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Via Electronic Mail

Stephen Wright
Administrator
Bonneville Power Administration
P.O. Box 14428
Portland, OR 97293-4428

Re: Regional Dialogue Comments of ICNU

Dear Mr. Wright:

The Industrial Customers of Northwest Utilities (“ICNU”) submits the following comments regarding the Bonneville Power Administration’s (“BPA”) Long-Term Regional Dialogue Policy Proposal (“Regional Dialogue”). ICNU recognizes that BPA and regional stakeholders have put significant effort into the Regional Dialogue process; however, ICNU has serious reservations about the proposed policy choices in the Regional Dialogue and how these choices could potentially harm BPA’s customers and the region. ICNU appreciates this opportunity to provide comments and hopes that BPA will use this constructive feedback to improve the final Regional Dialogue.

As a preliminary matter, ICNU is troubled by the lack of specificity and detail in the Regional Dialogue. BPA is seeking to resolve, for the next twenty years, a wide array of complex and contentious issues. Although BPA wishes to obtain regional consensus, ICNU will not know whether to support many aspects of the Regional Dialogue until BPA provides an adequate written explanation of how its proposals would be implemented and how they are consistent with BPA’s governing statutes, including the Northwest Power Act. Based on the explanations that BPA has provided in its Regional Dialogue proposal, ICNU cannot determine if BPA’s proposals violate the Northwest Power Act or otherwise dilute or reduce preference customers’ rights to cost-based power.

BPA has explained that it is seeking agreement on the “big picture” issues before providing the specific “details” of how many aspects of the Regional Dialogue would actually work. ICNU is concerned that many of the “details” that BPA has left unclear are not small or insignificant; rather, they are critical issues that will shape how the benefits of the Columbia River hydro system will be allocated for the next two

decades. Important unresolved issues include: calculation of the residential exchange benefits; dispute resolution; cost containment; the tiered rate methodology; determination of net requirements; the details regarding the implementation of the high water marks (“HWMs”); DSI service and rates; the waiver of statutory rights; and how BPA would serve customers that do not accept the Regional Dialogue. Some of these issues have been festering and unresolved for the past decade while others are fundamental uncertainties associated with BPA’s new proposals. BPA should not expect its customers to support the “big picture” and hope that they will be treated fairly when BPA actually resolves many of these critical “details.”

ICNU also recommends that BPA focus on providing products that customers will actually use. If BPA adopts tiered rates, BPA will offer a variety of new products and services to replace the options currently available. These new products and services should focus on the needs of its customers and be fashioned in a user-friendly manner.

As much of the Regional Dialogue remains in a state of continuing development, ICNU is not providing all-encompassing comments and BPA should not assume that ICNU’s silence equates with support of any aspect of BPA’s proposal. ICNU reserves the right to challenge any aspect of BPA’s Regional Dialogue in the future, and may provide additional feedback on other aspects of the Regional Dialogue as BPA continues to refine and develop its proposals.

I. BPA’s Tiered Rates Proposal Should Be Revised

ICNU has significant concerns with BPA’s proposal to provide service to the public utilities under tiered rates. BPA’s tiered rate proposal is not sufficiently developed at this time for ICNU to provide support or opposition, and ICNU’s comments are intended to be constructive proposals to improve upon the “tiered rate construct.” Nonetheless, ICNU notes that the tiered rate proposal is a significant departure from BPA’s historic melded rate approach, and BPA has not made the case that tiered rates are consistent with the statutory requirements contained in the Northwest Power Act.

BPA has proposed to limit the amount of firm, cost-based power available to public utility customers after 2011. Under the Regional Dialogue, each public utility would be allocated an amount of cost-based, or Tier 1, power that will be set using each utility’s HWM based on 2010 loads and resources. The utility’s actual Tier 1 purchases would be the lower of its net requirements or its HWM. Public utilities that take power from BPA above their HWM will be charged Tier 2 rates based on the marginal, market-based price of electricity. The terms, conditions and costs of Tier 2 rates are to be determined later.

