

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

2007 SUPPLEMENTAL WHOLESALE POWER)
RATE ADJUSTMENT PROCEEDING) BPA Docket No. WP-07

**BONNEVILLE POWER ADMINISTRATION’S MOTION TO STRIKE
DIRECT TESTIMONY OF ASSOCIATION OF PUBLIC AGENCY
CUSTOMERS**

INTRODUCTION

On March 31, 2008, the Association of Public Agency Customers (APAC) filed the direct testimony of Lincoln Wolverton in this proceeding. *See* Wolverton, WP-07-E-AP-1. Such testimony contains legal argument, which is precluded by the “Special Rules of Practice to Govern This Proceeding.” Bonneville Power Administration (BPA) hereby moves to strike the portions of the testimony comprising legal argument for the reasons stated below.

ARGUMENT

The “Special Rules of Practice to Govern These [WP-07] Proceedings” provide that “[a]rgument and legal opinions will not be received into evidence. They are the province of the lawyer, not the witness. They should be presented in briefs or legal memoranda.” *See* Special Rules of Practice, WP-07-O-01 at 6. In this proceeding, parties did not have to include legal argument in testimony because parties had the opportunity to file legal memoranda to accompany their direct testimony. *See* Order Establishing Schedule, WP-07-HOO-37.

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Earlier in this WP-07 rate adjustment proceeding, the Hearing Officer established that legal argument contained in testimony will be struck. In the “Order Granting Motion to Strike Portions of Direct Testimony of the Investor Owned Utilities,” WP-07-O-19, the Hearing Officer stated:

. . . I struck testimony of WPAG that consisted of legal opinion insofar as it interpreted statutory language and its applicability to the rights and obligations of parties in BPA proceedings. Furthermore, although there may be a line of general authority regarding non-legal expert witnesses commenting upon law in a highly technical industry, in this particular proceeding, the specificity of the Special Rules of Practice overrides whatever line of general authority that may have arisen in the absence of specific rules to the contrary. The testimony at issue as legal argument identified by reference on page one of this Order shall be stricken.

Order, WP-07-O-19 at 3.

BPA recognizes that sometimes non-legal witnesses may cite statutory provisions or judicial decisions in order to provide a context to their testimony. BPA also recognizes that a legal statement by a non-legal witness does not establish the statement as fact, but rather as unsupported opinion entitled to no weight. In light of these facts, BPA has not moved to strike all possible objectionable portions of the witness’s testimony. Nevertheless, according to the rules governing this proceeding, the above-cited portions of the direct testimony of Mr. Wolverton should be struck from the record as improper legal argument. Mr. Wolverton is not a lawyer or legal expert. He is not qualified to interpret statutory provisions or judicial decisions or to offer legal opinions. The cited provisions of Mr. Wolverton’s testimony belong in briefs, not testimony.

Finally, granting this motion would not harm APAC. This motion, if granted, would eliminate only legal arguments from APAC’s testimony. It does not strike Mr. Wolverton’s conclusions, proposals or opinions about BPA’s case. Furthermore,

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APAC can include all of its legal arguments in its legal memoranda and Initial Brief.

BPA notes that parties must present all arguments, technical and legal, in their Initial Briefs in order to present such arguments to BPA for decision and preserve such arguments for any subsequent appeal. Testimony alone does not preserve any issues.

Based on the foregoing argument, the direct testimony of Lincoln Wolverton, WP-07-E-AP-1, should be struck as follows:

1. Page 2, lines 6-11.

~~The Ninth Circuit directed BPA to calculate the amounts improperly collected from Preference Customers due to inclusion in rates of costs related to the Residential Exchange Program (REP) Settlement Agreements, insofar as such costs exceed the amount that could have legally been recovered from Preference Customers pursuant to §7(b)(2) of the Northwest Power Act (NWPRA or Regional Act). BPA was directed to reimburse those amounts to Preference Customers.~~

2. Page 2, lines 18-21.

~~Instead of carrying out this straightforward direction from the Ninth Circuit on remand, BPA has fabricated a new rate case and a speculative, unsupportable set of revisionist “costs” and “loads” to recalibrate the illegal overpayments imposed on preference customers.~~

3. Page 7, lines 1, 6.

~~BPA has erred by not doing what the Ninth Circuit directed. . . . The issues in the WP-02 decision were not reversed on appeal and are not reasonably subject to reopening.~~

4. Page 8, lines 23-24.

~~BPA’s implementation of the remand instructions from the Court, i.e., to remove illegal costs from rates, is inappropriate and in error.~~

5. Page 12, lines 6-8.

~~BPA’s proposal fails to follow the Ninth Circuit’s direction on remand. BPA is to remove the costs—all illegal costs—of the REP settlement program from the Preference Rate.~~

6. Page 12, lines 20-22.

~~The Ninth Circuit decision required BPA to eliminate from rates the costs imposed from the Settlement Agreements between BPA and Pacific Northwest IOUs.~~

7. Page 9, lines 19-20.

Subsection 1 serves as an introduction and provides the context of BPA's proposed actions in light of decisions ~~and directions~~ from the Ninth Circuit on remand.

