BPA WATCH

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# A federal court finds that BPA acted "contrary to law"

**For the first time in its history, the Bonneville Power Administration ("BPA") has lost a string of federal court cases involving power rates and contracts. And every residence in the Pacific Northwest is indirectly affected by what the court said.**

BPA, a federal power marketing agency with headquarters in Portland, Oregon, supplies 40% of all the electricity used in the region.[1]

In the past, BPA operated with a wide berth to run its business affairs.[2]

BPA Administrator Stephen Wright and his predecessors adopted a "let's make a deal" approach to regional power issues. BPA insisted it had discretion to implement federal law, without paying attention to specific formulas adopted by Congress.

The federal court opinions therefore constitute a strong rebuff. In May 2007, and again in October 2007, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit concluded that BPA violated federal law when it decided to pay extra money to six power companies for their residential and small-farm consumers.[3] The companies serve 60% of the population in the region.

In its briefs, BPA asked the court to grant it the deference to which it was long accustomed. This time, however, the court did not

## In this Issue:



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buy BPA's argument. "BPA cannot acquire an NBA franchise just because it can be accomplished by contract; BPA has broad authority to settle claims, but it cannot buy timeshares in the Bahamas by calling them a 'settlement,'" the court said.[4]

## Public power versus private power

At the heart of the dispute is a distinction between two types of electric utilities: those owned by the public or consumers ("public power"); and those owned by the private sector ("power companies" or "investor-owned utilities").[5]

Since the late 1930s, these utilities have competed against each in the Pacific Northwest for customers and benefits from the federal power system.[6] The battle of "public power" versus "private power" is still ongoing. The court opinions are the latest chapter in this struggle.

BPA was originally established in 1937 with a populist mission: to favor public power utilities and limit the influence of private power companies. But the modern BPA is a different creature, with a more complex mission.

Under the Northwest Power Act of 1980, BPA can make payments to the region's power companies for their residential and small-farm customers ***if*** these payments are consistent with a formula spelled out in the law.

In 2000, BPA responded to political pressure from six power companies for more benefits. The companies objected to BPA's interpretation of the Northwest Power Act. Instead of going to Congress and asking it to amend the law, BPA acted unilaterally and attempted to do what the power companies wanted. BPA gave them more money for their residential and small-farm customers.

**BPA is a bureaucracy that responds to political pressure.**

BPA then sought to avoid judicial review of its decisions by coercing public power utilities to sign away their rights and agree not to pursue lawsuits. A handful of public power utilities, who believed there was too much money at stake, were not intimidated. The court's recently-released opinions represent the culmination of a long battle by these utilities to hold BPA accountable and make it follow the law.

*Franklin Roosevelt's 1932 speech still matters.*

## Public Power's Legal Challenges

Public power utilities argued in their legal challenges that BPA forced them to pay an extra $1.3 billion in power rates for the overly-generous payments to the power companies between 2002 and 2006. The court agreed. "BPA's actions conflict with its governing statutes" and are not consistent with law, the judges said in their May 2007 decisions.[7]

Then, in October 2007, the court ruled on the legality of the current BPA payments to the power companies. Those contracts expire September 30, 2011. At stake is another $1.1

billion. Public power lawyers had asked the court to strike down those agreements, too. The court, however, did not void the agreements in their entirety but instead "remanded" them back to BPA to consider in light of the May 2007 decision. As a result, BPA now has a little wiggle room to see if it can salvage any of the contract terms.

## The Reaction to the Court Decisions

To millions of residents who have not paid attention to regional power issues, the court decisions came as a rude surprise.

But it is a basic fact of life in the Pacific Northwest that where you live makes a big difference on your power bill. If your home is in Bellevue, Washington, or Portland, Oregon, for instance, you are supplied by a power company that is eligible for a cash payment from BPA for its residential and small farm customers. The companies then give their residential and small farm-customers a credit on their power bill.

On the other hand, if you live in Seattle, Tacoma or Aberdeen, for instance, you receive power from a publicly-owned utility (Seattle City Light, Tacoma Power or Grays Harbor Public Utility District, respectively). You help pay for BPA's excessive cash payments to the power companies. In effect, homes and businesses in those "public power" areas paid more to their publicly-owned utilities, which sent extra money to BPA, which then passed it on to the power companies, which gave a credit on the monthly power bill of their residential and small-farm customers.

