

**Nos. 03-73426, 03-73707, 03-73753, 03-73767, 03-73772, 03-73775, 03-73778,
03-73779, 03-73786, 03-73819, 03-73820, 03-74002, 03-74651, 03-74801,
04-70206, 04-70235, 04-70286, 04-70382, 04-70546**

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

**GOLDEN NORTHWEST ALUMINUM, INC, ET AL.,
PETITIONERS,**

v.

**BONNEVILLE POWER ADMINISTRATION AND
FEDERAL ENERGY REGULATORY COMMISSION,
RESPONDENTS.**

**ON PETITION FOR REVIEW OF ORDERS OF THE
BONNEVILLE POWER ADMINISTRATION AND OF THE
FEDERAL ENERGY REGULATORY COMMISSION**

**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

**CYNTHIA A. MARLETTE
GENERAL COUNSEL**

**DENNIS LANE
SOLICITOR**

**BETH G. PACELLA
ATTORNEY**

**FOR RESPONDENT
FEDERAL ENERGY REGULATORY
COMMISSION
WASHINGTON, DC 20426**

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**BRIEF FOR RESPONDENT
FEDERAL ENERGY REGULATORY COMMISSION**

STATEMENT OF THE ISSUES

1. Whether this Court lacks jurisdiction to address the Tribes' challenges to FERC's orders because the Tribes did not file a petition for Court review of those orders within 60 days of FERC's order on rehearing, as required by Federal Power Act ("FPA") §313(b).

2. Assuming jurisdiction, whether the Commission appropriately determined that Bonneville Power Administration's ("BPA") proposed rates satisfied the requirements of the Northwest Power Planning and Conservation Act ("Northwest Power Act" or "NPA") §7(a)(2), 16 U.S.C. §839e(a)(2).

STATUTES AND REGULATIONS

Pertinent sections of the NPA, the FPA, and the Commission's implementing regulations are set out in the Addendum to this brief.

COUNTER-STATEMENT OF JURISDICTION

As shown in Point I of the Argument below, this Court does not have jurisdiction to address the Tribes' challenges to FERC's orders because the Tribes did not file a petition for court review of those orders within 60 days of FERC's rehearing order.¹ *Washington Utilities and Transportation Commission v. FERC*, 26 F.3d 935, 940-41 (9th Cir. 1994); FPA §313(b), 16 U.S.C. §825l(b).

¹ The Tribes' brief indicates that they filed their petition for review of FERC's orders on December 16, 2003, Br. at 1, 60 days after FERC's rehearing order issued (October 17, 2003). This Court's Docket No. 03-74651 indicates, however, that the Tribes' petition was not filed until December 17, 2003, 61 days after FERC's rehearing order. FERC counsel contacted counsel for the Tribes and requested a Court-stamped copy of their December 2003 petition. The Tribes' counsel did not respond to FERC counsel's several requests.

STATEMENT OF THE CASE

I. NATURE OF THE CASE, COURSE OF PROCEEDINGS, AND DISPOSITION BELOW

In July, 2000, as supplemented in June, 2001, BPA filed for FERC confirmation and approval of its proposed five-year rates in accordance with NPA §7(a), 16 U.S.C. §839e(a). Under the NPA, FERC reviews BPA rates only to determine whether they: “(A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting [BPA]’s other costs; [and] (B) are based upon [BPA]’s total system costs.” NPA §§7(a)(2)(A) and (B), 16 U.S.C. §§839e(a)(2)(A) and (B). Based upon its review of the extensive record developed in the BPA rate setting process, FERC determined that the proposed rates met the requirements of NPA §§7(a)(2)(A) and (B). *United States Department of Energy – Bonneville Power Admin.*, 104 FERC ¶ 61,093 (2003) (“July Order”); *United States Department of Energy – Bonneville Power Admin.*, 105 FERC ¶ 61,068 (2003) (“Rehearing Order”).

Although numerous petitions in these consolidated cases challenge various aspects of BPA’s rate determination, only one set of petitions, filed jointly by the Confederated Tribes of the Umatilla Indian Reservation and the Yakama Nation (“Tribes”), challenges FERC’s orders confirming and approving BPA’s rates. FERC’s brief responds only to the FERC-related matters in the Tribes’ brief.

