

MEMORANDUM

Date: March 8, 2016
From: Lawrence A. Kogan, Esq.
To: Boone Cole, FJBC Chairman; Kristin Ovig, FJBC Montana Counsel
Re: Article 40(c) Proceedings – Amending the Revised Preliminary Statement of Contested Issues to Ensure the Critical Issues Engendered by Article 40(c)(ii) Are Adequately Addressed

I. Facts:

On September 1, 2015, the Federal Energy Regulatory Commission (“FERC” or “Commission”) approved the partial transfer of the co-license to the Kerr Hydroelectric Project from the Confederated Salish and Kootenai Tribes (“CSKT” or “Tribes”) and NorthWestern Energy Corporation (“NorthWestern”) to the CSKT and Energy Keepers, Inc. (“EKI”), the Tribes’ federally chartered subsidiary.¹ On September 5, 2015, the Tribes took control and ownership of the Kerr Dam Project from NorthWestern.²

Previously, on May 28, 2015, the Flathead Joint Board of Control and the Flathead, Mission Jocko Valley Irrigation Districts (“FJBC/Districts”), through its/their Washington, D.C. counsel, had filed with the FERC a request for a mandatory evidentiary public hearing as set forth in Kerr Dam license Article 40(c).³ The FJBC/Districts argued that it/they was/were entitled to request a public hearing because: 1) “[e]ach of the Districts was a party to the 1985 Settlement, the provisions of which were approved and incorporated into the 1985 Kerr Hydroelectric Project License;” and 2) “[e]ach of the Districts currently receive low-cost power from the Kerr Hydroelectric Project and *has rights (as detailed in Article 40(c) of the Kerr Hydroelectric Project License) to have a hearing to resolve the question of their rights once the Kerr Hydroelectric Project is conveyed to CSKT (and potentially, EKI)*” (emphasis added).⁴ This memorandum shall refer to “low cost power,” hereafter, as “low cost block of power” or (“LCB”).

On September 17, 2015, the FERC issued an order granting the FJBC’s/Districts’ request for “a public

¹ See United States of America, Federal Energy Regulatory Commission, *Order Approving Partial Transfer of License, Project No. 5-098* (Sept. 1, 2015), available at: http://www.koganlawgroup.com/uploads/EXHIBIT_39_-_FERC_ORDER_GRANTING_CSKT-EKI_PARTIAL_LICENSE_TRANSFER_152_FERC_62_1409_9-1-15_.pdf.

² See *Montana Tribes Take Over 194-MW Kerr Hydro Project Under FERC License Terms*, Hydropower.com (Sept. 18, 2015), available at: <http://www.hydropower.com/articles/premium-content/2015/09/montana-tribes-take-over-194-mw-kerr-hydro-project-under-ferc-license-terms.html>.

³ See “Motion of the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts to Intervene, Comments on Application for Partial Transfer of License and Co-licensee Status and Request for Hearing Required by Article 40(c) of the Kerr Hydroelectric Project License,” Project Nos. 5-098, 5-004 (May 28, 2015), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13889471>.

⁴ *Id.*, at p. 4.

hearing [to] be held concerning whether the Tribes shall make any part of the *output* of the project available to the United States, for and on behalf of the Flathead Irrigation Project or the Flathead, Mission and Jocko Valley Irrigation Districts, and, if so, under what terms and conditions.”⁵ The hearing so ordered was a “trial-type evidentiary hearing,”⁶ pending the results of scheduled “settlement judge procedures.”⁷

On March 2, 2016, the FJBC’s/Districts’ Washington, D.C. counsel filed with the FERC a “Revised Preliminary Statement of Contested Issues” that had allegedly been supported by all parties and trial staff.⁸ However, this filing focused exclusively on issues surrounding Article 40(c)(i) of the 1985 Kerr Dam licensing agreement. It failed to address the critical Article 40(c)(ii) issues arising thereunder, which concern the right of the United States to reserve for itself the exclusive right to sell power within the bounds of the reservation and the terms and conditions thereof.

Items A, D and E of this filing seek information specifically relating to the availability of Kerr Dam electric *output* and the terms and conditions thereof, which falls squarely within the scope of Article 40(c)(i). Items B, C and F cleverly restate these information requests from the perspective of the United States in an effort to indirectly invoke Article 40(c)(ii) without expressly doing so. These items request information concerning the terms and conditions pursuant to which the United States will procure electricity from the Tribes: “the rate payable to the Tribes for energy taken by the United States” (Item B); the point of delivery for the energy taken by the United States and [the parties] responsible for procurement and payment of transmission” (Item C); “other terms and conditions [that] must apply to energy taken by the United States” (Item F). Arguably, as discussed below, this filing does not go far enough to expressly and directly invoke the critical issues engendered by Article 40(c)(ii).

On March 2, 2016, FERC Administrative Law Judge, H. Peter Young, dispatched an email to all counsels indicating that he did not object to the items contained in the Preliminary Statement of Contested Issues so filed, except for Item E, which he stated “falls beyond the scope of matters set for hearing in this case.”⁹ He encouraged all counsels “to reconsider whether the issue

⁵ See United States of America, Federal Energy Regulatory Commission, *Order Establishing Hearing and Settlement Judge Procedures*, Project No. 5-100 (Sept. 17, 2015), at p. 4, 152 FERC ¶ 61,207, available at: <https://www.ferc.gov/whats-new/comm-meet/2015/091715/H-2.pdf>.

⁶ 152 FERC ¶ 61,207, at paras. 11, C-D.

⁷ *Id.*, at paras. 1, A, D.

⁸ See United States of America, Federal Energy Regulatory Commission, *Revised Preliminary Statement of Contested Issues of the Flathead, Mission, and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control for the Flathead, Mission, and Jocko Valley Irrigation Districts*, Project 5-103 (March 2, 2016), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14161582>.

⁹ See H. Peter Young Email of March 2, 2016, dispatched to all counsel in connection with Project No. 5-103 (“All Counsel: Be advised that my initial reaction to your Revised Joint Statement of Issues is that while Issue II (E) might well be appropriate to address in a settlement context, it appears to fall beyond the scope of matters set for hearing in this case. I encourage you to reconsider whether the issue ultimately should be included in the Joint Stipulation of Issues. If so, you may anticipate being required to demonstrate as a threshold matter that the Commission set this issue for hearing in the underlying hearing order. Judge Young”).

ultimately should be included in the Joint Stipulation of Issues,” and if so, that they should be prepared to “demonstrate as a threshold matter that the Commission set this issue for hearing in the underlying hearing order.”¹⁰

II. Issues:

1. Whether it is necessary to flesh out in greater detail the Revised Preliminary Statement of Contested Issues filed on March 2, 2016, to ensure the critical issues engendered by Kerr Dam license Article 40(c)(ii) are properly and adequately addressed.
2. If so, how can counsel ensure that these Article 40(c)(ii) issues are added to the issues the Commission previously set for an evidentiary public hearing now underway, (i.e., the administrative record) without triggering the FERC Administrative Law Judge’s rejection.

