The Western Interconnection Regional Advisory Body (“WIRAB”) appreciates the opportunity to comment on the proposed Alternative Funding Agreement for Peak Reliability.

WIRAB was created by Western Governors under Section 215 of the Federal Power Act. Members of WIRAB represent the Governors of 14 western states, the Canadian provinces of Alberta and British Columbia, and Mexico. The WIRAB is charged to advise the Western Electricity Coordinating Council (“WECC”), the North American Electricity Council (“NERC”) and the Federal Energy Regulatory Commission (“FERC”) on whether proposed reliability standards and the governance and budgets of the NERC and WECC are in the public interest.

WIRAB offers the following recommendations to the Peak Board of Directors:

1. The Peak Board should reject the Alternative Funding Agreement.

2. The Peak Board should take no action on alternative funding until the Court issues a ruling on the use of Section 215 funding for Peak Reliability functions.

3. If the Peak Board does not follow our recommendations #1 and #2 and decides to consider the Alternative Funding Agreement, the board should only consider an Agreement that, at a minimum, does not include provisions in Sections 4.1.1, 4.1.5, 4.1.7, 2.3, 15.9, 7.2, 4.2, 5.4 and 8.3.3 discussed below.

4. If the Peak Board decides to consider an alternative funding agreement, the Board should provide the opportunity for comment and recommendations on any revised proposed agreement.

WIRAB has used four criteria to evaluate funding mechanisms for Peak Reliability. Those criteria are:

- Provide stable funding;
- Provide adequate funding;
- Ensure the independence of Peak Board decision-making on all Board matters and the independence of Peak Reliability operations from funders; and
- Align with Peak’s bylaws and status as a not-for-profit 501(c)(4) organization with a social welfare mission.

Based on an application of those criteria, WIRAB believes that the proposed Alternative Funding Agreement fails on at least three counts:
Independence of Peak Board Decision-making and Peak Reliability Operations. The Alternative Funding Agreement fails to ensure the independence of Peak Board decision-making and Peak operations from Class 1 and Class 2 entities. The Alternative Funding Agreement strips authority from the Peak Board and gives it to Class 1 and Class 2 members. For example, as discussed in more detail below, the Alternative Funding Agreement uses a combination of a narrow definition of “Funding Party” and thresholds requiring approval of 75 percent of the “Funding Parties” to potentially limit both the reliability services and operating budget of Peak. All decision-making authority should remain with the independent board. No Class should have any decision-making say over any board matter.

Adequate Funding: Under provisions of the Alternative Funding Agreement, the ultimate decision on what is adequate funding can be made by Class 1 and 2 members - who are parties subject to Peak Reliability directives – and not by the Board. If the Alternative Funding Agreement is adopted as is, budget levels could be constrained regardless of reliability improvement needs or the Board’s views.

Alignment with Bylaws and 501(c)(4) Status: Before acting on any Alternative Funding Agreement, Peak management and the Peak Board should evaluate and make public their evaluation of the provisions of the proposed agreement to ensure they comport with Peak’s Bylaws and status as a 501(c)(4) corporation. Many provisions of the proposed Alternative Funding Agreement are inconsistent with the Bylaws and Peak’s non-profit status. For example:

- Section 4.1.1 of the Alternative Funding Agreement would require Peak to provide Funded Services at the lowest practicable cost consistent with Good Utility Practice. Good Utility Practice, as defined in the proposed agreement, is not optimal or exceptional practice, but rather, “practices, methods, or acts generally accepted in the region.” In other words, Section 4.1.1 would set Peak’s funding at the lowest level needed to achieve acceptable utility practice. This is inconsistent with the mission of Peak as stated in its Bylaws and with its status as a 501(c)(4) corporation operating to promote the social welfare. Peak’s mission, as defined in its Bylaws, is to achieve “the appropriate level of reliability at the least cost considering all costs throughout the economy.” Peak’s purpose, as stated in its draft Strategic Plan, is to achieve “exceptional reliability performance.” Peak’s social welfare mission and its purpose statement should guide board action on the level of funding not what is deemed “acceptable” utility practice. Section 4.1.1 is inconsistent with Peak’s Bylaws and status as a 501(c)(4) corporation.

- Section 4.1.5 states that Peak shall not approve the Proposed Funding Amount if 75 percent or more of the Class 1 and Class 2 Funding Parties object. This provision is inconsistent with Peak’s Bylaws because it inappropriately delegates a core fiduciary responsibility of the Peak Board, setting the level of Peak’s funding, to the Class 1 and Class 2 members of Peak.

- The last sentence of Section 4.2 states that Peak will not seek any funding under Section 215 of the Federal Power Act during the Term of the agreement. This
provision is inconsistent with Peak’s Bylaws because it inappropriately limits the Peak Board’s fiduciary responsibility to pursue the best sources of funding for Peak.

