

UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF ENERGY
OFFICE OF ELECTRICITY DELIVERY AND ENERGY RELIABILITY

TransAlta Energy Marketing (U.S.) Inc.)

Docket No. EA-216-C

PROTEST OF THE CANADIAN ELECTRICITY ASSOCIATION
AND THE ELECTRIC POWER SUPPLY ASSOCIATION
TO SIERRA CLUB'S NOTICE OF INTERVENTION AND MOTION TO INTERVENE

Pursuant to Section 202(e) of the Federal Power Act ("FPA"), 16 U.S.C. § 824(e) (2006) and § 385.211 of the Federal Energy Regulatory Commission's ("FERC") Rules of Practice and Procedure, the Canadian Electricity Association ("CEA") and the Electric Power Supply Association ("EPSA") hereby submit this filing in protest to Sierra Club's Notice of Intervention and Motion to Intervene and in support of TransAlta Energy Marketing (U.S.) Inc.'s ("TEMUS") Application to Export Electric Energy to Canada.

CEA and EPSA seek leave to submit this Protest out of time. In the Federal Register Notice of TEMUS' Application to Export Electric Energy to Canada, the Department of Energy ("DOE") had requested that any comments, protests or requests to intervene be submitted on or before February 22, 2011. It was not until Sierra Club's Notice of Intervention and TEMUS' response to that Notice that issues were raised that require a response from CEA and EPSA. Given CEA's and EPSA's interest in the outcome of this proceeding, as further described below, CEA and EPSA request that DOE grant this request for leave to file out of time.

Description of CEA and EPSA and Their Interest in the Proceeding

Founded in 1891, CEA is the voice of the Canadian electricity industry, promoting electricity as the critical enabler of the economy and Canadians' expectations for an enhanced

quality of life. CEA members generate, transmit and distribute electrical energy to industrial, commercial, residential and institutional customers across Canada every day. From vertically integrated electric utilities, to power marketers, to the manufacturers and suppliers of materials, technology and services that keep the industry running smoothly – all are represented by this national industry association.

EPSA is the national trade association representing competitive power suppliers, including generators and marketers. Competitive suppliers, which, collectively, account for 40 percent of the installed generating capacity in the United States, provide reliable and competitively priced electricity from environmentally responsible facilities serving power markets. EPSA seeks to bring the benefits of competition to all power customers. The comments contained in this filing represent the position of EPSA as an organization, but not necessarily the views of any particular member with respect to any issue.

A number of the members of CEA and EPSA hold export authorizations granted by DOE. CEA and EPSA are in the best position to represent such interests in this proceeding. And, as further explained below, their interests could be significantly undermined depending on the outcome of DOE's consideration of the Sierra Club submission.

DOE Should Reject Sierra Club's Challenges to TEMUS' Export Authorization Application

CEA and EPSA agree with TEMUS' challenge to Sierra Club's standing to become a party to the proceeding. The focus of this filing, however, will be on the substantive challenges made by Sierra Club in its filing. For the reasons explained below, DOE should reject those challenges to TEMUS' Export Authorization Application.

In its Motion, Sierra Club maintains that TEMUS is seeking authorization "to export excess power generated by sources which include coal and other fossil fuel plants in North

Dakota, Washington, Maine, Michigan, New York, Minnesota, and Vermont.” Motion at 2-3. Using TEMUS’ Centralia coal-fired power plant in Washington state as an example, Sierra Club argues that, “[b]ecause those emissions certainly create the probability, let alone possibility, of significant effects, an environmental impact statement (“EIS”) must be prepared.” *Id.* at 3.

Under the National Environmental Policy Act (“NEPA”), Federal agencies are required as a general matter to prepare either an Environmental Assessment (“EA”) or an Environmental Impact Statement (“EIS”) for major Federal actions significantly affecting the quality of the human environment. *Alaska Center for the Environment v. US Forest Service*, 189 F.3d 851, 853 (9th Cir. 1999). However, each agency is required to identify categories of actions which do not individually or cumulatively have a significant effect on the human environment. *Id.* at 854. Classified as “categorical exclusions,” such actions require neither an EA nor an EIS unless there are “extraordinary circumstances” related to the proposed action. *Id.* at 858.

DOE’s National Environmental Policy Act Implementing Procedures provide that actions that are listed as categorical exclusions “are classes of actions that DOE has determined do not individually or cumulatively have a significant effect on the human environment.” 10 C.F.R. 1021.410(a). Among the actions for which a categorical exclusion is applied is the following: “Export of electric energy as provided by Section 202(e) of the Federal Power Act over existing transmission systems or using transmission system changes that are themselves categorically excluded.” Appendix B to Subpart D of Part 1021, B4.2. Only where there are “extraordinary circumstances related to the proposal that may affect the significance of the environmental effects of the proposal” will a proposal not be categorically excluded. 10 C.F.R. 1021.410(b)(2). DOE defines extraordinary circumstances as “unique situations presented by specific proposals, such as scientific controversy about the environmental effects of the proposal, uncertain effects

or effects involving unique or unknown risks; or unresolved conflicts concerning alternative uses of available resources within the meaning of section 102(2)(E) of NEPA.” *Id.*

In its Application for Authorization to Transmit Electric Energy to Canada, TEMUS does not identify specific generation facilities from which it will purchase power for sales into Canada. Instead, TEMUS seeks authorization to export electricity “purchased from electric utilities, federal power marketing agencies, qualifying cogeneration and small power production facilities, independent power producers, and other sellers.” Application at 4-5. Sierra Club has the burden of proof in demonstrating that extraordinary circumstances are present to require the preparation of an EA or an EIS. *Colorado Wild v. United States Forest Service*, 435 F.3d 1204, 1215 (10th Cir. 2006). As explained below, Sierra Club has failed in its burden to demonstrate that extraordinary circumstances are present.

