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COMMENTS: Attached please find Respondent's Brief in Opposition to Petitioner's Petition for Writ of Mandamus that Respondent is filing in Public Utility Dist. No. 1 of Snohomish Co. v. Administrator, BPA, 9th Cir. No. 04-76212. You will also receive a copy of this document via Federal Express overnight delivery service as well as the referenced Affidavit of Allen Burns and attachments filed in support of the response. Please do not hesitate to contact me if you have any questions or problems receiving this transmission.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-76212

In re PUBLIC UTILITY DISTRICT NO.1 OF SNOHOMISH COUNTY,
WASHINGTON,

Petitioner,

v.

ADMINISTRATOR, BONNEVILLE POWER ADMINISTRATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S
PETITION FOR WRIT OF MANDAMUS

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Summary of Argument

No proposal exists for BPA to subdelegate its statutory responsibilities to Grid West. Nor has any subdelegation occurred. An environmental assessment and a record of decision are therefore unwarranted. Petitioner has not met its burden to show that BPA's alleged duty to produce these documents is free from doubt. Where there is no duty, Petitioner will suffer no actionable injury or prejudice in the absence of this Court's intervention. Petitioner has another adequate remedy under this Court's exclusive jurisdiction over challenges to BPA's final actions. The petition for a writ of mandamus should be denied.

History of Proceedings

On December 2, 2004, Petitioner Public Utility District No. 1 of Snohomish County, Washington, filed an Emergency Motion for Interim Injunctive Relief Pursuant to Circuit Rule 27-3 and a Petition for a Writ of Mandamus To Compel the Administrator of the Bonneville Power Administration to Prepare a Record of Decision and an Environmental Assessment. Respondent Bonneville Power Administration filed its Respondent's Brief in Opposition to Petitioner's Emergency Motion for Interim Injunctive Relief on December 6, 2004. Also, on December 6, PacifiCorp moved for leave to file an *amicus curiae* brief in support of Respondent, and on

December 7 the Western Public Agencies Group (WPAG) moved for leave to file an *amicus curiae* brief in support of Petitioner.

On December 8, 2004, this court denied Petitioner's Emergency Motion for Preliminary Injunctive Relief and ordered Respondent to file a response to the Petition for a Writ of Mandamus by close of business December 17, 2004. The court subsequently granted Respondent's request for a short extension of the deadline to file the response until 12:00 noon on December 20, 2004. The Motions Panel also granted the *amicus* requests of PacifiCorp and WPAG.

Background

Over the past eight years, BPA and other transmission owners in the Pacific Northwest have been exploring proposals to form an independent regional transmission organization. The purpose of such an organization would be to manage and operate multiple electric transmission systems as a single system in order to gain commercial and operational efficiency, improved planning and grid expansion, and increased reliability of the interconnected grid. The Federal Energy Regulatory Commission (FERC) has encouraged the establishment of regional transmission organizations through its Order 2000,¹ and several have been formed in other parts of the

¹ *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (Jan. 6, 2000), FERC Stats. & Regs. ¶31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12, 088 (Mar. 8, 2000), FERC Stats. & Regs

country. The preceding two regional efforts, the first called IndeGO and the second called RTO West, foundered for lack of regional support.

BPA has been involved in these efforts because it operates over 50 percent of the bulk electric transmission facilities in the Pacific Northwest and has a statutory responsibility for operating a reliable and efficient transmission system. 16 U.S.C. §838b. In particular, BPA is exploring the extent to which management and operation of multiple, interconnected electric transmission systems, including the Federal transmission system in the Pacific Northwest, could produce reliability and efficiency benefits, thereby enhancing its ability to more effectively implement its statutory responsibilities. BPA would only enter into a contractual relationship with a regional transmission organization and transfer to it any of the agency's responsibilities in a manner consistent with its statutory authorities and the doctrine of subdelegation.²

Over the last year, representatives of the electric power industry in the

¶131,092 (2000), *petitions for review dismissed. Pub. Util. Dist. No. 1 of Snohomish Cty, Wa v. FERC*, 272 F.3d 607. (D.C. Cir. 2001).

² In his November 12, 2004, letter to Petitioner, BPA's General Counsel stated: "We are aware of the issues and limitations surrounding subdelegation of Federal responsibilities . . . We . . . have no intention to transfer authority over the Federal transmission assets to Grid West, or any other entity, without complying with the requirements set out in the caselaw." SR 326. (For efficiency, Respondent will cite to relevant documents contained in the Supporting Record ("SR") appended to Petitioner's Request for a Writ of Mandamus.)

four Pacific Northwest states, British Columbia, Nevada, Utah and Wyoming have participated in an open, public process to develop the latest proposal for improved management and planning of the interconnected electric power transmission system within that area. These representatives³ comprise a loose organization referred to as the Regional Representatives Group (RRG), which has met generally on a monthly basis to explore the development of a proposal and to assess the progress of various work groups.⁴ The concept accepted by the RRG in December 2003 as the basis for further development envisions the establishment and development of an independent entity that would eventually contract with willing transmission providers to provide coordinated operations, planning and commercial services over their systems.⁵ Whether BPA would be willing to be one of those willing transmission providers would not be decided by BPA until a satisfactory contractual arrangement had been negotiated and offered.

