

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Clatskanie People's Utility District,

Petitioner,

v.

Bonneville Power Administration,

Respondent.

Case No. \_\_\_\_\_

MOTION OF PETITIONER  
CLATSKANIE PEOPLE'S  
UTILITY DISTRICT TO  
EXPEDITE APPEAL

**MOTION**

Petitioner Clatskanie People's Utility District ("Petitioner") filed its Petition for Review in this matter on March 5, 2008. Along with its Petition for Review, Petitioner hereby moves the Court for an order expediting review of a final action of Respondent Bonneville Power Administration ("Respondent"). Petitioner proposes the following schedule:

- Opening Brief due March 17.
- Responding Brief due March 31.
- Oral Argument/Submission April 14.

**GROUND FOR MOTION**

**A. BACKGROUND**

Petitioner is a People's Utility District organized under the laws of the State of Oregon. Petitioner is a power customer of Respondent. Under the Bonneville Project Act and the Pacific Northwest Power Planning and

Conservation Act, 16 U.S.C. §§ 839 to 839h (“Northwest Power Act”), Respondent is required to treat Petitioner as a preference customer.

Petitioner seeks an expedited appeal of a final action by Respondent. The final action was announced in an official document issued by Respondent on February 21, 2008 (hereinafter referred to as the “BPA Action Document”). The BPA Action Document details Respondent’s commitment to immediately resume making Residential Exchange Payments of approximately \$131 million to certain Investor-Owned Utilities (“IOUs”) prior to Respondent’s completion of the administrative rate case required by Section 7(b)(2) of the Northwest Power Act. According to the BPA Action Document, the source of the funds for these Residential Exchange Payments would be revenues collected from Respondent’s preference customers.

## **B. PRECEDING AUTHORITY**

The final action described in the BPA Action Document is contrary to this court’s companion decisions in *Portland General Electric Co. v. Bonneville Power Administration*, 501 F.3d 1009 (9th Cir. 2007) (“*PGE v. BPA*”), and *Golden Northwest Aluminum Co v. Bonneville Power Administration*, 501 F.3d 1037 (9th Cir. 2007) (“*Golden Northwest*”). In *PGE v. BPA*, the court found certain settlement agreements to be unlawful because Respondent is not authorized to make any Residential Exchange Payments to the IOUs without first determining that the payments are consistent with the provisions of Section

7(b)(2) of the Northwest Power Act, 16 U.S.C. § 839e(b)(2). *See PGE v. BPA*, 501 F.3d at 1037. In *Golden Northwest*, the court found that it was unlawful for Respondent to include in rates charged to preference customers any costs associated with the settlement agreements that were found to be unlawful in *PGE v. BPA*. *See Golden Northwest*, 501 F.3d at 1048. Petitioner is concerned that the so-called “interim” Residential Exchange Payments described in the BPA Action Document are simply a continuation of practices found by this court to be unlawful in both *PGE v. BPA* and *Golden Northwest*.

### **C. GOOD CAUSE JUSTIFIES EXPEDITED REVIEW**

Petitioner has “good cause” for requesting expedited consideration, as required by Circuit Rule 27-12. In light of the “importance of the issues raised,” the court should review this matter *before* Respondent takes any action that is contrary to this court’s rulings in *PGE v. BPA* or *Golden Northwest*. *See generally Associated Builders and Contractors of Massachusetts/Rhode Island, Inc. v. Massachusetts Water Res. Auth.*, 1990 WL 163312 (1st Cir. 1991) (granting petitioner’s motion for expedited consideration of review of a governmental agency’s proposed public bidding requirements and expenditure of funds “[b]ecause of the importance of the issues raised”).

#### **1. Respondent Will Resume Payments to IOUs Without First Following Statutory Mandates.**

Respondent states in the BPA Action Document that it intends to resume Residential Exchange Payments to the IOUs “as soon as practicable.”

Petitioner believes that the payment of any such Residential Exchange Payments prior to Respondent completing the Section 7(b)(2) analysis required by the Northwest Power Act may be contrary to *PGE v. BPA*. Respondent has attempted to facilitate the continuation of its Residential Exchange Payments by reducing the amount of the payment and by changing the name of the payments from “settlement,” which this court found to be unlawful, to “interim,” which this court is yet to address. Before Respondent makes any so-called “interim” Residential Exchange Payments, the court should address the threshold question of Respondent’s legal authority to resume Residential Exchange Payments at any level, and under any name, prior to the completion of the Section 7(b)(2) analysis.

**2. Respondent Will Shift the Costs of its Interim Residential Exchange Payments to Preference Customers, Contrary to Golden Northwest.**

According to the BPA Action Document, Respondent intends to fund the “interim” Residential Exchange Payments using revenues that Petitioner collected from its preference customers. As mentioned above, this court decided in *Golden Northwest* that it was improper for Respondent to collect revenues from preference customers to fund the settlement payments that were found by this court to be unlawful in the *PGE v. BPA* decision. Respondent admits that, since that time, it has continued to collect from its preference customers approximately \$280 million in revenues that would otherwise be

used to fund such settlement payments. Rather than escrowing those over-collections pending completion of a revised rate determination, Respondent now intends to use \$131 million of the \$280 million to resume making Residential Exchange Payments. Petitioner believes that Respondent's intended use of funds collected from preference customers may be contrary to this court's decision and remand instructions in *Golden Northwest*. Petitioner seeks the court's determination on this important issue prior to Respondent paying out any funds collected from preference customers.