III. Rules:

1. The plain language of Article 40(c) indicates that there are two relevant issues eligible for resolution in the current mandatory evidentiary public hearing. The language of Article 50 also leads to this conclusion. These issues are set forth in Articles 40(c)(i) and 40(c)(ii), respectively. There are additional important public interest issues raised by granting the United States the ability to reserve for itself (via the Bureau of Indian Affairs and its federally owned subsidiary MVP operated and managed by the CSKT, a sovereign federally recognized tribe) the exclusive unencumbered right to sell energy within the bounds of the reservation, especially without specifying the terms and conditions pursuant to which that right may be exercised.
2. Sections 215(a)(1), (3)(iii) and (d) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission permit the FJBC/Districts to file an amendment to their petition for the setting of an evidentiary public hearing even after the first (February 17, 2016) prehearing conference had taken place. FERC administrative practice reveals that a matter may be set for a trial-type evidentiary hearing only when there are disputed issues of material fact that cannot be resolved on the written record. The Commission is required to set such a hearing only if the disputes involve concerns such as witness credibility, and the party requesting such hearing proffers evidence adequate to demonstrate that the hearing is necessary and that the new issues do not warrant summary action.

IV. Analysis:

1. Article 40(c)(i) and the Availability and Terms and Conditions of Output from Kerr Dam

¹⁰ *Id.*

The FJBC's/Districts' right under the 1985 license agreement to Kerr Dam LCB electric *output* derives from license Article 40(a), which breaks down that right into two elements¹¹ somewhat along the lines of Article 26 of the 1930 Kerr Dam license.¹²

The first element is described as follows: “up to 7.466 megawatts of capacity at up to 100 percent load factor [...] during all months of the year.”¹³ This translates under the 1930 license roughly to “not exceeding 5,000 horsepower [3.734 MW or 3,734 KW¹⁴] of demand to be used exclusively for pumping water for irrigation,” *and* to “not exceeding 5,000 horsepower [3.734 MW or 3,734 KW¹⁵] of demand for all project and farm uses and for resale.”¹⁶ Article 26 of the 1930 license had provided that no more than 10,000 horsepower was available at a “price of 1 mil per kilowatt hour.”¹⁷ Arguably, the total 10,000 horsepower/7.466 MW was required to operate both “field pumping by irrigators” and “the large 216 c.f.s. pumping plant on the Flathead River near Poison consisting of three 3,000 hp pumps.”¹⁸

The second element is described as follows: “additional capacity of up to 3.734 megawatts at up to 100 percent load factor [...] during the months of April through October.”¹⁹ This translates under the 1930 license roughly to “additional electrical energy not to exceed 5,000 horsepower of demand for all project and farm uses and for resale.” Article 26 of the 1930 license had provided that the additional 5,000 horsepower was available at a “price of 2½ mils per kilowatt hour.”²⁰ In other words, prior to the conveyance of Kerr Dam to the Tribes, the prior licensee had been obligated to make available 11.2 MW for up to seven months of the year (i.e., during the irrigation season).

¹¹ See United States of America, Federal Energy Regulatory Commission, “Order Approving Settlement and Issuing License, Project Nos. 5-004, 5-003 and 2776-000,” Docket No. EL84-12-001 (Sept. 17, 1985), at Article 40(a)(i)-(ii), available at: http://www.koganlawgroup.com/uploads/EXHIBIT_1_-_FERC_1985_AGRMT_287-17-85_29.pdf.

¹² See “The Federal Power Division License on Government Lands Project No. 5 Montana-Rocky Mountain Power Company” (May 23, 1930), in Senate Document No. 153, “Flathead Power Development – Memorandum of the Development of Flathead River Power Sites, Montana,” 71st Cong., 2nd Sess. (May 23, 1930), available at: <https://westernmtwaterrights.files.wordpress.com/2014/09/fip-19300523-flathead-power-development.pdf>.

¹³ See United States of America, Federal Energy Regulatory Commission, “Order Approving Settlement and Issuing License, Project Nos. 5-004, 5-003 and 2776-000,” Docket No. EL84-12-001 (Sept. 17, 1985), *supra* at Article 40(a)(i).

¹⁴ See Edward Fitzgerald Dibble, *Electric Power for the Flathead Irrigation Project: An Evaluation of the Power System and Power Division* (Oct. 1985), at p. 7-9, in U.S. Department of the Interior Bureau of Reclamation Pacific Northwest Regional Office and U.S. Bureau of Indian Affairs Portland Area Office, “Comprehensive Review Report: Flathead Indian Irrigation Project,” Prepared at the Direction of the Secretary of the Interior (Oct. 1985), at Vol. 2 of 3.

¹⁵ *Id.*, at p. 7-10.

¹⁶ See “The Federal Power Division License on Government Lands Project No. 5 Montana-Rocky Mountain Power Company” (May 23, 1930), in Senate Document No. 153, “Flathead Power Development – Memorandum of the Development of Flathead River Power Sites, Montana,” 71st Cong., 2nd Sess. (May 23, 1930), *supra* at Article 26.

¹⁷ *Id.*

¹⁸ See Before the Federal Energy Regulatory Commission, *Direct Testimony of Robert H. Sarikas*, Project No. 5 and Project No. 2776 (April 20, 1984), at p.7.

¹⁹ See United States of America, Federal Energy Regulatory Commission, “Order Approving Settlement and Issuing License, Project Nos. 5-004, 5-003 and 2776-000,” Docket No. EL84-12-001 (Sept. 17, 1985), *supra* at Article 40(a)(ii).

²⁰ See “The Federal Power Division License on Government Lands Project No. 5 Montana-Rocky Mountain Power Company” (May 23, 1930), in Senate Document No. 153, “Flathead Power Development – Memorandum of the Development of Flathead River Power Sites, Montana,” 71st Cong., 2nd Sess. (May 23, 1930), *supra* at Article 26.

The 1985 license agreement, unlike the 1930 license agreement, provided a single prescribed rate for the total MW made available (11.2 MW for up to seven months and 7.466 MW for all twelve months) during the year. The 1985 license agreement rate, which was equal to “12 mils per kWh [...] during the first license year” with adjustments tracking the CPI in subsequent license years,²¹ was to apply until Kerr Dam was transferred to the Tribes.²²

LCB savings can be and have been rather significant. According to at least one U.S. government report, it amounted to approximately \$654,000 in the first year of the license.

