

**RESIDENTIAL EXCHANGE PROGRAM SETTLEMENT AGREEMENTS  
WITH PACIFIC NORTHWEST INVESTOR-OWNED UTILITIES**

**ADMINISTRATOR'S RECORD OF DECISION**

Bonneville Power Administration  
U.S. Department of Energy

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**Record of Decision**

**Residential Exchange Program Settlement Agreements  
With Pacific Northwest Investor-Owned Utilities**

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## INTRODUCTION

The Bonneville Power Administration (BPA) was created in 1937 to market electric power generated at Bonneville Dam, and to construct and operate facilities for the transmission of power. 16 U.S.C. § 832-832i (1994 & Supp. III 1997). Since that time, Congress has directed BPA to market power generated at additional facilities. *Id.* § 838f. Currently, BPA markets power generated at thirty Federal hydroelectric projects, and several non-Federal projects. BPA also owns and operates approximately 80 percent of the Pacific Northwest's high-voltage transmission system. In 1974, BPA became a self-financed agency that no longer receives annual appropriations. *Id.* § 838i. BPA's rates must therefore produce sufficient revenues repay all Federal investments in the power and transmission systems, and to carry out BPA's additional statutory objectives. *See id.* §§ 832f, 838g, 838i, and 839e(a).

In the 1970's, threats of insufficient resources to meet the region's electricity demands led to passage of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act). 16 U.S.C. § 839, *et seq.* (1994 & Supp. III 1997). In that Act, Congress, among other things, directed BPA to offer new power sales contracts to its customers. *Id.* §§ 839c, 839c(g). While Congress provided that BPA's public agency customers (preference customers) and investor-owned utility customers (IOUs) had a statutory right for service from BPA to meet their net requirements loads, Congress did not provide such a right to BPA's direct service industrial customers (DSIs). BPA was provided the authority, but not the obligation, to serve the DSIs' firm loads after the expiration of their power sales contracts in 2001. *See id.* §§ 839c(b)(1), 839d. Congress also established the Residential Exchange Program, which, as discussed in greater detail below, provides Pacific Northwest utilities a form of access to the benefits of low-cost Federal power. *Id.* § 839c(c).

### A. The Residential Exchange Program (REP)

Section 5(c) of the Northwest Power Act established the REP. *Id.* § 839c(c). Under the REP, a Pacific Northwest electric utility (either a publicly owned utility, an IOU or other entity authorized by state law to serve residential and small farm loads) may offer to sell power to BPA at the utility's average system cost (ASC). *Id.* § 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 equals the utility's residential and small farm load. *Id.* In past practice, no actual power sales have taken place. 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 load. These monetary benefits must be passed through directly to the utility's residential and small farm consumers. *Id.* § 839c(c)(3). While REP benefits have previously been monetary, the Northwest Power Act also provides for the sale of actual power to exchanging utilities in specific circumstances. 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 to the utility as part of an exchange sale. *Id.* § 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.* In these circumstances, BPA acquires power from an in lieu resource and sells actual power to the exchanging utility.

Each exchanging utility's ASC is determined by the Administrator according to the 1984 ASC Methodology, an administrative rule developed by BPA in consultation with its customers and other regional parties. A utility's ASC is the sum of a utility's production and transmission-related costs (Contract System Costs) divided by the utility's system load (Contract System Load). A utility's system load is the firm energy load used to establish retail rates. BPA's current ASC Methodology was established in 1984. BPA has recognized, however, that the ASC Methodology can be revised. BPA's current ASC Methodology uses a "jurisdictional approach" in determining utilities' ASCs, which relies upon cost data approved by state public utility commissions (in the case of IOUs) and utility governing bodies (in the case of public utilities) for retail ratemaking. These data provide the starting point for BPA's determination of the ASC of each utility participating in the REP. Costs that have not been approved for retail rates are not considered for inclusion in Contract System Costs.

The schedule for filing and reviewing a utility's ASC is established in the 1984 ASC Methodology, which provides that "not later than five working days after filing for a jurisdictional rate change or otherwise commencing a rate change proceeding, the utility shall file a preliminary Appendix 1, setting forth the costs proposed by the utility and shall deliver to BPA all information initially provided to the state commission." The filing includes all testimony and exhibits filed in the retail rate proceeding. Not later than 20 days following the effective date of new rate schedules in a jurisdiction, the utility must file a revised Appendix 1 reflecting costs as approved by the state commission or utility governing body. BPA then has 210 days to review the filing and issue a report signed by the Administrator. During this review process, BPA ensures that the costs and loads conform to the rules and requirements of the ASC Methodology, as well as the applicable provisions of the Northwest Power Act. BPA makes adjustments as necessary.

The REP has traditionally been implemented through Residential Purchase and Sale Agreements (RPSAs), which were executed in 1981. Between 1981 and the present, Residential Exchange Termination Agreements have been negotiated with all of the previously active exchanging utilities except Montana Power Company (MPC). MPC continues to be in "deemer" status. When a utility's ASC is less than the PF Exchange Program rate, the utility may elect to deem its ASC equal to the PF Exchange Program rate. By doing so, it avoids making actual monetary payments to BPA. The amount that the utility would otherwise pay BPA is tracked in a "deemer account." At such time as the utility's ASC is higher than BPA's PF Exchange rate, benefits that would otherwise be paid to the utility act as a credit against the negative "deemer balance." Only after the "positive benefits" have completely offset the "negative balance," bringing the negative "deemer account" to zero, would the utility again receive actual monetary payments from BPA under an existing or new RPSA. The issue of deemer balances with IOUs is currently in dispute. Regional utilities are eligible to participate in the REP again

beginning July 1, 2001, except for those utilities that have previously executed settlement agreements for terms extending beyond July 1, 2001.

## **B. The Comprehensive Review of the Northwest Energy System**

In early 1996, the governors of Idaho, Montana, Oregon and Washington convened the Comprehensive Review of the Northwest Energy System to seize opportunities and moderate risks presented by the transition of the region's power system to a more competitive electricity market. *See Comprehensive Review of the Northwest Energy System, Final Report, December 12, 1996 (Final Report).* The governors appointed a 20-member Steering Committee that was broadly representative of the various stakeholders in the power system to study that system and make recommendations about its transformation. *Id.* Each governor had a representative on the Steering Committee to make certain the public was educated about and involved in the Comprehensive Review. *Id.* In establishing the review, the governors stated:

The goal of this review is to develop, through a public process, recommendations for changes in the institutional structure of the region's electric utility industry. These changes should be designed to protect the region's natural resources and distribute equitably the costs and benefits of a more competitive marketplace, while at the same time assuring the region of an adequate, efficient, economical and reliable power system.

*Id.* In 1996, the Steering Committee held 30 day-long meetings. *Id.* In addition, almost 400 people were involved in more than 100 meetings of various work groups reporting to the Steering Committee. *Id.* Hundreds of citizens attended the 10 public hearings that were held throughout the region on the Committee's draft report. *Id.* More than 700 written comments were received. *Id.* The Final Report was the product of that work. *Id.*

The Final Report noted that the electricity industry in the United States is in the midst of significant restructuring. *Id.* This restructuring is the product of many factors, including national policy to promote a competitive electricity generation market and state initiatives in California, New York, New England, Wisconsin and elsewhere to open retail electricity markets to competition. *Id.* This transformation is moving the industry away from the regulated monopoly structure of the past 75 years. *Id.* Today the region is served by individual utilities, many of which control everything from the power plant to the delivery of power to the region's homes or businesses. *Id.* In the future, the region may have a choice among power suppliers that deliver their product over transmission and distribution systems that are operated independently as common carriers. *Id.* There is much to be gained in this transition. *Id.* Broad competition in the electricity industry that extends to all consumers could result in lower prices and more choices about the sources, variety and quality of their electrical service. *Id.*

The Final Report also noted that there are risks inherent in the transition to more competitive electricity services. *Id.* Merely declaring that a market should become

competitive will not necessarily achieve the full benefits of competition or ensure that they will be broadly shared. *Id.* It is entirely possible to have deregulation without true competition. *Id.* Similarly, the reliability of the region's power supply could be compromised if care is not taken to ensure that competitive pressures do not override the incentives for reliable operation. *Id.* How competition is structured is important. *Id.* It is also important to recognize the limitations of competition. *Id.* Competitive markets respond to consumer demands, but they do not necessarily accomplish other important public policy objectives. *Id.* The Northwest has a long tradition of energy policies that support environmental protection, energy-efficiency, renewable resources, affordable services to rural and low-income consumers, and fish and wildlife restoration. *Id.* These public policy objectives remain important and relevant. *Id.* The Final Report states that given the enormous economic and environmental implications of energy, these public policy objectives need to be incorporated in the rules and structures of a competitive energy market. *Id.*

The Final Report stated that, in some respects, the transition to a competitive electricity industry is more complicated in the Northwest because of the presence of BPA. *Id.* BPA is a major factor in the region's power industry, supplying, on average, 40 percent of the power sold in the region and controlling more than half the region's high-voltage transmission. *Id.* BPA benefits from the fact that it markets most of the region's low-cost hydroelectric power. *Id.* It is hampered by the fact that it has high fixed costs, including the cost of past investments in nuclear power and the majority of the costs for salmon recovery. *Id.* As a wholesale power supplier, BPA is already fully exposed to competition and is struggling to reduce its costs so that it can compete in the market. *Id.* The transition to a competitive electricity industry raises many issues for the BPA and the region. *Id.* In the near term, how can BPA continue to meet its financial and environmental obligations in the face of intense competitive pressure? *Id.* In the longer-term, when market prices rise and some of BPA's debt obligations have been retired, how can the Northwest retain the economic benefits of its low-cost hydroelectric power when the rest of the country is paying market prices? *Id.* And finally, what is the appropriate role of a Federal agency in a competitive market? *Id.*

The Final Report noted that while participants on the Comprehensive Review Steering Committee represented, by design, many divergent interests, they were fundamentally interconnected through one unifying value. *Id.* Collectively, they share an abiding interest in the stewardship of a great regional resource -- the Columbia River and its tributaries. *Id.* The river is the link that brought all the parties together and unites them in a single, overriding goal. *Id.* That goal is to protect and enhance the assets of this great natural resource for the people of the Pacific Northwest. *Id.*

The Final Report stated that the Federal power system in the Pacific Northwest has conferred significant benefits on the region for more than 50 years. *Id.* The availability of inexpensive electricity at cost has supported strong economic growth and helped provide for other uses of the Columbia River, such as irrigation, flood control and navigation. *Id.* The renewable and non-polluting hydropower system has helped maintain a high quality environment in the region. *Id.* But while the power system has

produced significant benefits, these benefits came at a substantial cost to the fish and wildlife resources of the Columbia River basin. *Id.* Salmon and steelhead populations had been reduced to historic lows, and many runs were about to be listed under the Federal Endangered Species Act. *Id.* Resident fish and wildlife populations had also been affected. *Id.* Native Americans and fishery-dependent communities, businesses and recreationists had suffered substantial losses due in significant part to construction and operation of the power system. *Id.* The region's ability to sustain its core industries, support conservation and renewable resources, and restore salmon runs would be clearly threatened if the region cannot reach a consensus regional position to bring to the national electricity restructuring debate. *Id.* Without a sustainable and financially healthy power system, funding for fish and wildlife restoration could be jeopardized. *Id.*

The Final Report noted that the Governors of Idaho, Montana, Oregon and Washington, in their charge to the Comprehensive Review, and the Steering Committee in their deliberations, recognized that the electricity industry is changing, whether the region likes it or not. *Id.* The Comprehensive Review was not an initiation of change, but a response to change. *Id.* It was an effort to shape that change, to the extent shaping is possible, to ensure that the potential benefits of competition are achieved and equitably shared, environmental goals are met, and the benefits of the hydroelectric system are preserved for the Northwest. *Id.* The region's ability to shape the change in the Northwest electricity industry depends on its ability to develop a regional consensus. *Id.* If the Comprehensive Review failed to result in a consensus for regional action, the electricity industry would still be restructured. *Id.* A return to the historical industry structure is not an option. *Id.* Many of the comments received during the public hearing process on the Steering Committee's draft recommendations made it clear that this was not a widely appreciated fact. *Id.*

The Final Report summarized the Steering Committee's goals and proposals. The Steering Committee's goals for Federal power marketing were to: (1) align the benefits and risks of access to existing Federal power; (2) ensure repayment of the debt to the U.S. Treasury with a greater probability than currently exists while not compromising the security or tax-exempt status of BPA's third-party debt; and (3) retain the long-term benefits of the system for the region. *Id.* The recommendation was also intended to be consistent with emerging competitive markets and regional transmission solutions. *Id.* The mechanism proposed to accomplish these goals was a subscription system for purchasing specified amounts of power at cost with incentives for customers to take longer-term subscriptions. *Id.* Public utility customers with small loads would be able to subscribe under contracts that would accommodate minor load growth. *Id.* Subscriptions would be available first to regional customers a specified multiparty priority order, starting with preference customers, then the DSIs and the residential and small farm customers of the IOUs participating in the REP, followed by other regional customers. *Id.* Non-regional customers could subscribe after in-region customers. *Id.* Within each phase of the subscription process, longer-term contracts would have priority over shorter-term contracts if the system were oversubscribed. *Id.*



With regard to the REP, the Final Report noted that as a result of the Northwest Power Act, Northwest utilities have the right to sell to BPA an amount of power equal to that required to serve their residential and small farm customers at the utilities' average system costs and receive an equal amount of power at BPA's average system cost. *Id.* In reality, this is an accounting transaction. *Id.* No power is actually delivered. *Id.* This was intended to be a mechanism to share the benefits of the low-cost Federal hydropower system with the residential and small farm customers of the region's IOUs. *Id.* As a result of decisions made by BPA in its 1996 rate case, those benefits were reduced. *Id.* The Steering Committee acknowledged that the residential and small farm consumers of exchanging IOUs would be adversely affected by the reduction of exchange benefits. *Id.* Congress intervened for one year to stabilize the exchange benefits. *Id.* However, on October 1, 1997, there would be rate increases to the residential and small farm customers of the exchanging utilities. *Id.* The Steering Committee encouraged the parties to continue settlement discussions and to explore other paths to ensure that residential and small farm loads receive an equitable share of Federal benefits. *Id.*

### **C. BPA's Power Subscription Strategy**

The concept of power subscription came from the Comprehensive Review of the Northwest Energy System, which, as noted above, was convened by the governors of Idaho, Montana, Oregon, and Washington to assist the Northwest through the transition to competitive electricity markets. The goal of the review was to develop recommendations for changes in the region's electric utility industry through an open public process involving a broad cross-section of regional interests. In December 1996, after over a year of intense study, as noted above, the Comprehensive Review Steering Committee released its Final Report. The Final Report recommended that BPA capture and deliver the low-cost benefits of the Federal hydropower system to Northwest energy customers through a subscription-based power sales approach. In early 1997, the Governor's representatives formed a Transition Board to monitor, guide, and evaluate progress on these recommendations.