II. STATEMENT OF FACTS

A. Statutory And Regulatory Background

BPA is the federal marketing agent for power generated by federal dams constructed and operated in the Pacific Northwest. *Central Lincoln Peoples' Utility District v. Johnson*, 735 F.2d 1101, 1108 (9th Cir. 1984). BPA's generation and transmission facilities constitute the Federal Columbia River Power System. *Aluminum Co. of America v. Bonneville Power Administration*, 903 F.2d 585, 588 (9th Cir. 1989). BPA also purchases energy to supplement its own generation to serve its load. *Id.*

BPA "operates on a self-financing basis so that it must establish rates to recover the costs of acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment" in the Federal Columbia River Power System. *Central Lincoln*, 735 F.2d at 1116. (citing 16 U.S.C. § 839e(a)(1)). While rates proposed by BPA become final only upon confirmation and approval by FERC, FERC has an extremely limited role regarding BPA rates. Congress has "remove[d] FERC from actual rate-making and . . . limit[ed] FERC's role to financial oversight" *Id.* at 1110. Thus, unlike FERC's broad ratemaking authority under the FPA, *see, e.g.*, FPA §205, 16 U.S.C. §824d, FERC's BPA rate "review does not extend to rate design or cost allocation."

California Energy Commission v. Johnson, 767 F.2d 631, 635 (9th Cir. 1985).

FERC's financial oversight role is statutorily limited to considering only whether

BPA's proposed rates:

(A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years² after first meeting [BPA]'s other costs; [and]

(B) are based upon [BPA]'s total system costs.

NPA §§ 7(a)(2)(A) and (B), 16 U.S.C. §§ 839e(a)(2)(A) and (B);³ *Central Lincoln*, 735 F.2d at 1110, 1112, 1114-15.

As FERC's review is appellate in nature, FERC is not permitted to hold hearings, but must rely solely upon the record developed before BPA. *Central Lincoln*, 735 F.2d at 1112; *United States Department of Energy – Bonneville Power Admin.*, 13 FERC ¶ 61,157 at 61,339 (1980). Likewise, if FERC finds that BPA's proposed rates do not satisfy the NPA §7(a)(2), 16 U.S.C. § 839e(a)(2), criteria, FERC cannot modify the proposed rates, but can only remand the rates to BPA for further proceedings. *Central Lincoln*, 735 F.2d at 1113; *United States*

² “It has long been established that 50 years is a reasonable period within which [BPA must] repay the government's investment.” *United States Department of the Interior, Bonneville Power Administration*, 34 FPC 1462 at (*10) (1965) (citing, e.g., House Document No. 172, 79th Congress at 24; Senate Report No. 167 at 28, on Supplemental Appropriation Bill 1965, H.R. 7091, 89th Congress).

³ As the BPA rates at issue do not involve transmission, FERC's review did not consider the third factor under NPA §7(a)(2), whether transmission rates “equitably allocate the costs of the Federal transmission system between Federal

Department of Energy – Bonneville Power Admin., 23 FERC ¶ 61,378 at 61,801 (1983).

B. Events Leading to the Challenged Orders

1. BPA’s Original Rate Proposal

On July 6, 2000, after ten months of evidentiary hearings, briefings, and oral argument at BPA, BPA requested FERC approval, pursuant to NPA § 7(a)(2) and Part 300 of FERC’s regulations, 18 CFR Part 300, of proposed rates for the five-year period from October 1, 2001, through September 30, 2006. Original Proposal Transmittal Letter at R. 40585, ER 6; Original Proposal BPA Record of Decision at R. 40652, ER 7. BPA asserted that revenues under its rate proposal would recover total costs, “including the repayment of Federal investment in hydro generation [and] fish and wildlife recovery.” Original Proposal BPA Record of Decision at R. at 40681 (citing Revenue Requirement Study), ER 11; *id.* at R. 40682, ER 12.

Assuring sufficient revenues for fish and wildlife recovery complied with the Fish and Wildlife Principles established in 1998 after an extensive public process to “enable the BPA to continue providing low-cost power . . . while committing necessary funding for salmon restoration in the Columbia River Basin.” Original Proposal BPA Record of Decision at R. 40664-66, ER 8-10; *id.* at

and non-Federal power utilizing such system.” 16 U.S.C. § 839e(a)(2)(C).