This transfer of money is called the "Residential Exchange Program," and it was created by Congress in 1980 to reduce the disparity in power rates in the region.

Whether this arrangement is fair or not depends in large part on where you live. Equity, an elusive concept, depends in part on whether you are receiving benefits or paying for someone else's. If you are one of the 7.5 million people in the region served by private power companies, then you want the BPA benefits to continue. If you are one of the 5 million people served by public power utilities, you have been paying extra each month – money that accrues to other homeowners.

## BPA Suspends the Payments

Three weeks after the court opinions were announced in May, BPA suspended $28 million in monthly payments to six power companies.[8]

The effect of BPA's was felt throughout the region. In response, the power companies received permission from state regulators to raise rates for residential and small-farm customers, sometimes by an average of $10 per month, a significant increase for many low and middle-income consumers.

BPA's decision particularly hurt homes in Oregon, where 75% of the population is served by two power companies, Portland General Electric and PacifiCorp. The companies immediately took out ads denouncing BPA's decision. "Our customers have a right to a fair share of the benefits of the Northwest hydro system," said Peggy Fowler, CEO and president of Portland General Electric.

The impact in Washington is different because public power utilities dominate the landscape and serve 55% of retail customers.[9] Nonetheless, parts of the

state – such as the suburbs of Seattle – are served by power companies that are adversely affected by the court's ruling. "At the end of the day, this is a simple question of fairness," said Steve Reynolds, chairman, president and CEO of Puget Sound Energy, based in Bellevue.

## The Yardstick

To understand the court's rulings – and to put them in their proper historical context – it is necessary to go back to 1932, when Herbert Hoover was president and the nation was in the midst of the Great Depression. It was fall of that year, a presidential election year, and Democratic Party nominee Franklin Delano Roosevelt came to Portland to give a campaign speech.

**Utilities in the Pacific Northwest are supposed to compete against each other.**

Campaign speeches rarely have a profound effect on subsequent public policy – most talks recede into well-deserved obscurity shortly after they are given. Roosevelt's speech was different. It is not possible to understand the federal power system in the Pacific Northwest as it exists to this day without paying homage to Roosevelt's speech.

At the time, the federal government was building Boulder Dam on the Colorado River between Arizona and Nevada. But the Hoover Administration had rejected a recommendation from the U.S. Army Corps of Engineers to build a network of big dams on the Columbia River. Private power companies demanded that they, not the federal government, have the right to build dams on the Columbia River.

Roosevelt had different ideas. "The next great hydroelectric development to be undertaken by the federal government must be that on the Columbia River," he told his Portland audience.

Roosevelt conceded that building large dams -- by themselves -- would not make electricity available to large pockets of the nation that had none. Something more was needed. The nation needed a "yardstick" by which the public could compare whether the rates of private power companies were fair or not. The yardstick would induce competition between the public and private sector, forcing utilities to vie for the opportunity to serve customers.

*"The next great hydroelectric development to be undertaken by the federal government must be that on the Columbia River," Roosevelt told his Portland audience, 1932.*

There were two components of this yardstick in the Pacific Northwest. First, the federal government, not the private sector, would develop untamed rivers for power, flood control, irrigation and navigation. Second, the federal government would sell power from the dams ***at cost*** to local public power utilities, wherever they were formed.

If the power companies charged too much, the local population could establish their own city or county utility and buy directly from the federal government, bypassing the companies entirely. Nor was this an idle threat. In 1930, voters in Washington and Oregon had authorized citizens in each county to form their own publicly-owned electric utility.[10]

## Preference and Priority for Public Power

In the 1932 election, Roosevelt won every state south and west of Pennsylvania. Soon after, his Administration started to build Bonneville Dam, east of Portland, and Grand Coulee Dam in the eroded scablands of eastern Washington. When Bonneville Dam was nearing completion in fall 1937, Congress created BPA to sell and deliver power from the dam. By law, public agencies (cities, towns, public utility districts or peoples' utility districts) and rural electric cooperatives were given "preference and priority" to federal power, as Roosevelt had suggested five years earlier in this speech. Congress recognized that these consumer-owned utilities were nonprofit entities that sold power at cost to their retail customers.

