No. 26-2569

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AVISTA CORPORATION, et al.,
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION, et al.,
Respondents,

NORTHWEST REQUIREMENTS UTILITIES, et al.,
Intervenors.

ON PETITION FOR REVIEW OF FINAL AGENCY ACTION OF
THE BONNEVILLE POWER ADMINISTRATION

BRIEF OF THE PUBLIC COUNSEL UNIT OF THE WASHINGTON STATE ATTORNEY GENERAL'S OFFICE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Nicholas W. Brown,
Attorney General
Rachel Breslin
Alexandra Kory
Tad Robinson O'Neill
Assistant Attorneys General
State of Washington,
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 464-7744
Attorneys for the Public Counsel Unit of the Washington State Attorney General's Office

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I. INTRODUCTION

Utility consumers have virtually no control over whether their power comes to them from a private or public utility, nor do they have much say in the source of the energy that powers their utility. Because of disparities in power sources and costs over which consumers have no influence, in 1980 Congress enacted the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. § 839. Congress created the Residential Exchange Program (REP) as a key component of the Northwest Power Act to reduce the then-growing rate disparities between public and private utilities in the Pacific Northwest. Over time—and in the midst of a growing affordability crisis—those rate disparities have continued to widen, despite the REP and to the disadvantage of customers of private, investor-owned utilities in Washington and neighboring states. The Bonneville Power Administration's (BPA) March 2026 decision to continue excluding the environmental attributes of federal hydropower from the REP exacerbates those existing rate disparities and arbitrarily favors customers of public, consumer-owned utilities. The Attorney General's Public Counsel Unit (Public Counsel) submits this amicus curiae brief to emphasize that private utility customers should not be deprived of the benefits that Congress intended, and urges this Court to vacate BPA's decision.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

The Attorney General's constitutional and statutory powers include the submission of amicus briefs on matters that affect the public interest. *See Young Americans for Freedom v. Gorton*, 588 P.2d 195, 200 (Wash. 1978). The Attorney General also has a statutory right to advocate in matters of public interest, including the public's right to a fair distribution of public utility benefits regardless of the specific utility provider servicing each residence. *See City of Seattle v. McKenna*, 259 P.3d 1087, 1091-92 (Wash. 2011) (Attorney General's "powers and duties" include "discretionary authority to act in any court, state or federal, trial or appellate, on a matter of public concern") (internal quotation marks omitted).

More specifically, the Attorney General is charged with representing the people of the State of Washington in actions involving customer utility rates. Wash. Rev. Code § 80.01.100. The Attorney General's Office established the Public Counsel Unit to advocate on behalf of consumers of private, investor-owned utilities in Washington. *Power v. Washington Water Power Co.*, 662 P.2d 374, 378 (1983), *aff'd*, 684 P.2d 716 (1984). Public Counsel has a strong interest in ensuring that customers of privately-owned utilities are treated fairly and not deprived of benefits intended for the public. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 602-08 (1982) (ensuring "well-being of its residents" is well within a state's legitimate interests). In this case, Public Counsel's interest is to ensure federal power benefits are fairly distributed to all Washington electric utility customers. Because the BPA's 2026 decision directly impacts residential electricity rates, the Attorney General has a duty to represent the interests of privately-owned electricity customers in Washington in this matter.

III. STATEMENT OF AUTHORITY TO FILE

The Attorney General of the State of Washington submits this amicus curiae brief under Federal Rule of Appellate Procedure 29(a).[1] In accordance with Federal Rule of Appellate Procedure 29(a)(2) and (3), the Public Counsel Unit of the Washington State Attorney General submits this brief along with a motion for leave to file. Public Counsel did not attempt to seek the consent of all parties before filing.

IV. ISSUES ADDRESSED BY AMICUS CURIAE

Public Counsel wishes to highlight the ongoing affordability crisis impacting all Washingtonians and the increasing rate disparity facing customers of investor-owned utilities (IOUs). IOU customers face different economic realities than customers of public agencies and cooperative utilities because of the different nature of IOUs compared to public utilities (commonly referred to as

[1] Pursuant to Fed. R. App. Proc. 29(a)(4)(E), the Attorney General states that no party's counsel authored the brief in whole or in part; (2) no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) no person—other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this amicus brief.

consumer-owned utilities (COUs)). The current rate disparity between these two groups of customers is the result of key differences in how IOUs and COUs operate. Congress created the REP under the Northwest Power Act to address rate disparities between publicly and privately owned utilities. 1-ER-10.

