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STATE OF WASH.
UTIL. AND TRANSP.
COMMISSION

April 5, 2007

Ms. Carole Washburn, Executive Secretary
Washington Utilities & Transportation Commission
1300 S. Evergreen Park Drive SW
P. O. Box 47250
Olympia, WA 98504-7250

RE: **Matter of the Petition of Bonneville Power Administration**
Docket No. UE-070494

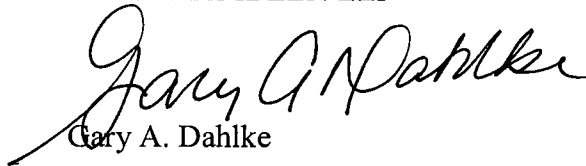
Dear Ms. Washburn:

Please find enclosed for filing the original and nineteen (19) copies of AVISTA CORPORATION'S COMMENTS TO PETITION OF BONNEVILLE POWER ADMINISTRATION'S PETITION FOR DECLARTORY ORDER.

Please conform and return the one additional copy in the self-addressed, stamped envelope which is enclosed.

Very truly yours,

PAINE HAMBLEN LLP


Gary A. Dahlke

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Enclosures

BEFORE THE WASHINGTON UTILITIES
AND TRANSPORTATION COMMISSION

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In the Matter of the Petition of Bonneville)
Power Administration For Declaratory) Docket No. UE-070494
Order Disclaiming Jurisdiction) AVISTA CORPORATION'S
) COMMENTS TO PETITION OF
) BONNEVILLE POWER
) ADMINISTRATION'S PETITION FOR
) DECLARTORY ORDER

1. Avista Corporation, dba Avista Utilities, ("Avista") 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"). Avista is also engaged in the transmission of electric energy in interstate commerce and the sale of electric energy at wholesale and, therefore, is also subject to the regulatory authority of the Federal Energy Regulatory Commission ("FERC").

2. Avista requests that the following persons be added to the official service list in this proceeding and that all communications be addressed to:

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3. On March 12, 2007, 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 of “various, as of yet undetermined, transmission facilities, including system replacements, upgrades, and additions, to be put into service over time, and primarily affecting existing transmission infrastructure ranging from 69 kV to 1000 kV (the ‘Facilities’)[,]” which will be located in Washington.¹

4. Avista submits these comments in response to the Commission’s Notice of Receipt of Petition for Declaratory Order and Opportunity to Submit Statements of Fact and Law dated March 16, 2007.

5. 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 that Bonneville intends to take place over the Facilities. Specifically, Bonneville states:

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

6.3.1 Under Section 201 of the Federal Power Act, FERC has exclusive jurisdiction over the unbundled transmission of electric energy in interstate commerce.

* * * * *

6.3.2 The Facilities will be used by [Bonneville] to provide interstate transmission service and will not be available for use for bundled retail service. Under the Federal Power Act, FERC has exclusive jurisdiction over such transmission and therefore sole jurisdiction over the Facilities, to the extent that such facilities are controlled or used by the Owner Lessor. 16 U.S.C. § 824(b). The Commission should therefore disclaim jurisdiction over the Owner Lessor with respect to the Facilities.

¹ Petition at p 3.1.1.
AVISTA CORPORATION'S COMMENTS TO
PETITION OF BONNEVILLE POWER
ADMINISTRATION'S PETITION FOR
DECLARTORY ORDER - 2

Petition at pp. 6.3, 6.3.1, 6.3.2 (some emphasis omitted).

6. On January 21, 2004, Bonneville filed a substantially similar petition in Docket No. UE-040088, in which it sought a declaratory order disclaiming jurisdiction over the owner lessor and the indenture trustee of certain transmission facilities located in Washington (“January 2004 petition”).² In the January 2004 petition, as in its current Petition, Bonneville incorrectly asserted as a basis for its claim for relief the bundled or unbundled nature of the delivery service that would take place on the facilities.