8. Page 14, lines 1-4.

~~That obligation is to calculate the amount of illegal charges, which is based on what was paid to the IOUs less what the maximum that was allowed to be paid under the May 2000 BPA rate test decision.~~

9. Page 15, line 8.

The choice of how to meet the ~~mandate of the~~ Ninth Circuit decision is straightforward.

10. Page 15, lines 15-17.

~~In exceeding the constraints of the remand,~~ BPA engages in a Lookback analysis that is speculative and suspect with its dubious implementation actions that are not supportable factually or legally.

11. Page 15, lines 26-27 through page 16, line 9.

APAC counsel will file legal briefs detailing the directions in the Ninth Circuit remand and the limitations on BPA's discretion in this supplemental case. ~~Based on that legal advice, and my own rate expert review of the decision, BPA is not following the remand mandate. It is my understanding that the remand requires BPA to establish the illegal overcollection from Preference Customers and provide a mechanism to recompense them for their losses. This assessment is to be made on the rates that were in effect, not on a revisionist history of what those rates might have been under differing conditions and assumptions.~~

12. Page 18, lines 3-7.

Divergence from the determinations in that case gives rise to a range of speculative and unsupportable factual and legal positions that require renewed scrutiny and evaluation. The Lookback exercise is this speculative form of "decisionmaking" ~~and undermines the straightforward directives of the Ninth Circuit as implemented by BPA.~~

13. Page 19, line 14.

~~The “subscription step” was negated by the Ninth Circuit.~~

14. Page 21, lines 5-6.

However, BPA then ignored the rate-test results and imposed the Subscription Step, ~~which the Ninth Circuit struck down and remanded back to BPA to set rates in accord with its ROD.~~

15. Page 24, lines 17-21.

In its approach, BPA obfuscates and undermines the real issues on remand ~~dictated by the Ninth Circuit.~~ The issue is not the determination of REP benefits; rather, it is the fact that the Ninth Circuit has determined that BPA unlawfully provided benefits to the IOU residential customers ~~in spite of the restrictions of the results of the WP-02 rate proceeding.~~

16. Page 24, lines 24-25.

This represents an entirely different agenda—~~an agenda that the Ninth Circuit found to be in error when it invalidated the REP Settlement Agreements.~~

17. Page 24, line 28 through page 25, line 2.

Indeed, BPA’s “update” of things it did not update “back then” is an exercise that is not consistent with my understanding of ~~the law, the facts or the Court’s directive.~~

18. Page 25, lines 9-10.

Q. Doesn’t BPA have to develop a new PF Exchange rate ~~in order to comply with the Ninth Circuit mandate?~~

19. Page 26, lines 10-12.

~~When the rate ceiling is triggered, §7(b)(3) mandates that further REP benefits must be paid by non-Preference Customers—principally, the Exchanging utilities.~~

20. Page 30, line 18.

~~The Ninth Circuit’s decision did not invalidate the ROD in the WP-02 case.~~

21. Page 42, line 27 through page 43 line 2.

~~Indeed, the Ninth Circuit found that methodology to be lawfully in force until and unless subsequently changed in a formal rate process.~~

22. Page 49, lines 22-23.

Q. Could you summarize your opinion on BPA's reopening of the WP-02 case to comply with the Ninth Circuit's ~~mandate~~?

23. Page 49, line 27 through page 50, line 1.

~~BPA has all of the information needed from the record in that proceeding to do what the Ninth Circuit has ordered.~~

24. Page 50, lines 9-11.

The Lookback exercise is a fiction to secure a different set of assumptions for rates and costs ~~that would effectively frustrate the Ninth Circuit remand.~~

25. Page 50, lines 16-17.

~~BPA's proposal does not meet even minimal standards for evidence to support a rate proposal.~~

26. Page 51, lines 17-20.

~~This is the analysis contemplated by the Ninth Circuit remand rather than the speculative reconstruction and imaginary back-casting of what might have been alternative rates, costs and loads.~~

27. Page 52, lines 16-21.

~~If the constraints of the Ninth Circuit remand are not observed by BPA, I believe the §7(b)(2) analysis should be calculated based on the best projections – actual loads, market prices and resource availability – with load augmentation due to conservation properly excluded, with most pre-Subscription contracts recognized as §5(f) contracts, and with the Mid-C resources not used by public agencies for their loads made available to the resource stack.~~

28. Page 53, lines 15-20.

~~BPA has misconstrued and misinterpreted its obligations under the Ninth Circuit remand, and as a consequence it has constructed a flawed and error filled Lookback proposal. The Lookback proposal fails to take into account actual circumstances as of the spring of~~

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2001, has to create data where none existed, and has gone beyond what is a reasonable response to the remand ~~mandate~~ of the Ninth Circuit.