“If taken at 100% load factor, this block of power represents approximately 84,580,000 kWh in a year. At 12 mils per kWh, this will cost the Flathead Indian Irrigation Project in the first year \$1,014,960. The cost of an equivalent block of BPA wholesale firm preference power, also at 100% load factor at this time, would be about \$1,669,083, for a saving to the Flathead Indian Irrigation Project of about \$654,000 in the first year.”²³

The Bonneville Power Administration (“BPA”) wholesale firm preference power rate is significant at the energy generation level precisely because it is useful as a benchmark to measure the value of the LCB made available by the Tribes. It also is useful at both the wholesale and retail levels because it can serve to measure, respectively, the cost at which Mission Valley Power (“MVP”) purchases electricity from BPA, and the reasonableness of rates at which MVP resells BPA-procured electricity to reservation residents (i.e., to measure any MVP profit). This will be discussed below.

On May 28, 2015, the FJBC/Districts requested an evidentiary public hearing under Article 40(c) only to ensure the continued availability of the 11.2 MW/7.466 MW LCB provided under Article 40(a), pursuant to reasonable terms and conditions for the remainder of the current license term and any renewal term.²⁴ The FJBC/Districts premised its/their request for an evidentiary public hearing under Article 40(c) *only* on the failure of the CSKT’s/EKI’s partial license transfer request to “mention [...] any desire or requirement to make the output of the Kerr Hydroelectric Project available to United States, for and on behalf of FJBC or the Districts.”²⁵ According to the FJBC’s/Districts’ filing, given this failure,

²¹ See United States of America, Federal Energy Regulatory Commission, “Order Approving Settlement and Issuing License, Project Nos. 5-004, 5-003 and 2776-000,” Docket No. EL84-12-001 (Sept. 17, 1985), *supra* at Article 40(a).

²² *Id.*

²³ See Edward Fitzgerald Dibble, *Electric Power for the Flathead Irrigation Project: An Evaluation of the Power System and Power Division* (Oct. 1985), *supra* at p. 7-15, in U.S. Department of the Interior Bureau of Reclamation Pacific Northwest Regional Office and U.S. Bureau of Indian Affairs Portland Area Office, “Comprehensive Review Report: Flathead Indian Irrigation Project,” Prepared at the Direction of the Secretary of the Interior (Oct. 1985), at Vol. 2 of 3.

²⁴ See “Motion of the Flathead, Mission and Jocko Valley Irrigation Districts and the Flathead Joint Board of Control of the Flathead, Mission and Jocko Irrigation Districts to Intervene, Comments on Application for Partial Transfer of License and Co-licensee Status and Request for Hearing Required by Article 40(c) of the Kerr Hydroelectric Project License,” Project Nos. 5-098, 5-004 (May 28, 2015), *supra* at p. 5.

²⁵ *Id.*

“it cannot be assumed that the Applicants will make any of the output of the Kerr Hydroelectric Project available to the United States for an on behalf of the Districts, nor can it be assumed that Applicants will enter into power purchase agreements which take into account the Districts’ rights to the output of the project.”²⁶

To reiterate, the FJBC’s request for an Article 40(c) evidentiary public hearing *identified only a single issue for resolution:* Page | 6

“As per Article 40(c), that hearing will determine whether CSKT and EKI Tribes must make any part of the *output* from the Kerr Hydroelectric Project available to the United States, for and on behalf of FIP or the Districts, and, if so, on what terms and conditions” (emphasis added).²⁷

The FERC Administrative Judge thereafter acknowledged this issue as the only issue raised for resolution in the Article 40(c) proceeding.²⁸

2. The Relevance of Article 40(c)(ii) and the Ability of the United States to Reserve for Itself the Exclusive Right Sell Energy Within the Bounds of the Reservation

The FJBC’s/Districts’ Washington, D.C. counsel, however, failed to identify a second critical issue eligible for resolution under Article 40(c) of the 1985 license agreement.

The second issue eligible for resolution under Article 40(c) falls under 40(c)(ii), to wit:

“(c) This joint license does not cover the questions of whether from the time the project is conveyed by MPC [NorthWestern] to the Tribes until the expiration of the joint license [...] *or (ii) the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation*” (emphasis added).²⁹

The plain language of Article 40(c) indicates that there are two relevant issues eligible for resolution in the current mandatory evidentiary public hearing:

“[...] Such matters *are* expressly reserved for resolution hereafter by agreement of the parties, with the approval of the Commission, for insertion in this joint license as a term hereof, or, failing such agreement, by the Commission, as provided below,

²⁶ *Id.*, at pp. 5-6.

²⁷ *Id.*, at p. 6.

²⁸ See United States of America, Federal Energy Regulatory Commission, Order Approving Settlement and Issuing License, Project Nos. 5-004, 5-003 and 2776-000, Docket No. EL84-12-001 (Sept. 17, 1985), *supra* at Article 40(c)(i) (“(c) This joint license does not cover the questions of whether from the time the project is conveyed by MPC to the Tribes until the expiration of the joint license (i) the Tribes must make any part of the output from the project available to the United States, for and on behalf of FIP or the Districts, or if so on what terms or conditions [...]”).

²⁹ *Id.*, at Article 40(c)(ii).

subject to the authority of the Secretary to the extent provided by applicable law” (emphasis added).

In addition, the language of Article 40(b) confirms that issues relating to Article 40(c)(ii) are among the matters eligible and relevant for resolution in the current Article 40(c) mandatory evidentiary public hearing. Pursuant to Article 40(b) of the 1985 license agreement, the U.S. government had previously reserved for itself the exclusive right to sell power year round within reservation boundaries up to 7.466 MW. It held that right from the time the 1985 license was executed (July 17, 1985) until the time the Kerr Dam was conveyed to the Tribes (September 5, 2015). Page | 7

Article 40(b) of the 1985 license agreement, like Article 28 of the 1930 license agreement, provides as follows:

“The United States *reserves to itself or the FIP management* for the period prior to conveyance of the project to the Tribes the exclusive right to sell power within the boundaries of the Flathead Indian Reservation to the extent of 7.466 megawatts [10,000 horsepower³⁰] to be delivered for use and or sale as provided in Article 40(a) above” (emphasis added).³¹

A reasonable interpretation of these similar provisions strongly suggests that they are related to the U.S. government’s exclusive right to sell on the reservation a limited amount of electric output generated year round from Kerr Dam, and from no other source.

Article 40(c) acknowledges, however, that, following Kerr Dam’s conveyance to the Tribes, Article 40(b) of the 1985 license agreement no longer addresses whether the U.S. government exclusively can sell electricity on the reservation. This omission gives rise to various uncertainties, including whether the U.S. government exclusively can sell/resell annually on the reservation: 1) more than 7.466 MW procured from Kerr Dam or any other power generator; 2) a limited or unlimited amount of electricity procured from a power wholesaler such as BPA; and 3) the terms and conditions pursuant to which it may procure power under 1 and 2 above.

These are the types of questions that are eligible for renegotiation under Article 40(c)(ii). The FERC Administrative Law Judge who recommended FERC’s approval of the 1985 settlement and license agreement similarly reached this understanding.

