NOTICES

DEPARTMENT OF ENERGY

Bonneville Power Administration

Legal Interpretation of Section 7(b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act

Friday, June 8, 1984 – Vol. 49, No. 112

49 Fed. Reg. 23,998

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Statutory Interpretation. *BPA File No:* 7(b)(2)-84.

SUMMARY: On January 23, 1984, Bonneville Power Administration (BPA) published a notice of proposed legal interpretation of section 7(b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. § 839 (1980). *See* 49 FR 2811 (Jan. 23, 1984). Under section 7(b)(2), after July l, 1985, the rates charged for firm power sold to public body, cooperative, and Federal agency customers, may not exceed in total, as determined by the BPA Administrator, such customers' power costs for their general requirements, under five specified assumptions. BPA invited comments and reply comments to its proposed legal interpretation. BPA considered these comments and reply comments in drafting the section 7(b)(2) implementation methodologies released on February 29, 1984, and published as an initial proposal in the Federal Register. 49 FR 11,235 (Mar. 26, 1984).

In this legal interpretation, BPA will explain its resolution of the basic legal questions involved in the implementation of section 7(b)(2). BPA currently is conducting separate hearings on the section 7(b)(2) implementation methodology under section 7(i) of the Northwest Power Act, 16 U.S.C. § 839e(i). Actual implementation of section 7(b)(2), however, will not occur until BPA's 1985 wholesale power rate proceeding conducted pursuant to section 7(i) of the Northwest Power Act in the fall and winter of 1984 and spring of 1985.

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SUPPLEMENTARY INFORMATION:

I. Background

A. Relevant Statutory Provisions

BPA is charged with the responsibility of implementing section 7(b)(2) of the Northwest Power Act. An agency's interpretation of the statute it is charged to administer is entitled to great deference; in this regard, the Ninth Circuit Court of Appeals recently held that "[b]ecause BPA helped draft and must administer the Act, we give substantial deference to BPA's statutory interpretation." *Cent. Lincoln Peoples' Util. Dist. v. Johnson*, No. 81-7622, *et al.*, slip op. (9th Cir. Feb. 9, 1984); *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708 (9th Cir., 1982).

Basic principles of statutory construction must be followed in interpreting the Northwest Power Act. These principles require that particular provisions of a statute be interpreted to give

effect to its overall purposes. *United States v. Am Trucking Ass'n*, 310 U.S. 534, 543 (1950). Wherever possible, statutory provisions should be construed so as to be consistent with each other. *Adams v. Howerton*, 673 F.2d 1036, 1040 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982). Thus, BPA interprets the Northwest Power Act in a manner which seeks consistency among the requirements of each section of the Northwest Power Act.[1]

Section 7(b)(2) is interpreted, therefore, in a manner which avoids conflict with the criteria of section 7(a)(1), under which the Administrator must establish rates to recover total system costs, and those of section 7(a)(2), under which the Federal Energy Regulatory Commission shall approve BPA rates only after finding that BPA rates: (1) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System, (2) are based on BPA's total system cost, and (3) equitably allocate the costs of Federal transmission system between Federal and non-Federal users.

In addition to the Northwest Power Act, BPA is governed by the Bonneville Project Act, 16 U.S.C. § 832, *et seq.*, the Federal Columbia River Transmission System Act, 16 U.S.C. § 838, *et seq.*, and the Flood Control Act of 1944, 16 U.S.C. § 825, *et seq.* These statutes require BPA to set rates, in accordance with sound business principles, at levels sufficient to recover BPA's total system costs, including repayment of the Federal treasury investment in the Federal Columbia River Power and Transmission System. All statutory provisions concerning the timely recovery of BPA's revenue requirement are relevant to the interpretation of the Northwest Power Act. For "[w]hen there are two acts upon the same subject, the rule is to give effect to both if possible." *Morton v. Mancari*, 417 U.S. 535, 551 (1974), quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

Section 7 of the Northwest Power Act, 16 U.S.C. § 839e, contains a number of directives that the BPA Administrator must consider in establishing rates for the sale of electric energy and capacity and for the transmission of non-Federal power. Section 7(b)(2), commonly referred to as the "rate test", is one of these directives. Under section 7(b)(2) of the Northwest Power Act, 16 U.S.C. § 839e(b)(2), after July 1, 1985, rates charged for firm power sold to public body, cooperative, and Federal agency customers (exclusive of amounts charged those customers for costs specified in section 7(g) of the Northwest Power Act) may not exceed in total, as determined by the Administrator, such customers' power costs for general requirements, if specified assumptions are made. Section 7(b)(2) specifies that in determining public body and cooperative customers' power costs during any year after July 1, 1985, and the ensuing four years, the Administrator should assume:

[1] The Association of Public Agency Customers (APAC) argues that BPA will disregard section 7(b)(2) if it is not feasible to recover costs through section 7(b)(3), and suggests that BPA will subordinate section 7(b)(2) to section 7(a). APAC Comments at 29. The Public Power Council also suggests that by this interpretation BPA has established a "hierarchy of statutory obligations." PPC Comments at 3. The Public Generating Pool declares that "[s]ection 7(b)(2) is the cornerstone of the Regional Act for Preference Customers." PGP Comments at 1. These arguments suggest that BPA properly could ignore other sections of the Northwest Power Act should a conflict with section 7(b)(2) arise. BPA rejects any approach which reads section 7(b)(2) in isolation from other provisions with which section 7(b)(2) must be consistent.