As currently drafted, the Regional Dialogue appears to inappropriately deprive some end use consumers of their statutory rights to place load on their utilities and be charged at the cost-based BPA power rate. BPA’s tiered rate construct is intended

to limit BPA's open ended resource procurement obligation and limit its costs, rates and risks. While these goals may have merit, BPA should not penalize end use consumers for the decisions they made based on the reasonable assumption that BPA would continue to offer melded rates. Nor should BPA take away customers' statutory rights to cost-based power.

In the Regional Dialogue, BPA has recognized that its tiered rate construct can have unintended, harmful impacts, and that exceptions should be made for certain resources and loads. For example, BPA has proposed an exemption for consumer resources for "returned hydro resources." Regional Dialogue at 15. BPA is also considering an exemption for those utilities that have sold their share of Centralia, and has proposed additional changes to reflect the possibility that new public utilities may form over the next twenty years. These exemptions reflect that BPA can modify the Regional Dialogue to accommodate the particular needs of its consumers. BPA should adopt similar changes to protect its end use customers from the problems associated with switching from melded rates to tiered rates.

A. BPA Has Not Made the Case That Tiered Rates Are Permissible Under Current Law

BPA asserts that legally sustainable contracts are "critical" and that it has "structured each element of this [Regional Dialogue] proposal to be legally sustainable." Regional Dialogue at 4. These statements are surprising given the uncertainty surrounding whether BPA can offer tiered, rather than melded, rates. The Northwest Power Act contemplates that BPA would offer melded rates, and Congress rejected efforts that would have allowed BPA to offer tiered rates. Regardless of the public policy merits associated with tiered rates, the Regional Dialogue does not incorporate a compelling argument as to why tiered rates are legally sustainable. In fact, BPA's emphasis upon customers waiving any challenges to the Regional Dialogue in order to obtain cost-based power suggests that BPA is worried that its tiered rate proposal may be subject to successful legal challenge. If BPA is serious about ensuring that its Regional Dialogue proposal is legally sustainable, then BPA should fully explain to the region why its proposal is lawful, abandon its efforts to make customers waive their statutory rights, and make the other changes, consistent with the recommendations in these comments, to improve the "tiered rate construct."

B. The Regional Dialogue Unfairly Penalizes End Use Cogeneration Consumers

BPA's proposal to use 2010 loads and resources could be a major and very harmful change in BPA policy for end use consumers that are currently using their own generation resources to serve load. BPA has proposed that the HWM will be based on the difference between the public utility's actual 2010 firm load and the amount of resources (including end use consumer resources) that the public utility uses to serve its load during 2010. An end use consumer that utilizes its own generation resources to

serve its load in 2010 will reduce the amount of Tier 1 power available to the public utility for the next 20 years.

Use of 2010 loads and resources could harm end use consumers with cogeneration resources and undermine BPA and the region's goals of developing cogeneration resources. Cogeneration is an environmentally beneficial resource that the Northwest Power Act has prioritized over all non-renewable resources. Northwest Power Act, 16 U.S.C. § 839b(e)(1). Under BPA's past and current policies, a cogeneration consumer could elect to self generate and reduce the load it placed on a BPA-served public utility. The cogeneration consumer could also place its load on the public utility and either shut down its generation or sell its output to third parties. The different economic options available to end use consumers serve as an incentive to develop cogeneration resources. Elimination of this flexibility will increase cogenerators' business costs and may reduce the possibility that additional cogeneration resources will be built in the region.

With regard to existing cogeneration facilities, BPA's selection of 2010 as the date upon which to set resource component of the HWMs arbitrarily locks in a cogeneration consumer's resource decisions in 2010 or earlier for the next twenty years. BPA's proposal stands in contrast to the Public Power Council's ("PPC") proposal to use 2012 resources instead of 2010 resources to set the HWMs. Regional Dialogue at 15. BPA's use of 2010 resources and its rejection of the PPC proposal are inconsistent with BPA's stated objective to reach regional consensus.

BPA's proposal fails to accommodate the fact that the public utilities' current contracts expire in 2011. End use consumers that use their generation resources to serve load in 2010 should not be required to continue using their generation resources to serve load for the next twenty years, or pay higher, market-based rates. The economic decisions that led to a consumer's decision to commit its cogeneration to load in a single year or rate period should not decide that consumer's rights to cost-based power for the next twenty years. It is particularly unfair to penalize consumers for making economic decisions based on the assumption that BPA would continue to offer melded rates.