7. In comments to Bonneville’s January 2004 petition, Avista noted that prior to Order No. 888,³ federal and state jurisdiction was delineated on the basis of wholesale or unbundled service versus retail or bundled service. However, following the adoption by FERC in Order No. 888 of a seven-factor test for distinguishing between local distribution facilities and FERC-jurisdictional facilities, the D.C. Circuit found that states retain exclusive jurisdiction over the distribution portion of unbundled delivery service.⁴

² Notably, the petition Bonneville filed in Docket No. UE-040088 sought a declaratory order disclaiming jurisdiction over a specific transmission facility—*i.e.*, a 64 mile-long, 500 kV transmission line, linking Bonneville’s Schultz Substation to a then-planned Wautoma Substation. Bonneville’s current Petition is much broader in that it seeks a similar declaration for “various, as of yet undetermined transmission facilities[.]” Petition at P 3.1.1.

³ *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 (1996) (“Order No. 888”), *reh’g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 14, 1997), FERC Stats. & Regs. ¶ 31,048 (1997), *reh’g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *reh’g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *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).

⁴ *Detroit Edison v. FERC*, 333 F.3d 48 (D.C. Cir. 2003) (“Detroit Edison”). FERC recently issued Order No. 890, in which it modified Order No. 888. *See Preventing Undue Discrimination and Preference in Transmission Service*, 118 FERC ¶ 61,119 (2007) (“Order No. 890”). In Order No. 890, FERC did not disturb the jurisdictional divide established in Order No. 888. Order No. 890 at P 94.

8. Avista has no objection to the request of Bonneville for a Declaratory Order pertaining to the status of an owner lessor of the transmission Facilities located within the state. Without speculating as to the specific facts of service involved with the Facilities at issue, Avista believes that such Facilities would, under the application of the seven factor test established in Order No. 888, fall under FERC jurisdiction as to the facilities based test for jurisdiction.

9. To the extent that the Commission uses a seven-factor test for jurisdiction delineation between state and federal jurisdiction, such as it adopted for limited purposes for Puget Sound 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 suggests. Rather, consistent with Order No. 888 and *Detroit Edison*, the jurisdictional line should be based upon application of the seven-factor test.

10. Following *Detroit Edison*, unbundling does not necessarily remove any jurisdiction from states. Rather, the jurisdiction is determined by a seven-factor test. Thus, the bundled or unbundled nature of service is irrelevant to jurisdictional determinations. To the extent that the Commission were to use bundling or unbundling as the basis for retaining or relinquishing jurisdiction, such a decision may have significant implications on the development of regional transmission planning efforts, including any future efforts to develop a regional transmission organization. Such issues should be divorced from the pending Petition and should be decided separately at the appropriate time.

11. In granting Bonneville's January 2004 petition, the Commission noted that under *Detroit Edison*, states retain exclusive jurisdiction over the distribution portion of unbundled delivery service and stated that it was inappropriate to resolve the question posed on the basis of preemptive federal jurisdiction.⁵ Ultimately, the Commission found that, because neither the owner lessor nor the indenture trustee at issue in that case were subject to regulation as a public service company under the provisions of Title 80 RCW, it did not need to reach the issue of FERC's exclusive jurisdiction over unbundled transmission service.⁶

12. In this case, as in the earlier docket, it appears that the Commission will be able to address the question of Commission jurisdiction over the owner lessor raised in Bonneville's Petition without reaching the questions of whether those facilities are used for bundled or unbundled transmission service and whether FERC has exclusive jurisdiction over such service.

WHEREFORE, for the reasons stated herein, 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 5th day of April, 2007.

PAINE HAMBLEN LLP



Gary A. Dahlke
Of Attorneys for Avista Corporation

⁵ Order No. 1, Docket No. UE-040088 at P16 n.1 (issued February 20, 2004).

⁶ *Id.* at PP 16, 32.

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 F. Roberts Bonneville Power Administration Routing LC-7 P. O. Box 3621 Portland, OR 97232	Michael D. Hornstein Orrick Herrington & Sutcliffe, LLP Washington Harbour 3050 K Street NW Washington, DC 20007
Simon Ffitch, AAG Office of the Attorney General Public Counsel 900 Fifth Avenue, Suite 2000 Seattle, WA 98164-3188	Sally Johnston Assistant Attorney General WUTC Attorney General Office State Mail Stop 40128 Olympia, WA 98504


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