(A) the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customer loads which are –

(i) served by the Administrator, and

(ii) located within or adjacent to the geographic service boundaries of such public bodies and cooperatives;

(B) public body, cooperative, and Federal agency customers were served, during such five-year period, with Federal base system resources not obligated to other entities under contracts existing as of the effective date of this Act (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in subparagraph (A) of this paragraph;

(C) no purchases or sales by the Administrator as provided in section 5(c) were made during such five-year period;

(D) all resources that would have been required, during such five-year period, to meet remaining general requirements of the public body, cooperative and Federal agency customers (other than requirements met by the available Federal base system resources determined under subparagraph (B) of this paragraph) were –

(i) purchased from such customers by the Administrator pursuant to section 6, or

(ii) not committed to load pursuant to section 5(b), and were the least expensive resources owned or purchased by public bodies or cooperatives; and any additional needed resources were obtained at the average cost of all other new resources acquired by the Administrator; and

(E) the quantifiable monetary savings, during such five-year period, to public body, cooperative and Federal agency customers resulting from –

(i) reduced public body and cooperative financing costs as applied to the total amount of resources, other than Federal base system resources, identified under subparagraph (D) of this paragraph, and

(ii) reserve benefits as a result of the Administrator's actions under this Act were not achieved. 16 U.S.C. § 839e(b)(2).

B. Scope of Interpretation

BPA has completed three tasks to create a methodology for implementation of section 7(b)(2). The first task was the development of this legal interpretation, which resolves only the

basic legal issues necessary to implement section 7(b)(2). Application of section 7(b)(2) methodologies and any resulting** cost reallocation under section 7(b)(3) will be addressed through BPA wholesale rate proceedings for periods beginning on July l, 1985. The second task was the development of a computer model to perform the rate test. The third task was the preparation and release of a proposed rate test methodology. By letter of March 6, 1984, the BPA Administrator indicated his intent to phase the 1985 hearings process so that a section 7(i) hearing on BPA's proposed 7(b)(2) implementation methodology could begin on April 10, 1984. This phasing of the hearings process will BPA and the parties to address specific section 7(b)(2) issues apart from other issues in the 1985 rate case. The purpose of the first phase, however, is solely to provide input for BPA's general rate proceeding.

C. Public Comment Procedures

On January 23, 1984, BPA published a "Notice of Proposed Legal Interpretation of Section 7(b)(2) of the Pacific Northwest Electric Power Planning and Conservation Act; Request for Comments." 49 FR 2811 (January 23, 1984). In the notice, BPA requested comments from the public on the legal issues and definitions contained in the notice, and other legal issues which the public believed to be relevant to the statutory interpretation. BPA received comments from fourteen parties, including representatives of the publicly-owned utilities, investor-owned utilities (IOUs), and direct service industrial customers (DSIs).[2] BPA's Public Involvement Manager made these comments available to interested parties. BPA also requested reply comments in the proposed notice. BPA received written replies from four parties and copies of the reply comments were reproduced and sent to interested parties by February 29, 1984.[3] This legal interpretation has taken full consideration of both the first round comments and the reply comments of interested parties.

II. Interpretation

A. Definitions

This section contains definitions applicable to section 7(b)(2). Terms identified in the Northwest Power Act have the same meaning in this interpretation, unless further defined.

1. *7(b)(2) customers:* Those firm power customers of BPA that are listed in section 7(b)(2) of the Northwest Power Act as subject to the rate test, *viz*, public bodies, cooperatives, and Federal agencies.

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[2] The following parties responded to the first round request for comments: Direct Service Industrial Customers of BPA (DSIs), Portland General Electric (PGE) as representative for the Intercompany Pool (ICP), Association of Public Agency Customers (APAC), the Public Power Council (PPC), the Public Generating Pool (PGP), Snohomish County Public Utility District No. 1 (Snohomish), Public Utility District of Grant County (Grant), Lewis County Public Utility District (Lewis), Public Utility District 3 of Mason County (Mason), Pacific Northwest Generating Company (PNGC), Lincoln Electric Cooperative, Inc. (Lincoln), Benton Rural Electric Association (Benton), Rural Electric Company of Rupert, Idaho (Rupert), City of Tacoma Department of Public Utilities (Tacoma), Eugene Municipal Utilities (Eugene), Canby Utility Board (Canby), and Northern Lights, Inc. (Northern Lights). Grant, Lewis, Mason, PNGC, Lincoln, Benton, Rupert, Tacoma, Eugene, Canby, and the PGP adopted the comments submitted by the PPC. Grant and Eugene also adopted the comments of the PGP.

[3] BPA received reply comments from the PPC, DSIs, APAC and the PNGC.

2. *Within or adjacent:* Relating to direct service industrial (DSI) customer loads determined in accordance with section 7(b)(2)(A) to be geographically** within or adjacent to the service territories of 7(b)(2) customers.

3. *Forecast DSI loads:* Those loads of direct service industries that are forecast to be served by BPA, during any future period, pursuant to section 5(d)(1) of the Northwest Power Act.

4. *Relevant rate case:* The wholesale power rate adjustment proceeding being conducted at the time the projections for section 7(b)(2) are made, and in which any adjustment to rates in accordance with section 7(b)(2) may be reflected.

5. *7(b)(2) case:* The entire process of projecting rates for the relevant five-year period under the provisions of section 7(b)(2) of the Northwest Power Act, including specific data, assumptions, and results.

6. *Program case:* The entire process of projecting rates to be charged in the future under the provisions of the Northwest Power Act other than section (7)(b)(2), including specific data, assumptions, and results.

7. *Relevant five-year period:* The test year of the relevant rate case, plus the ensuing four years.

8. *7(b)(2) general requirements:* For the purpose of this methodology, the public body, cooperative and Federal agency customers' electric power assumed to be purchased from BPA in the 7(b)(2) case. General requirements include power purchased from BPA only under section 5(b) of the Northwest Power Act; section 5(c) purchases from BPA are not included.

9. *Applicable 7(g) costs:* the costs identified in section 7(g) of the Northwest Power Act that are also listed in section 7(b)(2), *viz*, costs chargeable** to 7(b)(2) customers[4] for conservation, resource and conservation credits, experimental resources and uncontrollable events.

