SHORT-TERM BRIDGE RESIDENTIAL PURCHASE AND SALE AGREEMENT FOR THE PERIOD FISCAL YEARS 2009-2011

AND

REGIONAL DIALOGUE LONG-TERM RESIDENTIAL PURCHASE AND SALE AGREEMENT FOR THE PERIOD FISCAL YEARS 2012-2028

ADMINISTRATOR'S RECORD OF DECISION

Bonneville Power Administration
U.S. Department of Energy

September 4, 2008

This page intentionally left blank.

TABLE OF CONTENTS

I. INTRODUCTION 2

II. BACKGROUND 3
- A. Section 5(c) of the Northwest Power Act 3
- B. Need for New RPSAs 4

III. EVALUATION OF COMMENTS 4
- A. Termination and Reentry Issues 5
- B. Balancing Account Issues 14
- C. In-lieu Issues 26
- D. Other Issues 36

IV. NATIONAL ENVIRONMENTAL POLICY ACT 48

V. CONCLUSION 48

ATTACHMENT A 1

ATTACHMENT B 1

ATTACHMENT C 1

This page intentionally left blank.

I. INTRODUCTION

This Record of Decision ("ROD") evaluates and makes final decisions on issues raised, and on proposals offered, by parties regarding Bonneville Power Administration's ("BPA") prototype Short-Term Bridge Residential Purchase and Sale Agreement (the "Bridge RPSA"), which is proposed to be effective during the period FY 2009-2011, and the Regional Dialogue Long-Term Residential Purchase and Sale Agreement ("Long-Term RPSA"), which is proposed to be effective during the period FY 2012-2028. The substantive provisions of the Bridge RPSA and the Long-Term RPSA (hereinafter referred to together as the "RPSA" or "Agreement") are nearly identical, and parties' comments generally addressed the two agreements as one and the same. This ROD addresses both agreements. Capitalized terms used herein that are not parenthetically defined, or defined in context, are defined in the Agreement.

The RPSAs were proposed by BPA as the basis for contracting with all eligible utilities applying for benefits under the Residential Exchange Program (the "REP") during the above-referenced periods. BPA provided draft RPSAs to interested parties by letter dated May 16, 2008, and stated it would accept comments on the "non-standard" provisions in the Agreements through June 16, 2008.[1] *See* Attachment A. BPA anticipates that the Bridge RPSA will be signed shortly after this ROD is issued, and that the Long-Term RPSA will be signed at the same time all other Regional Dialogue contracts are signed, currently expected to be in late 2008.

BPA received comments by the comment deadline from the Idaho Power Company ("IPC"), Avista Corporation, PacifiCorp, Portland General Electric Company ("PGE"), and Puget Sound Energy, Inc. ("Puget") (together the "investor-owned utilities" or "IOUs"), the Oregon Public Utility Commission ("OPUC"), the Idaho Public Utilities Commission ("IPUC"), the Public Power Council ("PPC"), the Western Public Agencies Group ("WPAG"), and Snohomish Public Utility District No. 1 ("Snohomish").

On July 2, 2008, BPA issued a letter stating that it would accept additional comment on a number of prototype Regional Dialogue contracts. *See* Attachment A. The letter contained a web link to these contracts, including a contract styled "07/03/08 Revision- RPSA Template" which indicated that BPA would accept comments on the standard, or boilerplate, portions of the Long-Term RPSAs, which had not been open for comment during the earlier comment period that closed June 16.[2] Comments on the standard provisions were due by July 15, 2008.

[1] BPA highlighted the nonstandard provisions on which it would accept comments. Discussions regarding the "standard" (*i.e.*, boilerplate) provisions for all Regional Dialogue contracts, including the Long-Term RPSA, were the subject of ongoing separate public processes and are not yet ready for formal comment.

[2] The standard provisions of the two Agreements are different. The Bridge RPSA contains standard provisions contained in BPA's existing "Subscription" contracts, which generally expire on September 30, 2011. The standard provisions in the Bridge RPSA are set and not subject to change. The Long-Term RPSA contains proposed new standard provisions that will be in all of BPA's so-called "Regional Dialogue" contracts, which will be effective October 1, 2012.

II. BACKGROUND

A. Section 5(c) of the Northwest Power Act

Section 5(c) of the Northwest Power Act established the REP. 16 U.S.C. §§ 839c(c), *et seq*. Under the REP, a Pacific Northwest electric utility may offer to sell power to BPA at the utility's average system cost ("ASC"). 16 U.S.C. § 839c(c)(1). BPA purchases such power and, in exchange, sells an equivalent amount of power to the utility at BPA's PF Exchange rate. *Id*. The amount of the power exchanged is based on up to 100 percent of the utility's qualifying residential and small farm load. *Id*. BPA's past practice has not required actual power purchases and sales.[3] Instead, BPA provided monetary benefits to the utility based on the difference between the utility's ASC and the applicable PF Exchange rate multiplied by the utility's residential and small farm load.[4] These monetary benefits must be passed through directly to the utility's residential and small farm consumers. 16 U.S.C. § 839c(c)(3).

The purpose of the REP is to exchange resource costs for the benefit of the residential and small farm ratepayers of participating utilities. When the BPA PF Exchange rate is less than a participating utility's ASC, BPA pays the net difference to the utility. However, when the PF Exchange rate is greater than the ASC, *i.e.*, when the net difference of the exchange is negative, BPA has previously provided the utility a right to "deem" its ASC equal to the PF Exchange rate, so that no cash payment flows from the utility to BPA. BPA does, however, keep an account of such unpaid "deemer" amounts, which must be reduced to zero through cash payments or setoff against future payments before the utility can receive additional REP cash payments. Furthermore, Northwest Power Act section 5(c)(4), 16 U.S.C. § 839c(c)(4), recognizes that BPA's PF Exchange rate is subject to a supplemental rate charge due to implementation of section 7(b)(3) of the Northwest Power Act. 16 U.S.C. § 839e(b)(3). Were this to occur and cause the PF Exchange rate to exceed a participating utility's ASC, that utility has the statutory right to terminate its participation in the REP upon reasonable terms and conditions agreed to with BPA prior to such termination. *See* 16 U.S.C. § 839c(c)(4).

Pursuant to section 5(c)(5) of the Northwest Power Act, in lieu of purchasing any amount of electric power offered by an exchanging utility, the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold by BPA to the utility as part of an exchange sale. 16 U.S.C. § 839c(c)(5). However, the cost of the acquisition must be less than the cost of purchasing the electric power offered by the utility. *Id*.

---

[3] "The exchange actually transfers no power to or from BPA because the 'exchange' is simply an accounting transaction: 'In practice, only dollars are exchanged, not electric power.'" *CP Nat'l Corp v. Bonneville Power Admin.*, 928 F.2d 905, 907 (9th Cir. 1991) (*quoting Public Utility Commissioner of Oregon v. BPA*, 583 F. Supp. 752, 754 (D. Or. 1984)).

[4] As described in greater detail below, in the event the economic value of the exchange transaction favored BPA, then the exchanging utility accumulated a non-cash obligation owing to BPA to be offset against any future exchange benefit payments by BPA to the utility.

B. Need for New RPSAs

In early 1996, the governors of Idaho, Montana, Oregon, and Washington convened the Comprehensive Review of the Northwest Energy System. The goal of the review was to develop recommendations for changes to the region's electric utility industry, focusing on BPA, through an open public process involving a broad cross-section of regional interests. In December 1996, after over a year of intense study, the Comprehensive Review Steering Committee released its Final Report. The Final Report summarized the Steering Committee's goals and proposals. The Final Report proposed a subscription system for purchasing specified amounts of power from BPA at cost with incentives for customers to take longer-term subscriptions ("Subscription"). In connection with its Subscription proposal, the Steering Committee encouraged BPA and other parties in the region to explore a settlement of REP disputes with the region's IOUs. BPA's Subscription Strategy was a comprehensive BPA business plan that addressed many details regarding service for all of BPA's customer classes: public utilities, IOUs, and direct-service industrial customers. With regard to the IOUs, the Subscription Strategy proposed that BPA would offer the ability to (1) continue participation in the REP through RPSAs or (2) enter into negotiated settlement agreements of the REP for the FY 2002-2011 period.

BPA developed prototypes of two agreements: (i) a Residential Purchase and Sale Agreement (the "2000 RPSA") and (ii) a 2000 REP Settlement Agreement (the "2000 REP Settlement Agreement"). Developing both agreements was necessary because while BPA expected the IOUs to sign the Settlement Agreements, BPA elected to have an RPSA ready in the event a qualified utility, including an IOU, chose to implement the REP through an RPSA.

Although there was broad customer support for the 2000 REP Settlement Agreements, several customers challenged BPA's decision to execute the 2000 REP Settlement Agreements in the Ninth Circuit. A number of parties also challenged BPA's decision in its WP-02 wholesale power rate proceeding to allocate the costs of the 2000 REP Settlement Agreements to the PF Preference rate. *See Golden NW Aluminum, Inc. v. Bonneville Power Admin*., 501 F.3d 1037 (9th Cir. 2007) ("*Golden NW"*). On May 3, 2007, the Court held that the 2000 REP Settlement Agreements executed by BPA and the IOUs were inconsistent with the Northwest Power Act. *See Portland General Elec. Co. v. Bonneville Power Admin*., 501 F.3d 1009 (9th Cir. 2007) ("*PGE*"). The REP has been suspended pending resolution of the issues engendered by the Court's decisions.[5]

As a result of the Court's decision, BPA has prepared to resume the REP by negotiating new RPSAs with its utility customers, including the Bridge RPSA, designed to bridge the gap to the commencement on October 1, 2011 of the Long-Term RPSA.

III. EVALUATION OF COMMENTS

BPA's evaluation of issues raised in parties' comments is divided into four sections. Section III.A. addresses comments regarding a utility's right to terminate the RPSA and subsequently reenter the REP. Section III.B. addresses comments regarding the proposed

[5] Estimated REP benefits for FY 2008 were distributed to some exchanging IOUs through Interim Relief and Standstill Agreements signed in March 2008.

Balancing Account in the RPSA.[6] Section III.C. addresses comments regarding the "in-lieu" provisions. Section III. D. addresses all other issues raised in comments regarding the prototype RPSA.

BPA has amended the Agreements in response to the comments filed. A copy of each Agreement as amended is included as Attachments B and C.[7]

A. Termination and Reentry Issues

Section 5(c)(1) of the Northwest Power Act provides that BPA shall enter into an exchange transaction whenever an exchanging utility offers to sell power to BPA at the utility's average system cost. 16 U.S.C. § 839c(c)(1). The Act further provides that an exchanging utility may terminate an exchange transaction "upon reasonable terms and conditions agreed to by the Administrator and such utility prior to such termination" in the event that the 7(b)(2) rate test triggers and additional costs are allocated to the PF Exchange rate, causing that rate to exceed the average system cost of power sold by an exchanging utility to BPA. 16 U.S.C. § 839c(c)(4). The effect of this termination provision is to relieve the exchanging utility from buying higher-priced BPA power and selling to BPA its own lower cost power, but only in the case where the 7(b)(2) rate test trigger is the cause of PF Exchange rate exceeding the utility's ASC. The statute does not expressly provide for termination of an exchange transaction in the event the PF Exchange rate exceeds a utility's ASC due to an increase in the PF Exchange rate caused by something other than the 7(b)(2) rate test triggering.

The termination provision in the prototype Agreement provides as follows:

> **"11. TERMINATION OF AGREEMENT**
>
> (a) «Customer Name» may elect to terminate this Agreement within 30 days of confirmation and approval by the Federal Energy Regulatory Commission of new BPA rates (on the earlier of an interim basis, or if interim approval is not granted, on a final basis) in which the supplemental rate charge provided for in section 7(b)(3) of the Northwest Power Act is applied and the PF Exchange rate charged «Customer Name» exceeds «Customer Name»'s ASC.
>
> In the event a court of competent jurisdiction remands to BPA the Priority Firm Power (PF) Exchange Rate relied upon by «Customer Name» to provide a notice of termination of this Agreement, and BPA amends such rate upon remand such that «Customer Name» would not have given a notice of termination under such rate, the termination is rescinded and the parties shall be placed in the position of

[6]Issues regarding the termination and Balancing Account provisions of the Agreement (the latter also referred to herein as the "deemer" provision) are closely related. In some instances, issues raised that could have been addressed in the termination section of this ROD are addressed in the deemer section, and vice-versa.

[7]The amended Agreements incorporate a different numbering system for sections. For example, section 2(a) in the Agreements as originally proposed has become section 2.1. In order to avoid confusion, in general, section references in this ROD are to the Agreements as originally proposed, not to the amended Agreements.

the notice never having been given. Similarly, in the event a court of competent jurisdiction remands to BPA the Priority Firm Power (PF) Exchange Rate relied upon by «Customer Name» in failing to provide a notice of termination, and BPA amends such rate upon remand such that «Customer Name» would have given a notice of termination under such rate, the termination shall be effective at the time the earlier termination notice would have taken effect.

(b) «Customer Name» may elect to terminate this Agreement within 6 months of confirmation and approval by the Federal Energy Regulatory Commission of a new or amended ASC methodology (on an interim basis, or if interim approval is not granted, on a final basis) under which «Customer Name's» initial ASC calculated under such ASC methodology falls below BPA's PF Exchange rate applicable to the initial Exchange Period under the new or amended ASC methodology. Such termination shall be effective retroactively to the beginning of the initial Exchange Period under the new or amended ASC methodology.

(c) After termination, «Customer Name» shall not participate in the Residential Exchange Program established in section 5(c) of the Northwest Power Act until «Customer Name» offers to sell electric power to the Administrator at the average system cost of «Customer Name's» resources pursuant to section 5(c) of the Act."

In summary, pursuant to this provision, an exchanging utility may terminate its RPSA in two circumstances: (1) when Northwest Power Act section 7(b)(3) costs allocated to the PF Exchange rate (following the 7(b)(2) rate test triggering) cause that rate to exceed the exchanging utility's ASC; or (2) when a change in the ASC methodology causes an exchanging utility's ASC to drop below the PF Exchange rate. Subsection (c) provides that an exchanging utility that has terminated its RPSA may request a new RPSA at any time.

Issue 1

Whether the termination and reentry provisions should be amended.

Parties' Positions

WPAG argues that if a utility terminates the RPSA because its ASC has fallen below the PF Exchange rate, it should either accrue a deemer balance account that must be worked off after benefits turn positive, as has been the case since the REP was instituted, or it should forgo participation in the REP once its ASC exceeds the PF Exchange rate for a "period equal to the duration of its termination." (WGAG, BNR005, at 1-2.)

The PPC argues that although section 5(c)(4) of the Northwest Power Act does provide for termination of a utility's participation in the REP, the proposed termination provision is inappropriate and should be modified to provide that once it terminates the contract, it should not be allowed to participate in the exchange again "during the years contemplated in the term of the contract." (PPC, BNR0004, at 1-2.)

Snohomish argues that the proposed termination provision would allow an exchanging utility to swing into and out of the REP when it is economically advantageous to do so, and is therefore a "drastic change from past practice." Snohomish proposes that an exchanging utility that has terminated its participation in the REP should have a one-time opportunity to reenter beginning on October 1, 2019, similar to a consumer-owned utility under the Regional Dialogue contracts. (Snohomish, BNR007, at 4.)

IPC argues BPA should expand the right in the provision to permit an exchanging utility to essentially suspend the Agreement and "cease exchanging power" at such times that its ASC is below the PF Exchange rate and "resume exchanging power" when its ASC again exceeds the PF Exchange rate. (IPC, BNR0003, at 2.)

The IPUC argues that the termination provision should expressly provide for termination (or suspension) any time an exchanging utility's ASC is below the PF Exchange rate. (IPUC, RPS0003, at 4). The OPUC essentially makes the same proposal. (OPUC, BNR0006, at 5.)

BPA Staff's Position

The first issue is if, and when, an exchanging utility that has terminated its RPSA may receive a new RPSA prior to the date the terminated RPSA would have expired by its own terms. The termination and reentry provision proposed by BPA echoes section 5(c)(1) of the Northwest Power Act, which provides that the Administrator shall enter into an exchange agreement with a Pacific Northwest electric utility whenever requested. 16 U.S.C. § 839c(c)(1). An exchanging utility could implement proposed RPSA section 11 in a way that would allow it to participate in the REP when its ASC was above the PF Exchange rate, and terminate its participation when the reverse condition prevailed, thereby avoiding the accumulation of any deemer balance, but only in cases where the exchanging utility's ASC falls below the PF Exchange rate due to (1) a 7(b)(3) allocation, or (2) a change in BPA's ASC Methodology. Absent one of those triggers arising, there is no termination, so the reentry issue is moot.

The parties' comments with respect to the termination and reentry provisions reflect fundamentally different interpretations of section 5(c) of the Northwest Power Act. Some parties believe, notwithstanding the structure of section 5(c) of the Act as an actual power exchange, that the intent of Congress in creating the REP was to have benefits flow only one way, from BPA to the residential and small farm consumers of exchanging utilities. Others believe the structure of section 5(c), and the termination language in section 5(c)(4), which limits and qualifies an exchanging utility's termination right, support the conclusion that Congress intended and understood that REP benefits could flow two ways, both from and to BPA.

Evaluation of Positions

WPAG notes that by allowing an exchanging utility to request and receive a new RPSA at any time after it has terminated its existing RPSA, without conditions, the proposed termination provision effectively eliminates the possibility that an exchanging utility would ever accrue a deemer obligation to BPA, allowing the exchanging utility to receive payments when its ASC exceeds the PF Exchange rate and avoiding any deemer exposure (or "negative benefits") by

terminating the Agreement "when the reverse situation applies." (WPAG, BNR0005, at 1.) WPAG correctly notes that under all prior RPSAs, any negative benefits were accrued in a deemer account and repaid prior to the exchanging utility receiving positive benefits, and concludes that the proposed section does away with this "balancing to [sic] interests." *Id.*

WPAG states that section 5(c)(4) of the Northwest Power Act provides for termination of a utility's participation in the REP "upon reasonable terms and conditions agreed to by the Administrator and such utility," but argues that the proposed terms and conditions are not reasonable, because the proposal "leaves the preference customers with the worst of both worlds, paying REP benefits when ASCs are high but receiving no compensating payment from the participating utility when the ASCs are low." (WPAG, BNR005, at 1-2). WPAG characterizes this result as allowing participating utilities to "cream skim" the REP. *Id*. at 2. WPAG proposes that if a utility terminates the RPSA because its ASC has fallen below the PF Exchange rate, it should either (1) accrue a deemer account balance that must be worked off after benefits turn positive, as has been the case since the REP was instituted, or (2) it should forgo participation in the REP once its ASC exceeds the PF Exchange rate for "a period equal to the duration of its termination." (WPAG, BNR0005, at 1-2.)

Both PPC and Snohomish largely echo WPAG's comments on this issue, noting that the termination provision provides a clear path for utilities to take advantage of the REP in the years when doing so benefits them, and to opt out of the program in years that it would not, and that this is inconsistent with section 5(c) of the Act and with the take-or-pay construct that will govern preference customers' contracts. (PPC, BNR0004, at 1-2; Snohomish, BNR007, at 4.) PPC's proposal differs from WPAG, however, arguing that once an exchanging utility terminates its RPSA, it should not be allowed to participate in the exchange again "during the years contemplated in the term of the contract." *Id.* For its part, Snohomish proposes that an exchanging utility that has terminated its RPSA should have a one-time opportunity to "re-enter the REP" on October 1, 2019, similar to a consumer-owned utility under the Regional Dialogue contracts. *Id.*

IPC takes a contrary position, based on a fundamentally different view of the intended purpose of the REP. IPC argues BPA should expand the right in the provision to permit an exchanging utility to essentially suspend the Agreement and "cease exchanging power" at such times that its ASC is below the PF Exchange rate and "resume exchanging power" when its ASC again exceeds the PF Exchange rate. (IPC, BNR0003, at 2.) IPC argues that such a right would not deprive other BPA customers of any benefits "to which they are legally entitled" and would "better facilitate achievement of the wholesale rate parity contemplated by the Act." *Id.* IPC's view is supported by the IPUC and the OPUC. The IPUC argues that while the proposed RPSA provides more favorable termination rights than contained in the 1981 RPSA, they remain "overly restrictive," and the better route would be to expressly provide for suspension of the Agreement when the utility's ASC is below the PF Exchange rate, which IPUC argues is already encompassed in section 11(c) of the proposed termination provision. (IPUC, RPS0003, at 4.) IPUC states that in the alternative, section 11 could be divided into two sections – one for termination and another for suspension. *Id.* The OPUC proposed language that would "allow customers to terminate for any reason" on 90 days' notice. (OPUC, BNR0006, at 5.)

BPA believes WPAG, PPC, and Snohomish are, to some extent, overstating the amount of flexibility the proposed termination and reentry provisions give exchanging utilities. It is not true that the proposed termination provision effectively eliminates the possibility that an exchanging utility would ever accrue a deemer obligation to BPA. It is possible during the term of the Agreement that BPA's rates could provide for rate adjustments within a rate period, akin to the Cost Recovery Adjustment Clauses, or CRACs, that have applied to BPA's base rates since 2002. Such a rate adjustment could lead to an increase in the PF Exchange rate above an exchanging utility's ASC, resulting in an accumulation in the utility's balancing account under section 12(b) of the Agreement. Even absent CRAC-like increases, the PF Exchange rate could move above an exchanging utility's ASC due to rising BPA costs that are allocated to all of BPA's base rates. The proposed termination events, including a change in BPA's ASC Methodology, would not be available to an exchanging utility in this situation. Consistent with section 5(c)(4) of the Act, the proposed RPSA provides limited termination rights, but because it would not provide an exchanging utility with a means to avoid accumulating an amount in its balancing account in all circumstances, the proposed provision is consistent with these commenters' view that the REP was intended by Congress as a "two-way street" with benefits potentially flowing each way.

