

149 FERC ¶ 61,216  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;  
Philip D. Moeller, Tony Clark,  
and Norman C. Bay.

Confederated Salish and Kootenai Tribes  
of the Flathead Reservation

Docket No. EL14-92-000

SX<sup>w</sup>NQ̇ E?ELS LSU<sup>w</sup>EČM / KSUKŁIEMUMAE ' A·K̇AŁMUKWA'ITS, Inc.

ORDER ON PETITION FOR DECLARATORY ORDER

(Issued December 8, 2014)

1. On August 20, 2014, pursuant to Rules 205 and 207 of the Commission's Rules of Practice and Procedure<sup>1</sup> and section 35.12 of the Commission's regulations,<sup>2</sup> the Confederated Salish and Kootenai Tribes of the Flathead (the Tribes) and SX<sup>w</sup>NQ̇ E?ELS LSU<sup>w</sup>EČM / KSUKŁIEMUMAE ' A·K̇AŁMUKWA'ITS, Inc. (EKI)<sup>3</sup> (together, Petitioners) filed a petition for declaratory order (Petition) in the above-captioned proceeding, requesting that the Commission determine that Petitioners are exempt public utilities under section 201(f) of

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<sup>1</sup> 18 C.F.R. §§ 385.205, 385.207 (2014).


<sup>2</sup> 18 C.F.R. § 35.12 (2014).

<sup>3</sup> We note that SX<sup>w</sup>NQ̇ E?ELS LSU<sup>w</sup>EČM / KSUKŁIEMUMAE ' A·K̇AŁMUKWA'ITS, Inc. does business as Energy Keepers, Inc., hence the acronym "EKI." See Petition, Attachment B, Exh. A (Federal Charter of Incorporation Issued by the United States of America Department of the Interior Bureau of Indian Affairs to Tribes for EKI (EKI Charter)).

the Federal Power Act (FPA).<sup>4</sup> Petitioners also seek a similar determination that, pursuant to section 366.2 of the Commission's regulations,<sup>5</sup> Petitioners are exempt public utilities under the Public Utility Holding Company Act of 2005 (PUHCA 2005)<sup>6</sup> and thus are not required to maintain or make their books and records available to the Commission under PUHCA 2005 and related regulations.<sup>7</sup> In this order, the Commission grants the Petition.

## I. Background

### A. Petitioners



2. Petitioners state that the Tribes are a federally-recognized Indian tribal government established pursuant to section 16 of the Indian Reorganization Act of 1934 (Indian Reorganization Act).<sup>8</sup> Noting that the Tribes signed the Hellgate Treaty on July 16, 1855, Petitioners assert that this treaty memorialized the sovereign status and the fundamental nature of their government-to-government relationship with the United States.<sup>9</sup> Petitioners add that the Tribes have a federally-recognized Constitution and Bylaws, which were ratified on October 4, 1935, in accordance with section 16 of the Indian Reorganization Act.<sup>10</sup> 

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<sup>4</sup> 16 U.S.C. § 824(f) (2012). Petitioners acknowledge that certain provisions of Part II of the FPA nevertheless apply to public utilities that are exempt public utilities under section 201(f) of the FPA. *See infra* P 16.

<sup>5</sup> Petition at 2 (citing 18 C.F.R. § 366.2 (2014)).

<sup>6</sup> 42 U.S.C. § 16451 (2012).

 <sup>7</sup> The requirement to maintain and make available to the Commission “books, accounts, memoranda, and other records,” *see* 42 U.S.C. § 16452 (2012); 18 C.F.R. § 366.2, is generally referred to as the books and records requirement. 

<sup>8</sup> Petition at 4 & n.4 (citing 25 U.S.C. § 476 (2012); Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 79 Fed. Reg. 4,748 (Jan. 29, 2014)).


<sup>9</sup> *Id.* at 4 & n.5 (citing 12 Stat. 975) Petitioners note that the treaty was ratified on March 8, 1850 and proclaimed on April 18, 1859.

<sup>10</sup> *Id.* at 4; *see also id.*, Attachment A (Constitution and Bylaws). Petitioners note that the preamble to the Tribes' Constitution provides, as follows:

(continued...)

