



November 12, 2021

**Comments to the Northwest Power Pool from the Northwest & Intermountain Power Producers Coalition on Section 205 filing rights for a regional states committee of the Western Resource Adequacy Program**

The Northwest & Intermountain Power Producers Coalition (NIPPC)<sup>1</sup> has advocated for the creation of an independent regional states committee to engage with the Northwest Power Pool (NWPP) about the Western Resource Adequacy Program (WRAP). NIPPC supports elements of the governance proposal to date of the WRAP, but the program still lacks a key and determining factor of independence: a states committee that is more than merely advisory.

In these comments, NIPPC elaborates on its perspective about why a states committee (named here the Committee of State Representatives (COSR)) should have the authority to have a filing made about the WRAP to the Federal Energy Regulatory Commission (FERC) under Section 205 of the Federal Power Act.<sup>2</sup>

**Distinctions between public power and the regulated sector**

NIPPC applauds the degree to which consumer-owned utilities and power marketers (collectively, “public power”) have collaborated with each other and with their private counterparts to design a program that will address the pressing regional issue of resource adequacy (RA). Public power is an indispensable partner in forming any meaningful regional RA program that encompasses the Pacific Northwest. But a program will only be successful if it also reflects that public power and its private, for-profit peers operate under fundamentally different frameworks of decision-making, accountability, and market competition.

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<sup>1</sup> NIPPC represents competitive power participants in the Pacific Northwest. NIPPC members include owners, operators, and developers of independent power generation and storage, power marketers, and affiliated companies. Collectively, NIPPC represents over 4,500 megawatts of operating generation and an equal amount permitted or under development.

<sup>2</sup> NIPPC recognizes that in order to comply with FERC’s interpretation of the term “public utility” in the Federal Power Act as excluding regional state committees (see *ISO-NE, Bangor Hydro-Electric Company, The Consumers of New England v. NEPOOL*, 106 FERC ¶ 61,280 (2004) at P 79), the WRAP tariff may have to specify that NWPP (as a “public utility”) would be obliged to make a filing on the behalf of the COSR, rather than the COSR itself having freestanding authority to make such a filing.

Of the twenty-three load-responsible entities (LREs) whose participation (as of October 26) in Stage 3A of the WRAP is publicly known,<sup>3</sup> eleven of them are private companies regulated in some manner by state public utility commissions. These companies serve the majority of electrical load covered under the program's first live phase.<sup>4</sup> Their participation in the program may be subject to both proactive standards and reactive reviews by state regulators who do not, and cannot, have any direct managerial or fiduciary responsibility over the companies they regulate. These regulators instead have, as representatives from eight of the states recently noted to NWPP, "historically been responsible for determining both reserve margin requirements for utility system planning and capacity contributions of various resources. These state decisions bear heavily on regulators' state-authorized and state-mandated duties, in various agencies, to ensure that utility customers are protected, pay just and reasonable rates, and receive reliable service in accordance with state policies."<sup>5</sup>

By contrast, public power is more the master of its own fate: it helped design the WRAP, will have votes on the proposed primary decision-making body (the Resource Adequacy Participants Committee (RAPC)), and has no third-party economic regulator to second-guess design or participation decisions later. Instead, final accountability for those decisions rests directly with an appointed board, elected commission, or the utility owners themselves (voters or cooperative members). Public power also does not, for the most part, have the kinds of sanctioned wholesale and retail competition within its service territories that investor-owned utilities in the region have. The special case of the Bonneville Power Administration (BPA) does not complicate this summary: first call on BPA's power supply rests with consumer-owned utilities, and the very limited role<sup>6</sup> that FERC has in reviewing its power and transmission rates is not comparable to the detailed role of state commissions in overseeing the private retail sector.

Like public power, investor-owned utilities and competitive retail suppliers will also have votes on the RAPC and also face accountability from their own boards of directors and owners (shareholders and other private investors). But by the intentional design of state law, these companies are also subject to arms-length scrutiny from state utility commissions that simply doesn't exist for public power. This is particularly true for the dominant incumbent utilities who still operate, to a greater or lesser degree, as vertically-integrated monopolies. Ultimately, the regulatory commissions are masters of

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<sup>3</sup> NWPP, WRAP Stakeholder Advisory Committee (October 26, 2021) at 3, *available at* [https://www.nwpp.org/private-media/documents/2021-10-26\\_SAC\\_Meeting\\_Slides.pdf](https://www.nwpp.org/private-media/documents/2021-10-26_SAC_Meeting_Slides.pdf).