ICNU recommends that BPA should maintain cogenerating end use consumers' current flexibility and allow them to remove or add their resources from its public utility's net firm requirements in each rate period. If BPA elects to continue with the proposal contained in the Regional Dialogue, BPA should, at a minimum, provide these cogeneration consumers with reasonable opportunities to decide whether their resources reduces their local public utility's HWM. Using 2012 resource to determine the HWMs would be a good first step that would, at least, allow such consumers to decide whether to commit their resources to load after knowing that tiered rates will be in place.

C. The Regional Dialogue Treats Historic BPA End Use Consumers as New Large Single Loads

BPA cannot use the Regional Dialogue to deny existing end use consumers their rights to cost-based power, and to treat restored load and load growth as a new large single load (“NLSL”) in violation of the Northwest Power Act. The tiered rate proposal in the Regional Dialogue eliminates the distinction between NLSLs and certain loads of BPA end use consumers in a manner that ignores BPA’s statutory responsibilities. BPA must correct this problem by ensuring that BPA’s end use consumers with 2010 loads that are currently lower than the amount that the public utility contracted for, or committed to, in September 1979 (“CFCT”) are able to purchase power at Tier 1 rates up to their CFCT amount.

The Northwest Power Act treats NLSLs differently than other end use consumer loads. A NLSL is defined as any new load that is not CFCT, and which will result in an increase in power requirements of 10 aMW in any consecutive twelve-month period. Northwest Power Act, 16 U.S.C. § 839a(13). NLSLs are within a utility’s net requirements, but are not eligible to receive power at the same cost-based rate and are charged a market-based rate. Northwest Power Act, 16 U.S.C. § 839e(b)(4). In contrast, other end use consumers have the statutory right to place their load up to their CFCT amount on public utilities which are entitled to cost-based rates.

The Regional Dialogue harms those end use consumers that have 2010 loads that are smaller than their full CFCT amount. Under the Regional Dialogue, an end use consumer will only have a right to cost-based power up to the 2010 loads of their public utility. Restored load for that end use consumer, even though it is within the CFCT amount, would not increase the utility’s HWM and BPA would serve this restored load the same as a NLSL, *i.e.* they will be charged the Tier 2 or market price for power.

ICNU recommends that BPA revise the Regional Dialogue to ensure that end use consumers with 2010 loads that are lower than their CFCT amount do not lose their statutory right to place load on their public utilities and obtain Tier 1 power. The simplest remedy would be to allow any end use consumer to purchase power at Tier 1 rates up to their CFCT amount. BPA should adjust customers HWMs and/or augment its system to purchase any additional power needed to meet this CFCT load.

BPA has already recognized that it may need to augment its system to meet its statutory responsibilities to provide more power than is available from the Federal base system. For example, BPA has recognized that new public utilities will have a statutory right to cost-based power at the Tier 1 rate. BPA cannot accurately estimate the amount of new public utility load that will form over the next twenty years, and has proposed that it will augment the system up to 250 MWs to provide an amount of power priced at the Tier 1 rate for new public utilities. Similarly, BPA has a statutory obligation to provide cost-based power to the public utilities that serve end use consumers’ that have CFCT amounts larger than their 2010 loads, and BPA should

ensure that it will augment the system and provide these consumers with cost-based, Tier 1 power.

II. BPA Should Not Provide the Direct Service Industries with Any Subsidies

BPA must end all subsidies to the direct service industries (“DSIs”) because there is no reasonable level of cost that BPA’s other customers are willing to bear in order to ensure the DSIs’ continued profitability. BPA should focus on providing low-cost power to its preference customers, and refuse to adopt a 20-year policy that would have public power customers financially supporting one small group of customers that do not have a statutory right to power. It is poor public policy for BPA to sacrifice the region’s economic viability to subsidize an aluminum industry that is enjoying historic record profits.

