UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

BONNEVILLE POWER ADMINISTRATION	)	
(WP-07 SUPPLEMENTAL RATES)	)	**Docket No. EF06-2011-002**
	)	
	)	

NOTICE OF INTERVENTION AND PROTEST OF THE IDAHO PUBLIC UTILITIES COMMISSION

The Idaho Public Utilities Commission ("Idaho PUC") files this Notice of Intervention and Protest in response to the Federal Energy Regulatory Commission's ("Commission") September 29, 2008 Notice of Filing of Bonneville Power Administration's ("BPA") proposed FY 2009 supplemental wholesale power rates (WP-07 supplemental rates) in the above referenced docket. BPA requests "interim and final confirmation and approval" of the proposed WP-07 rates effective October 1, 2008. Section 7(a)(2) of the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act" or "NPA") authorizes the Commission to review and approve BPA's proposed WP-07 supplemental rates. 16 U.S.C. § 839e(a)(2).

In its transmittal letter dated September 26, 2008, BPA seeks interim approval of its WP-07 supplemental rates for FY 2009. Transmittal Letter at 1. BPA also requested in a Motion filed concurrently with its Application that the Commission waive its administrative regulations requiring BPA to file its rates at least 60 days prior to the requested effective date of October 1, 2008. 18 C.F.R. § 300.10(a)(3)(ii). The Idaho PUC does not object to the Commission approving BPA's WP-07 supplemental rates on an interim basis effective October 1, 2008, because interim rates are subject to refund pursuant to 18 C.F.R. § 300.20(c). However, the Idaho PUC does protest the proposed rates and final decisions made by BPA which adversely

affect BPA's calculation of the Residential Exchange Program (REP) benefits pursuant to Section 5(c) of the Northwest Power Act. 16 U.S.C. § 839e(c).

BPA states that its "enabling statutes underscore the importance of cost recovery as a primary goal" and that "BPA must recover those costs through its rates." WP-07-A-05 at 26; BPA-A___000583. To wit, the Flood Control Act mandates that federal Power Marketing Agencies (PMAs) must implement "rate schedules . . . having regard to the recovery . . . of the cost of producing and transmitting such electric energy, including the amortization of the capital investment allocated to power over a reasonable period of years." 16 U.S.C § 825s.

BPA's actions in this case have dangerously imperiled its ability to meet its treasury payment obligation. As explained more fully below, the Idaho PUC argues that BPA acted in an arbitrary and capricious manner by submitting rates that run afoul of a fundamental principle of ratemaking, i.e. rule against retroactive ratemaking, and by utilizing an illegal deemer mechanism to calculate future REP benefits for Investor Owned Utilities (IOUs). If the WP-07 Supplemental rate schedule is overturned then BPA will be in serious jeopardy of not being able to forward payment to the US Treasury pursuant to its obligation to repay the federal capital investment in the Columbia River hydroelectric system.

I. COMMUNICATIONS

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II. NOTICE OF INTERVENTION

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214(a)(2), the Idaho PUC hereby intervenes in the above-entitled matter. The Idaho PUC actively participated in BPA WP-07 proceeding by submitting testimony and briefs. BPA Final Record of Decision (FROD) [1] at ix, 16-18, 23, 25, 27, *et al.* The Idaho PUC also regulates the Idaho retail electric rates of Avista, Idaho Power Company and PacifiCorp – utilities that file ASC data necessary to participate in the REP.

The Idaho PUC's Notice of Intervention, Protest and Request for Hearing is timely. The Commission's Notice of Filing set an intervention deadline of October 13, 2008.

III. PROCEDURAL HISTORY OF THIS FILING

In September 2006, the Commission granted interim approval of BPA's WP-07 rates for FY 2007-2009. WP-07-A-BPA-05, p. 1; BPA-A___000583. Subsequent to that filing, BPA discovered minor errors in the proposed rates and BPA filed a motion to stay the rates to allow BPA to correct the errors. *Id.* While the stay was in effect, the Ninth Circuit issued two opinions overturning BPA's 2000 REP Settlement Agreements. The Court also held that BPA improperly included the costs of the REP Settlement Agreements in BPA's WP-02 wholesale power rates. Because BPA had allocated the costs of the REP Settlement Agreements in the same fashion in the WP-07 rates which were stayed, BPA requested and the Commission approved continuance of the stay of the WP-07 rates. The stay allowed BPA to conduct the present WP-07 supplemental rate proceeding. On September 29, 2008, BPA filed its proposed supplemental wholesale power rates for interim and final approval.