³ Transmission owners, transmission-dependent utilities, generators, power marketers, end-use customers, state and provincial regulators, and environmental and energy conservation groups. See latest list of specific participants at the RRG website: http://www.rtwest.com/RRG_Main.htm

⁴ Workpapers of various RRG committees, summaries of RRG meetings and other related material have continually been made available through the web address contained in footnote 4 above.

⁵ Attachment A to Affidavit of Allen L. Burns in Support of Respondent's Motion to Deny Petition for Writ of Mandamus (Dec. 17, 2004)(hereafter, and all other such attachments will be similarly referenced, "Attachment A"), "Narrative Description of RRG Platform Group Regional Proposal."

A three-year, incremental decision process was developed in February 2004 to guide the development of this latest proposal.⁶ Four major decision points were identified, which could potentially culminate in a decision by transmission providers to accept or reject contracts negotiated and offered by the independent entity. *Failure to move forward at any decision point will terminate the entire process.* As discussed below, only at Decision Point #4 would BPA potentially delegate any authority to Grid West, and then only if consistent with subdelegation legal principles and NEPA requirements.

The first decision point (Decision Point #1) occurred on December 9, 2004, and is the primary focus of Petitioner's Motion for Interim Injunctive Relief and Petition for a Writ of Mandamus.⁷ This decision resulted in the restructuring of an existing Washington nonprofit corporation, RTO West,⁸ into "Grid West." The 9-member RTO West board of directors, including one representative of BPA, accomplished this restructuring through the

⁶Attachment B, Process Diagram.

⁷ Because the court did not enjoin BPA from participating in the Decision Point #1 vote to restructure RTO West into Grid West, the status of Petitioner's mandamus request with respect to other Grid West-related activities of Respondent is unclear. Nevertheless, Respondent assumes that Petitioner may well now seek to argue that the court should issue a writ of mandamus directing BPA to conduct an environmental assessment and issue a record of decision prior to participating in any further Grid West activities.

⁸ RTO West was a Washington nonprofit corporation established in 2000 as a funding mechanism for an effort to form a regional transmission organization pursuant to FERC's Order 2000. After several filings at FERC, the proposal foundered in early 2003 for lack of regional support.

adoption of revised articles of incorporation and bylaws,⁹ the negotiation and drafting of which has been the major task of the RRG to this point.¹⁰ The RTO West board of directors became the Grid West Interim Board which has authority to facilitate the transition to a membership corporation, seek out potential independent candidates for trustee positions, and complete the initial design for Grid West operations including a cost estimate.¹¹

The next decision point (Decision Point #2) is planned to occur in late spring or early summer 2005, and will address whether to elect and seat the five independent trustees who would guide the corporation through the remaining two developmental decision points.¹² If the independent trustees are seated, the third decision point (Decision Point #3) is scheduled to occur within twelve months of the first meeting of the newly elected trustees and entails a decision by the trustees about whether to offer transmission

⁹ See Attachment C, Grid West press release.

¹⁰ Various versions of the proposed new bylaws have been posted on the RRG website since April, 2004. See http://www.rtowest.com/RRG_GridWestBylaws.htm

¹¹ Although Grid West has now been formally established, its status as an operating regional transmission organization remains very much in the incubation phase pending the development of further technical detail concerning the services it may offer, the tariffs under which it would offer those services, successful negotiation of contracts with transmission owners, and the execution of those contracts by the transmission owners.

¹² Developmental Bylaws, Section 7.1.13(iii)-(v) and 7.2.7, SR 68, 71; see also Process Diagram at SR 292.

agreements to the transmission owners for rights to use their systems.¹³ If transmission agreements are offered, the final decision point (Decision Point #4) is scheduled to occur no later than twelve months from the date of the contract offers and entails BPA and at least two investor-owned transmission providers determining whether to accept the offers.¹⁴ Decision Point #4 is likely to occur sometime in 2007. *Only at that point would transmission providers transfer any authority to Grid West with respect to their transmission systems.* If they do, Grid West will then, and only then, move from a purely developmental corporation to an operational corporation through the adoption by the trustees of the Grid West Operational Bylaws.¹⁵

BPA's own involvement in this long development process has been very public. From an early stage, the agency has openly communicated with its customers and constituents regarding the principles and criteria it would use to judge the acceptability of any proposal.¹⁶ It has made itself available for meetings with customers or constituent groups to hear and consider what

¹³ Developmental Bylaws, Section 13.1, SR 094; *see also* Process Diagram at SR 292.

¹⁴ Developmental Bylaws, Section 13.2, SR 094; *see also* Process Diagram, Attachment B.

¹⁵ Developmental Bylaws, Section 7.2.5, SR 071.