WPAG proposes that an exchanging utility be barred from reentry into the REP for a term equal to the period it was not participating due to an RPSA termination, but it is not clear the proposal would adequately address the fairness and equity concerns it raises. Under WPAG's proposal, an exchanging utility that was not participating in the REP for a five-year period following an RPSA termination would be barred from reentry for an additional five years, measured, presumably, from the date its ASC again exceeded the PF Exchange rate.[8] However, WPAG's proposal seems to assume that the exchanging utility would otherwise be entitled to benefits during this second five-year period, and that this is the "price" it must pay for its earlier termination. In fact, it is possible that if it had been allowed to reenter the REP at the beginning of the second five-year period, the utility might still have accumulated obligations to BPA in its balancing account, as in the situation described above.

WPAG's alternative proposal, that an exchanging utility accrue deemer obligations following termination of the RPSA, appears to be inconsistent with section 5(c)(4) of the Act, by which Congress provided an exchanging utility with a limited right to terminate both its purchase from BPA and its sale to BPA under an RPSA. Accumulating a deemer balance after an exchanging utility invokes this statutory termination right appears inconsistent with the right provided by Congress. In addition, WPAG's implication that its proposal is consistent with the manner in which the REP has been implemented since its inception is incorrect, as no deemer balances accrued under the 1981 RPSA following termination.

The PPC and Snohomish proposals (no right to reenter the program for the duration of the RPSA term, and a one-time right in 2019, respectively) do not seem proportionate in light of the limited circumstances under which an exchanging utility may terminate the RPSA. As a practical matter, if an exchanging utility exercised its limited termination right, it would be out of the REP

[8] How BPA would know when this cross-over occurred is not clear because BPA would not be calculating the utility's ASC during the termination period, nor would BPA be establishing that utility's PF Exchange rate during this period.

for at least the remaining term of the rate period, which, under BPA's current rate period construct, would likely be two years, but could be as long as five years. Following termination of an RPSA, the exchanging utility accrues no deemer amounts. However, under the PPC proposal, in an extreme but possible example, if an exchanging utility terminated its Long-Term RPSA at the beginning of the third year of the proposed Agreement (which could be as early as 2015), the residential and small farm consumers of an exchanging utility could forfeit any possibility of receiving REP benefits for the next 13 years, regardless of how high its ASC may be in relation to the applicable PF Exchange rate.

As a general matter, BPA agrees with the view that Congress intended and understood that REP benefits could flow both from BPA to the exchanging utility and from the exchanging utility to BPA. BPA implemented the REP through the original RPSA in 1981 to reflect the "two-way" nature of the exchange by providing an account to track accrued liabilities of an exchanging utility to BPA during periods when the utility's ASC was below the PF Exchange rate, but the utility's termination right could not be invoked. However, through section 5(c)(4) of the Act, Congress provided exchanging utilities with a means to avoid this liability, albeit under limited circumstances and only pursuant to "reasonable terms and conditions" agreed to prior to any termination. 16 U.S.C. § 839c(c)(4). Section 5(c)(4) of the Act expressly addresses the termination side of the equation, yet termination is only one-half of the equation. The other half concerns the exchanging utility's reentry into the REP. Section 5(c)(4) does not expressly address this part of the equation. Rather, Congress stated in section 5(c)(1) that the exchange could be initiated by an exchanging utility at any time.

On its face, then, Congress provided exchanging utilities with a limited termination right, but an unfettered reentry right. However, there is support for the view that Congress did not intend section 5(c)(1) to entitle an exchanging utility to participate in the REP on demand following a termination, but that the "reasonable terms and conditions" provided for termination in section 5(c)(4) would apply to section 5(c)(1) in the context of reentry into the REP following a termination under section 5(c)(4). In Senate Report 96-272 (Committee on Energy and Natural Resources), the committee described the provisions of the REP, which at the time were contained in section 5(b)(2) of the proposed legislation. The provisions in section 5(b)(2) are substantially similar to the language that was eventually enacted into law as section 5(c), but section 5(b)(2) was drafted as a single section and the main clause providing that BPA would enter into an exchange transaction whenever requested was followed by four provisos, including the termination proviso in section 5(b)(2)(C). The report describes section 5(b)(2) as follows:

> Section 5(b)(2). - This section governs the exchange power sales between the Administrator and the utilities, and the determination of the costs of such power sold by the utilities. In the four part proviso, part (C) permits a utility to terminate such exchange sales under specified circumstances. *It is intended that the Administrator include in contracts implementing this section provisions governing termination and resumption of any previously-terminated exchange, for the purpose of minimizing disruption of the Administrator's rate-making or power marketing programs or planning.*

S. Rep. No. 96-272, 96th Cong., 1st Sess., at 27 (1979) (emphasis added). The report language indicates Congress intended that both termination *and* reentry into the REP following

termination would be conditioned by "reasonable terms and conditions" for the "purpose of minimizing disruption of the Administrator's rate making or power marketing programs or planning." *Id*.

Nevertheless, absent a more robust termination right – one that would allow an exchanging utility to terminate the RPSA at any time and for any reason – BPA finds that the PPC and Snohomish proposals barring reentry for potentially the majority of a 20-year period are not "reasonable" and are inconsistent with the REP, the primary purpose of which is to allow the residential and small farm consumers of regional investor-owned utilities to share in the economic benefits of lower-cost Federal power.[9]

On the other hand, proposals by IPC, IPUC, and the OPUC that an exchanging utility should be allowed to terminate and resume its participation in the REP, essentially at will, seems equally untethered from section 5(c) of the Act and the above-referenced legislative statements regarding termination and reentry. If Congress had intended that the REP be a one-way transaction, with benefits only flowing to the exchanging utility (which would be the effect of the proposal by these parties), it could have so provided. But the termination and reentry provisions of the Act, which Congress specified must be invoked only upon "reasonable terms and conditions" that accommodate BPA's ratemaking, power marketing, and other program interests, support the conclusion that Congress intended otherwise.

BPA agrees, however, that the proposed termination and reentry provisions, which provide one additional termination trigger for exchanging utilities but which are otherwise essentially carryovers from the 1981 RPSA, should be amended to better accommodate the competing interests expressed in section 5(c). To that end, BPA has amended section 11 to provide a termination right that mimics section 5(c)(4) of the Act, and a suspension right that allows an exchanging utility to avoid ever incurring any deemer balances in exchange for a commitment not to participate in the REP upon suspension until expiration of the RPSA at the end of its stated term. Because the termination right is tied to the 7(b)(3) allocation, as a practical matter that right (and its corollary reentry right) will be available only at the beginning of each rate period, when BPA reestablishes the PF Exchange rates. This is a "reasonable term and condition" tied to BPA's ratemaking. The suspension right, which will encompass the right to suspend the Agreement in the event of changes to the ASC Methodology that would result in a utility accumulating a deemer balance, will provide the exchanging utility with flexibility to manage the RPSA in way to maximize REP benefits in the context of a program that, BPA finds, is structured and was intended by Congress to be a two-way bargain. In exchange for the utility's right to suspend the Agreement at any time, BPA will receive certainty regarding its REP obligations to such exchanging utility for a known period. BPA believes this a "reasonable term and condition" that is both important to BPA's cost and resource planning, and reflects the underlying two-way nature of the REP. The amended section 11 is as follows: [10]

"**11. TERMINATION AND SUSPENSION OF AGREEMENT**

11.1 **Termination of Agreement**

[9] See H.R. Rep. No. 96-976, pt. 2, 96th Cong., 2d Sess., at 34-35 (1980)
[10] Additional changes to section 11 as originally proposed are addressed under Issue 2 immediately below.

11.1.1 «Customer Name» may terminate this Agreement by providing BPA with written notice within 30 days following the date of approval by the Federal Energy Regulatory Commission of new BPA rates (on the earlier of such approval on an interim basis, or if interim approval is not granted, on a final basis) in which the supplemental rate charge provided for in section 7(b)(3) of the Northwest Power Act is applied and causes the PF Exchange rate charged «Customer Name» to exceed «Customer Name»'s ASC. Such termination shall become effective as of the date specified in the notice.

11.1.2. Upon termination of this Agreement pursuant to section 11.1.1 «Customer Name» shall not participate in the Residential Exchange Program established in section 5(c) of the Northwest Power Act until «Customer Name» offers to sell electric power to BPA pursuant to a new Residential Purchase and Sale Agreement (RPSA) that has been executed by the Parties. Such RPSA shall become effective no earlier than the start of the first Exchange Period following such request.

11.2 **Suspension**

11.2.1. «Customer Name» may suspend performance under this Agreement for any reason upon 30 days written notice to BPA. Such suspension shall become effective as of the date specified in the notice, and shall suspend the rights and obligations of both Parties as of such date, and such suspension shall continue through [September 30, 2011 or September 30, 2028].

11.2.2. Upon suspension of this Agreement pursuant to section 11.2.1, «Customer Name» shall not seek and shall not be entitled to receive a new RPSA until the expiration of this Agreement on [September 30, 2011 or September 30, 2028]."

Decision

For the foregoing reasons, section 11 will be amended as provided above.

Issue 2

Whether the RPSA should require an exchanging utility to refund REP benefits received over a certain period: (1) in the event that a court remands to BPA the PF Exchange rate and BPA amends such rate upon remand such that the exchanging utility would not have been entitled to receive any REP benefits during such period; or (2) in the event BPA amends or replaces its

ASC methodology applicable to such period such that the exchanging utility would not have been entitled to receive any REP benefits during such period.

Parties' Positions

Snohomish argues that BPA must include in sections 11(a) and 11(b) a requirement that any and all REP payments received in the circumstances described therein must be refunded to BPA within 90 days, plus an interest charge. (Snohomish, BNR0007, at 3-4.)

PPC filed a similar comment, but its comment only addresses an overpayment contemplated under section 11(a). (PPC, BNR0004, at 2.)

BPA Staff's Position

This issue is evaluated in the context of section 11 as originally proposed, *i.e.*, prior to the changes reflected above under Issue 1, because a different termination event (one tied to court action) is addressed here. Section 11(a) of the RPSA as originally proposed provided the Agreement would be deemed retroactively terminated in the event a court of competent jurisdiction remanded to BPA the PF Exchange rate relied upon by an exchanging utility as the basis for its election not to provide a notice of termination and BPA amended such rate upon remand, thereby causing the exchanging utility's ASC to drop below the PF Exchange rate for such period. Similarly, original section 11(b) provided for a retroactive termination triggered by a new or amended ASC Methodology that caused an exchanging utility's ASC to fall below the PF Exchange rate.

The purpose of these clauses was to hold harmless an exchanging utility from certain specified judicial or administrative action, beyond their control, that fundamentally changed the basis (*i.e.*, an ASC above the PF Exchange rate) upon which the exchanging utility made its decision to participate in the REP for an Exchange Period.

Evaluation of Positions

Snohomish and the PPC correctly note that section 11(a) provides for retroactive termination in the event that the PF Exchange rate is remanded to BPA, and BPA re-establishes the rate at a level that would have led the exchanging utility to terminate if the newly established rate had been in effect originally. (Snohomish, BNR007, at 3-4; PPC BNR0004, at 2.) The comments are correct that the effective date of the retroactively applied termination may be several years in the past, and that in this case the exchanging utility will have collected REP payments it was not otherwise entitled to receive. Snohomish and PPC urge BPA to include a requirement that any REP payments received following the effective date of the termination be repaid with interest. *Id.*

Snohomish makes a similar argument with respect to a retroactive termination triggered by section 11(b) of the proposed termination provision. *Id*. Snohomish recommends repayment 90 days from the notice of termination, with interest at "the Prime Rate plus four percent." *Id.*

As originally proposed, the second paragraph of section 11(a) would allow an exchanging utility to (1) retroactively withdraw a termination, and (2) retroactively implement a termination, each in the circumstance where court action has resulted in a change to the PF Exchange rate relied upon by the utility in making its original election to terminate or not terminate. No provision was made for either refunds by the exchanging utility (in the event of a retroactive termination) or payments to the utility (in the event of a retroactive withdrawal of a termination), though the requirement for such payments can be inferred from the retroactive nature of the termination revocation.

In either case, however, the rights and obligations of the parties under the REP following Federal Energy Regulatory Commission or court action setting aside a BPA final decision or decisions that formed the basis for an exchanging utility's benefits or election with respect to participating in the REP will be determined by BPA through additional administrative action in response to such regulatory or court decisions. BPA agrees with Snohomish and PPC that, as a general matter, if an exchanging utility receives REP benefits it was not entitled to receive, such benefits should be returned to BPA by direct payment or setoff. Likewise, the logic for such a result would seem to apply equally to a payment wrongly withheld, and would require that BPA make an exchanging utility whole for payments that should have been made but were not.

However, creating additional contract language to address these hypothetical occurrences raises additional questions regarding the nature of the court's remand and BPA's response, neither of which can be known ahead of time. As a consequence, BPA has decided to eliminate the second paragraph of section 11(a) in its entirety, and leave for administrative action the resolution of REP issues engendered by a court setting aside a BPA final decision or decisions that formed the basis for an exchanging utility's election with respect to participating in the REP, including whether and how REP payments made or not made should be trued up.

Snohomish's comment with respect to section 11(b) is made moot due to the elimination of the right to terminate following changes to the ASC Methodology, as described under Issue 1 above.

Decision

If the Federal Energy Regulatory Commission (FERC) or a court of competent jurisdiction remands, reverses, or otherwise finds unlawful a BPA final decision or decisions that affect an exchanging utility's receipt, or failure to receive, Residential Exchange Program benefits, BPA will review and determine the rights and obligations of the Parties through additional administrative action(s) as necessary to respond to such regulatory or court decisions.

B. Balancing Account Issues

Section 5(c) of the Northwest Power Act established the REP as a "purchase and exchange sale" by and between BPA and an exchanging utility. *See* 16 U.S.C. §§ 839c(c)(1) and (2). While the language and structure of section 5(c) is couched in terms of an actual power exchange (with BPA selling power to the exchanging utility at the PF Exchange rate and purchasing an equivalent amount of power from the exchanging utility at the utility's ASC), BPA has implemented the REP as a monetary transaction since its inception in 1981. As a monetary

transaction, BPA pays the exchanging utility the difference between the PF Exchange rate and the utility's ASC.

Nevertheless, because REP benefits are derived by comparing the rate levels charged by each party for its hypothetical sale of power to the other, the benefits (or economic value of the exchange) could flow from an exchanging utility to BPA in the event the utility's ASC (the rate "paid" by BPA) is lower than BPA's PF Exchange rate. However, Congress appears to have contemplated such a circumstance, and provided exchanging utilities with a limited statutory right to terminate their RPSAs in the event the utility's ASC falls below the PF Exchange rate, due to application of section 7(b)(3) of the Act. 16 U.S.C. §§ 839c(c)(4), 839e(b)(3).

The 1981 RPSA, in addition to providing for termination or suspension of the Agreement consistent with the above-referenced statutory right, included a provision that gave an exchanging utility the option, in lieu of invoking its termination or suspension right, to have its ASC "deemed equal" to the PF Exchange rate. Notwithstanding this deemed equalization of the two rates, the provision also provided that during the period any such election was in effect, BPA would "debit to a separate account the net exchange payment to Bonneville, if any, that would have been required of the Utility if the Utility had not made such election and shall credit to that account any exchange payments that would have been made."[11]

This "deemer" account concept is carried forward by BPA in the proposed RPSAs. The Agreement also includes provisions addressing disposition of existing deemer balances carried over from the 1981 RPSA. The balancing account provison in the prototype Agreement provides as follows:

> "**12. PAYMENT BALANCING ACCOUNT**
>
> (a) **Balancing Account (BA)**
> The account balance, if any, is deemed to be $«___» on October 1, [2008 or 2011][12], subject to the resolution of any disputes regarding such balance. This account balance includes an adjustment for changes in the Western Region Consumer Price Index (all items) (CPI) applied to such balance beginning in October 1, [2008 or 2011], and continuing until such time as the BA balance is reduced to zero, based on the methodology described below. BPA shall adjust such balance monthly effective October 1, [2008 or 2011], to reflect actual monthly changes in the CPI. This account balance (BA_B), if any, comprises the beginning balance for a balancing account described in this section.
>
> As long as the BA_B is greater than zero, such balance shall be adjusted monthly by the change in the Consumer Price Index value for that month relative to the CPI value for the previous month as follows. For the current month (m)

[11] 1981 RPSA, section 10, "Election to Equalize Rates." This provision is has been referred to by parties colloquially as the "deemer account" or "deemer provision."

[12]The 2008 date is in the Bridge RPSA, and the 2011 date is in the Long-Term RPSA.

$BA\ adjustment_{m+1} = \{CPI_m/CPI_{m-1}-1\}*BA\_B_m$

where

CPI_m= current month's CPI Index value as determined below

CPI_{m-1}= Previous month's CPI Index value

BA_B_m = Current month's ending BA balance

BA_B_{m+1} = Next month's beginning BA balance

The CPI index value shall be the end of month Consumer Price Index – All Urban Consumers (West Region. All Items), as published on the Bureau of Labor Statistics web site: http://data.bls.gov/cgi-bin/surveymost?cu (select "West Region, all items" and then select the applicable range of months and years).

The adjusted BA balance for the next month (m+1) shall then be:

$BA\_B_{m+1} = BA\_B_m + BA\ adjustment - P$

Where P is the amount by which the BA increases or decreases as determined by multiplying the difference of the <<Customer Name>>'s current ASC minus the applicable PF Exchange rate by the utility's Residential Load. If the ASC is less than the applicable PF Exchange rate, P will be negative and add to the BA balance; otherwise P will be positive and reduce the BA balance.

(b) **Additions to the Beginning Balancing Account**

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.

(c) **Resumption of Monetary Benefits**

If there is a balance in the balancing account and the ASC is greater than the applicable Priority Firm Power Exchange Rate, BPA will make no cash payments but will apply the amount that would have been paid in order to reduce the account balance. «Customer Name» will resume the receipt of exchange payments from BPA under this Agreement provided that there is no longer an amount in the balancing account, or «Customer Name» makes payments to BPA to bring the balance in the balancing account to zero. «Customer Name» may elect to make cash payments to BPA in order to eliminate all or a portion of «Customer Name»'s account balance at any time.

(d) **Account Balance Carryover**

Any balance in the balancing account, upon termination of this Agreement, shall not be a cash obligation of «Customer Name» but will carry over to the balancing account of the <<Customer Name>>'s next RPSA."

Issue 1

Whether to modify or eliminate section 12(a), which: (1) requires that an exchanging utility's "deemed" account balance as of October 1, 2008 for the Bridge RPSA, and October 1, 2011 for the Long-Term RPSA, must be determined and stated at the time each agreement is executed; and (2) provides that account balances will be adjusted through time to reflect changes in the Western Region Consumer Price Index.

Parties' Positions

With respect to the Long-Term RPSA, WPAG, PPC, and Snohomish argue that instead of including a number that is "deemed" to be the account balance as of October 1, 2011, the clause should provide that the actual balance will be calculated and included in the Agreement on October 1, 2011. (WPAG, BNR0005, at 2-3; PPC, BNR0004, at 3-4; Snohomish, BNR0007, at 5.) PPC also suggests that a "forecasted" amount can be included as a placeholder in the Long-Term RPSA prior to that time. *Id.* These parties do not specifically raise this issue with respect to the Bridge RPSA, but Snohomish and PPC indicated that their comments applied to both agreements, and BPA will treat the comments of these parties on this issue as applicable to both agreements.

These parties also argue that the CPI is not the appropriate measure for adjustments to account balances, but that an interest component should be used instead.

The investor-owned utilities (addressing their comments to both the Bridge and Long-Term RPSAs) state that because the deemer balances are disputed and subject to resolution in other forums, the "restatement or confirmation of the alleged balances" is not a reasonable or necessary term or condition of service under a new RPSA, and that BPA should not include provisions that restate or confirm such balances. (IOU, BNR0002, at 2.) The IPUC echoes the IOUs' position, and questions whether it is realistic that parties can conclusively resolve the issue of outstanding deemer balances even prior to October 1, 2011. (IPUC, RPS0003, at 3.) The IPUC argues that section 12 should be deleted in its entirety. *Id*.

BPA Staff's Position

Proposed section 12(a) requires that the parties agree to a "deemed" account balance attributable to the exchanging utility as of October 1, 2008, in the case of the Bridge RPSA, and October 1, 2011, in the case of the Long-Term RPSA. The "deemed" amount is expressly subject to the resolution of any disputes regarding such balance. BPA's intent with respect to this clause of the Agreement is to carry forward from the 1981 RPSAs, and to state expressly in the new RPSAs, any deemer account balances accrued by an exchanging utility under the 1981 RPSAs. BPA believes this is what was contemplated by the 1981 RPSAs, and that the contractual liability incurred by exchanging utilities under the 1981 RPSAs for deemer amounts should be contractually recognized in the new RPSAs, which is the vehicle through which those liabilities are to be discharged.

