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

WHOLESALE POWER AND TRANSMISSION RATE ADJUSTMENT PROCEEDING	))	BPA Docket BP-12

BONNEVILLE POWER ADMINISTRATION'S RESPONSE IN OPPOSITION TO "MOTION OF THE ASSOCIATION OF PUBLIC AGENCY CUSTOMERS, ET AL. TO DETERMINE PROPER SCOPE OF PROCEEDING AND TO CORRECT FEDERAL REGISTER NOTICE"

INTRODUCTION

A. Background

On December 1, 2010, the Association of Public Agency Customers ("APAC"), filed a motion to determine the proper scope of this proceeding and to correct the Federal Register notice issued by the Administrator of the Bonneville Power Administration ("BPA" or "Bonneville") commencing this proceeding. 75 Fed. Reg. 70744 (November 18, 2010) ("the FR Notice"). APAC alleges that the FR Notice improperly instructs the hearing office to "exclude evidence of any proposed revisions to the Tiered Rates Methodology ("TRM")" and that this alleged exclusion "is in direct contravention of the Ninth Circuit finding that any challenges to the TRM and associated revisions must be presented and litigated in this case." Motion, at 1. Further, APAC alleges that the FR Notice erroneously directs the hearing office to exclude evidence of BPA's post-2011 Conservation Program.

APAC's motion should be denied on both procedural and substantive grounds. Procedurally, the Administrator has the sole discretion to set the scope of BPA's rate proceeding. The Hearing Officer lacks the authority under the Northwest Power Act ("NPA") to either expand the scope this proceeding or to direct the Administrator to issue a revised Federal Register notice. Substantively, APAC's arguments have no merit because they fundamentally misconstrue the nature of this proceeding as well as the holdings of the Ninth Circuit.

ARGUMENT

I. THE ADMINISTRATOR HAS THE SOLE DISCRETION TO DETERMINE THE SCOPE OF THIS PROCEEDING.

Under the NPA, the Hearing Officer plays an important but limited role in the section 7(i) process. Sections 7(i)(2)(A) and 7(i)(5) provide that the role of the Hearing Officer is to develop a full and complete record from which the Administrator makes a final decision in establishing rates. 16 U.S.C. §§ 839e(2)(A); 839e(5). The Hearing Officer's role is essentially to preside over the hearing and ensure that parties are provided an opportunity to offer rebuttal testimony, cross examine witnesses and allow participants to submit comments. 16 U.S.C. §§ 839e(2)(A); 839e(2)(B). The provisions of the NPA do not afford the Hearing Officer the opportunity to modify the FR Notice issued by the Administrator, and APAC makes no demonstration that such authority exists under any other statute.

In addition, section 1010.3 of the Rules of Procedure Governing BPA Rate Hearings sets forth the matters that the Administrator includes in the FR Notice. Among the list of matters included is 1010.3(f), which states that the Administrator shall "[p]rovide other information which the Administrator determines to be pertinent to the

hearing." This catchall provision has routinely been used as the mechanism for the Administrator to establish limitations regarding the scope of the proceeding. Limiting the scope is critical to the efficient and proper functioning of these complex hearings.

As a consequence of these statutory and regulatory limitations, the Hearing Officer is limited to conducting the hearing consistent with and pursuant to the directions provided by the Administrator in the FR Notice. Because the Administrator, not the Hearing Officer, is the decision maker in this proceeding, it is not with the providence of the Hearing Officer to modify or change the directions provided in the FR Notice regarding the scope of this proceeding.

II. APAC HAS MISCONSTRUED THE FR NOTICE AND THE HOLDING OF THE NINTH CIRCUIT IN *INDUSTRIAL CUSTOMERS*.

A. Introduction

On October 31, 2008, BPA offered long-term (20 year) power sales contracts, called Regional Dialogue ("RD") Contracts, to all of its utility customers. The RD Contracts were the culmination of a massive administrative process that began in April 2002. Contemporaneous with the development of the RD Contracts, BPA developed the Tiered Rate Methodology ("TRM"). The TRM serves as a framework for the development of tiered rates that, once adopted, will apply to sales of power under the new long-term RD Contracts. On November 10, 2008, less than two weeks after offering the RD Contracts, BPA issued its Final Tiered Rates Methodology as well as a Record of Decision ("ROD") supporting the Final TRM. The TRM and TRM ROD were final actions under section 9(e)(5) of the Northwest Power Act, 16 U.S.C. 839f(e)(5).