¹⁶ *See e.g.*, "Bonneville Power Administration Northwest Regional Transmission Organization Principles," SR 342, and "Strategy for Moving RTO West Development Forward", Attachment D.

they regard as important elements of a proposal.¹⁷ On July 14, 2004, prior to the RRG's completion of the proposed Grid West bylaws, BPA formally asked for the written views of all of its customers and constituent groups on whether the proposed bylaws were workable, provided for adequate cost control, and assured sufficient accountability of the independent board to regional interests.¹⁸ BPA received 65 written comments from state public utility commissions, public power customers, members of the Northwest congressional delegation, public interest groups and other interested stakeholders.¹⁹ BPA also sponsored a review of the proposed Grid West governance structure by the National Academy of Public Administration (NAPA), an independent, nonprofit organization chartered by Congress to identify emerging issues of governance and to help federal, state, and local governments improve their performance.²⁰ Based on public comments and NAPA's review, BPA presented to the RRG a list of 35 recommended revisions to the draft bylaws to strengthen regional accountability, cost

¹⁷ Attachment E, Listing of Allen Burns's meetings with customers and constituents. *See also* BPA's informational documents, Power Point presentations and speeches about the process and issues posted at <http://www.bpa.gov/corporate/business/restructuring/>

¹⁸ Attachment F.

¹⁹ All comments are posted at the BPA website referenced in footnote 17.

²⁰ www.napawash.org; NAPA's report, "Grid West: An Assessment of the Proposed Governance Structure" is posted at the BPA website referenced in footnote 17.

control and workability.²¹ The vast majority of these recommendations were incorporated in a manner acceptable to BPA.

BPA is currently finalizing a "close-out letter" that responds to the themes from customer and constituent comments and explains the reasons for BPA's decision to support adoption of the Grid West Developmental Bylaws at Decision Point #1. This document, however, will not address the agency's authority to ultimately transfer authority to a regional transmission organization because that decision is far down the road – if it occurs at all. The document should be finished and published the week of December 20, 2004, and Respondent intends to file it with the court at that time.

Argument

1. Petitioner's standing to bring its NEPA claim is in doubt.

Petitioner alleges no environmental impacts related to its demand for an environmental assessment to be completed before BPA takes further action. The only injuries claimed by Petitioner to result from BPA's actions are "to pay dues and participate according to the membership rules contained in the Developmental Bylaws,"²² alleged changes in its communications with BPA,²³ and uncertainties from alleged changes in BPA's transmission planning

²¹ Attachment G.

²² Petitioner's Reply at 13; *see also* Petition for Mandamus at 8.

²³ Petitioner's Reply at 13.

process.²⁴ Although Petitioner's claim may be for "procedural injury" which lowers the standards of proof for standing, *Churchill County v. Babbitt*, 150 F.3d 1072, 1077 (9th Cir.), *amended on other grounds*, 158 F.3d 491 (9th Cir. 1998)(citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992), it is doubtful that these injuries constitute "an actual or imminent invasion of a concrete and legally-protected interest" required for constitutional standing by the Supreme Court. *Lujan, supra*. And they certainly do not meet the prudential standing requirement, also applicable to procedural standing, of "a 'concrete interest' . . . within the zone of interests NEPA was designed to protect." *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995), *cert. denied*, 516 U.S. 1042, 116 S. Ct. 698, 133 L.Ed.2d 655 (1996)(*see also, Churchill County* at 1078).

"NEPA was enacted in order to 'promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.' 42 U.S.C. §4311 (1988). The purpose of NEPA is to protect the environment, not . . . economic interests Therefore, a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA."

Nevada Land Ass'n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir.

1993)(citations omitted)(*see also Port of Astoria v. Hodel*, 595 F.2d 467, 475 (9th Cir. 1979).

²⁴ Petition for Mandamus at 8.

2. Issuance of a writ of mandamus is reserved for extraordinary situations.

Issuance of a writ of mandamus pursuant to the All Writs Act²⁵ is a “drastic remedy that will be invoked only in extraordinary situations” in light of “the strong policy against review of nonfinal agency actions.” *Public Utilities Commission of the State of California v. Federal Energy Regulatory Commission*, 814 F.2d 560, 562 (9th Cir. 1987). An extraordinary situation can be shown only by meeting a number of stringent tests. The burden is on the petitioner to show that his right to the writ is clear and indisputable. *S.G. Cowen Securities Corp. v. U.S. District Court for Northern Dist. of CA*, 189 F.3d 909, 913 (9th Cir. 1999)(citing *Calderon v. United States Dist. Ct.*, 103 F.3d 72, 74 (9th cir. 1996)).

The Ninth Circuit has established a five-part test for determining whether a situation is sufficiently extraordinary so as to warrant issuance of a writ of mandamus to a district court in *Bauman v. United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977), as follows:

- The party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires;

²⁵ 28 U.S.C. §1651(a)

- The petitioner will be damaged or prejudiced in a way not correctable on appeal (a guideline closely related to the first);
- The district court's order is clearly erroneous as a matter of law;
- The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules; and
- The district court's order raises new and important problems, or issues of law of first impression.

In cases petitioning for writs to be issued against administrative agencies, the Ninth Circuit has more often applied an even more stringent 3-part test:²⁶

- The petitioner's claim is clear and certain, *i.e.*, the court must be convinced that the petitioner's legal argument is correct;²⁷

²⁶ "The preemptory writ of mandamus has traditionally been used in federal courts to review nonfinal district court orders and is used only in exceptional circumstances. *Use of the All Writs Act in connection with agency matters has been even more rare and the scope of relief granted in these cases has been narrow.* The circumstances that will justify our interference with nonfinal agency action must be truly extraordinary for this court's supervisory province as to agencies is not as direct as our supervisory authority over trial courts." *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622, 630 (9th Cir. 1985)(internal citations omitted, emphasis added).