<sup>4</sup> See U.S. Energy Information Administration, Form EIA-861 data (*available at* <https://www.eia.gov/electricity/data/eia861/>); Bonneville Power Administration, 2019 Pacific Northwest Loads and Resources Study (October 2020) at 16 (*available at* <https://www.bpa.gov/p/Generation/White-Book/wb/2019-WBK-Summary.pdf>); and BC Hydro Quick Facts (2021) (*available at* <https://www.bchydro.com/content/dam/BCHydro/customer-portal/documents/corporate/accountability-reports/financial-reports/annual-reports/bchydro-quick-facts-2021.pdf>).

<sup>5</sup> WRAP detailed design comment letter of individual state signatories to NWPP (October 12, 2021) at 5, *available at* [https://www.nwpp.org/private-media/documents/NWPP-RA-Program-Governance\\_Written-Comments\\_FINAL\\_2021-10-15.pdf](https://www.nwpp.org/private-media/documents/NWPP-RA-Program-Governance_Written-Comments_FINAL_2021-10-15.pdf).

<sup>6</sup> 16 U.S.C. 839e(i)(6).

the fate of cost recovery by utilities in these jurisdictions, among other responsibilities granted them under state law.

This difference alone in regulatory treatment is reason enough to grant the COSR Section 205 rights. Section 205 rights (described at more length below) are one of the few meaningful recourses available under federal law to states whose jurisdiction will be affected by the federal oversight brought about by creating the WRAP. Failure to grant the states Section 205 rights may lead to more uncertainty in the regulated sector. In the aftermath of a WRAP design decision or implementation outcome, investor-owned utilities (and, to a lesser extent, competitive marketers) will disperse to their respective state commissions for subsequent regulatory review without the same level of confidence that the WRAP's tariff provisions reflect the states' views. Worse, at least for consumers and non-utility market participants, failure to grant Section 205 rights may also lead to more games of regulatory chicken: a regulated utility may bring a fait accompli WRAP outcome to its commission and dare the commission to act—alone in the region—to negate the outcome for that utility and incidentally affect the regional program. Both of these scenarios can be mitigated by granting the COSR Section 205 rights.

The case for Section 205 rights would be compelling even if the regulated utilities were entirely vertically integrated and purchased no power from independent power producers (IPPs). But NIPPC underscores that the need for Section 205 rights is even more evident given the nature of competition in the private power sector in the Northwest. Public power simply does not face these same competitive, fiduciary, and regulatory cross-currents.

The NWPP subgroup that led the design of the WRAP did include one IPP, a diversification of the group's membership last year that NIPPC appreciated. But the program remains utility-dominated. In effect, as implementation of the WRAP begins, utilities with a fiduciary responsibility to earn their shareholders a return on their investment will be setting market terms for IPPs who are both their competitors and the counterparties who sell them power. The generating and storage assets of IPPs and the expectations placed on IPPs in utility resource procurements (e.g., to acquire particular types of transmission service) will be materially affected by WRAP rules. But IPPs, unless they have an affiliate in a different line of business—serving load, will have no membership in the program and no vote on the participants committee. Except for the Nominating Committee for NWPP's Board of Directors and the program's technical committee (the Program Review Committee), the program is almost entirely load-centered. Those two exceptions are meaningful but insufficient.

Rather than opening up the RAPC to all generators, wholesale marketers, independent transmission companies, consumer advocates, public-interest organizations, and large end-use consumers—a change needed if NWPP wishes to scale up the governance of WRAP to cover future additional regional markets or services—NWPP can instead improve WRAP's governance structure by granting the COSR Section 205 rights.

### **What Section 205 rights contribute to independent governance**

NIPPC understands that some WRAP participants may view Section 206 of the Federal Power Act as sufficient means for the COSR to challenge a WRAP provision. Of course, making a filing under Section 206 is already an option available to any party to challenge a tariff at FERC. The legal standard for a filing under Section 206 is to prove that provisions in the tariff are unjust, unreasonable, unduly discriminatory or preferential, in addition to establishing that a proposed change is just and reasonable.<sup>7</sup> This burden of proof is higher than what the public utility that originally filed the tariff had to demonstrate under Section 205. Under Section 205, the burden of proof is that the provisions are just and reasonable, and not unduly discriminatory or preferential.<sup>8</sup> NIPPC believes that only Section 205 rights will give states a meaningful increment of responsibility over regional RA and ensure that the WRAP tariff achieves an appropriate balancing of interests.