When the Northwest Power Act was enacted over 40 years ago, state laws setting out green energy goals did not exist. That landscape has dramatically changed. State law sets green energy targets for all utilities in Washington, but COUs are impacted less by these carbon-free goals because hydropower, which most COUs rely on but not IOUs, is a carbon-free power source. In contrast, IOUs must invest in low- and no-carbon generation sources in order to meet their statutory targets, and the costs of those investments are passed onto consumers. While the REP addresses rate disparities due to the cost of power, it does not account for the cost savings that COUs enjoy because hydropower is already green energy. As renewable energy generation sources and renewable energy credits become increasingly more expensive, federal hydropower becomes more valuable beyond its stated cost.

In the decision below, BPA refused to update the REP Benefit to reflect the increased value of federal hydropower. This frustrates Congress's goal of providing rate relief for IOU customers and equitably spreading the benefits of federal hydropower in the Northwest Power Act. BPA's decision does not reflect current economic realities and dishonors Congressional intent. In its current form in the

Record of Decision, the REP increases the existing rate disparity between IOU and COU customers. This will exacerbate the affordability crisis, a result that is inconsistent with the purpose of the Northwest Power Act. Public Counsel asks the Court to uphold the intent of the Northwest Power Act and ensure that IOU customers receive the rate disparity protection intended by Congress.

V. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Public Counsel largely adopts the facts as presented in Petitioners' opening brief, DE-31, but offers the following additional facts to illustrate its position.

A. Congress Adopted the Northwest Power Act Specifically to Address the Then-Growing Imbalance in the Allocation of Low-Cost Federal Hydropower Benefits

There was a time when the Federal Columbia River Power System generated enough hydropower to satisfy the electricity needs of all Pacific Northwesterners. 1-ER-10-11. However, due to growing power demand during the second half of the twentieth century, IOUs needed to obtain expensive, market-rate thermal generation resources to meet customer needs. 1-ER-10. The IOUs passed the costs of these more expensive resources onto its customers, resulting in higher utility rates. *Id*. By contrast, COU customers did not see the same rate impacts because COUs received priority access to hydropower-generated electricity under federal law. 16 U.S.C. § 832c(a); 1-ER-10. As a result, in the 1970s, IOU customers were paying up to three times as much for electricity as COU customers. 1-ER-10-11.

Recognizing the inequity of this situation, Congress enacted the Northwest Power Act in part to address the rate disparity. 16 U.S.C. §§ 839-839h.

The Northwest Power Act provided "rate relief for consumers served by IOUs" by spreading the benefits of cheaper federal hydropower to IOU customers more evenly with COU customers. *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 398 (1984). Through the REP created by the Northwest Power Act, all residential and small farm electric customers in the Pacific Northwest benefit from low-cost federal hydropower. The REP is implemented as a purchase and sale exchange between the IOUs and BPA: IOUs sell power generated by the higher-cost resources at the average system cost of resources, and BPA sells the same quantity of power back to the IOUs at BPA's lower cost of power. 16 U.S.C. § 839c(c)(1); 1-ER-11. BPA then pays the IOU the difference between the two sales, multiplied by the IOU's residential load. 16 U.S.C. § 839c(c)(1); 1-ER-12. This payment is known as the REP Benefit and is funded by levying a surcharge on COU customers' power bills, appearing as a credit on an IOU ratepayer's utility bill. 16 U.S.C. § 839c(c)(1), (3); 1-ER-12. By law, these cost benefits are passed through directly to an IOU's residential customers; the IOU and its shareholders do not retain any benefit or profit from the REP Benefit. 16 U.S.C. § 839c(c)(3). Under this programmatic structure, the financial benefits of federal hydropower are distributed to both COU and IOU customers, allowing both groups of residential electric customers to benefit directly from the cheaper federal hydropower. Between 1981 and 2028, IOU customers will have saved about $11 billion through the REP Benefit. 1-ER-13.

Currently, seven utilities participate in the REP: six IOUs and one COU. *Id*. Three of the IOUs serve residential customers in Washington: Avista Corporation, Pacific Power and Light ("PacifiCorp"),[2] and Puget Sound Energy ("PSE"). *See* Washington UTC Comments, AR_002058, 1 (Jan. 21, 2026).