²⁷ See *In Re California Power Exchange Corp.*, 245 F.3d 1110, 1121, 1123 (9th Cir. 2001)(court not convinced "that CalP/X has presented a 'clear and certain' claim that FERC violated §206(a) by terminating its tariff and rate schedules.")("CalPX has failed to present a 'clear and certain' claim that the prohibition is unduly discriminatory.")

- The alleged duty is ministerial and so plainly prescribed as to be free from doubt, *i.e.*, that the government has not merely "abused [its] discretion, incorrectly found the facts, or misapplied the law;"²⁸ and
- No other adequate remedy is available.

Kildare v. Saenz, 325 F.3d 1078 (9th Cir. 2003); *Lowry v. Barnhart*, 329 F.3d 1019 (9th Cir. 2003); *In re California Power Exchange Corp.*, 245 F.3d 1110 (9th Cir. 2001); *Oregon Natural Resources Council v. Harrell*, 52 F.3d 1499 (9th Cir. 1995).

The Ninth Circuit has addressed the mandamus remedy under the All Writs Act in four instances of alleged failure to act on the part of BPA. In none of these cases did the court find the existence of an extraordinary situation and issue a writ. In *Public Utility Commissioner of Oregon v. Bonneville Power Administration*, 767 F.2d 622 (9th Cir. 1985), the court declined to exercise its jurisdiction under the All Writs Act where petitioners alleged bias on the part of the BPA Administrator in a rate proceeding. The court held that, in light of petitioners' right under the Pacific Northwest Electric Power Planning and Conservation Act²⁹ to obtain direct review by this court of the final action approving and implementing the rate methodology, "petitioners have failed to

²⁸ *Jarrett v. Resor*, 426 F.2d 213, 217 (9th Cir. 1970).

²⁹ 16 U.S.C. §839 et seq.

demonstrate they face any irreparable injury that is not correctable on review of final BPA action.” *Id.* at 630. In another case involving BPA ratemaking, this court held that a claim that BPA failed to hold a statutorily-required hearing did not present “a truly extraordinary situation that warrants mandamus relief” because “petitioners have failed to convince us that there is a possibility of harm not correctable when we review the final rate order.” *Public Utilities Commission of the State of California, supra* at 562. In *Puget Sound Energy v. United States*, 310 F.3d 613 (9th Cir. 2002), this court found that it was not necessary to issue a writ of mandamus to preserve the court’s jurisdiction because the court already had jurisdiction over the petitioner’s claim as the implementation of a final action under the Northwest Power Act. *Id.* at 623. Finally, in *Confederated Tribes of the Umatilla Indian Reservation v. Bonneville Power Administration*, 342 F.3d 924 (9th Cir. 2003), where petitioners alleged a continuing failure by BPA to create “a document, plan, mechanism, decision-making tool, or decision to provide equitable treatment” for fish and wildlife, this court held that a writ of mandamus was not justified because:

- “Petitioners have ‘adequate means, such as a direct appeal, to attain the relief he or she desires.’” *Id.* at 930 (quoting *Bauman*);

- “BPA’s decision is not ‘clearly erroneous as a matter of law.’” *Id.* at 931 (quoting *Bauman*); and
- Petitioners “have not shown that they will be irreparably injured.” *Ibid.* (quoting *Bauman*).

In each of these cases, the allegations of harm were of greater significance and more immediate than those claimed by Petitioner. Nevertheless, the court declined to issue a writ. It therefore goes without saying that the court should similarly decline to do so in the present case.

3. Petitioner utterly fails to meet the requirements for a writ of mandamus.

A. Petitioner’s assertions concerning the Administrator’s duties are not free from doubt. Petitioner asserts that, by supporting the establishment of Grid West by its affirmative vote to adopt the Developmental Bylaws at Decision Point #1, BPA has already subdelegated certain of its statutory responsibilities to a nonfederal entity. Petition for Mandamus at 9, 16, & 21. On the basis of this allegation, Petitioner argues that BPA must conduct an environmental assessment pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. §4321 et seq., and issue a record of decision on its legal authority to participate in Grid West before participating further in the development of the Grid West proposal. Petition for Mandamus at 1.

Petitioner badly distorts the Grid West development process and BPA's participation in it, however, when it asserts that "[u]pon approval of Grid West's Bylaws, BPA will delegate" to Grid West its statutory responsibility to inform the public and its customers about major regional power issues and to obtain their views and advice concerning those issues.³⁰ Petitioner also incorrectly claims that, "once the Grid West Bylaws are approved," BPA will delegate "much of its statutory authority" to Grid West and lists, as examples, BPA's responsibility to establish, maintain and enhance reliability of the Federal transmission system; provide the lowest total cost to consumers; administer a transmission tariff; plan for and build transmission upgrades; and provide for public involvement.³¹

Nothing could be further from the truth. Petitioner has not provided, and cannot provide, any evidence that BPA has made, or will soon make, a proposal or a decision to transfer any of these responsibilities to Grid West. Transfer of authority from transmission owners, including BPA, to Grid West must result from executed contracts.