[1] Hereinafter, BPA's Final Record of Decision will be denoted as FROD.

IV. PROTEST

The Bonneville Power Administration (BPA) has no express legal authority to engage in retroactive ratemaking or provide retroactive relief in this proceeding. Consistent with its authority in Section 7 of the Northwest Power Act, BPA should only set rates prospectively. The successful petitioners in the two circuit appeals failed to avail themselves of established stay procedures and thus should only be accorded prospective relief. In addition, the deemer accounting mechanism is not authorized by the Northwest Power Act and deemer balances should not be included in the "Lookback" mechanism. Consequently, the Administrator should reject the Lookback mechanism as unlawful, arbitrary, and not in conformance with sound ratemaking principles.

BACKGROUND

A. The Ninth Circuit Opinions

On May 3, 2007, the United States Court of Appeals for the Ninth Circuit issued two opinions in consolidated appeals challenging BPA's Residential Exchange Program (REP) Settlement Agreements and certain rates in BPA's WP-02 Wholesale Rate proceeding. In *Portland General Electric Co. v. Bonneville Power Admin.* ("*PGE*"), 501 F.3d 1009 (9th Cir. 2007), *cert. denied*, ___U.S. ___, 128 S.Ct. 2902 (2008), the Court held that BPA's REP Settlement Agreements with the six regional investor-owned utilities (IOUs) were contrary to the Northwest Power Act, 16 U.S.C. §§ 839-839h. The Court also held that BPA improperly included these "settlement costs" in the rates paid by preference customers in violation of Section 7(b)(2) and (3) of the Northwest Power Act, 16 U.S.C. § 839e(b)(2) and (3). *PGE*, 501 F.3d at 1036. The Court held "that BPA was bound by the power exchange requirements of the

[NPA], and that BPA exercised its settlement authority contrary to those requirements." *Id.* at 1013. It granted the petitions for review.

In the companion appeal, *Golden Northwest Aluminum, Inc. v. Bonneville Power Admin.* ("*Golden Northwest*"), 501 F.3d 1037 (9th Cir. 2007), *cert. denied sub nom. Portland General Electric Co. v. Public Power Council,* ___ U.S. ___, 128 S.Ct. 2902 (2008), three groups of petitioners also challenged BPA's WP-02 preference power rates. Two groups argued that the established preference rates were too high. More specifically, the first group asserted that BPA inappropriately allocated the costs of supplying power to the DSIs to the preference rates. The second group insisted that BPA erroneously allocated REP settlement costs to the preference rates. The Ninth Circuit held against the first group but held for the second group. *Golden Northwest*, 501 F.3d at 1040-41. In granting the petition of the second group, the Court stated that the holding in *PGE* was dispositive in this case: BPA improperly allocated the costs of the REP Settlement Agreements in the rate paid by preference customers. *Id.*, at 1048.

The third group of petitioners ("the Tribes") argued the preference rates were too low for BPA to meet its fish and wildlife obligations. The Court agreed. *Id.*, at 1052-53. The Court "therefore remand[ed] to BPA to set rates in accordance with this opinion." *Id.* at 1053 (emphasis added). On October 5, 2007, the Court denied petitions seeking rehearing and *en banc* on the two opinions.

B. Remand to BPA

Following the two Circuit opinions, BPA suspended REP payments to the IOUs effective June 2007. BPA later acknowledged "the Ninth Circuit provided little guidance to BPA in its [two] decisions regarding the subsequent actions BPA should take in response to those opinions." BPA Response to APAC's Motion to Strike, WP-07-M-BPA-77, p. 5. Settlement

negotiations were unsuccessful and BPA subsequently issued its Federal Register Notice reopening this WP-07 case. 73 Fed.Reg. 7,539 (Feb. 8, 2008). Because BPA's WP-07 proceeding used the same methodology that the Court overturned in the WP-02 proceeding, BPA's response to the opinions[2] is to "correct both the WP-02 rates and the WP-07 rates and response to the Court's rulings." WP-07-E-BPA-52, p. 2, l.14.

