

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION**

**PROPOSED RESIDENTIAL PURCHASE AND)
SALE AGREEMENTS FOR THE) BPA DOCKET NO. PS-6
RESIDENTIAL EXCHANGE PROGRAM)
ESTABLISHED BY SECTION 5(c) OF THE)
PACIFIC NORTHWEST ELECTRIC POWER)
PLANNING AND CONSERVATION ACT)**

**COMMENTS OF THE
IDAHO PUBLIC UTILITIES COMMISSION
ON BOTH THE "BRIDGE AND RD RPSA AGREEMENTS"**

On May 16, 2008, the Bonneville Power Administration (BPA) released two draft Residential Purchase and Sale Agreements (RPSA) for implementing the Residential Exchange Program (REP) authorized by Section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act). The first Agreement is called a "Bridge RPSA" and is intended to be effective between October 1, 2008 and October 1, 2011. The second Agreement is called the "Regional Dialogue Long-Term RPSA." BPA has invited comments on the "highlighted" portions of both Agreements.

The Idaho Public Utilities Commission (Idaho PUC) appreciates the opportunity to provide comments on these proposed Agreements. This matter is of great importance to all electric utility customers in Idaho, especially the customers of the investor-owned utilities (IOUs) subject to the jurisdiction of the Idaho PUC.

BPA currently has a number of ongoing proceedings that all relate to implementing the REP. The Idaho PUC is participating or has previously submitted comments in a number of

these proceedings (WP-07 Supplemental 2007 Rate Case and the Draft Record of Decision for the Average System Cost Methodology). Each of these proceedings involves issues that overlap, and our comments in this proceeding should be viewed as dependent upon and reinforcing of positions already expressed in these other proceedings.

**ELIMINATE THE “DEEMER” MECHANISM
(I.E., PAYMENT BALANCING ACCOUNT)**

Our primary concern pertains to the “deemer” mechanism, in Section 12 of the draft RPSA Agreements, entitled the “Payment Balancing Account.” However, the change in name has not turned this sow’s ear into a silk purse. The Idaho PUC strenuously opposes the use of the Payment Balancing Account or any other effort to re-implement or continue the “deemer” mechanism of the 1981 RPSAs. Requiring a utility to in essence “pay” BPA when the utility’s ASC is lower than the PF Exchange rate is contrary to the intent of Section 5(c) of the Northwest Power Act, 16 U.S.C. § 839c(c).

As drafted, Section 12 in part provides a mathematical formula for the operation of the Payment Balancing Account. Section 12(a) states:

Where P is the amount by which the [Balancing Account] increases or decreases as determined by the difference between the utility’s current ASC minus the PF Exchange Rate multiplied [by] the utility’s Residential Load. If the ASC is less than PF Exchange rate, P will be positive and add to the [Balancing account] balance; otherwise P will be negative and reduce the [Balancing Account] balance.

Section 12(a) at p. 12 (emphasis added). In addition, Section 12(b) also provides: “Whenever the ASC is less than BPA’s then-current PF Exchange rate during the term of this Agreement, the payment that would otherwise be owed BPA will be tracked by BPA and added to the Balancing Account.”

These provisions are clearly contrary to Section 5(c) of the Northwest Power Act. Congress enacted the Northwest Power Act for the purpose of providing rate relief to residential

and small farm customers of the IOUs. H.R. Report No. 96-976(I) at 60, 1980 U.S.C.C.A.N. 59889. The power exchanges were intended to provide IOUs with access to lower-cost federal power, and thereby (to the extent allowable under the ASCM) promote wholesale rate parity between BPA preference customers and eligible IOU customers. *Id.* Under the draft provisions of Section 12, BPA would stand Section 5(c) on its head. Instead of providing rate relief to customers of eligible IOUs when the IOU's ASC is greater than the PF Exchange Rate, the Balancing Account would provide benefits in the opposite direction when the IOU's ASC is less than the PF rate.

BPA recognizes that the existence of the deemer balances, if any, is a disputed issue in the WP-07 supplemental rate case. Despite this unresolved, long-running dispute, Section 12(a) would require the parties to the RPSAs to specify the beginning balance of the balancing account as of October 1, 2008, "subject to the resolution of any disputes regarding such balance." Although this quoted language seems to condition the starting balance "subject to" any resolution, the 20-year history of this ongoing dispute does not give the Idaho PUC confidence that the parties can timely reach "resolution" of the chronic deemer dispute. Indeed, Section 12(d) (Account Balance Carry Over) of the RPSAs allows any deemer account balance to be carried "over to the balancing account of the next RPSA." This "carry-over" mechanism does not promote the resolution of the chronic deemer problem but seemingly provides the parties with a convenient alternative to resolving this issue.

Section 12 should be stricken in its entirety. In its place, BPA should craft language that adopts a policy of suspending an IOU's participation in the REP when the utility's ASC is lower than the PF Exchange rate, but allowing the utility to resume REP eligibility when the utility's ASC is higher than the PF Exchange rate. This is a solution that is easy to understand

and implement. This policy harms no other party and, more importantly, is consistent with the Northwest Power Act.