3. Petitioners state that EKI is a corporation that is chartered by the Department of Interior pursuant to section 17 of the Indian Reorganization Act.<sup>11</sup> Petitioners explain that EKI is wholly-owned by the Tribes, which hold one share of non-transferable stock on behalf of the entire membership of the Tribes.<sup>12</sup> Petitioners state that the Tribes' Tribal Council functions as the shareholder's representative for all purposes involving EKI. According to Petitioners, EKI's business affairs are managed by a board of directors, which consists of directors appointed by the shareholder's representative as provided in and subject to EKI's corporate bylaws. Petitioners further explain that, pursuant to an annual operating plan that is developed by the board of directors and approved by the shareholder's representative, the board of directors and management perform the corporate activities of EKI. Petitioners add that EKI's net revenues, if any, are to be disbursed annually to the Tribes.

#### **B. Kerr Project**

4. Petitioners state that the Tribes are poised to become the first American Indian tribe to own and operate a Commission-licensed hydroelectric power plant, **the Kerr Hydroelectric Project, Project No. 5 (Kerr Project)**.<sup>13</sup> They state that the Kerr Project consists of a reservoir, dam, penstocks, power plant, and related assets.<sup>14</sup> They add that the Kerr Project is located on Flathead Lake and Flathead River,<sup>15</sup> and the Kerr Project power plant and the majority of its reservoir are **located within the Tribes' treaty-reserved Flathead Reservation**.<sup>16</sup> 

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We, the Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana, in order to establish a more responsible organization, promote our general welfare, conserve and develop our lands and resources, and secure to ourselves and our posterity the power to exercise certain rights of self-government not inconsistent with Federal, State, and local laws, do ordain and establish this Constitution for the Confederated Tribes of the Flathead Reservation.

<sup>11</sup> Petition at 5 (citing 25 U.S.C. § 477 (2012)).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 3.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 4.

5. Petitioners explain that, on July 17, 1985, the Commission issued the current license for the Kerr Project with a 50-year term to Montana Power Company and the Tribes, as joint licensees.<sup>17</sup> Petitioners state that the licensing order reflected settlement provisions negotiated between Montana Power Company and the Tribes as competing applicants for the license, specifying that, after a term of thirty years, the Kerr Project could be transferred to full ownership by the Tribes.<sup>18</sup>

6. Petitioners state that, under the procedures set forth in the license, the Tribes will take over the Kerr Project on September 5, 2015.<sup>19</sup> On this date of conveyance, the Tribes will be the sole owner and operator of the Kerr Project, through and until the license expires on September 4, 2035.<sup>20</sup>

7. Petitioners explain that the instant Petition asking the Commission to find that Petitioners are exempt public utilities is in anticipation of and in preparation for the conveyance of the Kerr Project. They assert that the nature of the bilateral marketplace in the Pacific Northwest is such that Petitioners would like to have these exemption issues resolved in a sufficient amount of time to secure contracts for the sale of electricity from the Kerr Project well in advance of the conveyance date.<sup>21</sup>

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<sup>17</sup> *Id.* at 3 & n.1 (citing *Montana Power Co.*, 32 FERC ¶ 61,070 (1985)). We note that PPL Montana purchased the Montana Power Company's interest in 1999. On July 24, 2014, pursuant to delegated authority, Commission staff approved the transfer of the license for the Kerr Project from PPL Montana, LLC to Northwestern Corporation. *PPL Montana, LLC*, 148 FERC ¶ 62,072, *dismissing reh'g*, 148 FERC ¶ 61,220 (2014) (dismissing rehearing request as untimely because it should have been filed as a request for rehearing of *Montana Power Co.*, 32 FERC ¶ 61,070).

<sup>18</sup> Petition at 3. *See also* *Montana Power Co.*, 32 FERC ¶ 61,070 at 61,178-79 (explaining that parties agreed to a joint license arrangement under which Montana Power Company's ratepayers will receive part of the benefits of the Kerr Project's generation, with Tribes' members receiving part of such benefits through the annual charge and, for the last 20 years of the license term, the Tribes' members will share such benefits with the ratepayers of the utility with whom the Tribes negotiate the output, as well as the benefit of controlling the resource).

<sup>19</sup> *Id.* at 3 & n.2; *see also* Tribes' March 5, 2014 Notice of Conveyance, Kerr Project No. 5 (designating September 5, 2015 as the conveyance date for the Kerr Project).

<sup>20</sup> Petition at 3.

<sup>21</sup> *Id.* at 3-4.

