

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Case No. 08-74811

Public Power Council, et al., (
Petitioners (

v. (

United States Department of (
Energy - Bonneville Power (
Administration, (
Respondent (

**PUBLIC POWER COUNCIL’S
REPLY TO**

- 1) BPA’S RESPONSE TO THE
PUBLIC POWER
COUNCIL’S JOINT
MOTION TO REFER CASE
TO ORIGINAL PANEL,**
- 2) RESPONSE TO MOTIONS
FOR REFERRAL TO
SPECIFIC PANEL OF
AVISTA CORPORATION
AND PUGET SOUND
ENERGY, INC., AND**
- 3) RESPONSE TO MOTIONS
FOR REFERRAL TO
SPECIFIC PANEL OF
PACIFICORP, PORTLAND
GENERAL ELECTRIC
AND IDAHO POWER
COMPANY**

BACKGROUND

On November 21, 2008, the Public Power Council (PPC), Northwest Requirements Utilities (NRU), and Pacific Northwest Generating Cooperative (PNGC Power) filed a *Petition for Review Under the Northwest Power Act*, seeking review of certain actions taken by the Bonneville Power Administration (BPA) in response to three opinions of this Court. On the

same date, PPC, NRU, and PNGC Power filed a joint motion to refer the case to the original panel that issued the opinions to which the challenged BPA actions respond (“Joint Motion”).

On November 26, 2008, BPA filed a response to the Joint Motion. On the same date, Avista Corporation and Puget Sound Energy, Inc. (“Puget”) (both of which have filed motions to intervene in this proceeding) also filed a response to the Joint Motion. In addition, on the same date PacifiCorp (“Pacific”), Portland General Electric (“PGE”) and Idaho Power Company (“IPC”) (who also have filed motions to intervene in this proceeding) filed a response to the Joint Motion. In its response, BPA asks the Court to either defer ruling on the Joint Motion or to deny it. Avista-Puget and PacifiCorp-PGE-IPC ask the Court to deny the Joint Motion.

In accordance with Federal Rule of Appellate Procedure 27(a)(4), PPC, NRU, and PNGC Power (collectively “PPC” in this reply) file this reply to the responses of BPA, Avista–Puget and PacifiCorp-PGE-IPC.

ARGUMENT

I. The Arguments of BPA, Avista, and Puget About the Petition for Review Being Premature Are Not Relevant to the Joint Motion.

BPA, Avista, and Puget repeatedly assert in their response to the Joint Motion that this case should be dismissed because the Court should withhold

review until the Federal Energy Regulatory Commission (FERC) makes a final determination regarding confirmation of BPA's FY 2009 rates.¹

Although PPC contends that the actions it challenges in this case are ripe for review at this time, PPC does not herein respond to the arguments of BPA, Avista, and Puget regarding timeliness of the Petition for Review in this case because no motion to dismiss the Petition has been filed. If such a motion is filed, PPC will respond to the arguments made therein in its response to that motion. The Court should review the Joint Motion based on its merits, not with speculation about whether a yet unfiled motion to dismiss the case will be granted.

II. The Matters at Issue in this Proceeding are the Same Matters that Were at Issue in the *Golden Northwest*, *PGE*, and *Snohomish* Cases, Even if the Precise Issues May Differ.

Aside from arguing that the Court should not grant the Joint Motion due to BPA's contention that the case should be dismissed, BPA argues that the Court should deny the Joint Motion because this case does not involve review of the issues previously dealt with by the requested panel.² In its response, BPA then recaps each relevant case decided by the requested panel, and asserts that BPA's actions under review in this case are not the

¹ See, e.g. BPA Response at 6-11; Avista and Puget Motion at 8-11.

² BPA Response at 11-13.

same issues previously decided, and that therefore nothing warrants assigning this case to the same panel. Specifically, BPA states that the *Portland General Electric v. BPA*³ case (“PGE”) left “no further issue for a panel to address regarding the lawfulness of the REP Settlement Agreements.”⁴ BPA then asserts that its actions under review in this case are not closely tied with the Court’s decisions in *Golden Northwest Aluminum, Inc. v. BPA*,⁵ (“Golden NW”) either because “[t]he issue raised in *Golden NW* no longer exists” or because knowledge of the previous REP Settlement Agreements is not required in order to judge the merits of BPA’s instant decisions.⁶ Finally, BPA argues that the issues in *Snohomish County Pub. Util. Dist. No. 1 v. BPA*,⁷ (“Snohomish”) provide no basis for assigning this case to the same panel because “BPA’s authority to enter into settlement agreements is not at issue in the challenges identified in the petitions.”⁸

Similarly, Avista and Puget assert that the same panel should not hear this case because “the petitions for review in the current proceedings seek review of issues and BPA actions not previously reviewed by this Court.”⁹

³ 501 F.3d 1009 (9th Cir. 2007).