B. Washington's Clean Energy Transformation Act and Hydropower's Role as a Carbon-Free Power Source

In 2019, Washington passed the Clean Energy Transformation Act (CETA), which requires retail electricity sales to be greenhouse gas neutral by 2030 and carbon-free by 2045. Wash. Rev. Code § 19.405.020(2). IOUs and COUs face starkly different paths to satisfy these targets due to the differences in their fuel profiles.

Hydropower is a carbon-free power source, a valuable environmental attribute in an energy economy aiming to be carbon-free within 19 years. As discussed above,

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[2] As of the date of this amicus brief, there is a matter pending before the Washington Utilities and Transportation Commission by Pacific Power and Light requesting permission for it to transfer its Washington assets to Portland General Electric. If approved, Portland General Electric would control and operate PacifiCorp's Washington service territory. *See generally In the Matter of the Joint Application of Portland General Electric Co., GemSub LLC & PacifiCorp d/b/a Pacific Power & Light Co. For An Order Authorizing Service Area Transfer & Asset Purchase & Sale, Wash. Utilities & Transp. Comm'n.*, Docket UE-260208.

there is sufficient federal hydropower available for COUs to meet most residential customer electricity demand. This means that the majority of a COU's electricity is already carbon-free, bringing COUs much closer to CETA-compliance than IOUs. To meet the CETA benchmarks, IOUs must continue to make investments in low- and no-carbon generation sources—investments that IOU customers will see reflected in higher rates.

C. Washingtonians Face an Ever-Growing Affordability Crisis

Affordability is a pressing issue for all Americans. Washingtonians are concerned about the cost of living and inflation, and for good reason.[3] Washington is the fifth most expensive state to live in. *Id.* Of the almost 30 Metropolitan Statistical Areas in Washington, five are within the top ten percent for highest cost of living nationwide. *Id.* at 6. The prices of goods and household expenses in Washington are outpacing the national average. *Id.* at 3. In fact, prices in Washington have risen faster than in any other state in the country. *Id.* As shown in **Figure 1**[4], the cost of items in the western United States is higher compared to the rest of the

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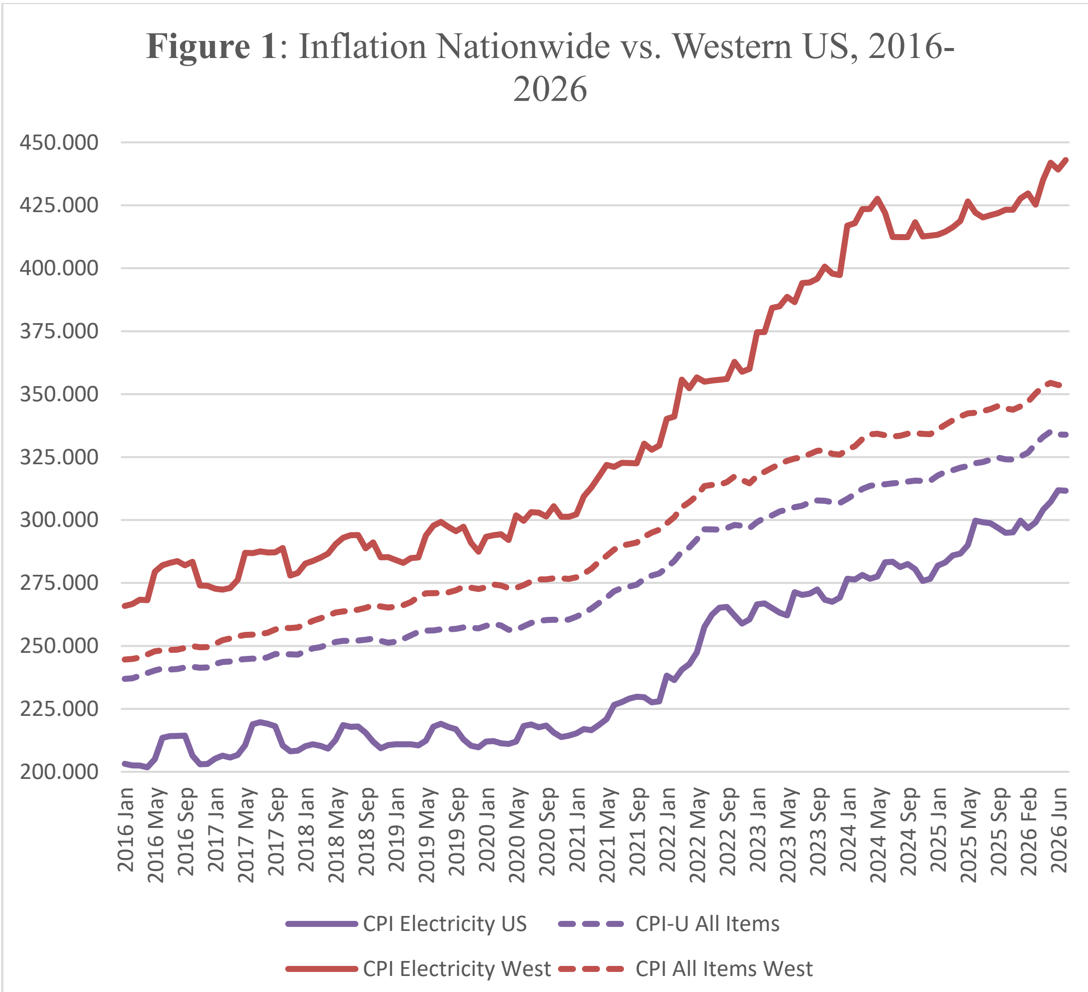
[3] Washington Roundtable, *Prices We Pay: Understanding Washington's Affordability Crisis*, 2 (Mar. 2026), https://www.waroundtable.com/wp-content/uploads/2026/03/WRT_AffStudy_FINAL_3.20.26.pdf.

