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

2014 RATE ADJUSTMENT PROCEEDING	)	Docket No. BP-14

BONNEVILLE POWER ADMINISTRATION'S MOTION FOR AN ORDER ALLOWING PARTIES TO PRESERVE ARGUMENTS

Bonneville Power Administration ("BPA") hereby moves the Hearing Officer to adopt an order allowing parties to preserve their arguments from previous proceedings as described below.

BACKGROUND

A. Scope of BP-14 Proceeding

In BPA's Federal Register Notice ("FRN") announcing the BP-14 rate proceeding, the Administrator directed the Hearing Officer to limit the scope of the proceeding:

> Because BPA's decision to adopt the 2012 REP Settlement was made as part of the REP–12 ROD, which is already under review by the Court, challenges to BPA's decision to adopt the 2012 REP Settlement and implement its terms in BPA's rate proceedings are not within the scope of this case. 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 visit or revisit BPA's determination to adopt the 2012 REP Settlement or implement its terms in this rate proceeding.
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> Although challenges to BPA's decision to adopt the 2012 REP Settlement and implement its terms in BPA's rate proceedings are not within the scope of this case, the Hearing Officer shall permit BPA and the rate case parties, through a "standstill" agreement, to incorporate by reference material from the BP-12 proceeding, which includes the record from the REP-12 proceeding.

77 Fed. Reg. 66,966, at 66,969.

In summary, the FRN provides that arguments challenging BPA's determination to adopt the 2012 REP Settlement and to implement its terms in the BP-14 proceeding are beyond the scope of this proceeding. Also, if the parties reach a "standstill agreement," such agreement will be permitted by the Hearing Officer. Conversely, if the parties fail to reach a standstill agreement, arguments challenging the REP Settlement and its implementation are still prohibited.

B. History of Standstill Agreements

In BPA's two previous general ratemaking proceedings (Docket Nos. WP-10 and BP-12), BPA and the parties entered into "standstill agreements," which were written agreements executed by all litigants. The standstill agreements, in simple terms, preserved evidence and arguments raised in previous proceedings and incorporated them into the record of a subsequent proceeding. The desire for standstill agreements in WP-10 and BP-12 arose from BPA's WP-07 Supplemental rate proceeding. In that proceeding, BPA determined the manner in which it would respond to the Ninth Circuit Court of Appeals' ("Ninth Circuit" or "Court") decisions in *Portland General Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009 (9th Cir. 2007) ("*PGE*"), and *Golden NW Aluminum v. Bonneville Power Admin.*, 501 F.3d 1037 (9th Cir. 2007) ("*Golden NW*"). In *PGE*, the Court found that a settlement of REP disputes executed by BPA and its investor-owned utility customers in 2000 was inconsistent with sections 5(c) and 7(b) of the Northwest Power Act, which meant that BPA's preference customers had been overcharged for their power purchases during the term of the settlement. In the WP-07 Supplemental proceeding, in simple terms, BPA calculated a refund amount due to its preference customers, and proposed to recover the refund amount by reducing prospective Residential Exchange Program benefits to BPA's investor-owned utility customers.

After the conclusion of BPA's WP-07 Supplemental proceeding, a number of parties filed petitions for review in the Ninth Circuit challenging BPA's alleged non-ratemaking decisions in the WP-07 Supplemental ROD. Approximately a year later, BPA began preparations for its WP-10 rate proceeding, which established rates for FY 2010-2011. Challenges to BPA's decisions in the WP-07 Supplemental proceeding had not yet been decided by the Court. The WP-10 litigants therefore realized that many of the issues that would likely be litigated in the WP-10 proceeding had already been fully briefed by the parties and responded to in BPA's WP-07 Supplemental ROD. Because these issues had been thoroughly argued in the prior proceeding, it would not have been a prudent use of BPA's or the parties' resources to require them to relitigate these issues in the WP-10 proceeding. Consequently, in the interest of administrative and judicial economy, BPA filed a motion to adopt a written standstill agreement, signed by the litigants, which would preserve certain evidence and arguments from the WP-07 Supplemental proceeding by incorporating them in the WP-10 record. The WP-10 standstill agreement was adopted by the Hearing Officer. A similar standstill agreement was reached in BPA's BP-12 proceeding.

In 2012, BPA conducted a proceeding to determine whether to adopt a proposed settlement agreement to resolve longstanding Residential Exchange Program disputes. A standstill agreement was also reached in this proceeding. At the conclusion of the hearing (Docket No. REP-12), the Administrator adopted the proposed settlement. In the REP-12 ROD, the Administrator withdrew his REP-related decisions in the WP-07 Supplemental proceeding and replaced them with the decisions in the REP-12 ROD. (REP-12 ROD at 20.) The REP Settlement was signed by all of BPA's investor-owned utility customers, three state utility commissions, the Citizens Utility Board, and a large number of BPA's public agency customers.

Two parties, Alcoa Inc. ("Alcoa") and the Association of Public Agency Customers ("APAC"), filed petitions for review challenging the REP Settlement in the Ninth Circuit. Although Alcoa withdrew its petition, APAC's petition remains before the Court.

C. Alternative to Standstill Agreement in BP-14

Because of the possibility that parties might desire a standstill agreement for the BP-14 proceeding, BPA distributed a draft standstill agreement to parties via the BP-14 Tech Forum email list on November 7, 2012. In its email, BPA identified the draft standstill agreement as an additional matter to be discussed at the BP-14 scheduling conference, set for November 9, 2012. At the scheduling conference, BPA counsel asked whether parties were interested in a standstill agreement. Several parties indicated that the 2012 REP Settlement, which was executed by BPA and numerous parties, contained terms that precluded the signers from raising any challenge to the 2012 REP Settlement or its implementation in any subsequent proceeding. Because evidence and arguments from previous BPA proceedings (*e.g.*, REP-12) challenged the REP Settlement, this meant that a standstill agreement was no longer an appropriate means of addressing the preservation of arguments and evidence in the BP-14 proceeding. BPA and the parties therefore failed to reach a standstill agreement as contemplated by the FRN.