ARGUMENT

BPA'S LOOKBACK MECHANISM IS UNLAWFUL RETROACTIVE RATEMAKING

A. BPA Cannot Correct the WP-02 Rates

Despite BPA's intent to correct the WP-02 rates, these rates have been superseded. Indeed, the WP-02 rates expired September 30, 2006. On September 21, 2006, the Federal Energy Regulatory Commission (FERC) granted interim approval of BPA's new WP-07 rates effective October 1, 2006 (subject to refund). *Order Approving Rates on an Interim Basis and Providing Opportunity for Additional Comments*, Docket No. EF06-2011-000, 116 F.E.R.C. Rec. ¶ 61,264 (Sept. 21, 2006). The WP-07 interim rates currently remain in effect pending completion of this supplement proceeding and final FERC approval. On March 4, 2008, BPA moved FERC to continue the previously granted Stay of the WP-07 rates through September 4, 2008.

As the chronology above clearly demonstrates, the WP-02 rates no longer exist because they have been superseded by the interim WP-07 rates as of October 1, 2006. The only "retroactive" relief that the consumer-owned utilities (COUs) may be entitled to is the "refund with interest" of the interim WP-07 rates if these interim rates are determined to be too high. 18

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[2] In October 2007, the Ninth Circuit also issued a third opinion addressing the 2004 amendments to the REP Settlement Agreements. *Public Utility Dist. No. 1 of Snohomish Cty, Wash. v. Bonneville Power Admin.*, 506 F.3d 1145 (9th Cir. 2007).

C.F.R. § 300.20(c); *see also* 18 C.F.R. § 300.21(g) ("if a rate collected by any power marketing administration on an interim basis exceeds the rate which is confirmed and approved by [FERC] as a final rate, the Administrator . . . must refund with interest any rate collected during the interim period which exceeds the final rate."). Thus, BPA cannot correct the WP-02 rates.

B. The Court Did Not Order BPA to Provide Retroactive Relief

There is nothing in the Ninth Circuit's two decisions that requires BPA to provide retroactive relief to the prevailing parties in the *PGE* and *Golden Northwest* cases. In *Golden Northwest* the Court "remand[ed] to BPA to set rates in accordance with this opinion." 501 F.3d at 1053. BPA has reopened the WP-07 proceeding with its interim rates still in effect. Because BPA has requested an extension of the existing Stay of the WP-07 interim rates, BPA should simply proceed to set lawful rates.

In neither case did the Ninth Circuit vacate the BPA rates. Indeed, given the Court's findings in *Golden Northwest* that the rates were both too high and too low, the Court remanded the matter back to BPA "to set rates in accordance with this opinion." *Id.* This is consistent with the well-established rule that Courts do not set rates – they are empowered to set aside agency action. 5 U.S.C. § 706(2). It is BPA that is vested with the authority to "establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity . . . ." Section 7(a)(1), 16 U.S.C. § 839e(a)(1). Moreover, it is for BPA to first establish rates and then submit those rates for "confirmation and approval by" FERC. Section 7(a)(2), 16 U.S.C. § 839e(a)(2).

C. BPA has no Statutory Authority to Engage in Retroactive Ratemaking or Provide Retroactive Relief

The law is clear: a federal agency must have express statutory authority before it can engage in retroactive ratemaking or provide a retroactive remedy such as reparations or refunds.

In *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 109 S.Ct 468, 102 L.Ed.2d 493 (1988), the United States Supreme Court declared that "[r]etroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result." 488 U.S. at 208, 109 S.Ct at 471. Indeed, because it is not a sound business practice to retroactively increase rates, the Court requires that Congress expressly permits such a practice in no uncertain terms. *Bowen*, 488 U.S. at 208, 109 S.Ct. at 472.[3]

"The power to require re-adjustments for the past is drastic. It . . . ought not to be extended so as to permit unreasonably harsh action without very plain words." *Id., quoting Brimstone R. Co. v. United States*, 276 U.S. 104, 122, 48 S.Ct. 282, 287, 72 L.Ed. 487 (1928). In particular, IOU customers are not a fungible mass where future customers may be substituted for past customers to make up for past rate deficiencies. *Utah Power & Light Co. v. Idaho Public Utilities Commission*, 685 P.2d 276, 285 (Idaho 1984). Even the BPA witness panels recognize that "residential customers of the IOUs are those who will ultimately bear the entire brunt of the application of the Lookback Amounts to reduce future REP benefits paid." WP-07-E-BPA-76-CC1, p. 96, ll. 7-9.

