October 1, 2015

Ms. Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
Washington, D.C.

In re: Project No. 5-098, Confederated Salish and Kootenai Tribes; Energy Keepers, Incorporated

Dear Secretary Bose:

For filing, please find the Request for Rehearing of the Montana Public Service Commission in the above-entitled proceeding. The parties have also been provided with a copy of this filing, as indicated in the attached Certificate of Service. Should you have any questions, please contact me at (406) 444-6376.

Sincerely,

/s/ Justin Kraske

Justin Kraske
Chief Legal Counsel
Montana Public Service Commission

Enclosure

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

Confederated Salish and Kootenai Tribes
Energy Keepers, Incorporated

Project No. 5-098

REQUEST FOR REHEARING OF THE MONTANA PUBLIC SERVICE COMMISSION

INTRODUCTION AND SUMMARY

The Montana Public Service Commission ("MPSC") is the regulatory body of the State of Montana having jurisdiction over "public utilities," operating in the State of Montana pursuant to Title 69 of the Montana Code Annotated. The MPSC is a "state commission," as that term is defined in 18 C.F.R. § 1.101(k) and within the meaning of Rule 214(a)(2) of the Rules of Practice and Procedure. Therefore the MPSC previously intervened and submitted comments in this proceeding.

On April 14, 2015, the Confederated Salish and Kootenai Tribes ("CSKT") and Energy Keepers, Incorporated ("Energy Keepers" or "EKI") filed an application for partial transfer of license and co-licensee status of the Kerr Hydroelectric Project, FERC No. 5, located on the Flathead River in Lake County, Montana ("Application") with the Federal Energy Regulatory Commission ("Commission"). NorthWestern Energy ("NorthWestern") specially joined the Application. On April 28, 2015, the Commission issued a Notice of Application for Partial Transfer of License and Co-licensee Status and Soliciting Comments, Motions to Intervene, and Protests ("Notice"). The deadline for filing comments and motions to intervene was May 28, 2015. Timely interventions and comments were filed by the MPSC, the Montana Land and Water Alliance, Inc., the Flathead, Mission, and Jocko Valley Irrigation Districts ("Districts"),

the Joint Board of those Districts, and Conservation District Supervisor Verdell Jackson and State Senator Bob Keenan. The Commission issued its Order Approving Partial Transfer of License to Energy Keepers on September 1, 2015 ("Order"). The deadline to request rehearing of the Commission's Order is October 1, 2015.

REQUEST FOR REHEARING

I. STATEMENT OF ISSUES AND SPECIFICATION OF ERRORS

Pursuant to Rule 713(c)(1),[1] the MPSC submits the following statement of issues and specification of errors.

1. The Commission erred by not setting a hearing to determine if the transfer of the license for the Kerr project is in the public interest consistent with Section 8 of the Federal Power Act ("FPA")[2].
2. The Commission erred by not scheduling a hearing as there are issues of material fact about the lack of financial transparency of Energy Keepers and therefore whether the public interest standard is met pursuant to Section 8 of the FPA.

II. DISCUSSION

The MPSC respectfully requests the Commission grant rehearing and/or reconsideration of the Order Approving Partial Transfer of License to Energy Keepers.

A. The Commission erred by not setting a hearing to determine if the transfer of the license for the Kerr project is in the public interest consistent with Section 8 of the FPA.

The Commission's failure to set a hearing based on the request of the majority of the intervenors resulted in inadequate findings on the issue of whether adding Energy Keepers as a co-licensee is in the public interest. The MPSC, in its written comments, strongly encouraged

[1] 18 C.F.R. § 385.713(c)(1).
[2] 16 U.S.C. § 801 (2012).

the Commission to provide further administrative process and an opportunity for public input by way of a public hearing in Montana prior to the Commission reaching a final determination on this important decision impacting Montanans. The MPSC encouraged the Commission to take its time to review the Application, provide sufficient administrative process, and an opportunity for public hearing prior to making a decision on whether the public interest requires approval of the Application.

The MPSC noted in its comments that the only opportunity for public input on the conveyance of the Kerr project to CSKT occurred three decades ago during the 1985 Commission relicensing proceeding. The citizens impacted at that time may no longer be alive or may have subsequently moved out of the area. New residents have moved to the area, new businesses have been created, and a completely new set of citizens have interest in this proceeding. Montana residents have concerns that the original intent involving power production and irrigation from the Kerr project is followed with the license transfer and remains consistent with the public interest. Montanans demand an open and transparent public process from their state institutions and expect the same from a federal government agency, especially for a vitally important hydroelectric facility in the state. The failure to schedule a hearing unfairly denied due process to the MPSC, other Montana entities, and Montana citizens who have questions and concerns about whether adding EKI as a co-licensee is in the public interest and how this transfer will impact them.