**3. Respondent Has Limited Ability to Recover Any Interim Payments to IOUs.**

Petitioner is concerned that Respondent has very limited ability to recoup any "interim" Residential Exchange Payments that may later be found to be unlawful. Respondent has attempted to address this issue by reserving a contractual right to "true-up" any overpayments or unlawful "interim" payments. Respondent's willingness and ability to enforce this contractual remedy, however, is far from certain. The problem is that the Northwest Power Act and the state retail regulatory bodies require the IOUs to pass any Residential Exchange Payments through to the IOUs' residential and small-farm customers in the form of retail rate credits. Respondent has no legal authority to force the IOUs' ratepayers to forgo or to return these retail rate credits. Nor does Respondent have any legal authority to compel the IOUs to recapture such rate credits through future rates. Thus, there is a substantial risk

that Respondent will essentially put \$131 million into the hands of the IOUs' retail ratepayers with no assurance of getting it back.

**4. Respondent's Overall Scheme for Making Payments Attempts to Evade Public Involvement and Court Review.**

Respondent intends to make interim payments to the IOUs and, later, to "true-up" the amounts paid in its supplemental rate proceeding. The overall process consists of Respondent (i) deciding now to resume Residential Exchange Payments to the IOUs from funds collected from Respondent's preference customers pursuant to rates found contrary to law by this court; (ii) deciding the amounts to be paid the IOUs based on factors that have no relation to the statutory directives in the Northwest Power Act; (iii) deciding to eventually and retroactively make those payments consistent with the statutory requirements pursuant to a novel "true-up" process that has no known basis in the Northwest Power Act; and (iv) deciding that if the interim payments exceed the amount each IOU is due under the Residential Exchange Program, Respondent will attempt to collect such over payments through some unspecified scheme. Respondent has decided to take all of these actions absent any public participation or without following any of the procedures required by the Administrative Procedures Act or the Northwest Power Act.

Petitioner believes this court in *PGE v. BPA* directed Respondent to follow and complete the statutory procedures set forth in the Northwest Power Act before resuming any Residential Exchange payments to the IOUs. 501 F.3d

at 1037. The court further noted that Respondent does not have any authority to substitute its objectives for the procedures required by Congress. *Id.* Consistent with that decision is Respondent's obligation to follow the requirements of the Administrative Procedures Act to allow public participation, including legal challenge, of its decisions. Respondent's proposed course of action would, if allowed to stand, once again substitute Respondent's goals over the directives of Congress and allow Respondent to evade public and judicial scrutiny of Respondent's important and final decisions.

**5. Expedited Review Will Reduce the Amount of Future Court Review.**

Finally, expedited review of these questions would best serve the interests of judicial economy. If Respondent makes "interim" Residential Exchange Payments as planned and the payments are subsequently found by this court to be unlawful, that finding would undermine the finality of Respondent's pending rate case. For example, such a finding could result in further remands to Respondent and further administrative actions to remedy the defects cause by the "interim" payments. The importance of the issues raised by Petitioner is to ensure that Respondent's rate case is conducted in accordance with the court's decisions and that the rates and Residential Exchange Payments established by Respondent through that rate case will be lawful and final.

## CONCLUSION

Good cause exists for this court to provide expedited review of this Petition for Review. Respondent plans to resume Residential Exchange Payments to the IOUs without first fulfilling the statutory requirements in the Northwest Power Act and contrary to this court's opinions in *PGE v. BPA* and *Golden Northwest*. Respondent cannot assure that any over payments to the IOUs would be recovered in the future. Furthermore, Respondent has carefully structured its proposed actions in a deliberate attempt to evade public and judicial review of its Residential Exchange Payments. Expedited review on these issues also will likely reduce the amount of court review later.

## TRANSCRIPT STATUS

The portion of Circuit Rule 27-12 concerning the status of the transcript does not apply to this appeal of an administrative decision, where the proceedings were not transcribed.

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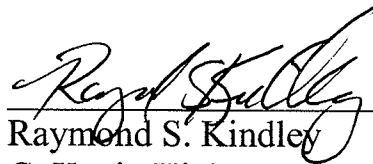
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**POSITION OF OPPOSING COUNSEL**

Counsel for Respondent does oppose this Motion.

March 5, 2008.



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**CERTIFICATE OF SERVICE**

Except for Respondent, the Petitioners are the only Parties admitted to participate in proceedings concerning this case. Pursuant to Federal Rule of Appellate Procedure 15(c)(1) and Ninth Circuit Rule 15-3.2 no service of the **Petition for Review** and/or the **Motion to Expedite the Appeal** is required on parties other than Respondent.

Dated: March 4, 2008.

  
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