There is no authority in Section 7 of the Northwest Power Act which expressly permits BPA to engage in retroactive ratemaking. On the contrary, the ratemaking scheme embodied in

[3] In addition to the prohibition of retroactive ratemaking, *Bowen* also forbids retroactive rulemaking. 488 U.S. at 208, 109 S.Ct. at 471. In *Bowen*, the Secretary of Health and Human Services promulgated a rule that had a retroactive application. On appeal, the Circuit Court of Appeals for the District of Columbia held as a general matter that the Administrative Procedures Act, 5 U.S.C. §§ 551, 553 *et seq.*, forbids retroactive ratemaking. *Georgetown University Hospital v. Bowen*, 821 F.2d 750, 757 (D.C. Cir. 1987) (the APA is clear and "equitable considerations are irrelevant to the determination of whether the Secretary's rule may be applied retroactively"). The Supreme Court affirmed. *Bowen*, 488 U.S. at 208, 109 S.Ct. at 471. The Court held that "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms." *Id.* at 208, 109 S.Ct. at 472. "Even where some substantial justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Id.* at 209, 109 S.Ct. at 472. BPA has no authority empowering it to provide reparation, refunds or any similar retroactive remedy.

Section 7 contemplates that rates will be set prospectively. In particular, the Administrator shall establish rates and such rates shall be "revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power. . . ." Section 7(a)(1), 16 U.S.C. § 839e(a)(1) (emphasis added).

The rates established by BPA are also subject to FERC approval. Section 7(a)(2), 16 U.S.C. § 839e(a)(2). The Ninth Circuit has declared that "One of the fundamental tenets in FERC jurisprudence is the rule against retroactive ratemaking." *Public Utilities Comm'n of Cal. v. FERC*, 456 F.3d 1025, 1061 (9th Cir. 2000) *citing Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578, 101 S.Ct. 2925, 2930-31, 69 L.Ed.2d 856 (1981); *see also Consolidated Edison Co. of New York, Inc. v. FERC*, 347 F.3d 964, 966 (D.C. Cir. 2003)(Agreeing with FERC's assertion that it "lacked the authority under [section 205 of the] the Federal Power Act to revise rates retroactively.").

In *Consolidated Edison*, the D.C. Circuit Court recognized certain exceptions to the general rule against allowing utilities a retroactive recovery. *Id.* at 969. According to the Circuit Court, the bar against retroactive ratemaking can be satisfied "when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or where they have agreed to make a rate effective retroactively." *Id.*[4]

The exceptions outlined by the Circuit Court are not applicable to this rate proceeding. As explained above, the FY 2002-2006 rates that BPA seeks to reconstruct in the instant case are not interim, nor are they tentative. *See* supra p. 4. To the contrary, the FY 2002-2006 rates

[4] The Court referred to tariffs with an established rate formula as "a practical application of this principle" because such rates would be perpetually subject to changes consistent with the filed rate formula. *Id.* (citing *Pub. Utilities Comm'n v. FERC,* 254 F.3d 250, 254 (D.C.Cir.2001)). To its credit, BPA has not attempted to characterize the so-called "Lookback Amounts" it seeks to recover from IOU customers via this supplemental rate proceeding or the reconstructed PF Exchange Rate for FY 2002-2006 as even remotely related to filed rate tariffs with formulas.

received full FERC approval and expired prior to the Ninth Circuit decisions that precipitated the instant proceeding. *See* WP-07-TE, Vol. 1, p. 35-36, ll. 18-5, 1; BPA-TR___000104 (p. 35-36).

BPA's proposal to undergo a wholesale reconstruction of previously approved rates stands in stark contrast with FERC's recognized authority to order refunds for egregious or fraudulent violations of the Federal Power Act. *See California ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1018 (9th Cir. 2004). BPA's proposal is more analogous to the fact pattern presented to the D.C. Circuit Court in *Columbia Gas Transmission Corp. v. FERC*, 895 F.2d 791 (D.C. Cir. 1990). In *Columbia Gas*, a group of pipeline customers petitioned for redress after FERC allowed certain gas pipeline sellers to recoup past costs over a three-year period through a "retroactive mechanism" devised and approved by the Commission and referred to as purchase gas adjustment clauses. *Id.* at 793. The aggrieved pipeline customers' objections to the retroactive recovery centered mainly upon the unrebutted fact that the customers that would be forced to absorb the newly authorized costs were "not representative of those who, during those three years, had purchased the gas that was subject to the deferred costs." *Id.*