The DSIs are urging BPA to provide them with 560 MW of power at Tier 1 rates each year for the 20-year period beginning 2011. During this time period, BPA does not have enough Tier 1 power to serve those customers that it is statutorily obligated to serve. Under BPA’s proposal, ICNU’s members will be forced to buy any power needed to serve load growth at market prices to pay for the DSI subsidy.

A. Subsidizing the DSIs Hurts Industry in the Northwest

Providing subsidies to the DSIs harms the Northwest economy, and hurts the ability of Northwest industry to compete in the global economy during a period of high local energy prices. Subsidizing the DSIs is not cheap or cost effective. BPA recently signed contracts with the DSIs that provide them with over \$59 million in annual subsidies. This current BPA subsidy increases BPA’s rate to public utilities by \$1 per MWh, which means that BPA is taking about \$1 per MWh from its end use consumers, and directly giving that money to the DSIs. This is especially egregious in the case of a DSI like Port Townsend Paper Company which would receive a subsidy from a competitor in order to compete against some of ICNU’s members.

The DSIs have loudly championed the myth that their industrial jobs are more important than other regional industrial jobs. Northwest industry served by BPA’s preference customers contributes far more economic benefits and jobs than the DSIs. Georgia Pacific, Kimberly Clark, Longview Fibre, Ponderay Newsprint, Grays Harbor Paper Company, Hewlett Packard and Weyerhaeuser are only a few of the non-DSI industries that are served by BPA. These companies directly contribute more than 12,000 jobs to the region at facilities served by public power. These are direct jobs and not inflated by a “multiplier.” These employment numbers would be increased to well over 30,000 using the DSIs’ “multiplier.” The more than 12,000 jobs that these companies provide reflect a portion of the non-DSI industry, and is lower than the historic average because of recent facility closures that have been caused, in part, by higher power prices. Regardless, these numbers demonstrate that the estimated 1,300 direct DSI jobs (which is

the number that 560 aMW of Tier 1 power may achieve) are dwarfed by the other industrial jobs that will be harmed by any DSI subsidy.

BPA recently completed a study on the economic impact of providing service to the DSIs. The authors of the DSI Study distanced themselves from its conclusions because the data that was available to them and upon which the study was based is not relevant to the issue of the economic impact on the Northwest. The authors cautioned that the DSI Study's long-term job loss projections were also suspect. Even with these limitations, the DSI Study did identify some areas in which the DSI subsidy will directly harm the economic health of the Northwest. For example, providing the DSIs with 560 aMW at a Tier 1 rate when the market price of power is \$50 per MWh will result in BPA customers paying a subsidy of over \$71,000 per year for each DSI employee, a subsidy that is likely equal to the entire wage of the average DSI employee. See DSI Study at 15-16. If the market price of power were to reach \$60 per MWh, the cost to BPA customers would reach \$110,000 per year for each DSI employee. This is not a cost-effective use of Federal resources.

The DSI Study also showed that BPA will be directly responsible for causing other Northwest industries to lose a projected 879 jobs in the short run and 1,110 jobs in the long run. DSI Study at 16. These estimates are understated as the DSI study reviewed the overall impacts on the Northwest economy, but did not review the impact upon those industries that are struggling to stay in business. BPA should not rely upon the DSI study's low estimate of non-DSI job losses without conducting a more comprehensive review of the economic harm in providing cash or cost-based power to the DSIs.

Finally, based on current and projected BPA power prices, the DSIs are not expected to operate in the long-term, even with access to Tier 1 power. The DSI Study concluded that "smelters will not operate in the long-term without earning their cost of capital." DSI Study at 10. The DSIs are not likely to invest in these facilities and their poor competitive situation will only worsen. Given the smelter economics, even under favorable assumptions, a subsidy at the PF rate will not support the long-term operations of these facilities.

More importantly, the DSI Study also showed that, if the DSIs all close down there is not expected to be any significant drop in regional employment and income. BPA should not prop up an industry with little long-term economic viability at the expense of other Northwest industries that are more likely to survive, especially if those other industries are not burdened with higher electric prices.