## II. Petition

8. Petitioners ask the Commission to determine that they are exempt public utilities under section 201(f) of the FPA and that they are not required to maintain or make available their books and records to the Commission under PUHCA 2005 and the related regulations. Petitioners assert that, consistent with Commission precedent in *Sovereign Power, Inc.*<sup>22</sup> and *Confederated Tribes of the Warm Springs Reservation of Oregon*,<sup>23</sup> Petitioners are exempt public utilities because the Tribes are instrumentalities of the federal government and EKI is a wholly-owned corporation of the Tribes that assists the Tribes in performing their government functions. Petitions assert that, therefore, they are exempt from the majority of the requirements of Part II of the FPA, and that the PUHCA 2005 requirement to provide the Commission access to books and records does not apply to Petitioners.<sup>24</sup>

### A. FPA Part II Exemption

9. Petitioners state that the FPA and its regulations apply to public utilities that are not otherwise exempt.<sup>25</sup> Petitioners point out that “public utility” is defined in section 201(e) of the FPA as follows:

The term “public utility” when used in this subchapter and subchapter III of this chapter means any person who owns or operates facilities subject to the jurisdiction of the Commission under this subchapter (other than facilities subject to such jurisdiction solely by reason of section 824e(e), 824e(f), [1]824i, 824j, 824j-1, 824k, 824o, 824p, 824q, 824r, 824s, 824t, 824u, or 824v of this title).<sup>26</sup>

10. Petitioners emphasize, however, that section 201(f) of the FPA exempts “governmental instrumentalities” from the Commission’s authority over public utilities:

<sup>22</sup> 84 FERC ¶ 61,014 (1998) (*Sovereign*).

<sup>23</sup> 93 FERC ¶ 61,182 (2000) (*Warm Springs*).

<sup>24</sup> Petition at 1-2, 5-9, 11-13. Petitioners acknowledge that, even if they are exempt public utilities for the majority of the provisions of Part II of the FPA, they will nevertheless remain subject to certain provisions. For further details, *see infra* P 16.

<sup>25</sup> *Id.* at 6 (citing 16 U.S.C. §§ 824d (2012), 824e (2012); 18 C.F.R. Part 35 (2014)).

<sup>26</sup> *Id.* (quoting 16 U.S.C. § 824(e)).

*No provision in this subchapter shall apply to, or be deemed to include the United States, a State or any political subdivision of a State . . . or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.*<sup>27</sup>

11. Petitioners assert that, in *Sovereign*, a case of first impression, the Commission found under the plain language of Part II of the FPA that the Sovereign tribal corporation was exempt from the Commission’s authority over public utilities.<sup>28</sup> Petitioners add that, in *Warm Springs*, the Commission relied on *Sovereign* to make a similar finding that the Warm Springs Indian Tribe and its wholly-owned corporation were similarly exempt. Petitioners contend that the Commission should rely on *Sovereign* and *Warm Springs* to conclude that Petitioners are exempt public utilities.

12. Petitioners elaborate that, in *Sovereign*, the Commission disclaimed jurisdiction over Sovereign Power, Inc. (Sovereign Power), a tribal corporation wholly-owned by the federally recognized Spokane Tribe of Indians (Spokane Tribe), because the Commission found that Sovereign Power was an instrumentality of the United States government and therefore not subject to regulation under section 201(f) of the FPA. Petitioners add that the Commission found that the Spokane Tribe was an instrumentality of the “United States, a State or any political subdivision of a state” because, among other reasons, “the Spokane [T]ribe performs inherent government functions and the funds generated by Sovereign [Power] will be used by the tribe on the behalf of government and in performance of government functions.”<sup>29</sup>

Petitioners state that the Commission ultimately concluded that Sovereign Power was not a public utility for purposes of the Commission’s jurisdiction because Sovereign Power “was a corporation wholly owned by this instrumentality under 201(f)[.]”<sup>30</sup>

13. Petitioners explain that, in *Warm Springs*, the Commission cited to its finding in *Sovereign* that “it lacks jurisdiction over a tribal corporation owned and operated by the

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<sup>27</sup> *Id.* (quoting 16 U.S.C. § 824(e) (emphasis added by Petitioner)).

<sup>28</sup> *Id.* at 7 (citing *Sovereign*, 84 FERC ¶ 61,014 at 61,070).

<sup>29</sup> *Id.* & n.16 (quoting *Sovereign*, 84 FERC ¶ 61,014 at 61,070 (internal quotation marks omitted)).