R. 40705-10, ER 15-20. Because the appropriate agencies had not yet singled out the particular fish and wildlife plan that would apply in BPA's region, BPA followed the Principles' directive to "take into account the entire range of potential fish and wildlife costs, as reflected in 13 long-term alternatives . . . and treat the alternatives as if each [were] equally likely to occur." Original Proposal BPA Record of Decision at R. 40664-66, 40684, 40688, 40705, 40716-19, ER 8-10, 13, 14, 15, 21-24. By accounting for this range of costs, BPA assured that its rates "yield[ed] a very high probability of BPA meeting all post-FY 2001 financial obligations, including BPA funding obligations for the fish and wildlife recovery strategy that is eventually adopted." Original Proposal BPA Record of Decision at R. 40665, ER 9.

BPA's proposed rates also complied with the Principles' requirement that BPA achieve a minimum five-year U.S. Treasury Payment Probability ("TPP") of 80 percent. Original Proposal BPA Record of Decision at R. 40793, ER 31. BPA's rate proposal provided an average 88 percent probability of repaying federal investment in the Federal Columbia River Power System in full in each year of the five-year rate period.⁴ Revenue Requirement Study at R. 14458, ER 3; Supplemental Proposal Transmittal Letter at R. 49651, ER 64; Original Proposal

⁴ BPA determined this TPP by averaging the TPP of each of the 13 fish and wildlife alternatives. Original Proposal BPA Record of Decision at R. 40800, 32.

BPA Record of Decision at R. 40788-93, ER 26-31. The proposed rates also provided for full recovery of federal investment over the traditional 50-year repayment period. Supplemental Proposal Transmittal Letter at R. 49651, ER 64; Original Proposal BPA Record of Decision at R. 40788-93, ER 26-31.

Because many variables outside BPA's control can affect BPA's ability to repay the Treasury, the Principles do not require it to prove with certainty that its rates will enable it to meet all Treasury payments. Original Proposal BPA Record of Decision at R. 40719, ER 24. Rather, BPA simply "needs to establish that its rates are sufficient to achieve a specified *probability* of meeting all of its payments, in light of many uncertainties." *Id.* (citing Volume I, Revenue Requirement Study Documentation, WP-02-E-BPA-02A at 275). The rates proposed here provided "an 88 percent TPP, which explicitly acknowledges that subsequent events such as regional adoption of an extremely expensive Fish and Wildlife plan or the occurrence of several dry years in a row could result in a Treasury payment deferral. . . . But there is an 88 percent probability that a Treasury payment deferral will not occur in even one of the five years in the 2002-2006 rate period." *Id.*

Moreover, BPA pointed out, even if a Treasury payment deferral were to occur, BPA would still meet its fish and wildlife recovery cost obligations. Original Proposal BPA Record of Decision at R. 40719, ER 24. "Inasmuch as

payments to Treasury represent the lowest priority in BPA's priority of payments, the average amount of these payments is large, and the level of TPP is very high, these higher priority costs [*e.g.*, fish and wildlife expenses] are virtually guaranteed to be recovered, which is to say, the availability of cash to fund these costs is certain." *Id.* (quoting DeWolf, *et al.*, WP-02-E-BPA-13 at 13) (insertion added by BPA). In fact, because "[b]y law, BPA's payments to Treasury are the lowest priority of revenue application, meaning that principal, interest, and other payments to Treasury are the first to be missed if financial reserves are insufficient to pay all bills on time[,] . . . BPA measures its potential for recovering costs in terms of [its] probability of being able to make Treasury payments on time [TPP]." Original Proposal BPA Record of Decision at R. 40784, ER 25.

2. BPA's Requests To Stay FERC Review

BPA moved to stay FERC's review of its rate proposal, explaining that, as a result of unprecedented wholesale power price spikes in the West during the summer of 2000, BPA expected significantly higher demand for its power than anticipated when it set the rates filed for approval. R. 49530-37, ER 33-40; R. 49622-30, ER 41-49; R. 49636-42, ER 50-56. Concerned that, under these unanticipated conditions, its pending rate proposal would not recover its costs and allow it to make its yearly Federal investment repayment, BPA needed to hold

additional hearings and, thereafter, to file a supplemental rate proposal with FERC. FERC granted the stay requests.