On January 27, 2009, the Industrial Customers of Northwest Utilities ("ICNU") filed a petition to review the TRM and the TRM ROD in the U.S. Court of Appeals for

the Ninth Circuit. *Industrial Customers of Northwest Utilities, et al. v. Bonneville Power Administration*, No. 09-70920 *et seq*. ("*Industrial Customers*"). Similar petitions for review were filed by Georgia-Pacific LLC ("GP") and Clatskanie People's Utility District ("Clatskanie"). On July 16, 2010, the Ninth Circuit issued an unpublished memorandum opinion in these consolidated cases. *See Industrial Customers*, Attachment to APAC's Motion. The Court dismissed the majority of claims raised by petitioners because those claims were not ripe for review, and denied relief on the merits of the single claim that *was* ripe. Mem. Op., at 2, 3-7.

B. The FR Notice

In the FR Notice initiating this proceeding, BPA stated in pertinent part, that:

> Modifications to the TRM are within the scope of this proceeding; however, the TRM restricts BPA and customers with Contract High Water Mark (CHWM) contracts from proposing changes unless certain procedures have been successfully concluded. BPA has concluded these procedures regarding five proposed revisions, and these proposed revisions are within the scope of this proceeding. Pursuant to § 1010.3(f) of BPA's Procedures, the Administrator hereby directs the Hearing Officer to exclude from the record all argument, testimony, or other evidence that seeks in any way to propose other proposed revisions to the TRM made by BPA, customers with a CHWM contract, their representatives, or representatives of their consumers, unless it can be established that the TRM procedures for proposing a change to the TRM have been concluded.

75 FR at 70746.

As a result, the Administrator explained that (1) the TRM restricts BPA and customers with "CHWM" Contracts from proposing changes to the TRM unless certain procedures have been followed, (2) these procedures were followed with respect to five proposed revisions to the TRM, and (3) modifications to these proposed revisions are within the scope of this proceeding. However, the Administrator directed the Hearing Officer to exclude argument and evidence attempting to propose other revisions to the

TRM by customers with CHWM contracts (unless the proper procedures have been concluded).

C. APAC Misconstrues *Industrial Customers*.

APAC alleges that in *Industrial Customers*, the Court instructed that "challenges to the TRM and associated revisions must be presented and litigated in this case." Motion, at1. APAC further alleges that "[l]itigating the TRM in this rate case will allow the parties to properly present their challenges to the TRM to BPA and also give BPA the opportunity to correct any defects in the TRM." Motion, at 3. Thus, APAC interprets *Industrial Customers* to mean that challenges to the TRM *itself* are now ripe for review and can now be brought in this rate proceeding. However, APAC has fundamentally misinterpreted *Industrial Customers*. As explained below, the TRM itself was a final action that was ripe for review in *Industrial Customers*. It was only the majority of *claims* raised by the petitioners therein that were unripe. The Court never stated or suggested that the TRM could be *re*-litigated in the context of BPA's rate proceeding. On the contrary, such an interpretation would directly undermine the finality provisions of the Northwest Power Act.

1. Section 9(e)(5) of the NPA Bars Re-litigation of the TRM.

Section 9(e)(5) of the NPA provides that all challenges to BPA final actions must be filed within 90 days of the date of the final action "or be barred." 16 U.S.C. § 839f(e)(5). In *Industrial Customers*, ICNU, GP and Clatskanie filed timely petitions to review the TRM and TRM ROD. The Ninth Circuit found that "it is undisputed" that the TRM (and TRM ROD) was a final action. Mem. Op., at 2. Indeed, APAC concedes that "[t]he TRM was adopted by BPA in a formal proceeding resulting in a final action."

Motion, at 2. As a result, *all* challenges to the TRM had to be brought within the 90 day statutory deadline or be barred.