Ultimately, the Circuit Court held that FERC had violated the clear and express language of the Natural Gas Act which mandates that rate changes be made prospectively only. 895 F.2d at 797. The Circuit Court rejected FERC's argument that on a finding of "sufficient cause" it could waive the filed rate doctrine and stated emphatically that "once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively." *Id.*; *see also Southern California Edison Co. v. FERC*, 805 F.2d 1068, 1070 n.2 (D.C. Cir. 1986) ("Derived from the filed rate doctrine is the rule against retroactive ratemaking . . ."). Finally, any change to the filed rate can be made only if notice was given to the ratepayers that said rates "were provisional only and subject to later revision." *Id.*

Similar to the pipeline customers in *Columbia Gas*, millions of non-representative residential and small farm customers throughout the Pacific Northwest will be, under BPA's proposal, forced to absorb the deferred costs of participating in the Residential Exchange Program (REP). BPA does not dispute this intergenerational inequity. Rather, the Agency clearly supports this inevitable outcome, stating that "reductions of future REP benefits paid [to IOU customers] due to Lookback Amounts is a direct transfer of dollars from one class of customers to another . . ." WP-07-E-76-CC1, p. 4; BPA-E___008332.

The rule against retroactive ratemaking arose amid concerns over allowing utilities to "set rates to recover for past losses." James C. Bonbright et al., *Principles of Public Utility Rates*, (2d.Ed. 1988) p. 198. BPA claims that its Lookback Analysis does not occur in the "typical context in which retroactive ratemaking issues arise." WP-07-E-BPA-76-CC1, p. 3; BPA-E___008332. BPA states that it is merely responding to the Ninth Circuit decisions by "re-running its rate models for the specific purpose of determining the Lookback Amounts for the IOUs that will be dealt with on a prospective, and not retrospective, basis." *Id.* These claims fly in the face of BPA's own admission that this supplemental rate proceeding is essentially an effort to reconstruct the PF Exchange Rate for FY 2002-2006. *See* WP-07-E-BPA-53-CC1, p. 9; BPA-E___003325.

In summary, BPA argues that while the process of calculating the "Lookback Amounts" for each of the IOUs is, by definition, a procedure that is retrospective in nature, this process cannot be defined as retroactive ratemaking simply because the Agency will seek to recover the purported overpayments, or Lookback Amounts, made to the IOUs and disburse those amounts "to the consumer-owned utilities (COUs) through future reductions to the PF Preference rate." WP-07-E-BPA-76-CC1 at 5; BPA-E___008332. This is a distinction with no

real difference. In fact, it is hard to imagine any scenario where a ratemaking authority would run afoul of the rule against retroactive ratemaking because recovery for past losses will nearly always be on a going forward basis. If this sort of Carrollian logic is allowed to define the parameters of "retroactive ratemaking" then the term would quickly be robbed of its meaning.

D. The Prevailing Parties in PGE and Golden Northwest Failed to Exercise Measures that would have Protected Their Interests

Even though BPA has no power to grant a retroactive remedy[5], the prevailing parties in *PGE* and *Golden Northwest* could have preserved the fruits of their appeal by obtaining a stay of BPA's WP-02 Order from BPA or the Court. Judicial review of final BPA actions under the APA expressly provides for such a procedure. 5 U.S.C. § 705 (an agency "may postpone the effective date of action taken by it, pending judicial review.").[6]

Likewise, Rule 18 of the Federal Rules of Appellate Practice provides for a stay pending appellate review. Under Rule 18, a petitioner must ordinarily first move BPA for a stay pending review of its decision or final order. FRAP 18(a)(1). In addition, this rule provides that a motion for stay may be made to the Ninth Circuit or one of its judges. FRAP 18(a)(2). As indicated in WP-07-E-ID-CC1-AT1, no parties to the underlying appeal sought a stay from BPA, FERC or the Ninth Circuit.

Because BPA's WP-02 rates were not stayed, they remained lawful and valid through the judicial review process consistent with "the well-established rule that an appeal will not affect the validity of a judgment or order during the pendency of an appeal, absence a stay or

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[5] As noted previously, the Administrator must issue refunds if the final FERC-approved WP-07 rates are less than the interim WP-07 rates. 18 C.F.R. § 300.21(g).