A discussion ensued as to alternative methods for preserving parties' positions. At the conclusion of the discussion, Mr. Paul Murphy, counsel for certain public agency customers, stated that he would draft a proposed order and present it to BPA, and BPA could then distribute the draft to the parties. On November 12, 2012, Mr. Murphy sent a draft order to BPA, which distributed it to all parties via the Tech Forum email distribution list on November 13, 2012. The prehearing conference for the BP-14 proceeding was held the following day. After the transcribed discussions at the prehearing conference had concluded, BPA and interested parties

remained in the hearing room to discuss the draft order. The litigants discussed various aspects of the draft order, and certain edits were made. Parties then asked BPA to distribute the revisions. Ms. Sarah Dennison-Leonard, counsel for the City of Seattle, sent the revisions to BPA counsel on November 14, 2012, and parties received a copy of the revised draft order that same day. Between November 15 and November 27, 2012, BPA received comments on the draft order from Alcoa, the Association of Public Agency Customers, and the Washington Public Agencies Group. To the extent the comments contained proposed revisions to the draft order, BPA distributed such revisions to the parties. On November 30, 2012, BPA distributed a final version of the draft order with a request to submit comments to BPA by December 5, 2012. By December 5, 2012, all parties except Alcoa, which opposed the order, had either agreed to the changes or not responded.

Instead of a standstill agreement, nearly all parties to the proceeding supported filing a motion with the Hearing Officer to adopt an order allowing parties to preserve arguments as follows:

> Wherefore, it is ordered that:
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> No party shall present in this proceeding any argument, testimony, or other evidence that seeks in any way to challenge BPA's determination to adopt the 2012 REP Settlement or implement its terms. In the event that BPA's decision to (1) adopt the 2012 REP Settlement, or (2) implement its terms in this proceeding or in a prior proceeding, is reversed or remanded, in whole or in part, by a court of competent jurisdiction, in lieu of presenting such testimony or evidence in the BP-14 proceeding prior to such reversal or remand, each party hereby preserves and will not be deemed to have waived any argument, and will have the right to present any relevant argument, testimony or other evidence from any prior proceeding in any remand of or any reconsideration of the rates proposed or set in this proceeding.

The instant motion implements the litigants' intent to file a motion seeking an order from the Hearing Officer to preserve arguments and evidence. Only Alcoa has indicated possible opposition to the instant motion.

ARGUMENT

As noted previously, the "standstill agreement" identified in the FRN, if achieved, would have permitted parties to the BP-14 proceeding to reach a written agreement to incorporate material from prior proceedings into the BP-14 administrative record (including the record from the REP-12 proceeding), thereby preserving certain evidence and arguments. Parties to the REP Settlement, however, opposed the use of a standstill agreement because it appeared to violate the signing parties' contractual obligations not to challenge the REP Settlement or its implementation in BPA's rate development. Therefore, the litigants did not reach a standstill agreement as contemplated by the FRN.

The failure to reach a standstill agreement means that, absent an alternative agreement, challenges to the REP Settlement and its implementation are still prohibited in the BP-14 proceeding ("challenges to BPA's decision to adopt the 2012 REP Settlement and implement its terms in BPA's rate proceedings are not within the scope of this case"). 77 Fed, Reg. 66,966, at 66,969. Although the FRN directs the Hearing Officer to "permit BPA and the rate case parties, through a standstill agreement, to incorporate by reference material from the BP-12 proceeding," the FRN did not *require* the parties to reach a standstill agreement or preclude the Hearing Officer from permitting the parties to preserve evidence and arguments by another means.

As is evident in part from the factual background recounted earlier in this motion, BPA and the parties have recently engaged in numerous proceedings with many interrelated issues. These include BPA's development of its FY 2007-2009 power rates in the WP-07 proceeding;

BPA's response to the Court's *PGE* and *Golden NW* decisions in the WP-07 Supplemental proceeding; parties' challenges to BPA's WP-07 Supplemental decisions in the Ninth Circuit; BPA's development of its FY 2010-2011 power rates in the WP-10 proceeding; BPA's development of its FY 2012-2013 power rates in the BP-12 proceeding; BPA's adoption of the REP Settlement in the REP-12 proceeding; and parties' challenges to the REP Settlement in the Ninth Circuit. Because it is impossible to know the manner in which the Ninth Circuit may resolve the petitions currently before it, the parties have exercised caution in preserving and not waiving significant issues. After thorough discussions, all parties except Alcoa have agreed to, or not objected to, the previously cited language as a means to preserve their arguments and evidence.

Granting this motion would promote administrative efficiency, avoid duplicative arguments, and prevent an unnecessary and massive enlargement of the BP-14 administrative record. Importantly, the proposed order would protect *all* parties in the BP-14 proceeding and would not harm *any* party. In the event a party nevertheless opposes this motion and the motion is denied, the preservation of arguments and evidence that would have been achieved by granting this motion would not exist, and the limited scope for this proceeding as identified in the FRN would control.

CONCLUSION

For the foregoing reasons, BPA respectfully moves the Hearing Officer to issue an order allowing parties to preserve their arguments as stated above.

DATED this 4th day of January, 2013.

Respectfully submitted,

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