<sup>30</sup> *Id.* at 8 & n.17 (quoting *Sovereign*, 84 FERC ¶ 61,014 at 61,071).

Spokane Tribe.”<sup>31</sup> Petitioners list the factors the Commission relied on in *Warm Springs*, based on its determination in *Sovereign*, to support a determination that the Commission lacked FPA Part II jurisdiction over Warm Springs Power Enterprises, a federal corporation wholly-owned by the Confederated Tribes of the Warm Springs Reservation of Oregon (Warm Springs Tribe):

[T]he enterprise was wholly owned by the Spokane Tribe; the Spokane Tribe performed government functions; the funds generated would be used for governmental purposes; such funds would decrease the need for federal funding; and the Spokane Tribe was subject to extensive federal oversight.<sup>32</sup>



Petitioners state that the Commission applied these factors to the Warm Springs Tribe and found that it, too, was an instrumentality of the United States, and thus the Commission concluded that Warm Springs Power Enterprises “is not a public utility for purposes of [the Commission’s] jurisdiction.”<sup>33</sup>

14. Petitioners argue that, like the Spokane Tribe and the Warm Springs Tribe, the Commission should consider the Tribes to be an instrumentality of the United States because they perform “inherent government functions” of the federal government.<sup>34</sup> Petitioners assert that “there is a unique federal relationship with Indian tribes and because of the fiduciary duty the United States has to Tribes,” the Tribes should be deemed to be an agency, authority, or instrumentality of the United States for purposes of Part II of the FPA.<sup>35</sup>

15. Additionally, Petitioners argue that EKI, a corporation chartered by the United States and wholly-owned by the Tribes, should be deemed to be a “corporation which is wholly-owned, directly or indirectly” by an agency, authority, or instrumentality of the United States, for purposes of Part II of the FPA.<sup>36</sup> Petitioners state that, like *Sovereign Power, Inc.* and Warm Springs Power Enterprises, EKI will disburse net revenues (generated by the sale of

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<sup>31</sup> *Id.* at 8 & n.18 (quoting *Warm Springs*, 93 FERC ¶ 61,182 at 61,598).

<sup>32</sup> *Id.* at 8 & n.19 (quoting *Warm Springs*, 93 FERC ¶ 61,182 at 61,598).

<sup>33</sup> *Id.* at 8 & n.20 (quoting *Warm Springs*, 93 FERC ¶ 61,182 at 61,599).

<sup>34</sup> *Id.* at 8.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 9.

electrical output from the Kerr Project) to the Tribes to aid it in performing the Tribes' inherent government functions. Petitioners state that revenue from the Kerr Project will be managed by EKI and the funds EKI helps to generate will decrease the need for the Tribes to receive federal funding, thus promoting one of Congress' "over-riding goals" to encourage "Tribal self-determination and economic independence."<sup>37</sup> Petitioners state that EKI's purpose generally is to "promote and facilitate the development and utilization of energy resources for the benefit of members of [the Tribes]."<sup>38</sup> Petitioners add that EKI's specific purpose is to acquire, construct, manage, operate, and maintain the Kerr Project on behalf of the Tribes, so as to generate a profit and accrue income that will be disbursed to the Tribes to support the Tribes' government functions.<sup>39</sup> Petitioners assert that, therefore, as a wholly-owned entity of the Tribes that assists the Tribes in performing inherent government functions, EKI should also be considered an exempt public utility.

16. Petitioners acknowledge, however, that they are not exempt from all of Part II of the FPA and that the following provisions of Part II will still apply to the Tribes and EKI: section 215 (electric reliability);<sup>40</sup> section 221 (prohibition on filing false information);<sup>41</sup> section 222 (prohibition of energy market manipulation);<sup>42</sup> section 206(e)(2) (refund authority for short-term sales violating a Commission-approved tariff or market rule);<sup>43</sup> and, potentially, section 211A (open access by unregulated transmitting utilities).<sup>44</sup> Petitioners state that they intend to comply with these provisions of the FPA.

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<sup>37</sup> *Id.* at 9 & n.22 (quoting Sovereign Power, Inc. May 14, 1998 Petition for Acceptance of Initial Rate Schedule Waivers and Blanket Authority, Docket No. ER98-2295-000 at 5).

<sup>38</sup> *Id.* at 9 (quoting *id.*, Attachment B).

<sup>39</sup> *Id.* at 9 & n.24.