3. BPA's Supplemental Rate Proposal

On June 29, 2001, after additional BPA proceedings, BPA filed its supplemental rate proposal with FERC, requesting interim and final confirmation and approval of its proposed rates. R. 49644-927. The supplemental proposal retained the originally-proposed base rates, but assured recovery of total costs and repayment of federal investment by replacing the original proposal's capped single cost recovery adjustment clause ("CRAC"). A new three-component CRAC was designed to track BPA's: (1) energy purchase costs (Load-Based CRAC); (2) level of net revenues (Financial-Based CRAC); and (3) ability to repay Treasury (Safety-Net CRAC). Supplemental Proposal Transmittal Letter, R. 49644-63, ER 57-76; Supplemental Proposal BPA Record of Decision at R. 49754-55, 49758-78, ER 78-79, 80-100; Supplemental Proposal BPA Record of Decision Appendix at R. 49896-921, ER 101-26.

The Load-Based CRAC, calculated every six months during the five-year rate period, tracks "BPA's cost of acquiring power to meet its contractual obligations to serve loads in excess of the expected firm capability" of its own generation. Supplemental Proposal BPA Record of Decision Appendix at R. 49897, ER 102; Supplemental Proposal Transmittal Letter at R. 49650, ER 63.

The Financial-Based CRAC, which is similar to the single cost recovery adjustment clause in the original proposal, allows “a temporary, upward adjustment to posted power rates . . . if end-of-year Accumulated Net Revenues (ANR) in the generation function fall below a threshold value.” Supplemental Proposal BPA Record of Decision Appendix at R. 49914, ER 119; Supplemental Proposal Transmittal Letter at R. 49650, ER 63. Finally, the Safety-Net CRAC significantly increases the security of BPA’s planned payments to the Treasury by allowing a rate surcharge if, after implementation of the Load- and Financial-Based CRACs, a payment to Treasury or another creditor has been missed, or if there is a 50 percent probability that such a payment may be missed in the then-current year. Supplemental Proposal BPA Record of Decision Appendix at R. 49896, 49919-20, ER 101, 124-25; Supplemental Proposal Transmittal Letter at 49651, 49654, ER 64, 67.

With these adjustments, BPA explained, it would satisfy NPA §7(a)(2) and the Principles, even with the unanticipated higher levels of demand:

Taken together, its [Original] and Supplemental Proposals fully demonstrate cost recovery because:

- The base rates recover BPA’s revenue requirement, not including the increased level of augmentation [energy it must purchase from the market above what it can generate] and the market prices associated with purchasing to serve unanticipated load.

- The [Load-Based] CRAC . . . recover[s] the costs of the increased level of augmentation at any market price.
- The [Financial-Based] CRAC has been strengthened in the first year, allowing BPA to build reserves in the first year if the starting accumulated net revenues for the rate period are low.
- The TPP is within the 80-88 percent range that BPA is targeting. Because by design the [Load-Based] CRAC percentages are based on the amount of BPA's purchases for augmentation and market prices, the Supplemental Proposal is described through the use of a set of analyses instead of a single analysis. Therefore, the range of TPPs for the Supplemental Proposal is from 81.6 percent to 88.3 percent, depending on what is assumed for market prices.
- Additionally, the [Safety-Net-Based] CRAC has been added, and while not modeled in the TPP calculation, it increases the probability that BPA will make its payments to Treasury.

Supplemental Proposal Transmittal Letter at R. 49654, ER 67.

4. FERC's Interim Rate Approval

On September 28, 2001, FERC approved BPA's proposed rates on an interim basis, pending further review to determine whether to confirm and approve the rates on a final basis in accordance with NPA §7(a)(2). *United States Department of Energy – Bonneville Power Administration*, 96 FERC ¶ 61,360 (2001). In view of the volume and complexity of the rate application and the short 60-day period provided for review of BPA interim approval requests, the Commission, in accordance with its precedent, granted interim approval as the

proposed rates were not patently deficient. *Id.* at 62,357-58 (citing 18 C.F.R. § 300.10(a)(3)(ii)). In doing so, the Commission noted that it “may order refunds with interest if [it] later determines in its final decision not to approve the rates.” *Id.* at 62,358 (citing 18 C.F.R. § 300.20(c)).