“Article 40(c) reserves for adjudication before FERC upon petition by the Tribes, the

³⁰ See “The Federal Power Division License on Government Lands Project No. 5 Montana-Rocky Mountain Power Company” (May 23, 1930), in Senate Document No. 153, “Flathead Power Development – Memorandum of the Development of Flathead River Power Sites, Montana,” 71st Cong., 2nd Sess. (May 23, 1930), *supra* at Article 28 (“The United States reserves to itself or to the Flathead irrigation project management the exclusive right to sell power within the boundaries of the Flathead Indian Reservation to the extent of 10,000 horsepower to be delivered for use and/or for sale as provided in Article 26.”).

³¹ *Id.*, at Article 40(b).

Secretary, or the Irrigation Districts no later than the 15th anniversary of the joint license, *the so-called bargain power issue*, viz., “whether, from the time the Project is conveyed by MPC to the Tribes until the expiration of the Joint License, (i) the Tribes must make any part of the output from the Project available to the United States, for and on behalf of FIP [Flathead Irrigation Project] or the Districts, or if so on what terms or conditions, or (ii) *the United States may reserve for itself the exclusive right to sell power within the boundaries of the Reservation*” (emphasis added).³²

He recognized that Article 40(c) of the 1985 license agreement grants the U.S. government, for the remainder of the Kerr Dam license term and during any subsequent renewal term, the ability to exercise its exclusive right to sell power on the reservation however procured, for whatever purposes, and under whatever terms and conditions it determines, unless the FJBC/Districts affirmatively contest that open-ended right by raising Article 40(c)(ii) issues in its/their petition for a mandatory Article 40(c) evidentiary public hearing.

3. The Relevance of Article 50 and the Ability of MVP to Procure from EKI and BPA NorthWestern- and/or BPA-Transmitted Electricity for the Entire Reservation

A review of Article 50 of the 1985 license agreement further supports this interpretation of Article 40(c).³³ It empowers NorthWestern to transmit (wheel) electricity the Tribes generate at Kerr Dam, once they assume and for as long as they retain ownership and control of the Project, to any point on the Bonneville Power Administration (“BPA”) “grid system at non-discriminatory rates.”³⁴ BPA is a part of the U.S. Department of Energy, an executive agency of the U.S. government.

The facts indicate that Mission Valley Power (“MVP”) is on BPA’s grid system. They also indicate that MVP is an electric utility owned by the U.S. Department of Interior’s Bureau of Indian Affairs, which is operated and managed by the Tribes under the authority of Public Law 93-638 (i.e., pursuant to a 1991 Indian Affairs, which is operated and managed by the Tribes under the authority of Public Law 93-638

³² See The Montana Power Company, Project No. 5-004, Confederated Salish and Kootenai Tribes of the Flathead Reservation, Project No. 2776-000, *Certification of Uncontested Offer of Settlement* (Issued April 16, 1985), available at: http://www.koganlawgroup.com/uploads/EXHIBIT_2_-_FERC_ALJ_ORDER_-_284-16-85_29.pdf.

³³ See United States of America, Federal Energy Regulatory Commission, Order Approving Settlement and Issuing License, Project Nos. 5-004, 5-003 and 2776-000, Docket No. EL84-12-001 (Sept. 17, 1985), *supra* at Article 50 (“(a) During the time that the Tribes own and operate the Kerr Project under this license MPC [NorthWestern] will transmit for the Tribes the output of the project from the Kerr switchyard to any point of interconnection between MPC’s [NorthWestern’s] system and the Bonneville Power Administration, or to such other points as the Tribes and MPC [NorthWestern] may hereafter agree upon. [...] (b) Transmission under (a) shall be at rates that are not unduly discriminatory and are otherwise in accordance with law. MPC [NorthWestern] will be free unilaterally to change such rates from time to time, and the Tribes will be free to oppose such changes in proceedings before any agency having jurisdiction over such rates.”)

³⁴ See Edward Fitzgerald Dibble, *Electric Power for the Flathead Irrigation Project: An Evaluation of the Power System and Power Division* (Oct. 1985), *supra* at p. 7-14, in U.S. Department of the Interior Bureau of Reclamation Pacific Northwest Regional Office and U.S. Bureau of Indian Affairs Portland Area Office, “Comprehensive Review Report: Flathead Indian Irrigation Project,” Prepared at the Direction of the Secretary of the Interior (Oct. 1985), at Vol. 2 of 3.

(i.e., pursuant to a 1991 638 contract “effective for an indefinite period of time”).³⁵ The facts, furthermore, indicate that MVP exclusively “provides service to the entire 1.25-million-acre reservation.”³⁶

On September 1, 2015, consistent with license Article 50, MVP apparently entered into a one-year power purchase agreement with EKI to procure 12 MW of low cost Kerr Dam-generated electricity³⁷ which NorthWestern transmits to MVP via a 42 MW line.³⁸ As of October 2015, MVP’s General Manager stated that MVP had purchased approximately 80 percent of the electricity delivered to the reservation from BPA and approximately 19 percent from Kerr Dam.³⁹ These activities reflect an ongoing pattern of steadily increasing electricity sales within the bounds of the reservation by the U.S. government (BPA) to the U.S. government (Flathead Indian Irrigation Project Power Division (“FIIP”) and, currently, BIA/MVP). Indeed, these sales of electricity have continued since August 1, 1967, when “Bonneville commenced delivery of power to the FIIP.”⁴⁰

As previously discussed, part of the electricity currently sold on the reservation by MVP is procured from EKI. EKI is a federally chartered corporation, a deemed instrumentality of the federal government for purposes of Part II of the Federal Power Act, and an exempt public utility for purposes of the Public

³⁵ See Mission Valley Power, *Operations Manual Including Services Policies* (Eff. Jan. 1, 2014), at p. 7, available at: <http://missionvalleypower.org/wp-content/uploads/2015/02/Ops-Manual-January-2014-Customer-Website.pdf>.

³⁶ See U.S. Government Accountability Office, *Tribal Management of Mission Valley Power* (Sept. 18, 1992), at p. 1, available at: <http://www.gao.gov/products/RCED-92-282R>.

³⁷ See *Keenan v. Bay*, Federal Defendants’ Response to Plaintiff’s Motion for a Preliminary Injunction, Case 1:15-cv-01440-RCL Document 27 (filed 09/17/15), at p. 17 (“Energy Keepers has entered into a Master Electric Sales Agreement with Mission Valley Power for continued delivery of the low cost block of irrigation power and consumer power that is the subject of Article 40 of the FERC license for the Kerr Project, and has scheduled deliveries of those electrical products commencing 12:00:00 September 5, 2015.”).