Proposed section 12(a) also contains the method by which amounts in the balancing account will be adjusted to account for the time value of money. BPA proposed a measure based on inflation rather than an interest rate, as this seemed to be a better measure of the "cost" incurred by BPA's other customers associated with accumulating unpaid amounts in the balancing account.

Evaluation of Positions

WPAG argues that it is unclear why the RPSA should "deem" an account balance when BPA stated the balance for each IOU in testimony in the WP-07 Supplemental Rate Case. (WPAG, BNR005, at 2.) WPAG argues that the Agreement should include the "actual balance as calculated by BPA" as of October 1, 2011, including any interest accrued on the actual balance. *Id.* WPAG does not specifically address this issue with respect to the Bridge RPSA. PPC similarly argues (also with respect specifically to the Long-Term RPSA) that it is unclear why the RPSA should deem an exchanging utility's 2011 account balance to be a specific amount at the time of contract execution. (PPC, BNR0004, at 3.) PPC proposes that the Agreement should include a forecasted account balance, but include a provision for calculating and including the "actual balance" on October 1, 2011. *Id.*

Snohomish argues that the word "deemed" is inappropriate here, as it implies that the parties know today what the account balance will be more than three years into the future. (Snohomish, BNR007, at 5.) Snohomish proposes the following substitute language:

> The account balance, if any, is estimated to be $ <__> on October 1, 2011. This balance is subject to the resolution of any disputes regarding such balance, and will be adjusted to reflect the actual balance, if any, of the most recent balancing account attributed to <<Customer Name>>.

Id.

For their part, the investor-owned utilities argue that any obligations that purportedly arose under the 1981 RPSAs are "properly the subject of litigation, settlement or otherwise." (IOUs, BNR0002, at 2.) They argue it would be "inappropriate, in violation of the Act, and arbitrary and capricious" for BPA to require contracting parties to restate or confirm such disputed balances, and "waive rights and defenses" they may have with respect to such balances as a condition of executing a new RPSA, and that BPA should not include provisions that restate or confirm such balances. *Id.*

The IPUC states that that the deemer balances are a disputed issue in the WP-07 Supplemental Rate Case. (IPUC, RPS0003, at 2-4.) The IPUC notes that while section 12(a) "seems to" condition the starting balance subject to any resolution, the long running dispute between the parties regarding deemer balances does not give the Idaho PUC confidence that the parties can resolve the issue prior to October 1, 2008. *Id.* Finally, the IPUC argues that the carryover clause of the proposed Agreements does not promote the resolution of the chronic deemer problem but seemingly provides the parties with a convenient alternative to resolving this issue. *Id.*

In summary, none of the commenters believe that the first sentence of proposed section 12(a) is satisfactory. The 1981 RPSAs expressly provided for BPA to "debit to a separate account the net exchange payment to Bonneville" when an exchanging utility was in deemer status, and provided that any balance in that account was to accumulate interest as provided in the RPSA. See 1981 RPSA, section 10. Balances existing at the time the contract terminated were to be carried forward and applied "to any subsequent exchange." *Id*. Setting aside whether these "deemer" balances are consistent with section 5(c) of the Northwest Power Act, some exchanging utilities did accumulate such balances under the 1981 RPSA. The IOUs' conclusion that including a placeholder figure that is "deemed" to be the account balance on the execution date is "inappropriate, in violation of the Act, and arbitrary and capricious" is overblown, as the deemed amount is expressly subject to change through dispute resolution. But BPA agrees it is not strictly necessary that a dollar amount – whether deemed, forecasted, or otherwise – be included in the text of the Agreements, either at the time of execution or on the Effective Date.

However, BPA does believe that it is important, at a minimum, that the Agreements acknowledge whether an exchanging utility did accumulate a deemer account balance under the 1981 RPSA, pursuant to the terms and conditions in that contract. BPA recognizes that these utilities, and their public utility commissions, contest either the amount of these balances, the legality of these balances, or both. In an attempt to accommodate parties' comments, BPA will amend proposed section 12(a) to provide that it will determine the account balance of any utility that accumulated a deemer balance under the 1981 RPSA for carryover, subject to resolution of disputes regarding such determination; but where no such balance was accumulated for carryover by a utility under the 1981 RPSA, the Agreement will recognize this fact. The new section reads as follows:[13]

> "12.1 **Balancing Account (BA)**
>
> *Drafter's Note: First sentence of this section will have one of two possible versions. Version 1 will be used for utilities with a deemer carryover from the 1981 RPSA, Version 2 for utilities with no carryover.*
>
> *Version 1:* The account balance attributable to carryover amounts under the 1981 RPSA shall be determined by BPA, subject to the resolution of any disputes regarding such determination; provided, however, that the effect of section 12.3 below shall not be stayed pending resolution of any such dispute.
>
> *Version 2:* The account balance is zero as of the Effective Date."

With respect to whether it is appropriate to adjust account balances based on inflation, WPAG states that because the account balances reflect an alternative to the exchanging utility paying BPA cash, it is inappropriate to apply an inflationary adjustment to those balances, and interest should be applied to those cash obligations for which payment has been deferred. (WPAG, BNR0005, at 3.) PPC makes the identical argument. (PPC, BNR0004, at 3.)

[13] These versions will be used in the Bridge RPSA. Similar versions, but that also account for the possible accumulation of a deemer balance under the Bridge RPSA, will be used in the Long-Term RPSA.

Snohomish argues that an adjustment based on a measure of inflation is inconsistent with section 5(c) of the Northwest Power Act, which "contemplates a commercial transaction between the exchanging utility and BPA." (Snohomish, BNR007, at 5-6.) As such, any deferral in the obligation by the exchanging utility to make a cash payment requires that interest be applied to the deferred balance, and that BPA should add a statement that any outstanding account balance will accrue interest at the Prime Rate plus four percent. *Id.*
In addition to bringing section 12(a) of the RPSAs back into line with the transaction contemplated by the Northwest Power Act, Snohomish argues that the accrual of interest on an outstanding payment is consistent with prudent utility practice. *Id.*

BPA continues to believe that adjusting the amounts in the balancing account based on the CPI (1) more accurately measures the cost to other BPA customers of the deferred "repayment" of such amounts, and is therefore fairer to both those customers and to the residential and small farm consumers of exchanging utilities, and (2) is easier to apply. First, for reasons explained in Issue 2 below, amounts in the balancing account are not cash obligations of the exchanging utility, but rather non-cash deferred obligations. The Agreements contemplate – consistent with the 1981 RPSA – that this non-cash obligation will be discharged through an offset by BPA to future REP benefits.[14] Using offsets to future REP benefit payments as the default mechanism for amortizing deemer balances is consistent with the fact that these deferred obligations, like the REP benefits paid by BPA, are more accurately attributable to the residential and small farm consumers of the exchanging utilities than to the utilities themselves, which receive no monetary benefits whatsoever from the REP. Absent a contractual obligation to make a cash repayment on a fixed schedule, applying an interest rate of prime plus four percent to outstanding account balances, as proposed by Snohomish, is excessive in relation to the nature of the obligation, and would arguably overcompensate BPA's other customers compared to applying an inflation rate, which, using the CPI based on the last 10 years, would be in the 2 to 5 percent range.

Second, the date by which amounts in the balancing account would be "repaid" by offset is unknowable and largely, if not wholly, outside the control of an exchanging utility. As such, it would be difficult to choose the appropriate interest rate to apply to such amounts, because the rate of interest is determined in large part by the duration of the "loan." Again, in this respect adjusting the amount in the balancing account based on an inflation rate provides a fair surrogate that should make BPA's customers "whole" in the context of the obligation owed to them, and does not unfairly penalize the residential and small farm consumers of the exchanging utilities by using an interest rate that could be excessive in light of the nature and duration of the outstanding obligation.

Finally, Snohomish's argument that section 5(c) of the Northwest Power Act requires that deemer account balances must be treated as if they were cash obligations, even if repayment is effected through offset, is addressed in Issue 2 below.

[14] Section 12(c) of the proposed Agreement does provide for cash payments at the election of the utility.

Decision

The first sentence of proposed section 12(a) will be amended as stated, but no changes will be made to the proposed application of the CPI as the measure for adjustments to amounts in the balancing account.

Issue 2

Whether section 12(d) should be amended to require an exchanging utility to pay in cash a carried-over account balance in the circumstance where the utility does not sign a new RPSA.

Parties' Positions

Snohomish and PPC each note that section 12(d), which expressly states that carryover account balances are not cash obligations, could result in a carried-over account balance remaining unsatisfied in the circumstance where the exchanging utility does not enter into a new RPSA. (Snohomish, BNR007, at 5-6; PPC, BNR0004, at 3-4.) Snohomish questions whether the provision as proposed is consistent with the structure and intent of the REP as provided in section 5(c) of the Northwest Power Act. Snohomish also argues that there is no guarantee that future RPSAs will contain a balancing account in which to put carried-over account balances from the proposed RPSAs.

IPUC argues that the carryover construct is flawed in that it does not promote resolution of the underlying "chronic deemer problem." (IPUC, RPS0003, at 2-4.)

BPA Staff's Position

The proposed RPSA provides that any balancing account amount existing upon termination of this Agreement shall not be a cash obligation of the exchanging utility, but will carry over to the balancing account of the next RPSA. This proposal is consistent with the treatment of these account balances in the 1981 RPSA.

Evaluation of Positions

Snohomish argues that the Northwest Power Act structured the REP as a "standard purchase and sale transaction" with BPA purchasing a set amount of power from a utility at that utility's ASC, and the utility purchasing the same amount of power from BPA at the PF Exchange rate. (Snohomish, BNR007, at 4-5.) Snohomish asserts that the difference between the utility's ASC and the PF Exchange rate was intended by the Act to be a cash obligation between the utility and BPA that flows directly from the transaction established in the Act. *Id.* Snohomish argues that the deemer account concept is not found anywhere in the Act, and is only a mechanism to allow a utility to repay an obligation to BPA through a reduction of exchange benefits it expects to receive in the future, but that the proposed balancing account does not change the nature of the transaction or the statutory obligations stemming from that transaction. *Id.* Snohomish

concludes that without acknowledging that the balancing account is merely an alternative means of repaying a cash obligation, it is in conflict with section 5(c) of the Act. *Id.*

To "better reflect the exchange transaction" nature of the REP and "to avoid conflict with section 5(c)" of the Act, Snohomish proposes the following text be added to the RPSA before section 12(a):

> "Where <<Customer Name>>'s ASC is less than the PF Exchange Rate, <<Customer Name>> may elect to either (i) pay the balance to BPA by the Due Date set forth in section 8(c) or (ii) accrue a balance in a Balancing Account as set forth herein."

Id.

With respect to including language providing for cash payments at the utility's election, BPA believes that a utility could elect to make such a payment notwithstanding any language specifically providing for such payments, and the language already provided in section 12(c) could be applied to such a contingency.[15] Snohomish and PPC also each point out that there is no provision for the circumstance where an exchanging utility with an account balance opts not to sign a future RPSA, and that therefore section 12 does not ensure that BPA will receive the benefit of any account balance that accrues to it. (Snohomish, BNR007 at 5-6; PPC, BNR0004, at 3-4.) *Id.* Snohomish also notes that there is no guarantee that future RPSAs will contain the option to accrue a balance in a Balancing Account, and that section 12(d) of the RPSAs refers to "the next RPSA," but fails to define the term RPSA in the contract. To cure its concerns Snohomish proposes the following changes to section 12(d) of the Agreement:

> "Any balance in the balancing account, upon termination of this Agreement, ~~shall not be~~ remains a cash obligation of <<Customer Name>> but ~~will~~ may, at <<Customer Name>>'s written election, carry over to the balancing account of the next---~~RPSA~~ agreement implementing section 5 (c) of the Northwest Power Act, if such an account is established. If <<Customer Name>> fails to sign a subsequent 5(c) agreement within ninety (90) days following the expiration of this Agreement, any balance in the balancing account, including interest, shall become due and payable within 120 days following the expiration of this Agreement."

Id.

IPUC argues that the carryover construct is flawed in that it does not promote resolution of the underlying "chronic deemer problem." (IPUC, RPS0003, at 2-4.)

BPA believes that Snohomish's characterization of the REP as "a standard purchase and sale transaction" is inaccurate and misleading. Snohomish reasons that because section 5(c) of the Northwest Power Act is structured as an actual exchange implemented through a purchase and sale agreement, Congress must have understood the value of that exchange could move in BPA's favor, and that REP benefits could be owed by an exchanging utility to BPA. Certainly, Snohomish is correct that section 5(c) contemplates a purchase and sale agreement, with REP

[15] Section 12(c) has been renumbered as section 12.3.

benefits measured as the difference between BPA's PF Exchange rate and the utility's ASC. But the fact that Congress provided an exchanging utility with a limited statutory right to terminate the exchange if its ASC fell below the PF Exchange rate is strong evidence against the conclusion that Congress intended or believed that the REP would be akin to an arms-length transaction. It is not "standard" for one party to a contract to have the right to terminate the transaction if its performance is no longer economically advantageous; yet that is exactly the right (albeit with some important limitations) that Congress provided to the exchanging utilities in section 5(c)(4) of the Act.

A Congressional presumption that REP benefits, in the main, would flow from BPA through the utilities and to the intended beneficiaries (residential and small farm consumers) is supported by Congressional committee report language stating that the termination provision was intended to permit an exchanging utility "to terminate the exchange if the rate ceiling of section 7(b)(3) is applied and the resulting surcharge *makes the exchange uneconomic to the utility*." H.R. Rep. 96-976, part 1, 96th Cong., 2d Sess., at 61 (1980) (emphasis added). In fact, most, if not all, of the legislative history regarding the REP discusses it in terms of providing a share of the benefits of the Federal hydroelectric system to the residential and small farm consumers of investor-owned utilities, thereby providing some rate relief to those consumers, not as a "standard purchase and sale transaction" in which REP benefits would be flowing two ways. *See, e.g.,* S. Rep. 96-272, 96th Cong., 1st Sess., at 27 (1979) (pass-through provisions included in bill to "assure that the full cost benefit of the exchange power sales" are passed on to the residential ratepayers); H.R. 96-976, part 2, 96th Cong., 2d Sess., at 34-35 (exchange provides share of economic benefits of low-cost Federal resources and wholesale rate parity with public preference customers); Cong. Rec. S14,694 (daily ed. November 19, 1980) (the proposed exchange provisions provide "power to private utilities for their residential loads at exactly the same rate as power sold to preference bodies" (statement of Sen. Hatfield)).

Nevertheless, Snohomish is correct that the exchange is structured in a way that the economic benefit of the exchange transaction could accrue to BPA, at least in cases where a utility's termination right is unavailable or otherwise conditioned in a way that limits its application. This situation occurred in some periods under some of the 1981 RPSAs. BPA believes it has provided for this eventuality in the proposed Agreements, consistent with the manner it was provided for in the original 1981 RPSA, by offsetting "deemer" account balances against future REP benefit payments. BPA believes repayment of such amounts to BPA by an offset against future REP benefit payments, as opposed to requiring cash payments by the exchanging utility, is consistent with assigning the repayment obligation directly to the real beneficiaries of the REP: the residential and small farm consumers of the exchanging utilities.

As a practical matter, and as expressly required by section 5(c)(3) of the Act, the exchanging utilities are conduits between BPA and the utilities' residential and small farm consumers. The exchanging utilities do not directly profit from the exchange transaction, but rather the "cost benefits, as specified in the contracts with the Administrator, of any purchase and sale transaction … shall be passed through directly to such utility's residential loads." 16 U.S.C. § 839c(c)(3). Cash repayment of deemer account balances has not been required because, while it may be likely, it is not a certainty that an exchanging utility, in particular an investor-owned utility, would be permitted by its regulatory body to recover the cost of such payments from its

residential and small farm consumers. Because the exchanging utilities are not entitled to the financial benefits of the REP, they should not be saddled directly with the financial burdens either.

Finally, the disposition of any funds received by BPA as a cash payment in settlement of a deemer balance is unclear. BPA notes that during such periods of time that the section 7(b)(2) rate test is providing preference customers with rate protection, any additional costs of the REP that might be incurred due to the deeming of an ASC to the PF Exchange rate may not fall on preference customers. Therefore, in cases where the economic benefit of the exchange transaction accrued to BPA, it is not certain where that economic benefit would be allocated. For example, if section 7(b)(2) rate protection was triggered, returns of deemer balances might serve to increase the REP benefits of other exchanging utilities whose benefits had been reduced by the section 7(b)(2) rate protection pursuant to section 7(b)(3). Other non-preference BPA ratepayers might be similarly affected. Thus, the decisions regarding the proper allocation of either cash repayments or REP benefit reductions due to deemer balance reductions are best left to section 7(i) rate proceedings.

In summary, BPA believes treating accumulated deemer amounts in the balancing accounts as non-cash obligations to be satisfied through offset against future REP benefit payments by BPA better comports with (1) the tension inherent in the REP between its structure as an actual exchange, and Congress' evident intent that, at least in the main, benefits flow from and not to BPA, and (2) the fact that the residential and small farm consumers of the exchanging utilities are the real beneficiaries of the REP. However, language has been added to section 12 to clarify that such offset would be applicable as against any instrument, including a new RPSA, used to implement the REP.

Decision

Amounts accumulated in the balancing accounts will not be made cash obligations of the exchanging utilities.

Issue 3

Whether the deemer construct should be deleted in its entirety.

Parties' Positions

The IPUC and Idaho Power each argue that the deemer account construct is contrary to section 5(c) of the Northwest Power Act, and that it should be eliminated in its entirety. They argue that the Agreements should permit a utility to simply cease exchanging power at such times that the PF Exchange rate exceeds the utility's ASC and resume exchanging power when the circumstances reverse. (IPUC, RPS0003, at 2-4; Idaho Power, BRN0003, at 1-2.)

BPA Staff's Position

Sections 12(a) and (b) together provide that whenever an exchanging utility's ASC is less than BPA's PF Exchange rate "during the term of this Agreement," the payment that would otherwise be owed by the exchanging utility to BPA will be tracked by BPA and added to the Balancing Account.[16] This provision is consistent with the deemer account provision contained in the 1981 RPSA, except that the requirement in the 1981 RPSA that an exchanging utility send a notice of an election to deem its ASC as equal to the PF Exchange rate has been eliminated.

Evaluation of Positions

The IPUC states that its primary concern with the proposed Agreements pertains to the "deemer" mechanism. (IPUC, RPS0003, at 2-4.) IPUC argues that 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. *Id.* Citing legislative history, the IPUC concludes that Congress enacted the REP for the purpose of providing rate relief to residential and small farm consumers of the IOUs by providing IOUs access to lower-cost Federal power, thereby promoting wholesale rate parity between BPA's preference customers and eligible IOU customers. *Id.* IPUC argues that proposed sections 12(a) and (b) would stand this Congressional intent "on its head" by providing benefits in the opposite direction. *Id.*

The IPUC proposes that section 12 be stricken in its entirety, and replaced with provisions that permit an exchanging utility to suspend participation in the REP when the utility's ASC is lower than the PF Exchange rate, and to resume participation when the circumstances reverse. *Id.* IPUC concludes that this solution is easy to understand and implement, harms no other party, and is consistent with the Northwest Power Act. *Id.*

Idaho Power echoes IPUC's arguments that the Northwest Power Act does not contemplate the accumulation of large deemer balances or a significant transfer of value from an exchanging utility and its customers to BPA when the PF Exchange rate exceeds a utility's average system cost. (Idaho Power, BRN0003, at 1-2.) IPC also supports IPUC's proposal that the RPSA should permit an exchanging utility to cease exchanging power when the PF Exchange rate exceeds the utility's average system cost and resume exchanging power when the utility's average system cost again exceeds the PF Exchange rate. *Id*. Like the IPUC, Idaho Power argues that a contractual provision of this nature would not deprive other regional customers of BPA of any benefits to which they are legally entitled, but would better facilitate achievement of the wholesale rate parity contemplated by the Act. *Id.*

For the reasons outlined in Issue 2 immediately above, BPA disagrees with the conclusion that the REP is a "one-way street" exclusively. Section 5(c), together with its legislative history, creates a tension between a program that, fundamentally and primarily, is intended to provide benefits to residential consumers of exchanging utilities, but that is structured and limited in a way that anticipates the possibility that the value of an exchange transaction could favor BPA,

[16] The phrase "during the term of this Agreement" in section 12(b) (renumbered as section 12.2) will be amended to reflect changes to the termination and suspension provisions and to make clear that it was not the intent that deemer balances would accrue during any period after the Agreement was terminated by an exchanging utility.

and providing exchanging utilities with only a limited and conditional means of terminating the exchange transaction. BPA must attempt to accommodate these competing expressions of legislative intent. As amended, the proposed RPSA provides exchanging utilities with the flexibility, through a combination of termination and suspension rights, to optimize REP benefits and minimize, or avoid completely, deemer obligations. To the extent any deemer balance is accumulated, it will not be treated as a cash obligation under the Agreement.

Decision

BPA will not eliminate the balancing account.