<sup>40</sup> *Id.* at 10 (citing 16 U.S.C. § 824o (2012)).

<sup>41</sup> *Id.* (citing 16 U.S.C. § 824u (2012)).

<sup>42</sup> *Id.* (citing 16 U.S.C. § 824v (2012)).

<sup>43</sup> *Id.* (citing 16 U.S.C. § 824e(e)(2) (2012)).

<sup>44</sup> *Id.* (citing 16 U.S.C. § 824j-1 (2012)).



**B. PUHCA 2005 Exemption**

17. Additionally, Petitioners argue that the Commission should find that the Tribes and EKI are also exempt public utilities under PUHCA 2005 and related Commission regulations.<sup>45</sup> Petitioners state that, under section 366.2 of the Commission's regulations, implementing PUHCA 2005, a holding company that is considered to be an instrumentality of the United States government is not required to maintain or make available its books and records to the Commission.<sup>46</sup>

18. Specifically, Petitioners explain that, under section 366.2, the books and records requirements do not apply to "[a]ny agency, authority, or instrumentality" of the United States.<sup>47</sup> Noting the similarity between section 366.2 and section 201(f) of the FPA, which provides that government instrumentalities are not subject to the Commission's jurisdiction under Part II of the FPA, Petitioners assert that the Tribes should similarly be considered an instrumentality of the United States for purposes of PUHCA 2005.<sup>48</sup>

Additionally, Petitioners contend that EKI should be considered a wholly-owned tribal corporation that assists the Tribes in performing their inherent government functions by managing the revenue from the Kerr Project. They assert that, consistent with the *Sovereign*

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<sup>45</sup> *Id.* at 11 & n.31 (citing 18 C.F.R. § 366.2).

<sup>46</sup> *Id.* at 11-12. Section 366.2 provides, in pertinent part, the following:

(a) *In general.* Unless otherwise exempted by Commission rule or order, each holding company and each associate company thereof shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates. However, for purposes of this subchapter, no provision in the subchapter shall apply to or be deemed to include:

- (1) The United States;
- (2) A state or political subdivision of a state;
- (3) Any agency, authority, or instrumentality of any entity referred to in paragraphs (a)(1), (2), (3), or (4) of this section as such in the course of his or her official duty.

<sup>47</sup> Petition at 12 (quoting 18 C.F.R. § 366.2).

<sup>48</sup> *Id.* at 12-13.

and *Warm Springs* precedent, the Commission should determine that the Tribes and EKI are exempt public utilities under PUHCA 2005 and related regulations because the Tribes are an instrumentality of the United States and EKI is a chartered enterprise of this instrumentality.

### III. Notice of Filing and Responsive Pleadings

19. Notice of the Petition was published in the *Federal Register*, 79 Fed. Reg. 52,000 (2014), with interventions and protests due on or before September 19, 2014. None was filed.

### IV. Discussion

20. Based on the facts as presented in the Petition, the Commission determines that the Tribes and EKI are exempt public utilities as defined in section 201(f) of the FPA. The Commission also concludes that PUHCA 2005 and relevant Commission regulations do not apply to the Tribes and EKI. These determinations are discussed below.

#### A. FPA Part II Exemption

##### 1. Standard for Exemption

21. Section 201(f) of the FPA provides exemptions from the Commission's authority under most provisions of Part II of the FPA for "the United States, a State or any political subdivision of a state, or any agency, authority or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing."<sup>49</sup> As the courts have explained, "this exemption is generally viewed as applicable to 'governmental entities.'"<sup>50</sup>

22. In *Sovereign*, the Commission determined that it lacked jurisdiction over the Spokane Tribe and over Sovereign Power, a tribal corporation that was a power marketer wholly-owned and operated by the Spokane Tribe. In reaching its determination, the Commission found that: the Spokane Tribe performed inherent government functions; Sovereign Power was wholly-owned by the Spokane Tribe and the funds it generated would be used for governmental purposes; such funds would decrease the need for federal funding; and the Spokane Tribe was subject to extensive federal oversight.<sup>51</sup> The Commission concluded that

<sup>49</sup> 16 U.S.C. § 824(f).

<sup>50</sup> *Bonneville Power Admin. v. FERC*, 422 F.3d 908, 915 (9th Cir. 2005).

