UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION

2010 Proposed Wholesale Power	)	
Rate Adjustment Proceeding	)	BPA Docket No. WP-10

BONNEVILLE POWER ADMINISTRATION'S
MOTION TO STRIKE PORTIONS OF ALCOA'S DIRECT TESTIMONY AND THE ACCOMPANYING LEGAL MEMORANDUM.

Bonneville Power Administration ("BPA") moves to strike certain portions of Alcoa's Direct Testimony of Jack A. Speer ("Alcoa Testimony") (WP-10-E-AL-01 at page 17, lines 3-4; page 17, line 7, through page 19 line 19; Exhibits 8, 9, 10, 11, and 12 in their entirety) and the accompanying Alcoa, Inc.'s Legal Memorandum in Support of the Direct Testimony ("Alcoa Legal Memorandum")(WP-10-M-AL-01 at page 13, line 23 through page 14, line 9). The identified statements in the two filings deal with what remedies, if any, might be required for the service period occurring prior to the effective date of the Ninth Circuit's remand order in *PNGC v. DOE*, 550 F.3d 846 (9th Cir. 2008) ("*PNGC*").[1] This period of service is commonly called the DSI Lookback Period. BPA agrees with Alcoa that it is the Administrator's responsibility to respond to this aspect of the Court's order. However, for reasons stated below, BPA also believes

[1] Essentially, Alcoa alleges that, pursuant to the Court's holding, BPA charged Alcoa a higher rate than the one to which it was entitled during the DSI Lookback period, therefore, entitling Alcoa to $195 million. Part of Alcoa's calculation of the amount owed for the alleged injury pertains to service for 2009, 2010, and 2011. However, as the testimony shows, these calculations are predicated on "power pre-purchased from non-BPA sources" during the Lookback Period. Alcoa elected the option of making these "pre-purchases" for the full five-year term of the contract, so as to lock in its benefit level for the full contract term, an option that both Alcoa and CFAC specifically requested. Thus, to the extent that Alcoa argues that it should in some way be relieved of the cost of the "pre-purchases," or some portion thereof, that issue is relevant to the determinations required by the remand order for the DSI Lookback Period.

that it would be inappropriate to address the relevant issues in the context of the WP-10 rate proceeding.

In its discussion relevant to the Lookback Period, *PNGC* specifically discussed issues related to the enforceability of the "damages waiver provision" of the Alcoa contract, which states

> In the event the Ninth Circuit Court of Appeals or other court of competent jurisdiction issues a final order that declares or renders this Agreement void or otherwise unenforceable, *no Party shall be entitled to any damages or restitution of any nature*.

Id. at 881 (emphasis added). In response to PNGC's assertion that the damages waiver provision of the Alcoa contract was unforceable because the entire contract was void *ab initio*, the court noted that the issue was not that clear due, in part, to the existence of a separate severability clause, which states that

> [i]f any term of this Agreement is found to be invalid by a court of competent jurisdiction then . . . . [a]ll other terms shall remain in force unless that term is determined not to be severable from all other provisions of this Agreement. . . .

Id. The Court affirmed BPA's authority to sell physical power to the DSIs at a valid rate and recognized that "the monetized service benefit provisions of the agreements are, at least, potentially severable from the agreement as a whole, leaving a possibly valid option, the sale of physical power at an as-yet to be specified rate." *Id.* The Court recognized that the question to be resolved is "whether, if the agreements are partially invalidated, BPA is permitted to seek restitution, not whether it is 'requir[ed]' to do so." *Id.* at 882. Thus, the Court concluded that the proper course was to "remand to BPA to determine in the first instance the applicability and construction of the severability clause, the damage waiver, and physical power sale option in light of our holdings here." *Id.*

Thus, the *PNGC* decision states that, on remand, the Administrator must determine the status of the damage waiver provision, in light of the severability clause, and assess how those determinations affect any requests for remedial action related to the Lookback Period. Because these determinations would be integral to the Court's original disposition of the case, and its continuing jurisdiction over compliance with the remand, they would be subject to section 9(e) of the Northwest Power Act, which provides for review of final agency actions in the United States Court of Appeals for the Ninth Circuit. 16 U.S.C. § 839f(e).

The Administrator has separately committed to conducting a public process, or processes if necessary, to resolve issues related to the Lookback Period. However, it would be inappropriate to commence that undertaking as part of the WP-10 rate proceeding.