B. The Corporate Owners of the DSIs Do Not Need a Subsidy to Remain Profitable

In light of the world market for aluminum, there is no legitimate reason to favor an aluminum industry that is unlikely to survive in the long-term in the Northwest

because of the high market prices for power. Despite the long-term economic difficulties in the Northwest, the corporate owners of the DSI facilities as a whole are experiencing excellent overall financial performance and do not need a subsidy from other industrial consumers to maintain their high profitability. Continued DSI subsidies will only keep the aluminum facilities in the Northwest on life support and provide additional cash to parent companies that are experiencing record profits.

For example, Alcoa Inc. has reported the highest quarterly profit in any year of the company's 117-year history with \$1.2 billion in net income. Columbia Falls is owned by Glencore Group, which has experienced solid financial performance. Golden Northwest is owned by Harbinger, a private equity fund owned by high net worth individuals and pension funds. The high profitability of the individual DSIs is reflected by the fact that demand for aluminum has increased by nearly 4%, and prices in the aluminum industry have risen by 13% from last year. Essentially, none of these entities need a subsidy from other Northwest industries to maintain their excellent financial status. If continued Northwest operations are important, then these companies, not other Northwest ratepayers, should invest in the region to prolong the life of these aluminum facilities.

C. The DSIs Should Not Be Treated the Same as the End Use Consumers of the Public Utilities

BPA should reject the DSIs' disingenuous claims that they should be treated just like BPA's preference customers. When the DSIs agreed to support the Northwest Power Act, they choose not to be treated the same as the end use consumers of the public utilities, and agreed to have their statutory rights to any BPA power end after their initial power sales. The DSIs have benefited for years from their special status by paying lower rates and consistently entering into preferential contracts. These contracts have often provided the DSIs with special rights unavailable to the end use consumers of preference utilities and with more benefits than BPA originally intended, and have allowed the DSIs to shift additional costs to BPA's remaining customers both when market prices were high and when they were low. For example, in the mid-1990s, when market prices fell below BPA's rates, the DSIs were able to use their unique contracts to obtain sweetheart deals from BPA. Later, during the power cost crisis, the flexibility contained in the DSI contracts allowed the DSIs to become more profitable by curtailing operations and, in effect, reselling cost-based BPA power in a \$250-300 power market.

Although the DSIs benefited for decades because of their special status, the DSIs are now complaining that they just want to be treated like other BPA customers. The DSIs, however, do not take service from (nor do they financially support) their local public utilities and they do not have a right to preference power. The DSIs have used their different position to their advantage in the past, and they should not be protected now that this difference means that BPA is no longer obligated to provide them with power.

III. BPA's New Residential Exchange Program Proposal Is Illegal and Provides Excessive Benefits

The Regional Dialogue proposes a settlement of the investor-owned utilities' ("IOUs") residential exchange benefits in a manner that replaces the statutorily prescribed methodology with a new, complex, and undefined benefit calculation. BPA estimates that this would result in approximately \$250 million in annual residential exchange benefits, adjusted by changes to the average system costs of the IOUs and the priority firm ("PF") rate. This new "settlement" of the residential exchange issue inappropriately departs from the statutorily required method, is unclear and capable of manipulation, and will likely result in illegally high levels of benefits.

The \$250 million in adjusted annual benefits is too high. If BPA intends to adopt a new residential exchange methodology, the benefit amount should be significantly reduced. Contrary to the claims in the Regional Dialogue, the residential exchange benefits would not range between \$250-\$300 million under a "traditional" program. The historic amount of residential exchange benefits was lower than \$250 million and was trending downward to less than \$100 million from 1998-2001. The amount of benefits only increased in 2002 after BPA abandoned the statutorily required methodology and entered into settlements with the IOUs. Based on BPA's most recent power rate proceeding, the amount of residential exchange benefits consistent with the Northwest Power Act is no more than \$40 million and could be lower. BPA Docket No. WP-07, WP-07-E-BPA-05A at 25. BPA should not abandon the statutorily mandated program in favor of an ad hoc methodology that provides the IOUs with far more benefits than they are entitled.