[4] **Figure 1** compiles data from U.S. Bureau of Labor Statistics, *Consumer Price Index for All Urban Consumers (CPI-U)*, Series IDs CUUR0400SEHF01, CUUR0400SA0, CUUR0000SA0, and CUSR0000SEHF01 https://data.bls.gov/timeseries/CUUR0400SEHF01?amp%253bdata_tool=XGtable&output_view=data&include_graphs=true

country. Electricity rates are a significant contributor to this trend. Since 2021, Western electricity prices have significantly outpaced national inflation and have increased at a higher rate than national electricity prices.



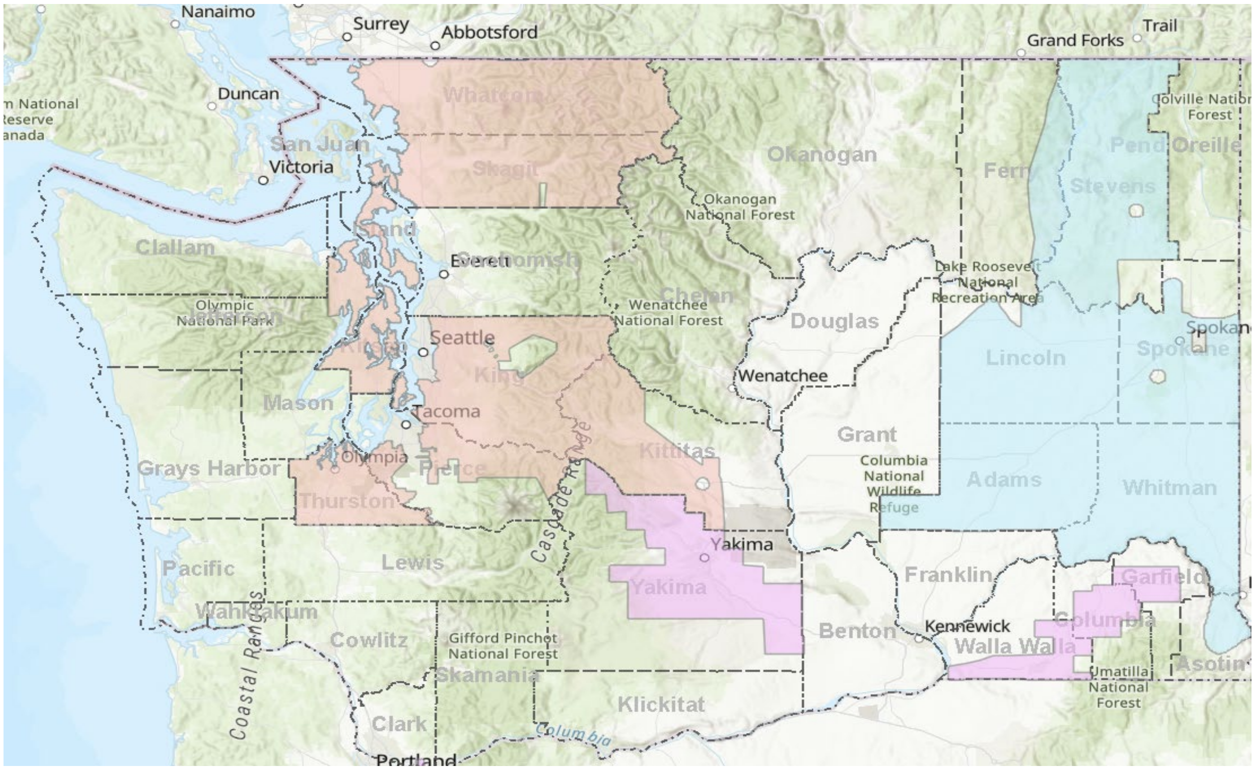
Washingtonians have seen a 62% increase in the cost of housing and utilities, compared to the national average of 55%. *Prices We Pay*, *supra*, at 4. Total annual consumer spending by Washingtonians has increased by almost 55% since 2015. *Id*. Washingtonians spend 59% of their income on essentials, with housing and utility costs constituting 20% of those expenditures. *Id.* at 3. In the last ten years, Washington saw the sixth largest increase in housing and utility prices nationwide. *Id.* at 4.