Public process is integral to BPA's decisionmaking. With the changing marketplace for electric power, there is considerable regional interest in defining how and to whom the region's Federal power should be sold. The public was involved at several levels during the development of BPA's Power Subscription Strategy. In addition to the public meetings held specifically on Subscription, BPA sought input from a wide range of interested and affected groups and individuals. BPA collaborated with Northwest Tribes, interest groups, Congressional members, the Department of Energy (DOE), the Administration, and BPA's customers to resolve issues, understand commercial interests, and develop strong business relationships.

In early 1997, BPA and the Pacific Northwest Utilities Conference Committee (PNUCC) invited 2800 interested parties throughout the Pacific Northwest to help further define Subscription. The collaborative effort to design a Subscription contract process began with a public kickoff meeting on March 11, 1997. At this meeting, a BPA/customer design team presented a proposed work plan, including a description of the

environmental coverage for Subscription. An important element of the work plan was the formation of a Subscription Work Group. The Work Group, which normally met in Portland twice a month from March 1997 through September 1998, was open to the public. On average, 40-45 participants--representing customers, customer associations, Tribes, State governments, public interest groups, and BPA--attended. Three subgroups formed to more intensely pursue the resolution of issues involving business relationships, products and services, and implementation.

Over 18 months, BPA, its customers and other interested parties discussed and clarified many Subscription issues. During this time, BPA and the public confirmed goals, defined issues, developed an implementation process for offering Subscription, and developed proposed product and pricing principles. The following is a chronology of events.

On March 11, 1997, a public meeting was held in Portland to kick off the Federal Power Marketing Subscription development process. The following topics were discussed at this meeting: the role of the Regional Review Transition Board in the Subscription process; the Draft Work Plan that was developed to guide the development process; the issues that relate to the Subscription process that need to be addressed; and the National Environmental Policy Act (NEPA) strategy for this effort. The Work Plan identified a "self-selected" work group to lead this effort (anyone eligible to participate).

On March 18, 1997, a "Federal Power Marketing Subscription" web site was established at BPA to help disseminate information about the Subscription Process.

On March 19, 1997, the Federal Power Subscription Work Group held its first meeting in Portland, Oregon. The Work Group held a total of 33 meetings (approximately two per month), ending on September 22, 1998.

On September 9, 1997, a Progress Report was presented to the Transition Board.

On November 25, 1997, an update meeting for stakeholders was held in Spokane to discuss progress to date and next steps. A summary of the meeting, along with the meeting handout/slide presentation and concerns/issues raised, was posted to the web site.

In January 1998, an article entitled "*Subscription Process Underway*" was published in the BPA Journal, (January 1998).

On April 30, 1998, BPA's Power Business Line (PBL) established a web site to disseminate information about a customer group's Slice of the System Proposal. The Slice proposal was evaluated by the Subscription Work Group, and the proposal as modified by BPA continued to be developed in a subgroup through January 1999. BPA's pricing of the Slice product was part of BPA's initial power rate proposal and was also included in BPA's 2002 Final Power Rate Proposal, Administrator's Record of Decision (ROD), WP-02-A-02.

In June 1998, as part of the Issues '98 process, BPA published Issues '98 Fact Sheet #3: Power Markets, Revenues, and Subscription. Issues '98 (June/Oct. 1998). The fact sheet discussed implementation approaches being considered by the Subscription Work Group so participants in the Issues '98 process could comment. As part of Issues '98 BPA conducted a series of meetings around the region. Issues related to Subscription were key topics in the discussions at those meetings. The public comment period for Issues '98 closed June 26, 1998.

On June 8, 1998, BPA's PBL established a web site to disseminate information about development of the power rates that would be used in the Subscription contracts beginning October 1, 2001. Preliminary discussions regarding development of the power rates occurred in a series of informal public meetings and continued in workshops before BPA's initial proposal was published in early 1999.

On June 18, 1998, the third Subscription public meeting was held in Spokane to present, discuss, and collect comments on the various components related to Subscription. The meeting slide presentation and summary of the meeting were posted to the web site.

On September 18, 1998, BPA released its Power Subscription Strategy Proposal for public comment. Accompanying the proposal was a press release entitled "Spreading Federal Power Benefits" and a Keeping Current publication entitled "Getting Power to the People of the Northwest, BPA's Power Subscription Proposal for the 21st Century." Keeping Current (Sept. 1998). On September 25th, an electronic version of the BPA Power Product Catalog was posted to the web site.

On September 22, 1998, the Federal Power Subscription Work Group held its final meeting in Portland, Oregon.

Subscription issues were discussed at the "Columbia River Power and Benefits" conference on September 29, 1998, in Portland, Oregon. Over 250 people attended. Conference notes were posted to BPA's web site.

On September 30, 1998, BPA's Energy Efficiency organization established a web site to help disseminate information on the proposal for a Conservation and Renewables Discount. Development of the discount continued in a series of meetings through January 1999. Development of the discount was part of BPA's initial power rate proposal and was also included in BPA's 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02.

The public was invited to participate in two comment meetings on the Subscription Proposal; one in Spokane, Washington, on October 8, 1998; the other in Portland, Oregon, on October 14.

BPA developed the Power Subscription Strategy Proposal after considering the efforts of the Subscription Work Group, public comments on Subscription, and the broad

information from Issues '98. The Proposal incorporated the information received from customers, Tribes, fish and wildlife interest groups, industries and other constituents. It laid out BPA's strategy for retaining the benefits of the Federal Columbia River Power System (FCRPS) for the Pacific Northwest after 2001. The comment period on the proposal closed October 23, 1998, although all comments received after that date were considered in the Power Subscription Strategy ROD and the NEPA ROD.

During the spring and summer of 1998, BPA conducted extensive public meetings with all interested parties regarding the development of BPA's Power Subscription Strategy. At the conclusion of these lengthy discussions, on September 18, 1998, BPA released a Power Subscription Strategy Proposal for public review. During the comment period BPA received nearly 200 responses to the proposal comprising nearly 600 pages of comments. After review and analysis of these comments, BPA published its final Power Subscription Strategy on December 21, 1998. *See* Power Subscription Strategy and Power Subscription Strategy, Administrator's ROD. At the same time, the Administrator published a National Environmental Policy Act (NEPA) ROD that contained an environmental analysis for the Power Subscription Strategy. This NEPA ROD was tiered to BPA's Business Plan ROD (August 15, 1995) for the Business Plan Environmental Impact Statement (DOE/EIS-0183, June 1995). The purpose of the Subscription Strategy is to enable the people of the Pacific Northwest to share the benefits of the FCRPS after 2001 while retaining those benefits within the region for future generations.

The Subscription Strategy also addresses how those who receive the benefits of the region's low-cost Federal power should share a corresponding measure of the risks. The Subscription Strategy seeks to implement the subscription concept created by the Comprehensive Review in 1996 through contracts for the sale of power and the distribution of Federal power benefits in the deregulated wholesale electricity market. The success of the Subscription process is fundamental to BPA's overall business purpose to provide public benefits to the Northwest through commercially successful businesses.

The Subscription Strategy is premised on BPA's partnership with the people of the Pacific Northwest. BPA is dedicated to reflecting their values, to providing them benefits and to expanding and spreading the value of the Columbia River throughout the region. In this respect, the Strategy had four goals:

- (1) Spread the benefits of the FCRPS as broadly as possible, with special attention given to the residential and rural customers of the region;
- (2) Avoid rate increases through a creative and businesslike response to markets and additional aggressive cost reductions;
- (3) Allow BPA to fulfill its fish and wildlife obligations while assuring a high probability of U.S. Treasury payment; and
- (4) Provide market incentives for the development of conservation and renewables as part of a broader BPA leadership role in the regional effort to capture the value of these and other emerging technologies.

The Power Subscription Strategy describes BPA decisions on a number of issues. These include the availability of Federal power, the approach BPA will use in selling power by contract with its customers, the products from which customers can choose, and frameworks for pricing and contracts. The Power Subscription Strategy discussed some issues that would not be finally decided in the Strategy. Most of these issues were decided in BPA's 2002 power rate case, although some were decided in other forums, such as the transmission rate case, which concluded recently. For example, while the Strategy documents BPA's intention to implement a rate discount for conservation and renewable resources, the final design of that discount was developed in BPA's 2002 power rate case. Other issues that were decided in the 2002 power rate case include the design and application of the CRAC, which rates apply to which sales, and the design of the Low Density Discount (LDD). Customers raised issues regarding the application of other customers' non-Federal resources to serve regional load. These resource issues involve factual determinations under section 3(d) of the Act of August 31, 1964, P.L. 88-552 (Regional Preference Act), and section 9(c) of the Northwest Power Act, 16 U.S.C. § 839f(c) (1994 & Supp. III 1997), which BPA could not address in the Power Subscription Strategy and which were not made a part of the decisions in the Subscription Strategy ROD.

While BPA's Power Subscription Strategy did not establish any rates or rate designs, rate design approaches identified in the Power Subscription Strategy were part of BPA's initial power rate proposal, which was published in 1999. The comments received during the Subscription public process regarding the various rate-related issues were addressed in BPA's 2002 power rate case, which included extensive opportunities for public involvement.

BPA's Power Subscription Strategy provided a framework for the 2002 power rate case and Subscription power sales contract negotiations. The Subscription window was to remain open 120 days after the 2002 Final Power Rate Proposal, Administrator's ROD, was signed by the BPA Administrator, providing relatively certain information to potential purchasers regarding rates.

One element the Power Subscription Strategy proposal was a settlement of the REP for regional IOUs for the post-2001 period. The Power Subscription Strategy proposed that IOUs may agree to a settlement of the REP in which they would be able to receive benefits equivalent to a purchase of a specified amount of power under Subscription for their residential and small farm consumers at a rate expected to be approximately equivalent to the PF Preference rate. Under the proposed settlement, residential and small farm loads of the IOUs would be assured access to the equivalent of 1,800 aMW of Federal power for the FY 2002-2006 period and 2,200 aMW of Federal power for the FY 2007-2011 period.

The Power Subscription Strategy noted that BPA would set the physical and financial components of the Subscription amount, by year, in the negotiated Subscription settlement contracts. Any cash payment would reflect the difference between the market price of power forecasted in the rate case and the rate used to make such Subscription

sales. The actual power deliveries for these loads would be in equal hourly amounts over the period.

The Power Subscription Strategy proposed that BPA would offer five-year and 10-year Subscription settlement contracts for the IOUs. Under both contracts, the Subscription Strategy proposed that BPA would offer and guarantee 1,800 aMW of power and/or financial benefits for the FY 2002-2006 period. At least 1,000 aMW would be met with actual BPA power deliveries. The remainder could be provided through either a financial arrangement or additional power deliveries, depending on which approach was most cost-effective for BPA. The IOUs' settlement of rights to request REP benefits under section 5(c) of the Northwest Power Act would be in effect until the end of the contract term. *See* 16 U.S.C. § 839c(c) (1994 & Supp. III 1997).

Under the 10-year settlement contract, in addition to the benefits provided during the first five years, BPA proposed to offer and guarantee 2,200 aMW of power or financial benefits for the FY2007-2011 period. BPA intended for this 2,200 aMW to be comprised solely of power deliveries. The IOUs' settlement of rights to request REP benefits under section 5(c) would be in effect until the end of the 10-year term of the contract. In the event of reduction of Federal system capability and/or the recall of power to serve its public preference customers during the terms of the five-year and 10-year contracts, BPA would either provide monetary compensation or purchase power to guarantee power deliveries.

In summary, residential and small farm loads of the IOUs may receive benefits from the Federal system through one of two ways. An IOU may participate in the established REP or it may participate in a settlement of the REP through Subscription. If an IOU chose to request REP benefits under section 5(c), then the Subscription settlement amount for all the IOUs would be reduced by the amount that would have gone to the exchanging utility.

#### **D. Power Subscription Strategy Supplemental ROD**

As noted above, on December 21, 1998, the BPA Administrator issued a Power Subscription Strategy and accompanying ROD, which set the agency's PBL on a course to establish power rates and offer power sales contracts in anticipation of the expiration of current contracts and rates on September 30, 2001. The Strategy and ROD were the culmination of many public processes that came together to form the framework to equitably distribute in the Pacific Northwest the electric power generated by the FCRPS.

BPA's 1998 Power Subscription Strategy served to guide BPA in accomplishing its goals. After adoption of the Strategy, however, developments occurred that prompted BPA to seek, in some instances, additional comment from customers and constituents on new issues. The Strategy contemplated further public processes to implement its goals. BPA's 2002 power rate case, ongoing since August 1999, was completed on May 8, 2000. BPA and its customers continued discussions on power products and power sales contract prototypes, and the Slice of System product was further defined. In a December

2, 1999, letter, BPA sought comment from customers and constituents on some of these new issues, specifically, the length of the Subscription window for power sales contract offers, the actions required of new small utilities during this window to qualify for firm power service, and new developments with respect to General Transfer Agreements. Other issues arose independently, such as new large single loads (NLSL) under the Northwest Power Act, duration of the new power sales contracts, and a new contract clause regarding corporate citizenship. BPA also undertook a comment process on the amount and allocation of power and financial benefits to provide the IOUs on behalf of their residential and small farm consumers. On November 17, 1999, BPA sent a letter to all interested parties requesting comments on two specific issues: (1) whether the amount of the proposed IOU settlement should be increased by 100 aMW from 1800 aMW to 1900 aMW for the FY 2002-2006 period; and (2) the manner in which the settlement amount should be allocated among the individual IOUs.