As noted, APAC contends that litigating the TRM in the context of this rate proceeding is appropriate because it will allow parties to "present their challenges to the TRM to BPA and also give BPA the opportunity to correct any defects in the TRM." Motion, at 3. However, this opportunity was already afforded to APAC and all other parties. The TRM was the result of a massive multi-year administrative process that generated an administrative record of thousands of pages and culminated in the TRM and TRM ROD. To subject the TRM to a second level of review in the context of this rate proceeding and *re*-litigate the TRM would completely undermine the finality of the TRM, eviscerate the NPA's 90-day statute of limitations, and give APAC a 'second shot at the apple.' Section 9(e)(5) of the NPA is intended to avoid precisely this result. *See generally Puget Sound Energy, Inc. v. Bonneville Power Admin.* 310 F.3d 613, 628 (9th Cir. 2002) (explaining that the Ninth Circuit has strictly interpreted time constraints in section 9(e)(5) of the NPA because "an important goal of Congress in enacting the Northwest Power Act was to expedite litigation challenging BPA actions.").

Moreover, the reason that BPA developed and finalized the TRM sufficiently in advance of establishing rates is because the TRM is the foundation for the development of rates. To allow re-litigation and reconsideration of the TRM in this proceeding would eliminate the certainty that is provided by the TRM and is necessary for the development of BPA's rates. As a result, because the TRM was a final action over two years ago and all challenges to the TRM were statutorily required to be filed within 90 days of that final action, re-litigation of the TRM in this rate proceeding is barred.

2. *Industrial Customers* Did Not Hold That Challenges To The TRM *Itself* Should Be Raised In This Rate Proceeding.

In *Industrial Customers*, the Court held that it lacked jurisdiction to review most of the *claims* brought by petitioners therein because such claims were challenges to hypothetical rates that were not yet established, were not approved by FERC and therefore were not ripe for review. For instance, as explained by the Court, petitioners alleged that the TRM "will result in BPA charging the same market-based rate for some 'contracted-for or committed to' load as it charges for new large single loads, thus violating a statutory mandate in the Northwest Power Act that such rates be different." Mem. Op., at 2-3. The Court held that "[b]ecause the BPA has not yet completed a rate-making proceeding, and the petitioners' challenge . . . is based on future rate making and cost allocation decisions, *this challenge is not ripe for review*." *Id*. at 3 (emphasis added). The Court reiterated, later on in the opinion, that "[b]ecause the BPA has not yet completed a rate-making proceeding, and the petitioners are not challenging an actual rate made in violation of a controlling statute, *these particular challenges are not ripe for decision*. *Id*., at 4-5 (emphasis added).[1] Thus, the Court was clear that the "particular challenges" raised by petitioners were not ripe for review because those challenges were based on allegations about rates that had not been established by BPA or approved by FERC and as such were hypothetical and based on pure speculation.

In contrast to these unripe rate claims, petitioners also alleged that the TRM violated the Administrative Procedures Act ("APA") because the TRM allegedly provided special treatment to a Department of Energy facility. *Id.* at 6-7. The Court held

[1] The Court made a similar finding with respect to Georgia-Pacific's allegations that the TRM resulted in an unconstitutional taking. *Id*.

that this particular claim *was* ripe for review because "this claim . . . neither challenges a rate established under the [TRM] nor requires analysis of hypothetical characteristics of future rates . . . ." *Id*. at 6. Therefore, the Court expressly found that it had jurisdiction to review challenges to the TRM that *were* ripe for review.

In its motion, APAC ignores this distinction and misses the fundamental point of *Industrial Customers.* Contrary to APAC's allegations, the Court never stated that "any challenges to the TRM and associated revisions must be presented and litigated in this case." Motion, at 1. On the contrary, the Court found that the TRM itself *was* ripe for review because it reviewed *on the merits* the properly raised APA challenges. It was only the specific rate challenges raised by the petitioners that were not ripe for review because those rates had not yet been established.