WIRAB opposes the following provisions in the proposed agreement and will oppose any agreement that includes any of these provisions:

1. Lowest Practical Cost (Section 4.1.1)
2. Funding Party Approval Thresholds (Sections 4.1.5 and 4.1.7)
3. Secondary Services (Section 2.3)
4. No Third Party Beneficiaries (Section 15.9 and Section 7.2)
5. No Funding Under Section 215 of Federal Power Act (Section 4.2)
6. Payment of Penalties (Section 5.4 and Section 8.3.3)

**Lowest Practical Cost (Section 4.1.1):**

Section 4.1.1 of the Alternative Funding Agreement would require Peak to provide Funded Services at the lowest practicable cost consistent with Good Utility Practice. Good Utility Practice is not optimal or exceptional practice, but rather, “practices, methods, or acts generally accepted in the region.” Generally accepted utility practices may not be sufficient for meeting Peak’s mission or purpose. Continued reliance on generally accepted utility practices could result in an inappropriately low level of reliability and higher risk of widespread outages.

Peak should aim at all times to be efficient and effective and should undertake all cost-effective actions within its purview to improve system reliability. That should be the sole guide for determining budget levels and not a lowest practical cost standard. A lowest cost standard is inconsistent with Peak’s mission, purpose, and bylaws and should not be adopted.

**Funding Party Approval Thresholds (Sections 4.1.5 and 4.1.7):**

Section 4.1.5 states that Peak shall not approve a proposed budget (“Proposed Funding Amount”) if 75 percent or more of the Class 1 and Class 2 Funding Parties object. Section 4.1.7 further states that adjustments to the final budget (“Final Funding Amount”) for unforeseen circumstances or errors requires a majority vote of the Class 1 and Class 2 Funding Parties. These provisions give Class 1 and 2 members decision-making say over the level of Peak’s budgets and adjustments to that budget. WIRAB strongly opposes both provisions.

The independence of the Peak Board to determine the level and composition of the Peak budget as well as any adjustments to that budget is fundamental. The Peak Board should support no funding agreement that links Peak’s ability to perform its Reliability Coordinator and Interchange Coordinator functions to a requirement to gain approval for funding of its functions from Class 1 and Class 2 members.
Secondary Services (Section 2.3):

The proposed Alternative Funding Agreement distinguishes between Core Services and Secondary Services. WIRAB sees no benefit to making the distinction. (At the same time, WIRAB recognizes and supports the distinction between Funded Services and Additional Services) Further, Secondary Services are determined to be the six non-core services listed in Attachment A. Section 2.3 limits the modification of Attachment A by requiring the agreement of 75 percent of the Class 1 and Class 2 Funding Parties. What services are funded should solely be determined by the independent Peak Board with input from Peak Classes and others. Again, no Class should have any decision-making say over the composition of the budget.

No Third Party Beneficiaries (Section 15.9 and Section 7.2):

Section 15.9 states that the Funding Agreement is solely for the benefit of the Class 1 and Class 2 Funding Parties and not for the benefit of others. Section 7.2 states that any revenues derived from Peak Intellectual Property shall be treated as a either a credit or a reserve for the benefit of the Funding Parties. WIRAB opposes this provision. The independent Peak Board should determine how revenues derived from Peak Intellectual Property should be treated.

Further, Peak’s mission is to promote social welfare by endeavoring to ensure reliability of the Bulk Electric System within Peak’s footprint for the benefit of end-use customers. As WIRAB has stated before, to a large extent, the ultimate funders of Peak are not the Class 1 and Class 2 members but the end users of electricity in the Western Interconnection. The beneficiaries of any funding agreement should be Western end-users.

No Funding Under Section 215 of Federal Power Act (Section 4.2):

The last sentence of Section 4.2 states that Peak will not seek any funding under Section 215 of the Federal Power Act during the Term of the agreement. Instead of putting trust in the independence and judgment of the Peak Board, the proposed Alternative Funding Agreement limits the ability of the Peak Board to pursue Section 215 funding.

The agreement itself points to one extreme counter-example where the Peak Board may need to retain the ability to pursue Section 215 funding. If more than 50 percent of the Funding Parties object to the renewal of the funding agreement (See Section 5.2.1), then Peak should retain the option of seeking funding under Section 215 of the Federal Power Act prior to the end of the term of the agreement.

The Peak Board has a responsibility to secure adequate funding for Peak. The Peak Board should reject any funding agreement that limits its ability to determine that a return to funding under Section 215 of the Federal Power Act is warranted.
Payment of Penalties (Section 5.4 and Section 8.3.3):

The Funding Parties should be financially responsible for penalties levied on Peak. Section 5.4 would allow a Funding Party to withdraw from the funding agreement after a violation is discovered but before the penalties are levied on Peak. Parties to the Agreement should not be allowed to shirk their financial responsibilities associated with penalties levied against Peak. Section 8.3.3 requires Peak to pay penalties out of financial reserves included in the Final Funding Amount. By objecting to the Final Funding Amount, the Funding Parties could force Peak to pay for penalties out of its margin on Additional Services. These provisions threaten the adequacy and stability of Peak’s funding.

NO ACTION UNTIL COURTS ACT ON USE OF SECTION 215 FUNDING

Section 215 meets all of WIRAB’s criteria for a funding mechanism for Peak Reliability and should be retained as long as it is legal. The greatest risk to secure funding of Peak under Section 215 is a successful lawsuit by the Edison Electric Institute (‘EEI”) to ban the use of Section 215 funding for the Reliability Coordination function. Only if EEI prevails in court should the Board adopt an alternative to Section 215 funding and there will be time to implement an alternative in that circumstance.