B. General Approach To Interpreting Section 7(b)(2)

Section 7(b)(2), read in isolation from the rest of the Northwest Power Act, assures that 7(b)(2) customers are charged no more for their general requirements after July 1, 1985, than they would have been charged if five assumptions were to be realized. These assumptions direct BPA to hypothesize power supply arrangements between itself and its customers that are quite different from reality.[5] Implementation of the five assumptions listed in section 7(b)(2) is by

[4] APAC, the PPC and Snohomish noted that "applicable 7(g) costs" should only be those 7(g) costs listed in 7(b)(2) that are chargeable to 7(b)(2) customers. BPA has clarified the definition to reflect this interpretation.

[5] For example, section 7(b)(2)(C) states, "no purchase or sales by the Administrator as provided in section 5(c) were made during such five-year period." In fact, there are currently 60 average system cost filings for establishing rates for power sold to BPA by IOUs and Publics participating in the residential exchange established in section 5(c).

nature an exercise in speculation.[6] This interpretation was undertaken to reduce this inherent speculation insofar as possible.

1. Section 7(b)(2) grants the Administrator broad discretion to limit consideration in the 7(b)(2) case to the five assumptions listed in section 7(b)(2) and the secondary effects of those assumptions.

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA proposed to interpret section 7(b)(2) as a broad grant of discretion. BPA also proposed to interpret section 7(b)(2) as limiting consideration in the 7(b)(2) case to the five assumptions listed in section 7(b)(2) and the secondary effects of those assumptions.

(b) Summary of Comments:

The DSIs and the ICP agree that section 7(b)(2) includes a broad grant of discretion. The ICP, however, maintains that the Northwest Power Act does not limit the assumptions of the "rate test" to those five specified in section 7(b)(2).

APAC, PGP, PNGC, Snohomish and the PPC agree with BPA that the Northwest Power Act limits the assumptions of the 7(b)(2) case to those specified in the Northwest Power Act. These parties, however, dispute the inclusion of secondary effects of the five assumptions in the 7(b)(2) case. The PPC contends that "the use of 'unavoidable secondary effects' in the calculation of the 7(b)(2) case is contrary to the Act." PPC Comments at 3. Moreover, the PPC feels that "[a]dding whatever additional considerations that may someday strike the Administrator's fancy as 'unavoidable secondary effects' hardly seems consistent with the House Commerce Committee's belief that all assumptions are specifically set forth in Section 7(b)(2)." *Id.* APAC also questions the meaning of "secondary effect", noting that the statute and legislative history never mention the term. APAC asserts, "…it is clear BPA is attempting to include factors not specified in section 7(b)(2) in the preference rate methodology thus bootstrapping administrative discretion without congressional authority." APAC Comments at 13. Snohomish contends that the modeling of secondary impacts "would amount to the addition of new assumptions in the statute." Snohomish comments at 3. APAC further argues that Congress consciously refused to grant the Administrator discretion in section 7(b)(2). APAC Comments at 24-25.

(c) Discussion:

The statute provides that after July 1, 1985, the 7(b)(2) customers' power costs "may not exceed … as determined by the Administrator" the power costs for general requirements based on the enumerated assumptions. 16 U.S.C. § 839e(b)(2). This language is a clear grant of

[6] Northern Lights agreed with BPA's observation in this regard. Northern Lights Comments at 3. APAC argued that Congress, in section 7(b)(2), intended to provide the Administrator with objective rate factors. Consistent with Congressional intent, BPA will implement section 7(b)(2) in an objective manner. This interpretation, however, was necessary in order for BPA to proceed with this implementation.

discretion to the Administrator to determine the manner in which the five assumptions of section 7(b)(2) are applied and the rate test is implemented. However, BPA recognizes that the reasonableness of methodologies used to implement section 7(b)(2) will be tested in the relevant rate case.

The Administrator will exercise his discretionary authority in the following manner. Except for the assumptions specified in section 7(b)(2), all underlying premises will remain constant between the program case and the 7(b)(2) case. Assumptions not specified by the statute will not be considered. The natural consequences,[7] however, of the 7(b)(2) assumptions will be given full recognition in the modeling of the 7(b)(2) customers' power costs in the 7(b)(2) case. This general approach will allow the 7(b)(2) case to be modeled under the same accepted ratemaking techniques used in the program case. This approach will also avoid the modeling of a hypothetical world that attempts to reflect in extreme detail what would have occurred had the Northwest Power Act not been enacted.

The legislative history of the Northwest Power Act supports limiting the assumptions of the 7(b)(2) case to those specified in the statute. The House Committee on Interstate and Foreign Commerce Report accompanying S. 885 (the bill that became the Northwest Power Act) notes that "[t]he assumptions to be made by the Administrator in establishing this ceiling are specifically set forth." H. Rep. No. 976-I, 96th Cong., 2d Sess., at 68 (1980). Similarly, the Report of the House Committee on Interior and Insular Affairs declares that "[s]ubsection 7(b)(2) establishes a 'rate ceiling' for BPA's preference customers, and specifies the method of calculating this ceiling…" H. Rep. No. 976-II, 96th Cong., 2d Sess., at 52 (1980).

Legislative history also supports including the natural consequences or unavoidable secondary effects of the assumptions listed in the Northwest Power Act. In particular, in addressing reserve benefits, Appendix B to the Report of the Senate Committee on Energy and Natural Resources provides that in addition to costs specifically described in sections 7(b)(2) (B) and (D), the Administrator is to consider "[a]ny other general system operating costs, including reserves…" Appendix B at 58.