Therefore, if APAC believes that BPA is now proposing to charge the same market-based rate for "contracted-for or committed to" loads as it charges for new large single loads, then, consistent with *Industrial Customers*, APAC is free to challenge that proposal in the context of this rate proceeding. And, once BPA establishes final rates and such rates are confirmed and approved by FERC, then BPA's rate decision is a final action that is ripe for review in the Ninth Circuit.[2] However, nothing in *Industrial Customers* supports that proposition that the TRM itself is subject to re-litigation in this proceeding.

[2] It should be noted, however, that the proposed Tier 2 PF rates, which would apply to "contract-for or committed to" loads, is significantly different and lower than the proposed NR rate for New Large Single Loads. Therefore, petitioners' speculation in *Industrial Customers* that these two rates would be the same or equivalent has proven to be erroneous.

As such, APAC's motion to modify the scope of the proceeding or "correct" the FR Notice should be rejected.

D. The Limitations In The FR Notice Are Consistent With The TRM.

In its motion, APAC alleges that BPA "directed the Hearing Officer to exclude *all* evidence proffered by designated parties that seeks to propose revisions to the TRM." Motion, at 2 (emphasis added). This allegation is clearly erroneous. In the FR Notice, BPA stated that "[m]odifications to the TRM are *within* the scope of this proceeding." 75 FR at 70746 (emphasis added). However, BPA explained that the TRM requires that certain procedures be followed before the TRM can be revised or modified. *Id*. BPA stated that there are five proposed revisions to the TRM that are within the scope of this proceeding because these requisite procedures have been followed and concluded. *Id*. Thus, the Administrator limited the exclusion in the FR Notice to argument, testimony or other evidence "that seeks in any way to propose *other* proposed revisions to the TRM." *Id*. (emphasis added).

This limitation is perfectly appropriate. Section 13 of the TRM sets forth the specific and detailed procedures that must be followed before the TRM may be modified or revised. APAC would simply ignore these procedures and have the Hearing Officer permit revisions to the TRM in contravention of these procedures. APAC's motion should be rejected because it directly violates section 13 of the TRM.

III. APAC'S CHALLENGE TO BPA'S EXCLUSION OF THE CONSERVATION PROGRAM HAS NO MERIT.

In the FR Notice**,** the Administrator directed the Hearing Office to exclude from the record all argument, testimony and other evidence that seeks to revisit the reasonableness or appropriateness of BPA's 2011Conservation Program dated August 18,

2010. 75 FR at 70746. APAC alleges that BPA's direction to exclude such evidence is improper for the sole reason that the 2011 Conservation Program is allegedly not a final action. APAC Motion, at 4-6. APAC's argument is a *non-sequitar*: the status of the 2011 Conservation Program as a final action or a non-final action is completely irrelevant.

First, section 7(i) of the NPA applies to the establishment of "rates." It does not apply to the development of BPA programs or policies. Therefore, there is no statutory basis whatsoever for the 2011 Conservation Program to be considered or reconsidered in the context of this rate proceeding. In the FR Notice, the Administrator culled out the 2011 Conservation Program to be clear that this recently completely program would not be reconsidered in this proceeding.

Second, APAC's argument lacks any legal foundation. APAC argues that the 2011 Conservation Program is non-final and simply presumes that non-final program decisions are fair game for further scrutiny in a section 7(i) rate proceeding. APAC cites no authority to support this presumption because no such authority exists.

Third, the logical consequence of APAC's argument is that the scope of BPA's rate proceedings would expand exponentially and become potentially boundless. If BPA's 2011 Conservation Program is subject to reconsideration in this rate proceeding, then arguably the same could be said for BPA's Fish and Wildlife Program, Resource Program and virtually any other program as long as the program is not final.

In the instant case, the Administrator properly exercised his discretion to limit the scope of this proceeding by insuring that the proceeding focuses on the establishment of rates and not on the reconsideration of various programs or policies. APAC's arguments

should be rejected because they are devoid of any legal basis, make no sense, and would inappropriately expand the scope of this proceeding to programs and policies that do not involve the establishment of rates.

CONCLUSION

For the foregoing reasons, APAC's motion should be denied.

Respectfully submitted this 7th day of December, 2010.

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