C. In-lieu Issues

Section 5(c)(5) of the Northwest Power Act provides that "in lieu" of purchasing power from the exchanging utility, BPA may acquire an equivalent amount of power from other sources if the cost of such acquisition is less than the cost of purchasing the power offered by the utility priced at its ASC. 16 U.S.C. § 839c(c)(5). Under the 1981 RPSA, following notice by BPA of its intent to make an acquisition in lieu of purchasing all or a portion of the exchanging utility's power, the utility could either reduce the amount of power it sold to BPA to the amount remaining after BPA's in-lieu acquisition (with BPA purchasing the remainder from the in-lieu resource), or reduce its ASC to the cost of the intended in-lieu acquisition. The proposed in-lieu provisions in the Bridge and Long-Term RPSA are based substantially (but with important modifications) on the in-lieu provisions in the 2000 RPSA prototype, which added provisions not in the 1981 RPSA regarding the physical delivery of in-lieu power at the PF Exchange rate from BPA to the exchanging utility.

Although the proposed in-lieu provisions address most of the essential terms and conditions regarding in-lieu transactions, many important details regarding their implementation are left for the development of an In-Lieu Power Policy ("In-Lieu Policy" or "Policy") to be developed and adopted by BPA through a notice and comment process. By definition, BPA may not exercise its in-lieu rights under the Agreement until such time as the Policy is adopted.

The proposed in-lieu provision is as follows:

> "**7. IN-LIEU TRANSACTIONS**
>
> (a) **BPA's Right to In-lieu**
> Rather than purchase all or a portion of the electric power offered to BPA pursuant to section 5 by «Customer Name» at a rate equal to its ASC, BPA may acquire In-Lieu Power if the cost of such power is less than «Customer Name»'s ASC. The ASC that will be used for issuing an in-lieu notice shall be the ASC in effect on the date such notice is given.
>
> (b) **In-lieu Notice(s)**
> BPA shall provide «Customer Name» a minimum period advance written notice of its election to acquire In-Lieu Power, and shall include in the

notice the following information: the source(s) of In-Lieu Power, the amount of In-Lieu PF Power, the shape of In-Lieu Power, the cost of such In-Lieu Power, the term of the In-Lieu PF Power sale, and the point or points of delivery. Such minimum period shall be established by the In-Lieu Power Policy (but in no event shall be less than 90 days).

(1) **Source(s) of In-Lieu Power**
The sources of In-Lieu Power shall be defined in the In-Lieu Power Policy.

(2) **Amount of In-Lieu PF Power**
The monthly amounts of In-Lieu PF Power shall be based on BPA's most recent forecast of «Customer Name»'s Residential Load. «Customer Name» shall identify the portion of its Contract System Load, as described in Exhibit D, 2008 Average System Cost Methodology, that is Residential Load at the time it files an Appendix 1 under this Agreement in the manner described in section 7(f) below. BPA may issue an in-lieu notice for all or a percentage portion of «Customer Name»'s Residential Load.

(3) **Expected Costs of In-Lieu Power**
BPA shall identify its expected costs of In-Lieu Power in the in-lieu notice. Such expected costs shall consist of BPA's forecast of the wholesale costs of supplying In-Lieu Power to the delivery point in the amount and in the shape identified in the in-lieu notice. Such expected costs of the In-Lieu Power shall be developed in accordance with procedures described in the In-Lieu Power Policy and shall include: the cost of transmission and losses to integrate the power into the BPA system, to the extent they are incurred; the costs of the power shaped to meet a uniform percentage of Diurnally differentiated monthly amounts of Residential Load identified in the in-lieu notice; the costs of additional operating reserves if such reserves are necessary under Western Electricity Coordinating Council procedures; the product of the Transmission Component of ASC multiplied by the amount of In-Lieu PF Power; and the costs that BPA incurs to deliver the In-Lieu PF Power to the point of delivery as described below.

The expected cost of In-Lieu Power shall include the costs of delivering the power to «Customer Name». Any transmission cost or losses incurred to deliver the In-Lieu Power directly to «Customer Name» shall be treated as a cost to integrate the power into the BPA system.

(4) **Term and Quality of the In-Lieu PF Power Sale**
The In-Lieu PF Power will be firm power offered by BPA for a period of one or more Fiscal Years. BPA may issue multiple in-lieu notices.

(c) **«Customer Name» Election to Either Receive In-Lieu PF Power or Reduce ASC**
Within a minimum period (as described below) following the receipt of BPA's notice to acquire In-Lieu Power pursuant to section 7(b) above, «Customer Name» shall provide BPA written notice of its election to either receive and pay for all or a portion of the In-Lieu PF Power or to not receive In-Lieu PF Power and instead reduce its ASC for all or a portion of the In-Lieu Power to the expected cost of the In-Lieu Power. If «Customer Name» elects to reduce its ASC to the expected cost of the In-Lieu Power, and the expected cost of such In-Lieu Power is less than the PF Exchange Rate, then «Customer Name» may suspend its sale and purchase under sections 5 and 6 of this agreement for all or a portion of the amount of Residential Load that BPA proposes to serve with In-Lieu PF Power, for the duration of time specified in the In-lieu notice. «Customer Name»'s election under this section shall be based on all or a percentage portion of «Customer Name»'s Residential Load that BPA has specified in its in-lieu notice. Amounts suspended under this section 7(c) shall not be added to «Customer Name»'s payment balancing account under section 12. Such minimum period shall be established by the In-Lieu Power Policy (but shall in no event be a period less than 15 days). If «Customer Name» fails to notify BPA of its election under this section, then «Customer Name» shall be deemed to have agreed to receive and pay for all of the In-Lieu PF Power specified in such notice.

(d) **Delivery of and Payment for In-Lieu PF Power**
In-Lieu PF Power shall be delivered to the transmission system connected to «Customer Name»'s distribution system. All In-Lieu PF Power deliveries shall be scheduled. «Customer Name» shall pay BPA for In-Lieu PF Power made available for delivery at the PF Exchange Rate. For any month that «Customer Name» pays BPA for such In-Lieu PF Power, BPA shall pay to «Customer Name» an amount equal to the product of the Transmission Component of ASC multiplied by the amount of such In-Lieu PF Power.

(e) **Scheduling of In-Lieu PF Power**
«Customer Name» shall preschedule In-Lieu PF Power in accordance with Exhibit E, Power Scheduling.

(f) **Shaping of In-Lieu PF Power**
In-Lieu PF Power will be delivered in monthly amounts shaped to «Customer Name»'s monthly Residential Load (*e.g.*, if «Customer

Name»'s January Residential Load is 12 percent of its annual Residential Load, In-Lieu PF Power deliveries for January will be 12 percent of annual In-Lieu PF Power deliveries). Such monthly amounts shall be based on data used by «Customer Name» to establish its then-current rates, and shall be supplied to BPA with its forecast of Residential Load. «Customer Name» shall supply a monthly forecast of Residential Load, and the diurnal amounts of Residential Load, when it files its Appendix 1. Deliveries within each month will be in equal hourly amounts during each HLH and in equal hourly amounts during each LLH, for each monthly period based on the load shape data in «Customer Name»'s forecast of Residential Load. If BPA does not have, or is not provided adequate load shape data, BPA will determine the load shape of the In-Lieu PF Power based on the average load shape of its preference customer class. Adequately documented load shape data shall include, but not be limited to, data that are verifiable through published sources. The load shape established for each notice will continue for the duration of the In-Lieu PF Power transaction."

Issue 1

Whether BPA should adopt an In-Lieu Policy prior to offering the RPSAs.

Parties' Positions

WPAG argues that the cost protection mechanism of an In-Lieu Policy cannot be "left as an afterthought," but must be addressed fully before the implementation of the RPSAs takes place. (WPAG, BNR005, at 3.)

The IOUs argue that leaving significant terms and conditions regarding an in-lieu transaction undefined will cause "undue and unacceptable uncertainty" regarding the parties' responsibilities and obligation if BPA attempts to engage in such transactions before adoption of an In-Lieu Policy. (IOUs, BNR0002, at 1-2.) They propose that the Agreement expressly state that BPA will not engage in any in-lieu transactions until it adopts an In-Lieu Policy. *Id.*

BPA Staff's Position

The In-lieu section requires that the In-Lieu Policy provide the following guidelines, terms, and conditions regarding any in-lieu transaction: (1) the minimum period written notice of an in-lieu transaction that BPA must provide to the exchanging utility (section 7(b)); (2) the permissible sources of In-Lieu Power (section 7(b)(1)); (3) the costs that must (or must not) be attributed to the In-Lieu Power purchase (section 7(b)(3)); and (4) the period (but not less than 15 days) by which the exchanging utility must provide BPA notice of its election regarding physical receipt of In-Lieu Power (section 7(c)).

BPA believes it would not be able to exercise its option to implement an in-lieu transaction until such time as it has adopted an In-Lieu Policy after a notice and comment period.

Evaluation of Positions

WPAG states that section 5(c)(5) of the Northwest Power Act was included to ensure that BPA did not pay more than market for the power offered to it under the REP, and as such that it was intended to protect BPA's vital interest of ensuring cost recovery, in accordance with section 7(a) of the Northwest Power Act. (WPAG, BNR005, at 3.) WPAG argues that the problem with this approach is that the in-lieu mechanism will not be ready for implementation when needed, leaving BPA in the position of incurring unnecessary and unwarranted costs from which Congress intended to protect BPA and, by inference, its preference customers. *Id.*

BPA disagrees with WPAG that leaving for a later date development and adoption of an In-Lieu Policy will result in unnecessary and unwarranted costs to its preference customers. First, even if there were sufficient time to undertake a process to develop and adopt an In-Lieu Policy before the Bridge RPSAs are implemented, all of the most likely exchanging utilities' ASCs are substantially below the cost of potential in-lieu resources, as measured by current and forward market prices. BPA believes it is most likely that this situation will persist for at least the first two to three years of the Bridge RPSA term. But in the event that market conditions change dramatically from current expectations, making in-lieu transactions desirable, BPA can promptly begin an administrative proceeding to establish an In-Lieu Policy. Second, the In-Lieu Policy will require BPA to provide an exchanging utility with a reasonable period of notice prior to initiation of an in-lieu transaction. Because an in-lieu transaction may include the delivery of physical power to the exchanging utility by BPA, it can be anticipated (although BPA is not prejudging the issue here) that such notice period will be measured in months, not days. The IOUs have already proposed a five-year minimum notice in their RPSA comments. Whatever notice period is ultimately adopted, it will overlap some part of the term of the Bridge RPSA, so adopting the Policy prior to the effective date of the Bridge RPSA is unnecessary. Nevertheless, BPA is mindful that both the exchanging utilities' ASCs and the cost of possible in-lieu resources could change substantially prior to implementation of the Long-Term RPSA on September 30, 2011. BPA will revisit the desirability of initiating the process for adopting an In-Lieu Policy no later than early in FY 2011.

For their part, the IOUs argue that absent the In-Lieu Policy, significant terms of an in-lieu transaction are undefined, causing undue and unacceptable uncertainty regarding the parties' responsibilities and obligations in the event BPA attempts to engage in such transactions before adoption of an In-Lieu Power Policy. (IOUs, BNR0002, at 1-2.) Although BPA believes that, as written, the proposed RPSA precludes BPA from implementing any in-lieu transaction until the In-Lieu Policy is adopted, to remove any uncertainty BPA will revise the RPSA templates, along the lines suggested by the IOUs, to expressly state that BPA will not engage in such transactions until it adopts an In-Lieu Policy following notice and comment and the issuance of a record of decision. BPA will address any IOU proposals regarding the proposed Policy, including proposals regarding notice periods, as part of that process.

Decision

The adoption of an In-Lieu Policy prior to implementation of the Bridge RPSA is impractical and unnecessary. BPA can promptly begin the development of an In-Lieu Policy in the event market conditions change dramatically from current expectations. BPA will revisit the desirability of initiating the process for adopting an In-Lieu Policy no later than early 2011. The in-lieu provision will be amended to expressly prohibit any in-lieu transaction until BPA has adopted an In-Lieu Policy through a record of decision following a notice and comment period.

Issue 2

Whether BPA should monetize in-lieu transactions.

Parties' Positions

The PPC proposes that BPA implement any in-lieu transaction through a monetary transaction, rather than through a physically delivered power sale, as contemplated in the proposed RPSA. (PPC, BNR0004, at 2.)

BPA Staff's Position

The proposed RPSA incorporates, with some modifications, provisions developed for the 2000 RPSA prototype regarding BPA's physical delivery of In-Lieu PF Power to an exchanging utility.[17] The rationale for making the in-lieu transaction a physical, as opposed to monetary, transaction is twofold. First, as noted previously, the Northwest Power Act structured the REP as a physical exchange of power, with BPA essentially using the power it purchases from the exchanging utility to make its return delivery to the utility. In an in-lieu transaction, BPA ceases to "purchase" all or a portion of the power from the exchanging utility under the RPSA, but its delivery obligation to the exchanging utility remains. Therefore, BPA's in-lieu purchase, according to the logic of the Act, is used to satisfy this delivery obligation. Second, because the purpose, and consequence, of an in-lieu transaction is to reduce the amount of REP benefits to the exchanging utility, it is important that the in-lieu transaction be bona fide. The best way to ensure and test the genuineness of the in-lieu transaction, including most importantly the cost of the in-lieu resource, is to deal in physically delivered power.

Notwithstanding the physical delivery provisions, section 7(c) of the Agreement gives the exchanging utility the option of declining physical receipt of some or all of the In-Lieu PF Power, and instead reducing its ASC to the expected cost of the In-Lieu Power.[18] In the event

[17] Section 2(j) of the proposed RPSA defines In-Lieu PF Power as "firm power that is sold by BPA to «Customer Name» in an in-lieu transaction at the Priority Firm Power Exchange Rate, or its successor."

[18] In-Lieu Power (as opposed to In-Lieu PF Power) is defined in the RPSA as the firm power *acquired* by BPA as part of the in-lieu transaction, whereas In-Lieu PF Power is the power *sold* by BPA to the exchanging utility as part of the transaction. *See* section 2(k) of the Agreement (renumbered as section 2.17).

that this cost is still above the PF Exchange rate, then that portion of the exchanging utility's REP benefits would continue to be provided in cash, albeit at a lower level.

Evaluation of Positions

PPC states that section 5(c)(5) (the in-lieu provision) of the Northwest Power Act is designed to ensure that if market power is available at a cost less than the exchanging utility's ASC, BPA will be required to pay benefits to the exchanging utility that reflect only the cost differential between the PF Exchange Rate and the market price. (PPC, BNR0004, at 2.) PPC argues that for ease of implementation, and in order to avoid an unnecessary exchange of actual power, BPA should implement the in-lieu protections of the REP through a financial transaction, rather than through an actual power sale to the IOUs. *Id.*

BPA agrees that monetizing in-lieu transactions, that is, paying the exchanging utility REP benefits based on the difference between the In-Lieu Power cost and the PF Exchange rate (for the amount of the in-lieu transaction), would be easier to administer than an actual power sale. Eliminating a physical purchase and sale could have additional benefits as well; for example, eliminating BPA's counterparty risk associated with a market purchase of In-Lieu Power. As noted above, monetization is already contemplated by the RPSA in the case where the utility elects to decline physical delivery of In-Lieu PF Power and deem its ASC equal to the cost of the In-Lieu Power, in which case that portion of the exchanging utility's REP benefits would continue to be provided in cash. There does not appear to be anything in the Northwest Power Act that would preclude structuring the RPSA so that all in-lieu transactions would be monetized, or that would preclude making monetization the default mechanism.

However, BPA would like to hear from the IOUs, and other interested parties, regarding this issue. Monetizing all in-lieu transaction presents a number of issues, including how to measure the costs of what would essentially be a hypothetical transaction. Therefore, BPA will seek comments on this issue as part of the In-Lieu Policy notice and comment process. BPA will remove these provisions from the RPSA, and add language indicating that the in-lieu transaction delivery mechanism will be addressed in the In-Lieu Policy, and subsequently incorporated into the Agreement as appropriate.[19]

Decision

The delivery terms in section 7 of the RPSA will be removed pending further review of this issue as part of the In-Lieu Policy notice and comment process.

Issue 3

Whether BPA should allow an exchanging utility to remarket In-Lieu PF Power in the event it chooses to take physical delivery of such power from BPA as part of an in-lieu transaction.

[19] Sections 7(c)-(f) will be deleted from the RPSA and replaced with a new section 7(c) (renumbered as section 7.3).

Parties' Positions

The OPUC argues that to ensure that a utility can prudently manage its resource supply, BPA should include contract language that allows the utility to "market any PF Exchange Power." (OPUC, RPS0005, at 4-5.)

BPA Staff's Position

As noted above, BPA will address the issue of whether to monetize all in-lieu transactions as part of the In-Lieu Policy notice and comment process, and the delivery provisions in section 7 of the proposed RPSA will be removed pending completion of that process. However, under the proposed RPSA language, in the event an exchanging utility elects to receive In-Lieu PF Power, such power would be scheduled and delivered to the transmission system connected to the utility's distribution system. *See* sections 7(d) and (e). As a practical matter, this means the power could be delivered by BPA to the various points on its transmission system that are connected to the utility's own distribution system.

Evaluation of Positions

The OPUC argues that the physical delivery by BPA to an exchanging utility of In-Lieu PF Power would raise issues regarding the utility's "power planning (integrated resource planning) and could limit a utility's flexibility to plan resource supply at the lowest cost." (OPUC, RPS0005, at 5.) OPUC proposes, as a means of ensuring that an exchanging utility can prudently manage its resource supply, that BPA should include contract language that allows the utility to "market any PF Exchange Power." *Id*. OPUC proposes that a new section 7(g) should be added as follows:

> *"(g) **Resale of PF Exchange Power***
> *Notwithstanding and Federal law prohibition on resale of Federal power, <<Customer Name>> may remarket PF Exchange Power [sic]. In the event the power is remarket, [sic] <<Customer Name>> shall provide BPA thirty days notice of such resale and provide BPA any documentation necessary to identify the net proceeds from the sale. <<Customer Name>> shall record any net proceeds in a clearly identified account and distribute any such proceeds exclusively to its qualifying residential consumers."*

Id. BPA believes that, in general, the provisions for delivery of In-Lieu PF Power would provide most exchanging utilities with a good deal of flexibility with respect to where they received In-Lieu PF Power on their systems, and how they disposed of such power once it was received. It is not the intent of the delivery provisions, nor is it physically possible, to require that an exchanging utility resell each electron of In-Lieu PF Power only to its residential and small farm consumers. There are times when the delivery of In-Lieu PF Power could cause the exchanging utility to have more power than needed to serve its native load. In such cases, it would be BPA's expectation that the utility would sell its system surplus into the market. Nothing in the proposed in-lieu provisions would preclude such a result. Therefore, it is not clear how the provisions could be read as limiting a utility's resource supply flexibility.

BPA's primary interest is that the value of the in-lieu transaction be passed through to the exchanging utility's residential and small farm consumers, and that such value be measured as the difference between the cost of the In-Lieu Power and the PF Exchange rate. It is not clear that OPUC's proposal would guarantee this result. The OPUC proposal seems to contemplate that the resale price garnered by the exchanging utility would substitute for the cost of the In-Lieu Power for purposes of calculating the REP benefits owing to its eligible load, with the "net proceeds" distributed to "qualifying residential customers." By "net proceeds," BPA assumes the OPUC means the proceeds net of the rate paid by the utility to BPA; that is, the PF Exchange rate. However, it is possible that some or all of the remarketed power, as contemplated by the OPUC language, could be sold at a price below the cost of the In-Lieu Power. This would result in lower REP benefits to pass through than if benefits were measured as the difference between the PF Exchange rate and the cost of the In-Lieu Power. BPA believes any marketing of an exchanging utility's system surplus, which may or may not be created through the purchase by the utility of In-Lieu PF Power, should stay at the utility's system level, and not be pegged specifically as associated with In-Lieu PF Power.

Decision

The proposal by the OPUC appears to have the possibility of resulting in lower REP benefits than would otherwise be available, and will not be included.

Issue 4

Whether BPA should allow an exchanging utility to purchase In-Lieu PF Power at the expected In-Lieu Power cost instead of at the PF Exchange rate if the former is lower than the latter.

Parties' Positions

The IOUs propose that if an exchanging utility elects to purchase In-Lieu PF Power, and the cost of such power is less than the applicable PF Exchange rate, then the utility should pay a rate equivalent to the expected cost of In-Lieu Power. (IOUs, BNR0002, at 1-2.)

BPA Staff's Position

Section 7(d) of the proposed RPSA states that an exchanging utility shall pay BPA for In-Lieu PF Power made available for delivery at the PF Exchange rate, minus an amount equal to the product of the Transmission Component of ASC multiplied by the amount of such In-Lieu PF Power.

Evaluation of Positions

The IOUs argue they should pay the lesser of the PF Exchange Rate and the expected cost of In-Lieu Power, and that this change is "necessary to prevent BPA from inappropriately profiting from an In-Lieu Power transaction." (IOUs, BNR0002, at 1-2.)