BPA's new "cookbook" methodology is undefined. The Regional Dialogue admits that the details of the new approach would be negotiated in the future, critical aspects remain unresolved, and the methodology must be flexible to change over the next two decades. Regional Dialogue at 50. Rather than comprehensively settling the residential exchange issue, BPA's proposal may simply create new disputes in which the relevant issues are not whether the levels of benefits are consistent with the Northwest Power Act, but compliance with a vague and malleable BPA policy.

The only clear aspect of BPA's proposal regarding the residential exchange program for the IOUs is that it violates the Northwest Power Act. The Northwest Power Act establishes the statutory requirements that prescribe the manner in which BPA can enter into power exchanges and otherwise provide benefits to the IOUs. 16 U.S.C. § 839c(c). BPA proposes to replace the methodology mandated by the U.S. Congress with a new "cookbook" method that BPA believes would "serve as a reasonable proxy for how a conventional [residential exchange program] might behave." Regional Dialogue at 49. ICNU urges BPA to abandon its latest effort to circumvent the intent of Congress and to offer a traditional residential exchange program consistent with all the provisions of the Northwest Power Act, including the Section 7(b)(2) rate ceiling test.

IV. BPA Should Not Adopt the Administration's Secondary Sales Proposal

ICNU strongly recommends that BPA not adopt the budget proposal to use any surplus power sales (net secondary) revenues above \$500 million a year to make early payments on its federal bond debt to the U.S. Treasury. The Regional Dialogue contracts should include protections against this or any other similar scheme to artificially increase BPA's rates. This one-sided proposal has been estimated to unnecessarily increase BPA's rates an additional 10%. For example, if the Administration's budget proposal had been in effect for 2006, BPA's rates would have been increased by over \$3 per MWh. This is unreasonable and could harm the economic viability of the Northwest.

BPA relies upon its secondary sales revenues to set low, cost-based rates for its customers. Secondary sales can vary based on hydro conditions, and low secondary sales have contributed to higher BPA rates in the past. Ratepayers in the Northwest have borne both the benefits and burdens over the years associated with these secondary sales. It is highly inequitable to change how BPA uses its secondary sales so that BPA's customers will continue to bear the burden of low secondary sales during periods of poor hydro availability, but no longer benefit in the form of lower rates when BPA's secondary sales exceed \$500 million a year.

The Regional Dialogue seeks to obtain support for the Administration's budget proposal by raising the oft-repeated fear that BPA will run out of borrowing authority from the U.S. Treasury in 2011. Regional Dialogue at 6. BPA's borrowing authority should be judged upon its own merits and not connected with the Administration's proposal to siphon off secondary sales revenues during good water years. BPA has never "run out" of borrowing authority, and the region, BPA's customers, and Northwest Congressional delegation will continue to support extension of BPA's borrowing authority if BPA has a legitimate need for additional amounts.

V. BPA Should Adopt Meaningful Dispute Resolution Procedures and Cost Controls

ICNU appreciates BPA's efforts to establish a more transparent long-term cost control process and to implement an effective dispute resolution process. Many of the proposals contained in the Regional Dialogue are the rough, broad outlines of what could be reasonable options; however, they do not provide BPA's customers with any real assurances that BPA will actually develop more effective cost controls or provide its customers with any real rights to dispute BPA's decisions. BPA must provide the region with the opportunity to conduct a comprehensive review of, and a timely opportunity to influence decisions regarding BPA's costs and policy proposals. This is particularly important because BPA is asking its customers to make 20-year commitments and to trust that BPA will be able to control its costs and make prudent financial decisions.

A. Cost Controls

The Regional Dialogue explains that BPA is seeking to develop a cost control process that provides stakeholders with greater opportunity to provide input to BPA before decisions are made, creates accountability for BPA to manage operations to established cost levels, and provides some recourse in the event of disagreement with BPA's staff. Regional Dialogue at 74. BPA has proposed three alternatives: 1) a cost management group with a limited number of representatives to review BPA's costs and policy decisions affecting costs; 2) a regional cost review open to all interested parties; and 3) the inclusion of cost levels in BPA rate cases. The cost management group process would include a third party panel that could provide written recommendations to BPA in the event that the cost management group disagrees with BPA's cost levels and policy proposals.