These statistics show that in a relatively short period of time Washingtonians have seen their spending power decrease significantly. As a result, Washingtonians are spending more to meet daily needs, and some are facing difficult decisions to forgo certain necessities.

D. Washingtonians Cannot Choose Their Utility Providers

Like consumers nationwide, Washington electricity customers are unable to choose their provider. Geography determines a household's utility provider, and if a customer wants to switch their electricity provider, they need to move. This has been the case since the Northwest Power Act was enacted. Depending on where they live, electricity customers can either be served by an IOU or a COU. **Figure 2** shows the service areas for the three IOUs in Washington state, all of which participate in the REP. Avista, shown in blue, serves Eastern Washington, including Spokane and the Spokane Valley, Adams County, Lincoln County, and Whitman County. PacifiCorp, shown in pink, serves communities in Central Washington, including Walla Walla, the Yakima Valley, and portions of Columbia and Garfield County. PSE, shown in orange, serves Western Washington, including Island County, portions of King County, Kitsap County, Kittitas County, Pierce County, Skagit County, Thurston County, and Whatcom County.

Figure 2 – Washington UTC Regulated Investor-Owned Utilities Service Territory[5]



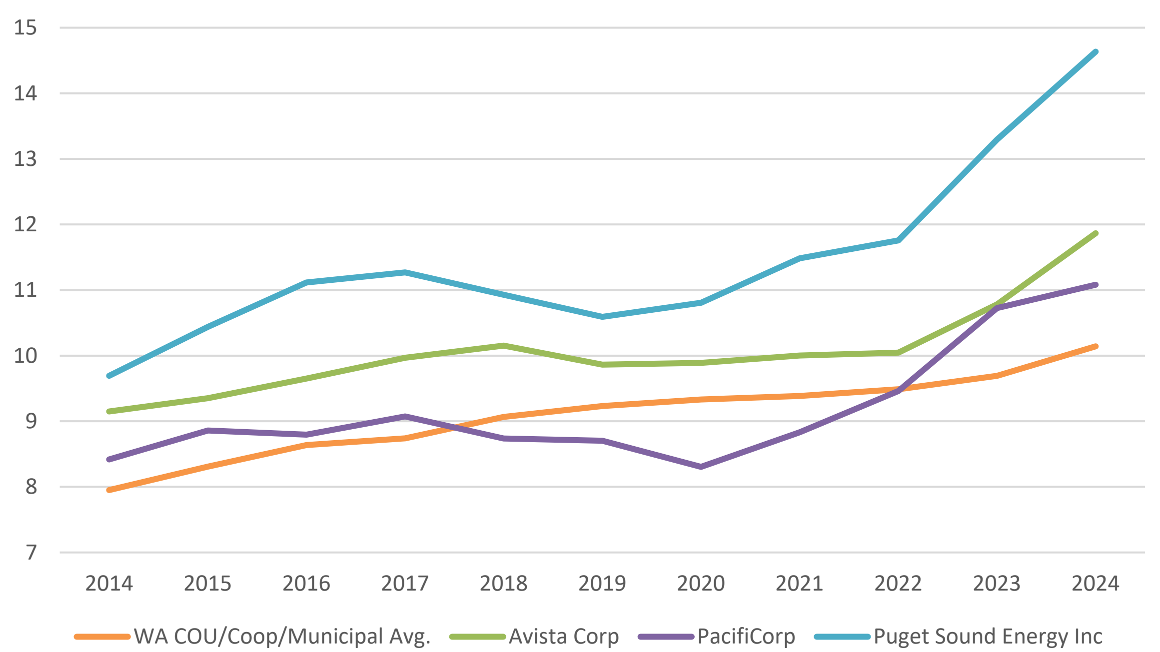
These three IOUs serve approximately 45% of Washington state's electric customers. Washington UTC Comments, AR_002058, 1. This means that 45% of the electricity ratepayers in Washington can only benefit from hydropower either by physically relocating or through their IOU's participation in the REP Benefit.