As an illustration of the natural consequences referred to above, BPA has identified three secondary effects of the five assumptions found in section 7(b)(2). These effects involve demand elasticities, surplus levels and nonfirm energy markets.[8] The secondary effects must be included in section 7(b)(2) methodologies as natural consequences of the five assumptions in section 7(b)(2) on the results of underlying premises that are held constant between the program case and the 7(b)(2) case. For example, implicit in the function of section 7(b)(2) is the possibility that electricity prices may be different under the assumptions contained in section 7(b)(2). Therefore, it could be appropriate to reflect the effects of different price projections in loan forecasts used for the two cases. Ignoring these price effects would require adopting a new assumption, not specified in the statute, that the price elasticity or electricity demand for the 7(b)(2) customers is zero (in effect, adding something like this to the statute: "costs calculated

[7] These natural consequences have also been referred to as "secondary effects".
[8] This notice should not be taken as an exhaustive discussion of secondary effects. Other secondary effects may become clear during the implementation of section 7(b)(2) and the program case in the relevant rate case as a result of the section 7(i) process. The situations cited are simply examples.

pursuant to subsection (A)-(E) of this paragraph shall give only partial effect to the assumptions in those subsections"). An assumption of this nature is theoretically and empirically** unjustified and would be inconsistent with the structure of the models used to develop load forecasts for the relevant rate case. Similarly, surplus levels and the nonfirm energy market must change as a natural consequence of section 7(b)(2) assumptions. As the DSIs are assumed to shift to the private utilities and 7(b)(2) customers under section 7(b)(2), BPA's load/resource balance changes. This change will affect the level of BPA's surplus. The nonfirm energy market will also change; the top quartile of DSI loads will no longer be served by BPA's nonfirm energy.

Section 7(b)(2) requires BPA to assume that the section 7(b)(2) case is identical to the program case except for those differences required by the five assumptions set out in section 7(b)(2)(A)-(E).[9] Present modeling techniques used in the program case, which will be used in the modeling of the 7(b)(2) case, incorporate secondary effects. 49 FR 11235 (1984).

(d) Decision:

BPA interprets section 7(b)(2) as a broad grant of discretion. BPA will, however, limit consideration in the 7(b)(2) case to the five assumptions listed in section 7(b)(2). BPA will also consider the natural consequences of those assumptions in a manner consistent with the outcome of the section 7(i) hearing process for the relevant rate case.

2. Section 7(b)(2) will be implemented in a manner that avoids conflict with section 7(a).

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA proposed to interpret section 7(b)(2) so that implementation of section 7(b)(2), and any subsequent reallocation pursuant to section 7(b)(3), will not conflict with the requirements of section 7(a).

(b) Summary of Comments:

Both the DSIs and the ICP support application of section 7(b)(2) in a manner which will avoid conflict with BPA's statutory obligations to repay the United States Treasury and meet its operating costs. The PGP suggests that Bonneville has predetermined the results of the rate test. PGP Comments at 2. In a similar manner, the PPC and Snohomish argue that 7(b)(2) is coequal to 7(a), and that section 7(b)(2) is not subject to "waiver merely because of 'concerns' about revenue collection." Snohomish Comments at 4-5; *see* PPC Comments at 3. APAC adds that "BPA further suggests that it will disregard the section 7(b)(2) rate ceiling if BPA finds it not 'feasible' to recover costs through the section 7(b)(3) mechanism." APAC Comments at 29-30.

(c) Discussion:

[9] The DSIs, PPC, and APAC support this position. DSI Comments at 5; PPC Comments at 4; APAC Reply Comments at 3.

BPA will conscientiously follow the requirements of section 7(b)(2) to perform the "rate test" for its public body, cooperative and Federal agency customers. If the results of the rate test indicate that BPA must recover costs in excess of those allowed under section 7(b)(2), BPA will implement the section 7(b)(3) supplemental rate charge provision for that purpose. BPA's concern is that failure to recover some, or all, of the reallocated costs "through supplemental rate charges for all other power sold by the Administrator to all customers" may result in BPA's inability to meet the requirements of section 7(a). Such a determination, if it occurs, would be rigorously documented and exposed to careful review during the section 7(i) process for the relevant rate case. Should this occur, BPA would be forced to resolve a possible conflict among sections 7(b)(2), 7(b)(3), and 7(a).

Section 7(a) of the Northwest Power Act requires that BPA rates recover the costs of the electric power and transmission systems, including the repayment of Federal Treasury investments in those systems. Section 7(a) reaffirms this long-standing obligation which was articulated earlier in the Bonneville Project Act and the Federal Columbia River Transmission System Act. Section 7(b) must be applied in a manner which enables BPA to set rates at levels sufficient to recover costs, or the rates will not receive confirmation and approval. *See* section 7(a)(2) of the Northwest Power Act, 16 U.S.C. § 839e(s)(2).

The legislative history of the Northwest Power Act supports application of section 7(b) in a manner consistent with BPA's primary statutory obligation that its rates recover costs. The House Interior Committee report declares that:

> Section 7 of the legislation sets out the requirements BPA must follow when fixing rates for the power sold its customers under this legislation. Subject to the general requirement (contained in section 7(a)) that BPA must continue to set its rates so that its total revenues continue to recover its total costs, BPA is required by the legislation to establish the following rates: [report continues by setting out rate structure of the Act]. H. Rep. No. 976-II, 96th Cong., 2d Sess., at 36.

Section 7(a)(2) illustrates the importance of BPA's statutory obligation to set rates at levels sufficient to collect its costs. Section 7(a)(2) states that FERC cannot approve BPA's rates unless the rates "are sufficient to assure repayment of the federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs," 16 U.S.C. § 839e(a)(2)(A), and "are based upon the Administrator's total system costs…" 16 U.S.C. § 839e(a)(2)(B). Indeed,

> BPA is a self-financed agency under the terms of the Federal Columbia River Transmission System Act of 1974. This means that BPA receives no appropriations. It is required by law to cover its full costs through its own revenues derived from the sale of power and other services… The United States of America does not stand behind BPA's obligations. … BPA alone must meet these obligations, and BPA's rates cannot be approved by FERC unless they are sufficient to meet these obligations. These requirements, and the lack of any Federal guarantees, are made explicit in sections 6(j) and 7(a) of S 885, even

though they are also explicit in the Federal Columbia River Transmission System Act.

126 Cong. Rec. H9843 (daily ed. Sep. 29, 1980) (statement of Rep. Ullman).

BPA is neither predetermining the results of the rate test nor suggesting a disregard for section 7(b)(2) with this discussion. BPA is not suggesting a solution to any problem arising from a potential conflict among sections 7(a), 7(b)(2), and 7(b)(3). BPA is merely attempting through this notice to alert its customers and the public to one possible problem which may present itself in the future. By raising the matter at this early date, BPA hopes that full discussion and consideration of such issues will enhance resolution of the problem when, and if, it arises in the context of the relevant rate case.