29. Page 53, lines 25-27.

If such a Lookback exercise is to be entertained at all, it must be strictly compliant with the law, known factual conditions and the Court's remand ~~mandate~~.

30. Page 54, lines 13-16.

~~BPA is offering a proposal that frustrates and avoids the Ninth Circuit mandate and fails to implement the requirements of the Regional Act in both policy and implementation.~~

31. Page 57, lines 3-5.

The ~~legislative protections afforded by the~~ §7(b)(2) rate test are “triggered” and costs of the Residential Exchange are not ~~unlawfully~~ imposed on Preference Customers.

32. Page 57, lines 11-13.

The \$168.38 million represents an ~~illegal~~, excess payment that should be immediately recovered by Preference Customers.

33. Page 58, lines 15-17.

The ~~legislative protections afforded by the~~ §7(b)(2) rate test are “triggered” and the costs of the Residential Exchange are not unlawfully imposed on Preference Customers.

34. Page 60, line 28 through page 61, line 3.

The differences support the inclusion of 5(d)(1) loads in the definition of DSI load, but do not support the inclusion of §5(f) loads ~~because the former must include benefits for Preference Customers while there is no legal requirement that the latter provide any benefit to Preference Customers.~~

35. Page 63, lines 27-30.

BPA's treatment of conservation (as documented in WP-07-E-BPA-50, Attachment B) imposes an inappropriate and ~~apparently unlawful~~ penalty on conservation. ~~The Regional Act specifically obligates the BPA Administrator to encourage conservation (NWPA §2(1)).~~

36. Page 64, lines 1-4.

As a consequence, BPA's proposed treatment of conservation in its §7(b)(2) Implementation Methodology is poor public policy ~~and counter to the conservation objectives embedded in the Regional Act.~~

37. Page 71, lines 15-16.

No. ~~BPA's proposed treatment severely hinders the conservation objectives of the Regional Act.~~

38. Page 72, line 26 through page 73, line 2.

~~This payment mechanism was found to be illegal by the Ninth Circuit in PGE v. BPA and Golden Northwest v. BPA.~~

39. Page 77, lines 17-22.

No. ~~The statutory language in §7(b)(2)(D) requires that the resources used to meet preference load not be committed to load "pursuant to section 5(b)." The statutory language does not exclude all resources committed to load. Rather, it excludes only those resources committed under section 5(b). Mid-C resources serving IOU load can be excluded from the resource stack only if they are committed under 5(b).~~

40. Page 78, lines 2-4.

The only contracts provided in response to that data request are the power sales contracts to implement the REP Settlement Agreements, ~~which were invalidated by the Ninth Circuit. My understanding is that these agreements are no longer enforceable and cannot be considered to commit resources to load.~~

CONCLUSION

For the foregoing reasons, BPA respectfully moves the Hearing Officer to strike the above-noted testimony.

DATED April 11, 2008

Respectfully submitted,

/s/ Kurt R. Casad (by electronic filing)

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CERTIFICATE OF SERVICE

I certify that I have this day served the forgoing Bonneville Power Administration's Motion To Strike Direct Testimony Of Association Of Public Agency Customers upon the parties identified in the attached Order Amending Service List dated April 4, 2008, as corrected ("Order"), via electronic filing in the Bonneville Power Administration Secure Rate Case Web Site, 2007 Wholesale Power Rate Case (including 2007 Supplemental Rate Case, beginning date 02-19-08), and upon the following persons, via email and facsimile, who were designated by the Association Of Public Agency Customers in the Order as the proper recipients for all official communications concerning these filings:

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DATED this 11th day of April, 2008.

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BPA Docket WP-07

ORDER AMENDING SERVICE LIST

The Service List is amended.

SO ORDERED, March 21, 2008.

/s/ [Martin Henner]

Martin Henner
2007 Supplemental Wholesale Power
Rate Adjustment Proceeding
BPA Hearing Officer

WP-07 Supplemental Wholesale Power Rate Adjustment Proceeding – Service List

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