### **1. Total Amount of IOU Settlement Benefits**

BPA's intent in the Power Subscription Strategy was to spread the benefits of the FCRPS as broadly as possible, with special attention given to the residential and rural customers of the region. The Subscription Strategy enabled the benefits of the FCRPS to flow throughout the region, whether currently served by publicly owned or privately owned utilities.

The Power Subscription Strategy provided that residential and small farm loads of the IOUs, through settlement of the REP, would be provided access to the equivalent of 1800 aMW of Federal power for the FY 2002-2006 period. At least 1000 aMW of the 1800 aMW would be served with actual BPA power deliveries. The remainder would be provided through either a financial arrangement or additional power deliveries depending on which approach was most cost-effective for BPA.

The four Pacific Northwest state utility commissions (Commissions), in a letter dated July 23, 1999, requested that BPA increase the amount of the settlement from 1800 aMW to 1900 aMW for the FY 2002-2006 period. This request was made in order for the Commissions to arrive at a joint recommendation for allocating the settlement benefits among the IOUs for both the FY 2002-2006 and FY 2007-2011 periods. Many parties supported this increase for many reasons, including: (1) the increase is a wise policy decision and it helps to ensure that the regional interest in the system and preserving the system as a valuable benefit in the Northwest will be shared as broadly as possible among the region's voters; (2) the increase is appropriate in order for BPA to achieve the stated Subscription Strategy goal to "spread the benefits of the Federal Columbia River Power System as broadly as possible, with special attention given to the residential and rural customers of the region," *see* Power Subscription Strategy at 5; (3) the increase creates a fair and reasonable settlement to the REP for the IOUs; (4) the increase to the settlement staves off contentious issues surrounding the traditional REP as well as provides a fair allocation of power to the IOUs; and (5) the increase will help ensure an appropriate sharing of benefits of Federal power among the residential ratepayers in the Northwest.

After review of the comments, BPA found the arguments for increasing the IOU settlement amount by 100 aMW to be compelling. BPA determined that the conditions surrounding the proposed increase to the proposed Subscription settlement of the REP were expected to be met. Therefore, BPA increased the amount of total benefits for the proposed settlements of the REP with regional IOUs from 1800 aMW to 1900 aMW.

## **2. Allocation of Settlement Benefits Among IOUs**

In the Power Subscription Strategy, BPA noted its intent to request comments from interested parties regarding the amounts of Subscription settlement benefits that should be provided to individual IOUs. BPA also noted that the Commissions indicated that they would collaborate on an allocation recommendation. After review of all comments, BPA would determine the appropriate amounts to be allocated to the individual IOUs.

BPA solicited the Commissions' views on the proposed allocation of settlement benefits. This was appropriate because the Commissions have traditionally been responsible for establishing retail electric rates for residential consumers of the regional IOUs, including the credit applied to those rates to reflect benefits of the REP as determined by BPA. The Commissions also have a statutory responsibility to the residential consumers of the IOUs in their particular state jurisdiction. Furthermore, because of these responsibilities, a joint recommendation by the Commissions would likely reflect a fair allocation of benefits among the residential consumers of the Northwest states and would enhance the likelihood of BPA delivering the benefits in a way that would work for each state and its consumers.

The Commissions collaborated and submitted a joint recommendation on the proposed allocation of the settlement benefits. They noted that their recommendation reflects many different considerations, including the amount of residential and small farm load eligible for the REP, the historical provision of REP benefits, the REP benefits received in the last five-year period ending June 30, 2001, rate impacts on qualifying customers, and the individual needs and objectives of each state. BPA reviewed the Commissions' recommendation and determined that this proposal was a reasonable approach upon which to take public comment.

Virtually all commenters supported the allocation recommended by the Commissions and proposed by BPA. The reasons for such support included: (1) it is appropriate for BPA to weigh heavily the Commissions' joint recommendation concerning the allocation of benefits; (2) the Commissions are the best arbiters of the settlement among the IOUs; and (3) the proposed allocation establishes access to a level of benefits that recognizes changed market conditions while at the same time addresses the needs and issues important to each of the four states. It is worthy of note that BPA's allocation has received support from diverse customer and interest groups: publicly owned utilities, IOUs, the Commissions, state agencies, and a city commission. BPA concluded that the following allocation amounts would be incorporated into the proposed settlement contracts with the individual IOUs that choose to settle the REP:



	<b>Amount of Settlement (aMW) FY2002-2006</b>	<b>Amount of Settlement (aMW) FY2007-2011</b>
Avista Corp. 1/	90	149
Idaho Power Company 1/	120	225
Montana Power Company	24	28
PacifiCorp (Total)	476	590
<i>PacifiCorp (UP&amp;L)</i>	<i>140</i>	<i>140</i>
<i>PacifiCorp (PP&amp;L – WA) 1/</i>	<i>83</i>	<i>109</i>
<i>PacifiCorp (UP&amp;L – OR) 1/</i>	<i>253</i>	<i>341</i>
Portland General Electric	490	560
Puget Sound Energy (PSE)	700	648
<b>Total</b>	<b>1900</b>	<b>2200</b>

1/ BPA also concluded that the allocation of benefits among the states served by these multi-state utilities would be based on the forecasts of the respective state residential and small farm loads at the time the IOU signs its Settlement Agreement.

#### **E. BPA’s Section 5(b)/9(c) Policy**

As BPA recognized that its existing long-term power sales contracts would soon expire, BPA proposed to establish a policy to guide the agency in making determinations of the net requirements of its utility customers in order to offer Federal power under new contracts. (For the most part, existing power sales contracts expire by October 1, 2001.) A net requirements policy is an important component to BPA’s execution and implementation of new power sales contracts. Under section 5(b)(1) of the Northwest Power Act, BPA is obligated to offer a contract to each requesting public body, cooperative, and investor-owned utility to meet each utility’s regional firm load net of the resources used by the utility to serve its firm power consumer load. 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997). In making this determination, BPA has a corresponding duty to apply the provisions of section 9(c) of the Northwest Power Act, 16 U.S.C. § 839f(c) (1994 & Supp. III 1997), and section 3(d) of the Regional Preference Act, 16 U.S.C. § 837b(d) (1994 & Supp. III 1997).

BPA provided two opportunities for public review and comment in developing its proposed policy. On May 6, 1999, BPA published its initial policy proposal, entitled “Opportunity for Public Comment Regarding Bonneville Power Administration’s Subscription Power Sales to Customers and Customer’s Sale of Firm Resources,” 64 Fed. Reg. 24,376 (1999). BPA held two public meetings to discuss this policy. The first meeting was held on May 27, 1999, in Spokane, Washington. The second meeting was held on June 2, 1999, in Portland, Oregon. On June 3, 1999, the thirty-day comment period was extended by BPA through June 30, 1999.

After reviewing and considering the comments received on the initial policy proposal, particularly those that requested that BPA provide a second round of review and

comment, BPA issued a revised policy proposal on October 28, 1999, entitled “Revised Draft Policy Proposal Regarding Subscription Power Sales to Customers and Customer’s Sales of Firm Resources,” 64 Fed. Reg. 58,039 (1999). BPA reviewed and considered the comments received on the revised policy. On May 24, 2000, BPA issued its final “Policy on Determining Net Requirements of Pacific Northwest Utility Customers under Sections 5(b)(1) and 9(c) of the Northwest Power Act,” also called BPA’s “Section 5(b)/9(c) Policy.” BPA also issued a Section 5(b)/9(c) Policy Record of Decision.

## **F. IOU Settlement Agreements**

After completion of the Administrator’s Supplemental ROD, BPA began the development of a prototype Residential Purchase and Sale Agreement (RPSA) and a prototype Settlement Agreement. On May 5, 2000, BPA sent a letter to all interested parties requesting comments on the proposed agreements. BPA’s letter included a background document describing the two agreements. BPA also enclosed copies of the draft RPSA and Settlement Agreement. BPA’s letter and attachment noted that BPA’s Power Subscription Strategy proposed comprehensive settlements of the REP with participating regional IOUs and that IOUs would also have the option of entering into contracts to participate in the REP. The Power Subscription Strategy also noted that public agency customers were eligible to enter RPSAs under the REP.

BPA’s letter noted that BPA had prepared a prototype RPSA to implement the REP and that this prototype would be used as the basis for contracting with all eligible parties to apply for benefits under the REP. BPA requested public comment on the following issues: (1) which entities are eligible utilities to request benefits under section 5(c) of the Northwest Power Act; (2) BPA’s proposal to implement the in lieu provisions of section 5(c)(5) of the Northwest Power Act through wholesale market purchases; (3) any exceptions to the limitations of section 5(c)(6) that preclude the restriction of exchange sales under section 5(c) below the amounts of power acquired from, or on behalf of, the utility pursuant to section 5(c); and (4) any comments on the terms and conditions of the prototype RPSA agreement.

BPA’s letter also described BPA’s proposal for comprehensive settlement of the rights of regional IOUs eligible for benefits under the REP. BPA noted that it had prepared a prototype Settlement Agreement for implementing the Subscription Strategy. The prototype provided power sales pursuant to a contract offered under section 5(b) of the Northwest Power Act. The prototype also provided for the payment of monetary benefits. BPA requested public comment on all relevant issues, including the following issues: (1) any comments on the terms and conditions of the prototype Settlement Agreement; and (2) whether the total amount of benefits and the proposed terms and conditions for settling the rights of regional IOUs to request benefits under the REP were reasonable.

BPA’s letter noted that BPA’s Power Subscription Strategy proposed an allocation of benefits to the region’s IOUs that included both physical and monetary components. It further noted that the Administrator’s Supplemental ROD for the Power Subscription

Strategy proposed to offer the IOUs the equivalent of 1900 aMW of Federal power for the FY 2002-2006 period. Of this amount, at least 1000 aMW would be provided in physical power deliveries. BPA requested that each IOU notify BPA by July 21, 2000, whether they wished to participate in BPA's REP. The IOUs were not required to make an election whether to accept a settlement offer or participate in the REP through an RPSA at that time. Based on each IOU's request to participate in the REP, BPA would prepare a settlement offer for their consideration prior to October 1, 2000. At the time each IOU requested to participate in the REP in July, BPA's letter asked that each IOU identify (1) its preferred mix of physical deliveries and financial settlement; and (2) whether it would prefer a five-year or 10-year offer. BPA would only make a settlement offer including net requirements physical deliveries if the IOU could establish a net requirement for the amount of power requested.

BPA's letter requested public comment on two issues regarding the offer of physical power and financial benefits in settlement of REP rights: (1) whether BPA should require IOUs to take additional power if the combined requests of all the companies for physical deliveries are less than 1000 aMW; and (2) how BPA should limit physical deliveries to each IOU if the companies requested physical deliveries of more than 1000 aMW and such deliveries were more power than BPA was willing to offer.

Comments on all of the issues regarding the prototype agreements were to be submitted through close of business on Friday, June 9, 2000. BPA's letter noted that after receiving public comment on the proposed prototype agreements, BPA would prepare final draft prototypes based on the public comments. These draft prototypes will be published to allow IOUs to determine whether they wish to participate in the REP pursuant to an RPSA or through a settlement offer based on physical or monetary benefits. Once BPA received each IOU's request to participate in the REP, BPA would prepare a settlement offer and an RPSA for each IOU in accordance with the choices made. This ROD addresses the public comments on the proposed REP Settlement Agreements. A separate ROD is also being issued which addresses the public comments on the proposed RPSA. BPA expects to offer both an RPSA and a Settlement Agreement to each IOU in September 2000. The settlement offers will expire on October 31, 2000. If an election to execute the settlement has not been made at that time, the IOU will retain the option of signing the RPSA.

On July 28, 2000, BPA sent a letter to interested parties regarding a request by Montana Power Company (MPC) to be offered a Settlement Agreement in which the power component would be made under section 5(c) of the Northwest Power Act instead of a sale of requirements power under section 5(b) of the Act. BPA's letter noted that on May 5, 2000, BPA asked for public comment on BPA's proposed contracts for implementing the REP, including a request for comments on a proposed IOU Settlement Agreement. The Settlement Agreement BPA offered for comment on May 5 contained benefits that were comprised of proposed power sales and monetary payments. The power sales proposed under the Settlement Agreement were sales under section 5(b) of the Northwest Power Act. *See* 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). However, as BPA stated in its Power Subscription Strategy, released on December 21, 1998, power sales in its

proposal for settling the REP would be based either under section 5(b) or 5(c) of the Northwest Power Act. In the background document included with BPA's May 5 letter, BPA noted that it had not prepared a prototype Settlement Agreement based on a power sale under section 5(c) of the Northwest Power Act, but that it would consider such proposals if they were made.

In a letter dated July 27, 2000, MPC requested that BPA provide a settlement offer including firm power benefits under section 5(c) of the Northwest Power Act. BPA prepared a draft Settlement Agreement reflecting a section 5(c) power sale. The proposed settlement, attached to BPA's July 28, 2000, letter, is very similar to the proposed agreement that BPA issued for public comment with BPA's May 5, 2000, letter. Instead of providing an IOU Firm Power Block Sales Agreement (Block Sales Agreement) for a specified amount of firm power under section 5(b) of the Northwest Power Act, this proposed section 5(c) prototype agreement provides a specified amount of firm power under a Negotiated In Lieu Agreement.