(d) Decision:

BPA will interpret section 7(b)(2) so that implementation of section 7(b)(2), and any subsequent reallocation pursuant to section 7(b)(3), will not conflict with the requirements of section 7(a).

C. Specific Statutory Interpretations

1. Applicable 7(g) costs should be excluded from the program case, but not from the 7(b)(2) case.

(a) Proposed Interpretation

In the Notice of Proposed Interpretation, BPA proposed that applicable 7(g) costs should be excluded from the program case, but not from the 7(b)(2) case.

(b) Summary of the Comments:

The DSIs and the ICP support BPA's interpretation that applicable 7(g) costs should be excluded from the program case before comparison with the 7(b)(2) case.

The PNGC, PPC, PGP and Northern Lights argue that applicable 7(g) costs should be excluded from both the 7(b)(2) case and the program case. PNGC Comments at 2; PGP Comments at 3; PPC Comments at 5; Northern Lights Comments at 3. APAC apparently argues that 7(g) costs would be double-counted if they were included only in the 7(b)(2) rate before comparison with the program case, and then added back into the 7(b)(2) rate in the event the 7(b)(2) rate was triggered. APAC Comments at 48-49. APAC also argues that "[b]ecause the § 7(g) exclusion occurs before the enumeration of the differences between the program and § 7(b)(2) cases, both cases must exclude the § 7(g) costs." APAC Comments at 49. APAC further argues that inclusion of 7(g) costs in the 7(b)(2) cases would violate the intent and meaning of section 7(b)(2). APAC Comments at 49-50.

(c) Discussion:

Section 7(b)(2) is clear: "…the projected amounts to be charged for firm power for the combined general requirements of public body, cooperative and Federal agency customers, exclusive of amounts charged such customers under subsection (g) for the costs of conservation, resource and conservation credits, experimental resources and uncontrollable events, may not exceed in total, … an amount equal to the power costs for general requirements of such customers if the Administrator assumes…"

Section 7(b)(2) is explicit in excluding the applicable 7(g) costs from the program case before comparison is made with the 7(b)(2) case.

Since section 7(g) costs are specifically excluded from the program case, but not excluded from the 7(b)(2) case, it would be inappropriate to subtract section 7(g) costs from the 7(b)(2) case for the purpose of comparison with the program case. If Congress intended the power costs in the 7(b)(2) case to be exclusive of conservation costs and other section 7(g) costs, language to that effect would have been included in the provisions.

(d) Decision:

The projected amounts to be charged 7(b)(2) customers for their firm power general requirements will include the applicable 7(g) costs of conservation, resource and conservation credits, experimental resources and uncontrollable events, regardless of the implementation of section 7(b)(2). Section 7(b)(2), however, is explicit in excluding the applicable 7(g) costs from the program case before comparison is made with the 7(b)(2) case.

2. Pertinent DSI loads are to be included in 7(b)(2) customer loads for the entire five-year test period.

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA proposed to interpret section 7(b)(2)(A) as requiring the Administrator to assume that 7(b)(2) customers' loads include the loads of DSIs within or adjacent to the 7(b)(2) customers' service territories for the entire five-year test period.

(b) Summary of the Comments:

The DSIs and the ICP support BPA's interpretation.

Northern Lights, APAC and PPC adopted similar positions on the timing of DSI load transfer to 7(b)(2). The PPC indicated that it "…was willing to accept this approach [DSI loads transfer to 7(b)(2) customers for the entire test period) if BPA confined itself to the five specific assumptions set out in the statute." PPC Comments at 5; *see* Northern Lights Comments at 3-4; APAC Comments at 53. The PPC continued as follows:

> [h]owever, since BPA has demonstrated its unwillingness to do so by proposing to examine 'unavoidable secondary effects,' the PPC contends that BPA's

> proposal here is arbitrary and capricious in that it is inconsistent with their [sic] own approach. An obviously unavoidable effect of assuming that DSI loads transfer to public and cooperative systems is the assumption that they do so only when necessary, that is, only when their BPA contracts expire. The PPC also disagrees with BPA's assertion that to include the DSI loads only from the expiration dates of their individual contracts would require speculation; the expiration dates and contract demands are listed in Appendix B, as well as BPA's own files, and it hardly seems speculative to look up the dates and amounts in a list.

PPC Comments at 5-6. The PGP echoed this comment and suggests that BPA harmonize the timing of DSI load transfers to 7(b)(2) customers and to IOUs by linking both to contract expirations. PGP Comments at 3-4. Snohomish commented in a manner similar to the PGP and PPC. Snohomish Comments at 11.

(c) Discussion:

Section 7(b)(2)(A) provides that BPA is to assume that "the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customer loads which are: (i) Served by the Administrator, and (ii) located within or adjacent to the geographic service boundaries of such public bodies and cooperatives…" The plain language of section 7(b)(2)(A) requires the Administrator to assume that 7(b)(2) customers' loads include the DSI loads within or adjacent to the 7(b)(2) customers' service territories for the entire five-year test period.

An alternate interpretation would require the assumption that relevant DSI loads were transferred to 7(b)(2) customers at the expiration dates of DSI power sales contracts in effect on December 5, 1980. However, there is nothing in this statutory assumption that permits BPA to phase DSI loads into 7(b)(2) customers' general requirements over time.