[5] Wash. Utilities & Transp. Comm'n, *UTC Regulated Investor Owned Utilities – Electric* (last visited Sep. 8, 2026), https://wutc.maps.arcgis.com/apps/instant/basic/index.html?appid=39cd8428f872494e91b13da94a5cd3cd

E. Washington IOU Customers Have Endured Drastic Rate Increases Since 2018

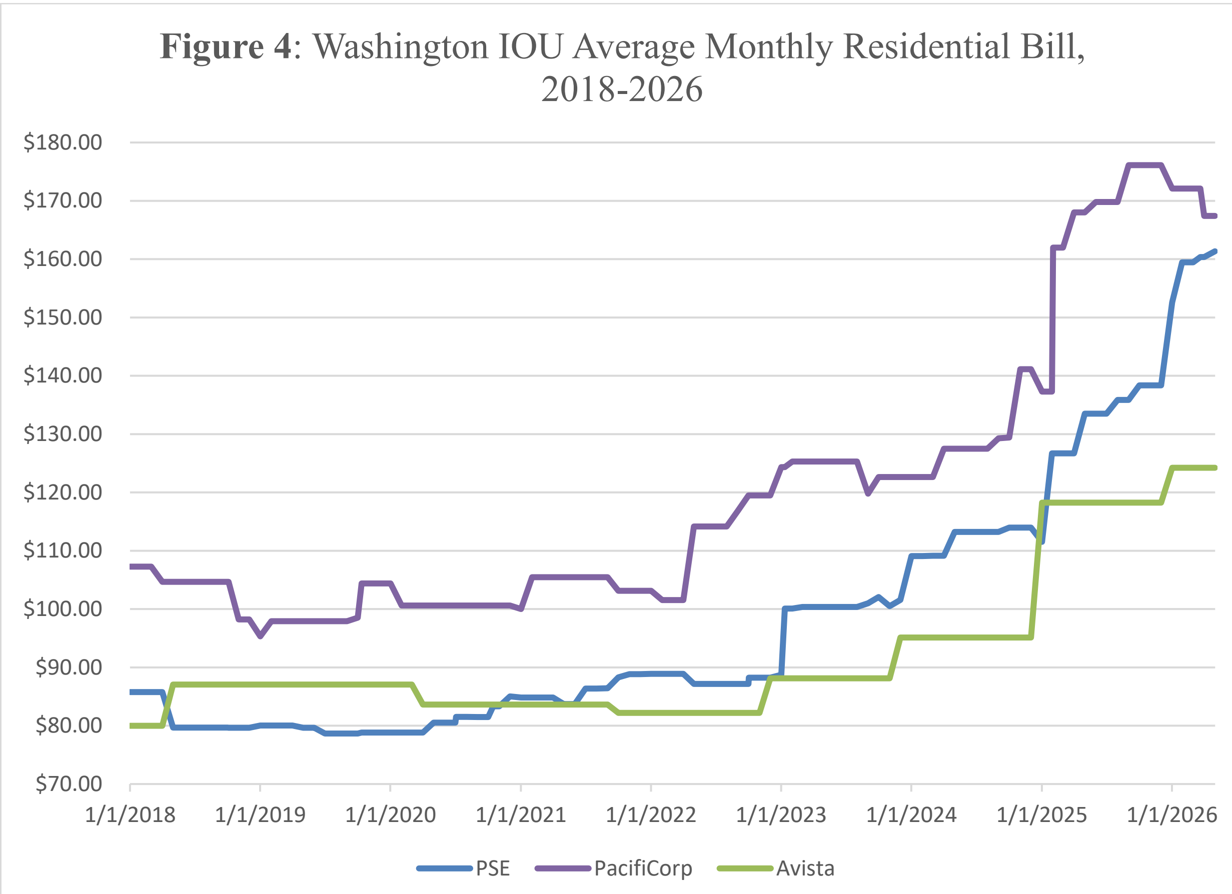
All Washingtonians, both IOU and COU customers, are facing the same affordability challenges. But with regard to rising electricity costs, the magnitude of these challenges depends on whether a customer is served by an IOU or a COU, something a customer has virtually no control over. Despite the intent of the REP Benefit, significant rate disparities between IOU and COU customers continue to increase. **Figure 3**[6] demonstrates the rate disparity between Washington IOU and COU customers from 2014 to 2024.