<sup>51</sup> *Sovereign*, 84 FERC ¶ 61,014 at 61,070. Among the features the Commission singled out as indicators of extensive federal involvement were the fact that purchases of land are forbidden without federal consent; the Secretary of Interior (Secretary) is authorized to

(continued...)

the Spokane Tribe was a governmental entity within the embrace of section 201(f) and Sovereign Power was a corporation wholly-owned by the Spokane Tribe; consequently, the Commission reasoned that Sovereign Power was an exempt public utility under section 201(f) of the FPA.<sup>52</sup>

23. Subsequently, in *Warm Springs*, the Commission applied the standard enunciated in *Sovereign* to determine that the Warm Springs Tribe was similarly a governmental entity exempted from Part II of the FPA by section 201(f) of the Act and that a chartered enterprise of the Warm Springs Tribe, Warm Springs Power Enterprises, was not a public utility for purposes of Commission jurisdiction.<sup>53</sup>

## 2. The Tribes

24. Applying the standard and precedent to the facts as presented in the Petition, the Commission concludes that the Tribes are an “agency, authority or instrumentality” of the “United States, a State or any political subdivision of a state.”<sup>54</sup> As explained below, the Tribes perform inherent government functions and they will use the funds generated by their wholly-owned corporation, EKI, on behalf of the government and in performance of government functions. As Petitioners point out, the revenue EKI will generate by the sale of the electrical output from the Kerr Project will decrease the Tribes’ need for federal government funding.<sup>55</sup>

25. Specifically, similar to the tribe in *Warm Springs*, the Tribes are subject to Interior Department oversight, and the Interior Department’s influence over the Tribes’ actions indicates that, to a significant extent, the Tribes are linked to the federal government. First, the Tribes are organized pursuant to section 17 of the Indian Reorganization Act,<sup>56</sup> a federal

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sell lands for the tribe; and all attorney contracts must be approved by the Bureau of Indian Affairs. *Id.* at 61,070-71.

<sup>52</sup> *Id.*

<sup>53</sup> *Warm Springs*, 93 FERC ¶ 61,182 at 61,599.

<sup>54</sup> 16 U.S.C. § 824(f).

<sup>55</sup> Petition at 9. As the Commission has previously declared, and Petitioners reiterate, such self-funding generally “promotes the goal of encouraging tribal self-determination and economic independence.” *Warm Springs*, 93 FERC ¶ 61,182 at 61,599; *see also* Petition at 9 & n.4 (citation omitted).

<sup>56</sup> Petition at 4 (citing 5 U.S.C. § 476 (2012)).

government statute. Next, a number of the Tribes' more important enumerated powers involve review and/or approval by the Secretary (of the Interior) before the Tribes may take action. Examples of the federal government's involvement with the Tribes include the following: Secretary consent required for the Tribes to acquire land;<sup>57</sup> Secretary approval required for Tribes' membership;<sup>58</sup> Secretary approval required for employing specific legal counsel to protect and advance the Tribes' rights;<sup>59</sup> Secretary approval required for amending the Tribes' Constitution and Bylaws;<sup>60</sup> Secretary review required for appropriations by the Tribes in excess of \$25,000.00;<sup>61</sup> Secretary review required for the Tribes to promulgate or enforce ordinances that levy assessments or licensing fees on nonmembers doing business with the Tribes or for obtaining special rights or privileges;<sup>62</sup> Secretary review required to exclude people from reservation lands who are not entitled to live on such lands;<sup>63</sup> Secretary review required over the Tribes' promulgation and enforcement of ordinances governing Tribes' members' conduct, providing for the maintenance of law and order, and establishing an Indian Court and defining its powers and duties;<sup>64</sup> and Secretary review required for the Tribes' to promulgate any ordinance regulating trade and the use of property on the reservation that directly affects nonmembers;<sup>65</sup> Secretary review required for the Tribes to regulate the inheritance of real and personal property, other than allotted lands, within the Flathead Reservation.<sup>66</sup>

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<sup>57</sup> *Id.*, Attachment A, Tribes' Constitution and Bylaws, art. VIII (Land), § 11.

<sup>58</sup> *Id.*, art. II (Membership), §§ 2-3, 7.

<sup>59</sup> *Id.*, art. VI (Powers and Duties of the Tribal Council), § 1(b).

<sup>60</sup> *Id.*, art. X (Amendments), § 1.

<sup>61</sup> *Id.*, art. VI, § 1(h).

<sup>62</sup> *Id.*, art. VI, § 1(i).

<sup>63</sup> *Id.*, art. VI, § 1(j).