Section 7(b)(2)(A) has no language linking DSI load transfer to contract expiration. Section 7(b)(2)(B), on the other hand, states that:

> Public body, cooperative, and Federal agency customers were served during such five-year period, with Federal base system resources not obligated to other entities under contracts existing as of the effective date of this Act (*during the remaining term of such contracts*)…, (Emphasis added)

It is generally understood that expression of one thing excludes another. 24 *Sutherland, Statutes and Statutory Construction* § 47.23 (C.D. Sands ed. 4th ed. 1973); *see also City of Walla Walla v. Walla Walla Water Co.*, 172 U.S. 1 (1898). Thus the express language in section 7(b)(2)(B) linking DSI load transfer to the IOUs with contract expiration, and the absence of such language in section 7(b)(2)(A), excludes the consideration of contract expiration from section 7(b)(2)(A).

The legislative history of the Northwest Power Act also supports Bonneville's interpretation of the statute. In the analysis of the section 7(b)(2) directives contained in

Appendix B to the Senate Report, S. Rep. No. 272, 96th Cong. 1st Sess., at 65.79 (1979), forecasted DSI loads were transferred from BPA to 7(b)(2) customers for the entire test period regardless of contracts in effect as of the effective date of the Northwest Power Act. In the projections contained in Appendix B, calculations of public agency loads for the 7(b)(2) case included a full 85 percent of projected DSI loads beginning in 1980 (85 percent was the amount determined to be "within or adjacent" to preference agency service areas). Although Appendix B is not conclusive evidence of legislative intent, S. Rep. 272, *supra*, at 58, it was "an important part of the common understanding about how the costs of resources would be distributed as a result of [the Northwest Power Act]." S. Rep. 272, at 31. Appendix B is a useful tool for statutory construction where it does not conflict with the language of the statute.

Contrary to the suggestions of several interested parties, section 7(b)(2)(A) regarding the timing of DSI load transfer to 7(b)(2) customers should not allow speculation on contract negotiations. Nothing in section 7(b)(2)(A) allows for an assumption of renegotiation of service contracts between 7(b)(2) customers and "within or adjacent" DSIs. Section 7(b)(2) deals with quantifiable concepts which direct the changes in assumptions that must be made between the program case and the 7(b)(2) case.

(d) Decision:

BPA will interpret section 7(b)(2)(A) as requiring the Administrator to assume that 7(b)(2) customers' loads include the DSI loads "within or adjacent" to the 7(b)(2) customers' service territories for the entire five-year test period.

3. All DSI loads assumed to be placed on 7(b)(2) customers will be treated as firm.

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA interpreted section 7(b)(2) as requiring the Administrator to treat as firm the DSI loads assumed to be placed on 7(b)(2) customers pursuant to section 7(b)(2)(A).

(b) Summary of the Comments:

Both the DSIs and the ICP support BPA's interpretation regarding quality of service. The PPC, Northern Lights and APAC adopted a position contrary to that of the DSIs and ICP. The PPC's comments are illustrative of the approach taken by these parties.

> Again, the PPC once agreed to accept this assumption as part of a strict statutory interpretation of subsection (A), in accordance with Appendix B, if BPA confined its assumptions to the five spelled out in subsections (A) through (E). However, since BPA complicates the situation with additional assumptions or 'unavoidable secondary effects,' the PPC believes that only 3 quartiles should be treated as firm. To assume that all four quartiles transfer as firm ignores the obviously unavoidable effect of public agencies and cooperatives negotiating with the industries to secure restriction rights for reserves. PPC comments at 6.

(c) Discussion:

Section 7(b)(2)(A) provides that BPA is to assume "that the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customers loads…" Section 7(b)(2)(A) does not expressly state the nature or quality of service assumed to be provided by the public bodies and cooperatives to the relevant DSI loads.

The DSI loads now served by BPA include three quartiles that are firm loads and one quartile (the first quartile) that BPA does not plan or acquire resources to serve. However, the language of the Act is compelling that Congress intended all relevant DSI loads, assumed to be served by public bodies and cooperatives, to be treated as firm.

Section 7(b)(2)(A) requires BPA to assume that the loads of relevant DSIs are included in the 7(b)(2) customers' "general requirements", a term defined by section 7(b)(4) of the Northwest Power Act as limited to electric power purchased from the Administrator under section 5(b) of the Act. Section 5(b) deals exclusively with firm power. In addition, sections 7(b)(2)(B) and 7(b)(2)(D) require that Federal base system and additional resources be assumed to serve the total general requirements of the 7(b)(2) customers.

The legislative history of the Northwest Power Act supports interpreting the statute to require 7(b)(2) customers' firm power general requirements in the 7(b)(2) case to include all DSI loads served by the Administrator, including DSI loads that under the program case BPA does not plan or acquire resources to serve. In Appendix B to the Senate Report, all four quartiles of DSI loads were treated as firm when assigned to public agency customers in the 7(b)(2) case.

Moreover, BPA will not infer the renegotiation of DSI service contrasts to allow non-firm service. To do so would result in BPA's engaging in speculation outside the assumptions governing the rate test.

(d) Decision:

BPA will treat all DSI loads assumed to be transferred to the 7(b)(2) customers as firm.

4. BPA will use Appendix B to determine DSI loads within or adjacent to the geographic service boundaries of public bodies and cooperatives.

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA proposed the use of Appendix B to determine DSI loads within or adjacent to the geographic service boundaries of 7(b)(2) customers.

(b) Summary of the Comments:

The DSIs and the ICP both support BPA's use of the Appendix B list of DSIs to determine which DSIs are "within or adjacent" pursuant to section 7(b)(2)(A)(i). The DSIs believe that "[c]hanges to the list included in Appendix 'B' should be made only for changes in status which occur after enactment of the Legislation. … The original list included in Appendix 'B' was developed as a political assumption which was used to determine the overall economic basis in support of the legislation." DSIs Comments at 4. The IOUs disagree: "[t]here appears to be no need to attempt to revise the list for the 7(b)(2) case to reflect changes in BPA service to DSI customers in the program case." ICP Comments at 3.

Northern Lights and APAC support a position similar to that of the DSIs. Northern Lights Comments at 4. APAC Comments at 54. The PPC stated that as a result of BPA's "abandonment of the strict statutory interpretation", it was no longer willing to support the use of the Appendix B list, and instead supported an approach which would require a "new examination of which DSIs are 'within or adjacent.'" The PPC did suggest that use of the Appendix B list would be acceptable if BPA updated the list to reflect changes in DSI status. PPC Comments at 6.