While the Court's original opinion was issued on December 17, 2008, both BPA and Port Townsend Paper Company have filed Petitions for Rehearing. Those petitions are still pending and so the Court's mandate has not yet issued. The Federal Rules for Appellate Procedure ("FRAP") state:

> The timely filing of a petition for panel rehearing, petition for hearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

FRAP, R. 41(d)(1). Consistent with the above, the rules further establish the date upon which the mandate will issue, as follows:

> The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or *7 calendar days after entry of an order denying a timely petition for panel rehearing*, petition for rehearing en banc, or motion for stay of mandate whichever is later.

FRAP, R. 41(b) (emphasis added). The implications of the lack of a mandate are substantial. As noted in comments to the 1998 amendments to the appellate rules: "A court of appeals judgment or *order is not final until issuance of the mandate*; at that time the parties' obligations become fixed." FRAP, R. 41, Comments to 1998 Amendments, Subdivision (c) (emphasis added).

Accordingly, the Administrator believes that consideration of the Lookback Period must take place at a later time, in a separate public process or processes that will include all three DSIs—CFAC, Alcoa, and Port Townsend. Port Townsend's petition for rehearing is still pending and so any obligations it might have pursuant to *PNGC* are not yet fixed. It would not comport with principles of fundamental fairness and due process to make the necessary findings until finality is achieved.

It is true that CFAC and Alcoa have not filed petitions for rehearing and so their situation is somewhat different. However, BPA's petition is still pending. While BPA did not request a different outcome in the case, it did ask for clarification of significant aspects of the opinion. If adopted by the Court, BPA's recommendations could provide useful information regarding service to the DSIs with respect to both future service and service that transpired during the Lookback Period. It would be premature, then, to make findings with respect to the Lookback Period in the context of the WP-10 rate proceeding, where the results would become embedded in BPA's rates, with the result that any mistakes that may become evident later would be difficult to change.

It should also be noted that the *PNGC* panel has appointed Ninth Circuit Judge Leavy to determine whether any of the issues related to the *PNGC* decision can be successfully resolved through a mediation process. Until that process is completed, it would be inappropriate for BPA to initiate a proceeding that would essentially undermine the purpose of the panel in appointing a mediation judge in the first place.

For these reasons, the identified statements, all related to the DSI Lookback Period, are premature and provide no evidentiary value for the purposes of this proceeding. Therefore, BPA requests that the following text be stricken: Alcoa's Direct Testimony of Jack A. Speer ("Alcoa Testimony"), WP-10-E-AL-01, at page 17, lines 3-4; page 17, line 7, through page 19 line 19; Exhibits 8, 9, 10, 11, and 12 in entirety, and the accompanying Alcoa, Inc.'s Legal Memorandum in Support of the Direct Testimony ("Alcoa Legal Memorandum"),WP-10-M-AL-01 at page 13, line 23 through page 14, line 9. For convenience, BPA has attached excerpts from the Alcoa Testimony and Legal Memorandum, highlighting those portions which should be stricken. The Exhibits could not be reproduced at this time. However, since they simply detail the calculations of the amount of alleged Lookback Period injury, as summarized in the testimony itself, these supporting exhibits should be stricken in their entirety.

DATED this 31st day of January, 2009.

Respectfully submitted,

/s/ Jon Wright

Jon Wright
Attorney
P.O. Box 3621 – LP-7
Portland, OR 97208
Bonneville Power Administration

ATTACHMENT

1. **Excerpt from Alcoa's Direct Testimony of Jack A. Speer ("Alcoa Testimony") (WP-10-E—AL-01 at page 17, lines 3-4; page 17, line 7, through page 19 line 19**

Q. What would happen if Actual Dollars were above IP Dollars at the time of contract termination?

A. The mechanism we propose will guarantee that BPA collects at least the IP standard rate from 2006 through the life of a new contract. We believe that the determination of what happens if the Actual Dollars are above the IP Dollars at the time of contract termination should be a matter determined in the contract.

Q. Why is October 1, 2006 the appropriate date to start the true-up?

A. We believe the appropriate power rate for Alcoa to pay under a BPA contract is the IP rate. Beginning on October 1, 2006, Alcoa was offered a monetized power contract that was not priced at the IP rate. The Ninth Circuit Court of Appeals has remanded this contract to BPA, but the economic impact of actions taken under the remanded contract will likely result in power costs through September 30, 2011 which are higher than the applicable IP rate. Rather than proposing that BPA immediately return with interest the amount of the overpayment during this period, we believe it would be beneficial to other BPA customers to include this in the true-up mechanism for a variable rate that may result in no repayment or at least spread the burden of a repayment over several years.

Q. Please describe the amount that Alcoa is likely to pay above the IP rate because of the remanded monetized contract?

A. The expected overpayment can be segregated into 4 categories:

1. First, is the difference between the amounts actually paid for power from non-BPA sources (including BPA monetized benefits received) versus what would have been paid under the IP-07 and IP-07R rates from October 1, 2006 through November 30, 2008 under the original monetized benefit contract. This is summarized in Exhibit 8 to this testimony.