³⁰ Petition for Mandamus at 9.

³¹ Petition for Mandamus at 16. However, at page 21, Petitioner steps back from these mischaracterizations by more correctly describing what is occurring as an "ongoing process" and a "development process." And in its December 7, 2004 Reply, Petitioner acknowledges that "delegation of [BPA's] operating functions . . . will not begin until 2007", Petitioner's Reply at 8, and that "Grid West will *at some point* become responsible for BPA's operating functions," Petitioner's Reply at 10 (emphasis added).

The Grid West bylaws do not operate as a contract between BPA and Grid West. They only establish the governance mechanisms for the corporation. They do require the Grid West Developmental Board to consult with the public, including BPA's customers, as part of the Grid West developmental processes,³² but they do not undertake to carry out the public involvement responsibilities of BPA or any other entity. And an agreement between BPA and Grid West regarding the latter's use of Federal transmission assets in the Grid West operational stage has not even begun to be negotiated – and, indeed, may never be negotiated. Moreover, even if such an agreement is eventually negotiated, there is no assurance it would be executed. That decision will not be presented, if at all, until sometime in 2007. Thus, there is, as yet, no proposal to assess under NEPA,³³ much less any irreversible commitment or decision to subdelegate BPA's responsibilities.

The cases cited by Petitioner simply do not support its position that an environmental assessment is required at this early point in the process or, even

³² See Article IV of the Grid West Developmental Bylaws, SR 030-032.

³³ *Andrus v. Sierra Club*, 442 U.S. 347, 350 n.2, 99 S.Ct. 2335, 2337 n.2, 60 L.Ed.2d 943 (1979) (“Of course an EIS need not be promulgated unless an agency's planning ripens into a ‘recommendation or report on proposals for legislation (or) other major Federal actions significantly affecting the quality of the human environment.’”); see also *Defenders of Wildlife v. Andrus*, 627 F.2d 1234, 1243 (D.C. Cir. 1980) (“[O]nly when an agency reaches the point in its deliberations when it is ready to propose a course of action need it be ready to produce an impact statement.”)

more certainly, that the court possesses the authority to issue a writ at this juncture to direct BPA to cease its ongoing exploratory efforts until it has prepared such a document. For example, in *Port of Astoria v. Hodel, supra*, BPA had executed a contract without having prepared and considered and Environmental Impact Statement. That is not the case here. In *Forelaws on Board v. Johnson*, 743 F. 2d 677 (9th Cir. 1984), the court held that BPA should have conducted an environmental assessment on a contract "proposal." *Id.* at 684-685. Again, that is not the case here. Notably, this court in *Association of Public Agency Customers v. Bonneville Power Administration*, 126 F.3d 1158 (9th Cir. 1997) clearly stated that "*Forelaws* does not hold that failure to conduct an EIS prior to negotiations violates NEPA." *Id.* at 1184-85. Requiring BPA to prepare a NEPA document at this nascent stage of Grid West's development, even before any contract negotiations have commenced, would obviously be contrary to well-established principles of administrative law dictating that courts not intervene prematurely in an agency's decision-making process. *See Kleppe v. Sierra Club*, 427 U.S. 390, 406 (1976).³⁴

³⁴ BPA's election to continue funding of the Grid West development effort does not require an environmental assessment either. *Macht v. Skinner*, 916 F.2d 13, 16 (D.C. Cir. 1990) ("as the district court aptly recognized, '[t]o argue that the federal funding . . . for the preliminary analysis studies constitutes major federal action in the proposed extensions would be putting the proverbial cart before the horse because until these studies are done, a decision cannot be reached.") Similarly, the imposition of legal obligations

Regarding its demand for a record of decision, Petitioner has cited no authority for the proposition that BPA is required to issue a record of decision on its compliance with the law either before or after taking any of the alleged actions. Certainly the present situation does not mandate BPA's issuance of a written explanation of decision pursuant to either (i) the Northwest Power Act requirement to "include a full and complete justification" of final rates, 16 U.S.C. §839e(i)(5), or (ii) the requirement under the Energy Policy Act, when establishing transmission service terms and conditions in certain circumstances, to "make a determination setting forth the reasons for reaching any findings and conclusions which may differ from those of the hearing officer." 16 U.S.C. §824k(i)(2)(A)(ii)(III).

In its December 7 Reply, Petitioner asserts that adoption of the Developmental Bylaws by the RTO West board grants to Grid West transmission planning authority over Federal transmission assets: "BPA on December 9, 2004 will subdelegate its transmission planning responsibilities to Grid West. From that time forward, Grid West will be the venue for transmission planning activities."³⁵ Again, this assertion is a gross mischaracterization of the Developmental Bylaws. In support of its assertion,

upon BPA would occur, if at all, only in the future after further development of the Grid West proposal.

³⁵ Petitioner's Reply at 5. See also Petitioner's Reply at 9.