(c) Discussion:

Section 7(b)(2)(A) requires the Administrator to assume that during the relevant five-year period, "the public body and cooperative customers` general requirements had included … the direct service industrial customer loads which are … located within or adjacent to the geographic service boundaries of such public bodies and cooperatives…" 16 U.S.C. § 839e(b)(2)(A). It is not apparent from the statute how BPA is to resolve the question of which DSIs are "within or adjacent to" public body and cooperative customers` boundaries. Therefore, BPA must look to legislative history to resolve the ambiguity.

The legislative history of the Northwest Power Act indicates that the determination of which DSIs are "within or adjacent" to public body and cooperative customers' boundaries was made in Appendix B. S. Rep. No. 272, 96th Cong., 1st Sess., Appendix B, at 66. Appendix B includes a table listing the DSIs "within BPA preference customers' service areas," DSIs "adjacent to BPA preference customers' service areas" and those DSIs that "could not readily be served by BPA preference customers". *Id.*

The "within or adjacent" table in the numerical analysis in Appendix B is accompanied by a narrative explanation which states that the loads for establishing resource requirements under section 7(b)(2) will include "DSI total loads within or adjacent to the service territory of the public bodies and cooperatives. (85 percent of existing DSIs as shown in the attached table)." Appendix B at 58. The detailed nature of the "within or adjacent" table and the narrative explanation in Appendix B convince BPA that Congress intended the Appendix B table to be used in resolving which DSIs are " within or adjacent" to the service territory of public body and cooperative customers. The Appendix B table will be disregarded only if service to those DSI customers changes, such as in the case of termination of BPA service to a DSI industrial plant.

There is nothing in the statute requiring BPA to undertake a new determination of which DSI loads were within or adjacent to 7(b)(2) customer service territories. A determination of a

DSI's being "within" a relevant service territory poses little problem; however, adjacency may not be capable of resolution without protracted hearings. Should "adjacent" be defined as within one mile of a relevant service territory, two miles, or fifteen miles? Are air miles determinative, or should terrain be considered? What effect should size of the DSI load have on the question? It may be economic to extend service to a large DSI load, but not to a small one. BPA rate cases should not become forums for competing testimony by construction engineers, surveyors and architects. Congress could not have intended such a result and hence provided the BPA Administrator discretionary authority to implement section 7(b)(2) in a reasonable manner.

Making a new determination of "within or adjacent" DSI loads would also force BPA to decide matters of state utility law in which the agency has no expertise. Since the DSIs are already interconnected with the Pacific Northwest transmission grid, determination of the public or private utility to provide new service to a given DSI would likely be a matter of resolving questions of state law and regulations. Where two or more utilities are in a position to serve a customer, most states have utility laws to govern the outcome. BPA does not propose to interpret the state laws of Oregon, Washington, Idaho and Montana as part of the section 7(b)(2) implementation.

(d) Decision:

BPA will use Appendix B to determine DSI loads within or adjacent to the geographic boundaries of 7(b)(2) customers. BPA will adjust this list to reflect changes in the status of BPA service to the list of DSI customers as assumed in the relevant rate case.

5. Determination of "Federal base system resources not obligated to other entities" necessitates reference to the contracts of pertinent DSIs.

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA interpreted section 7(b)(2)(B) to require reference to the contracts of pertinent DSIs for the determination of "Federal base system resources not obligated to other entities".

(b) Summary of the Comments:

The DSIs and Northern Lights support the interpretation adopted by Bonneville. DSI Comments at 5; Northern Lights Comments at 4. The PPC also supports this interpretation, "but believes BPA overstates the difficulty of the factual determinations involved." PPC Comments at 7. Snohomish suggests that this interpretation is "inconsistent with Bonneville's approach to an analogous** issue, and is designed to preclude the rate test from operating as Congress intended". Snohomish Comments at 10. The PGP adopted a similar position. PGP Comments at 4.

(c) Discussion:

Section 7(b)(2)(B) provides that the Administrator is to assume that 7(b)(2) customers were served by FBS resources "not obligated to other entities under contracts existing as of the effective date of this Act (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in (Section 7(b)(2)(A)]." Unlike the assumption relating to DSI loads served by public body and cooperative customers, section 7(b)(2)(B) requires BPA to make two factual determinations: (1) What the level of FBS resources is, and (2) what level of FBS resources is obligated for service to other entities, over all, or a portion, of the relevant five-year period. The first determination is necessary because the FBS includes resources purchased by BPA under long-term contracts. Expiration of these contracts will likely cause a change in the size of the FBS during the relevant five-year period.

The second determination concerns BPA power sales contracts existing as of the effective date of the Northwest Power Act. When these contractual obligations on FBS resources are removed through expiration of the relevant contracts, the size of FBS resources available to 7(b)(2) customers would increase. In the 7(b)(2) case, particular attention must be given to DSI loads not "within or adjacent to the geographic service boundaries" of 7(b)(2) customers, which will be assumed to transfer to private utilities as of the expiration dates of the DSI contracts in effect on December 5, 1980.

Legislative history supports the interpretation that DSI loads should shift to 7(b)(2) customers without regard to existing DSI contracts, while the size of FBS resources available for allocation to the 7(b)(2) customers should depend on DSI contract expiration dates. Section 7(b)(2)(B) initially stated that the Administrator was to assume that 7(b)(2) customers were served by FBS resources, "less (the) firm power contractual commitments as of the date of this Act" to DSIs "not located within or adjacent…" S. 885, Amendment No. 134, 96th Cong., 1st Sess. (April 15, 1979); H.R. 4150, 96th Cong., 1st Sess. (May 21, 1979). The Senate Committee on Energy and Natural Resources amended S 885 to incorporate language substantively identical to section 7(b)(2)(B) as enacted. Thus, a directed legislative effort was made to incorporate language shifting DSI loads to the IOUs only after expiration of the DSI contracts. This same effort is absent from the development of section 7(b)(2)(A).