³⁸ See NorthWestern Corporation (Montana), Docket No. ER15-2576, *Service Agreement No. 744 – Service Agreement for Firm Point-to-Point Transmission Service between NorthWestern Corporation and Energy Keepers, Incorporated*, (Submitted for Filing and Acceptance Aug. 31, 2015) (Ex. 2), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=13974257>; United States of America, Federal Energy Regulatory Commission Office of Energy Market Regulation, *Acceptance of NorthWestern Corporation Transmission Service Agreement* (Docket No. ER15-2576-000) (Oct. 16, 2015), available at: <http://elibrary.ferc.gov/idmws/common/opennat.asp?fileID=14015645>.

³⁹ See Mission Valley Power Company, *Notes From the Desk of the General Manager* (Oct. 2015), available at: <http://missionvalleypower.org/wp-content/uploads/2015/10/Notes-from-GM1.pdf> (“In the big picture, energy purchases for the service area have remained at 80% bought from Bonneville Power [Administration], 19% bought from Kerr Dam, and 1% purchased from small hydro facilities on the Flathead Indian Reservation.”).

⁴⁰ See Edward Fitzgerald Dibble, *Electric Power for the Flathead Irrigation Project: An Evaluation of the Power System and Power Division* (Oct. 1985), *supra* at p. 7-69, in U.S. Department of the Interior Bureau of Reclamation Pacific Northwest Regional Office and U.S. Bureau of Indian Affairs Portland Area Office, “Comprehensive Review Report: Flathead Indian Irrigation Project,” Prepared at the Direction of the Secretary of the Interior (Oct. 1985), at Vol. 2 of 3 (“Starting at 1,437,000 kilowatt-hours in 1967, the power purchased [by FIIP] from Bonneville has increased over the years, and in 1984 was 161,476,000 kilowatt-hours. As power use on the Reservation grows, it will be necessary to draw on Bonneville for the increasing amounts of power because FIIP is already using the entire amount available from the low-cost block of power from Montana Power.”)

Utility Holding Company Act.⁴¹ The remainder of the electricity sold on the reservation is sold by BPA, a U.S. government-owned electricity wholesaler, to MVP, a U.S. government-owned utility. Given, however, the sizeable steadily increasing portion of BPA electricity wholesaled to MVP that is unrelated to the LCB, which MVP resells throughout the reservation, any increase in the kWh rate charged for field pumping, domestic water use and/or well use can have an adverse impact on not only irrigator profits, but also reservation municipal budgets, business profits and living conditions.⁴² It is apparent, moreover, that BPA rates continue to increase as they had steadily done in the past,⁴³ evidenced most recently by the successive increases in BPA rates charged to reservation customers in 2013-2014⁴⁴ and 2015-2016.⁴⁵

Indeed, in a December 2014 federal register notice, the BPA had proposed “four different rates for Federal power sales and services” for fiscal year 2016-2017.⁴⁶ These included a Priority Firm Power Rate (PF-16) schedule, a New Resource Firm Power Rate (NR-16) schedule, an Industrial Firm Power Rate (IP-16) schedule, and a Firm Power and Surplus Products and Services Rate (FPS-16) schedule.⁴⁷ In particular, “[t]he PF rate schedule applies to net requirements power sales to public body, cooperative, and Federal agency customers made pursuant to section 5(b) of the Northwest Power Act...”⁴⁸

The currently scheduled public hearing proceedings will likely disclose the rates at which EKI sells the

⁴¹ See United States of America Federal Energy Regulatory Commission, *Order on Petition for Declaratory Order*, Docket No. EL14-92-000 (Dec. 8, 2014), at pp. 10-17, available at: http://www.koganlawgroup.com/uploads/EXHIBIT_24_-_FERC_DECLARATORY_ORDER_-_CSKT-EKI_-_EXEMPT_UTILITIES_12-08-14_.pdf.

⁴² See Mission Valley Power, *Operations Manual Including Services Policies* (Eff. Jan. 1, 2014), *supra* at Section 1.2, pp. 8-19.

⁴³ See Mission Valley Power Company, *Notes From the Desk of the General Manager* (Oct. 2015), *supra*. See also Edward Fitzgerald Dibble, *Electric Power for the Flathead Irrigation Project: An Evaluation of the Power System and Power Division* (Oct. 1985), *supra* at pp. 7-68 to 7-69, in U.S. Department of the Interior Bureau of Reclamation Pacific Northwest Regional Office and U.S. Bureau of Indian Affairs Portland Area Office, “Comprehensive Review Report: Flathead Indian Irrigation Project,” Prepared at the Direction of the Secretary of the Interior (Oct. 1985), at Vol. 2 of 3 (“Bonneville in recent years found it necessary to increase its rates very substantially. This relates to higher costs generally, but in particular because of the much higher costs of the nuclear plants to which it was committed for future sources of power over and above the hydroelectric base which is no longer enough to meet its customer needs, especially in dry years.”). See also Mission Valley Power, *FY 2014 Annual Report, October 1, 2013 to September 30, 2014* (Sept. 30, 2014), at p. 7, “Historical Rate Changes – 1937-2013.”

⁴⁴ See Mission Valley Power, *FY2013 Annual Report, October 1, 2012 thru September 30, 2013* (Sept. 30, 2013), at p. 12, available at: <http://missionvalleypower.org/wp-content/uploads/2014/06/Annual-Report-FY2013.pdf> (stating that, “[s]tarting October 1, 2013, the Board was faced with a new rate from Bonneville Power Administration, MVP’s major power supplier. The power business is complicated, but the Board has managed to stay abreast of changing rates and new regulatory requirements. It is expected that rates will now change every two years, but will only be increased as necessary.”).

⁴⁵ See Mission Valley Power Company, *Notes From the Desk of the General Manager* (Oct. 2015), *supra* (describing a \$06.6 cent increase in the kWh rate charged by BPA to MVP for by BPA

⁴⁶ See Department of Energy Bonneville Power Administration, *Fiscal Year (FY) 2016–2017 Proposed Power and Transmission Rate Adjustments Public Hearing and Opportunities for Public Review and Comment*, 79 FR 71984, 71988 (Dec. 4, 2014), available at: <https://www.gpo.gov/fdsys/pkg/FR-2014-12-04/pdf/2014-28463.pdf>.

⁴⁷ *Id.*, at 71988-71989.

⁴⁸ *Id.*, at 71988.

LCB to reservation irrigators because they are included in the issues identified in the FJBC's/Districts' public hearing petition which the Commission subsequently set for public hearing. However, the absence of Article 40(c)(ii) issues from the petition and, consequently, from the FERC order setting the issues for public hearing largely precludes the FJBC/Districts from securing information about the following items: 1) the rates, terms and conditions of EKI electricity sales to BPA which MVP later procures for resale to its reservation customers; and 2) the rates, terms and conditions of BPA non-LCB electricity sales to MVP which MVP then resells to its reservation customers. In other words, there is no way to discern whether the Tribes and/or the U.S. government are double-dipping in terms of profitable mark-ups on EKI-generated and/or BPA-wholesaled electric power procured by MVP for resale to reservation customers, unless Article 40(c)(ii) issues are included in the issues set for public hearing, or such information is otherwise artfully elicited during the pre-hearing discovery process.