Figure 3: Washington State Retail Electricity Prices, 2014-2024 ($/kWh)



[6] **Figure 3** compiles data from U.S. Energy Info. Admin., *Electric Sales, Revenue, and Average Price*, T6: Residential Sector (Oct. 7, 2025), https://www.eia.gov/electricity/sales_revenue_price/

IOU customers are no longer benefitting from the same inexpensive energy to the same extent as COU customers. Not only are IOU customers paying more for electricity, but their rates have increased significantly and at a faster rate than COU electricity rates, especially since 2020. **Figure 4**[7] shows a closer look at the magnitude of the drastic rate increases Washington IOU customers face.



[7] **Figure 4** compiles data from Puget Sound Energy, *Rates schedule summaries*, https://www.pse.com/en/pages/rates/schedule-summaries#sort=%40documentdate%20descending; Avista, *Washington Rates*, https://www.myavista.com/about-us/our-rates-and-tariffs/washington-rates; and Pacific Power, *Washington rates and tariffs*, https://www.pacificpower.net/about/rates-regulation/washington-rates-tariffs.html (last visited Sep. 8, 2026).

Within the last two years, all Washington IOU residential customers experienced an increase of at least 30% to their monthly electricity bill. PSE residential electricity ratepayers saw a 43% increase in their monthly average bill, rising from $113.24 to $161.35 per month. PacifiCorp and Avista customers were not far behind, with 29% and 30% increases in their bills, respectively.

IOUs will continue to see steep rate increases over the next three to four years, further deepening the rate disparity with COU customers. On top of the rate increases discussed above, as of the date of this amicus brief, both Avista and PSE are requesting permission to implement significant rate increases for electricity customers. Avista wants to increase electricity rates by 25% through 2030. Washington Utilities & Transportation Commission v. Avista Corporation, d/b/a Avista Utilities, Order 01 ¶¶ 1-4, Dockets-260007 & UG-240008 (Consolidated) (Feb. 2, 2026). If approved as filed, by 2030 the average customer's electric bill will increase by $33.71 per month.[8] PSE wants to increase electricity rates by 29% through 2029. Washington Utilities & Transportation Commission v. Puget Sound Energy, Order 01 ¶¶ 1-4, Dockets UE-260005 & UG-260006 (Consolidated) (Mar. 13, 2026). If approved as filed, by 2029 the average customer's electric bill

[8] Press Release, Washington Attorney General Nick Brown, AG Brown fights to save Avista customers over $600 million on energy bills (June 13, 2026), https://www.atg.wa.gov/news/news-releases/ag-brown-fights-save-avista-customers-over-600-million-energy-bills

will increase by $50.58 per month.[9] While PacifiCorp is not currently seeking a rate increase, it is likely to file one in the coming years. These rate projections are conservative; they do not include the additional rate increases customers see due to the approval of trackers and other cost-recovery mechanisms by the Washington Utilities and Transportation Commission outside the rate case process.

VI. ARGUMENT

A. BPA's Decision Frustrates the Purpose of the Northwest Power Act by Widening the Disparity in the Value of Hydropower Between IOU and COU Customers

Since 1980, residential electricity customers have not been able to choose their electricity provider, making customers beholden to the rates and services available at their address. This prolonged lack of choice makes the core purpose of the Northwest Power Act as relevant today as it was in 1980. Whether you enjoy benefits from federal hydropower should not depend on your domicile. BPA's refusal to account for the value of federal hydropower's environmental attributes when calculating the REP Benefit recreates the problem that spurred enactment of the Northwest Power Act in the first place: the benefits of federal hydropower are inequitably distributed between COU and IOU customers solely due to where a

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[9] Press Release, Washington Attorney General Nick Brown, AG Brown continues fight against excessive energy rate increases with challenge to PSE rate increase (Jul. 30, 2026), https://www.atg.wa.gov/news/news-releases/ag-brown-continues-fight-against-excessive-energy-rate-increases-challenge-pse

customer lives. COU customers enjoy a disproportionate benefit solely by chance. The growing rate disparity between IOU and COU customers demonstrates this lopsidedness. Decreases to the REP Benefit—like the one BPA enacted below—exacerbate the existing inequity between COU and IOU customers.