During World War II, however, most of the power from both Bonneville and Grand Coulee Dams went to the aluminum industry and private power companies. There was not a significant number of public power utilities to buy the power. With the exception of a handful of municipal utilities, like those in Seattle and Tacoma, public ownership was still in its infancy. It was not until the post-war boom in the late 1940s and early 1950s that public power came into its own, taking more and more federal electricity.

## The Residential Exchange Program

By 1980, the political dynamics in the Pacific Northwest had changed. The difference in power rates between public power utilities and the region's power companies had widened. Some company executives feared they would lose large blocks of customers to public power utilities.

The solution was the Residential Exchange Program, under which BPA would make cash payments to power companies for their residential and small-farm customers.[11] Congress hoped the program would end the squabbling over "who gets what" from the federal power system.

The program was part of a complex technical and political deal that culminated in the Northwest Power Act of 1980. Although BPA is most commonly associated with selling and delivering federal power, Congress gave BPA new responsibilities in the legislation.

**Under the Residential Exchange Program, BPA writes checks to the power companies for their residential and small-farm customers.**

BPA would write checks to the power companies for their residential and small-farm customers.[12] The companies were required to pass on these benefits to consumers. The companies do not make money on the transaction. Nonetheless, a steady stream of high BPA cash payments has a tangible political benefit: it reduces the companies' rates and dampens demands to create new public power utilities.[13] Their residential and small-farm consumers do not get cash – they receive a credit on their bills.

But Congress was clear that BPA's payments to the power companies were subject to a "rate cap" created by section 7(b)(2) of

the Act.[14] Simply put, the section 7(b)(2) rate cap was intended to protect public power utilities from making excessively large payments to BPA for the power companies.[15]

By the mid-1990s, however, power company executives were fuming about what they perceived to be serious inequities in the Residential Exchange Program. In 1996, BPA proposed to pay the power companies about $65 million per year in the following year, roughly 40% of what they had historically received. The reason: the section 7(b)(2) rate cap had "triggered" and BPA said it could not pay the companies more if it were to base the payments on what the Northwest Power Act required.

For the first (and only time) since the Northwest Power Act of 1980, the power companies asked Congress to intervene in setting a level for the Residential Exchange Benefits. ***Congress did so, but only for one year***. Congress specified that the 1997 benefits to the power companies would total $145 million. In 1998, BPA went back to recalculating the benefits according to the formula and procedures in the Northwest Power Act. As a result, BPA paid only $79 million to the power companies that year.

To the region's power company executives, this amount was unacceptably low. In their view, BPA had too much discretion to manipulate the numbers on which the cash benefits were based. They derided the section 7(b)(2) rate cap as nothing more an arbitrary exercise in rate making – a "black box" out of which BPA pulled numbers. The power companies wanted BPA to distribute money more widely in the region, never mind the section 7(b)(2) rate cap.

## BPA's 2000 "Settlement" with the Power Companies

In 1998, the companies appeared to have found a sympathetic audience for their complaints. Judi Johansen, a former vice president of Avista Energy, an affiliate of a power company with headquarters in Spokane, Washington, was now the BPA Administrator.

BPA's proposal, adopted in the 2000 power rate case, called for it to give the region's six power companies a choice. The companies could sign up for the traditional Residential Exchange Program and collectively accept a $48 million annual cap on cash payments. That was the amount BPA had calculated in the power rate case ***after*** it imposed the section 7(b)(2) rate cap and followed the formula in the Northwest Power Act.

As an alternative, BPA said the companies could sign "settlement" contracts in which they would receive $140 million a year in cash payments from BPA for their residential and small-farm consumers, ***and*** a large block of power at less than its market value.[16] Not surprisingly, the power companies took the generous "settlement" offer worth a total of $300 million per year.

BPA maintained that it could provide these extra benefits because it was "settling" prior requests for more money from the power companies. The additional benefits, BPA said, were ***not*** subject to the section 7(b)(2) rate cap in the Northwest Power Act.

Under this approach, BPA would avoid the Residential Exchange Program formula created by Congress. BPA would devise a new program of its own making. The state regulatory commissions

in Washington, Oregon, Idaho and Montana, which set retail rates for private power companies (but not for public power utilities), encouraged BPA to go down this perilous road. The commissions wanted more money for residential and small-farm consumers served by the power companies, and they served as cheerleaders for BPA's contrived "settlement."