BPA's July 28 letter asked for public comment on a prototype agreement to provide firm power under section 5(c) of the Northwest Power Act, in addition to monetary benefits, to settle the rights of MPC under the REP. As noted above, the Northwest Power Act provides that BPA may, in lieu of purchasing any amount of electric power offered by an exchanging utility at its ASC, acquire an equivalent amount of electric power from other sources if BPA's cost of acquisition is less than the cost of purchasing the electric power offered by the utility. 16 U.S.C. § 839c(c)(5) (1994 & Supp. III 1997). In its 2002 power rate case, BPA noted the utilities that were expected to have an ASC that exceeded BPA's forecast of the cost of an in lieu resource. One of those utilities was MPC. BPA also forecasted the cost of purchasing from the wholesale power market in BPA's rate case. This forecasted market price, the price of one type of in-lieu resource, was less than MPC's expected ASC. BPA's proposed Settlement Agreement with MPC under section 5(c) specifies an amount of in lieu power that BPA will purchase and provide at the PF Exchange Subscription rate in addition to an amount of monetary benefits in settlement of MPC's rights under the REP.

BPA's July 28 letter noted that the proposed section 5(c) Settlement Agreement is based on the proposed settlement with power offered under section 5(b). The differences between the two Settlement Agreements were specifically marked in the proposed section 5(c) Settlement Agreement attached to BPA's letter. BPA noted that because the attached section 5(c) prototype Settlement Agreement was nearly identical to the section 5(b) prototype Settlement Agreement that was made available for comment on May 5, parties did not need to repeat the comments that were made on any issues related to the earlier settlement prototype that also existed with the 5(c) prototype. BPA noted that parties' previous comments on such issues would be reviewed in making a determination regarding the proposed MPC Settlement Agreement.

Issues regarding BPA's proposed Residential Exchange Program Settlement Agreements with regional IOUs are addressed below.

## I. ELIGIBILITY

### Issue

*Whether BPA has properly defined eligible utilities for participation in the Settlement Agreements.*

### Parties' Positions

The Washington Utilities and Transportation Commission (WUTC), Oregon Public Utilities Commission (OPUC), Montana Public Service Commission (MPSC), Portland General Electric (PGE), Montana Power Company (MPC) and Montana Consumer Council (MCC) argue that the proposed definition of "Qualified Entity" as "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of «Customer Name»'s Residential Load" is appropriate and is needed to address the restructuring of retail electric service in the coming years. WUTC, IOURESEXC:016; OPUC, IOURESEXC:014; MPSC, IOURESEXC:005; PGE, IOURESEXC:021; MPC, IOURESEXC:004; MCC, IOURESEXC:009.

Puget Sound Energy (PSE) and Avista Utilities (Avista) support the offer of a fair settlement of the REP through Subscription, but in the continuing absence of a fair REP and a fair Subscription settlement offer, PSE and Avista reserve their rights to address the equity of any allocation flowing from new eligibility standards resulting from deregulation of commodity service to residential customers. PSE, IOURESEXC:018; Avista, IOURESEXC:001.

PacifiCorp notes that under the Northwest Power Act, any "Pacific Northwest utility," including regional IOUs, may participate in the REP. PacifiCorp, IOURESEXC:011. PacifiCorp notes that from the inception of the REP, BPA has recognized utilities as Pacific Northwest utilities regardless of the state of incorporation or location of the utility's headquarters or shareholders. *Id.*

Central Lincoln Peoples' Utility District (Central Lincoln) notes that BPA's statement that it "[b]elieves the intent of Congress under section 5(c) is that benefits of the Federal Columbia River Power System are intended to flow to residential consumers" reflects the plain language of the Northwest Power Act, a law that did not in any way anticipate the restructuring of any utility systems and certainly not the selling off of generating resources by large utilities." Central Lincoln, IOURESEXC:007. Central Lincoln emphasizes that no IOU or marketer should be entitled to make any economic profit from the passed-through energy and power. *Id.*

Northern Wasco County Public Utility District (Northern Wasco), Whatcom County Public Utility District (Whatcom County) and Springfield Utility Board (SUB) argue that the Northwest Power Act sets forth the qualifications for participation in the REP. Northern Wasco, IOURESEXC:013; Whatcom County, IOURESEXC:022; SUB,

IOURESEXC:003. They argue that at least three criteria must be met by the participating utility for it to obtain the benefits of the REP: first, the utility must be a Pacific Northwest electric utility with an ASC; second, it must have qualifying regional loads to which the benefits of the REP may be passed; and third, the utility must pass the benefits directly to its regional residential and small farm loads. *Id.*

The Public Power Council (PPC) and Emerald Public Utility District (EPUD) argue that it is impermissible for BPA to offer a "settlement" of the REP, with substantial associated financial benefits, to a utility that would not have originally qualified for the REP. PPC, IOURESEXC:006; EPUD, IOURESEXC:023. In short, BPA cannot use the Settlement Agreement to provide benefits to non-Pacific Northwest utilities that would otherwise be ineligible for the REP. *Id.*

Energy Services, Inc. (ESI), like some public agencies noted above, argues that the Northwest Power Act sets three criteria that must be met before a utility can participate in the REP. ESI, IOURESEXC:008. ESI argues that none of the potential settlement participants have calculated their ASC under the 1984 ASC Methodology that FERC approved for implementing the provisions of the REP. *Id.*

The DSIs argue that BPA has proposed to offer benefits to IOUs whose ASCs would not qualify for benefits under the REP and to guarantee the continuation of such benefits even if residential consumers were to be served by entities that do not qualify for the REP. *Id.*

### **BPA's Position**

In section 5(c) of the Northwest Power Act, Congress intended that benefits of the FCRPS would flow to residential and small farm consumers of Pacific Northwest utilities. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). BPA believes that, given the current restructuring of regional retail electric service in the coming years, BPA must address eligibility consistent with section 5(c) and in a manner that would permit benefits to continue to flow to residential and small farm consumers. The proposed Settlement Agreements define "Qualified Entity" as "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of «Customer Name»'s Residential Load."

### **Evaluation of Positions**

As noted previously, section 5(c) of the Northwest Power Act established the REP. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). Under section 5(c)(1) of the Northwest Power Act, BPA offers to purchase amounts of power offered for sale by Pacific Northwest electric utilities at the individual utility's "average system cost," or ASC, in exchange for an equivalent amount of power priced at BPA's PF Exchange rate. *Id.* § 839c(c)(1). The amount of the exchange power is equal to the utility's eligible residential and small farm load. *Id.* § 839c(c)(2). The cost benefits of this exchange "shall be passed through directly to such utility's residential loads within such State." *Id.* § 839c(c)(3). Since

enactment of the Northwest Power Act, the residential and small farm consumers of regional electric utilities -- public utilities and IOUs -- have enjoyed cash credits to their power bills resulting from the REP. Pacific Northwest electric utilities serving such loads qualified for REP benefits on the basis of the relationship of their ASCs to BPA's PF Exchange rate. Following an Appendix 1 filing with BPA, a Pacific Northwest electric utility obtains a cash payment from BPA to be passed through directly to the utility's residential and small farm loads. These REP benefits provide a sharing of the benefits of the Federal hydropower system with those consumers.

The WUTC supports the provisions in Section 8 of the Settlement Agreement that address ways in which residential customers may still receive benefits even in the event they are supplied with power by entities other than their current utilities. WUTC, IOURESEXC:016. The WUTC notes that currently for Washington State, the three IOUs it regulates are eligible under section 5(c) of the Northwest Power Act to request benefits. *Id.* The WUTC states that each serves residential and small farm consumers under state law and subject to its regulation. *Id.* The WUTC notes that public utilities serving residential and small farm consumers are also eligible to request benefits. *Id.* The WUTC states that Washington is not currently restructuring retail utility service, but changes could occur in the next ten years, and it is prudent for the contract to anticipate them. *Id.* The WUTC notes that if alternative power suppliers develop in Washington it would anticipate that they would require certification of some kind from the state. *Id.* The WUTC states that a provision in the contract requiring such state certification could help both BPA and the state ensure that Federal power benefits remain available to eligible customers and that they are passed through. *Id.* The suggestion of including a provision requiring state certification was also supported by the OPUC, as discussed immediately below.

As a matter of policy, the OPUC believes there are several key guiding objectives with respect to the REP. OPUC, IOURESEXC:014. The objectives are:

- (1) All of the benefits of the exchange provided to utilities must be flowed through to qualifying residential and small farm consumers.
- (2) All qualifying consumers being served by distribution facilities owned by an IOU should receive an equal share of benefits.
- (3) The REP should not act as a barrier to a state's effort to create competitive electric markets.

*Id.* The OPUC believes that it is critical that both BPA and the OPUC work together to achieve these objectives. *Id.* The OPUC can work towards this end through carefully designing certification requirements for Energy Service Suppliers (ESSs). *Id.* Under 1999 Oregon legislation SB 1149, the OPUC has the authority to establish conditions ESSs must meet in order to be certified to sell power to retail electricity consumers. *Id.* But the OPUC believes that, together, the OPUC and BPA can do more to ensure the above objectives are met. *Id.*

The OPUC believes that BPA can work cooperatively with the states. OPUC, IOURESEXC:014. The OPUC notes that one alternative in this regard is for BPA to require a Qualified Entity first to be certified by the state to receive section 5(c) benefits on behalf of residential customers served by IOU distribution utilities before BPA declares the utility as an eligible utility. *Id.* The OPUC believes that such a condition would help ensure that BPA carries out its Federal statutory requirements that all of the Federal system benefits are flowed through to qualifying customers. *Id.* From the OPUC's review of the contract prototypes, it does not appear that the RPSA includes the state certification requirement. *Id.* The OPUC believes such a requirement is a prudent business action. *Id.* The OPUC argues that this issue is ripe. *Id.* Under SB 1149, small farm consumers of PacifiCorp and PGE will have the option to purchase power from alternative suppliers. *Id.* Residential consumers will have a portfolio of energy products available. *Id.* In response to these arguments, BPA believes the states may include whatever certification requirements they determine are appropriate in establishing eligibility to supply residential retail loads under state law. BPA believes the authority to establish such requirements and the desirability of creating such requirements are matters of state law. It is not a matter of state law, however, to determine which entities are eligible to receive REP benefits on behalf of residential consumers. Section 5(c) of the Northwest Power Act requires BPA to enter exchanges with Pacific Northwest utilities in the amount of such utilities' residential and small farm loads when the utilities request an exchange. If a state allows an entity to provide retail service to residential and small farm loads, that entity is an eligible utility for purposes of section 5(c) of the Northwest Power Act. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). While BPA believes state requirements to centralize the administration of the REP in a single entity are desirable, BPA does not believe such requirements are mandated by Federal law. BPA believes the certification requirements proposed by the OPUC and the WUTC may be established by states, but should not be a requirement of BPA's contracts if a state does not choose to establish such requirements.

The last objective noted by the OPUC relates to creating a fair and open energy marketplace. OPUC, IOURESEXC:014. The OPUC argues that the availability of REP benefits should not impede or act as a barrier to a state's effort to create competitive electric markets. *Id.* The OPUC notes that barriers can be raised if residential customers face the loss of REP benefits in the event the provider of electric power is no longer the incumbent utility. *Id.* The OPUC notes that, conversely, qualifying consumers should not be induced to seek changes in ownership or power supplier in order to capture a greater share of fixed Federal system benefits. *Id.* BPA agrees with the OPUC that, ideally, the availability of REP benefits should not impede a state's efforts to create competitive electric markets. BPA also acknowledges that residential consumers could potentially face the loss of such benefits if the provider of electric power is no longer the incumbent utility. Also, ideally, residential consumers should not be provided incentives to change power supplier in order to capture a greater share of fixed Federal system benefits. However, BPA must address these concerns within the requirements of existing law. BPA cannot control how a state decides to restructure its provision of electric service. BPA also does not believe the eligibility of residential consumers under the REP should be dependent on state laws. BPA has structured its proposed Settlement



Agreement to require that the benefits of the settlement be assigned to BPA if a new supplier begins serving the residential loads of the IOUs. BPA has allowed the states and the IOUs to develop agency relationships allowing the incumbent utility to administer the REP on behalf of the new supplier instead of assigning the benefits back to BPA. If a new supplier chooses to approach BPA for an RPSA instead of signing an agency agreement, or an agency arrangement is not established by an IOU and state commission, BPA will determine whether to provide an RPSA or negotiate a settlement with that entity at that time.