<sup>64</sup> *Id.*, art. VI, § 1(l).

<sup>65</sup> *Id.*, art. VI, § 1(n).

<sup>66</sup> *Id.*, art. VI, § 1(p).

26. In light of the specific facts and supporting documents presented in the Petition, the Tribes, like the tribes in *Sovereign* and *Warm Springs*, are an “agency, authority or instrumentality” for purposes of the FPA.<sup>67</sup>

### 3. EKI

27. The Commission finds that EKI is also an exempt public utility as defined in section 201(f) of the FPA. EKI is a chartered corporation under section 17 of the Indian Reorganization Act that is wholly-owned by the Tribes and assists the Tribes in performing their inherent government functions, pursuant to section 201(f) of the FPA.

28. As in *Sovereign* and *Warm Springs*, the Commission’s decision in this proceeding is based on the facts of this case, particularly the fact that EKI is a corporation that is wholly-owned and operated by the Tribes. Additionally, like *Sovereign Power* and *Warm Springs Power Enterprises*, EKI will disburse the net revenue that will be generated by the sale of electrical output from the Kerr Project to the Tribes to help them perform their inherent government functions.<sup>68</sup> The revenue from the Kerr Project will be managed by EKI and the funds EKI helps to generate will decrease the need for the Tribes to receive federal funding.<sup>69</sup> In addition, EKI’s general purpose is to “promote and facilitate the development and utilization of energy resources for the benefit of members of [the Tribes].”<sup>70</sup> EKI’s specific purpose is to acquire, construct, manage, operate, and maintain the Kerr Project on behalf of the Tribes so as to generate a profit and accrue income that will be disbursed to the Tribes to

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<sup>67</sup> While the Commission recognizes that in other contexts courts have ruled that Indian tribes are not instrumentalities of the government, none of those cases involved the FPA. See, e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1975) (finding tribe’s off-reservation ski resort does not constitute “a federal instrumentality constitutionally immune from state taxes of all sorts”); *United States v. Wheeler*, 435 U.S. 313 (1978) (holding that Double Jeopardy clause does not bar successive tribal and federal prosecutions because tribe’s power to punish derives from its retained sovereignty, not from federal sovereignty delegated to the tribe by Congress); *Smart v. State Farm Insurance Co.*, 868 F.2d 929 (7<sup>th</sup> Cir. 1989) (tribe is not a federal instrumentality for purposes of Employment Retirement Income Security Act).

<sup>68</sup> Petition at 9; see also Attachment B, Exh. A (EKI Charter), art. V. (Purposes and Objectives) XI. (Disbursement of Net Revenue) B.

<sup>69</sup> Petition at 9.

<sup>70</sup> *Id.* at 9 & n.23; see also *id.*, Attachment B, Exh. A, art. V.A.

support their government functions.<sup>71</sup> Therefore, as a wholly-owned corporation of the Tribes that assists the Tribes in performing their inherent government functions, EKI is an exempt public utility as defined in section 201(f).

29. Furthermore, as the Commission stated in *Warm Springs*, our conclusion is consistent with the long-standing principle that “statutes are to be liberally construed in favor of the Indians, with ambiguous provisions interpreted to their benefit.”<sup>72</sup> Because neither section 201(f) of the FPA nor the legislative history explicitly reference “tribal utilities,” we construe this statutory silence in Petitioners’ favor and conclude that EKI, as an enterprise wholly-owned by a government “agency, authority or instrumentality,” is exempt from regulation as a public utility by virtue of section 201(f).

#### 4. **Limits of Exemption**



30. Additionally, although we find Petitioners are exempt public utilities pursuant to section 201(f) of the FPA, as Petitioners acknowledge, they are not exempt from every provision of Part II of the FPA. Section 201(b)(2) states that certain provisions of the FPA apply to “the entities described in those provisions,” even those entities that are otherwise considered to be exempt public utilities under section 201(f). Petitioners are subject to these provisions, including, for example, reliability standards pursuant to section 215;<sup>73</sup> the prohibition on filing false or misleading information in section 221;<sup>74</sup> the prohibition on energy market manipulation in section 222;<sup>75</sup> and the Commission’s refund authority for short-term electricity sales into organized markets that violate existing tariffs or market rules in section 206(2).<sup>76</sup>

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<sup>71</sup> *Id.* at 9 & n.24; *see also id.*, Attachment B, Exh. A.