2. Second, is the difference between what Alcoa is likely to pay for power pre-purchased from non-BPA sources (including monetized benefits and revenues received from the remarketing of surplus pre-purchased power) under the amended monetized benefit contract versus what would have been paid under the IP-07R rate from December 1, 2008 through September 30, 2009. This is summarized in Exhibit 9 to this testimony.

3. Third is the difference between what Alcoa is likely to pay for power from BPA at an expected IP rate plus what Alcoa is likely to pay for pre-purchased non BPA sources (including BPA monetary benefits and revenues from the remarketing pre-purchased power) versus what would have been paid under the proposed IP-l0 rate from October 1, 2009 through September 30, 2011. This is summarized in Exhibit 10 to this testimony.

4. Fourth is the difference between what Alcoa would have paid at the improperlyhigh IP-07 rate and what Alcoa would have paid had BPA revised the IP-07 rate during the WP-07R proceeding. When BPA conducted its supplemental 2007 rate case, it adjusted future PF rates to comply with the remanded Residential Exchange Program settlement. This indirectly affected future IP rates. However, it did not adjust the incorrect IP-07 rate

methodology retroactively to be consistent with the correct methodology used to determine the IP-07R rate. This resulted in artificially high IP-07 rate as compared to the IP-07R rate. This is summarized in Exhibit I I to this testimony.

Q. Did Alcoa object to the IP-07 methodology?

A. No. Alcoa was not purchasing power under that rate, but under the monetized power contract at the time, and was not impacted by that rate at that time.

Q. What should the IP-07 rate have been?

A. It is very difficult to replicate the calculations in the development of the IP-07 rates under the methodology used in the IP-07R rate development. As an estimate, I assume that the IP-07 rates would have been equal to the IP-07R rates.

Q· Please summarize the total amount of the expected overpayment between October 1, 2006 and September 30, 2011.

A. The total expected overpayment is summarized in Exhibit 12.

Q· Do you propose that the entire $195 million shown in Exhibit 12 be included in the variable rate true-up calculation?

A. No. We realize the amount of work required for BPA to retroactively revise its rates from October 1, 2006 through September 30, 2008. In the spirit of cooperation and long-term problem solving we propose to eliminate any adjustment in category 4 (Exhibit 11) in the true-up of a variable aluminum rate. This would reduce the total estimated true-up to the $147 million subtotal for the first 3 categories shown in Exhibit 12.

Q. How will the true-up be calculated for other aluminum companies that may have contracts that allow purchases under the variable aluminum rate?

A. A true-up using the same methodology would be used beginning with power costs under BPA contracts on October 1, 2006. Of course, the numbers will be different because of different operating levels and different power costs.

2. **Excerpt from Alcoa, Inc.'s Legal Memorandum in Support of the Direct Testimony ("Alcoa Legal Memorandum")(WP-10-M-AL-01 at page 13, line 23 through page 14, line 9).**

In addition to the Variable Rate, BPA has, in the past, developed other flexible IP rates that are designed to recover the allocated IP costs, but which provide operating flexibility to meet unusual circumstances either on BPA's system or in aluminum markets. Mr. Speer uses the example of the IP-83 rate schedule in which BPA developed a Premium Industrial Rate and an Industrial Incentive Rate in addition to the Standard IP rate. *See* Speer Testimony page 11. lines 14-18, and Exhibit 5. Again, the Federal Energy Regulatory Commission approved these options, under the IP rate schedule.

Mr. Speer has also proposed the variable rate as a way of resolving the dispute surrounding BPA's implementation of the Monetary Benefit under the Block Sale Agreement. Mr. Speer demonstrates that Alcoa paid substantially in excess of the IP rate. The Ninth Circuit ruled that the appropriate rate to apply under the Block Sale Agreement was the IP rate. *PNGC* at 852. As Mr. Speer demonstrates, in each period that BPA offered the Monetary Benefit, Alcoa paid a net rate that was higher than the IP rate. Thus, Alcoa would be entitled to an adjustment to its rates to recover the overpayment it made in an amount of $195 million. Speer Testimony at page 19, line 6, and Exhibit 12. In lieu of a lump sum recovery of the overpayment, Mr. Speer proposes an adjustment to the rate true-up to reduce the recover to $147 million and to recover that sum over the term that the variable rate remains in place, much in the same way that BPA returned the overpayment of residential exchange costs to its customers in the WP-07 Supplemental rate proceeding. Speer Testimony at page 19, lines 719.