The MPSC notes that with the passage of the 1997 Electric Utility Industry Restructuring and Customer Choice Act, Montana embarked on a path to customer choice and competition in electricity supply. MPSC, IOURESEXC:005. The MPSC notes that this bold move, an early action in what is unfolding as a national trend, challenges many of the region's traditional institutions. *Id.* The MPSC believes the proposal by BPA recognizes this trend and recognizes Montana's unique needs. *Id.* The MPSC notes that in MPC's service territory, it is not yet clear who will own the transmission and distribution system (and thus the utility obligation to serve), nor who will take on the duty and privileges of serving as default supplier. *Id.* The MPSC argues that, therefore, it is essential that the rights and benefits under BPA's REP be assignable. *Id.*

PGE argues that the REP benefits under section 5(c) of the Northwest Power Act were intended to correct a grievous imbalance in the price of electricity between residential and small farm customers (residential customers) of "preference" utilities and residential customers of utilities not so favored. PGE, IOURESEXC:021. In other words, argues PGE, the benefits of the Federal power are meant to go to residential customers regardless of what type of utility serves them. *Id.* PGE argues that given the power supply situation in the Northwest and the still huge price disparity between BPA's cost-based power and the market, any "Qualified Entity" serving residential loads in the Northwest should be eligible to request and receive REP benefits on behalf of those loads. *Id.* PGE argues that the hope is that as open access is implemented, energy providers other than the traditional "utilities" will offer electricity to all consumers in the region. *Id.* PGE notes that to make this possible there must be equity among all competitors, including allowing these new energy providers to supply Federal system benefits to residential customers. *Id.* If this cannot be done under present statutes, then the statutes must be changed to make all Qualified Entities eligible that serve residential loads. *Id.* PGE argues that the aim is to create a level playing field by allowing residential customers not served by preference utilities to retain their rights to the benefits of the Federal hydropower system. *Id.* PGE argues that to do otherwise would be anti-competitive and frustrate the intent of the Federal government to open retail electricity markets to competition. *Id.* PGE argues that failure to make this work will only serve to increase the pressure from outside the region to raise BPA's rates to market. *Id.*

MPC notes that the context of the proposed settlement of the REP is defined by the overall goals of the Subscription process as expressed by the Comprehensive Review. MPC, IOURESEXC:004. In the opening paragraph of its recommendations for Federal Power Marketing, the Review stated that the subscription process "is to be consistent

with emerging competitive markets." *Id.* The Review made clear its meaning of competitive markets, stating: "The Steering Committee recommends no later than July 1, 1999, all retail distribution utilities offer open retail market access for those customers that desire direct market access." *Id.* MPC argues that BPA recognizes this fundamental goal on page 6 of its decision document, where it states: "The Power Subscription Strategy seeks to implement the subscription concept created by the 1996 Comprehensive Review through contracts for the sale of power and the distribution of federal benefits in the deregulated wholesale electricity market." *Id.*

MPC notes that the Settlement Agreements that BPA is proposing accomplish distribution of a share of the Federal benefits to those regional citizens that have retail choice, consistent with the recommendations of the Review. *Id.* The Settlement Agreements are the result of an extensive negotiation process between BPA, the IOUs of the region, and other regional stakeholders, and are a sufficient vehicle to accomplish this distribution. *Id.* MPC notes that any significant changes would jeopardize the ability of the contracts to accomplish this fundamental goal of the Subscription process, and would be inconsistent with the recommendations for Subscription as outlined by the Review. *Id.*

MPC notes that while MPC is the first regional utility to implement customer choice as recommended by the Review, other states are beginning their implementation process or are in various stages of legislative and regulatory activity. *Id.* Therefore, while certain aspects of the Settlement Agreement apply specifically to MPC today, they will apply to other utilities in the future. *Id.* MPC argues that BPA's process must facilitate this eventuality, or it will be an impediment to the region's movement to competition, and at odds with the expressed desires of Congress and the present Administration. *Id.* MPC argues that BPA is clearly correct in its belief that the intent of Congress under section 5(c) of the Northwest Power Act is that benefits of the FCRPS are intended to flow to "residential customers." *Id.* MPC states that BPA is also correct that "Pacific Northwest electric utilities" for purposes of section 5(c) are "those entities serving the residential and small farm loads of the region as authorized by State law or order of the applicable State regulatory authority." *Id.* The Northwest Power Act does not define "eligible utility" directly, but rather infers that an entity that serves regional residential load is an eligible utility. *Id.* MPC argues that this inference is clear from the method that the Act outlines for the delivery of benefits and by the definition of what constitutes regional residential load through definitions of "residential use" and "Pacific Northwest" or "regional." *Id.* MPC argues that an eligible utility is one that serves the power needs of regional residential load, and is therefore capable of exchanging resources with BPA. *Id.* MPC argues that if an entity is serving load, it follows that it has acquired access to resource for serving that load, and therefore has resource costs to exchange. *Id.* MPC argues that in constructing a mechanism that is consistent with the Act and the competitive market, BPA and the IOUs have constructed a Settlement Agreement that enables the rights of the eligible retail load to flow uninterrupted in the context of changing eligible utilities in the competitive market. *Id.*

MCC, in general, agrees with the comments submitted by MPC. MCC, IOURESEXC:009. MCC states that the settlement of the REP should be neutral to electric industry restructuring. *Id.* MCC believes that BPA's proposal recognizes Montana's unique needs. *Id.* MCC notes that it is not yet clear who will ultimately own and operate the MPC transmission and distribution system, or who will have the obligation to serve as the default provider. *Id.* However, as MPC notes, Congress clearly intended that the benefits of the FCRPS flow to residential customers. *Id.* Therefore, MCC believes it is essential that the rights and benefits under the REP be assignable. *Id.*

PSE notes that under section 5(c) of the Northwest Power Act, only an entity that is a "Pacific Northwest electric utility" is eligible to participate in the REP. PSE, IOURESEXC:018. PSE states that it has incurred significant costs to acquire new resources to serve load since the adoption of the Northwest Power Act in 1980. *Id.* PSE argues that the utilities eligible for REP under section 5(c) must be determined in light of the intent of the Northwest Power Act to provide benefits for the residential and small farm customers of utilities such as Puget that have experienced rapid load growth since 1980 and that have needed to acquire new resources --especially during the 1980's when new resource costs were high. *Id.* PSE and Avista argue that while the move to deregulation in some states has caused the commodity service to some customers otherwise eligible to participate in the REP to be separated from their "local" distribution service, the states in which PSE and Avista serve continue to require that the sale of electric power to residential and small farm customers at retail be subject to state regulation, and service continues to be bundled service for these utilities. PSE, IOURESEXC:018; Avista, IOURESEXC:001. Accordingly, PSE and Avista see no new issues in their states concerning "eligible utilities," as there has been no change since the Act was adopted. *Id.* PSE argues that the eligible utility should be the utility that has been providing service and incurring costs of new generation to provide that service. PSE, IOURESEXC:018.

PSE and Avista argue that BPA is unable or unwilling to offer full participation in an REP with a true ASC Methodology for one hundred percent of regional IOUs' residential and small farm loads. PSE, IOURESEXC:018; Avista, IOURESEXC:001. PSE argues that, therefore, eligibility in other states that have deregulated cannot be applied in a manner that shifts benefits to those states. *Id.* In this respect, PSE and Avista support the offer of a fair settlement of the REP through Subscription, but in the continuing absence of a fair REP and a fair Subscription settlement offer, PSE and Avista reserve their rights to address the equity of any allocation flowing from new eligibility standards resulting from deregulation of commodity service to residential customers. *Id.* While BPA respects PSE's and Avista's opinions, BPA disagrees with their characterization of BPA's offer to regional utilities to participate in the REP through the RPSA. BPA is giving Avista and PSE a choice of participating in the REP through an RPSA, or entering a Settlement Agreement that settles the disputes between BPA and the companies on how to implement the REP. Participation in the REP under the RPSA would employ an ASC Methodology that has been approved by both FERC and the United States Court of Appeals for the Ninth Circuit for one hundred percent of the utilities' residential and small farm loads. *See, e.g.,* Methodology for Sales of Electric Power to the Bonneville

Power Administration, 29 FERC ¶ 61,013, 49 Fed. Reg. 39,293 (1994); Methodology for Sales of Electric Power to the Bonneville Power Administration, 30 FERC ¶ 61,108, 50 Fed. Reg. 4,970 (1985), and *PacifiCorp v. Fed. Energy. Regulatory Comm'n*, 795 F.2d 816 (9<sup>th</sup> Cir. 1986). Benefits under the REP will not be shifted from one state to another, but will be based on each utility's ASC as compared to BPA's PF Exchange Program rate. With regard to providing a fair settlement offer, BPA believes the extensive record in this proceeding shows that the total benefits offered under BPA's proposed Settlement Agreements is fair. BPA is offering a significant amount of benefits under the proposed Settlement Agreements, and the allocation of those benefits among the IOUs was first proposed by the four regional state utility commissions and adopted by BPA after a public comment proceeding.

Northern Wasco, Whatcom County, SUB and ESI argue that the Northwest Power Act must be complied with in the implementation of the REP, including an offer of "settlement" of the REP. Northern Wasco, IOURESEXC:013; Whatcom County, IOURESEXC:022; SUB, IOURESEXC:003; ESI, IOURESEXC:008. These parties argue that BPA should regard the Northwest Power Act as a minimum baseline for the proposals currently offered to regional IOUs. *Id.* They argue that the proposed offers fail that baseline test. *Id.* The four parties also argue that the Northwest Power Act sets forth the qualifications for participation in the REP. *Id.* They identify three threshold criteria are evident from the Act and argue that each must be met by the participating utility for it to obtain the benefits of the REP for pass-through to the residential and small farm consumers it serves. *Id.* First, the utility must be a Pacific Northwest electric utility, with an ASC, citing 16 U.S.C. § 839c(c)(1) (1994 & Supp. III 1997). *Id.* Second, the utility must have qualifying regional loads to which the benefits of the REP may be passed. *Id.* Third, the utility must pass the benefits directly to its regional residential and small farm loads, citing 16 U.S.C. §839c(c)(3) (1994 & Supp. III 1997). *Id.* The four parties argue that these statutory requirements must apply to the future participants of the REP, as they have applied to past participants in that program. *Id.* They argue that BPA cannot "settle" REP benefits if the beneficiary is not qualified to receive such benefits under the threshold statutory test. *Id.*

BPA agrees that Qualified Entities must meet the standards of the Northwest Power Act. As discussed in greater detail below, BPA's definition of Qualified Entities limits such entities to those that are Pacific Northwest utilities under section 5(c) of the Northwest Power Act. Also, BPA's definition includes only those entities that serve the power needs of regional residential and small farm load. Further, if an entity is serving load, it follows that it has acquired access to resources for serving that load, and therefore has resource costs to exchange, that is, an ASC. Finally, Section 6 of the Settlement Agreements expressly requires that any benefits be passed through only to residential and small farm consumers.

With regard to the first criterion, PPC, supported by EPUD, argues that BPA's draft Settlement Agreements appear to attempt to amend, administratively, the eligibility provisions of the Northwest Power Act. PPC, IOURESEXC:006; EPUD, IOURESEXC:023. PPC and EPUD note that section 5(c)(1) of the Act provides that:

Whenever a *Pacific Northwest electric utility* offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential customers within the region.

16 U.S.C. § 839c(c)(1) (1994 & Supp. III 1997) (emphasis in original). PPC and EPUD argue that the Settlement Agreements and the RPSA abrogate the statutory language regarding eligibility, and replace it with the following diluted language: to be a "Qualified Entity," a utility must be "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of <Customer Name>'s Residential Load" (*see* Section 2(h) on page 3 of the Agreement). PPC, IOURESEXC:006; EPUD, IOURESEXC:023. They argue that the drafts thereby drop the requirement that the "Qualified Entity" be a "Pacific Northwest electric utility." *Id.* PPC and EPUD believe that BPA is exceeding its authority by so doing. *Id.* Contrary to PPC's and EPUD's claims, BPA has not dropped the requirement that a Qualified Entity be a Pacific Northwest electric utility. Such a requirement is implicit in the definition of Qualified Entity. As PPC notes, the Settlement Agreement states that a Qualified Entity is "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of <<Customer Name>>'s Residential Load." All of the utilities with which BPA may initially sign Settlement Agreements are Pacific Northwest utilities that have previously executed RPSAs and received REP benefits for their residential and small farm loads. These utilities have been viewed as eligible "Pacific Northwest utilities" for nearly 20 years. These utilities, including numerous changes in ownership, were serving residential and small farm loads within the Pacific Northwest region long before the enactment of the Northwest Power Act and the establishment of the REP. Because the Settlement Agreement language refers to entities authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of an existing eligible Pacific Northwest utility's regional residential and small farm load, the benefits that may be provided under the Settlement Agreement will only be provided to regional residential and small farm loads that have previously received benefits from the REP. Thus, "Pacific Northwest" has already been incorporated in the Settlement Agreement definition. In the event the settlement benefits are assigned to another entity, that entity must still serve, in whole or in part, the original utility's residential and small farm loads. The entity therefore satisfies the requirement of a Pacific Northwest utility. As a general rule, therefore, Settlement Agreement benefits will only be provided to regional residential and small farm loads.

PPC commented during development of the Settlement Agreement and the RPSA that only "utilities" were eligible for the REP. Earlier this year, BPA reaffirmed its traditional standards of service, which identified the requirements for an entity to receive net requirements power service from BPA under section 5(b) of the Northwest Power Act. *See* Final Policy on Standards for Service, Administrator's ROD, December 1999. These standards for purchasing BPA power include, among other requirements, ownership of a distribution system and the obligation to serve all customers in a geographic area. These

requirements flow from the original purposes of the Bonneville Project Act. The Northwest Power Act requires that these standards for service be applied to BPA's power sales under section 5(b) of that Act. *See* 16 U.S.C. § 839c(b)(4). BPA's Standards for Service Policy only applies to sales under section 5(b) of the Act and not all sales under section 5.

BPA believes the intent of Congress under section 5(c) of the Northwest Power Act is that benefits of the Federal Columbia River Power System are intended to flow to regional residential and small farm consumers. Congress established the REP in such a manner that REP benefits are passed through to those consumers through their electricity supplier. BPA believes that "Pacific Northwest electric utilities," for purposes of section 5(c), are those entities serving the residential and small farm loads of the region as authorized by state law or order of the applicable state regulatory authority. BPA sees no intent of Congress to exclude residential consumers from receiving the benefits of the Federal Columbia River Power System based on how a state structures its electric power industry.

Similar to the arguments of Whatcom County, PPC and EPUD, noted above, SUB disagrees with BPA's definition of entities that qualify to sign an RPSA with BPA. SUB, IOURESEXC:003. SUB notes that Section 2(h) of the Settlement Agreement states that a Qualified Entity is "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of <<Customer Name>>'s Residential Load." *Id.* SUB argues that this definition does not comport with the definition of qualifying entities as defined in the Northwest Power Act. *Id.* SUB notes that section 5(c)(1) of the Northwest Power Act refers to "Pacific Northwest utilit[ies]" and that the Act defines the term "Pacific Northwest." *Id.* SUB then cites the administrative provisions of the Northwest Power Act, which state:

No "company" (as defined in section 79b(a)(2) of title 15), which owns or operates facilities for the generation of electricity (together with associated transmission and other facilities) primarily for sale to the Administrator under section 839d of this title shall be deemed an "electric utility company" (as defined in section 79b(a)(3) of title 15), within the meaning of any provision or provisions of chapter 2C of title 15, if at least 90 per centum of the electricity generated by such company is sold to the Administrator under section 839d of this title, and if (A) the organization of such company is consistent with the policies of section 79a(b) and (c) of title 15, as determined by the Securities and Exchange Commission, with the concurrence of the Administrator, at the time of such organization; and (B) participation in any facilities of such "company" has been offered to public bodies and cooperatives in the region pursuant to section 839d(m) of this title.