4. The CSKT's Operation and Management of MVP Raises Serious Public Interest Issues

A BPA customer must meet two statutory requirements of the Bonneville Project Act⁴⁹ “[t]o be eligible to purchase power from BPA on a preference and priority basis”⁵⁰ (i.e., the priority firm power rate identified above). First, the prospective applicant must meet the statutory definition of the terms “public body” or “cooperative,” as defined by Section 3 of that Act.⁵¹ Since at least 1998, “BPA has indicated that a federally recognized tribe that forms a cooperative utility pursuant to its tribal constitution and laws would be eligible for preference status”⁵² within the meaning of that provision. However, “a tribe could not create a cooperative inconsistent with state law for service to non-tribal members or outside the tribe’s jurisdiction.”⁵³ Second, “a public body or cooperative applicant [must] be in the public business of selling and distributing the federal power to be purchased from BPA.”⁵⁴

These two requirements are imposed in addition to the BPA’s normal conditions. Presumably, MVP already satisfies these conditions, because: 1) it was “legally formed in accordance with state and federal laws;” 2) it “[o]wn[s] a distribution system”⁵⁵ and [is] ready, willing and able to take power from BPA within a reasonable period of time;” 3) it has “a general utility responsibility within the service area;” 4)

⁴⁹ See “Bonneville Project Act of 1937,” P.L. 75-329, (50 Stat. 731) (Aug. 20, 1937), codified at 16 U.S.C. 12B, available at: <https://www.usbr.gov/power/legislation/bonnevil.pdf>.

⁵⁰ See U.S. Department of Energy Bonneville Power Administration, *Eligibility and Standards for Service to Purchase Federal Power* (1998), available at: https://www.bpa.gov/power/pl/subscription/SFS_71a.doc (discussing BPA’s Federal Power Subscription Strategy released in December 1998, stating inter alia “that new preference tribal utilities that form and qualify for service will be treated the same as other new public agency utilities with respect to the availability of power at the PF rate.”).

⁵¹ *Id.*, at p. 1 (defining a “cooperative” as “any form of nonprofit-making organization or organization of citizens supplying, or which may be created to supply, members with any kind of goods, commodities, or services, as nearly as possible at cost.”).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See Mission Valley Power, *FY2013 Annual Report, October 1, 2012 thru September 30, 2013* (Sept. 30, 2013), *supra* at p. 8 (“A total of 147 miles of Transmission Power Line exists within our system. [...] A total of 2,131 miles of Overhead Distribution Power Lines exist within our system.”)

it has “the financial ability to pay BPA for the federal power it purchases;” 5) it has “adequate utility operations and structure;” and 6) it is able to purchase power in wholesale, commercial amounts.”⁵⁶

Both the FIIP (MVP’s predecessor) and MVP “[a]s an agency of the United States, [and, hence as a “public body,” had qualifie[d] for Bonneville Power at BPA’s wholesale firm preference power rate.”⁵⁷ It is uncertain, however, whether MVP, operated and managed by the Tribes indefinitely since 1991, satisfies conditions 2 and 3 above. Page | 12

Condition 2 “assures that BPA sells power consistent with the legal requirement that it be sold to public bodies and cooperatives engaged in the public business of buying and distributing power through distribution facilities owned by the customer.”⁵⁸ In other words, MVP must be able “to demonstrate [it is] able to provide the benefits of cost-based federal power to retail customers.”⁵⁹ Condition 3 “assures that federal power will be sold by the applicant in a non-discriminatory manner for the benefit of the general public and particularly of domestic and rural consumers. [...] This means that any retail consumers may request and obtain service limited only by service area or franchise allocation restrictions.”⁶⁰ Arguably, the obligation to sell federal power for the benefit of the general public also includes an assurance that reservation-based rate paying customers are provided accessible and objective procedures for resolving any concerns or grievances they may have about a particular utility decision, action, policy or practice.

Assuming MVP, a utility owned by BIA, a federal agency, qualifies as a “public body,” and as either a “cooperative association”⁶¹ or a “foreign corporation” under Montana State law (MCA 35-18-104), it will be deemed eligible to receive the preferred BPA power rate, and yet simultaneously exempt from the consumer protection-oriented jurisdiction of the Montana Public Service Commission.⁶² As a federal entity operated and managed by the CSKT Tribal Council on the Flathead Indian Reservation, MVP also is exempt from the corporate registration and reporting requirements imposed by the Montana Secretary

⁵⁶ See U.S. Department of Energy Bonneville Power Administration, *Eligibility and Standards for Service to Purchase Federal Power* (1998), *supra* at p. 2.

⁵⁷ See Mission Valley Power Company, *Notes From the Desk of the General Manager* (Oct. 2015), *supra*. See also Edward Fitzgerald Dibble, *Electric Power for the Flathead Irrigation Project: An Evaluation of the Power System and Power Division* (Oct. 1985), *supra* at p. 7-68, in U.S. Department of the Interior Bureau of Reclamation Pacific Northwest Regional Office and U.S. Bureau of Indian Affairs Portland Area Office, “Comprehensive Review Report: Flathead Indian Irrigation Project,” Prepared at the Direction of the Secretary of the Interior (Oct. 1985), at Vol. 2 of 3.

⁵⁸ See Mission Valley Power Company, *Notes From the Desk of the General Manager* (Oct. 2015), *supra* at p. 3.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ The status of MVP under Montana state law, however, is not clear given the conflicting information this author has received. On the one hand, Justin Kraske, Chief Counsel of the MT PSC, informed this author and his clients during a scheduled February 12, 2016 meeting in Helena, that MVP was exempt from PSC jurisdiction because it qualifies as a cooperative association under state law. On the other hand, MVP General Manager, Jean Matt, informed this author during a subsequent March 7, 2016 telephone discussion, that MVP was not a cooperative association but rather a nonprofit corporation. Mr. Matt also referred to MVP as falling within the sovereignty of the CSKT which operates and manages it pursuant to a 638 contract even though MVP is a federal corporation.

⁶² See Montana Codes Annotated, § 35-18-104 (“Cooperatives and foreign corporations transacting business in this state pursuant to this chapter are exempt in all respects from the jurisdiction and control of the public service commission of this state.”).

of State.⁶³ Such treatment would appear to be consistent with Attorney General Opinion 24, which *inter alia* holds that “Application of state law to the on-reservation conduct of tribal governments is generally considered an undue infringement on tribal sovereignty, sometimes expressed as the right of the Indians to make their own laws and be governed by them.”⁶⁴

Should MVP not be subject to MT PSC jurisdiction for any one or more of the reasons noted above, no consumer of electricity on the reservation (including a district member) would have recourse to the MT PSC in the event he/she had a complaint about a particular MVP decision, action, policy or practice. Instead, the only recourse such person would have is to follow the U.S. government (BIA) grievance and appeal processes outlined in the MVP Operations Manual.