[6] Section 705 further provides: "On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for a certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

supersedeas." *Combine Metals Reduction Co. v. Gemmill*, 557 F.2d 179, 190 (9th Cir. 1977). By failing to stay the effects of the WP-02 rate order, the petitioners put themselves at risk of losing the fruits of their appeal. "[Thus,] a party who chooses to appeal but fails to obtain a stay or injunction pending appeal risks losing its ability to realize the benefits of a successful appeal." *Holloway v. United States*, 799 F.2d 1372, 1374 (9th Cir. 1986) (emphasis added and citations omitted), *quoting Matter of Combined Metals Reduction Co.*, 557 F.2d 179, 188 (9th Cir. 1977); *United States v. Peterson*, 19 F.3d 1442, 1444 (9th Cir. 1994) (unpublished disposition). That risk has now materialized.

THE "DEEMER" MECHANISM IS CONTRARY TO THE NPA

A. Introduction and History

Section 5(c) of the Northwest Power Act (NPA) authorizes BPA to enter into power exchanges with the six regional IOUs for the purpose of providing rate relief to residential and small farm customers of the IOUs. H.R. Report No. 96-976(I) at 60, 1980 U.S.C.C.A.N. 5989; FROD at 7-9, BPA-A __ 000583. The power exchanges were intended to provide the IOUs with access to lower-cost federal power. When it enacted Section 5(c), Congress recognized that the exchange mechanism may not result in parity between the retail rates of BPA's preference customers and the retail rates of the IOUs' eligible customers, "but it should equalize the wholesale costs of the electric power with a resulting benefit to investor-owned utilities' customers." *Id.*

The REP is the mechanism used to calculate the level of monetary benefits for the exchanging utilities, e.g., the six regional IOUs in the Pacific Northwest: Avista, Idaho Power, Northwestern, PacifiCorp, Portland General Electric Company, and Puget Sound Energy. There are three components to the REP mechanism. First, there is the calculation of each utility's

average system cost (ASC) using the approved ASC methodology.[7] Second, is the establishment of the PF Exchange rate in this docket. See BPA-A __ 001321 (p. 9). Third, BPA and the exchanging utilities must negotiate new Residential Purchase and Sales Agreements (RPSAs) containing the calculations for new REP benefits in BPA Docket No. PS-6.

The Ninth Circuit has often explained how the residential exchange operates. In *PGE*, the Court stated that "Section 5(c) permits IOUs to exchange power they have purchased or generated for lower-cost power generated by BPA." 501 F.3d at 1015 (emphasis added); *Golden Northwest*, 501 F.3d at 1047; *Washington Utilities and Transp. Comm'n v. FERC*, 26 F.3d 935, 936-37 (9th Cir. 1994); *PacifiCorp v. FERC*, 795 F.2d 816, 818-19 (9th Cir. 1986). Under the Section 5(c) Residential Exchange Program (REP), a regional IOU may elect to sell power to BPA at the IOU's average system cost (ASC) and then purchase and exchange an equivalent amount of BPA power at a lower price. 16 U.S.C. § 839c(c)(7). "The REP essentially acts as a cash rebate to the IOUs where the IOUs' power costs exceed those of BPA." *PGE*, 501 F.3d at 1015 (emphasis added). Section 5(c)(3) of the Northwest Power Act requires that utilities pass through any BPA exchange benefits to the utilities' residential and small farm customers. *PGE*, 501 F.3d at 1015; 16 U.S.C. § 839c(c)(3).

B. The Deemer Mechanism

In addition to the three factors mentioned above, there is a fourth factor which determines whether an IOU is eligible to receive benefits under the REP. The fourth factor is whether the exchanging utility has a negative "deemer" balance. The deemer mechanism is a remnant of the 1981 RPSAs between BPA and three of the IOUs. Section 10 ("Election to Equalize Rates") of the respective RPSA for Avista, Idaho Power and Northwestern provided that when the IOU's

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[7] The proposed 2008 ASCM is the subject matter of another docket: EF08-2011-000.

ASC was lower than the BPA PF Exchange rate, the IOU may elect to have its ASC "deemed equal" to the PF rate.[8] In the Final ROD, BPA explains the deemer mechanism in the following manner:

> When a utility's ASC is less than the PF Exchange rate, the utility may elect to deem its ASC equal to the PF Exchange rate. By doing so, it avoids making monetary payments to BPA. The amount that the utility would otherwise pay BPA is tracked in a deemer account." At such time as the utility's ASC is higher than BPA's PF Exchange rate, benefits that would otherwise be paid to the utility act as a credit against the negative "deemer balance." Only after the "positive benefits" have completely offset the "negative balance," bringing the negative "deemer account" to zero, would the utility again receive monetary payments from BPA. Avista Corporation (Avista), Idaho Power Company, and NorthWestern Energy have deemer balances. The issue of deemer balances with Idaho Power Company and Avista is currently in dispute.