*Id.* (quoting 16 U.S.C. § 839f(h)(1) (1994 & Supp. III 1997)). SUB's reliance on the foregoing provision is misplaced. The references to "company" and "electric utility

company” are not definitions established for purposes of the Northwest Power Act, much less for the REP, but rather are found in an entirely different statute. Indeed, following the mention of the term “company” is the reference to “section 79b(a)(2) of title 15.” After the mention of the term “electric utility company” is the reference to “section 79b(a)(4) of title 15.” These are simply not definitions that apply to the determination of a “Pacific Northwest utility” for purposes of the REP under section 5(c) of the Northwest Power Act. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997).

Northern Wasco, among others noted above, argues that a participant must be a qualifying Pacific Northwest electric utility whose ASC entitles its residential and small farm consumers to benefits from the REP. Northern Wasco, IOURESEXC:013.

Northern Wasco argues that the REP participant must be a "Pacific Northwest electric utility" pursuant to section 5 of the Northwest Power Act. *Id.* Northern Wasco argues that that term is not defined in the Act, yet one may conclude that a "Pacific Northwest electric utility" must be located in the Pacific Northwest (a defined region; *see* 16 U.S.C. § 839a(14) (1994 & Supp. III 1997)); and that the "electric utility" must have power supply resources with an ASC against which BPA's Priority Firm power rate may be measured; *see* 16 U.S.C. § 839c(c)(1) (1994 & Supp. III 1997)). *Id.* Northern Wasco's conclusion that exchanging utilities must be located in the region is not persuasive. The Northwest Power Act clearly does not require that exchanging utilities be *located* in the Pacific Northwest. Rather, the Act refers to the utilities' "residential users within the region." 16 U.S.C. §§ 839c(c)(1), (c)(2), and (c)(3) (1994 & Supp. III 1997). The definition of Qualified Entities in the Settlement Agreement limits such entities to those that serve regional residential loads. Furthermore, as a general matter, where a term is not defined in a statute, the courts have consistently recognized that BPA, as the agency responsible for implementing the Northwest Power Act, must interpret the statute to fill in the gaps left by Congress. *Aluminum Co. of Am. v. Cent. Lincoln Peoples' Util. Dist.*, 467 US 380, 389 (1984); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1180 (9th Cir. 1997); *Dept. of Water & Power of the City of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684, 690-91 (9th Cir.1985). BPA has interpreted the Act consistent with its plain meaning. Qualified entities must serve regional residential load, but need not have their headquarters located in the region or be incorporated in the region.

Northern Wasco argues that there is no history, before BPA or FERC, wherein an entity outside of the Pacific Northwest was authorized to obtain the benefits of the statutory REP. *Id.* Northern Wasco argues that nor is there precedent wherein the exchanging utility's focus of control and authority truly resided outside of the Pacific Northwest. *Id.* Northern Wasco argues that two potential cases exist today, Enron and Scottish Power, both such cases are untested before BPA, FERC, or the Federal courts, and as such, offer no guidance. *Id.* Neither entity has yet filed for benefits under the REP. *Id.* Northern Wasco's arguments on this issue are factually inaccurate and are not persuasive. The rebuttal to Northern Wasco's argument is perhaps best stated in the comments filed by PacifiCorp, as discussed below.

PacifiCorp notes that under the Northwest Power Act, any "Pacific Northwest utility" may participate in the program. PacifiCorp, IOURESEXC:011. PacifiCorp notes that although the term "Pacific Northwest utility" is not defined in the statute, the legislative history of the Northwest Power Act identified Congress' intent to provide benefits from low-cost Federal generation to residential and small farm customers of the IOUs operating in the Pacific Northwest region. *Id.* Similarly, Avista notes that Congress intended in crafting Northwest Power Act section 5(c) that residential and small farm customers would be permitted to participate in the REP irrespective of the type of local utility serving those customers. Avista, IOURESEXC:001. PacifiCorp notes that since 1980, BPA has determined that PacifiCorp and its predecessors, Pacific Power & Light Company (Pacific Power) and Utah Power & Light Company (Utah Power), are Pacific Northwest utilities. PacifiCorp, IOURESEXC:011. Before the PacifiCorp-Utah Power merger in 1989, Pacific Power provided REP benefits to its customers in the four jurisdictions within the Pacific Northwest region -- Idaho, Oregon, Montana and Washington -- and Utah Power provided benefits to its southeastern Idaho customers. *Id.* Both before and after the PacifiCorp-Utah Power merger, from 1981 through 1996, and the PacifiCorp-Scottish Power merger in 1999, PacifiCorp's residential and small farm customers have continued to receive benefits from the REP. *Id.*

PacifiCorp notes that under BPA's implementation of the Northwest Power Act, the relevant consideration for IOUs is whether the utility provides state-regulated retail service to residential and small farm customers within the Pacific Northwest. PacifiCorp, IOURESEXC:011. PacifiCorp notes that from the inception of the REP, BPA has recognized utilities as Pacific Northwest utilities regardless of the state of incorporation or location of the utility's headquarters or shareholders. *Id.* For example, BPA recognized Pacific Power as an eligible utility from the inception of the REP even though the utility was a Maine corporation when the initial contracts were executed. *Id.* Pacific Power changed its name to PacifiCorp in 1984 and became an Oregon corporation in 1989. *Id.* Utah Power was a Utah corporation headquartered in Salt Lake City, Utah when the initial contracts were executed. *Id.* Utah is outside the Pacific Northwest region, yet BPA recognized Utah Power as a utility eligible to participate in the REP in order to provide benefits to its Idaho residential and small farm customers within the region. *Id.* When PacifiCorp and Utah Power merged and PacifiCorp acquired new shareholders -- those of Utah Power -- BPA did not inquire into the geographical residence of the new shareholders. *Id.* The same was true when PacifiCorp merged with Scottish Power and became a wholly owned subsidiary of Scottish Power, as noted in correspondence with BPA confirming the continuing eligibility of PacifiCorp after it was acquired by Scottish Power. *Id.* PacifiCorp's arguments on this issue are compelling and dispositive.

Northern Wasco argues that the second element of the legal predicate to participating in the REP is that the participating utility has average system costs sufficient to qualify. Northern Wasco, IOURESEXC:013. Northern Wasco notes that the methodology for determining eligible costs is the 1984 ASC Methodology, 18 C.F.R. § 301.1 (1998); *see also* 18 C.F.R. §§ 35.30-35.31 (1998). Northern Wasco, IOURESEXC:013. The 1984 ASC Methodology was developed by BPA and approved by FERC for implementation of



BPA's REP. 18 C.F.R. § 301.1 (1998); *see also* 18 C.F.R. §§ 35.30-35.31 (1998). The 1984 ASC Methodology prescribes the method by which a utility calculates its preliminary ASC and establishes those utility costs that are eligible for inclusion in ASC. *Id.* Accordingly, a utility's ASC is determined by dividing Contract System Costs (the exchanging utility's transmission and production costs) by the Contract System Load (the exchanging utility's total load). *Id.* § 301.1(b), Appendix 1. *Id.*

Northern Wasco and ESI argue that they are unaware of any utility ASC calculations that have been performed and submitted under the 1984 ASC Methodology for the post-October, 2001, period. Northern Wasco, IOURESEXC:013; ESI, IOURESEXC:008. Northern Wasco argues that there is no indication in the BPA materials that are the subject of its comments that BPA intends to obtain ASC filings from the prospective beneficiaries of the Settlement Agreements. *Id.* Northern Wasco argues that BPA must do so, for to ignore the ASC calculation is to permit potentially unqualified entities to take REP benefits, either through the REP or through settlement of the REP, at the expense of BPA customers such as Northern Wasco that pay for the REP. *Id.* Northern Wasco assumes that if an IOU opted out of the settlement and instead chose to participate in the REP, that it would have to provide BPA with an ASC filing as directed in the Methodology and so too should participants in the settlement. *Id.* Similarly, ESI argues that a utility must meet the requirements of the Northwest Power Act to legally participate in the REP. ESI, IOURESEXC:008. ESI argues that these same criteria must be applied before a utility can participate in the REP Settlement. *Id.* ESI argues that because BPA did not require utilities to qualify under the REP before participating in the Settlement Agreements, the proposed Settlement Agreements fail to meet the requirements of the Northwest Power Act. *Id.* Similarly, PPC and EPUD argue that the issue of whether a utility qualifies under the provisions of the Northwest Power Act for the REP is key to the Settlement Agreements. PPC, IOURESEXC:006; EPUD, IOURESEXC:023. PPC and EPUD argue that the point of the Agreement is to settle a utility's rights to the REP, citing Section 3(b) on page 3 of the Agreement. *Id.* PPC and EPUD believe it is impermissible for BPA to offer a "settlement" of the REP, with substantial associated financial benefits, to a utility that would not have originally qualified for the REP. *Id.* In short, BPA cannot use the Agreement to provide benefits to non-Pacific Northwest utilities that would otherwise be ineligible for the REP. *Id.* This argument is also shared by the DSIs, who argue that BPA has proposed to offer benefits to IOUs whose ASCs would not qualify for benefits under the REP and to guarantee the continuation of such benefits even if residential consumers were to be served by entities that do not qualify for the REP. DSI, IOURESEXC:012.

First, as noted elsewhere in this ROD, the determination of whether an IOU should receive REP settlement benefits is not based solely upon a utility's ASC. BPA worked with all interested parties in the region at great length to develop BPA's Power Subscription Strategy. The Strategy identifies the appropriate amount of benefits for settlement of the REP with all regional IOUs, all of whom have previously actively participated in, and received benefits under, the REP. *See* Power Subscription Strategy, Administrator's ROD; Power Subscription Strategy, Administrator's Supplemental ROD, April 2000. BPA initially developed a proposed settlement amount based on a global

approach to the settlement. This approach viewed the exchanging regional IOUs as a class and proposed a settlement with the entire class at the same time. The IOUs have comprised the primary recipients of benefits during the existence of the REP, receiving some 88.5 percent of REP benefits provided to all exchanging utilities, both public and private, during the 20-year term of the REP. The settlement thereby resolves virtually the entire REP for the rate and contract period. This provides great benefit to BPA, including financial stability for BPA's responsibilities under the REP, greater benefit certainty for the IOUs, reduced expenses associated with administering the REP, elimination of disputes related to implementation of the REP, and other benefits. Taking a global approach to settlement of the REP with the IOUs is consistent with BPA's statutory authority. Section 2(f) of the Bonneville Project Act provides:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, *upon such terms and conditions and in such manner as [s]he may deem necessary.*

16 U.S.C. § 832a(f) (1994 & Supp. III 1997) (emphasis added). *See also id.* § 839f(a). The Bonneville Project Act and the Northwest Power Act thus provide that the Administrator may approach the settlement of the REP in a manner that settles with the entire IOU customer class and does not approach settlement on an individual IOU basis. While this was BPA's initial approach, as noted in greater detail below, BPA has not ignored the individual IOUs.

In response to Northern Wasco's and ESI's foregoing arguments, the proposed REP settlements satisfy the requirements of the Northwest Power Act. As discussed below, BPA used the ASC Methodology as part of developing its ASC forecasts for purposes of the Settlement Agreements. Furthermore, while formal ASC determinations must be made in the implementation of the REP, this is not so for Settlement Agreements, where BPA may "make such expenditures, upon such terms and conditions and in such manner as [the Administrator] may deem necessary." *Id.* §§ 832a(f), 839f(a). In addition, new ASC determinations were impractical given BPA's schedule for implementing the Power Subscription Strategy. Furthermore, ASCs are not the sole factor that is considered in determining the propriety of a settlement. Additional discussion of this issue is contained in Section II of this ROD, which addresses the total benefits provided to the IOUs under the proposed Settlement Agreements.

As noted previously, the Northwest Power Act established the REP. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). Under the Act, BPA "purchases" power from each participating utility at that utility's ASC. *Id.* The Administrator then offers, in exchange, to "sell" an equivalent amount of electric power to the utility at BPA's PF Exchange power rate. *Id.* The amount of power purchased and sold is the qualifying residential and small farm load of each utility participating in the REP. *Id.* The Northwest Power Act requires that the net benefits of the REP be passed on directly to the residential and small

farm customers of the participating utilities. *Id.* The REP does not involve a conventional purchase and sale of power. Under the normal implementation of the REP, no actual power is transferred either to or from BPA. The “exchange” has been referred to as a “paper” transaction, where BPA provides the participating utility cash payments that represent the difference between the power “purchased” by BPA and the less expensive power “sold” to the participating utility. Actual power sales may occur, however, under “in-lieu” transactions, where BPA purchases power from a source other than the utility and sells actual power to the utility. With regard to the current status of the REP, Residential Exchange Termination Agreements have been negotiated with all but one of the previously active exchanging utilities. The only remaining utility with an “active” RPSA is MPC, which is currently in “deemer” status.