C. The Challenged Orders

1. The July Order

After considering the voluminous record, and noting its Congressionally-mandated limited role in reviewing BPA rates, the Commission confirmed and approved BPA’s revised proposed rates on a final basis, finding that they satisfy the requirements of NPA §§7a(2)(A) and (B), 16 U.S.C. §§839e(a)(2)(A) and (B). July Order, ER 127-30.

NPA §7a(2)(A)’s requirement that BPA’s rates “are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting [BPA]’s other costs” was satisfied because the rates were based upon a 50-year Federal investment repayment period consistent with FERC precedent interpreting NPA §7(a) to require repayment within 50 years. July Order at ¶14, ER 129-30; *see supra* n.2 (origins of 50-year period). Moreover, the rates provided a reasonable intermediate level of repayment during the five-year rate period to ensure that

repayment occurs by the end of the 50th year. *Id.*; *cf.* Revenue Requirement Study at R. 14460, ER 5.

NPA §7a(2)(B)'s requirement that BPA's rates be "based upon [BPA]'s total system costs" was satisfied as well. July Order at ¶15, ER 130. As the Commission noted, "[t]he traditional measure of the adequacy of [BPA]'s revenues has been the power repayment study. [BPA]'s power repayment study indicates that the revenues expected to be collected under the proposed rates will be sufficient to recover [BPA]'s total system costs, including the recovery of the remaining Federal investment, with interest, over the repayment period." *Id.*

Despite entreaties by the parties, the Commission found it could not address issues challenging BPA's rate design as those issues were "outside the scope of the Commission's review." July Order at ¶18, ER 130 (citing *United States Department of Energy – Bonneville Power Administration*, 95 FERC ¶ 61,082 at 61,244-45 and n.12 (2001) and *United States Department of Energy – Bonneville Power Administration*, 28 FERC ¶ 61,087 at 61,146-47 (1984) (noting that *Central Lincoln* held that the remedy for substantive questions regarding regional rate design and cost allocation is not at FERC, but in the courts)).

2. The Rehearing Order

The Tribes sought rehearing of the July Order, which the Commission denied. After pointing out that "the proposed rates were intended to recover the

annual revenue requirements of the generation function, including: the Federal investment in hydro generation [and] fish and wildlife recovery,” Rehearing Order at ¶3,⁵ ER 153, and that the record showed that BPA’s “average annual projected expenses for the FY 2002-2006 rate test period are \$2,373 million . . . and its average annual revenues from rates for the same period [are] projected to be \$2,480 million, yielding average net revenues of \$107 million,⁶ *id.* at ¶4, ER 153, the Commission found that “the data provided by [BPA] supports the Commission’s conclusion that the [BPA] rates should be sufficient to recover costs and to assure repayment to the Treasury.” Rehearing Order at ¶9, ER 154. This was further assured by the three-component CRAC, which would allow the base rates to be adjusted if necessary to recover higher than anticipated costs and repay the Treasury. *Id.*

In addition, the Commission found beyond the scope of its appellate-type review the Tribes’ arguments that BPA had not adequately accounted for fish and wildlife costs or adequately addressed the Tribes’ substantive arguments and evidence in the BPA proceeding, *id.* at ¶10 (citing *United States Department of Energy – Bonneville Power Administration*, 67 FERC ¶ 61,351 at 62,219 (1994)

⁵ *Cf.* Original Proposal BPA Record of Decision at R. at 40681 (citing Revenue Requirement Study), ER 11; Revenue Requirement Study at R. 14456, ER 1.

⁶ *See* Revenue Requirement Study at R. 14459, ER 4.

and *United States Department of Energy – Bonneville Power Administration*, 32 FERC ¶ 61,014 at 61,053, 61,057 n.15, *reh’g denied*, 33 FERC ¶61,049 (1985)), ER 154. “In this regard, the Northwest Power Act provides [BPA] with broad discretion in developing its rates.^[7] The Commission is not the appropriate forum in which to challenge these decisions.^[8]” *Id.* Rather, because “Congress intended to limit Commission review to the specific findings in Section 7(a)(2) of the Northwest Power Act,^[9]” the Commission could not “substitute [its] evaluation in lieu of [BPA]’s evaluation, particularly of the Tribes’ arguments and evidence in the underlying proceeding on fish and wildlife issues. These actions are beyond the scope of the Commission’s statutory authority to review [BPA]’s rates under the Northwest Power Act.” *Id.*

The petitions for review followed.