In practice, it may be unlikely that a critical mass of state representatives will reach a conclusion counter to the WRAP's RAPC and NWPP's Board of Directors and make a filing at FERC. By the time such a critical mass is reached, it's more likely that NWPP will have become responsive to the concern expressed by the states. But the point of having Section 205 rights is not necessarily to exercise them; the point is to have recourse if significant input from the COSR is ignored or rejected by the RAPC or NWPP's Board of Directors. A COSR filing never needs to be made under Section 205 for the COSR's right to such a filing to have a balancing effect. And even in the event that a filing is made, NIPPC does not view it as a "nuclear option"; a filing right is not a right to have the filed proposal adopted. FERC remains in the position to review the just and reasonableness of a given filing, and NWPP remains in the position to file its preferred alternative proposal, if it so chooses.

NIPPC also understands that some WRAP participants may view the reconstituted NWPP Board of Directors as a robust enough independent oversight element to satisfy states, market participants, and other stakeholders not eligible to be program participants. NIPPC disagrees with this view. An independent board is essential, but it will not and cannot supplant the regulatory function of the state commissions. The proposed limited role for a representative of the states to have a seat on the Nominating Committee and the Program Review Committee, just as discrete sectors would, is important but insufficient. NWPP has also proposed making it easier, relative to its initial proposal, for the Board to take up matters on its own volition,<sup>9</sup> a design change that NIPPC supports. But to expect the Board to be a final arbiter, as it were, of the responsibilities of state officials whose regulated LREs will have a deciding voice in the program rather than the regulators themselves, places too much emphasis on the Board as a kind of appellate venue.

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<sup>7</sup> 16 U.S.C. 824e.

<sup>8</sup> 16 U.S.C. 824d.

<sup>9</sup> NWPP, WRAP Stakeholder Advisory Committee (October 26, 2021) at 8.

## **Southwest Power Pool and other precedents**

While the WRAP is neither a market nor a Regional Transmission Organization (RTO) in miniature, the role of the states committee in at least one of the RTOs is instructive. The Regional State Committee (RSC) of the Southwest Power Pool (SPP) is a compelling precedent in several ways.

In the course of FERC reviewing and approving SPP's request to be recognized as an RTO in 2003 and 2004, except for one case that NIPPC is aware of,<sup>10</sup> public power within the original footprint of SPP did not conceptually oppose the creation of a states committee with Section 205 rights (over resource adequacy and select transmission planning and cost allocation matters). Some public power entities did seek to clarify the RSC's scope and to ensure that it represented customers beyond those of investor-owned utilities.<sup>11</sup> In its February 2004 Order that conditionally granted RTO status to SPP, FERC directed SPP to refile the RSC proposal with a narrower scope of primary responsibilities and with fewer details about the RSC internal operations, including voting thresholds, leaving some of those decisions to the RSC itself.<sup>12</sup> The RSC incorporated itself later that year.<sup>13</sup>

Membership in the RSC is open to any state regulatory entity that regulates retail rates. In addition, it is also open to any state entity that approves retail service areas or regulates transmission siting.<sup>14</sup> This relatively broad eligibility has helped represent the interests of more market participants regulated by the states. NIPPC similarly supports keeping representation on the COSR open to a variety of state regulatory representatives. NIPPC notes that with the RSC in existence, including its Section 205 rights over resource adequacy, SPP currently lists 43 public power members.<sup>15</sup>

NIPPC also notes that a division of a federal power marketing administration, the Upper Great Plains Region of the Western Area Power Administration (WAPA-UGP), is a full transmission-owning member of SPP. WAPA-UGP joined SPP in 2015. If a states committee with Section 205 rights about resource adequacy was good enough for

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<sup>10</sup> See Golden Spread Electric Cooperative Request for Rehearing, Docket Nos. ER04-48-000 and RT04-1-000, at 7-9. Golden Spread, notwithstanding its status as a generation and transmission cooperative operating in both the Electric Reliability Council of Texas and SPP regions, is also a "public utility" under the meaning of the Federal Power Act, with wholesale rates regulated by FERC.

<sup>11</sup> Motion to Intervene and Protest of Missouri Joint Municipal Electric Utility Commission, Oklahoma Municipal Power Agency, and West Texas Municipal Power Agency, Docket Nos. ER04-48-000 and RT04-1-000, at 73-74. Note that in the case of Arkansas, state law had already provided that the utility commission regulates cooperative (but not municipal) utilities.

<sup>12</sup> *Southwest Power Pool, Inc.*, 106 FERC ¶ 61,110 (2004) at P 218-221.