OTHER COMMENTS

1. Section 11. Although Section 11 (Termination of Agreement) of the draft RPSAs provides greater flexibility than embodied in the 1981 RPSA, it is still overly restrictive. Rather than terminating a utility's participation in the REP program, a better route would be to merely suspend the utility's eligibility until such time as its ASC is greater than BPA's PF Exchange rate. This "suspension concept" is already encompassed in Section 11(c). In the alternative, Section 11 could be divided into two sections – one for termination and another section for suspension.

2. Section 20. The PUC also has serious concerns regarding draft Section 20 (Adjustments to Monetary Benefits) of the two RPSAs. In its entirety, this section provides:

The monetary benefits provided [the IOU] under this agreement shall be subject to adjustment by BPA to account for the overpayment of benefits under the residential exchange program settlement agreement, Contract No. _____, as amended, during FY 2002 through FY 2007. Any such adjustment shall be limited to those formally established by BPA in its wholesale power rate adjustment proceedings or other forums established by BPA for the determination of the amount of overpayment to be recovered and the recovery period.

Section 20 (emphasis added). The inclusion of this section raises three concerns.

First, the issue of overpayments is a disputed issue in the WP-07 supplemental rate case. More specifically, parties have advanced several arguments why the refund of benefits should be prohibited or limited to refunds back to October 1, 2006.

Second, the Ninth Circuit in *Portland General Electric Company ("PGE") v. BPA*, 501 F.3d 1009 (9th Cir. 2007), *cert. denied*, ___ U.S. ___ (2008) and *Golden Northwest Aluminum v. BPA*, 501 F.3d 1037 (9th Cir. 2007), *cert. denied sub nom. PGE v. BPA*, ___ U.S. ___ (2008),

did not order BPA to provide refunds to the consumer owned utilities. In commenting on the two circuit opinions, BPA acknowledges that “the Ninth Circuit provided little guidance to BPA in its [two] decisions regarding the subsequent actions BPA should take in response to those opinions.” BPA Response to APAC’s Motion to Strike, WP-07-M-BPA-77, p. 5. In neither opinion did the Ninth Circuit vacate the BPA rates. Indeed, given the Court’s findings in *Golden Northwest* that the PF rates were both too high and too low, the Court remanded the matter back to BPA “to set rates in accordance with this opinion.” 501 F.3d at 1053 (emphasis added). This is consistent with the well-established rule that courts do not set rates – they are empowered to affirm or set aside agency action. 5 U.S.C. § 706 (2). It is BPA that is vested with the authority to establish rates. 16 U.S.C. § 839e(a)(1).

Finally, although the Ninth Circuit found that the REP Settlement Agreements were contrary to law, there remains a question whether Section 3(b) of the 2000 REP Settlement Agreements survives. This section entitled “Invalidity” provides:

In the event the United States Court of Appeals for the Ninth Circuit finally determines, after all appeals and requests for reconsideration, that this Agreement (or Section 4(a), Section 4(c), or Section 5 of this Agreement) is unlawful, void, or unenforceable, then the provisions of Section 3(a) above shall be of no further force and effect, and the Parties intend and agree that: (1) the Firm Power and Monetary Benefits provided prior to such final determination shall be retained by [the IOU]; and (2) the satisfaction of BPA’s obligations to [the IOU] under Section 5(c) of the Northwest Power Act prior to such final determination shall be preserved, the maximum extent permitted by law. This Section 3(b) shall survive notwithstanding any determination that any other provision of this Agreement (or the exhibits) is unlawful, void, or unenforceable.

E.g., Idaho Power REP Settlement Agreement, WP-07-E-JP6-15, § 3(b) at p. 16-17 (emphasis added). The purported intent of draft Section 20 to recover the “overpayment of [REP Settlement] benefits” conflicts with Section 3(b) of the 2000 REP Agreements.

The 2000 REP Settlement Agreements also included a “Severability” clause that all of the provisions of the Agreement are independent and shall remain in effect even if other provisions of the Agreement are unlawful, void, or unenforceable. *Id.* at § 13(g) at p. 31. By the terms of the 2000 REP Settlement Agreement, BPA and the IOU Parties clearly contemplated the possibility that the Settlement Agreement might be overturned on appeal. Consequently, they made provisions in the 2000 Agreements that benefits provided under such REP Settlement Agreements would be retained by the IOUs. Thus, Section 20 of the proposed RPSAs would seem to run counter to Section 3(b) of the 2000 REP Settlement Agreements.

In summary, the Idaho PUC urges BPA to eliminate the deemer mechanism in Section 12 (Payment Balancing Account) from both RPSAs. We also recommend that the Termination provisions of Section 11 be revised to allow for a suspension of benefits if the utility’s ASC is below the PF exchange rate. Finally, Section 20 (Adjustments to Monetary Benefits) should be eliminated.

Respectfully submitted this 16th day of June 2008.

FOR THE IDAHO PUBLIC UTILITIES COMMISSION



Donald L. Howell, II
Deputy Attorney General

PO Box 83720
472 W. Washington Street (83702-5918)
Boise, ID 83720-0074
Idaho State Bar No. 3366
Telephone No. (208) 334-0312
E-mail: don.howell@puc.idaho.gov

N:BPA_rpsa_dh_Comments