The customer appeals process⁶⁵ outlined in MVP’s Operations Manual requires an objecting customer to follow certain procedures. First, the customer must take the complaint to the Customer Service Manager for resolution.⁶⁶ If no resolution is possible, the complaint “will be passed on to the General Manager.⁶⁷ If the General Manager reaffirms the utility decision to which the customer is objecting,” customer may proceed to file the complaint with the Consumer Council.⁶⁸ The Consumer Council may handle a complaint if the issue concerns “errors or disputes over billing, calculation of line extension charges, decisions to disconnect service, and other issues clearly related to utility/customer relations.”⁶⁹ If the Consumer Council accepts the complaint, the Council is “authorized to award no more than \$5,000 to satisfy the objection.”⁷⁰

Where a complaint concerns “a general utility policy,” it must be submitted for resolution to the General Manager who may ask the Utility Board to reconsider the policy.⁷¹ If the General Manager is unable to resolve a policy issue, the customer may take the complaint to the Consumer Council.⁷² “The Consumer Council, after investigating the complaint, may uphold the utility policy or make recommendations to the Utility Board to change its policy. Although these recommendations carry considerable weight, the Utility Board will make the final decision.”⁷³

“Complaints or appeals that cannot be resolved as provided above may be filed with the Northwest Regional Director under the authority of Title 25 CFR Section 175.60.”⁷⁴ If the Northwest Regional

⁶³ This author was informed of this treatment during a March 7, 2016 telephone conversation with a representative from the office of the Montana Secretary of State.

⁶⁴ See State of Montana Department of Justice, *48 Op. Att’y Gen. No. 24* (Jan. 2000) at p. 3, available at: <https://dojmt.gov/wp-content/uploads/2000/01/48-024.pdf>.

⁶⁵ See Mission Valley Power, *Operations Manual Including Services Policies* (Eff. Jan. 1, 2014), *supra* at Section 5, p. 51.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* The address of the Northwest Regional Director of BIA is: “Northwest Regional Director, Bureau of Indian Affairs, Northwest Regional Office, 911 N.E. 11th Avenue, Portland, OR 97232-4169.” *Id.*

Director is unable to resolve a complaint or appeal, it “may be appealed or referred to the Interior Board of Indian Appeals pursuant to Section 175.61.”⁷⁵ Considering how poorly the BIA continues to manage and account for the operations and maintenance of the Flathead Irrigation Project which, it estimates, has deferred O&M expenditures ranging from \$45 to \$82 million that an extensive U.S. Government Accountability Office (“GAO”) review remains unable to validate,⁷⁶ it is not likely that either the BIA’s Northwest Regional Director or the Interior’s Board of Indian Appeals will properly address consumer complaints or appeals.

A closer look at how the MVP operates from within explains why the public interest may not be adequately served by the procedures identified in the MVP Operations Manual. A prior General Accounting Office (“GAO”) report analyzing the 638 contracts entered into between the CSKT and BIA between 1986 and 1991,⁷⁷ reveals four key parties on the MVP side of each 638 contract: the ten-member Tribal Council, the utility’s uncompensated non-employee five-member Board of Directors which can include tribal and non-tribal members, the General Manager, and the seven-member non-employee Consumer Council. The Tribal Council serves as “the contractor, which agrees to provide the electrical service.”⁷⁸ The Board, “composed of reservation residents who meets certain qualifications and who are appointed by the tribal council, is responsible for managing the utility.”⁷⁹ “The General Manager, a utility employee” the board hired “with the Tribal Council’s concurrence, and who reports to the Board, is responsible for directing the utility’s operations.”⁸⁰ The Consumer Council, “composed of interested reservation residents who are geographically dispersed and who are appointed by the superintendent of BIA’s Flathead Agency Office, is responsible for providing opportunities for customers’ participation in the utility’s operations and hearing customers’ appeals.”⁸¹

The current MVP website, furthermore, reveals that the Tribal Council-appointed Board-of-Directors “develops and implements utility policies, plans, and rate schedules [that are] deemed necessary and comply with applicable federal and tribal law.”⁸² *The CSKT Tribal Council must review and concur with “[a]ll major utility policies and plans [...] prior to implementation”* (emphasis added).⁸³ Unfortunately,

⁷⁵ *Id.* The address of the Interior Board of Appeals is: “Interior Board of Indian Appeals, 801 North Quincy Street Suite 300, Arlington, VA 22203.” *Id.*

⁷⁶ See United States Government Accountability Office, *Indian Irrigation Projects - Numerous Issues Need to Be Addressed to Improve Project Management and Financial Sustainability*, Report to the Chairman, Subcommittee on Interior and Related Agencies, Committee on Appropriations, U.S. Senate, GAO-06-314 (Feb. 2006), at pp. 8-9, 11, 16-17, 19-20, 30, available at: <http://www.gao.gov/assets/250/249094.pdf>; GAO Report: *Irrigation Projects Not a Priority at BIA*, Indianz.com (March 30, 2006), available at: <http://www.indianz.com/News/2006/013246.asp>; United States Government Accountability Office, *Indian Irrigation Projects - Deferred Maintenance and Financial Sustainability Issues Remain Unresolved*, Statement of Anne-Marie Fennell, Director, Natural Resources and Environment, Testimony Before the Committee on Indian Affairs, U.S. Senate, GAO-15-453T (March 4, 2015), at p. 10, available at: <http://www.gao.gov/assets/670/668857.pdf>.

⁷⁷ See United States General Accounting Office, *Tribal Management of Mission Valley Power*, GAO/RCED-92-282R, (Sept. 18, 1992), available at: <http://www.gao.gov/products/RCED-92-282R>.

⁷⁸ *Id.*, at p. 2.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See Mission Valley Power, *Utility Board*, available at: <http://missionvalleypower.org/departments/utility-board/>.

⁸³ *Id.*

this strongly suggests that the Board is unable to render its own decisions because it is not actually “independent” from the Tribal Council. It also is well recognized that the CSKT Tribal Council is treated by federal and state authorities as a sovereign entity not generally transparent with or accountable to either. While the FERC only recently concluded that “retail customers may file complaints and protest transmission rates and wholesale sales rates before the Commission,⁸⁴ they must, nevertheless, follow detailed, arcane and potentially costly procedures to do so. Moreover, the current MVP website reveals that members of the BIA Flathead Agency Office-appointed Consumer Council “serve three-year terms,”⁸⁵ and may be reappointed;⁸⁶ consequently, community representatives may become entrenched and not actually represent the public interest.