Petitioner quotes Developmental Bylaws Section 3.1.2³⁶ that authorizes Grid West to engage in transmission planning activities. Petitioner conveniently ignores the *express condition* built into the section that Grid West's participation is conditioned upon "Members *voluntarily* participating in such planning."³⁷ Petitioner points to no contractual arrangements between Grid West and BPA regarding planning of the Federal transmission system because there are none. This provision clearly conditions Grid West's participation in regional planning activities on *future, voluntary* elections by transmission owners and others to participate with Grid West. Again, the contractual arrangements for such participation have not even begun to be negotiated.

BPA is fully aware of the limitations established in case law on subdelegation by Federal agencies to nonfederal entities. As the BPA General Counsel stated in his November 12, 2004 response to Petitioner's demand letter, "We are aware of the issues and limitations surrounding subdelegation of Federal responsibilities . . . We . . . have no intention to transfer authority over

³⁶ 3.1.2 Regional Transmission Plan and Planning. In addition, the Corporation may develop a regional transmission plan and coordinate transmission planning for Members voluntarily participating in such planning, subject to the Members approving (by the vote provided for in Section 5.14.8) a proposal to undertake any planning activities and the Interim Board or Developmental Board securing voluntary funding for such planning efforts.

³⁷ Petitioner's Reply at 9 (emphasis added).

³⁸ *Ibid.*

the Federal transmission assets to Grid West, or any other entity, without complying with the requirements set out in the caselaw."³⁹ However, a determination about whether a particular transfer of authority complies with the law depends upon the facts and circumstances, including most importantly the contract provisions, of that particular case. In this case, there is as yet no proposal to contractually transfer any authority over the Federal transmission assets to Grid West, by contract or otherwise.

Finally, Petitioner challenges BPA's authority to participate in the establishment of Grid West and to financially support its development.⁴⁰ BPA possesses an express and broad grant of statutory authority to participate in and support such activities:

Notwithstanding any other law, and without fiscal year limitation, each Federal Power Marketing Administration is authorized to engage in activities and solicit, undertake and review studies and proposals relating to the formation and operation of a regional transmission organization.

16 U.S.C. §824n. Contrary to Petitioner's minimization of this authorization by characterizing it as an appropriations measure,⁴¹ this provision has been codified into the United States Code, as the above citation attests. It went

³⁹ SR 326.

⁴⁰ Petitioner's Reply at 12-13.

⁴¹ Petitioner's Reply at 13.

beyond lifting the previous bar⁴² on certain studies and proposals by BPA; it expressly authorized "activities . . . relating to the formation and operation of a regional transmission organization." The Committee Report language accompanying this authorization provides:

The Committee is aware that in response to FERC's Order 2000 respecting Regional Transmission Organizations (RTO), efforts are underway in the Pacific Northwest to explore and pursue formation of an RTO. The Bonneville Power Administration is actively participating in those efforts. The Committee understands that if BPA ultimately participates in an RTO, the impacts on BPA Transmission Business Line employees could be significant. The Committee encourages the BPA Administrator to use available administrative authorities with regard to accrued leave, seniority, health and retirement benefits, and other related matters to ensure that BPA Transmission Business Line employees have an equitable opportunity to compete for jobs in the RTO. If it becomes apparent that existing administrative tools are inadequate to address these matters, legislative action may be necessary.

Senate Report 106-395, Energy and Water Development Appropriations Act Bill, 2001, at page 140. BPA's recent annual budget submissions to Congress have included funding of its activities related to formation of a regional transmission organization. Its FY 2004 budget submission contained the following:

Bonneville is continuing to participate in the development of a regional transmission organization called RTO West in response to the Federal Energy Regulatory Commission's Order 2000 and consistent with the Administration's support for competitive energy markets. Bonneville is working closely

⁴² Pub. L. No. 99-349, Title II, §208, 100 Stat. 710, 749 (1986).

with the region's investor-owned utilities as well as other stakeholders through a public collaborative process to design RTO West to meet the Commission's requirements and the specific needs of the Pacific Northwest . . . BPA will maintain its current level of resources and budget for FY 2003.

Fiscal Year 2004 DOE Congressional Budget Submission, Vol. 6, page 166

(Document DOE/ME-0021, Feb. 2003).⁴³ The agency's FY 2005 budget submission contains language referring specifically to the "recent proposal" for a "staged, voluntary implementation process" (now called Grid West):

Bonneville is continuing to participate in the development of a regional transmission organization called RTO West in response to FERC's Order 2000 and consistent with the Administration's support for competitive wholesale energy markets. Bonneville is working closely with the region's investor-owned utilities, Bonneville's public agency customers, as well as other stakeholders through a public collaborative process called the Regional Representatives Group (RRG) to design a regional proposal that addresses the specific needs and opportunities of the Pacific Northwest. A recent proposal that has broad regional support includes the creation of a regional transmission organization that is independent of market interests. At its core is a flexible business model providing for a staged, voluntary implementation process and a governance structure that provides for a set of check [sic] and balances to ensure the region has a hand in shaping how the entity serves the region's needs. BPA plans to maintain its current level of resources and budget for these activities in FY 2005.