⁷ Citing *Central Lincoln*, 735 F.2d at 1110-11; *United States Department of Energy – Bonneville Power Administration*, 20 FERC ¶ 61,292 at 61,558 (1982).

⁸ Citing *BPA*, 20 FERC at 61,558.

⁹ Citing *BPA*, 20 FERC at 61,558.

SUMMARY OF ARGUMENT

I

This court lacks jurisdiction to address the Tribes' challenges to FERC's orders because the Tribes did not file a petition for court review of those orders within 60 days of FERC's order on rehearing, as required by FPA §313(b).

II

Assuming jurisdiction, the Commission appropriately determined that BPA's proposed rates satisfied the requirements of NPA §7(a)(2)(A) as they were sufficient to assure repayment of the Federal investment over a reasonable number of years. Despite the Tribes' claim to the contrary, the approved rates provide for amortized repayment of Federal investment on a current basis. In addition, the proposed rates provide for full recovery of federal investment over the traditional 50-year repayment period.

FERC did not have jurisdiction to address the Tribes' claims that BPA determined the TPP range based on unrealistic assumptions. Such claims went well beyond FERC's statutorily-limited financial oversight role.

Because the Tribes did not raise on agency rehearing the contention that FERC should have considered whether "BPA had overstated its probability of repaying the Treasury because BPA treated a case where it failed to pay the Treasury multiple years the same as a case with one missed payment," this Court

lacks jurisdiction to consider it. In any event, there is no merit to the Tribe's contention because it, like other Tribes' claims, would require FERC to go well beyond the limited scope of its statutorily-prescribed review of BPA rates.

FERC also appropriately determined, on the entire record, that BPA's proposed rates met the requirements of NPA §7(a)(2)(B) as they were based on total system costs.

The Commission could not conduct the type of independent fact evaluation sought by the Tribes as it would have gone beyond FERC's statutorily-limited, appellate-type scope of review. The Commission was not empowered by Congress to substitute its evaluation regarding the Tribes' arguments and evidence on fish and wildlife issues for BPA's in the underlying proceeding.

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO ADDRESS THE TRIBES' CHALLENGES TO FERC'S ORDERS BECAUSE THE TRIBES DID NOT FILE A PETITION FOR COURT REVIEW OF THOSE ORDERS WITHIN 60 DAYS OF FERC'S ORDER ON REHEARING, AS REQUIRED BY FPA §313(b)

In order to preserve any right the Tribes might have had to judicial review of FERC's orders, they were required to file a petition within 60 days after October 17, 2003, that is by December 16, 2003. *Washington Utilities*, 26 F.3d at 940-41; FPA §313(b), 16 U.S.C. §825l(b). This Court's Docket indicates, however, that the Tribes did not file their petition for review until December 17, 2003, 61 days

after FERC's Rehearing Order.¹⁰ Br. at 1. As the Tribes did not meet the statutory deadline for obtaining judicial review of FERC's orders, this Court does not have jurisdiction to review them. *Washington Utilities*, 26 F.3d at 940-41; FPA §313(b), 16 U.S.C. §825l(b).

II. THE COMMISSION APPROPRIATELY DETERMINED THAT BPA'S PROPOSED RATES SATISFIED THE REQUIREMENTS OF NPA §7(a)(2)

A. Standard of Review

The Court reviews FERC orders to determine whether they are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *City of Fremont v. FERC*, 336 F.3d 910, 914 (9th Cir. 2003) (citing Administrative Procedure Act, 5 U.S.C. § 706(2)).¹¹ Here, FERC's orders were statutorily limited to determining whether the proposed BPA rates met the requirements of NPA §7(a)(2). That determination must be reasoned and based upon substantial evidence in the record developed before BPA.

¹⁰ As noted above at n.1, despite several requests from FERC counsel, the Tribes' counsel have not provided FERC a Court-stamped copy of their December 2003 petition.

¹¹ While the Tribes appear to contend that FERC's orders are subject to judicial review under the NPA (Br. at 21), "under the Northwest Power Act, 'judicial review is of the BPA action – the rate determination – and not FERC's subsequent approval and confirmation of the BPA determination.'" *Washington Utilities*, 26 F.3d at 940 (quoting *CP National Corp. v. Bonneville Power Administration*, 928 F.2d 905, 911 (9th Cir. 1991)).