*BPA has multiple duties. In addition to selling power, it owns a vast network of power lines throughout the Pacific Northwest.*

## Public Power Objects But To No Avail

There were two basic problems with BPA's approach, public power critics noted at the time.

First, BPA itself had rejected the power company claims for more money in the 2000 rate case and therefore there were no outstanding "claims," as that word is commonly used, to settle in the first place. In fact, BPA had plainly acknowledged that it could only pay $48 million per year if it calculated the Residential Exchange Program benefits according to the formula in the Northwest Power Act.

Second, BPA's "settlement" authority under both the Northwest Power Act of 1980 and the Bonneville Project Act of 1937 was "subject to" other provisions in the statute. BPA's settlement authority was not a trump card that overrode any provision in the statute as BPA saw fit. It was Congress, not BPA, which could change the basic formula of the Residential Exchange Program. But Congress had declined to intervene, except for a single year (1997).

When public power utilities raised these legal objections in the 2000 rate case, BPA dismissed them, arguing that it could "settle" the exchange under whatever terms it thought was fair at the time. In BPA's view, its discretion was virtually unbounded.

By October 2000, BPA signed "settlement" contracts with the region's six power companies that implemented the decisions made earlier in the power rate case.[17] A few weeks later, BPA Administrator Judi Johansen announced she would become a vice president at PacifiCorp, one of the chief beneficiaries of the new "settlement" contracts.[18]

**BPA's settlement authority is not a trump card that overrides other parts of federal law.**

Public power utilities immediately sought to challenge BPA's actions. They filed suits in late 2000 and early 2001 in the U.S Court of Appeals for the Ninth Circuit, where petitions to challenge BPA actions must be filed under the Northwest Power Act.

But the West Coast energy crisis in 2001 soon forced BPA and all of its customers to deal with more pressing issues. As a result, public power's lawsuits were put on hold. Most of the region was soon preoccupied with power shortages and skyrocketing power prices.

## BPA's "Poison Pill" For Public Power

In spring and summer 2001, BPA was facing such large power deficits that it sought to "buy back" the power obligations to the companies that it had

signed only months earlier as part of the "settlement" contracts.

BPA agreed to pay the power companies cash if they would agree not to take power from BPA. Thus, BPA "converted" the obligation of selling power to one of paying cash, and added that sum to the $140 million it was sending the power companies. In total, BPA agreed to pay them approximately $300 million per year.

That was not all. With two power companies, BPA struck a special $200 million deal: BPA would pay them an extra $50 million per year in benefits for four years if public power utilities persisted in their lawsuits.

To avoid paying the extra $200 million, public power utilities had to dismiss their petitions in the Ninth Circuit challenging the "settlement" contracts. If that happened, the two companies – PacifiCorp in Portland and Puget Sound Energy in Bellevue, Washington – agreed to accept $200 million less from BPA. This unusual arrangement was called a "reduction of risk discount" because the companies would face less legal risk if public power utilities walked away from their lawsuits. The agreement allowed the power companies to say in effect to public power: "Dismiss your lawsuits and we'll accept less money from BPA."

Public power representatives dubbed the arrangement "the poison pill." If they refused to go along and dismiss their lawsuits, BPA would pay more money to the two companies, the very thing the lawsuits were designed to avoid in the first place.

Although public power utilities were outraged when they first learned of the "poison pill," they soon seemed to accept the proposition that BPA could (and would) pressure them. They returned to the negotiating table with BPA and the companies, though in a much-weakened position.

Meanwhile, BPA Administrator Stephen Wright continued to push hard for a comprehensive legal settlement that would dismiss the pending litigation, pay more money to the power companies, ***and*** bring peace to the region until 2011.

## BPA's 2003 Proposal

In late 2003, BPA Administrator Wright unveiled a proposal that eventually received the unanimous support of every member of Congress from the Pacific Northwest ***and*** the governors of Washington, Oregon, Idaho and Montana.

BPA's proposal was the result of intense meetings with public power utilities, the power companies, state regulators and others, all conducted with a veneer of cordiality but with a pre-ordained outcome: BPA wanted to give the power companies more money.

The proposal that BPA Administrator Wright released -- with support from the power companies and many public power utilities -- called for BPA to pay a minimum of $100 million and a maximum of $300 million per year to the companies to replace the traditional Residential Exchange Program.

