

**BEFORE THE  
UNITED STATES DEPARTMENT OF ENERGY  
BONNEVILLE POWER ADMINISTRATION**

IN THE MATTER OF	)	Docket No. BP-12
2012-2013 WHOLESale POWER AND TRANSMISSION RATE ADJUSTMENT PROCEEDING	)	JP09 REPLY TO ALCOA RESPONSE TO JP09 MOTION TO STRIKE PORTIONS OF ALCOA'S DIRECT TESTIMONY AND LEGAL MEMORANDUM

On February 9, 2011, the JP09 group of parties, Pacific Northwest Generating Cooperative and its Members (PN), Public Power Council (PP), Northwest Requirements Utilities, and Western Montana Electric Generating and Transmission Cooperative (WM) filed a motion to strike certain portions of (1) the Direct Testimony of Jack A. Speer (BP-12-E-AL-01) (“Testimony”) and (2) the Legal Memorandum in Support of the Direct Testimony of Jack A. Speer (BP-12-B-AL-01) (“Memorandum”), filed by Alcoa Inc. (“Alcoa”) in this proceeding.

The JP09 Motion argued that the Hearing Officer should strike portions of the Testimony and Memorandum because they violated the Administrator’s scope limitation set forth in the Federal Register Notice and purported to assert claims that have been waived by Alcoa and, in any event, are barred by the statute of limitations.

On February 16, 2011, Alcoa filed a response to the Motion, arguing, *inter alia*, that the Hearing Officer should not strike portions of its Testimony because Alcoa has not, as JP09 has argued, waived certain claims because Alcoa was an intervenor, not a petitioner, in *Pacific Northwest Generating Cooperative, et al., v. Bonneville Power Administration*, 590 F3d 1065 (9th Cir. 2010) (PNGC II)..

The JP09 parties respectfully request leave of the Hearing Officer to submit this limited reply, because Alcoa's response fails to disclose controlling authority rejecting this position.

A Ninth Circuit decision issued in a Northwest Power Act case, applying Fed. R. App. P. 15(a)(1) controls the issue. Federal Rule of Appellate Procedure 15(a)(1) states that “[r]eview of an agency order is commenced by filing, within the time prescribed by law, a petition for review with the clerk of a court of appeals authorized to review the agency order.”

In *Washington Util. and Transp. Comm'n v. FERC*, 26 F.3d 935 (9th Cir. 1994) (“*WUTC*”), the Ninth Circuit reviewed certain determinations made by BPA regarding a utility's “average system costs,” which are determined as part of the “residential exchange program” set out in the Northwest Power Act, 16 U.S.C. § 839. In the *WUTC* case, certain intervenors, who had not filed a petition for review, sought to “attack other aspects of the BPA order” not raised by petitioners. *Id.* at 938. Petitioners in *WUTC* raised this issue by means of a motion to strike portions of the intervenors' brief unrelated to the issues the petitioners raised in their appeal, and the Ninth Circuit granted the motion. *Id.* at 941. The Ninth Circuit explained its reasoning as follows:

The petitioners and FERC moved to strike the portions of the intervenors' brief unrelated to the issues the petitioners raised in their appeal. We granted the motion and pause here to explain why.

On the surface, our decision to grant the motion to strike appears to be the obvious choice. *Federal Rule of Appellate Procedure 15(a)* states that review of an agency order shall be obtained by filing a petition within the time authorized by law. The intervenors neither filed a petition for review within the time authorized by law nor preserved the issue for appeal by asking FERC to reconsider its order. Orderly procedure would seem to dictate that we refuse to entertain the intervenors' issues.

*Id.* at 941.

The Ninth Circuit also expressly rejected BPA's suggestion that the Court should adopt a rule that once a party files a petition for review, all parties have the right to challenge any aspect of

the agency action so challenged. *Id.*

Other circuits that have addressed the question of whether intervenors are allowed to raise new arguments not raised by petitioners have uniformly espoused a general rule against doing so. *See, e.g., National Association of Regulatory Util. Commissioners v. ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994) (*NARUC v. ICC*) (“Intervenors may only argue issues that have been raised by the principal parties.”); *Id.* at 730 (“Even a cursory reading of our case law makes clear that a party who seeks to challenge an aspect of agency action not questioned by any other petitioner must file a separate petition for review.”); *Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465, 477 (7th Cir. 1984) (striking brief of intervenor and describing that “[i]f it wanted to challenge the order it had to file a petition for review” . . . and that this “is the orderly, as well as the prescribed, procedure”).

Because of this controlling precedent, Alcoa’s argument that the Hearing Officer must not strike its testimony must fail, and the Hearing Officer should grant JP09’s Motion to strike. Alcoa, because it was an intervenor, not a petitioner, in *PNGC II*, waived its rights to make the claims in the rate case at issue in the Testimony.

It is important to note that the JP09 parties do not ask the Hearing Officer for a ruling on the merits of the claims Alcoa thinks it has. Instead, the JP09 parties ask the Hearing Officer to strike specified portions of the Testimony and Memorandum on the grounds that they do not belong in this rates proceeding. The Administrator’s scope limitation plainly excludes them, and they are inappropriate for this proceeding because of facially apparent invalidity. Alcoa can attempt to assert them in the BPA process (“DSI Lookback”) that was ordered on remand by the *PNGC I* and *PNGC II* courts, but not here. Alcoa’s waiver and statute of limitations problems can be litigated on review of BPA’s issuance of a Record of Decision in the DSI Lookback

process.

## CONCLUSION

For the foregoing reasons, the Hearing Officer should strike the specified portions of Alcoa's Testimony and Memorandum.

DATED this 18<sup>th</sup> day of February, 2011.

Respectfully Submitted,

*/s/ Betsy Bridge*

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Betsy Bridge  
Attorney for Northwest Requirements Utilities

*/s/ Zabyrn Towner*

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Zabyrn Towner  
Attorney for Pacific Northwest Generating Cooperative and  
Members

*/s/ Richard Lorenz*

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Richard Lorenz  
Attorney for Public Power Council

*/s/ William K. Drummond*

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William K. Drummond, Manager  
Western Montana Electric Generating and Transmission  
Cooperative