As explained below, the Commission's determination was well-reasoned, supported by substantial evidence, and consistent with applicable law. Accordingly, the Commission's orders must be upheld.

B. FERC Appropriately Determined BPA's Proposed Rates Met The Requirements Of NPA §7(a)(2)(A) As They Were Sufficient To Assure Repayment Of The Federal Investment Over A Reasonable Number Of Years

There is no merit to the Tribes' claim (Br. 24-26, 29-30) that the approved rates do not provide for amortized repayment of Federal investment on a current basis. The approved rates include planned annual amortization payments to Treasury totaling \$549,243,000 over the five-year rate period. Revenue Requirements Study at R. 14460, ER 5; Supplemental Proposal Transmittal Letter at R. 49651, ER 64; Original Proposal BPA Record of Decision at R. 40788-93, ER 26-31. The probability of making those amortized payments in full in each year of the five-year rate period (TPP) under the approved rates is 81.6 percent to 88.3 percent, which exceeds the Fish and Wildlife Principles' minimum five-year TPP of 80 percent.¹² Revenue Requirement Study at R. 14458, ER 3; Supplemental Proposal Transmittal Letter at R. 49651, 49656, ER 64, 69;

¹² This also undermines the Tribes' hypothetical situation of BPA "setting rates for 45 years that are not high enough to pay Treasury and then adjust[ing] rates during years 46 through 50 to repay the debt." Br. at 25. That did not occur here. The evidence established that BPA's proposed rates for the five-year period would provide sufficient revenues to repay Treasury during that period.

Supplemental Proposal BPA Record of Decision at R. 49709, ER 77; Original Proposal BPA Record of Decision at R. 40788-93, ER 26-31. In addition, the proposed rates provided for full recovery of federal investment over the traditional 50-year repayment period. Supplemental Proposal Transmittal Letter at R. 49651, ER 64; Original Proposal BPA Record of Decision at R. 40788-93, ER 26-31.

These facts all support FERC's finding that the proposed rates satisfied the requirements of NPA §7(a)(2)(A) to provide "a reasonable intermediate level of repayment . . . to ensure that repayment will occur by the end of the fiftieth year." July Order at ¶¶14-16, ER 129-30; Rehearing Order at ¶¶4, 9, ER 153, 154. "[T]he data provided by [BPA] support[ed] the Commission's conclusion that the [BPA] rates . . . assure repayment to the Treasury." Rehearing Order at ¶9, ER 154. In addition, "the three-component Cost Recovery Adjustment Clause included in [BPA]'s rate proposal further should ensure that [BPA] will have flexibility to adjust the base rates if the likelihood of missing a payment to the Treasury reaches a certain level, . . . thus further ensuring payment to the Treasury." *Id.* Consequently, the Tribes' assertion that FERC failed to assess whether the TPP range at issue¹³ would allow for amortization of BPA's debt on a current basis (Br.

¹³ The Tribes claim the TPP range here is 82.7 to 85.9 percent. Br. at 27-28. In fact, the TPP range under the approved rates is 81.6 percent to 88.3 percent, depending on which fish and wildlife alternative is implemented. Supplemental Proposal Transmittal Letter at R. 49654, 49656, ER 67, 69; Supplemental Proposal BPA Record of Decision at R. 49709, ER 77. In any event, all the TPP range

at 27) is unsupported.

The Tribes also assert that FERC should have addressed their claims that BPA determined the TPP range based on unrealistic assumptions. Br. at 27-28. As FERC found, however, such claims went well beyond FERC's statutorily-limited financial oversight role. Rehearing Order at ¶10, ER 154; *Central Lincoln*, 735 F.2d at 1110.

Next, the Tribes contend that FERC erred in failing to consider their claims that "BPA had overstated its probability of repaying the Treasury because BPA treated a case where it failed to pay the Treasury multiple years the same as a case with one missed payment." Br. at 28-29. Because that contention was not raised on rehearing to FERC, this Court lacks jurisdiction to consider it.