The conclusions reached by the Court in *Northeast Utilities Service Company v. FERC*, 993 F.2d 937 (1st Cir. 1993) are controlling with respect to TEMUS’ Application. In that case, the Petitioner had challenged FERC’s refusal to examine the potential environmental impacts of its approval of a merger between two utilities, arguing that the merger might “alter mixes of generation in New England by constraining the locations for new plants.” *Id.* at 958. In finding that FERC’s reliance on a categorical exclusion for the merger was proper, the Court determined that there was no evidence of identifiable environmental harms that would likely result from the merger. *Id.* “The fact that new generating facilities might wind up in different locations than would have been the case in the absence of the merger does not approach in significance, because its significance is not quantifiable... The character and location of the future environmental effects of the ... merger are so uncertain that no meaningful environmental review would have been possible, even had FERC made the effort.” *Id.* at 958-59. In rejecting the

need for an EA or EIS, the Court concluded that, while the merger may influence how energy demand is met in New England in the future, “any attempt by FERC to prepare an EIS would have involved little more than spinning out multiple hypothetical development forecasts, with multiple options for the type, amount and location of future generating facilities.” *Id.* at 959.

As was the case in *Northeast Utilities*, in the present situation, the potential power sales into Canada are merely speculative. In its Application, TEMUS is only seeking an authorization to export power into Canada, not an authorization to export specific generation from specific facilities. TEMUS has not identified any actual or potential power sales that would result from the approval of the Export Authorization Application. Thus, any generation sales that will be made by TEMUS in the future into Canada would be merely speculative at this point in time, so that the analysis suggested by Sierra Club would have the same infirmities as the one suggested by the Petitioner in *Northeast Utilities*. Accordingly, since any meaningful environmental review would not be possible with respect to possible generation sales following approval of TEMUS’ Application, DOE need not prepare an EA or EIS with respect to that Application.

While Sierra Club’s Motion focuses just on TEMUS’ Application, Sierra Club’s arguments also have the effect of undermining DOE’s entire approach for addressing the environmental aspects of all Export Authorization Applications. DOE currently treats such applications as falling under categorical exclusion B4.2, thus requiring no EA or EIS. The import of Sierra Club’s argument that DOE must consider the environmental effects of all potential power sales by an applicant into Canada would be to require that DOE conduct an EA or an EIS for all Export Authorization Applications.

The establishment of this categorical exclusion resulted from an initial Notice of Proposed Rulemaking by DOE, followed by the receipt of public comments, the issuance of a

final rule, and review in subsequent rulemakings. *See, for example*, 61 F.R. 6414 (1996). “Once an agency establishes categorical exclusions, its decision to classify a proposed action as falling within a particular categorical exclusion will be set aside only if a court determines that the decision was arbitrary and capricious.” *Citizens’ Committee to Save our Canyons v. United States Forest Service*, 297 F.3d 1012, 1023 (10th Cir. 2002). Sierra Club has presented no credible arguments for why DOE must essentially eliminate the categorical exclusion for the export of electricity under Section 202(e) of the FPA and instead require consideration of all potential purchases from all generation facilities and subsequent sales to any place in Canada by any applicant at any time in the future. No applicant in its application for Export Authorization to DOE is seeking authorization to make a particular sale of electricity from a particular generation facility into Canada, so that analysis of specific generation sales would substantially alter the nature of the application. Moreover, as explained above, such analysis would involve highly speculative and conjectural transactions, so that any attempt to perform such an analysis would prove nearly impossible. Rather than benefit the public interest, as Sierra Club suggests, Sierra Club’s suggested changes would merely add significant costs and substantial delays to the application process, and could undermine DOE’s ability to grant Export Authorization Application requests. This would cause a degradation of economic trade, electric reliability and security of supply for both countries.

By definition, categorical exclusions “do not have a significant effect on the quality of the human environment.” *Heartwood v. United States Forest Service*, 230 F.3d 947, 954 (7th Cir. 2000). Sierra Club has presented no credible arguments for requiring DOE to essentially eliminate the categorical exclusion for exports of electric energy to Canada and to instead require an impossible analysis of any and all possible sales of power to Canada when considering an

Export Authorization Application. For the reasons stated above, DOE should reject Sierra Club's challenges to TEMUS' Application and should instead grant TEMUS' Application to Export Electric Energy to Canada.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have on this day served the Protest of the Canadian Electricity Association and the Electric Power Supply Association to Sierra Club's Notice of Intervention and Motion to Intervene by e-mail and by United States first class mail on the following:

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Dated at Washington, D.C. this 6th day of May, 2011.

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