⁴ BPA Response at 12.

⁵ 501 F.3d 1037 (9th Cir. 2007).

⁶ BPA Response at 12.

⁷ 506 F.3d 1145 (9th Cir. 2007).

⁸ BPA Response at 13.

⁹ Avista and Puget Response at 5.

They argue that because the precise issues before the Court in *PGE, Golden NW*, and *Snohomish* are “different from the issues before the Court in the current proceedings,” the Joint Motion should be denied. PacifiCorp, PGE and IPC contend sweepingly that “[t]he current petitions do not turn on the complaints raised in the earlier petitions except in the limited sense that the earlier petitions provided a historical backdrop for the current decisions.”¹⁰

Each of the above arguments by BPA, Avista–Puget and PacifiCorp–PGE–IPC rests on the untenable proposition that the very issues decided in an appeal must be the precise issues considered in the subsequent appeal for the Court’s practice of assigning cases to the original panel to apply. If this logic were to prevail, there would be virtually no circumstance in which a case would be referred to a specific panel, contrary to the Court’s stated practice and procedure. This is because the only time the very same issues would be raised in a subsequent appeal of an agency action would be when an agency persists in repeating the identical error identified by the Court in its original review. This narrow construction cannot represent the intent of the Court’s practice of assigning cases to the “panel that originally heard the matter.”¹¹

¹⁰ PacifiCorp–PGE–IPC Response, p. 2.

¹¹ Rules of the United States Court of Appeals for the Ninth Circuit, Introduction, section E(4).

The Court's rules of procedure make clear that assignment to the original panel is appropriate where a *matter* has previously been heard by the Court—not where an *issue* has previously been heard. PPC is not arguing that the same legal issues raised in the *PGE*, *Golden NW*, and *Snohomish* cases will be raised in this case. Rather, PPC submits that this case and the Court's previous review involve the same matter—BPA's treatment of its obligations under, and costs of the Residential Exchange Program during the 2002-2008 period. This is precisely the same matter considered in *PGE*, *Golden NW*, and *Snohomish*. Indeed, BPA's description of its proceedings on review in this case expressly acknowledges that the proceeding directly responds to the opinion in *PGE* and the remand orders in *Golden NW* and *Shohomish*.

Although BPA, Avista-Puget and PacifiCorp-PGE-IPC now assert that the actions under review are not the same matters previously reviewed by the Court, BPA's Federal Register Notice in the WP-07 Supplemental Proceeding (the proceeding in which the actions under review in this case were taken) plainly stated that the major purpose of BPA's proceeding was to “address its response to the Court's [*PGE*, *Golden NW*, and *Snohomish*]

decisions.”¹² Specifically, the *PGE* case found BPA’s Residential Exchange Program (“REP”) Settlement Agreements unlawful.¹³ BPA responded in the WP-07 Supplemental Proceeding by establishing the amount by which its preference customers were overcharged under those agreements.¹⁴ In the *Golden NW* case, the Court found that BPA’s rate treatment of the costs of the settlement agreements under the directives of the Northwest Power Act was improper during Fiscal Years 2002-2006.¹⁵ BPA responded in the WP-07 Supplemental Proceeding by determining what rates should have been during those years.¹⁶ In *Snohomish*, the Court remanded to BPA to “determine how BPA will treat [amendments to the settlement agreements]”.¹⁷ BPA responded in the WP-07 Supplemental Proceeding by determining the validity of the relevant contract provisions, and determining the amount by which preference customers were overcharged under those

¹² Bonneville Power Administration – 2007 Wholesale Power Rate Adjustment Proceeding, Public Hearings, Opportunities for Public Review and Comment, 73 Fed. Reg. 7,539, 7,540 (Feb. 8, 2008).

¹³ 501 F.3d at 1037.

¹⁴ See 2007 Supplemental Wholesale Power Rate Case, Administrator’s Final Record of Decision, WP-07-A-05, p. 9 (Sept. 22, 2008), available at http://www.bpa.gov/corporate/ratecase/2008/2008_WP-07S/docs/WP-07-A-05.pdf.

¹⁵ 501 F.3d at 1048.

¹⁶ See *infra* n.14.

¹⁷ 506 F.3d at 1155.

amendments.¹⁸ Based on the foregoing, BPA’s actions under review in this proceeding plainly deal with the very matters decided previously by the panel to which PPC seeks referral of this case.