⁴³ Attachment H

FY 2005 DOE Congressional Budget Submission, Volume 6, page 168 (DOE/ME-0037 document, February 2004).⁴⁴ Congress has not limited or disapproved BPA's proposed expenditures for these activities.⁴⁵ Certainly, Petitioner's claim that BPA lacks authority to engage in Grid West development activities, including providing financial support, is not free from doubt.

B. Petitioner has other available and adequate remedies. Final actions of the BPA Administrator are subject to direct review by this Court pursuant to section 9(e)(5) of the Northwest Power Act, 16 U.S.C. §839f(e)(5). In all of the other cases in which issuance of a writ of mandamus against nonfinal BPA action has been requested or in which this Court itself has raised and addressed the mandamus remedy, this Court has found that its exclusive jurisdiction over final actions of the BPA Administrator provides an adequate remedy. *See supra* at pp. 12-14. As in these other cases, Petitioner may seek this Court's review under section 9(e)(5) of the Northwest Power Act if the incipient Grid West developmental activities eventuate into a BPA final action. Specifically, if the Administrator ultimately elects to contractually authorize Grid West to conduct planning for the Federal transmission assets or, sometime in 2007, to execute a

⁴⁴ Attachment I

⁴⁵ As a self-financing federal agency, BPA receives no appropriations from Congress. However, the agency does submit its proposed annual budget to Congress for review, and Congress may impose "specific directives or limitations" on the proposed budget in the applicable appropriations acts. 16 U.S.C. §838i(b).

contract that grants operational and other authority over Federal transmission assets to Grid West, the execution of these contracts would be final actions subject to direct and exclusive review by this court. Upon a challenge, this court could determine whether BPA had fulfilled its procedural obligations under the National Environmental Policy Act (NEPA) and adhered to the restrictions on subdelegation of Federal responsibilities to nonfederal entities. If the court found that BPA had violated the law, it could upon an appropriate showing prevent the agency from moving forward to implement its decision.

BPA has publicly committed to conduct an environmental assessment of any proposed contract to transfer authority to Grid West and to issue a record of decision explaining its decision regarding any such proposal.⁴⁶ Until that time, no proposal exists on which to conduct an environmental assessment and no final action has occurred to be assessed in a record of decision for compliance with BPA's authorities. And Petitioner has failed to cite any statutory requirement for BPA to issue a record of decision on these matters prior to or after taking a final action.

⁴⁶ SR 331; Developmental Bylaws Section 12.2.2(iii), SR 093.

C. Petitioner has not shown injury not correctable on direct review of final action.

In the absence of any indication that BPA either has subdelegated, or is about to subdelegate, its transmission responsibilities to Grid West, Petitioner can show no injury that meets the strict requirements for a writ of mandamus. Petitioner's claims of injury thus arise from continued participation in the continuing development of the Grid West proposal.⁴⁷ In *Calderon v. U.S. Dist. Court for Cent. Dist.*, 163 F.3d 530, 534-35 (9th Cir. 1998), this Court held that the costs and effort of participation in an ongoing process were insufficient to meet the stringent requirements for a writ of mandamus:

When we say that a litigant . . . will be prejudiced in a way not correctable on appeal, we do not mean that the litigant has been forced by an erroneous ruling of the district court to suffer unnecessary cost and delay . . . [which] can be quite burdensome to the individual litigant. If such harm could support mandamus, however, then mandamus would no longer be an extraordinary remedy and we will have effectively abandoned our tradition against piecemeal appeals.

. . . [The non-correctable prejudice factor] could be satisfied if the litigant's claim will obviously be moot by the time the appeal is possible or when the person affected by the district court's order

⁴⁷ Petition for Writ of Mandamus at 8. Petitioner's claim that it would "potentially spend millions of dollars within the Grid West structure," *ibid*, is, at the very least, questionable and unsupported. *See also* Marshall Affidavit at paragraph 11. Annual membership dues is \$1000. Developmental Bylaws, Section 5.3.1(ii), SR 036. The costs of even fulltime participation by one or more employees would not approach the amount claimed by Petitioner.

will not have the ability to appeal. But, in general, the mere annoyance and cost of having to litigate will not support mandamus. (Internal citations omitted.)

As discussed *supra*, this type of injury is also not within the "zone of interest" of NEPA. Additionally, no requirement exists for Petitioner to participate in the development of the Grid West proposal. Petitioner will have a right to apply for membership in the developmental corporation⁴⁸ as well as a right to be consulted during the development process even if it elects not to become a member.⁴⁹ But the extent of its participation in the further development of the proposal will be determined solely by Petitioner. "In short, '[P]etitioners have failed to demonstrate they face any irreparable injury that is not correctable on review of final BPA action.'" *Confederated Tribes, supra* at 931 (quoting *Public Utilities Commission of Oregon, supra*).

Undermining its complaints about the cost of participating in the Grid West process, Petitioner supports and *is* willing to undertake the costs of participating in an alternative effort to obtain benefits similar to the Grid West proposal without having to create a new regional institution. As the affidavit of Allen Burns⁵⁰ explains, Petitioner is one of a number of utilities that support development of this alternative "Transmission Issues Group" approach that

⁴⁸ Developmental Bylaws, Sections 5.4, 5.5, SR 037-041.