BPA disagrees with the IOUs' analysis of this issue. First, the REP is structured as a sale by BPA to the utility at the PF Exchange rate, with a corresponding and simultaneous purchase by BPA from the utility at the utility's ASC. The fundamental purpose of the in-lieu provision is to substitute a lower price at which BPA makes its purchase, not to lower the rate at which BPA makes its sale. The in-lieu concept was intended by Congress to lower the cost of the REP where feasible, and the IOU proposal would seem to frustrate that purpose.[20]

Second, BPA disagrees that this change is necessary to prevent BPA from "inappropriately profiting" from an in-lieu transaction. In the event the cost of the In-Lieu Power is below the PF Exchange rate, the utility has the option under section 7(c) of deeming its ASC equal to the expected cost of the In-Lieu Power and suspending that portion of the exchange for the duration of the proposed in-lieu transaction. During such suspension no amounts are added to the utility's account balance. Therefore, BPA is neither realizing any net positive margin between a low-cost purchase and a high-priced sale (there is no sale at all due to the exchanging utility's election), nor is BPA realizing any benefit through a growing account balance (due to the exchanging utility's election to suspend).

Finally, BPA does not have the discretion to make sales of exchange power at any rate other than the PF Exchange rate, developed pursuant to section 7 of the Act and duly established by BPA in a section 7(i) proceeding, and approved by the Federal Energy Regulatory Commission. See 16 U.S.C. §§ 839e(i)(1) – (e)(6).

Decision

The IOUs' concern that BPA could inappropriately profit from certain in-lieu transactions is misplaced, and in any case BPA cannot make an exchange sale at a rate other than the duly established PF Exchange rate. The IOU proposal will not be adopted.

Issue 5

The following additional issues regarding in-lieu transactions were raised by certain parties:

> *(a) whether BPA should include the cost of transmission associated with delivering In-Lieu PF Power to an exchanging utility in the calculation of the cost of the In-Lieu Power;*
>
> *(b) whether BPA should make the shape of the In-Lieu PF Power match the Residential Load shape;*
>
> *(c) whether BPA should specify the term of the in-lieu transaction in the RPSA; and*

[20] *See, e.g.,* S. Rep. No. 96-272, 96th Cong., 1st Sess., at 29 (1979) (in-lieu provision allows BPA to carry out the exchange power sales by purchasing power other than that offered by the exchanging utility if it is available at a lower cost.)

(d) whether BPA should revise the minimum amount of time that an exchanging utility has to respond to BPA's notice to acquire In-Lieu Power.

BPA will defer addressing each of the foregoing issues until it undertakes the In-Lieu Policy process. BPA is mindful that each of these issues could be relevant whether a proposed in-lieu transaction is monetized or physically delivered. However, the exact nature, scope, and impact of each issue with respect to an in-lieu transaction may well be determined by whether BPA decides to monetize all in-lieu transactions. Other related issues may arise as well in the context of monetary-only in-lieu transactions.

BPA will address in the In-Lieu Policy proceeding the arguments and proposals made by parties in comments filed to date with respect to the above-referenced issues, plus any additional comments filed as part of such proceeding.

Decision

*BPA will defer addressing the foregoing issues until it undertakes the In-Lieu Policy process***.**

D. Other Issues

The following additional substantive issues were raised by parties in their comments.[21]

Issue 1

Whether an exchanging utility should be allowed to specify the term of any RPSA it executes.

Parties' Positions

The OPUC recommends that BPA should allow each customer to specify the expiration date of its Long-Term RPSAs. (OPUC, RPS0005, at 1.)

BPA Staff's Position

The proposed Long-Term RPSA has an expiration date of September 30, 2028, covering a 17-year period once performance begins under the Agreement.[22]

Evaluation of Positions

The OPUC states that a specific term for the agreement is needlessly restrictive, that BPA has no specific mandate to require that the contract term be 17 years, and that section 5(c)(l) of the

[21]Several parties raised non-substantive issues and/or proposed non-substantive changes to contract language. Most (if not all) of these proposed changes were helpful in correcting errors, clarifying the meaning of text, or resolving possible ambiguities. They have largely been incorporated into the final Agreements, but are not addressed individually here.

[22] As proposed, these contracts will be signed on October 1, 2008, but service will not commence until October 1, 2011, and will expire on September 30, 2028. Thus, while these are styled as 20-year contracts (as measured from the date they are signed), service under the contracts is for a term of 17 years.

Northwest Power Act requires BPA to offer an RPSA to an exchanging utility whenever requested. (OPUC, RPS0005, at 1.) OPUC states that the termination provisions are not a sufficient substitute for managing the term of the contract since termination is conditional. *Id.*

One of BPA's goals is to assure that residential and small-farm consumers of investor-owned utilities receive a fair and reasonable share of the benefits from the Federal system over the long term, consistent with the law, that will parallel the certainty obtained by public utilities. The offering of 20-year contracts to public utility, IOU, and direct-service industrial customers at the same time is a key component of BPA's Long-Term Regional Dialogue Final Policy (July 2007). Were BPA to allow each utility to choose and set the duration of its RPSA contract, it would undercut the certainty and stability that is one fundamental purpose of the 20-year period. Because the REP has a cost impact to BPA's other base rates, offering 20-year contracts with all its customer groups offers stability by clarifying, on a longer-term basis, the rights and obligations of all three customer classes with respect to the Federal hydroelectric system, and the potential cost and rate impacts that BPA must manage as a consequence. The OPUC's suggestion therefore runs directly counter to the major purpose of Regional Dialogue.

While OPUC is correct that section 5(c)(1) of the Act specifies that an exchanging utility may request to enter into an exchange transaction at any time, as discussed above BPA believes such contract offers are necessarily subject to the "reasonable terms and conditions" specified in section 5(c)(4) of the Act. In this case, BPA believes it is both desirable and reasonable to offer contracts to its customers that are effective for the same period of time, so as to minimize disruption that would otherwise occur with contracts expiring at different times. BPA's historical contracting practice under both sections 5(b) and (c) of the Act has been to offer contracts with specified term lengths that are standard for all contracts, thereby promoting certainty to BPA with respect to its obligations, and parity to customers with respect to access to the Federal system.

Decision

The Long-Term RPSAs will all specify expiration dates of September 30, 2028.

Issue 2

Whether BPA should allow exchanging utilities to access BPA's conservation credit offering.

Parties' Positions

The OPUC proposes that all BPA customers should have access to BPA's conservation and renewables discount program. (OPUC, RPS0005, at 2.)

BPA Staff's Position

The proposed RPSA does not contemplate access to any conservation or renewable credit program offered by BPA.

Evaluation of Positions

The OPUC suggests that all BPA customers should have access to BPA's conservation and renewables discount program, or "C&RDP". (OPUC, RPS0005, at 2.) The OPUC disagrees with BPA's position taken in other forums that IOUs participating in the REP should not have access to the C&RDP because conservation paid for by BPA would not reduce the level of loads placed on BPA. *Id.* The OPUC contends that, for example, pursuant to any in-lieu transaction BPA would be purchasing power and selling such power to serve the exchanging utility's residential loads. *Id.* The amount of In-Lieu Power purchased by BPA would directly depend on the level of residential loads. *Id.* With conservation, residential loads would decrease, and correspondingly, BPA's supply obligations would decrease as well. *Id.*

BPA is not persuaded by the OPUC's argument. BPA replaced the Conservation and Renewables Discount – a line item credit provided to BPA's customers on their monthly power bills from BPA – in the 2007 wholesale power rate case with the Conservation Rate Credit ("CRC"). The CRC, like its predecessor the C&RD, is included in customers' monthly power bills. These credits have not been included under the PF Exchange rate. The reason for this is that BPA is obligated to acquire conservation as a resource to meet its load obligations. Exchanging utilities have access to the CRC under their section 5(b) requirements contracts with BPA, if any, but BPA does not have an actual load serving obligation under the RPSAs or section 5(c) of the Act. In addition, it is unclear whether BPA will be physically delivering any power under the RPSAs as part of an in-lieu transaction. Whether a utility will have the option to take physical receipt of In-Lieu PF Power (if any is even offered by BPA), or whether in lieu-transactions will be monetized, will be determined in the In-Lieu Policy.

The OPUC argues that even under the traditional exchange, the level of residential loads directly affects the costs of the exchange since costs equal the utility's ASC multiplied by qualifying loads. (OPUC, RPS0005, at 2.) Therefore, OPUC reasons, all of BPA's customers would benefit from lower exchange costs if IOU loads were reduced through conservation. *Id.* However, OPUC fails to acknowledge the purpose of BPA's conservation program is to pursue conservation equivalent to all cost-effective conservation in the service territories of those public utilities that BPA is obligatd to serve under section 5(b) of the Act. (*See* Long-Term Regional Dialogue Final Policy, at 30.) Because BPA is not planning to serve IOU residential loads with firm requirements power, BPA will not include those loads in determining BPA's conservation target, nor will BPA provide separate funding for conservation for these loads. However, if BPA enters into a load obligation with an IOU under section 5(b), it is reasonable to assume rates applicable to sales under such a contract will include some form of conservation credit, if one is then in effect.

Finally, even though BPA is not providing exchanging utilities access to the CRC through the RPSA, it is important to note that these utilities, including the IOUs, are allowed to include the costs of their own conservation measures in the calculation of their ASCs. By allowing conservation costs in the ASC's, BPA picks up a share of those costs through the REP benefits it pays. Therefore, the IOUs are getting a portion of their conservation costs covered by BPA through means other then the CRC.

Decision

BPA will not allow exchanging utilities participating in the RPSAs access to BPA's applicable conservation credit offering.

Issue 3

Whether BPA should change the start of the commencement date in the RPSA from October 1 to November 1.

Parties' Positions

Snohomish proposes that the October 1 commencement date should be changed to a date after November 1, to allow time to gather and utilize the October data and submit the invoice. (Snohomish, BNR007, at 1.)

BPA Staff's Position

The draft RPSA states that upon filing an Appendix 1, the utility shall commence invoicing for eligible load on the later of the date of such filing or October 1.

Evaluation of Positions

Snohomish notes that the final sentence of section 4 of the RPSAs states that the customer "shall commence invoicing for Residential Load" on October 1, but that this date should be changed to a date after November 1, to allow time to gather and utilize the October data and submit the invoice. (Snohomish, BNR007, at 1.)

Snohomish's point is well taken. Under the 2008 ASC Methodology, a utility makes an Appendix 1 filing and receives a BPA ASC for the exchange period prior to the start of the rate period. In addition, as Snohomish points out, the utility submits an invoice each month during the exchange period reflecting actual eligible exchange loads for the prior month. This requirement results in the actual eligible exchange loads for a month to be invoiced to BPA the following month. BPA agrees that the language needs to be changed to reflect this requirement. BPA will amend section 4 to provide that upon filing an Appendix 1 for an Exchange Period, the utility shall commence invoicing for Residential Load Eligible for Monetary Benefits, pursuant to section 8.1 of the Agreement, in the month following the first full month of such Exchange Period.

Decision

The RPSA will be amended as stated above.

Issue 4

Whether BPA should provide more clarity in the Bridge RPSA payment section.

Parties' Positions

Snohomish proposes that BPA make certain clarifying amendments to section 8 of the proposed Bridge RPSA. (Snohomish, BNR007, at 2.)

BPA Staff's Position

The standard provisions in the Bridge RPSA are identical to the standard provisions in all of BPA's Subscription contracts, which all expire on September 30, 2011. BPA believes it is important for purposes of implementing these various agreements, and to avoid ambiguity, that these standard terms not be altered.

Evaluation of Positions

Snohomish states that section 8 of the Bridge RPSA is unclear and should be redrafted to allow for greater clarity. (Snohomish, BNR007, at 2.) Snohomish's proposal is as follows:

> "(i) Payment must be received by the 20th day after the issue date of the final bill pursuant to section 8(b) where <<Customer Name>> is required to pay BPA (Due Date). If the 20th day is a Saturday, Sunday, or Federal holiday, the Due Date is the next business day.
>
> (ii) Payment must be received within 30 days following receipt of each monthly invoice pursuant to section 8(a) above where BPA is required to pay <<Customer Name>> (Due Date). If the ~~20th~~ 30th day is a Saturday, Sunday, or Federal holiday, the Due Date is the next business day.
>
> (iii) After the Due Date, a late payment charge shall be applied each day to any unpaid balance. The late payment charge is calculated by dividing the Prime Rate for Large Banks as reported in the Wall Street Journal, plus 4 percent, by 365. The applicable Prime Rate for Large Banks shall be the rate reported on the first day of the month in which payment is received. <<Customer Name>> shall pay by electronic funds transfer using BPA's established procedures. BPA shall pay by electronic funds transfer using <<Customer Name>>'s established procedures."

Id.

BPA agrees that the Bridge RPSA language would be improved if Snohomish's proposal were adopted. However, one principle BPA wants to adhere to in connection with the Bridge RPSA is that the Agreement contain the same standard provisions as contained in Subscription contracts other BPA customers currently hold, and that expire along with the Bridge RPSA on September 30, 2011. This creates parity among the other Subscription contract holders who

cannot change their contract language at the moment, avoids possible ambiguities regarding interpretation as between the agreements, and makes administration of the agreements easier. BPA understands the desire to change common contract language but does not think it wise to disconnect common language for those signing a new Subscription contract and those currently holding a Subscription contract.

Decision

BPA will keep the common contract language that is in all Subscription contracts in the Bridge RPSA without any changes.

Issue 5

Whether BPA should change the interest rates on disputed bills to that of late payments.

Parties' Positions

Snohomish states that the interest rate applicable to disputed bills and for late payments should be the same. (Snohomish, BNR007, at 3.)

BPA Staff's Position

The differential in interest rates is a function of type of payment (or non-payment) that they are applied to, and should not be the same.

Evaluation of Positions

Snohomish states that the interest rate applicable to disputed bills is the Prime Rate for Large Banks, while the interest rate for late payments is the Prime Rate for Large Banks plus four percent, and that BPA should make these rates the same by adding four percent to the interest rate applicable to disputed bills.[23] (Snohomish, BNR007, at 3.) Snohomish argues this increased interest rate will ensure consistency and provide incentive for the parties to settle any differences. *Id.*

BPA disagrees with Snohomish's rationale and believes there is a good reason for having two different interest rates for these types of transactions. BPA does not apply the higher rate that is applied to late payments to disputed bills because of the basic premise behind both types of actions. If a customer decides not to pay its bill, BPA does not receive any money and the utility gets to keep the money to use it for other purposes. The higher interest rate provides a customer the incentive to pay BPA on time and imposes a reasonable penalty if it does not. In the event of a disputed bill, however, the utility pays the amount in dispute to BPA and then works with BPA

[23] The Bridge RPSA refers to the Prime Rate for Large Banks, but the Long-Term RPSA refers only to the Prime Rate, excluding the reference to Large Banks. However, Snohomish's comment is relevant to both Agreements, as the interest rate differential for late and disputed bills is included in both Agreements.

to resolve the dispute. In this case, BPA receives the funds, and the utility does not have the ability to use it for something else.

BPA does not agree with Snohomish's premise that a higher interest rate on disputed bills will help resolve disputes in a faster manner. Giving the two different actions the same penalty would tend to encourage the utility not to pay the bill up front and dispute it rather than make a good faith effort to pay the bill and then resolve the dispute. The utility should not be penalized because it is trying to resolve a dispute. The higher interest rate should be applied to the utility that is willful or negligent in not paying its bill to BPA, but that type of penalty should not be applied to utilities that pay the bill and then try to resolve the dispute.

Decision

BPA will continue to keep the interest rate on late payments different than the interest rate on disputed bills.

Issue 6

Whether BPA should apply an interest rate to any errors that result in an over or underpayment of exchange program benefits.

Parties' Positions

Snohomish proposes that to reflect the value of the benefits over or underpaid discovered pursuant to section 9, BPA should set the interest rate at the Prime Rate plus four percent. (Snohomish, BNR007, at 3.) In addition, Snohomish suggests revising the language in section 8(d) so that an exchanging utility would not receive a true-up REP payment where the original underpayment is due to that utility's own "failure to submit eligible Residential Load" data to BPA. *Id.*

BPA Staff's Position

BPA does not agree that an interest component is warranted in the situation contemplated under section 9. BPA agrees with Snohomish, however, that section 9 should be amended to clarify that an exchanging utility will not be entitled to a true-up payment where it failed to submit accurate exchange load data to BPA in the first instance.

Evaluation of Positions

Snohomish points out that the final paragraph of section 9 of the RPSAs sets out the procedure to be followed where errors are found that result in an over or underpayment of exchange program benefits, but that there is no interest component applied to these over- or underpayments. (Snohomish, BNR007, at 3.) Snohomish proposes that to reflect the value of the benefits over or underpaid, BPA should set the interest rate consistent with 8(c) of the Bridge RPSA or 8(d) of the RD RPSA (the Prime Rate plus four percent). *Id.*

BPA understands Snohomish's position but does not see the need for applying interest to such over or underpayments because of the shortness of the repayment period. The draft RPSA states that any such over or underpayment is due within 30 days after its determination, or is taken from future payments. In addition, if it is taken from future payments instead of paid back within 30 days, then it is added to the balancing account and is charged the appropriate interest for that account. This short recovery time for an issue that was an honest error does not warrant an interest rate.

In addition, Snohomish states that the language of this final paragraph permits an exchanging utility to receive an adjustment even where the underpayment is due to that utility's own "failure to submit eligible Residential Load" data to BPA. Snohomish suggests the intent of this section is to make parties whole when the over or underpayment is due to an honest error, not the failure to adequately perform the requirements of the RPSAs. Snohomish proposes the language in section 9 be amended as follows:

> "If BPA determines that <<Customer Name>> has not received monetary benefits due to ~~<<Customer Name>> failure to submit eligible Residential Load or other~~ an error~~s~~ in implementing this Agreement that result<u>s</u> in an underpayment . . . "

(Snohomish, BNR007, at 3.)

BPA agrees with Snohomish's suggestion and believes that a utility should not receive benefits for its failure to submit eligible exchange load data. The utility has the responsibility to submit timely and accurate data that only it has access to. The only variable in the invoicing of monthly benefits is the actual residential and small farm load data. All other variables are determined in a process prior to the exchange period. Allowing a utility to receive trued-up monetary benefits to correct for inaccurate data submitted in the first instance would put BPA in the position of always having to true-up any movement in such loads that should have been known to the utility, and submitted to BPA, in the first instance.

<u>Decision</u>

BPA will not charge interest on over or underpayments, but will amend the language in section 9 as proposed by Snohomish.

Issue 7

Whether BPA has the legal authority to pay money to the IOUs under an RPSA in light of an ongoing remand, an ongoing section 7(i) proceeding within BPA, and a proceeding to establish a new ASC Methodology.

Parties' Positions

PPC questions BPA's authority to make REP benefit payments to IOUs in light of preference customers' past overpayments to BPA for costs associated with the 2000 REP Settlement Agreements, which were set aside by the Ninth Circuit in May of 2007. (PPC, BNR0004.)

BPA Staff's Position

This issue is being addressed by BPA in the WP-07 Supplemental Wholesale Power Rate Case ("WP-07 Rate Case"). BPA will make REP benefit payments, if any, to exchanging utilities, including the IOUs, consistent with the decisions in that proceeding.

Evaluation of Positions

PPC did not elaborate on its position, but rather noted that it was preserving all of the issues it has raised in other proceedings related to the implementation of the REP in light of the Ninth Circuit decisions regarding the REP, and that BPA should not view PPC's comments as setting forth all of its objections regarding this issue. (PPC, BNR0004.)

BPA understands PPC's concern about paying REP benefits in light of the Ninth Circuit court cases; however, BPA believes it has the legal authority to make such payments, and the rationale for that position will be provided in the WP-07 Rate Case final Record of Decision. Concurrently, BPA is taking steps to reestablish the REP in a manner that is responsive to and consistent with the Court's rulings. A part of the process is to offer a new RPSA to utilities that request one. However, section 20 of the proposed RPSA does expressly provide that REP payments under the Agreement shall be subject to adjustment by BPA to account for the overpayment of benefits under the 2000 REP Settlement Agreements, all as established in a BPA rate proceeding, or other appropriate forums established to determine such amounts.

Decision

The REP overpayments referred to by PPC are being addressed by BPA in the WP-07 Rate Case, and the RPSA provides for the adjustment of REP benefits to reflect the outcomes in that or other proceedings.

Issue 8

Whether section 20 of the proposed RPSA must be deleted because it conflicts with section 3(b) of the 2000 REP Settlement Agreements.

Parties' Positions

The IPUC argues that section 20 should be eliminated from the RPSA because it conflicts with section 3(b) of the 2000 REP Settlement Agreements, which provided that in the event a court determined that the 2000 REP Settlement Agreement was unlawful, void, or unenforceable, an exchanging utility would nevertheless retain any REP benefits it received prior to such determination. (IPUC, RPS0003, at 2-3.)

BPA Staff's Position

Whether section 3(b) is valid and enforceable is being addressed by BPA in the WP-07 Supplemental Wholesale Power Rate Case ("WP-07 Rate Case"). BPA will make REP benefit payments to exchanging IOUs under the proposed RPSAs consistent with the decisions in that proceeding. However, BPA has amended section 20 to include language proposed by the IOUs that clarifies that parties reserve all arguments regarding, among other things, the 2000 REP Settlement Agreements and the calculation or implementation of REP benefit payments, for any period of time.