Hydroelectric licenses may only be transferred with Commission approval. A hydroelectric license transfer is contingent upon: (1) transfer of title to the properties under license; (2) acknowledgment of acceptance by the transferee filed in triplicate within 60 days of

the order approving the transfer; (3) delivery of all license instruments within 60 days of the order approving the transfer; and (4) a showing that the transfer is in the public interest.[3]

The Commission only spent one paragraph of its Order discussing the transfer standard and that it did not believe any substantial evidence existed "suggesting that Energy Keepers does not satisfy the Commission's transfer standard."[4] The Commission has failed to make adequate findings of fact that the Application is consistent with the public interest and should be approved. The Commission did not proactively inquire into the comments of the MPSC or other intervenors and then denied all requests for hearing on the Energy Keepers' transfer application.[5]

It is the Applicant's burden to show that the transfer is in the public interest and the Commission's obligation to make findings based on the record evidence that this transaction is in the public interest. Instead the Commission appeared to shift the burden to the intervenor parties by finding no substantial evidence was presented by the parties suggesting that Energy Keepers did not satisfy the standard. This finding is flawed. The MPSC brought several concerns to the Commission in its initial comments prior to the comment deadline and requested a hearing to inquire into these concerns. The Commission erred by not setting a public hearing and failing to inquire into whether the public interest standard was met. Therefore the Commission should reconsider its finding that the transfer is in the public interest until it holds a public hearing that was requested by the parties.

B. The Commission erred by not scheduling a hearing as there are issues of material fact about the lack of financial transparency of Energy Keepers and therefore whether the public interest standard is met pursuant to Section 8 of the FPA.

[3] 18 C.F.R. § 9.3 (2015).
[4] 152 FERC ¶ 62,140 at ¶15.
[5] The Commission did address the request for an Article 40(c) hearing requested by the Districts and the Flathead Board in a separate docket. 152 FERC ¶ 61,207 issued on Sept. 17, 2015.

Material facts exist involving whether sufficient financial transparency will occur with Energy Keepers' operations of the Kerr Dam. Energy Keepers' application states that "[i]n order to enter into power purchase agreements, generation interconnection agreements, and coordination agreements necessary for generation and sale of electricity from the Kerr Project, CSKT and EKI need assurance that EKI will be a Kerr Project co-licensee to satisfy EKI's legitimacy in the electric power marketplace and electric generation industry."[6] Transparency is important to the MPSC, the entities that do business with Energy Keepers, and Montana businesses, as it should be to this Commission.

The MPSC is concerned by the lack of financial transparency by Energy Keepers. The Commission issued an Order in December of 2014 granting the Petition for Declaratory Order of the CSKT and Energy Keepers in Docket No. EL14-92-000. That order agrees with the Petitioners and declares that:

> the Tribes are an agency, authority or instrumentality of the federal government and that EKI is a wholly-owned corporation of this agency, authority or instrumentality that assists the Tribes in performing their inherent government functions. Consequently, the Commission determines that the Tribes and EKI are exempt public utilities under section 201(f) of the FPA, and therefore, Petitioners are exempt from most of Part II of the FPA, as discussed above. Similarly, the Commission concludes that the Tribes are an agency, authority or instrumentality of the United States under section 366.2 of the Commission's regulations. Therefore, the books and records requirements of PUHCA 2005 and related regulations do not apply to the Tribes or their wholly-owned electric public utility, EKI.[7]

The Commission even recognized in footnote 67 of its Order that Tribes being considered instrumentalities of the federal government is subject to dispute in the Courts. The footnote stated "that in other contexts courts have ruled that Indian tribes are not instrumentalities of the government, none of those cases involved the FPA."[8] The MPSC stated concerns about the lack

[6] Energy Keepers App. Project No. 5-098 at p. 5.
[7] 149 FERC ¶ 61,216 (2014) at ¶34.
[8] 149 FERC ¶ 61,216 (2014) at footnote 67.

of financial transparency of CSKT and Energy Keepers in its comments in the current proceeding. The Commission dismissed the MPSC and intervenor's concerns about financial transparency by stating in its September 1, 2015, Order that, "To the extent that the intervenors have concerns regarding Energy Keepers' status and obligations under state law, those matters are not germane to this proceeding." The MPSC believes that the need for financial transparency from Energy Keepers is in the public interest, is rightfully in front of this Commission, and therefore is germane to this proceeding.

Energy Keepers should be required by this Commission to undertake a regular, full, and open accounting of its operations as the majority of other Commission regulated hydroelectric owners are. In this proceeding involving the addition of Energy Keepers as a co-license, the Commission should reconsider its prior decision allowing Energy Keepers to be exempt from most of Part II of the FPA and the books and records requirements of PUHCA 2005. In fact, the Kerr project has been subject to this requirement consistently in the past while it was under public utility ownership. Only now with the Commission's order would the lights go out on this financial data with new ownership by CSKT and Energy Keepers. The Commission's Order in the current proceeding should be reconsidered to contain the requirement that Energy Keepers be fully transparent and continue to provide the same financial information that was historically provided to the Commission by the previous owners.

The MPSC requests that the Commission reconsider its finding in paragraph 15 of its order that the license transfer to Energy Keepers is in the public interest unless Energy Keepers agrees to full and open accounting of its operations and grants the Commission full access to the books and records of its Montana operations.

III. CONCLUSION

Based on the foregoing reasons, the MSPC respectfully requests that the Commission grant rehearing and/or reconsideration, consistent with the foregoing statement of issues and specification of errors.

Dated this 1st day of October, 2015.

Respectfully submitted,

/s/ Justin Kraske
Justin Kraske
Chief Legal Counsel
Montana Public Service Commission
1701 Prospect Ave
P.O. Box 202601
Helena, MT 59620-2601

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing document of the Montana Public Service Commission to be served this day upon each person designated on the official service list compiled by the Secretary of the Commission in this proceeding in accordance with the requirements of the Commission's Rules of Practice and Procedure.

Dated this 1st day of October, 2015.

/s/ Justin Kraske
Justin Kraske
Chief Legal Counsel