In most of the past 20 years, exchanging utilities’ ASCs were readily available because the utilities were active participants in the REP. BPA would forecast utilities’ ASCs in BPA’s rate cases for purposes of determining BPA’s prospective REP costs for a coming rate period. The record in BPA’s 2002 Wholesale Power Rate Adjustment Proceeding established forecasted ASCs for exchanging utilities for the coming rate period, FY 2002-06. In this rate case, an exchanging utility’s ASC forecast was typically based on the costs included in its last approved ASC Report signed by the Administrator. Boling and Doubleday, WP-02-E-BPA-30, at 5. Such costs were then adjusted to account for inflation, power purchases, and resource additions, and applied to forecasted loads for future periods to calculate the forecasted ASC. *Id.* Because of the Residential Exchange Termination Agreements noted above, BPA no longer receives cost and load data from utilities through ASC filings as was previously required and provided under the RPSAs. *Id.* BPA therefore used a variety of data sources and approaches to determine ASCs. *Id.*

BPA’s first step in developing ASCs was to identify which of BPA’s many public agency and IOU customers might have ASCs that would be high enough to ensure positive exchange benefits and should therefore be evaluated in detail. *Id.* at 6. Utilities that executed Residential Exchange Termination Agreements that extend through 2011 were eliminated. *Id.* BPA then determined a proxy for the new PF Exchange rate. *Id.* Utilities’ ASCs would need to exceed this rate in order to receive positive exchange benefits. *Id.* In developing the proxy rate, BPA noted that the section 7(b)(2) rate test triggered in BPA’s 1996 rate case, and the 1996 PF Exchange rate was 32.7 mills/kWh. *Id.* BPA then reviewed some of the fundamental elements of the 1996 section 7(b)(2) rate test to determine whether it was likely that the trigger for the PF-02 rate period would be similar, and therefore the PF Exchange rate would be similar. *Id.* BPA noted that BPA’s generation costs after revenue credits had remained relatively flat since the 1996 rate case; that exchanging utilities’ ASCs were increasing over time; and that the value of reserves credit for the DSIs had diminished. *Id.* These factors suggested that the new trigger amount and the new PF Exchange rate would likely be at least as high as the previous trigger amount and 1996 PF Exchange rate. *Id.* Based on ASCs that were current or forecasted at the time the Residential Exchange Termination Agreements were negotiated, BPA assumed that Puget Sound Energy (PSE), PGE, the Pacific Power and Utah Power Divisions of PacifiCorp, and MPC might have relatively high ASCs. *Id.* In addition, as discussed in greater detail below, BPA used simplifying assumptions to

estimate whether Avista and Idaho Power were likely to be candidates for REP benefits during the rate period. *Id.* Among public utilities, Clark County Public Utility District (PUD), Snohomish County PUD, and the City of Idaho Falls were considered possible candidates to have relatively high ASCs. *Id.* Each utility has generating resources and had a relatively high ASC at the time it negotiated a Residential Exchange Termination Agreement. *Id.* at 6-7.

To forecast ASCs for PacifiCorp (the Pacific Power and Utah Power Divisions), PSE, PGE, and MPC, BPA developed a Microsoft Excel-based model to replace the ASC forecasting function that was performed by a mainframe computer model in BPA's 1996 rate case. *Id.* at 7. The starting point expense data used as the basis for forecasting rate period ASCs were essentially the same data used in BPA's 1996 rate case. *Id.* Plant replacement factors were adjusted to reflect the most current five years of plant retirement activity, and expenses were adjusted using current escalators. *Id.* In addition, given possible industry restructuring and uncertain market conditions, BPA assumed for ASC forecasting purposes that utility load growth would be satisfied with purchased power. *Id.* at 7-8. Such purchases were assumed to be at 28.1 mills/kWh, BPA's forecast of five-year flat-block purchases, plus a transmission charge. *Id.* at 8. The testimony of Oliver *et al.*, WP-02-E-BPA-20, describes the derivation of the five-year flat-block price forecast. *Id.* See also 2002 Final Power Rate Proposal, Administrator's ROD, Section 10.11. This forecast was determined to be appropriate because exchanging utilities will make long-term purchases to meet load growth. Boling and Doubleday, WP-02-E-BPA-30, at 7. BPA based the transmission charge on the PTP rate (currently \$1.00 per kW-month), which was assumed to increase to \$1.48 per kW-month in BPA's next TBL rate case. *Id.* The \$1.48 rate was assumed to be constant through FY 2010. *Id.* BPA then assumed an energy loss rate of 2 percent and flat delivery. *Id.* Converting these adjustments to an energy-only charge resulted in a rate of 2.07 mills/kWh. *Id.* BPA then assumed that the foregoing energy losses were valued at 28.1 mills/kWh, resulting in a cost of transmission with losses of 2.63 mills/kWh in FY 2002. *Id.*

BPA adjusted PGE's Contract System Costs based on the functionalization of certain benefits from PGE's merger with Enron, as directed by the OPUC in Order Number 97-196. *Id.* The OPUC's order specified that \$105 million in benefits relating to use of PGE's name and other intangibles be distributed with interest over eight years beginning in 1997. *Id.* The order further specified that \$36 million in cost of service savings be distributed with interest over four years beginning in 1998. *Id.* Based on the ratio of exchangeable plant in service to total plant in service (the "PTDG ratio") taken from PGE's ASC filing that was suspended when PGE's Residential Exchange Termination Agreement was negotiated, BPA assumed that 60 percent of such merger benefits would reduce Contract System Costs. *Id.* This results in a \$9.7 million reduction to PGE's Contract System Costs during the first three years of BPA's rate period, FY 2002-2004. *Id.*

The test years of the most recent ASC filings for Avista and Idaho Power are 1983 and 1984, respectively. *Id.* at 9. BPA estimated proxy ASCs for 1997. *Id.* BPA determined prior ASCs as a percentage of average residential revenue per kWh sold for the test years

and applied those percentages to average residential revenue per kWh sold for 1997. *Id.* The post-1997 ASCs for Avista and Idaho Power were escalated at 2.5 percent annually. *Id.* This escalation rate is equal to the simple average annual rate of growth in ASC for MPC, PGE, PSE, and the Pacific Power and Utah Power divisions of PacifiCorp for the FY 1999-2010 period. *Id.*

Load forecasts for PacifiCorp and PGE were based on data submitted by the utilities and used in BPA's 1996 rate case. *Id.* Load forecasts that did not extend through FY 2010 were escalated at average annual rates of growth during the utility's forecast period. *Id.* Load forecasts for MPC and PSE were based on utility forecasts submitted to BPA in March 1998. *Id.* Loads for Idaho Power were estimated from publicly available data in early 1998. *Id.* Residential loads for Avista were estimated by reviewing current total utility load data and residential loads that had been provided by Avista for FY 1995. *Id.*

Thus, while Northern Wasco argues that it is unaware of any utility ASC calculations that have been performed and submitted for the post-October, 2001, period, the results of the foregoing analysis established forecasted ASCs for the exchanging IOUs for the next rate and contract period. *See id.*; 2002 Final Power Rate Proposal, Administrator's ROD, at 11-1 through 11-26. Because current ASCs were not available, these ASCs were used, in part, as the basis to establish forecasted exchange benefits of the IOUs for purposes of the settlement offers. Since BPA's rate case, market prices have risen significantly. Market prices for five-year flat-block purchases are currently approximately 42 mills/kWh. Portions of regional IOUs' costs, which are included in ASC, are related to purchased power expenses. With higher market prices, IOUs' ASCs are also increasing. This argument is not speculative, but is occurring with IOUs around the region. For example, PGE, citing the impacts of market price increases of as much as 200 percent, filed a proposal for a one-year, \$135.6 million rate increase with the OPUC to cover "known and anticipated costs for wholesale electricity and power plant fuel starting in 2001." Therefore, for purposes of the determination of Settlement Agreement eligibility, BPA has revised its rate case ASC forecasts to reflect such higher costs.

Furthermore, the individual eligibility of many IOUs for REP benefits is clear, based on the ASCs forecasted in BPA's 2002 power rate case. Even absent an adjustment for increased purchased power costs, PSE's forecasted average ASC for the five-year rate period was 40.87 mills/kWh, which is higher than BPA's 2002 PF Exchange Program rate of 36.1 mills/kWh. Similarly, even absent an adjustment for increased purchased power costs, PGE's forecasted average ASC for the five-year rate period was 40.40 mills/kWh, which is also higher than BPA's 2002 PF Exchange Program rate. Also, even absent an adjustment for increased purchased power costs, PacifiCorp's Utah Power Division had a forecasted average ASC for the five-year rate period of 39.11 mills/kWh, which is higher than BPA's 2002 PF Exchange Program rate.

MPC's forecasted ASC would also permit participation in the REP. MPC's forecasted average ASC in BPA's 2002 rate case for the five-year rate period was approximately 35 mills/kWh and MPC's ASC is greater than the PF Exchange rate for part of the rate period. MPC's average ASC is very close to BPA's PF Exchange Program rate of 36.1

mills/kWh. BPA, however, must also review additional information that could affect MPC's ASC during the rate period.

In December 1999, MPC concluded the sale of its existing hydroelectric facilities and its existing thermal plants to PP&L Montana. MPC retained ownership of the contract rights to its PURPA resources. MPC received from PP&L Montana a right to receive power in the amount of its existing loads through June 2002. After that date, MPC will be required to purchase all of its power on the wholesale power market. MPC will be required to purchase both its capacity and energy needs. Purchase of its capacity needs would be expected to increase the market price for its energy purchases from 42 mills/kWh to 43.72 mills/kWh.

BPA has recalculated MPC's ASC based on its generation sale and purchase from PP&L Montana. BPA has removed the generation production plant, generation plant replacements, generation plant additions, operations and maintenance expenses for thermal plants, and fuel costs from its calculation; reduced the amount of general plant, accumulated depreciation, cash working capital, materials and supplies, return on investment, depreciation expense, and taxes attributable to generation; and eliminated surplus revenues. BPA has replaced these expenses with purchase power costs from PP&L Montana equal to BPA's calculated ASC for FY 2002 for the period through June 2002. BPA then assumed that MPC must purchase its power needs from the market in excess of its PURPA resources after June 2002. When higher market prices of 43.72 mills/kWh are added to the calculation of MPC's ASC to replace MPC's hydroelectric and thermal resources, MPC's forecasted ASC rises to an average of 48.25 mills/kWh. MPC is clearly eligible to receive REP benefits.

Avista's forecasted ASC also demonstrates its eligibility to receive benefits under the REP. BPA's 2002 power rate case forecasted a five-year average ASC for Avista at 30.75 mills/kWh. As noted previously, however, this forecasted ASC did not include the increased purchased power costs that would be incurred by Avista given the recent increase in market prices, and which results in a higher ASC. BPA developed a new ASC forecast for Avista using BPA's rate case methodology and incorporating adjustments to reflect recent market prices. Avista's forecasted average ASC for the five-year rate period is 38.04 mills/kWh. This is higher than BPA's PF Exchange Program rate of 36.1 mills. Avista therefore is eligible to receive REP benefits.

Similarly, BPA's 2002 power rate case forecasted five-year average ASCs for PacifiCorp's Pacific Power Division at 31.59 mills/kWh and for IPC at 27.02 mills/kWh. These forecasted ASCs, however, did not include the increased purchased power costs that would be incurred by Pacific Power and IPC given the recent increase in market prices, and which result in a higher ASCs. BPA developed a new ASC forecast for Pacific Power and IPC, using BPA's rate case methodology and incorporating adjustments to reflect recent market prices. Pacific Power's forecasted average ASC for the five-year rate period is 33.76 mills/kWh and IPC's forecasted average ASC for the five-year rate period is 28.70 mills/kWh. While Pacific Power's and IPC's forecasted ASCs are lower than the PF Exchange Program rate, these ASCs could be significantly higher during the rate period. BPA used the current ASC Methodology for its rate case

forecasts, but the methodology may be revised during the rate period. Indeed, as noted elsewhere in this ROD, BPA will be conducting regional discussions during the rate period regarding whether the 1984 ASC Methodology should be revised. If the methodology is revised and exchanging utilities are allowed to exchange greater costs, this would increase their ASCs and exchange benefits. Boling and Doubleday, WP-02-E-BPA-30. The IOUs have advocated a return to BPA's 1981 ASC Methodology, which, if adopted, would significantly increase prospective REP benefits. When BPA moved from the 1981 ASC Methodology to the 1984 ASC Methodology, the ASCs for exchanging utilities were reduced by an average of 26 percent. Assuming that moving back to the 1981 ASC Methodology were to increase ASCs by an average of 26 percent, this would substantially increase exchange benefits. For example, a calculation of Pacific Power's and IPC's ASCs, assuming reversion to terms of the 1981 ASC Methodology and reflecting higher purchased power costs, result in an average ASC for the rate period of 42.54 and 36.16 mills/kWh, respectively. These ASCs are higher than BPA's PF Exchange Program rate and would permit the receipt of REP and settlement benefits.

In addition, the issue of IOUs' eligibility to receive REP benefits cannot be based on ASC forecasts alone. REP benefits are determined by the difference between a utility's ASC and the PF Exchange Program rate. Thus, if a utility's ASC goes up, its REP benefits go up. If the PF Exchange Program rate goes down, the utility's REP benefits also go up. While a utility might not be eligible for REP benefits because its ASC is lower than the PF Exchange Program rate, a reduction in the PF Exchange Program rate could make the utility eligible. It is well-known that the IOUs are contesting many assumptions BPA made in developing the proposed PF Exchange Program rate. *See* 2002 Final Power Rate Proposal, Administrator's ROD, Section 13.0. If the IOUs successfully challenge that rate, the rate could be reduced and exchange benefits increased. *Id.* BPA must consider such factors when determining the proper consideration for an IOU's waiver of its right to participate in the REP. For this reason, it is reasonable to assume that Pacific Power and IPC would be eligible for REP benefits.

As noted above, Northern Wasco argues that BPA must obtain new ASC filings from the prospective beneficiaries of the Settlement Agreements in order to ensure that potentially unqualified entities do not take REP benefits, either through the REP or through settlements of the REP, at the expense of BPA customers such as Northern Wasco that pay for the REP. Northern Wasco, IOURESEXC:013. First, with regard to IOUs that choose to participate in the traditional implementation of the REP, such utilities must submit ASC filings to BPA in order to establish initial ASCs and proceed with the REP. *See* 16 U.S.C. 839c(c) (1994 & Supp. III 1997). A settlement of an exchanging utility's rights to participate in the REP, however, does not require an actual determination of a utility's ASC. This is because, for example, there may not be actual ASCs in effect at the time of a settlement, and forecasted ASCs must be used. Furthermore, while the determination of ASCs is part of the traditional REP and is prescribed in section 5(c) of the Northwest Power Act, section 5(c) does not establish conditions for the settlement of IOUs' rights to participate in the REP. *Id.* Instead, the guidelines for BPA's Settlement Agreements are found in section 2(f) of the Bonneville Project Act, as affirmed by

section 9(a) of the Northwest Power Act. *Id.* §§ 832a(f), 839f(a). Section 2(f) of the Bonneville Project Act provides:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as [s]he may deem necessary.