III. The Panel that Decided the *Golden Northwest, PGE, and Snohomish* Opinions is Best Situated to Effectively Review this Case.

In addition to the above arguments, BPA argues that the relief sought in the Joint Motion is not justified because all BPA cases involve the review of technical or statutory provisions to some degree, and the Court has not seen fit to assign a single panel to review all BPA cases.¹⁹ Similarly, Avista and Puget posit that “[v]irtually every review of issues arising out of BPA actions is technically complex. That, however, does not justify assigning BPA cases to the same panel over and over.”²⁰

BPA, Avista, and Puget mischaracterize the Joint Motion. The Joint Motion does not seek to assign this case to the original panel because the case involves a technically complex BPA action, or review of a BPA action under the Northwest Power Act. It seeks to assign the case to the original panel because the actions under review represent the agency’s response to the Court’s prior opinions and remand orders—the very matters addressed

¹⁸ See *infra* n. 14.

¹⁹ BPA Response at 13.

²⁰ Avista and Puget Response at 7.

by the requested panel. The Joint Motion does not rest on a theory that every technically complex BPA case should be assigned to a designated “BPA panel.” It rests on the general proposition, embodied in this Court’s procedures, that it is appropriate for a panel that originally hears a matter to hear any further appeal of that matter. This case involves the further appeal of BPA’s treatment of its obligations under, and costs of the Residential Exchange Program during Fiscal Years 2002-2008.

IV. BPA Will File a Proper Administrative Record and all Parties Who Wish to Participate May Do So.

PacifiCorp, PGE and IPC assert that the Joint Motion should not be granted because

not all parties to the prior cases will be participating in the current matters. An extensive administrative record not previously presented to this Court has been developed by BPA, and will form the focal point of the arguments of petitioners and BPA alike. That record embraces a number of issues that transcend simple questions of implementing the Court’s mandate from prior cases.²¹

All parties to the administrative proceeding in which BPA’s decisions for which PPC, NRU and PNGC seek review were served by these petitioners with the Petition for Review and accompanying filings, including the Joint Motion. The Court’s rules permit all interested parties to intervene.

²¹ PacifiCorp-PGE-IPC Response at 4.

If some do not, that is not a reason to treat the matter involved in this proceeding as different from the matters addressed by the Court's prior review. BPA will be required to file a proper administrative record for this proceeding. Whether issues that PacifiCorp, PGE and IPC seek to raise as intervenors in this proceeding may in their view "transcend" the Court's is irrelevant to whether the matter on review in this case is the same matter previously reviewed by the Court.

V. It Would be Timely to Rule on the Joint Motion Before Briefing.

In its response, BPA argues that the Court should defer ruling on the Joint Motion until "after briefing on the merits."²² BPA seems to assume that there will be no role for the panel of judges reviewing the case until after the case is finally briefed. PPC does not believe that this is necessarily so. The actions of which PPC seeks review relate specifically to BPA's response to prior opinions of a specific panel of judges of this Court. In some instances, this Court has referred even procedural motions to the panel of judges determining the merits of a case,²³ and doing so may be especially appropriate in this proceeding because the panel would be familiar with the history of the Court's review of the matters involved in the case. For

²² BPA Motion at 8.

²³ *See, e.g.* June 21, 2004 Order in Docket No. 01-70003 (*PGE* case) (assigning motion to supplement administrative record to merits panel).

example, the original panel may be in the best position to rule on any potential motions regarding the appropriate administrative record in this proceeding because it involves BPA's actions in response to the Court's order to make specific determinations. Moreover, a prompt ruling on the Joint Motion will facilitate scheduling of this case to accommodate the schedules of the panel.

If the Court determines that it need not decide whether to assign this case to the original panel until a later stage of the proceeding, then PPC submits that the Joint Motion should be granted at that later time, for all of the reasons stated in the Joint Motion and this reply. Deferring a decision on the motion would be more appropriate than denying the motion, either due to its being filed earlier than necessary or due to BPA's position that it should prevail on a motion to dismiss that it intends to file in the future.

CONCLUSION

For all of the reasons described above, and the reasons stated in the Joint Motion, the Court should grant the *Joint Motion to Refer Case to Original Panel*, filed by PPC, NRU, and PNGC Power in this proceeding.

Respectfully submitted this 3rd day of December, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2008, I served true copies of the attached Reply to Responses to the Joint Motion on each of the following parties, via U.S. Mail, first class postage pre-paid, to each individual's last known address, as shown below.

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