where the Commission has granted authorization. Sales of Regulation and Frequency Response Service and Reactive Supply and Voltage Control Service will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except at rates not to exceed the buying public utility transmission provider's OATT rate for the same service or where the Commission has granted authorization.

Attachment B-1

Market-Based Rate Authority and Generation Assets

Filing Entity and its Energy Affiliates	Docket where MBR Authority was Granted	Generation Name	Owned By	Controlled By	Date Control Transferred	Balancing Authority Area	Geographic Region	In-Service Date	Nameplate and/or Seasonal Rating
Smith Creek Hydro, LLC	[TBD]	Smith Creek Hydroelectric Project	Smith Creek Hydro, LLC (pending approval of purchase from EWEB)	Smith Creek Hydro, LLC	[TBD]	BPA	Northwest	April, 1990	37.8 MW (Nameplate)
Electron Hydro, LLC	Docket No. ER13-1646-001, <i>Order Granting Market-Based Rate Authorization and Request for Waivers</i> , 144 FERC ¶ 61,161 (2013).	Electron Hydroelectric Project	Electron Hydro, LLC	Electron Hydro, LLC	November 14, 2014	Puget Sound Energy	Northwest	1904	25.8 MW (Nameplate)
Black Creek Hydro, Inc.	N/A as a small power production QF (<20 MW).	Black Creek Hydroelectric Project	Black Creek Hydro, Inc.	Black Creek Hydro, Inc.	January 15, 2010	Puget Sound Energy	Northwest	May 1994	3.8 MW (Nameplate)

Attachment B-2

Electric Transmission Assets, Natural Gas Pipelines and/or Gas Storage Facilities

Filing Entity and its Energy Affiliates	Asset Name	Owned By	Controlled By	Date Control Transferred	Balancing Authority Area	Geographic Region	In-Service Date	Size
Smith Creek Hydro, LLC	Smith Creek Project Line	Smith Creek Hydro, LLC (pending approval of purchase from EWEB)	Smith Creek Hydro, LLC	[TBD]	BPA	Northwest	April 1990	30.5 mile, 115 kV line

FERC rendition of the electronically filed tariff records in Docket No. ER16-00904-000

Filing Data:

CID: C005130

Filing Title: Application for Market Based Rate Authority

Company Filing Identifier: 612

Type of Filing Code: 400

Associated Filing Identifier:

Tariff Title: Market Base Rate

Tariff ID: 834

Payment Confirmation:

Suspension Motion:

Tariff Record Data:

Record Content Description, Tariff Record Title, Record Version Number, Option Code:

FERC Electric Tariff, Market Based Rate, 0.0.0, A

Record Narrative Name:

Tariff Record ID: 1

Tariff Record Collation Value: 1000000 Tariff Record Parent Identifier: 0

Proposed Date: 2016-04-01

Priority Order: 500

Record Change Type: NEW

Record Content Type: 1

Associated Filing Identifier:

Smith Creek Hydro, LLC

FERC ELECTRIC TARIFF, Volume No. 1

1. Availability: Smith Creek Hydro, LLC (“Seller”) makes electric energy and/or capacity and ancillary services available under this FERC Electric Tariff to any purchaser for resale, except as prohibited below.
2. Rates: All sales shall be made at rates established by agreement between purchaser and Seller.
3. Seller Category: Seller is a Category 1 seller, as defined in 18 C.F.R. § 35.36(a), in all regions.
4. Compliance with Commission Regulations: Seller shall comply with the provisions of 18 C.F.R. Part 35, Subpart H, as applicable, and with any conditions the Commission imposes in its orders concerning Seller’s market-based rate authority, including orders in which the Commission authorizes Seller to engage in affiliate sales under this FERC Electric Tariff or otherwise restricts or limits Seller’s market-based rate authority. Failure to comply with the applicable provisions of 18 C.F.R. Part 35, Subpart H, and with any orders of the Commission concerning Seller’s market-based rate authority, will constitute a violation of this FERC Electric Tariff.
5. Limitations and Exemptions Regarding Market-Based Rate Authority: Seller has received waiver of: Subparts B and C of Part 35, except for sections 35.12(a), 35.13(b), 35.15 and 35.16; Part 41, Part 101, and Part 141, except sections 141.14 and 141.15.; and received blanket approval under Part 34. *Smith Creek Hydro, LLC*, ER16-[____]-000 (2016).
6. Ancillary Services:

California ISO: Seller offers regulation service, spinning reserve service, and non-spinning reserve service to the California Independent System Operator Corporation (“CAISO”) and to others that are self-supplying ancillary services to the CAISO.

Third-party ancillary services: Seller offers Regulation and Frequency Response Service, Reactive Supply and Voltage Control Service, Energy and Generator Imbalance Service, Operating Reserve-Spinning, and Operating Reserve-Supplemental. Sales will not include the following: (1) sales to an RTO or an ISO, *i.e.*, where that entity has no ability to self-supply ancillary services but instead depends on third parties; and (2) sales to a traditional, franchised public utility affiliated with the third-party supplier, or sales where the underlying transmission service is on the system of the public utility affiliated with the third-party supplier. Sales of Operating Reserve-Spinning and Operating Reserve-Supplemental will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except where the Commission has granted authorization. Sales of Regulation and Frequency Response Service and Reactive Supply and Voltage Control Service will not include sales to a public utility that is purchasing ancillary services to satisfy its own open access transmission tariff requirements to offer ancillary services to its own customers, except at rates not to exceed the buying public utility transmission provider’s OATT rate for the same service or where the Commission has granted authorization.

Document Content(s)

612-1c56e878-6b0e-4204-a317-2a9fa6fd824b.DOCX.....1-1

612-0ff59d7c-2662-41c9-abf9-5492c12f2ec1.DOCX.....2-3

612-1053a09e-d092-4717-85a5-f8b4627b300e.DOCX.....4-25

FERC GENERATED TARIFF FILING.RTF.....26-27