WP-07-A-05 at 115, BPA-A___000583 (citations omitted).) In calculating the Lookback Amounts BPA determined that the deemer balances must first be offset against reconstructed REP benefits. *Id.* at 217. Deemer balances, including interest, under BPA's construct are offset on a company-specific basis against any benefits that accrued to that company under exchange agreements until the deemer balances are satisfied. *Id.* BPA asserts that REP benefits would not be available to the three IOUs with deemer balances (Avista, Idaho Power, and Northwestern) until the deemer balances are satisfied. BPA initially calculated that as of October 1, 2007, Avista's deemer balance was $99.3 million and Idaho Power's deemer balance was $245.36 million. BPA-E __ 004189 (p.18). Consequently, the presence of deemers affects the calculation of the REP benefits. E.g., WP-07-FS-BPA-08 (Avista p. 267).

C. The Deemer Mechanism is not Authorized by the NPA

There is no statutory authorization for BPA to utilize the deemer mechanism or engage in deemer accounting. As construed by the Ninth Circuit, the Northwest Power Act contemplates

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[8] The phrase "deemed equal" appears to be the source of the term "deemer."

that BPA and the IOUs would exchange when an IOU's ASC was above BPA's cost. Section 5(c), 16 U.S.C. § 839c(c). In this fashion, IOUs would receive the lower-cost benefits of the federal hydropower system. There is nothing in the Northwest Power Act or its legislative history that suggests that the exchange benefits should flow in the opposite direction – from the three IOUs to BPA. Indeed, Section 5(c) was intended to provide residential and small farm customers "a share in the economic benefits of the lower-cost federal system," i.e., lower rates. H.R. Report No. 96-976(I) at 27, 60, 1980 U.S.C.C.A.N. at 5993, 6026. Instead of conferring a benefit, the operation of the deemer mechanism turns Section 5 on its head. As the facts in this case bear out, the "phantom" accounting of accruing negative deemer balances simply because the IOUs' ASC was subsequently lower than BPA's PF rate is extremely detrimental to IOU ratepayers, especially to the more than 400,000 eligible customers of Idaho Power. Under BPA's proposal to collect Idaho Power's accumulated deemer balance of $245 million, Idaho Power's current and future customers in Idaho and Oregon would not be eligible to receive REP benefits for the next 20 years. In fact, Idaho Power's deemer account has merely accrued interest since FY 1985. The deemer mechanism is simply contrary to the plain reading and intent of Section 5(c) of the Northwest Power Act, 16 U.S.C. § 839c(c).

Although BPA acknowledged that the NPA does not expressly allow a deemer mechanism, it asserts that the Act does not prohibit one. BPA-A __ 000583 (p.219). "In the absence of expressed statutory guidance" or a court decision, BPA found it reasonable to assume the deemers are valid. *Id.* However, it enacting Section 5 of the NPA, Congress intended that the "exchange will permit residential customers of investor-owned utilities to share in the benefits of the lower-cost federal resources. . . .By providing these residential customers wholesale rate parity with residential customers of preference utilities, the amendment serves in a

substantial way to cure a major part of the allocation [of benefits] problem." 1980 U.S.C.C.A.N. at 5995. Rather than providing benefits to the IOUs, the deemer mechanism turns Section 5 on its head. In the case of Avista and Idaho Power, benefits flow in the opposite direction than Congress intended.

As the Court stated in *PGE*, "whenever BPA engages in a purchase and exchange of power – whether on a yearly basis, under an REP program, or pursuant to a settlement agreement – BPA acts pursuant to its § 5(c) authority, and is thus subject to the congressionally imposed limitations on that authority as expressed in § 5(c) and § 7(b)." 501 F.3d at 1032. "[W]henever BPA exchanges power with a Pacific Northwest utility, it [must] act pursuant to its § 5(c) power[.]" *Id.* at 1028. BPA's deemer accounting mechanism is well outside the REP program that Congress created in the Northwest Power Act. 16 U.S.C. § 839c(c).