⁴⁹ Developmental Bylaws, Article IV, SR 030-032.

⁵⁰ Attachment J.

would, like the Grid West approach, address the need for more effective regional transmission planning, better reliability coordination between separate transmission systems and more efficient commercial use of the combined grid. At bottom, then, Petitioner's petition under review is little more than an attempt to have this court intercede in BPA's ongoing administrative process so that Petitioner can spend its time and money on an effort it favors. Such a preference is simply not the stuff on which a writ of mandamus may issue.

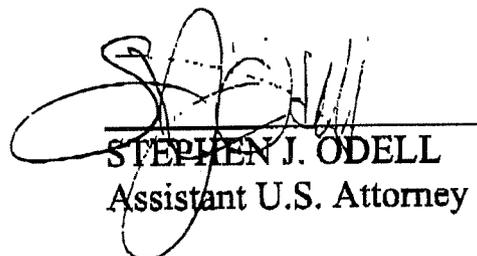
Conclusion

For the foregoing reasons, Respondent respectfully submits that this Court should deny Petitioner's pending Petition For A Writ of Mandamus.

Respectfully submitted,

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PROOF OF SERVICE

I hereby certify that, on this 20th day of December 2004, I transmitted the foregoing RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF MANDAMUS via facsimile machine and also by Federal Express overnight delivery service to the following counsel of record:

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PAGES TO FOLLOW: 3

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COMMENTS: Attached please find the Affidavit of Allen L. Burns (without attachments) that Respondent is filing this date in In re Public Utility Dist. No. 1 of Snohomish Co. v. Administrator, BPA, 9th Cir. No. 04-76212. You will also receive a copy of this document, with Attachments A-I, via Federal Express overnight delivery service. Please do not hesitate to contact me if you have any questions or problems receiving this transmission.

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PUBLIC UTILITY DISTRICT NO.1 OF)
SNOHOMISH COUNTY, WASHINGTON)

Case No. 04-76212

Petitioner,)

ADMINISTRATOR, BONNEVILLE POWER)
ADMINISTRATION,)

Respondent.)

**AFFIDAVIT OF ALLEN L. BURNS
IN SUPPORT OF RESPONDENT'S MOTION TO DENY PETITION FOR
WRIT OF MANDAMUS**

State of Oregon)

ss. Affidavit of Allen L. Burns

County of Multnomah)

I, Allen L. Burns, being first duly sworn, depose and state:

1. I am the Vice-President, Industry Restructuring, for the Bonneville Power Administration (BPA). My responsibilities include the management of BPA's participation in developmental activities related to regional transmission organizations. As such, I have personal knowledge of the facts stated herein and am providing this affidavit in support of Respondent's Motion to Deny Petition for Writ of Mandamus.

2. Until December 9, 2004, I served as one of nine directors on the board of RTO West, a nonprofit, nonmembership Washington corporation.

3. On December 9, 2004, the RTO West board of directors voted to restructure RTO West into a nonprofit, membership Washington corporation named "Grid West" through the adoption of new articles of incorporation and new bylaws. This decision required an affirmative vote of at least 75% of the directors in office and was passed unanimously. Under the new Grid West Developmental Bylaws, the nine-member RTO West board became the Interim Board of Trustees of Grid West. I am one of those nine Trustees on the Interim Board.

3. The following attachments to Respondent's Motion to Deny Petition for Writ of Mandamus are true and correct copies of the originals:

- a. December 24, 2003 "Narrative Description of RRG Platform Group Regional Proposal" – Attachment A
- b. February 24, 2004 "Overview of Process Diagram" – Attachment B
- c. December 9, 2004 Grid West press release – Attachment C
- d. December 13, 2002 "Strategy for Moving RTO West Development Forward" – Attachment D
- e. July 14, 2004 BPA letter to "Our Customers and Interested Parties" – Attachment F
- f. September 22, 2004 "Bylaws Issues for Discussion at RRG" – Attachment G
- g. February 2003 "Department of Energy FY 2004 Congressional Budget Request" – Attachment H

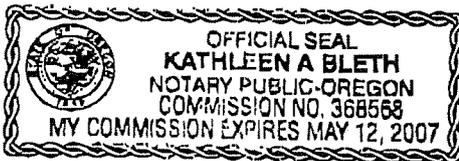
h. February 2004 "Department of Energy FY 2005 Congressional Budget Request" – Attachment I

4. The listing "Allen Burns – Customer Meetings" attached as Attachment E to Respondent's Motion to Deny Petition for Writ of Mandamus is a correct listing of meetings at which I have discussed regional transmission issues and formation of a regional transmission organization.

5. Nothing in the Grid West Developmental Bylaws grants Grid West any rights related to the management, operation, or planning of the Federal transmission assets. Decisions to grant Grid West any such authority would have to be made separately in the future.

Allen L. Burns
Allen L. Burns

Subscribed and sworn to before me this 17th day of December, 2004.



Kathleen A. Bleth
NOTARY PUBLIC FOR THE
STATE OF OREGON
My Commission Expires: 5-12-2007