(d) Decision:

BPA interprets section 7(b)(2) as necessitating reference to the contracts of pertinent DSIs in the determination of "Federal base system resources not obligated to other entities."

6. Section 7(b)(2)(D) is clear in identifying assumptions regarding additional resources to be acquired by BPA.

(a) Proposed Interpretation:

In the Notice of Proposed Interpretation, BPA proposed that section 7(b)(2)(D) identified three additional resources assumed to be acquired to meet the 7(b)(2) customers' general requirements when FBS resources are exhausted. The first type was identified as those resources actually acquired by BPA from the 7(b)(2) customers in the program case. The second type are those resources owned or purchased by the 7(b)(2) customers, and not dedicated to their own

loads. These two resources were proposed to be stacked in order of cost and then pulled from the stack to meet 7(b)(2) customers' loads, least expensive first. The third resource type was proposed to consist of generic resources of whatever size required to meet the remaining load, and to be priced at the average cost of all new resources acquired by BPA from non-7(b)(2) customers during the five year 7(b)(2) test period.

(b) Summary of the Comments:

Most of the commenters, including the DSIs, Northern Lights, APAC, the PPC and Snohomish, support Bonneville's interpretation of section 7(b)(2)(D). DSI Comments at 5; Northern Lights at 4; APAC Comments at 54-55; PPC Comments at 7; Snohomish Comments at 11. The ICP disagrees: "[t]he third resource type described by BPA is unrealistic. There is no reason to assume that 'generic' resources will be available in the exact size needed to serve remaining loads." ICP Comments at 3.

(c) Discussion:

Section 7(b)(2)(D) describes the manner in which additional resources are assumed to be acquired to meet the 7(b)(2) customers' loads when FBS resources are exhausted. The statute is clear in identifying assumptions regarding additional resources.

Three types of additional resources are available in the 7(b)(2) case. The first type of resource is described in section 7(b)(2)(D)(i) as being resources that were "purchased from such customers by the Administrator pursuant to section 6." These are the resources actually acquired by BPA from the 7(b)(2) customers in the program case. Section 7(b)(2)(D)(ii) describes the second type of resource as those "not committed to load pursuant to section 5(b)." These are resources owned or purchased by the 7(b)(2) customers that are not dedicated to their own loads. Together, these two provisions result in a list of resources which were developed by 7(b)(2) customers and which are assumed to be available to meet regional 7(b)(2) customer needs.

The remainder of section 7(b)(2)(D) outlines how this list of resources is to be used to serve the 7(b)(2) customers' loads and describes the third type of resources available to meet these loads. BPA is first to assume for the 7(b)(2) case that any required additional resources "were the least expensive resources owned or purchased by public bodies or cooperatives." This means that 7(b)(2)(D)(i) and (ii) resources would be stacked in order of cost and pulled from that stack to meet 7(b)(2) customers' loads in order of least to greatest cost. Should these resources be insufficient to satisfy the general requirements of 7(b)(2) customers, section 7(b)(2)(D) provides the assumption that "...any additional needed resources were obtained at the average cost of all other new resources acquired by the Administrator." This third resource type would consist of generic resources of the size required to serve the 7(b)(2) customers' remaining loads, the cost of which would be determined by the average cost of all new resources acquired by BPA from non-7(b)(2) customers during the relevant five-year period.

(d) Decision:

Section 7(b)(2)(D) is clear in identifying assumptions regarding the size and type of additional resources to be acquired by BPA.

C. Additional Issues:

Several parties raised additional issues which are not addressed in this legal interpretation but are being addressed in the methodology itself, in the initial proposal or in the 1985 rate case. BPA briefly summarizes those issues below.

1. Section 7(b)(2)(E) issues:

APAC noted that the Notice of Proposed Interpretation ignored "issues raised by § 7(b)(2)(E)." APAC Comments at 40. Issues concerning financing benefits and other benefits identified in section 7(b)(2)(E) are discussed in the initial proposal and the methodology. *See* 49 FR 11,235 (1980).

2. GCP 8(e):

Fourteen of the parties suggested that the notice of statutory interpretation violated General Contract Provision 8(e) (GCP 8(e)) of the power sales contracts. *See*, *e.g.*, PPC Comments at 1; Snohomish at 1-2. The requirements of GCP 8(e) are the subject of litigation. They are not addressed in this methodology, nor need they be. This legal interpretation is concerned only with the statutory requirements of the Northwest Power Act.

3. Reallocation of 7(b)(2) amount:

Tacoma stated that BPA should address "BPA's plan for possible implementation of cost reallocation under section 7(b)(3)…" Tacoma Comments at l. BPA will address the reallocation of any amount by which the program case exceeds the 7(b)(2) case in the relevant rate case. It is unnecessary in the development of the rate test to determine the reallocation to follow the rate test.

4. Adequacy of BPA's Notice of Proposed Legal Interpretation:

Several of the parties felt that BPA's statutory interpretation did not provide adequate notice of the issues involved in the section 7(b)(2) interpretation. *See*, *e.g.*, APAC Comments at 38. BPA's notice did adequately inform the public of those issues BPA felt were required to be addressed in a "legal interpretation". All commenters addressed precisely the issues BPA proposed. All commenters replied in such a manner as to make apparent the fact that BPA's proposed positions were clearly understood. Naturally, there was disagreement on the issues, but there has been full discussion and argument on various positions.

BPA maintains that the issues resolved by this legal interpretation provide the legal determinations necessary in order to develop the 7(b)(2) implementation methodology. BPA does not deny that other issues of fact and policy remain for resolution. These issues, however,

are appropriately developed through other forums which will eventually result in testimony presented in a section 7(i) proceeding under the Northwest Power Act.

Issued in Portland, Oregon, on May 30, 1984.

Robert E. Ratcliffe,

Acting Administrator, Bonneville Power Administrator.