ICNU recommends that BPA adopt a more rigorous customer review of its costs through a formal cost management process, as well as include its costs in its rate cases. It is critical that BPA provide the region with the opportunity to conduct a comprehensive review of BPA's costs and policy proposals before BPA makes its final decisions. ICNU also supports the idea of having a "third-party panel" review disagreements between BPA and members of a cost management group. Although ICNU believes that a third party review would be beneficial, the details of how this "third-party panel" would work and be appointed are important. For example, the effectiveness of any such third party panel could be neutered if it is not independent of BPA or if it does not have access to adequate information.

ICNU also believes that it is appropriate to include a review of BPA's costs in its rate proceedings. Reviewing and addressing BPA's spending levels separate and apart from the rate case reduces BPA's accountability, insulates BPA from a thorough review of its decision making process, and removes the most important issue in setting BPA's rates (its overall costs) from consideration. The main drawback to including cost levels in a rate proceeding is that, unlike state regulatory rate proceedings, BPA is both a litigant and decision maker. This drawback, however, would be even more prevalent in the informal cost review processes like the proposed cost management group and regional cost review. BPA could partially remedy this problem by functionally separating BPA advocacy and decision making staff, and providing the Hearing Examiner with the ability to resolve more disputes or make independent recommendations on disputed issues.

The Regional Dialogue recognizes that there would be advantages to including BPA's costs in rate cases, but asserts that they are outweighed by certain disadvantages. Specifically, the Regional Dialogue cites the failure to address cost levels in advance of the rate case, the complex and adversarial rate case process, the loss of participation by management level representatives, and the potential to expose cost decisions to litigation. Regional Dialogue at 77-78. These concerns are easily remedied or are actually advantages. Any concerns related to the loss of public participation or the

timeliness of a review can be rectified by combining the review of costs in a rate case with a cost management group or regional cost review. The potential exposure of cost decisions to litigation, and the additional information and discovery rights available in rate proceedings are advantages (not drawbacks) that should ensure increased BPA accountability.

B. Dispute Resolution

The Regional Dialogue outlines very broad principles, criteria and factors that will begin to define a potential process that could be used to resolve certain disputes between BPA and its customers. ICNU appreciates BPA's willingness to consider dispute resolution as a means to provide customers with a clear, fair, and simple process to settle factual and legal disputes. The dispute resolution principles in the Regional Dialogue could be further developed to benefit BPA's customers; however, as currently drafted, they do not appear to provide customers with any meaningful rights or recourse.

BPA has proposed "that the overall construct of tiered rates would not be abandoned or changed for a period of 20 years," that customers would have a guarantee against identified changes, and there would be a binding process to ensure that the guarantee was enforceable. Regional Dialogue at 83. Notably, the term "overall construct of tiered rates" is not defined; thus, it is unclear exactly what BPA would be committing not to change.

BPA proposes that it would be able to escape its commitment not to change the "overall construct" if: 1) ordered by a court; or 2) "the Administrator determined he/she could not timely and reasonably recover BPA's costs without the change." Id. The second exception could be huge, given that BPA has broadly interpreted its responsibility to ensure cost recovery as eliminating its other statutory responsibilities, including the residential exchange program and the Section 7(b)(2) rate ceiling test. There would need to be a limitation or meaningful review process regarding the Administrator's discretion to make such a determination under the second exception because BPA should not be allowed to unilaterally decide to abandon or change the "tiered rate construct." Finally, it is unclear what actual remedies customers would have if BPA acted inconsistent with its contractual commitments.

BPA has identified potential areas for specific dispute resolution, but cautioned that additional discussion is required before specifying any particular method of dispute resolution. Since the details of the potential dispute resolution proposals are in their infancy, ICNU cannot provide detailed comments. ICNU recommends, however, that BPA allow independent, third party resolution or recommendations regarding as many disputes as possible, including, inter alia: resolution of changes to HWMs, whether costs have been shifted between Tier 1 and Tier 2 rates, the Tier 1 resource size, whether BPA is proposing a change in its tiered rate methodology, contract interpretation, and Regional Dialogue policy interpretation disputes.

