

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

In the Matter of the Petition of)	
)	Docket No. UE-040088
Bonneville Power Administration)	
for Declaratory Order)	AVISTA COPORATION'S COMMENTS
Disclaiming Jurisdiction)	TO PETITIONER BONNEVILLE POWER
)	ADMINISTRATION'S PETITION FOR
)	DECLARATORY ORDER
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1. Avista Corporation d/b/a Avista Utilities ("Avista" or the "Company") is a public service company providing retail electric service within the states of Washington and Idaho and is subject to the regulatory authority of the Washington Utilities and Transportation Commission ("WUTC" or "Commission") and the Idaho Public Utilities Commission. The Company is also engaged in the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale and is thus also subject to the regulatory authority of the Federal Energy Regulatory Commission ("FERC") Avista requests that the following persons be added to the official service list in this proceeding and that all communications be addressed to:

Gary A. Dahlke
Paine, Hamblen, Coffin, Brooke
& Miller LLP
717 West Sprague, Suite 1200
Spokane, WA 99201
Telephone: 509-455-6000
Facsimile: 509-838-0007
E-Mail: gdahlke@painehamblen.com

Kelly Norwood
Avista Corporation
P. O .Box 3727
Spokane, WA 99220
Telephone: 509-495-4267
Facsimile: 509-495-4272
E-Mail: kelly.norwood@avistacorp.com

2. On January 21, 2004, Bonneville Power Administration ("Bonneville") filed with the Commission a Petition for Declaratory Order Disclaiming Jurisdiction ("Petition"). In its Petition, Bonneville seeks a declaratory order that the Commission does not have jurisdiction over the owner lessor and the indenture trustee in Bonneville's proposed lease financing of certain electric transmission facilities in Washington.

3. These comments are submitted in response to the Commission's Notice of Receipt of Petition for Declaratory Order and Opportunity to Submit Statements of Fact and Law dated January 23, 2004.

4. Bonneville's Petition states an incorrect basis for the relief it seeks. In the Petition, Bonneville bases its claim upon representations concerning the bundled or unbundled nature of the delivery service taking place over the line. Bonneville states:

7.3 The Commission should enter a declaratory order disclaiming jurisdiction over the SPE and the Trustee under title 80 RCW because, under federal law, FERC has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce.

* * * *

7.3.2 The Facility will be used by Bonneville to provide interstate transmission service and will not be available for use for bundled retail service. Silverstein Decl., ¶ 11. Under the Federal Power Act, FERC has exclusive jurisdiction over such transmission and therefore sole jurisdiction over the Facility.

Citing 16 U.S.C. § 824(b).

5. Avista has no objection to the request by Bonneville for a Declaratory Order pertaining to the status of an owner lessor and indenture trustee of a 500 kv transmission line located within the state. Without speculating as to the specific facts of service involved with this particular facility, it would be Avista's understanding that such a 500 kv transmission facility

would, under any application of a seven-factor test established in Order 888,¹ fall under FERC jurisdiction as to a facilities based test for jurisdiction.

6. While federal and state jurisdiction had been delineated on the basis of wholesale or unbundled service versus retail or bundled service prior to FERC's rulemaking in Order 888 in 1996 and the adoption by FERC of a seven-factor test, it has recently been decided in *Detroit Edison v. Federal Energy Regulatory Commission*, 333 F.3d 48 (D.C. Cir. 2003) that states retain exclusive jurisdiction over the distribution portion of unbundled delivery service. In *Detroit Edison* the court found:

FERC asserts that Midwest's distribution facilities are FERC-jurisdictional because they are used for both wholesale and retail distribution. Therefore, FERC claims jurisdiction to set rates for all service occurring over such facilities, including unbundled retail distribution service.