D. Collection of the Deemers is Barred by Regulation

Although BPA recognizes that the deemer balances are not cash obligations of the utilities, it asserts that "BPA may contractually set off [the deemer balances] against future REP benefits." WP-07-E-BPA-76, BPA-E __ 008332 (p. 72) (emphasis added). Despite BPA's assertion to the contrary, the Department of Energy (DOE) has promulgated a regulation that prohibits BPA from offsetting the deemer balances against future REP payments. In pertinent part, the DOE regulation states:

> Unless otherwise provided by law, administrative offset of payments under the authority of 31 U.S.C. 3716 to collect a debt may not be conducted more than 10 years after the Government's right to collect the debt first accrued, unless fact materials to the Government's right to collect the debt were not known and could not reasonably have been known by the official or officials of the Government who were charged with the responsibility to discover and collect such debts.

10 C.F.R. § 1015.203(a)(4) (emphasis added). In addition, 31 U.S.C. § 3716(e)(1) prohibits the Government from pursuing an administrative offset for claims that have been outstanding for more than 10 years. Section 3701 defines a "claim" as "any amount of funds . . . owed to the United States" including over-payments (e.g., REP benefits). 31 U.S.C. § 3701(b)(1)(C).

In its Final ROD, BPA argues that the deemers are not "due", thus, there is no bar to the administrative setoff. BPA-A __ 000583 (p.240-41). However, BPA recognized that this issue "is not without question" and it remains open to settlement this issue must be resolved in another forum. Id. At 242.

E. The Use of Different Methods to Calculate Deemer Interest is Arbitrary

Although the 1981 RPSA contracts for Avista, Idaho Power and Northwestern are identical, BPA used different methods of calculating the interest on the deemer balances. For Idaho Power and Northwestern, BPA used compounded interest to calculate the respective deemer balances, but for Avista it used simple interest to calculate Avista's deemer balance. BPA-E__ 009809 (p. 196); BPA-TR __000104 (p. 90 at ll. 1-2). Idaho PUC witness Westerfield testified that BPA's use of simple versus compound interest has a significant effect on the calculations of the deemer balances. For example, Avista's purported deemer balance grew 2.5 times from the accumulation of only interest between January 1987 and October 1, 2007 (to $99.3 million). BPA-E___004189 (p. 18). In comparison, BPA's use of compound interest increased Idaho Power's purported deemer balance 4.2 times (interest only) between January 1987 and October 1, 2007 ($245.36 million). *Id.*

When asked to explain why Avista's deemer balance was calculated using simple interest but Idaho Power's deemer balance was calculated using compound interest, BPA witnesses offered no explanation other than the wording of the utilities' respective Suspension Agreements

(BPA-E __ 007117, 007126). WP-07-TE, Vol. 1, p. 90-91, BPA-TR __000104. Avista's principal deemer balance has not changed since January 1987 and the growing balance merely represents the accrual of simple quarterly interest at the prime rate. BPA-E __ 0007092 (p. 8); WP-07-E-ID-5. On the other hand, BPA's Excel spreadsheet for the calculation of Idaho Power's deemer balance (WP-07-E-ID-4) reflects that using the compound method, interest is added to the principal and this "new" subtotal or principal balance is then subject to quarterly interest at the prime rate. BPA-E __ 007092; WP-07-E-ID-4.

The use of two different interest rates (i.e., simple versus compound) for similarly situated utilities is arbitrary and discriminatory. There is no evidence in the record and BPA did not offered a convincing explanation why BPA uses simple interest to calculate Avista's deemer balance, but used compound interest to calculate Idaho Power's deemer balance. BPA states in the Final ROD that it relied on the Settlement Agreements. BPA-A __ 000583 (p. 229-30). However, the circumstances between the two companies are indistinguishable yet BPA has intentionally treated them differently in calculating their deemer balances. The use of difference interest methodologies to calculate the deemer balances in this instance is clearly unreasonable and arbitrary. 5 U.S.C. § 706(2)(a).

Applying compound interest to Idaho Power's deemer balance also has a punitive effect. By adding the purported deemer balances to the Lookback amount, more than 400,000 Idaho Power residential and small farm customers will be deprived of any REP benefits for more than 20 years into the future. BPA-E __ 004189 (p. 12); BPA-TR __000104 (p. 95-96). Is it inequitable to withhold REP benefits from present and future customers because past customers received the benefit of BPA's inappropriate rates.