Even the ***floor*** in this approach – the $100 million number – was more than twice what the companies would have received ($48 million ) under the traditional Residential Exchange Program, as limited by the section 7(b)(2) rate cap. The $300-million annual ***ceiling*** was six times what these companies were entitled to receive under the traditional program.

But BPA held out a carrot to public power, an enticement that seemed to attract widespread support, though in retrospect it was a small carrot indeed. BPA said it would lower power rates by about 7.4% from 2003 levels because it would not pay the $200 million "poison pill" immediately and because it would defer other costs for three years.[19]

**Six public power utilities stood up to BPA in 2003 and said 'no.'**

To get this rate reduction, however, ***all*** of the public power utilities in the region had to accept the arrangement in writing and agree to dismiss their lawsuits in the Ninth Circuit and agree not to file new ones. Unanimity was the requirement. If only one public power utility refused, the entire regional peace accord was null and void.

Why did BPA insist on this draconian position? Perhaps because it sensed (correctly) that it would take only one persistent public power utility to go to court where it might prevail. If that happened, the whole house of cards would collapse.

Despite enormous political pressure from Congress, the governors and Administrator Wright himself, six public power utilities eventually said "no" to the settlement. BPA's largest public power customer, Snohomish County Public Utility District, declined to sign. So did Clallam County Public Utility District in Port Angeles, Washington, and Canby Utility, a small municipal utility in Canby, Oregon. The "no" utilities argued that the BPA proposal involved waiving basic rights under the Northwest Power Act – something they refused to do, no matter what the "consensus" was among their colleagues or members of Congress.

## BPA's 2004 "Settlement Lite" Contracts

Despite the failure of the proposed regional settlement, BPA went ahead and signed contract amendments in 2004 with the power companies. These amendments, commonly called "Settlement Lite" agreements, tracked the failed proposal put forth by BPA in 2003.[20]

Several public power utilities, including Snohomish and Canby, then filed petitions in the Ninth Circuit to challenge the agreements.

In addition, public power utilities resumed the litigation in the Ninth Circuit challenging the initial 2000 "settlement" contracts and the 2000 rate case. Those petitions had been on hold pending the drawn-out efforts to reach a regional compromise.

Oral argument on the cases took place in Seattle in November 2005 before three Ninth Circuit judges: Stephen Reinhardt, appointed to the bench by President Carter; William Fletcher, a nominee of President Clinton; and Jay Bybee, appointed by President George W. Bush.

## The Ninth Circuit Speaks

The court issued two opinions on May 3, 2007. Despite their diverse backgrounds, on this matter the three judges spoke with one voice. Their decisions -- one challenging BPA's 2000 "settlement" contracts, the other challenging the 2000 power rate case -- were a defeat for BPA.

The court noted in one footnote that BPA had attempted to change arguments mid-stream and had concocted a new ex-

planation of why it took the actions it did for the power companies. "BPA's latest argument is 'newly-minted, it seems, for this lawsuit, and inconsistent with prior agency actions,'" the court said, quoting from a 2001 opinion. "To the extent that BPA's latest statement purports to be an interpretation of its statutory authority, we owe no deference to it. To the extent BPA's latest statement is a characterization of its historic position, it is not true."[21]

In legal parlance, that is about as strong a rebuke to government lawyers as is normally found in a court opinion. This was the court's way of saying, "you tried to pull the wool over our eyes, and it didn't work."

*"BPA's latest argument is 'newly-minted, it seems, for this lawsuit, and inconsistent with prior agency actions,'" the court said.*

BPA, which initially said it would ask the court to reconsider its rulings, decided in July not to do so. But several private power companies and the state regulatory commissions in Washington and Oregon filed requests asking the court to reexamine the May 2007 decisions. On October 5, 2007, the court rejected their requests.

Then, on October 11, 2007, the court issued its opinion on the 2004 "Settlement Lite" contracts.[22] The court remanded the agreements back to BPA to consider in light of the May 2007 rulings.