5. It is Not Too Late for FJBC/District Counsel to Employ FERC Procedures to Amend the Prior Petition for an Evidentiary Public Hearing to Include Article 40(c)(ii) Issues

Section 215(a)(1) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission permits the filing of an amendment to a pleading, including a petition for the setting of an evidentiary public hearing filed by the FJBC/Districts, as long as it conforms to the requirements applicable to said pleading.⁸⁷ Section 215(d) of such rules provides that an unopposed amendment becomes effective as an amendment at the end of 15 days from the date of filing; otherwise, an amendment that is opposed by motion within 15 days of its filing will become effective after 20 days following its filing, unless “the decisional authority, before such date, issues an order rejecting the amendment, wholly or in part, for good cause.”⁸⁸

Section 215(a)(3)(iii) of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission provides that, “[i]f, in a proceeding [...] that is set for hearing under subpart E, a written amendment is filed after the time for filing provided under paragraph (a)(3)(ii) of this section [i.e., “more than five days before the earlier of either the first prehearing conference [February 17, 2016⁸⁹] or the first day of evidentiary hearings [March 25, 2016⁹⁰] [...]], the amendment becomes effective as an amendment only as provided under paragraph (d) of this section.”⁹¹

⁸⁴ See United States of America, Federal Energy Regulatory Commission, Order on Certification of Questions, Docket No. ER07-1069-006, 153 FERC ¶61,167 (Nov. 12, 2015), at pp. 2, 9, available at: <http://elibrary.ferc.gov/idmws/common/OpenNat.asp?fileID=14043779>. See also *Id.*, at p. 10 (concluding that Sections 201 and 306 of the Federal Power Act, “when read together,” respectively, “grants the Commission jurisdiction over public utility transmission rates and wholesale power sales rates, and [...] authorizes ‘any person’ to file a complaint concerning matters that are within the Commission’s jurisdiction.”).

⁸⁵ See Mission Valley Power, *Consumer Council*, available at: <http://missionvalleypower.org/departments/consumer-council/>.

⁸⁶ See, e.g., Mission Valley Power, *Mission Valley Power Notes - November/December 2009*, at p. 1, available at: <http://missionvalleypower.org/wp-content/uploads/2009/11/Power-Notes-November-December-2009.pdf> (“Consumer Council & Utility Board Members [...] Reappointments to the Consumer Council are: Jeannine Woods of Hot Springs and Wyman McDonald of Ronan. Reappointments to the Utility Board are Cynthia Benson and Gordon Fyant.”).

⁸⁷ See 18 CFR § 385.215(a)(1).

⁸⁸ See 18 CFR § 385.215(d).

⁸⁹ See United States of America, Federal Energy Regulatory Commission, *Order Establishing Procedural Schedule*, Project No. 5-103 (Feb. 18, 2016), available at: <http://elibrary.ferc.gov/IDMWS/common/opennat.asp?fileID=14149519>.

⁹⁰ *Id.*

⁹¹ See 18 CFR § 385.215(a)(3)(iii).

Moreover, FERC administrative practice reveals that a matter may be set for a trial-type evidentiary hearing only when there are disputed issues of material fact that cannot be resolved on the written record.⁹² The Commission is required to set such a hearing only if the disputes involve concerns such as witness credibility,⁹³ and the party requesting such hearing proffers evidence adequate to demonstrate that the hearing is necessary and that the new issues do not warrant summary action.⁹⁴

The Article 40(c)(ii) issues discussed in this memorandum can be procedurally added to the matters set for the trial-based evidentiary public hearing now underway. FERC's/Districts' counsel can accomplish this objective by filing an amendment to the prior petition/request. Arguably, any such amendment filed with the Commission is likely to be opposed by both the Tribes and the U.S. government agencies involved – namely, DOI-BIA and DOE-BPA. These parties are likely to materially disagree with the factual findings used to justify the addition of the Article 40(c)(ii) issues among the matters the Commission has set for consideration during said hearing. Nevertheless, counsel can prevail by emphasizing how newly acquired evidence concerning the U.S. government's considerable role in wholesaling and reselling electricity within the bounds of the reservation renders these issues highly relevant to this proceeding.⁹⁵

V. Conclusion:

It is necessary to flesh out in greater detail the Revised Preliminary Statement of Contested Issues filed on March 2, 2016, to ensure the critical issues engendered by Kerr Dam license Article 40(c)(ii) are properly and adequately addressed. FJBC's/Districts' counsel can employ FERC procedural rules and administrative case law to ensure that the Article 40(c)(ii) issues discussed in this memorandum are added to the issues the Commission previously set for the trial-type evidentiary public hearing now underway, (i.e., the administrative record) without triggering the FERC Administrative Law Judge's rejection.

⁹² See *Cal. ex rel. Lockyer v. FERC*, 329 F.3d 700, 708-09 (9th Cir. 2003) (the Commission need not convene a hearing when there are no issues of disputed fact and can decide issues as a matter of law); *Moreau v. FERC*, 982 F.2d 556, 568 (D.C. Cir. 1993) (the Commission need not conduct a hearing if the issues can be resolved on the written record); *Midcontinent Indep. Sys. Operator, Inc.*, 149 FERC ¶ 61,225, at P 60 (2014) (the Commission rejected a request for a hearing when there were no questions of material fact); *PJM Interconnection, L.L.C.*, 117 FERC ¶ 61,218, at P 69 (2006) (the Commission need not conduct a hearing when there are no disputed issues of material fact and issues raised may be adequately resolved based on the written record).

⁹³ See *Pac. Gas & Elec. Co. v. FERC*, 306 F.3d 1112, 1119 (D.C. Cir. 2002) (Commission's denial of an evidentiary hearing request is proper even for disputed issues, if "they may be adequately resolved on the written record, at least where there is no issue of motive, intent, or credibility"); *Union Pac. Fuels, Inc. v. FERC*, 129 F.3d 157, 164 (D.C. Cir. 1997) (The Commission "may resolve factual issues on a written record unless motive, intent, or credibility are at issue or there is a dispute over a past event."); *Iroquois Gas Transmission Sys., L.P.*, 52 FERC ¶ 61,091, at 61,368 (1990).

⁹⁴ See *Woolen Mill Assoc. v. FERC*, 917 F.2d 589, 592 (D.C. Cir. 1990); *Pepco Holdings, Inc.*, 124 FERC ¶ 61,176, at p. 130 (2008).

⁹⁵ See United States of America, Federal Energy Regulatory Commission, *Order on Remand*, 125 FERC ¶ 61,312, (Dec. 18, 2008) at paras. 4 and 18, pp. 4, 9, available at: <https://www.ferc.gov/whats-new/comm-meet/2008/121808/E-1.pdf> (wherein the Commission, in a case on remand from the U.S. Supreme Court concerning a series of wholesale energy contracts, reopened the record to allow the parties to submit new information). See also *Texas Railroad Comm'n*, 41 FERC ¶ 61,213 (1987) (considering new evidence); *Southwestern Pub. Serv. Co.*, 60 FERC ¶ 61,052 (1992) (reopening record). Cf. *PacificCorp v. Reliant Energy Serv., Inc.*, 103 FERC ¶ 61,355 (2003) (denying request to reopen record).