Per Congress, all electricity customers are supposed to benefit from the utilization of federal hydropower, whether through its direct use to generate electricity, resulting in lower-than-average electricity rates, or through the REP Benefit. As demonstrated above, on average COU customers pay significantly cheaper electricity rates than IOU customers, mainly due to the COUs' access to federal hydropower. IOU customers only share in those cheaper rates via the REP Benefit. Forecasts estimate that there will be significant cuts to the REP Benefit in 2028 after the ASCM and Legal Interpretation and Implementation Methodology for the Section 7(b)(2) rate test processes end. 2-ER-183. A decrease in the REP Benefit will decrease the utility rates of COU customers but increase the utility rates of IOU customers. Decreasing the monetary value of the REP Benefit unfairly and unjustifiably decreases the amount IOU customers benefit from hydropower while further increasing the benefit to COU customers.

At the same time IOU customers are looking at a monetary decrease in the REP Benefit, the recently approved Residential Purchase and Sale Agreement by BPA will further decrease the REP Benefit for IOU customers if it is not amended to account for the ancillary benefits. Similar to when the Northwest Power Act was enacted, Washington is yet again seeing steep rate disparities between IOU and COU customers. These disparities are explained in large part by the different levels of investment needed to meet utility demand; COUs do not need to make significant investments because of their priority access to federal hydropower, IOUs—without that priority access—must make those large investments. As currently calculated per the terms of the Residential Purchase and Sale Agreement approved in BPA's March 2026 Record of Decision, the REP Benefit does not account for the monetary value of hydropower created by the power's ability to meet a utility's state-mandated green energy compliance requirements. This discrepancy in the value of hydropower to residential ratepayers will continue unless BPA's decision below is vacated and the REP Benefit begins accounting for the environmental attributes of federal hydropower. Refusing to update the REP Benefit to reflect the increased value of hydropower frustrates Congress's goal of providing rate relief for IOU customers and equitably spreading the benefits of hydropower in the Northwest Power Act.

B. Significant Decreases in the Value of the REP Benefit Will Exacerbate the Affordability Crisis

While all utility customers are facing a similar affordability crisis, IOU customers are more deeply impacted due to the ever-rising electricity bills from IOUs. As demonstrated above, IOU customers already pay significantly more for electricity than COU customers, and they are facing steeper rate increases in the coming years. These dire affordability concerns will only be made worse if the amount of rate relief IOU customers receive from the REP Benefit is decreased. This decrease in rate relief will come from two sources. Either from changes to the inputs for the REP Benefit calculation through the ongoing BPA rulemaking process, which is outside the control of this Court, or from changes to how the value of federal hydropower is measured, which is squarely before the Court today. During this time when IOU customers face perpetually increasing electricity bills, these rate relief mechanisms are essential and should be updated to reflect economic reality.

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VII. CONCLUSION

For the foregoing reasons, Public Counsel supports Petitioners' request that this Court grant the petition for review, vacate BPA's March 2026 Record of Decision, and remand for further proceedings. In doing so, this Court can ensure that federal REP Benefits are distributed in a manner that does not unduly favor certain residents over others simply by virtue of whether their residence is served by a private or public utility company.

RESPECTFULLY SUBMITTED this 25th day of September, 2026.

NICHOLAS W. BROWN
Attorney General

/s/ Rachel Breslin

RACHEL BRESLIN, WSBA No. 64639
ALEXANDRA KORY, WSBA No. 49889
TAD ROBINSON O'NEILL, WSBA No. 37153
Assistant Attorneys General
Public Counsel Unit
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
206-464-7744
Rachel.Breslin@atg.wa.gov
Alexandra.Kory@atg.wa.gov
Tad.Oneill@atg.wa.gov
Attorneys for the Public Counsel Unit of the Washington State Attorney General's Office

CERTIFICATE OF SERVICE

I hereby certify that, on September 25, 2026, I caused the foregoing to be electronically filed with the Clerk of the United States Court of Appeals for the Ninth Circuit by using the ACMS system.

Date: September 25, 2026

/s/ Rachel Breslin
RACHEL BRESLIN

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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