Evaluation of Positions

BPA understands that resolution of issues arising from the *PGE* and *Golden NW* decisions, including the validity of section 3(b) of the 2000 REP Settlement Agreement, impacts the enforceability of section 20 of the RPSA. BPA has amended section 20 to acknowledge that parties have competing views regarding BPA's proposed disposition of the issues engendered by the above-referenced court cases, including how those decisions flow through to the proposed RPSAs. However, BPA believes the requirement in section 20 that REP benefits paid are subject to adjustment by BPA to account for the overpayment of REP benefits under the 2000 REP Settlement Agreements, is valid. The rationale for that position will be provided in the WP-07 Rate Case Final Record of Decision; but to summarize, BPA believes that since the Court found that the 2000 REP Settlement Agreements were invalid because BPA entered into the agreements without requisite statutory authority, unless the Court indicates otherwise, no obligation that may have existed under the agreements, including under section 3(b), can be enforced against BPA.

Decision

BPA will not delete section 20 from the RPSA, but has amended that section to make clear that parties have not waived their right to make arguments regarding the 2000 REP Settlement Agreement by virtue of signing an RPSA.

Issue 9

Whether Regional Dialogue contracts should assign all so-called "Environmental Attributes" associated with those power resources solely to PF Preference rate customers.

Parties' Positions

The IOUs argue that the Regional Dialogue contracts should not assign all Environmental Attributes associated with those power resources solely to PF Preference rate customers. (IOUs, BNR0002, at 3.) They argue that PF Exchange rate customers are entitled to an equitable share of the value of the Environmental Attributes to the extent that they bear the costs of electric power resources associated with those Environmental Attributes, and Regional Dialogue contracts and the RPSA contracts should reflect this equitable share. *Id.*

BPA Staff's Position

The proposed RPSA did not address this issue because there is insufficient information currently available upon which BPA can make a final decision regarding the REP treatment of Renewable Energy Certificates, carbon credits or Environmental Attributes in general.

Evaluation of Positions

The IOUs referenced here comments regarding the disposition of Environmental Attributes submitted in connection with the draft Master Regional Dialogue Contract Template. (IOUs, BNR0002, at 3.) They argue that PF Exchange rate customers are entitled to an equitable share of the value of the Environmental Attributes to the extent that they bear the costs of electric power resources associated with those Environmental Attributes, and Regional Dialogue contracts and the RPSA contracts should reflect this equitable share. *Id.*

BPA recognizes that the IOUs have concerns over BPA's treatment of Environmental Attributes (including in the form of Renewable Energy Certificates and carbon credits) associated with the Federal system. However, BPA cannot address those concerns in this ROD. First, the full value of Environmental Attributes associated with the Federal system, including Renewable Energy Certificates and carbon credits in particular, is unknown at this time. These markets are still evolving, and there is insufficient information available upon which BPA can make a final decision regarding the REP treatment of Renewable Energy Certificates, carbon credits, or Environmental Attributes in general.

Second, even if BPA were prepared to make a definitive statement on the disposition of Environmental Attributes, Renewable Energy Certificates or carbon credits, BPA would not make that decision in this ROD. The purpose of the RPSA is to establish the mechanism by which to pay REP benefits to exchanging utilities. Consequently, the issues that must be addressed in this ROD are limited to matters that directly relate to the distribution of REP benefits. The concerns raised by the IOUs as to how BPA will use the Environmental Attributes, Renewable Energy Certificates, or carbon credits of the Federal system go beyond the issues BPA must or can address through the RPSA.

Decision

BPA cannot make any decisions in this ROD on the treatment of Environmental Attributes, Renewable Energy Certificates, or carbon credits because such decisions are outside of the

scope of the RPSA. However, BPA has addressed the IOUs' concerns by adding language to Exhibit H to the Regional Dialogue contracts that assures that all ratemaking options available under statute concerning treatment of the value and cost of Renewable Energy Credits and/or carbon credits are preserved to the Administrator.

Issue 10

Whether BPA should amend the language in section 21 to allow for possible additional forums for determining adjustments referred to therein.

Parties' Positions

The OPUC argues that the language in the current draft does not provide the customer any rights in determining forums, or ensuring due process, for adjustments to entitlement to monetary benefits. (OPUC, RPS0005, at 5-6.)

BPA Staff's Position

Section 21 of the proposed RPSA provides that any adjustments referred to therein would 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.

Evaluation of Positions

OPUC proposed that the following text provides better assurances to customers regarding adjustment of benefit payments:

> "The monetary benefits provided <<Customer Name>> 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 adjustments shall be limited to those formally established by BPA in its wholesale power rate adjustment proceedings or other forums ~~*established by*~~ *mutually agreeable to* BPA and the <<Customer Name>> for the determination of the amount of overpayment to be recovered and the recovery period. *Agreement by the Customer regarding choice of other forum shall not be unreasonably withheld."*

Id.

The adjustment of monetary benefits contemplated by section 21 is one that has an impact on other BPA customers, not just the exchanging utilities. The amount of the adjustment is directly reflected in preference customers' rates as well. The whole premise for the adjustment is to account for overpayments made by the preference customers during FY 2002-08 for REP benefits. Therefore, the adjustment amount needs to be decided in a formally established forum where all BPA customers and other interested parties can have due process, including the IOUs

and the OPUC. BPA cannot and will not condition its responsibility to determine the appropriate forums and proceedings necessary to carry out its statutory or other legal obligations. Any party that believes its legal rights have been infringed through BPA's forum selection or the manner in which proceedings are noticed or conducted may take whatever actions it sees fit. In any case, BPA traditionally has worked informally with customers to ensure that the public processes it undertakes are fair to all interested parties.

Decision

BPA will not amend section 21 as proposed by the OPUC.

IV. NATIONAL ENVIRONMENTAL POLICY ACT

BPA has evaluated the potential for environmental effects related to the Bridge and Long-Term RPSAs, consistent with the National Environmental Policy Act (NEPA) 42 U.S.C. § 4321 et seq. These new RPSAs will provide the basis for contracting with all eligible utilities applying for REP benefits through 2028. The residential exchange has traditionally been implemented as a financial transaction – i.e., BPA has provided monetary REP benefits to an exchanging utility, instead of exchanging electric power. Under the new RPSAs, this practice would be expected to continue, although some physical power deliveries are possible in the event that BPA both elects to undertake an in-lieu transaction, and adopts an In-Lieu Power Policy that provides for physical deliveries. Nevertheless, the new RPSAs are expected to be primarily administrative in nature (*i.e*., monetary) and accordingly would not be expected to result in environmental effects. In addition, the new RPSAs will carry over many of the same provisions as the prototype 2000 RPSA., Because of this general continuation of providing REP benefits, the new RPSAs are not expected to result in a substantial change in consumer or utility behavior with the potential for environmental effects. Further, the potential resource development and acquisition consequences of different scenarios under the REP were anticipated in BPA's Business Plan Environmental Impact Statement (DOE/EIS-0183, June 1995), and are consistent with BPA's Market-Driven approach adopted in its Business Plan ROD (August 15, 1995). (See Business Plan EIS, Table 2.4.1, on *Determination of Firm Loads* and the Market-Driven Alternative, page 2-36; see also *Delivery of Power Under Residential Exchange Agreements*, Business Plan EIS, page 4-10.)

V. CONCLUSION

I have reviewed and evaluated the comments received by BPA on the foregoing issues regarding BPA's proposed Short-Term Bridge and Long-Term RPSAs. Based upon the record compiled in this proceeding, the decisions expressed herein, and all requirements of law, I hereby adopt the foregoing RPSAs in the form attached hereto as Attachments B and C, respectively. The

evaluations and decisions used in the development of the proposed RPSAs are consistent with the above referenced environmental analysis.

Issued at Portland, Oregon, the 4th day of September, 2008.

/s/ Stephen J. Wright
Stephen J. Wright
Administrator and Chief Executive Officer

ATTACHMENT A

Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

Power Services

May 16, 2008

In reply refer to: PS-6

To Parties Interested in Residential Purchase and Sale Agreements:

In order to re-establish the Residential Exchange Program (REP), Bonneville Power Administration (BPA) is proposing to offer Residential Purchase and Sale Agreements (RPSA) to utilities wishing to participate in the REP starting in FY 2009. BPA is seeking public comment on two draft RPSAs planned to be offered in August 2008.

The first Agreement, called a "Bridge RPSA," will implement the REP between October 1, 2008, and the time the Regional Dialogue Long-Term RPSA takes effect (currently scheduled to be October 1, 2011). The Bridge RPSA is based on the original Subscription RPSA template, and contains many of the same standard provisions that are present in the Full, Partial and Block contracts many BPA customers currently hold. However, BPA has updated some of the provisions unique to the RPSA, and reflects those same unique provisions in the Regional Dialogue Long-Term RPSA.

The second Agreement, called the Regional Dialogue Long-Term RPSA, will be offered in conjunction with the rest of the Regional Dialogue Long-Term Contracts this August. It contains the standard contract provisions that reside in the other Regional Dialogue Long-Term contracts, as well as language unique to the RPSA. Through this letter, BPA is seeking comments related to only the non-standard provisions in the RPSA (highlighted in yellow). Comments on the standard contract provisions have recently undergone informal public review and will continue to evolve through the public process on the Supplement to the Long-Term Regional Dialogue Policy in June and early July.

BPA is seeking comment on these proposed RPSAs in an effort to re-establish REP benefits beginning in FY 2009, and to meet the timeline of offering all Regional Dialogue Long-Term contracts in August 2008. Following the close of comments on June 16, 2008, BPA will consider all comments received and issue a record of decision on these contracts this summer.

How to Comment
BPA is requesting your comments on the contracts described in this letter and enclosed as Enclosures 1 and 2. These contracts can also be found at BPA's website at http://www.bpa.gov/corporate/finance/ascm/letters.cfm.

Comments on the two contracts must be received by 5:00 p.m., Pacific Standard Time, on June 16, 2008. Comments can be submitted on-line at: www.bpa.gov/comments; via e-mail to comment@bpa.gov; via mail to: Bonneville Power Administration, Public Affairs Office-DKC-7, P.O. Box 14428, Portland, OR 97293-4428; or faxed to 503-230-3285. You can also call us with your comments, toll free at 1-800-622-4519. Please reference "Bridge and RD RPSA Agreements" with your comments.

Sincerely,
/s/ *Mark Gendron*

Mark O. Gendron
Vice President
Northwest Requirements Marketing

Enclosures:
(1) Bridge RPSA
(2) RD Long-Term RPSA

ATTACHMENT B

Contract No. 08PB-«#####»

Bridge RPSA Template

RESIDENTIAL PURCHASE AND SALE AGREEMENT

executed by the

BONNEVILLE POWER ADMINISTRATION

and

«FULL NAME OF CUSTOMER»

1.1.1.1 Table of Contents

Section		Page
1.	Term	
2.	Definitions	
3.	Applicable PF Exchange Rate	
4.	Establishment of ASC to Activate Agreement	
5.	Offer By «Customer Name» and Purchase By BPA	
6.	Offer By BPA and Purchase By «Customer Name»	
7.	In-Lieu Transactions	
8.	Invoicing, Billing, and Payment	
9.	Accounting, Review, and Budgeting	
10.	Pass-Through of Benefits	
11.	Termination and Suspension of Agreement	
12.	Balancing Account	
13.	Notices	
14.	Cost Recovery	
15.	Uncontrollable Forces	
16.	Governing Law and Dispute Resolution	
17.	Statutory Provisions	
18.	Standard Provisions	
19.	Notice Provided to Residential and Small Farm Consumers	
	(Drafter's Note: For Publics, delete section 20 and change section 21 (Signatures) to section 20.)	
20.	Adjustments to Monetary Benefits	
21.	Signatures	

Exhibit A Residential Load Definition
Exhibit B CF/CT and New Large Single Loads
Exhibit C 2008 Average System Cost Methodology
Exhibit D Scheduling

This RESIDENTIAL PURCHASE AND SALE AGREEMENT (Agreement) is executed by the UNITED STATES OF AMERICA, Department of Energy, acting by and through the BONNEVILLE POWER ADMINISTRATION (BPA), and «FULL NAME OF CUSTOMER» («Customer Name»), hereinafter individually referred to as "Party" and collectively referred to as the "Parties". «Customer Name» is a «_____» organized under the laws of the State of «_____» to purchase and distribute electric power to serve retail consumers from its distribution system within its service area.

RECITALS

Section 5(c) of the Northwest Power Act provides that a Pacific Northwest Regional electric utility may offer to sell electric power to BPA and BPA shall purchase such electric power at the Average System Cost of that utility's resources, and in exchange BPA shall offer to sell in return an equivalent amount of electric power to such utility and such utility shall purchase such electric power at the PF Exchange rate. The cost benefits of such purchase and exchange sale attributable to a utility's residential load within a State shall be passed directly through to that utility's residential load within such State.

The Parties agree:

1. TERM

This Agreement shall take effect on the latter of (1) the date signed by the Parties, or (2) if required, upon acceptance for filing of this Agreement by the Federal Energy Regulatory Commission without change or condition unacceptable to either Party, and it shall terminate on September 30, 2011, unless terminated earlier pursuant to section 11 below. Performance by the Parties of their obligations under this Agreement shall commence on October 1, 2008. Upon termination of this Agreement, all obligations incurred hereunder shall be preserved until satisfied.

2. DEFINITIONS

Capitalized terms below shall have the meaning stated. Capitalized terms that are not listed below are either defined within the section or exhibit in which the term is used or, if not so defined, shall have the meaning stated in BPA's applicable Wholesale Power Rate Schedules, including the General Rate Schedule Provisions (GRSPs), or the ASC Methodology.

2.1 "Appendix 1" means the electronic form on which «Customer Name» reports its Contract System Costs and other necessary data to BPA for the calculation of «Customer Name»'s Base Period ASC pursuant to the ASC Methodology.

2.2 "Average System Cost," or "ASC" means the rate charged by «Customer Name» to BPA for BPA's purchase of power from «Customer Name» under section 5(c) of the Northwest Power Act for each Exchange Period and is the quotient

obtained by dividing Contract System Costs by Contract System Load, all in accordance with the ASC Methodology.

2.3 "ASC Methodology" means a methodology, as may be amended or superseded, used to determine ASC, as developed by BPA pursuant to section 5(c)(7) of the Northwest Power Act and attached to this Agreement for ease of reference purposes only as Exhibit C, 2008 Average System Cost Methodology. This Agreement is subject to the ASC Methodology but such ASC Methodology is not incorporated as part of this Agreement.

2.4 "Balancing Account," or "BA," means an account maintained by BPA comprised of amounts, if any, carried over from Contract No. _____, by and between «Customer Name» and BPA ("1981 RPSA"), plus any additional amounts accrued pursuant to section 12 of this Agreement.

2.5 "Base Period" means the calendar year of the most recent FERC Form 1 data at the commencement of the ASC review period.

2.6 "Base Period ASC" means the ASC determined in the Review Period using «Customer Name»'s Base Period data, all in accordance with the ASC Methodology.

2.7 "Business Day(s)"means every Monday through Friday except Federal holidays.

2.8 "Contract System Costs" means «Customer Name»'s costs for production and transmission resources, including power purchases and conservation measures, which costs are includable in and subject to the provisions of Appendix 1, all in accordance with the ASC Methodology. Under no circumstances shall Contract System Costs include costs excluded from ASC by section 5(c)(7) of the Northwest Power Act.

2.9 "Contract System Load" means (1) the total Regional retail load included in the Form 1, or (2) for a consumer-owned utility (preference customer), the total Regional retail load from the most recent annual independently audited financial statement, as either may be adjusted pursuant to the ASC Methodology, all in accordance with the ASC Methodology.

2.10 "Diurnal" or "Diurnally" means the distribution of hours of months between Heavy Load Hours (HLH) and Light Load Hours (LLH).

2.11 "Due Date" shall have the meaning as described in section 8.2.2.

2.12 "Effective Date" means the effective date of this Agreement, as determined pursuant to section 1 above.

2.13 "Exchange Period" means the period during which «Customer Name»'s ASC is effective for the calculation of «Customer Name»'s benefits under this Agreement. Each Exchange Period shall be the period of time concurrent with the duration of each BPA wholesale power rate period.

2.14 "Fiscal Year" or "FY" means the period beginning each October 1 and ending the following September 30.

2.15 "Form 1" means the annual filing submitted to the Federal Energy Regulatory Commission required by 18 CFR §141.1, as specified in the ASC Methodology.

2.16 "In-Lieu PF Power" means firm power that is sold by BPA to «Customer Name» in an in-lieu transaction at the applicable Priority Firm Power Exchange Rate, or its successor.

2.17 "In-Lieu Power" means firm power acquired by BPA from a source(s) other than «Customer Name» at a cost less than «Customer Name»'s ASC, as provided in section 5(c)(5) of the Northwest Power Act. The provisions for acquisition and delivery of In-Lieu Power shall be provided in a policy developed by BPA after this Agreement is executed.

2.18 "In-Lieu Power Policy" mans a policy to be developed by BPA that will contain provisions for (1) the acquisition and purchase of In-Lieu Power by BPA, and (2) the delivery and sale of In-Lieu PF Power to «Customer Name».

2.19 "Jurisdiction" means the service territory of «Customer Name» within which a particular Regulatory Body has authority to approve «Customer Name»'s retail rates. Jurisdictions must be within the Region.

2.20 "New Large Single Load" or "NLSL" has the meaning specified in section 3(13) of the Northwest Power Act and in BPA's NLSL Policy.

2.21 "Northwest Power Act" means the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. §839, Public Law No. 96-501.

2.22 "Region" means the Pacific Northwest as defined in section 3(14) of the Northwest Power Act.

2.23 "Regulatory Body" means a state commission or consumer-owned utility governing body, or other entity authorized to establish retail electric rates in a Jurisdiction.

2.24 "Residential Exchange Program" means the program implemented under this Agreement and established by section 5(c) of the Northwest Power Act.

2.25 "Residential Load" means the Regional residential load to which «Customer Name» sells power, as that residential load is defined in the Northwest Power Act and as further defined in Exhibit A, Residential Load Definition.

2.26 "Residential Load Eligible for Monetary Benefits" means the monthly amounts of Residential Load determined pursuant to Exhibit A, Residential Load Definition, less:

(a) any amounts of Residential Load with respect to which BPA has issued a notice of the election, pursuant to section 7.3 below, to acquire In-Lieu Power and «Customer Name» has elected to either take physical delivery of In-Lieu PF Power or forego exchange benefits corresponding to the amount of In Lieu Power; or

(b) any amounts of Residential Load with respect to which BPA has issued a notice of the election, pursuant to section 7.3 below, to acquire In-Lieu Power and «Customer Name» has elected to suspend its sale and purchase under sections 5 and 6 of this Agreement, for the duration of the time specified in the in-lieu notice.

2.27 "Review Period" means the period of time during which «Customer Name»'s Appendix 1 is under review by BPA. The Review Period begins on June 1 and ends on or about November 15 of the Fiscal Year prior to the Fiscal Year BPA implements a change in wholesale power rates.

2.28 "Uncontrollable Force" shall have the meaning specified in section 15.

3. APPLICABLE PF EXCHANGE RATE

Purchases by «Customer Name» under this Agreement are pursuant to the applicable Priority Firm Power Exchange (PF Exchange) rate and applicable GRSPs, or their successors, established by BPA in a proceeding pursuant to section 7(i) of the Northwest Power Act, or its successor. Sections 5 and 6 below establish purchases subject to the applicable PF Exchange rate schedule.

4. ESTABLISHMENT OF ASC TO ACTIVATE PARTICIPATION

The first Exchange Period during which «Customer Name» may activate its participation under this Agreement shall commence on October 1, 2008. «Customer Name» may activate its participation under this Agreement by filing an initial Appendix 1 for the initial Exchange Period that it has selected. Once «Customer Name» files an initial Appendix 1, «Customer Name» shall continue to file a new Appendix 1 for each subsequent Exchange Period, unless and until «Customer Name» elects to terminate or suspend this Agreement pursuant to section 11 below. Upon filing an Appendix 1 for an Exchange Period, «Customer Name» shall commence invoicing for Residential Load Eligible for Monetary Benefits, pursuant to section 8.1 below, in the month following the first full month of such Exchange Period.

5. OFFER BY «CUSTOMER NAME» AND PURCHASE BY BPA

Beginning with the first month of the initial Exchange Period established under section 4 above, «Customer Name» shall offer and BPA shall purchase each month an amount of electric power up to or equal to the Residential Load Eligible for Monetary Benefits.

The rate for such power sale to BPA shall be equal to «Customer Name»'s ASC, as determined by BPA using the ASC Methodology. «Customer Name» may only sell an amount of electric power under this section 5 that is up to or equivalent to the Residential Load Eligible For Monetary Benefits that «Customer Name» is authorized under State law or by order of the applicable State regulatory authority to serve.

6. OFFER BY BPA AND PURCHASE BY «CUSTOMER NAME»

Simultaneous with the offer by «Customer Name» and purchase by BPA pursuant to section 5 above, BPA shall offer and «Customer Name» shall purchase each month an amount of electric power equal to the Residential Load Eligible for Monetary Benefits that «Customer Name» offers and BPA purchases each month pursuant to section 5.

The rate for such power sale to «Customer Name» shall be equal to BPA's applicable PF Exchange rate, as established pursuant to section 3 above.

7. IN-LIEU TRANSACTIONS

7.1 BPA's Right to In-Lieu

In lieu of purchasing all or a portion of the electric power offered to BPA pursuant to section 5 by «Customer Name» at a rate equal to its ASC, BPA may upon prior written notice acquire or make arrangements to acquire In-Lieu Power if the expected cost of such power is less than «Customer Name»'s ASC(s).