Jurisdiction to review FERC's BPA rate orders lies not under the NPA, but under FPA §313(b), 16 U.S.C. §825l(b). *Washington Utilities*, 26 F.3d at 940; *CP National*, 928 F.2d at 911. In addition to requiring, as a jurisdictional prerequisite to judicial review, that petitions challenging FERC orders be filed within 60 days of FERC's order on rehearing, *Washington Utilities*, 26 F.3d at 940-41, FPA

figures exceed the Fish and Wildlife Principles' minimum five-year TPP of 80 percent. Original Proposal BPA Record of Decision at R. 40790, ER 28. *See also* the Tribes' Brief at 32 ("On September 19, 1998, the Federal government adopted the Fish and Wildlife Principles. Those principles committed BPA to achieve an 80 to 88 percent probability of repaying the Treasury during the rate period (Fiscal Year 2002 through 2006).").

§313(b) also includes the jurisdictional prerequisite that “[n]o objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is a reasonable ground for failure to do so.” Because the Tribes did not raise this contention in their rehearing request at FERC (FERC Certified Index to the Record 78, ER 131-52), they did not meet the statutory prerequisite and, thus, cannot raise this issue on appeal. In any event, there is no merit to the Tribe’s contention because it, like other Tribes’ claims, would require FERC to go well beyond the limited scope of its statutorily-prescribed review of BPA rates.

C. FERC Appropriately Determined BPA’s Proposed Rates Met The Requirements Of NPA §7(a)(2)(B) As They Were Based on Total System Costs

The Tribes contend that “FERC limited its review to BPA’s Power Repayment study” in finding that BPA’s proposed rates are based on its total system costs. Br. at 22. The Tribes are wrong.

FERC’s decision was based on the entire record, including not only the Power Repayment Study, but also the Revenue Requirement Study and the Original and Supplemental BPA Records of Decision. For example, the Commission’s finding that “the proposed rates were intended to recover the annual revenue requirements of the generation function, including: the Federal investment in hydro generation [and] fish and wildlife recovery” (Rehearing Order at ¶3, ER

153) was based on the Revenue Requirement Study (R. 14456, ER 1) and the Original Proposal's BPA Record of Decision (at R. 40681 (citing Revenue Requirement Study)). The Commission's determination that the evidence showed that BPA's "average annual projected expenses for the FY 2002-2006 rate test period are \$2,373 million . . . and its average annual revenues from rates for the same period [are] projected to be \$2,480 million, yielding average net revenues of \$107 million, *id.* at ¶4, ER 153, was based on the Revenue Requirement Study as well. R. 14459, ER 4.

The Tribes' final contention, that FERC "should have conducted an independent evaluation" beyond that conducted here, Br. at 24, is inconsistent with FERC's statutorily-limited, appellate-type scope of review. *Central Lincoln*, 735 F.2d at 1110-11; *BPA*, 95 FERC at 61,244-45 and n.12; *BPA*, 28 FERC at 61,146-47; *BPA*, 20 FERC at 61,558; July Order at ¶18, ER 130; Rehearing Order at ¶10, ER 154. Congress did not intend FERC to engage in fact-finding or fact analysis of the materials that already had been developed and subjected to examination in the BPA rate setting process. Because "Congress intended to limit Commission review to the specific findings in Section 7(a)(2) of the Northwest Power Act,^[14]" the Commission could not "substitute [its] evaluation in lieu of [BPA]'s evaluation, particularly of the Tribes' arguments and evidence in the underlying

¹⁴ Citing *BPA*, 20 FERC at 61,558.

proceeding on fish and wildlife issues. These actions are beyond the scope of the Commission's statutory authority to review [BPA]'s rates under the Northwest Power Act." *Id.*

CONCLUSION

For the foregoing reasons, the Tribes' petitions for review should be dismissed for lack of jurisdiction to the extent they challenge FERC's orders. Assuming jurisdiction, the petitions should be denied insofar as they challenge FERC's orders confirming and approving BPA's proposed rates.

STATEMENT OF RELATED CASES

Respondent FERC is not aware of any related case, other than those already consolidated herein, pending in this court.

Respectfully submitted,

Cynthia A. Marlette
General Counsel

Dennis Lane
Solicitor

Beth G. Pacella
Attorney

Federal Energy Regulatory
Commission
Washington, D.C. 20426
TEL: (202) 502-6048
FAX: (202) 273-0901
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