<sup>72</sup> *See Warm Springs*, 93 FERC ¶ 61,182 at 61,599 (citing *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985)).

<sup>73</sup> 16 U.S.C. § 824o.

<sup>74</sup> 16 U.S.C. § 824u.

<sup>75</sup> 16 U.S.C. § 824v.

<sup>76</sup> 16 U.S.C. § 824e(e)(2).

## B. PUHCA 2005 Exemption

31. The Commission also finds that PUHCA 2005 and regulations implementing PUHCA 2005 do not apply to Petitioners.<sup>77</sup>

32. PUHCA 2005 requires holding companies to provide the Commission access to their books and records.<sup>78</sup> The regulations implementing PUHCA 2005 define holding company as “any company that directly or indirectly owns, controls, or holds, with the power to vote, 10 percent or more of the outstanding voting securities of a public-utility company . . . .”<sup>79</sup> The Commission’s regulations implementing PUHCA 2005 define a “public-utility company” as “an electric utility company or a gas utility company.”<sup>80</sup> Relevant to the instant proceeding, the regulations define an “electric utility company” as “any company that owns or operates facilities used for the generation, transmission, or distribution of electric energy for sale.”<sup>81</sup> Pursuant to these definitions, EKI is an electric utility company, and thus a public utility company under PUHCA 2005, because it will operate the Kerr Project for the generation, transmission, or distribution of electric energy for sale. Thus, the Tribes, in turn, are a holding company under PUHCA 2005 because they are the sole shareholder of the public utility company, EKI.<sup>82</sup> Additionally, section 366.2 provides that each holding

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<sup>77</sup> 18 C.F.R. § 366.2; *see also* 42 U.S.C. § 16451(13) (defining public utility under PUHCA 2005 as “any person who owns or operates facilities used for transmission of electric energy in interstate commerce or sales of electric energy at wholesale in interstate commerce”).

<sup>78</sup> 42 U.S.C. § 16452 (federal access to books and records). Section 1264(a) of PUHCA 2005 provides, in pertinent part:

Each holding company and each associate company thereof shall maintain, and shall make available to the Commission, such books, accounts, memoranda, and other records as the Commission determines are relevant to costs incurred by a public utility or natural gas company that is an associate company of such holding company and necessary or appropriate for the protection of utility customers with respect to jurisdictional rates.

<sup>79</sup> *Id.*

<sup>80</sup> 18 C.F.R. § 366.1 (2014).

<sup>81</sup> *Id.*

<sup>82</sup> *See* Petition at 5. *See also id.*, Attachment C, EKI Bylaws, Article I (Shareholders Meetings, A. (Shareholders Meetings) and F. (Voting) (providing each member of the Shareholders Representative, the Tribal Council, with one vote).

company (and each associate company) shall maintain and make available to the Commission books and records, unless otherwise exempted by Commission rule or order.<sup>83</sup>

33. Section 366.2, however, also provides that these books and records requirements do not apply to “[a]ny agency, authority, or instrumentality of any entity referred to in paragraphs (a)(1), (2) or (3) of this section.”<sup>84</sup> Paragraph (a)(1) of section 366.2 refers to the “United States.” Thus, the books and records requirement expressly does not apply to any agency, authority or instrumentality of the United States. As discussed above,<sup>85</sup> for purposes of the FPA, the Tribes are an “agency, authority or instrumentality” of the United States and we find they should, for the same reasons, be viewed as an agency, authority or instrumentality of the United States for purposes of PUHCA 2005 and related regulations. Accordingly, the books and records requirements of PUHCA 2005 and related Commission regulations do not apply to the Tribes. Furthermore, for the same reasons, as discussed above, EKI is a chartered enterprise of this agency, authority or instrumentality of the United States that assists the Tribes in performing their inherent government functions, and so EKI is also “an agency, authority or instrumentality of the United States”<sup>86</sup> for purposes of PUHCA 2005 and related regulations. Therefore, the books and records requirements of PUHCA 2005 and related Commission regulations also do not apply to EKI.

### C. Conclusion

34. Based on the facts as presented in the Petition, the Commission finds 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. Accordingly, the Commission grants the Petition.

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<sup>83</sup> 18 C.F.R. § 366.2.

<sup>84</sup> *Id.*

<sup>85</sup> *See supra* PP 21-23.

<sup>86</sup> *Id.*



The Commission orders:

Petitioners' request for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.