"From our vantage point, BPA has at least two options," the judges said. BPA may conclude that "our decisions undermined the basis" for the 2004 contracts and treat them as null and void. Or, BPA might conclude that some of the contract terms continue to be valid, subject to the confines of the prior court decisions. "From the record before us, we cannot determine BPA's likely course of action. We, therefore, remand the 2004 Amendments [the "Settlement Lite" contracts]…to BPA to permit it to determine, in the first instance, their continued validity in light of our recent [May 2007] opinions. We do so without offering any opinion as to the validity of either course of action and without prejudice to other options available to BPA."[23]

## Public Power's Choice

Most public power representatives have yet to decide whether to seek refunds from BPA for the extra amounts they paid to the agency over the years. The bottom line, of course, is that BPA's excessive cash payments came out of the rates BPA charged to public power utilities. For BPA's large public power utilities, their share of BPA's excess payments could mean tens of millions of dollars in refunds. The Snohomish County Public Utility District in Everett, Washington, for instance, might have a claim against BPA in the range of $200 million for excess payments paid by BPA to the power companies.[24]

## BPA's Choice

As for BPA, it has hard choices, too. BPA Administrator Wright initially seemed to suggest he would try to fashion another political compromise, as if the court opinions did not really matter. At an August 1 meeting in Portland to discuss the future of the Residential Exchange Program, Wright conspicuously avoided saying BPA would promptly implement the court decisions. Instead, Wright

suggested that representatives from public power utilities and the power companies should try to fashion their own political deal. "We want a solution that boils up from the Pacific Northwest," he told the audience. But political deals – untethered to the statute – are exactly what the court has said BPA cannot do.

Privately, some mid-level managers at BPA say it has slowly sunk in at the agency that BPA overreached when it signed the "settlement" contracts with the power companies. If their view prevails, the region will see a more cautious BPA.

On the other hand, if BPA Administrator Wright persists in his belief that he can try once again to do whatever he wants to pacify the competing political interests in the region, then BPA's decisions will likely end up in federal court, once again.

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*The author of this article, Daniel Seligman, is an attorney in Seattle who worked on the public power briefs submitted to the Ninth Circuit in these cases. The views expressed in this article are not necessarily those of his clients.*

**ENDNOTES**

1. BPA is an agency within the U.S. Department of Energy. BPA sells and delivers power from 31 federal dams, one nuclear power plant and other facilities in the Pacific Northwest. See "Bonneville Basics" tab on this web site for details.

2. See, for example, the deference shown by courts to BPA in *Ass'n of Pub. Agency Customers v. BPA,* 126 F.3d 1158 (9th Cir. 1997).

3. The court issued two companion opinions on May 3, 2007. *See, Portland General Electric et al v. BPA,* __ F.3d __, WL 1288786 (9th Cir. 2007)(BPA's contracts with the power companies are contrary to law). *Golden Northwest Aluminum et al. v. BPA,* __ F.3d __, WL 1289539 (9th Cir. 2007)(BPA's rates in which it agreed to pay more than the Northwest Power Act allowed to the power companies are contrary to law). For the courts opinions go to www.bpa.gov/corporate/BPANews/Perspective/2007/ResExchRuling/

   The court addressed other issues in the Golden Northwest case, including BPA's estimate of fish and wildlife costs in the 2000 power rate case. The court held that BPA acted contrary to law because it excluded relevant information on fish and wildlife costs and failed to adopt power rates that reflected this information. The court therefore remanded the rate case back to BPA to "set rates in accordance with this opinion." On October 11, 2007, the court issued a third opinion, *Public Utility District No. 1 of Snohomish County, et al. v. BPA,* __ F.3d __ (9th Cir. 2007).

4. *PGE v. BPA,* Slip. Op., at 4870.

5. Public power utilities sell electricity at cost, and their rates are not regulated by the state. The power companies, in contrast, are for-profit entities. The state

approves their retail rates. In Oregon, that responsibility falls to the Oregon Public Utility Commission. In Washington, the Washington Utilities and Transportation Commission has this responsibility.

6. In most areas of the country, power companies dominate the utility landscape. Publicly-owned utilities are a distinct minority. Not so in the Pacific Northwest, which is home to 127 cities, towns, public utility districts, peoples' utility districts and rural electric cooperatives, all of which sell power at cost to retail customers.

7. The court issued two companion opinions. See endnote 3. BPA's fiscal year ("FY") begins on October 1 and ends on September 30. FY 2002 began on October 1, 2001. FY 2006 ended on September 30, 2006.

8. Although BPA said its decision was precipitated by the court rulings, this explanation struck many public power utilities as odd because the court had yet to render an opinion on the validity of BPA's ***current*** agreements (the "Settlement Lite" contracts) with the power companies. It was BPA's 2002-2006 agreements that the court held were contrary to law on May 3, 2007. The court decision on the 2007-2011 contracts was not issued until October 11, 2007.