<sup>13</sup> SPP, "The History of the Regional State Committee for the Southwest Power Pool, Inc." (2021) at 3, available at

<https://spp.org/documents/58610/history%20rsc%202021%2020210423%20web%20revision.pdf>.

<sup>14</sup> RSC Bylaws, Article II, available at

<https://spp.org/documents/55129/rsc%20bylaws%202017%20final%20approved%2010.30.17.pdf>.

Retail service area approval authority was added to the RSC bylaws as an eligibility criterion in 2009 to facilitate the Nebraska Power Review Board joining the RSC. See RSC Regular Meeting Minutes, July 27, 2009, at 3-4, available at <https://spp.org/documents/10089/rscadgbkqd072709.pdf>.

<sup>15</sup> SPP, Members & Market Participants, available at <https://www.spp.org/about-us/members-market-participants>.

WAPA, NIPPC sees no reason why it should not be good enough for a program that includes BPA.

By contrast, the purely advisory nature of the Western Energy Imbalance Market's Body of State Regulators is not an appropriate model for the COSR. Oversight of resource adequacy and closely related matters is a more fundamental state-specific regulatory responsibility, at least in states that did not fully restructure like those in the Midwest, Mid-Atlantic, and New England, than oversight of intra-hour real-time energy market operations.

NIPPC also notes that the Organization of MISO States (OMS) has Section 205 rights for regional transmission cost allocation methodology within the Midcontinent Independent System Operator. In granting those rights to OMS in 2013, FERC stated that "such filing rights can facilitate state consensus on certain regional issues, as well as a partnership between this Commission and state commissions."<sup>16</sup>

### **Potential conditions on Section 205 rights**

NIPPC acknowledges that the RSC in SPP was formed prior to that region coalescing around any particular regional approach to ensuring RA. By contrast, NWPP's program has already been largely designed through the voluntary collaboration of many of the participating LREs. Given this fact, the generic RA authority granted to the SPP RSC ("The RSC will also determine the approach for resource adequacy across the entire region. [...] As the RSC reaches decisions on the methodology that will be used to address any of these issues, SPP will file this methodology pursuant to Section 205 of the Federal Power Act.")<sup>17</sup> may be too extensive for the WRAP.

NIPPC would not oppose attaching some specific conditions to the COSR's Section 205 rights, either within a tariff filing at FERC or as a side agreement between NWPP and the COSR. For example, one or more of the following could be reasonable conditions:

- Compulsory use of a dispute resolution process between NWPP and the COSR prior to a Section 205 filing;
- An opportunity for NWPP to make a concurrent filing so the states don't act in a vacuum, perhaps drawing on the precedent of the "jump ball" mechanism between ISO New England and the New England Power Pool;
- A supermajority voting threshold by the state representatives prior to making a filing;
- One or more non-voting liaison seats for public power on the COSR; or

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<sup>16</sup> *MISO and MISO Transmission Owners*, 143 FERC ¶ 61,165 (May 23, 2013) at P 3.

<sup>17</sup> SPP Bylaws 7.2, available at

<https://www.spp.org/documents/13272/current%20bylaws%20and%20membership%20agreement%20tariff.pdf>.

- A more specific scope for COSR's filing rights than SPP's RSC that still addresses the states' core responsibilities to oversee the resource adequacy of the LREs they regulate.

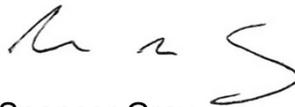
Some conditions would go too far. NIPPC believes that a unanimous threshold prior to making a Section 205 filing (i.e., letting any single state representative veto the filing) is too high. Consensus is useful as an aspirational norm, but unanimity as a regulatory standard is a recipe for inaction.

NIPPC also believes that giving public power, either individual utilities or BPA, a direct voting seat on the COSR is inappropriate. This would give public power participants in the WRAP two bites at the apple: first as program participants, and second as nominal regulators. It's unfair to privately-owned LREs, because public power would get to second-guess a RAPC decision at the states committee. It's unfair to the states, because WRAP participants could block concerns arising in the regulated sector, undermining the committee's independence. On the other hand, keeping the COSR's membership open to a variety of state regulatory representatives, including those with meaningful responsibility over public power, represents a viable alternative.

If working out a proposal with broad sectoral and regional support to give the COSR Section 205 rights affects the timing of NWPP's planned filing at FERC next year, then NWPP should resolve this matter before making a filing.

Thank you for your consideration.

Sincerely,



Spencer Gray  
*Executive Director*  
Northwest & Intermountain  
Power Producers Coalition