

Stenehjem, Carlene R - DKC-7

From: on behalf of BPA Public Involvement
Subject: FW: Comments of the Pacific Northwest Investor-Owned Utilities Regarding BPA's Proposed Interpretation of Section 4(c)(10)(B) of the Northwest Power Act

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From: Hall, Stephen [mailto:SCHALL@stoel.com]
Sent: Thursday, June 29, 2006 4:32 PM
To: BPA Public Involvement; Casad, Kurt R - LP-7
Subject: Comments of the Pacific Northwest Investor-Owned Utilities Regarding BPA's Proposed Interpretation of Section 4(c)(10)(B) of the Northwest Power Act

These comments are submitted by Avista Corporation, Idaho Power Company, PacifiCorp, Portland General Electric Company and Puget Sound Energy, Inc. (collectively, the "Pacific Northwest Investor-Owned Utilities").

By letter dated June 19, 2006, BPA sought comments on its proposed interpretation of section 4(c)(10)(B) of the Pacific Northwest Electric Power and Conservation Act (the "Northwest Power Act"). As explained below BPA should interpret Section 4(c)(10) as follows:

1. Section 4(c)(10) only establishes minimum, mandatory levels of Council funding. BPA's authority to provide funding to the Council to carry out the purposes of the Northwest Power Act is clear. There is no absolute statutory cap on the amount that BPA, in its discretion, can pay to the Pacific Northwest Electric Power and Conservation Council (the "Council") for its funding. Accordingly, BPA's determination of a power sale forecast under section 4(c)(10)(B) is irrelevant with respect to BPA's payment of Council expenses if the Administrator determines in his discretion that such payment should be made.

2. For purposes of any section 4(c)(10) forecast of firm power sales, BPA should note the approach taken with respect to REP resources and loads in determining its WP-07 rates.

A. BPA's Executive Authority to Set Budget and Spending Levels Determines the Maximum Amount of Council Funding, Not Section 4(c)(10)

The Council is an interstate compact agency established by section 4(a)(2)(A) of the Northwest Power Act (16 U.S.C. § 839b(a)(2)(A)) and is charged with the following principal functions:

(i) the development of a regional conservation and electric power plan (the "Plan") pursuant to section 4(d)-(g) of the Northwest Power Act to assure that the region has an adequate, efficient economical and reliable power supply (16 U.S.C. § 839b(d)-(g)); and

(ii) the development of a fish and wildlife program (the "Program") pursuant to the Section 4(h) of the Northwest Power Act (16 U.S.C. § 839b(h)) to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries.

The Northwest Power Act states that "[a]t the request of the Council, the Administrator shall pay ...the compensation and other expenses of the Council..." incurred in its performance of the Council's functions and responsibilities pursuant to the Northwest Power Act, including but not limited to costs associated with the development of both the Plan and the Program. See 16 U.S.C. § 839b(c)(10)(A) (emphasis added). Section 4(c)(10)(A) further provides that such mandatory payments are not to exceed "an amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded." Id. Section 4(c)(10)(B) provides that the limit on such mandatory payments may increase "to any amount not in excess of 0.10 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded" upon a showing by the Council that the section 4(c)(10)(A) limitation would not permit the Council to carry out its functions and responsibilities. See 16 U.S.C. § 839b(c)(10)(B).

The section 4(c)(10)(A) and (B) limitations establish mandatory amounts that the Council may require the Administrator to fund, but such sections do not limit the Administrator's discretion to make additional payments to the Council. Indeed, the BPA Administrator has

broad discretion pursuant to section 8(b)(12) of the Federal Columbia River Transmission System Act, as amended, to make expenditures from the Bonneville Power Administration fund to carry out the purposes and provisions of the Northwest Power Act:

The Administrator may make expenditures from the fund . . . for any purpose necessary or appropriate to carry out the duties imposed upon the Administrator pursuant to law, including but not limited to -

(12) making such payments, as shall be required to carry out the purposes and provisions of the Pacific Northwest Regional Power Planning and Conservation Act [the Northwest Power Act].

16 U.S.C. § 838i(b)(12).

Any discretionary payments made by the Administrator to fund the expenses necessary for the performance of the Council's functions, including but not limited to the development of both the Plan and the Program, would be to carry out the purposes and provisions of the Northwest Power Act. Although the amount of such discretionary expenditures may exceed the minimum levels of payments required by sections 4(c)(10)(A) and (B), such expenditures are within the Administrator's discretion pursuant to section 8(b)(12). The payments of Council expenses the Administrator may elect to make are simply not limited to 0.02 or 0.10 mills multiplied by the kilowatt hour of "firm power forecast to be sold." Further, as explained below, BPA's authority to set spending program levels is an inherent power of its Executive responsibility to set budgets. Of course, BPA should and does receive and consider input of BPA's customers and its other stakeholders in reaching its decisions on BPA spending levels, including Council expense payment. From a policy perspective, however, it is important that BPA have discretion on payment of Council expenses, given the pivotal role of the Council in the development of Plans and Programs. (The Pacific Northwest Investor-Owned Utilities offer no view in these comments on how BPA should exercise that discretion.) Accordingly, a power sale forecast is irrelevant with respect to BPA's payment of Council expenses if the Administrator determines in his discretion to make such payment.

B. A Forecasted Level of Firm Power Sales for Purposes of Section 4(c)(10)(B) Should Reflect REP Loads and Resources.

As BPA has stated, determination of spending level decisions, such as Council funding levels, should not be addressed in BPA's rate proceedings and are subject to review only by the President and Congress:

Ultimately, though, BPA's spending decisions have remained an unreviewable and discretionary function of the Executive Branch. BPA's spending levels are part of the Federal Budget, and are subject to review only by the President and Congress.

WP-07-A-01, at 17-20.

We do not dispute this proposition, but suggest that if BPA is determining a firm power sales forecast for purposes of section 4(c), BPA's treatment of REP resources and loads in the WP-07 rate case, while not precedential, should be noted in interpreting section 4(c)(10)(B). For example, in the WP-07 proceeding, the BPA Draft Record of Decision included REP resources and loads in its 7(b)(2) rate step calculation, notwithstanding the REP Settlements:

In every BPA rate case since 1985, which marked the first implementation of Section 7(b)(2), BPA has always forecast the resources, loads, and costs of the REP when developing rates.

WP-07-A-01, at 10-20. BPA noted that "inclusion of the REP in the Program Case allows Section 7(b)(2) to function properly." Id. Similarly, inclusion of REP resources and loads into BPA's forecasted firm power sales under section 4(c)(10)(B) is consistent with the statutory scheme envisioned by Congress. BPA stated in the WP-07 proceeding that REP settlement benefits are simply monetary payments and do not involve resources or loads:

[T]he REP settlement benefits are simply monetary payments to settle REP disputes. Unlike the REP, the REP settlement benefits involve no power sales, resources or loads. . . . BPA has always reflected the REP as a physical purchase and sale in BPA's ratemaking under the Northwest Power Act. WP-07-A-01, at 10-21.

Because such monetary payments are not resources or loads, in order to preserve the level

of funding intended by Congress it is appropriate for BPA to include REP resources and loads in calculating Council funding levels under section 4(c)(10)(B).

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