9. There are pockets in Washington served by power companies (i.e., on the Eastside of Seattle and in the Yakima area). Similarly, there are part of Oregon (i.e., in Eugene and along the coast) that are served by public power utilities.

10. Some cities, such as Seattle and Tacoma, established their own municipalities in the 1890s. But the pockets of municipal ownership were limited – rural areas did generally not have their own public power utility and were dependent on power companies.

11. Public power utilities could participate in the Residential Exchange Program, too, but it was the power companies that were the major recipients of the program. (Since 1981, public power utilities have received about 8% of all the cash benefits paid by BPA under the program.) Critics of the program pointed out that it rewarded those power companies that had made bad decisions in building new power plants. A power company that invested in a expensive nuclear or coal plant would have a higher "average system cost" of generation and was therefore eligible to receive greater exchange benefits from BPA. In the minds of the critics, the program undermined the "yardstick" standard articulated by Roosevelt in 1932. Proponents, on the other hand, said that BPA had an obligation to spread the benefits of the federal power system to all residential and small-farm customers.

12. Eligible power companies participate in the Residential Exchange Program by "selling" power to BPA at their average system cost of generation and "buying" an identical amount of power at BPA's lower rate. The exchange is a paper transaction. In practical terms, no electricity changes hands. The net effect is that BPA buys "high" and sells "low." BPA sends the power companies a check for the difference. Retail consumers of these power companies receive a credit on their power bill. The cost of the program is borne by BPA's other customers (primarily public power utilities but also by BPA's Direct Service Industries).

13. BPA is an unusual federal agency because it does not depend on annual appropriations from Congress. Instead, BPA relies on revenue from the sale of power, transmission and other services. In that sense, it is more like a publicly-owned business than a typical federal agency. BPA has three basic classes of customers: public power utilities; power companies; and Direct Service Industries (primarily aluminum smelters). If one class of customer gets a break in rates, the other classes pick up the tab. BPA's ratesetting process is often a balancing act between these three groups, each of which wants as much BPA

benefits (power or cash) as it can get.

14. The rate ceiling (or rate cap) compares the projected power costs of public power utilities with the hypothetical costs, as if the Northwest Power Act never passed (and if there was no Residential Exchange Program). If the projected rates exceed the hypothetical rates, the section 7(b)(2) rate test is said to have "triggered" and BPA shifts costs back to the power companies, thereby reducing the amount of their annual benefits.

15. BPA has described the 7(b)(2) rate test this way: "Basically, this rate test is designed to ensure that the cost of the Residential Exchange Program and other factors, when considered together, do not raise the rates of public [power] utilities beyond what they would have been absent the Northwest Power Act." See BPA "FactSheet" (June 2007) for a history of the Residential Exchange Program. www.bpa.gov/corporate/pubs/fact_sheets/07fs/

16. BPA agreed to sell 1,000 average megawatts ("aMW") to the power companies. This is a large amount of electricity, equivalent roughly to about 90% of the amount consumed in the City of Seattle in a year. 1 aMW is equal to 8,760 megawatt hours ("MWh").

17. BPA's "settlement" contracts with the power companies, like the new power rates, were scheduled to go into effect on October 1, 2001 (FY 2002).

18. PacifiCorp is one of the largest private power companies in the region and was a recipient of BPA's inflated payments under the Residential Exchange Program. The details behind Johansen's departure from BPA for PacifiCorp are not known. BPA announced on November 9, 2000, that she would join the company. BPA's press release said Johansen had recused herself from making decisions affecting PacifiCorp but neither BPA nor the U.S. Department of Energy have a written recusal on file.

19. BPA's proposal called for it to abandon $100 million of the $200-million "poison pill" and defer the remaining $100 million-payment for future years.

20. The contracts are still in place and expire September 30, 2011.

21. *PGE v. BPA,* Slip. Op., at 4864.

22. *Public Utility District No. 1 of Snohomish County, et al. v. BPA,* __ F.3d __ (9th Cir. 2007). The court also issued memorandum decisions on the same day that resolved three related cases.

23. *Id*., at 13776.

24. In prior decisions, the Ninth Circuit has held that it has the legal authority to order BPA to refund money.