FERC's position contradicts the plain language of the FPA. Section 201(b)(1) denies FERC jurisdiction over "facilities used in local distribution." 16 U.S.C. § 824(b)(1). FERC would rewrite the statute to exclude only "facilities used *exclusively* in local distribution." Such an interpretation would eviscerate state jurisdiction over numerous local facilities, in direct contravention of congress' intent. *See New York v. FERC*, 535 U.S. 1, 22, 122 S.Ct. 1012, 1025, 152 L.Ed.2d 47 (2002) (recognizing "Congress' intent to preserve state jurisdiction over local facilities"). Moreover, the orders under review totally ignore Order 888's carefully formulated seven-factor test for distinguishing between local distribution facilities and "FERC-jurisdictional facilities." which this court ultimately approved. *See Order 888* at 31,770-71, 31,981, *aff'd in TAPSG*, 225 F.3d at 696. FERC's interpretation disregards the statutory language and relevant precedent to expand impermissibly its statutory jurisdiction.

7. To the extent that the WUTC uses a seven-factor test for jurisdiction delineation between state and Federal jurisdiction, such as it adopted for limited purposes for Puget Sound

¹ *Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs. ¶ 31,036, at 31,771-785 (1996) ("Order 888"), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997) ("Order 888-A"), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997) ("Order 888-B"), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998) ("Order 888-C"), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Energy, *In the Matter of the Petition of Puget Sound Energy*, Docket No. UE-010010, April 5, 2001, the adoption and use of that test suggests that the unbundling of delivery services does not remove all jurisdiction from the states, as Bonneville's Petition might suggest. Rather, the jurisdiction line would be based upon application of the seven- factor test.

8. Further, Avista is uncertain whether bundled delivery services take place over Bonneville's 500 kv facilities in any event. While the Petition represents that there are no such services, it would appear to Avista, for example, that Direct Service Industrial customers service is bundled service, and that there is the potential that such bundled service will occur over the line. It is really not necessary to make this distinction, however, as the bundled or unbundled nature of service is irrelevant to jurisdiction determinations under a seven-factor test, given the *Detroit Edison* decision that unbundling does not remove any jurisdiction from states that would otherwise reside with the state if the service were unbundled.

9. The basis for making a jurisdictional determination of state versus federal jurisdiction is important to a number of pending policy decisions which the Commission will face. As noted in the Memorandum dated January 23, 2004, distributed at the January 28, 2004 Regional Representatives Group meeting, there are a number of significant jurisdictional issues pertaining to development of an RTO in the region. These include the question of whether jurisdiction over delivery facilities remains with the state after transfer of control of facilities to an RTO. To the extent that the Commission were to use "bundling" or "unbundling" as the basis for deciding whether to retain or relinquish jurisdiction, such a decision would have significant implications for the development of an RTO. Those issues should be divorced from the pending application by Bonneville and should be decided separately at the appropriate time.

10. In any event, it appears that the Commission may well be able to address the matter of lack of Commission jurisdiction over the owner lessor and the indenture trustee in Bonneville's proposed lease financing of facilities without having to reach the question of whether those facilities are used for bundled retail service.

WHEREFORE, for the above reasons, Avista respectfully requests that the Commission consider these comments in determining whether to grant Bonneville's request for a declaratory order and, if granted, the basis for doing so.

DATED this ____ day of February, 2004.

PAINE, HAMBLIN, COFFIN, BROOKE
& MILLER, LLP

By: _____
Gary A. Dahlke
Attorneys for Avista Corporation

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day caused to be served a true and correct copy of this document upon all parties of record in this proceeding, by U.S. Mail.

Robb Roberts
Bonneville Power Administration
P. O. Box 3621
Portland, OR 97232

Marc R. Greenough
Orrick, Herrington & Sutcliffe, LLP
719 Second Avenue, Suite 900
Seattle, WA 98104

Michael D. Hornstein
Orrick Herrington & Sutcliffe, LLP
3050 K Street NW
Washington, DC 20007

Sally Johnston
Assistant Attorney General
WUTC
Attorney General Office
State Mail Stop 40128
Olympia, WA 98504

Simon Ffitch, AAG
Office of the Attorney General
Public Counsel
900 4th Avenue, Suite 2000
Seattle, WA 98164

C. Robert Wallis
Administrative Law Judge
Washington Utilities & Transportation
Commission
P. O. Box 47250
Olympia, WA 98504-7250

Gary A. Dahlke