by Richard Lorenz

How will we defend preference power?

McNary Dam on the Columbia River, Umatilla, Ore. Photo by Bonneville Power Administration.

"Preference power" is the lifeblood of public power in the Pacific Northwest. It is a statutory right that must be jealously defended by each successive generation in public power.

But, what does the right to preference power really mean, and how can this right best be defended? Litigation can certainly be a powerful tool under the right circumstances. The Bonneville Power Administration (BPA) has taken significant actions that the public power community has challenged as contrary to law. It is important to see these legal actions through to a reasonable conclusion. It will no doubt be necessary and appropriate in the future to use litigation as a means test and establish the limits of BPA's statutory authority.

The question raised by this article is whether fighting the good fight for preference power might include something more than a parade of lawsuits to the 9th Circuit. The basic point is that relying on litigation as the sole, or even the primary, means for defending preference power may be problematic for the following reasons.

The preference statutes

Preference power in the Pacific Northwest was created by the *Bonneville Project Act of 1937*, 16 USC §832c. The *Bonneville Project Act* reads, in part, "[i]n order to ensure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives…." In 1964, Congress enacted the *Regional Preference Act of 1964*, Public Law 88-552, which precludes the sale outside the Pacific Northwest of federal hydroelectric power for which there is a use or a market in the region.

More recently, the *Pacific Northwest Electric Power Planning and Conservation Act of 1981*, 16 U.S.C. §§839-839h (*Northwest Power Act*), sets forth provisions that BPA must follow in selling power. The *Northwest Power Act* reaffirms existing preference provisions and directs BPA to offer new long-term power sales contracts to certain classes of non-preference customers. This includes, of course, power sales to the direct service industries (DSIs) and exchange contracts with eligible investor-owned utilities (IOUs). The basic structure of the *Northwest Power Act* was such that revenues from the DSIs would fund BPA's exchange payments to the IOUs. Now, however, the DSIs are all but gone. The question of how BPA's exchange obligation may or may not be funded remains subject to vigorous dispute.

BPA's discretion

There are those within the public power community who believe that allocating any portion of the IOU exchange payments to preference rates is not only unlawful, it is tantamount to an attack on preference power itself. The *Northwest Power Act* includes certain provisions, including Section 7(b)(2), that are intended to protect the preference customers from the exchange payment costs. Although all of public power may agree on the intent of Section 7(b)(2), the problem is one of enforcement.

According to federal law, BPA is to be afforded substantial deference in setting rates, including its implementation of Section 7(b)(2). Under the *Administrative Procedures Act*, BPA's actions may be reversed only to the extent that they are "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A). Moreover, the 9th Circuit has found that BPA's statutory interpretations are entitled to "even greater deference" than that normally provided to administrative agencies. *Confederated Tribes of the Umatilla Indian Res. v. BPA*, 342 F.3d 924, 928 (9th Cir. 2003) ("[D]ue to the complex subject matter and BPA's factual and legal expertise, we give special, substantial deference to BPA's interpretation of the *Northwest Power Act*."). This is not to say that BPA has unfettered discretion with respect to setting rates, or that any litigation challenging BPA actions is futile. Certainly BPA may not ignore Section 7(b)(2) in its entirety. Rather, the point is simply that any appellant bears a heavy legal burden in showing that BPA's proposed interpretation of Section 7(b)(2) is contrary to law.

The 9th Circuit

The *Northwest Power Act* is unusual in that it vests original jurisdiction over all final BPA action with the 9th Circuit Court of Appeals. This may be problematic with respect to future litigation for the following reasons:

- The 9th Circuit is an appellate court that is not accustomed to direct review of very technical administrative agency decisions (aside from BPA cases). Thus, the Court closely scrutinizes, and narrowly construes, the standing of the appellants and the ripeness of their claims. Even where standing and ripeness are shown, the Court tends to defer to BPA wherever possible.
- The 9th Circuit is unpredictable. It has been reported that the Supreme Court overturns the decisions of the Ninth more often than those of any other circuit. According to the Administrative Office of the United States Courts in Washington, the Supreme Court reversed the 9th Circuit 14 times out of 16 cases in the 2008-2009 term — an 88-percent reversal rate.
- The 9th Circuit moves slowly. It can take the Court five years or more to render a final decision on a complicated case.
- In many cases, the 9th Circuit lacks the authority to fashion a suitable remedy. It cannot, for example, order BPA to pay money damages. Even in the case of a total victory for public power, the Court has done little more than issue an open-ended remand to BPA. This leaves litigants on an endless treadmill of remands and subsequent appeals.

Congress can change the law

In each of the *Bonneville Project Act*, the *Regional Preference Act*, and the *Northwest Power Act*, Congress emphasized operating federal generating facilities for the benefit of the "general public" in the Pacific Northwest. If there is a perception that the benefits of federal power in the region have become skewed in favor of one group or another, then nothing precludes Congress from passing legislation to reallocate such benefits. "Preference power" is a creature of statute that is not specifically mandated or protected by the United States Constitution. The courts have consistently reasoned that Congress' authority to dispose of federal property, including federal power, is plenary. *Alabama v. Texas*, 347 U.S. 272, 273 (1954) ("The power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation.").

Conclusions

Smarter people than me will have to decide whether litigation is the only or the best choice for defending preference power. The humble suggestion of this article is that there may be alternative means of preserving the benefits of preference power for posterity, and it may be time for us to take a close look at those alternatives. NWPPA

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A Bonneville Power Administration (BPA) transmission tower. Photo by Bonneville Power Administration.