BPA should ensure that any dispute resolution process is fair and equitable to its customers. For example, BPA must be willing to allow a truly independent decision maker to resolve issues and (for issues that BPA is unwilling to cede its authority) to make recommendations. Similarly, the burden of proof and legal standard for parties other than BPA to make their case should not be so burdensome as to eliminate the possibility of any party successfully challenging BPA's decisions or interpretations.

Finally, ICNU notes that BPA appears only to be providing certain dispute resolution rights to BPA customers that enter into power sales contracts with BPA. If BPA adopts a new dispute resolution procedure to resolve important legal, factual and public policy issues, then all of BPA's customers, including end use industrial consumers, should be permitted to participate.

VI. BPA Customers Should Not Be Required to Waive Their Rights to Obtain Cost-Based Power

BPA's appears to be strong-arming public utilities by requiring them to choose either the Regional Dialogue proposal or potentially denying them access to the full statutory allowed amounts of cost-based power. Specifically, BPA is requiring customers to enter into a Regional Dialogue contract in which customers "would ultimately need to agree not to challenge the final tiered rate methodology." Regional Dialogue at 29. In addition, BPA would require customers to forego their rights to billing credits and to settle the residential exchange benefits as "nominal" amounts to obtain Regional Dialogue contracts. *Id.* at 19, 50-51. BPA should not force this Hobbesian choice upon BPA's preference customers.

As explained above, the Regional Dialogue proposal contains significant flaws and treats certain customers inequitably. BPA should not require customers to choose between a flawed methodology that deprives them of their statutory rights or reduces access to cost-based power. Essentially, BPA is attempting to prevent any party that is harmed from legally challenging the Regional Dialogue proposal by threatening to deprive that customer of access to their statutorily entitlement to cost-based power. It is inappropriate and potentially illegal for BPA, as a federal government agency charged with serving the public interest and implementing the Northwest Power Act, to force this "choice" upon its customers.

The Regional Dialogue is also purposefully vague and unclear as to exactly how BPA will treat those customers that do not choose to waive their rights to challenge the Regional Dialogue proposal. Numerous issues related to how BPA will penalize those customers that do not waive their rights are unclear, including whether customers will be penalized for the entire 20-year Regional Dialogue period, whether they would be provided any cost-based power, and how and if they would be allocated HWMs. In order for customers to make a meaningful decision, BPA must clearly spell out how much cost-based power BPA will offer to those utilities that do not agree to the

Administrator Stephen Wright

October 31, 2006

Page 14

Regional Dialogue and do not waive their rights. For example, BPA must inform customers of how much low cost power they will be allocated, where they will stand in the access queue in relationship to other customers, and how their load growth will be treated.

BPA's "fall back" proposal is another inappropriate and heavy-handed attempt to force the region to agree to BPA's proposals. Under the fall back proposal, BPA will impose unfavorable and harmful proposals upon customers if the region fails to reach consensus on key issues in the Regional Dialogue. Regional Dialogue at 92-93. For example, BPA's proposed fallback proposal would base the HWMs on 2007 instead of 2010 loads, base the Residential Exchange benefits on a yet to be developed "in-lieu policy," not augment the system to serve existing or new public utilities at Tier 1 rates, not change its proposed treatment of Centralia, and include no special provisions for new public utility customers. *Id.* BPA's Regional Dialogue proposal should be based on the Northwest Power Act and sound public policy, and not attempt to force the region to agree to its proposals or face Draconian penalties.

VII. Conclusion

ICNU urges BPA to carefully consider the comments of its regional stakeholders before making any long-term decisions on the issues presented in the Regional Dialogue. In many respects, BPA has proposed a radical departure from its past practices and the statutory framework outlined in the Northwest Power Act. Despite proposing numerous fundamental policy changes, BPA has not provided the region with sufficient detailed written explanations regarding how the Regional Dialogue would work or how it is consistent with its statutory obligations. ICNU recommends that BPA not issue a Final ROD, but to consider its Regional Dialogue proposal only as a draft and revisit the entire proposal once the majority of the provisions have been more fully developed.

ICNU appreciates the opportunity to comment on these important issues and looks forward to working with BPA to improve the Regional Dialogue proposal.

Sincerely yours,

/s/ Melinda J. Davison
Melinda J. Davison