If the expected cost of In-Lieu Power is less than the applicable PF Exchange Rate, then «Customer Name» may upon prior written notice suspend its sale and purchase under sections 5 and 6 of this agreement for all or a portion of the amount of Residential Load Eligible for Monetary Benefits that BPA proposes to serve with In-Lieu PF Power, for the duration of time specified in the in-lieu notice. «Customer Name»'s election under this section shall be based on all or a percentage portion of «Customer Name»'s Residential Load Eligible for Monetary Benefits that BPA has specified in its in-lieu notice. Amounts suspended under this section 7.1 shall not be added to «Customer Name»'s balancing account under section 12.

7.2 In-Lieu Power Policy

The terms and conditions of an in-lieu transaction, including the above referenced notice provisions, the source(s) of In-Lieu Power, the amount of In-Lieu Power, the shape of In-Lieu Power, the expected cost of such In-Lieu Power, and the term of the In-Lieu PF Power sale, shall be subject to BPA's then effective In-Lieu Power Policy; *provided, however*, that each In-Lieu Power Policy shall conform to this section 7. BPA may not initiate an in-lieu transaction until it has adopted

an In-Lieu Power Policy following notice and comment and the issuance of a final record of decision.

The Parties agree to work in good faith to amend this Agreement if, when, and as necessary to implement the then effective In-Lieu Power Policy. «Customer Name» acknowledges that in-lieu transactions are intended to lower the cost of the Residential Exchange Program to BPA, and agrees that it will not unreasonably withhold its consent to any amendment to this Agreement proposed by BPA.

7.3 **In-Lieu Notice(s)**

BPA shall, in each written notice of an in-lieu transaction, provide the following information, which shall include, but is not limited to (i) the source(s) of In-Lieu Power, (ii) the amount of In-Lieu Power, (iii) the shape of In-Lieu Power, (iv) the expected cost of such In-Lieu Power, and (v) the term of the In-Lieu PF Power sale. BPA shall keep «Customer Name» advised insofar as is practicable of BPA's plans to provide notice to «Customer Name» of BPA's election to acquire In-Lieu Power.

7.4 **In-Lieu Transaction Implementation Mechanisms**

The mechanisms by which in-lieu transactions are implemented, whether by the physical delivery of In-Lieu PF Power, the monetization of the value of such deliveries, some combination thereof, or some other mechanism, and all issues related thereto, shall be developed by and subject to the then effective In-Lieu Power Policy.

8. INVOICING, BILLING, AND PAYMENT

8.1 **Invoicing for Residential Load Eligible for Monetary Benefits**

(Drafter's Note: For Publics, delete (iv) in section 8.1.1 below and change (v) to (iv).)

8.1.1 «Customer Name» shall submit to BPA each month an accounting invoice that documents (i) the amount of Residential Load Eligible for Monetary Benefits that «Customer Name» has elected to exchange pursuant to sections 5 and 6 above, (ii) «Customer Name»'s ASC, (iii) «Customer Name»'s applicable PF Exchange rate, (iv) any adjustment pursuant to section 20, and (v) any adjustment pursuant to section 12. Such documentation shall include, but is not limited to, the kilowatt-hours of energy which «Customer Name» billed to the Residential Load Eligible for Monetary Benefits during the previous month. Each such invoice shall be subject to adjustment pursuant to section 9 below.

8.1.2 Within 30 days following the receipt of each monthly invoice from «Customer Name», and subject to section 9 below, BPA shall verify the

invoice and pay such invoice electronically in accordance with instructions on each such invoice.

8.2 **Billing and Payment for In-Lieu PF Power**

In the event monthly amounts of In-Lieu PF Power are physically delivered to «Customer Name» , amounts billed under this Agreement shall be the monthly amounts specified in the in-lieu notice that are delivered by BPA to «Customer Name» pursuant to section 7 above.

8.2.1 **Billing**

PBL shall bill «Customer Name» monthly, consistent with applicable BPA rates, including the GRSPs and the provisions of this Agreement. PBL may send «Customer Name» an estimated bill followed by a final bill. PBL shall send all bills on the bill's issue date either electronically or by mail, at «Customer Name»'s option. If electronic transmittal of the entire bill is not practical, PBL shall transmit a summary electronically, and send the entire bill by mail.

8.2.2 **Payment**

Payment of all bills, whether estimated or final, must be received by the 20th day after the issue date of the bill (Due Date). If the 20th day is a Saturday, Sunday, or Federal holiday, the Due Date is the next business day. If payment has been made on an estimated bill before receipt of a final bill for the same month, «Customer Name» shall pay only the amount by which the final bill exceeds the payment made for the estimated bill. PBL shall provide «Customer Name» the amounts by which an estimated bill exceeds a final bill through either a check or as a credit on the subsequent month's bill. After the Due Date, a late payment charge shall be applied each day to any unpaid balance. The late payment charge is calculated by dividing the Prime Rate for Large Banks as reported in the Wall Street Journal, plus 4 percent; by 365. The applicable Prime Rate for Large Banks shall be the rate reported on the first day of the month in which payment is received. «Customer Name» shall pay by electronic funds transfer using BPA's established procedures.

8.2.3 **Disputed Bills**

In case of a billing dispute, «Customer Name» shall note the disputed amount and pay its bill in full by the Due Date. Unpaid bills (including both disputed and undisputed amounts) are subject to late payment charges provided above. If «Customer Name» is entitled to a refund of any portion of the disputed amount, then BPA shall make such refund with simple interest computed from the date of receipt of the disputed payment to the date the refund is made. The daily interest rate used to determine the interest is calculated by dividing the Prime Rate for Large Banks as reported in the Wall Street Journal; by 365. The applicable Prime Rate for

Large Banks shall be the rate reported on the first day of the month in which payment is received by BPA.

9. ACCOUNTING, REVIEW, AND BUDGETING

«Customer Name» shall keep up-to-date records, accounts, and related documents that pertain to this Agreement. These records, accounts, and documents shall contain information that supports:

(1) «Customer Name»'s ASC as determined pursuant to the ASC Methodology;

(2) identification of the consumers that comprise «Customer Name»'s Residential Load;

(3) the amount of Residential Load Eligible for Monetary Benefits invoiced to BPA; and

(4) evidence that the benefits received by «Customer Name» have been passed through to consumers that comprise «Customer Name»'s Residential Load Eligible for Monetary Benefits, as provided for in section 10 below.

At BPA's expense, BPA or its agent may, from time-to-time, review or inspect, consistent with the provisions of section 18.3 of this Agreement, «Customer Name»'s records, accounts, and related documents pertaining to this Agreement. BPA's agent shall be subject to approval by «Customer Name»; such approval shall not be unreasonably withheld. «Customer Name» shall fully cooperate in good faith with any such reviews or inspections. BPA retains the right to take action consistent with the results of such reviews or inspections to require the pass-through of such benefits to Residential Load Eligible for Monetary Benefits.

BPA's right to review or inspect «Customer Name»'s records, accounts, and related documents pertaining to this Agreement for any Fiscal Year shall expire 60 months after the end of such Fiscal Year. As long as BPA has such right to review or inspect, «Customer Name» agrees to maintain such records, accounts, and related documents.

If BPA determines that «Customer Name» has received monetary benefits for ineligible load, including an NLSL, or that other errors have occurred in implementing this Agreement that result in an overpayment, then any such overpayment shall be returned to BPA within 30 days of BPA's determination, or BPA may adjust future monetary benefit payments to «Customer Name». If BPA determines that «Customer Name» has not received monetary benefits due to errors in implementing this Agreement that result in an underpayment, then BPA shall pay «Customer Name» such monetary benefits within 30 days of BPA's determination that such benefits were not received. In the event «Customer Name» disputes BPA's determination regarding any overpayment or underpayment, such dispute shall be subject to resolution in the same manner as a disputed bill under section 8.2.4 above.

10. PASS-THROUGH OF BENEFITS

10.1 Except as otherwise provided in this Agreement, all benefit amounts received by «Customer Name» from BPA under this Agreement shall be passed through to residential and small farm customers as either: (1) a separately stated credit to applicable retail rates; (2) monetary payments; or (3) as otherwise directed by the applicable Regulatory Body(ies).

10.2 Benefits shall be passed through by «Customer Name» in a timely manner, as set forth in this section 10.2 provided, that, it is specifically acknowledged and agreed that distributions of benefits for the Residential Load may be made by «Customer Name» in advance of its receipt of any such benefits from BPA and that such benefits may be used to set off distributions to the Residential Load made by «Customer Name» before or after October 1, 2011. The amount of benefits held as described in section 10.3 below at any time shall not exceed the greater of (i) the expected receipt of monetary payments from BPA under this Agreement over the next 180 days, and (ii) monetary payments received from BPA under this Agreement over the preceding 180 days; provided, however, that if the amount of benefits held in the account is less than $1,000,000, then «Customer Name» may distribute benefits on a less frequent basis, provided that distributions are made at least once each Fiscal Year; provided, further, that any remaining benefits held shall be distributed to Residential Load no later than one year following the earlier of (x) the end of the term of this Agreement; or (y) termination or suspension of this Agreement.

10.3 Benefits shall be passed through consistent with any procedures developed by «Customer Name»'s Regulatory Body(ies) that are not otherwise inconsistent with this Agreement, the Northwest Power Act, or other applicable federal law. Until «Customer Name» has passed through such benefits pursuant to section 10.1 above, benefits received by «Customer Name» shall be identified on «Customer Name»'s books of account and shall accrue interest at the rate(s) established by «Customer Name»'s Regulatory Body(ies).

10.4 Nothing in this Agreement shall require that any In Lieu PF Power delivered to «Customer Name» pursuant to section 7 be delivered on an unbundled basis to residential and small farm customers of «Customer Name» or that «Customer Name» provide retail wheeling for such In Lieu PF Power.

11. TERMINATION AND SUSPENSION OF AGREEMENT

11.1 Termination of Agreement

11.1.1 «Customer Name» may terminate this Agreement by providing BPA with written notice within 30 days following the date of approval by the Federal Energy Regulatory Commission of new BPA rates (on the earlier of such approval on an interim basis, or if interim approval is not granted, on a

final basis) in which the supplemental rate charge provided for in section 7(b)(3) of the Northwest Power Act is applied and causes the PF Exchange rate charged «Customer Name» to exceed «Customer Name»'s ASC. Such termination shall become effective as of the date of the notice.

11.1.2 Upon termination of this Agreement pursuant to section 11.1.1, «Customer Name» shall not participate in the Residential Exchange Program established in section 5(c) of the Northwest Power Act until «Customer Name» offers to sell electric power to BPA pursuant to a new Residential Purchase and Sale Agreement (RPSA) that has been executed by the Parties. Such RPSA shall become effective no earlier than the start of the first Exchange Period following such request.

11.2 **Suspension of Agreement**

11.2.1 «Customer Name» may suspend performance under this Agreement for any reason upon 30 days advance written notice to BPA. Such suspension shall become effective as of the date specified in the notice, and shall suspend the rights and obligations of both Parties as of such date, and such suspension shall continue through September 30, 2011.

11.2.2 Upon suspension of this Agreement pursuant to section 11.2.1, «Customer Name» shall not seek and shall not be entitled to receive a new RPSA until the expiration of this Agreement on September 30, 2011.

11.3 **Remedies**

If the Federal Energy Regulatory Commission (FERC) or a court of competent jurisdiction remands, reverses, or otherwise finds unlawful a BPA final decision or decisions that affect an exchanging utility's receipt, or failure to receive, Residential Exchange Program benefits, BPA will review and determine the rights and obligations of the Parties through additional administrative actions(s) as necessary to respond to such regulatory or court decisions.

12. BALANCING ACCOUNT

12.1 **Balancing Account**

Drafter's Note: First sentence of this section for the Bridge RPSA will have one of two possible versions. Version 1 will be used for a utility with a deemer carry over from the 1981 RPSA, Version 2 for a utility with no carry over.

Version 1 Bridge: The BA balance attributable to carry over amounts under the 1981 RPSA shall be determined by BPA, subject to the resolution of any disputes regarding such determination; provided, however, that the effect of section 12.3 below shall not be stayed pending resolution of any such dispute.

Version 2 Bridge: The BA balance is zero as of the Effective Date, subject to any adjustment provided for in section 20.

The BA balance includes an adjustment for changes in the Western Region Consumer Price Index (all items) (CPI) applied to such balance beginning on October 1, 2008, and continuing until such time as the BA balance is reduced to zero, based on the methodology described below. BPA shall adjust such balance monthly effective October 1, 2008, to reflect actual monthly changes in the CPI. This BA balance (BA_B), if any, comprises the beginning balance for a balancing account described in this section.

As long as the BA_B is greater than zero, such balance shall be adjusted monthly by the change in the Consumer Price Index value for that month relative to the CPI value for the previous month as follows. For the current month (m).

$$BA\ adjustment_{m+1} = \{CPI_m/CPI_{m-1}-1\}*BA\_B_m$$

Where

CPI_m= current month's CPI Index value as determined below

CPI_{m-1}= Previous month's CPI Index value

BA_B_m = Current month's ending BA balance

BA_B_{m+1} = Next month's beginning BA balance

The CPI index value shall be the end of month Consumer Price Index – All Urban Consumers (West Region. All Items), as published on the Bureau of Labor Statistics web site: address: http://data.bls.gov/cgi-bin/surveymost?cu, (select "West Region, all items" and then select the applicable range of months and years).

The adjusted BA balance for the next month (m+1) shall then be:

$$BA\_B_{m+1} = BA\_B_m + BA\ adjustment - P$$

Where P is the amount by which the BA increases or decreases as determined by multiplying the difference of the «Customer Name»'s current ASC minus the applicable PF Exchange rate by the utility's Residential Load Eligible for Monetary Benefits. If the ASC is less than the applicable PF Exchange rate, P will be negative and add to the BA balance; otherwise P will be positive and reduce the BA balance.

12.2 **Additions to the Beginning Balancing Account**

Whenever the ASC is less than BPA's then-current applicable PF Exchange rate during the period that this Agreement is in effect but not in suspension, pursuant to section 11.2, the payment that would otherwise be owed BPA will be tracked by BPA and added to the balancing account.

12.3 **Resumption of Monetary Benefits**
If there is a balance in the balancing account and the ASC is greater than the applicable PF Exchange rate, BPA will make no cash payments but will apply the amount that would have been paid in order to reduce the balance in the BA account. «Customer Name» will resume the receipt of exchange payments from BPA under this Agreement if and at such time that there is no longer a balance in the BA, or «Customer Name» makes payments to BPA to bring the balance in the BA to zero. «Customer Name» may elect to make cash payments to BPA in order to eliminate all or a portion of «Customer Name»'s balance in the BA at any time.

12.4 **BA Balance Carry Over**
Any balance in the BA, upon termination of this Agreement, shall not be a cash obligation of «Customer Name» but will carry over as a non-cash liability of «Customer Name» to the BA of a successor RPSA or other agreement implementing the Residential Exchange Program.

13. NOTICES

Any notice required under this Agreement shall be in writing and shall be delivered (a) in person; (b) by a nationally recognized delivery service; or (c) by United States Certified Mail. Notices are effective when received. Either Party may change its address for notices by giving notice of such change consistent with this section.

If to «Customer Name»:

«_____»
«_____»
«_____»
Attn: «_____»
«_____»
Phone: «___-___-____»
FAX: «___-___-____»
E-Mail: «_____»

If to BPA:

Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208-3621
Attn: «_____ - _____»
Account Executive
Phone: 503-230-«____»
FAX: «___-___-____»
E-Mail: «_____»

14. COST RECOVERY

14.1 Nothing included in or omitted from this Agreement creates or extinguishes any right or obligation, if any, of BPA to assess against «Customer Name» and «Customer Name» to pay to BPA at any time a cost under-recovery charge pursuant to an applicable transmission rate schedule or otherwise applicable law.

14.2 BPA may adjust the PF Exchange rate set forth in the applicable power rate schedule during the term of this Agreement pursuant to the Cost Recovery Adjustment Clause in the 2009 GRSPs, or successor GRSPs.

15. UNCONTROLLABLE FORCES

PBL shall not be in breach of its obligation to provide In-Lieu PF Power and «Customer Name» shall not be in breach of its obligation to purchase In-Lieu PF Power to the extent

the failure to fulfill that obligation is due to an Uncontrollable Force. "Uncontrollable Force" means an event beyond the reasonable control of, and without the fault or negligence of, the Party claiming the Uncontrollable Force that impairs that Party's ability to perform its contractual obligations under this Agreement and which, by exercise of that Party's reasonable diligence and foresight, such Party could not be expected to avoid and was unable to avoid. Uncontrollable Forces include, but are not limited to:

15.1 any unplanned curtailment or interruption for any reason of firm transmission used to deliver In-Lieu PF Power to «Customer Name»'s facilities or distribution system, including but not limited to unplanned maintenance outages;

15.2 any unplanned curtailment or interruption, failure or imminent failure of «Customer Name»'s distribution facilities, including but not limited to unplanned maintenance outages;

15.3 any planned transmission or distribution outage that affects either «Customer Name» or PBL which was provided by a third-party transmission or distribution owner, or by a transmission provider, including TBL and «Customer Name», that is functionally separated from the generation provider in conformance with FERC Orders 888 and 889 or their successors;

15.4 strikes or work stoppage, including the threat of imminent strikes or work stoppage;

15.5 floods, earthquakes, or other natural disasters; and

15.6 orders or injunctions issued by any court having competent subject matter jurisdiction, or any order of an administrative officer which the Party claiming the Uncontrollable Force, after diligent efforts, was unable to have stayed, suspended, or set aside pending review by a court of competent subject matter jurisdiction.

Neither the unavailability of funds or financing nor conditions of national or local economies or markets shall be considered an Uncontrollable Force. The economic hardship of either Party shall not constitute an Uncontrollable Force. Nothing contained in this provision shall be construed to require either Party to settle any strike or labor dispute in which it may be involved.

The Party claiming the Uncontrollable Force shall notify the other Party as soon as practicable of that Party's inability to meet its obligations under this Agreement due to an Uncontrollable Force. The Party claiming the Uncontrollable Force also agrees to notify any control area involved in the scheduling of a transaction which may be curtailed due to an Uncontrollable Force.

Both Parties shall be excused from their respective obligations, other than from payment obligations incurred prior to the Uncontrollable Force, without liability to the other, for the duration of the Uncontrollable Force and the period reasonably required for the Party

claiming the Uncontrollable Force, using due diligence, to restore its operations to conditions existing prior to the occurrence of the Uncontrollable Force.

16. GOVERNING LAW AND DISPUTE RESOLUTION

(Drafter's Note: The reference below to "CPR" means "Center for Policy Resolution." CPR is a proper name and should not be spelled out.)
[OPTIONS for section 16.
Option 1-Include the following if customer prefers to litigate (not arbitrate) disputes.
This Agreement shall be interpreted in accordance with and governed by Federal law. The Parties shall make a good faith effort to negotiate a resolution of disputes before initiating litigation. During a contract dispute or contract issue between the Parties arising out of this Agreement, the Parties shall continue performance under this Agreement pending resolution of the dispute, unless to do so would be impossible or impracticable. «Customer Name» reserves the right to seek judicial resolution of any dispute arising under this Agreement.

Option 2-Include the following if customer prefers to arbitrate (not litigate) disputes.

16.1 This Agreement shall be interpreted consistent with and governed by Federal law. Final actions subject to section 9(e) of the Northwest Power Act are not subject to binding arbitration and shall remain within the exclusive jurisdiction of the United States Ninth Circuit Court of Appeals. Any dispute regarding any rights of the Parties under any BPA policy, including the implementation of such policy, shall not be subject to arbitration under this Agreement. «Customer Name» reserves the right to seek judicial resolution of any dispute arising under this Agreement that is not subject to arbitration under this section 16. For purposes of this section 16 BPA policy means any written document adopted by BPA as a final action in a decision record or record of decision that establishes a policy of general application, or makes a determination under an applicable statute. If either Party asserts that a dispute is excluded from arbitration under this section 16, either Party may apply to the Federal court having jurisdiction for an order determining whether such dispute is subject to arbitration under this section 16.

16.2 Any contract dispute or contract issue between the Parties arising out of this Agreement, except for disputes that are excluded through section 16(a) above, shall be subject to binding arbitration. The Parties shall make a good faith effort to resolve such disputes before initiating arbitration proceedings. During arbitration, the Parties shall continue performance under this Agreement pending resolution of the dispute, unless to do so would be impossible or impracticable.

16.3 Any arbitration shall take place in Portland, Oregon, unless the Parties agree otherwise. The CPR Institute for Dispute Resolution's arbitration procedures for commercial arbitration, Non-Administered Arbitration Rules (CPR Rules), shall be used for each dispute; provided, however, that: (1) the Parties shall have the discovery rights provided in the Federal Rules of Civil Procedure unless the Parties agree otherwise; and (2) for claims of $1 million or more, each arbitration

shall be conducted by a panel of three neutral arbitrators. The Parties shall select the arbitrators from a list containing the names of 15 qualified individuals supplied by the CPR Institute for Dispute Resolution. If the Parties cannot agree upon three arbitrators on the list within 20 business days, they shall take turns striking names from the list of proposed arbitrators. The Party initiating the arbitration shall take the first strike. This process shall be repeated until three arbitrators remain on the list, and those individuals shall be designated as the arbitrators. For disputes involving less than $1 million, a single neutral arbitrator shall be selected consistent with section 6 of the CPR Rules.

16.4 Except for arbitration awards which declare the rights and duties of the Parties under the Agreement, the payment of monies shall be the exclusive remedy available in any arbitration proceeding. Under no circumstances shall specific performance be an available remedy against BPA. The arbitration award shall be final and binding on both Parties, except that either Party may seek judicial review based upon any of the grounds referred to in the Federal Arbitration Act, 9 U.S.C. §1-16 (1988). Judgment upon the award rendered by the arbitrators may be entered by any court having jurisdiction thereof.

16.5 Each Party shall be responsible for its own costs of arbitration, including legal fees. The arbitrator(s) may apportion all other costs of arbitration between the Parties in such manner as they deem reasonable taking into account the circumstances of the case, the conduct of the Parties during the proceeding, and the result of the arbitration.

End of OPTIONS for section 16.]

17. STATUTORY PROVISIONS

17.1 **Annual Financial Report and Retail Rate Schedules**
«Customer Name» shall provide PBL with a current copy of its annual financial report and its retail rate schedules, as required by Section 5(a) of the Bonneville Project Act, P.L. 75-329.

17.2 **New Large Single Loads*(09/05/00 Version for Block)***

17.2.1 **General**
All existing NLSLs are listed in section 1 of Exhibit B. «Customer Name» shall provide reasonable notice to PBL of any expected increase in load that is likely to qualify as a new NLSL. «Customer Name» may either serve a NLSL with Contracted Power or with power from another source. For purposes of this section 15(c), "Consumer" means an end-user of electric power or energy.*(Drafter's Note: List existing NLSLs in the Rate Commitments Exhibit)*

17.2.2 **Determination of a Facility**

PBL, in consultation with «Customer Name», shall make a reasonable determination of what constitutes a single facility, for the purpose of identifying a NLSL, based upon the following criteria:

(A) whether the load is operated by a single Consumer;

(B) whether the load is in a single location;

(C) whether the load serves a manufacturing process which produces a single product or type of product;

(D) whether separable portions of the load are interdependent;

(E) whether the load is contracted for, served or billed as a single load under «Customer Name»'s customary billing and service policy;

(F) consistent application of the foregoing criteria in similar fact situations; and

(G) any other factors the Parties determine to be relevant.

PBL shall show an increase in load associated with a Consumer's facility which has been determined to be a NLSL in section 1 of Exhibit B. PBL shall have the unilateral right to amend Exhibit B to reflect such determinations when made.

17.2.3 **Determination of Ten Average Megawatt Increase**

An increase in load shall be considered a NLSL if the energy consumption of the Consumer's load associated with a new facility, an existing facility, or expansion of an existing facility during the immediately past 12-month period exceeds by 10 average megawatts or more the Consumer's energy consumption for such new facility, existing facility or expansion of an existing facility for the consecutive 12-month period one year earlier, or the amount of the contracted for, or committed to load of the Consumer as of September 1, 1979, whichever is greater.

[OPTIONS for section 17(b)(4).

Option 1-Include the following if customer has no CF/CT loads.

17.2.4 **CF/CT Loads**

«Customer Name» has no loads that were contracted for, or committed to, as of September 1, 1979, as defined in section 3(13)(A) of the Northwest Power Act.

Option 2-Include the following if customer has CF/CT loads.

17.2.4 **CF/CT Loads**

The following loads were determined by the Administrator to be contracted for, or committed to, as of September 1, 1979, as defined in section 3(13)(A) of the Northwest Power Act, and are subject to the applicable rate for the rest (non-NLSL) of «Customer Name»'s load:

Retail electric power consumer's name:

Amount of firm energy contracted for, or committed to, as of September 1, 1979:

Facility description:

End of OPTIONS for section 17(b)(4).]

17.3 **Priority of Pacific Northwest Customers**

The provisions of sections 9(c) and (d) of P.L. 96-501 and the provisions of P.L. 88-552 as amended by section 8(e) of P.L. 96-501 are incorporated into this Agreement by reference. BPA agrees that «Customer Name», together with other customers in the Region, shall have priority to BPA power, consistent with these provisions.

17.4 **BPA Appropriations Refinancing Act**

Section 3201(i) of P.L. 104-134 is incorporated by reference.*(Drafter's Note: BPA is legally obligated to offer to make section 3201(i) of P.L. 104-134 a part of this Agreement. Customer may exclude this provision at their option.)*

18. STANDARD PROVISIONS

18.1 **Amendments**

No oral or written amendment, rescission, waiver, modification or other change of this Agreement shall be of any force or effect unless set forth in a written instrument signed by authorized representatives of each Party.

18.2 **Assignment**

This Agreement is binding on any successors and assigns of the Parties. BPA may assign this Agreement to another Federal agency to which BPA's statutory duties have been transferred. Neither Party may otherwise transfer or assign this Agreement, in whole or in part, without the other Party's written consent. BPA shall consider any request for assignment consistent with applicable BPA statutes. Such consent shall not be unreasonably withheld. «Customer Name» may not transfer or assign this Agreement to any of its retail customers.

18.3 **Information Exchange and Confidentiality**

The Parties shall provide each other with any information that is reasonably required and requested in writing by either Party, to operate under and administer this Agreement, including load forecasts for planning purposes, information

needed to resolve billing disputes, scheduling and metering information reasonably necessary to prepare power bills that is not otherwise available to the requesting Party, including metering data for each load that qualifies as an NLSL. Such information shall be provided in a timely manner. Information may be exchanged by any means agreed to by the Parties. If such information is subject to a privilege of confidentiality, a confidentiality agreement or statutory restriction under state or Federal law on its disclosure by a Party to this Agreement, then that Party shall endeavor to obtain whatever consents, releases or agreements are necessary from the person holding the privilege to provide such information while asserting the confidentiality over the information. Information provided to BPA which is subject to a privilege of confidentiality or nondisclosure shall be clearly marked as such and BPA shall not disclose such information without obtaining the consent of the person or Party asserting the privilege, consistent with BPA's obligation under the Freedom of Information Act. BPA may use such information as necessary to provide service or timely bill for service under this Agreement. BPA shall only disclose information received under this provision to BPA employees who need the information for purposes of this Agreement.

18.4 **Entire Agreement**

This Agreement, including all provisions, exhibits that are incorporated as part of this Agreement, and documents incorporated by reference, constitutes the entire agreement between the Parties. It supersedes all previous communications, representations, or contracts, either written or oral, which purport to describe or embody the subject matter of this Agreement.

18.5 **Exhibits**

The exhibits listed in the table of contents are incorporated into this Agreement by reference. The exhibits may only be revised upon mutual agreement between the Parties unless otherwise specified in the exhibits. The body of this Agreement shall prevail over the exhibits to this Agreement in the event of a conflict.

18.6 **Liability of Delivery**

«Customer Name» waives any claims against BPA under this Agreement for non-delivery of power to any points beyond the applicable point(s) of delivery under section 7. In no event will either Party be liable under this Agreement to the other Party for damage that results from an Electrical Disturbance caused by or occurring on an electric system owned or operated by such other Party or a third-party. Electrical Disturbance means any sudden, unexpected, changed, or abnormal electrical condition occurring in or on an electric system which causes damage.

18.7 **No Third-Party Beneficiaries**

This Agreement is made and entered into for the sole protection and legal benefit of the Parties, and no other person shall be a direct or indirect legal beneficiary of,

or have any direct or indirect cause of action or claim in connection with this Agreement.

18.8 **Waivers**

Any waiver at any time by either Party to this Agreement of its rights with respect to any default or any other matter arising in connection with this Agreement shall not be considered a waiver with respect to any subsequent default or matter.

18.9 **BPA Policies**

Any reference in this Agreement to BPA policies, including without limitation BPA's NLSL Policy, In-Lieu Power Policy, and the 5(b)/9(c) Policy, and any revisions thereto, does not constitute agreement by «Customer Name» to such policy, nor shall it be construed to be a waiver of the right of «Customer Name» to seek judicial review of any such policy.

[OPTION for section 18(j).
This provision is optional at customer's discretion.

18.10 **Hold Harmless**

Each Party assumes all liability for injury or damage to persons or property arising from the act or negligence of its own employees, agents, members of governing bodies or contractors. Each Party shall indemnify and hold the other Party harmless from any liability arising from such act or negligence.

End of OPTION for section 18(j).]

19. NOTICE PROVIDED TO RESIDENTIAL AND SMALL FARM CONSUMERS

«Customer Name» will ensure that any entity that issues customer bills to «Customer Name»'s residential and small farm consumers shall provide written notice on such customer bills that the benefits of this Agreement are "Federal Columbia River Benefits supplied by BPA."

Drafter's Note: *Include the following section 20 ONLY for IOUs*

20. ADJUSTMENTS TO MONETARY BENEFITS

The monetary benefits provided to under this Agreement shall be subject to adjustment by BPA to account for the overpayment of benefits, if any, for the period October 1, 2001, through September 30, 2008. Any such adjustments 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 associated recovery period; provided however, that any such adjustment is subject to the resolution of all administrative or judicial review thereof.

Drafter's Note: *For Puget and PAC, insert the Contract No. for the Load Reduction Agreement in this paragraph. For the other IOUs, delete (iii).*

Notwithstanding anything in this Agreement to the contrary, it is hereby agreed that neither Party has waived or is waiving, either by virtue of entering into this Agreement, by making or accepting payments under this Agreement, or otherwise, any arguments or claims it has made or may make, or any rights or obligations it has or may have,

regarding (i) the above referenced payments, if any, to «Customer Name», (ii) the calculation implementation or settlement of Residential Exchange Program benefits for any period of time, or (iii) implementation or settlement of rights under Contract No. _____ (Load Reduction Agreement), as amended, and each Party hereby expressly reserves all such arguments and rights. This section 20 shall survive the termination or the expiration of this Agreement and shall survive even if any other provision(s) of this Agreement is held to be not consistent with law, or void or otherwise unenforceable.

End section 20 for IOUs only

Drafter Note: *For publics, change section number below from 21 to 20.*

21. SIGNATURES

Each signatory represents that he or she is authorized to enter into this Agreement on behalf of the Party for whom he or she signs.

«FULL NAME OF UTILITY»	UNITED STATES OF AMERICA Department of Energy Bonneville Power Administration
By _____	By _____
Name _____ *(Print/Type)*	Name _____ *(Print/Type)*
Title _____	Title _____
Date _____	Date _____

Exhibit A
RESIDENTIAL LOAD DEFINITION

1. «Customer Name»'s Residential Load means the sum of the loads within the Region eligible for the Residential Exchange Program under the tariff schedules described below, adjusted for distribution losses as determined pursuant to Exhibit C, 2008 Average System Cost Methodology, as revised, supplemented, or superseded. If BPA determines that any action changes «Customer Name»'s general tariffs or service schedules in a manner which would allow loads other than Residential Loads, as defined in the Northwest Power Act, to be included under these tariff schedules, or that the original general tariffs or service schedules include loads other than Residential Loads, such nonresidential loads shall be excluded from this Agreement.

Such tariff schedules as presently effective include:

(1) for all schedules listed below, include the amount, expressed in kilowatt-hours, of Residential Load supplied by «Customer Name» under:

(A) ***«schedule»***

(B) ***«schedule»***

(C) ***«schedule»***, and

(2) a portion of the Residential Load supplied by «Customer Name» as determined pursuant to section 2 of this exhibit.

2. Any farm's monthly irrigation and pumping load qualifying under this Agreement for each billing period shall not exceed the amount of the energy determined by the following formula:

Irrigation/Pumping Load = 400 × 0.746 × days in billing period × 24

provided, however, that this amount shall not exceed that farm's measured energy for the same billing period.

where:

400	is equal to the horsepower limit defined in the Northwest Power Act,
0.746	is the factor for converting horsepower to kW,
days in billing period	is determined in accordance with prudent and normal utility business practices, and
24	is the number of hours in a day.

3. When more than one farm is supplied from a common pumping installation, the irrigation and pumping load of the installation shall be allocated among the farms using the installation, based on the method (e.g., water shares, acreage) that the farms use to

allocate the power costs among themselves. These allocated loads shall then be combined with any other irrigation and pumping loads attributed to the farms under section 2 of this exhibit. In no instance shall any farm's total qualifying irrigation loads for any billing month exceed 222,000 kWh.

4. A farm is defined as a parcel or parcels of land owned or leased by one or more persons (person includes partnerships, corporations, or any legal entity capable of owning farm land) that is used primarily for agriculture. Agriculture is defined to include the raising and incidental primary processing of crops, pasturage, or livestock. Incidental primary processing means those activities necessarily undertaken to prepare agricultural products for safe and efficient storage or shipment. All electrical loads ordinarily associated with agriculture as defined above shall be considered as usual farm use.

Contiguous parcels of land under single-ownership or leasehold shall be considered to be one farm. Noncontiguous parcels of land under single-ownership or leasehold shall be considered as one farm unit unless demonstrated otherwise by the owner or lessee of the parcels as determined by BPA.

Parcels of land may not be subdivided into a larger number of parcels in order to attempt to increase the number of farms. Ownership or leasehold interests in farms may not be changed in order to attempt to increase the number of farms, for example, by leases to family members or establishment of partnerships, corporations or similar devices. Acquisition of a parcel which was previously a separate farm becomes part of the single farm that acquired the parcel. In order for a noncontiguous parcel to constitute a separate farm, the farm must not share any equipment or labor with any other parcel and must maintain separate financial statements, accounting records, and tax returns as of May 1, 2000. Any new farms created after May 1, 2000, with irrigation loads, must submit an application for exchange benefits for such irrigation loads to «Customer Name» which shall then submit such application to BPA and such application must be reviewed and approved by BPA before the new farm is eligible to receive benefits for such irrigation loads. A number of additional factors may be used by BPA to determine whether noncontiguous parcels constitute one or more farms. These factors include but are not limited to:

(1) use,

(2) ownership,

(3) control,

(4) operating practices, and

(5) distance between parcels.

5. Unused irrigation allocations may not be reallocated to other farms or to another billing period.

6. The operator of a farm is required to certify to «Customer Name» all irrigation accounts, including horsepower rating for that farm, including all irrigation accounts commonly shared. The operator of a farm is required to provide «Customer Name» and BPA all documentation requested to assist in the farm determination.

7. This exhibit shall be revised to incorporate additional qualifying tariff schedules, subject to BPA's determination that the loads served under these schedules are qualified under the Northwest Power Act.

Exhibit B
NEW LARGE SINGLE LOADS

(Drafter's Note: For each NLSL in this section include the following: the retail electric power consumer name, the facility location, the date the load became a NLSL, a description of the NLSL, and how the NLSL shall be served. If BPA serves the NLSL, Contracted Power will be provided under the NR rate schedule unless the Parties agree to service under a surplus rate schedule, and establishes rates and billing factors in Exhibit D, Additional Products and Special Provisions.)

[OPTIONS for section (a).
Option 1-Include the following if customer has no existing NLSL.
1. «CUSTOMER NAME» HAS NO EXISTING NLSL.

Option 2-Include the following if customer has an existing NLSL. The load listed may no longer be considered to be a NLSL if BPA establishes a new NLSL policy (i.e., Klickitat, Goldendale). This should be noted and the right to change the determination should be established.
1. «CUSTOMER NAME» HAS AN EXISTING NLSL. THE NLSL IS LISTED BELOW.
End of OPTIONS for section (a).]

2. When «Customer Name» has a NLSL this exhibit shall be revised to include estimated monthly HLH and LLH MWs in a table below.

Exhibit C
2008 AVERAGE SYSTEM COST METHODOLOGY

EXHIBIT D
SCHEDULING

1. PURPOSE OF THIS EXHIBIT

The purpose of this exhibit is to identify power scheduling requirements and coordination procedures necessary for the delivery of electric power and energy sold under this Agreement. All provisions apply to Purchasing-Selling Entities (PSEs), including their authorized scheduling agent. Transmission scheduling arrangements are handled under separate agreements/provisions with the designated transmission provider. Nothing in this exhibit is intended to relieve the Parties of any obligation they may have under North American Electric Reliability Council (NERC) or Western Systems Coordinating Council (WSCC) policy, procedure, or guideline.

2. COORDINATION: GENERAL, PRESCHEDULE, REAL-TIME, AND AFTER-THE-FACT REQUIREMENTS

2.1 General Requirements

2.1.1 The Parties may revise and replace this exhibit by mutual agreement. BPA shall also have the right to revise and replace this exhibit under the following circumstances after providing an opportunity for all affected Parties to discuss and comment on any proposed changes: (1) to comply with rules or orders issued by FERC, NERC, or WSCC or (2) to implement changes reasonably consistent with standard industry practice, but necessary for BPA to administer it's power scheduling function.

2.1.2 PSEs shall have staff available 24 hours a day for each day an active transaction or preschedule is in effect. PSEs must be prepared to verify transactions on an hourly basis if necessary.

2.1.3 PSEs shall complete the prescheduling and check out processes, and to verify Transactions and associated totals, per NERC tag, and BPA contract.

2.1.4 Inability to verify Transactions may result in schedule rejection or curtailment.

2.1.5 PSEs shall verify Transactions and totals after-the-fact (ATF) per both parties' ATF processes.

2.1.6 BPA is not obligated to accept Transactions that do not comply with the scheduling requirements in this exhibit or the contract.

2.1.7 Should a PSE attempt to preschedule a Transaction for power for which that PSE has an obligation to provide transmission and fails to properly

reserve the transmission necessary to complete the Transaction, the PSE will not be excused from its payment obligation, if any, under this Agreement.

2.1.8 All Transactions shall be stated in WSCC time zone and "hour ending" format.

2.1.9 All Schedules, except Dynamic Schedules, will be implemented on an hourly basis using the standard ramp as specified by WSCC procedures.

2.1.10 [Intentionally Omitted]

2.1.11 Changes to telephone or fax numbers of key personnel (for Prescheduling, Real-Time, Control Area, or Scheduling Agents, etc.) must be submitted to BPA.

2.2. Prescheduling Requirements

2.2.1 Information Required For Any Preschedule

2.2.1.1 Unless otherwise mutually agreed, all Transactions will be submitted according to NERC instructions for E-tagging, as modified by WSCC.

2.2.1.2 When completing the NERC E-Tag insert the applicable BPA Contract number(s) in the "reference" column of the miscellaneous section of the tag.

2.2.1.3 Transactions going to or from COB (California-Oregon Border) must be identified as using Malin or Captain Jack, or COB Hub.

2.2.2 Preschedule Coordination

2.2.2.1 Final hourly preschedules (verbal submission of E-tag information) must be submitted for the next day(s) by 1000 of each Workday, unless otherwise agreed.

2.2.2.2 Typically, preschedules are for one to three days. By mutual agreement of the parties, final preschedules may be requested for longer time periods to accommodate special scheduling requirements.

2.2.2.3 Under certain operating conditions, either party may require submission of estimated daily preschedules for an ensuing period up to ten days in length, prior to the final preschedule.

2.3 **Real-Time Requirements**

2.3.1 PSEs may not make Real-Time changes to the scheduled amounts, including transmission arrangements unless such changes are allowed under individual contract provisions or by mutual agreement.

2.3.2 If Real-Time changes to the Schedule become necessary, and are allowable as described in section 2(c)(1) above, PSEs must submit such request no later than 30 minutes prior to the hour for which the Schedule change becomes effective.

2.3.3 Multi-hour changes to the Schedule shall specify each hour to be changed and shall not be stated as "until further notice."

2.3.4 Emergency scheduling and notification procedures (including mid-hour changes) will be handled in accordance with NERC and WSCC procedures.

2.4 **After-the-Fact Reconciliation Requirements**
PSEs agree to reconcile all Transactions, Schedules and accounts at the end of each month (as early as possible within the first ten calendar days of the next month). The parties will verify all Transactions per BPA contract, as to product or type of service, hourly amounts, daily, and monthly totals, and related charges.

3. DEFINITIONS AND ACRONYMS

Capitalized terms in this Exhibit shall have the meanings defined below, in context, or as used elsewhere in this Agreement.

3.1 **Control Area:** An electrical system bounded by interconnection (tie-line) metering and telemetry. It controls generation directly to maintain its interchange schedule with other control areas and contributes to frequency regulation of the interconnection.

3.2 **Hour Ending:** Designation for one hour periods of time based upon the time which the period ends. For example: the one hour period between 1300 and 1400 is referred to as Hour Ending 1400.

3.3 **Prescheduling:** The process (electronic, oral, and written) of establishing and verifying with all scheduling parties, advance hourly Transactions through the following Workday(s). Preschedules apply to the following day or days (if the following day or days are not Workday(s).

3.4 **Purchasing-Selling Entity (PSE):** (NERC defined term) An entity that is eligible to purchase or sell energy or capacity and reserve transmission services.

3.5 **Real-Time:** The hourly or minute-to-minute operation and scheduling of a power system as opposed to those operations which are prescheduled a day or more in advance.

3.6 **Schedule:** The planned Transaction approved and accepted by all PSEs and Control Areas involved in the Transaction.

3.7 **Transaction:** An agreement arranged by a PSE to transfer energy from a seller to a buyer.

3.8 **Workday:** Any day BPA, other regional utilities, and PSEs observe as a working day.

ATTACHMENT C

RD RPSA Template

The Regional Dialogue RPSA agreement will be published separately once the standard (non-RPSA) provisions are finalized.

This page intentionally left blank.

This page intentionally left blank.