*Id.* § 832a(f). Fundamentally, BPA must determine the appropriate consideration for a utility's agreement to waive participation in the REP. This consideration may consider, in part, forecasted future REP benefits, which can be based on a formal determination of a utility's ASC or a forecast of a utility's ASC. Furthermore, a utility's ASC need not be included as a provision in a Settlement Agreement or a Block Sales Agreement. It is something that is considered by BPA in determining REP eligibility and benefit determinations, but these determinations are not required to be made in a contract provision. BPA has made these determinations in the process of developing the proposed Settlement Agreement, as explained in great detail in this ROD. As noted previously, BPA recently forecasted IOUs' ASCs in BPA's 2002 wholesale power rate case. Because nearly all exchanging utilities have executed previous settlement agreements and therefore have not been required to make recent ASC filings, BPA has not issued any recent ASC reports. The IOUs' most recent ASC reports, however, were reviewed by BPA in developing its forecasted ASCs. Thus, BPA's forecasted ASCs were developed considering ASC determinations made under BPA's ASC Methodology. It is worth noting, in addition, that all of the regional IOUs that will be offered a proposed settlement have previously participated in, and received benefits under, the REP.

Furthermore, BPA's implementation of the REP has been a particularly controversial issue with regional IOUs in recent years. This was recognized in the Final Report of the Comprehensive Review of the Northwest Energy System, December 12, 1997. The Final Report noted that:

As a result of the Northwest Power Act of 1980, Northwest utilities have the right to sell to Bonneville an amount of power equal to that required to serve their residential and small farm customers at the utilities' average system costs and receive an equal amount of power at Bonneville's average system cost. In reality, this is an accounting transaction. No power is actually delivered. This was intended to be a mechanism to share the benefits of the low-cost federal hydropower system with the residential and small farm customers of the region's investor-owned utilities. As a result of decisions made by Bonneville in its most recent rate case, these benefits have been reduced. The Steering Committee acknowledges that the residential and small farm consumers of exchanging investor-owned utilities will be adversely affected by the reduction of exchange benefits. Congress intervened for one year to stabilize the exchange benefits.



However, on October 1, 1997, there will be rate increases to the residential and small farm customers of the exchanging utilities. The Steering Committee encourages the parties to continue settlement discussions and to explore other paths to ensure that residential and small farm loads receive an equitable share of the benefits of the federal base system.

Final Report at 14. In the Conference Report on Making Appropriations for Energy and Water Development for the Fiscal Year Ending September 30, 1996, and for Other Purposes, the Committee of Conference noted that “Consistent with the Regional Review, Bonneville and its customers should work together to gradually phase out the REP by October 1, 2001.” Conference Report, H.R. REP. NO. 104-293, at 92 (1995), *reprinted in U.S.C.C.A.N* (1995). Also, from the inception of discussions regarding BPA’s Power Subscription Strategy, BPA and interested parties have discussed settlement of the REP with regional IOUs as part of that Strategy. This was reflected in BPA’s Power Subscription Strategy Proposal, published on September 18, 1988, which contained a detailed description of the proposed settlements. *See* Power Subscription Strategy Proposal, at 4-5. REP settlements are an integral element of BPA’s final Power Subscription Strategy. *See* Power Subscription Strategy, at 8-10; Power Subscription Strategy, Administrator’s ROD, at 27-66.

In order to implement BPA’s Power Subscription Strategy, BPA had to develop a procedural schedule. BPA’s Subscription schedule had to address the needs of both BPA and its customers. BPA, for example, needed information about customer loads in order to plan to meet those loads. Customers, such as regional IOUs, needed detailed information about BPA’s new RPSA and BPA’s proposed REP Settlement Agreements in order to make a decision on which option to take and in order to discuss the options with their respective state utility commissions. BPA needed to provide regional IOUs 30 days to make decisions regarding their options, with execution of either an RPSA or a Settlement Agreement by October 1, 2000. Given this schedule, and given that BPA had previously settled participation in the REP with some 30 exchanging utilities, utilities did not have current ASCs. This is why, in BPA’s rate case, BPA forecasted the utilities’ ASCs. Furthermore, Northern Wasco’s suggestion that exchanging utilities should make Appendix 1 filings with BPA in order to participate in the proposed REP settlements is impractical, as discussed below.

Under the current ASC Methodology, the review period to establish a utility’s ASC is 210 days, or approximately 7 months. *See* 1984 ASC Methodology, Section I.M. Even after the seven months, an IOU’s ASC is subject to review and approval by FERC. FERC’s review period allows comments from interested parties and, obviously, takes additional time. Furthermore, ASC determinations are final actions that are subject to appeal in the United States Court of Appeals for the Ninth Circuit. 16 U.S.C. § 839f(e)(5). It would therefore be impractical for BPA to attempt to conduct a review process for all regional IOUs in order to establish new ASCs for the proposed settlements. This is particularly true where BPA recently forecasted IOU ASCs in BPA’s rate case. The Settlement Agreements are not the same as the RPSAs. Under the RPSAs, IOUs could make Appendix 1 filings as late as October 1, 2001, because a utility’s as-filed ASC becomes the ASC used to calculate exchange benefits until BPA issues its final

ASC report. This would obviously be too late for purposes of determining the proper consideration for the IOU Settlement Agreements.

Also, as previously noted by BPA, there are many uncertainties regarding the future implementation of the REP. Avista notes that in the course of the BPA's Wholesale Power Rate Case, BPA Docket No. WP-02, several parties suggested that BPA does not have the authority to offer the Northwest IOUs a settlement of the REP. *See* Brief on Exceptions of the Public Power Council, WP-02-R-PP-01, at 17-19; Alcoa Inc.'s and Vanalco Inc.'s Brief on Exceptions, WP-02-AL/VN-02, at 43-46. Avista, IOURESEXC:001. Avista notes that BPA responded to these arguments in the Final ROD. *See* 2002 Final Power Rate Proposal, Administrator's ROD, § 14.3 (May 10, 2000) ("Final ROD"). *Id.* Avista notes that BPA recognized in the Final ROD that "there are a number of variables that may affect and increase potential REP benefits for the IOUs, and it is appropriate that these variables be taken into consideration in determining the consideration for the settlement." Avista, IOURESEXC:001 (citing Final ROD, at 14-21). Avista notes that the amount of REP benefits is affected by the ASC Methodology, status of deemer balances and implementation of the 7(b)(2) rate test. *Id.* Avista notes that BPA made a number of assumptions in the implementation of section 7(b)(2) and in developing the PF Exchange Rate; all of these assumptions and issues were challenged in the rate case. *Id.*

Avista's summary of future uncertainties regarding the REP is correct. In its 2002 Wholesale Power Rate Adjustment Proceeding, BPA established that there are a number of variables that affect potential REP benefits for the IOUs. *See* Boling and Doubleday, WP-02-E-BPA-53, at 20. For example, the issue of deemer balances has not yet been resolved. *Id.* If such deemer balances did not exist or were small, this would not be an impediment to receiving benefits. *Id.* Also, while BPA has used the current ASC Methodology for its rate case forecasts, the methodology could be revised. *Id.* If the methodology is revised and exchanging utilities are allowed to exchange greater costs, this would increase their ASCs and exchange benefits. *Id.* Indeed, the IOUs have advocated a return to the 1981 ASC Methodology, which, if adopted, would significantly increase prospective REP benefits. When BPA moved from the 1981 ASC Methodology to the 1984 ASC Methodology, the ASCs for exchanging utilities were reduced by an average of 26 percent. If moving back to the 1981 ASC Methodology were to increase ASCs by an average of 26 percent, this would substantially increase exchange benefits. Furthermore, in-lieu transactions are dependent on resources available at lower cost than the utilities' ASCs. *Id.* Increases in market prices could reduce BPA's ability to conduct in-lieu transactions. *Id.* BPA has recently witnessed great volatility and a trend of increasing market prices. Because an in lieu transaction requires the in lieu resource to be less expensive than the utility's ASC, an increase in market prices, a potential in lieu resource, would likely reduce the exchanging utilities subject to in lieu transactions. This would increase BPA's REP costs. Also, the IOUs are contesting a number of assumptions BPA made in developing the proposed PF Exchange Program rate. *Id.* In determining REP benefits, exchanging utilities receive the difference between their ASC and BPA's PF Exchange rate. If BPA retains those assumptions and the IOUs successfully challenge that rate, the rate could be reduced and exchange benefits

increased. *Id.* If the IOUs' rate case arguments were successful on appeal, annual REP benefits to the IOUs would be approximately \$280 million per year, or \$1.4 billion over the five-year contract period. This is substantially greater than the proposed Settlement Agreement benefits. While BPA developed its 2002 power rates based on the best information available, BPA recognizes that there are variables that could allow all IOUs to receive very substantial REP benefits. *Id.* BPA must consider these factors when determining the proper consideration for the IOUs' waiver of rights to participate in the REP. As actual examples of these concerns, Avista notes that it has advocated a change in the ASC Methodology. Avista, IOURESEXC:001. Avista notes that BPA has acknowledged that the ASC Methodology is subject to change and that "[i]f the methodology is revised and exchanging utilities are allowed to exchange greater costs, this would increase their ASCs and exchange benefits," citing 2002 Final Power Rate Proposal, Administrator's ROD, Section 14, at 22. *Id.* Avista notes in such case, Avista would be eligible for REP benefits. *Id.*

In addition, as noted previously, BPA has previously executed settlements of the REP with some 30 exchanging utilities. Many of the settlements were executed by public agencies, like Northern Wasco. These settlements generally settled the REP through the 1981 contract period, June 30, 2001, with some of the settlements extending through 2011. These previous monetary settlements covered many years. Despite the fact that these settlements were for periods in which utilities' ASCs would likely change, BPA did not require the exchanging utilities to periodically file ASCs through the settlement period. Instead, BPA had to forecast ASCs and PF Exchange rates and determine the proper consideration for each settlement. As noted above, there are many factors that affect whether a utility might receive ASC benefits, not just ASCs. BPA does not have perfect knowledge and must make the best judgments it can regarding proper consideration for the IOUs' waiver of rights to participate in the REP.

SUB argues that transferring the definition of what entities may qualify to the discretion of states is not consistent with statutory language. SUB, IOURESEXC:003. Contrary to SUB's claims, BPA is not transferring the definition of eligible entities to the states. Section 2(h) of the Settlement Agreement states that a Qualified Entity is "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of <<Customer Name>>'s Residential Load." This is simply an affirmation of the manner in which BPA has previously provided REP benefits throughout the term of the RPSAs. This language was included in the definition of Qualified Entities in order to ensure that only Pacific Northwest utilities would be eligible to receive benefits from the Settlement Agreements. By requiring that an entity have authorization from the state to serve regional residential load, BPA gains assurance that entities not serving regional load will be ineligible to receive benefits under the Settlement Agreements. BPA has previously used information from the Commissions in implementing the REP. For example, in the 1984 ASC Methodology, the commission's order provides the starting point for BPA's review of utilities' proposed ASCs. *See* Average System Cost Methodology, Administrator's ROD, June 1984. The assignment provisions of Section 8 of the Settlement Agreements require the IOUs signing the Agreements to assign benefits back to BPA based on the amount of residential and small

farm load in the region served by Qualified Entities. These provisions require Qualified Entities to be actually serving residential loads to be eligible for assignment of benefits. Section 8(a) of the RPSA requires Qualified Entities to provide invoiced amounts of residential load they served in a previous month to receive any REP benefits. These provisions ensure that Qualified Entities are actually serving residential and small farm loads in the Pacific Northwest. Thus, BPA has not transferred the definition of Qualified Entities to the discretion of the states.

SUB argues that BPA should amend its definition of "Qualified Entity" in its proposed Settlement Agreement and add the definition of a Qualified Entity in its RPSA and IOU Firm Power Block agreements such that it complies with Federal laws. SUB, IOURESEXC:003. SUB suggests that the definition of "Pacific Northwest" be added to the Settlement Agreement. *Id.* Such a change, however, is unnecessary. As noted above, Section 2(i) of the Settlement Agreement states that a Qualified Entity is "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of <<Customer Name>>'s Residential Load." All of the utilities with which BPA may sign Settlement Agreements are Pacific Northwest utilities that have previously executed RPSAs and received REP benefits. These utilities have been viewed as eligible "Pacific Northwest utilities" for nearly 20 years. These utilities, including numerous changes in ownership, were serving residential and small farm loads within the Pacific Northwest region long before the enactment of the Northwest Power Act and the establishment of the REP. Because the Settlement Agreement language refers to entities authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of an existing eligible Pacific Northwest utility's residential and small farm load, the benefits that may be provided under the Settlement Agreement will only be provided to residential and small farm loads that have previously received benefits from the REP. Thus, "Pacific Northwest" has already been incorporated in the Settlement Agreement definition.

SUB also argues that the definition of a Qualified Entity should include a reference to owning generating or contractual resources, which provide electricity to its retail residential customers. SUB, IOURESEXC:003. This proposed change is unnecessary. The requirement of contractual or generating resources is already implicit in the proposed definition of Qualified Entity. A Qualified Entity is one that serves the power needs of regional residential load. In order to serve residential load, an entity must have resources. That entity is therefore capable of exchanging resources with BPA. If an entity is serving load, it follows that it has acquired access to resources for serving that load, and therefore has resource costs to exchange.

SUB argues that a change in an RPSA holder's status is not inconceivable. *Id.* SUB argues that Montana Power, which met the historic definition of a Pacific Northwest utility, is in the process of restructuring and as a result may no longer meet the definition of a Pacific Northwest utility. *Id.* The discussion of MPC's eligibility is addressed in greater detail elsewhere in this ROD. *See* Settlement Agreement ROD, Section 12. In short, however, if an IOU no longer meets the definition of Qualified Entity, it cannot continue to provide benefits, although such benefits may be assigned to a Qualified Entity

that would pass through the benefits to the former utility's residential and small farm load.

SUB also argues that, should the status of a RPSA/IOU Block contract holder change such that they no longer meet the definition of a Qualified Entity, then the contract should terminate. SUB, IOURESEXC:003. SUB argues that language to that effect should be added to Section 16 of the IOU Firm Power Block Contract and Section II of the RPSA. *Id.* This proposed change is unnecessary. The requirement that a Qualified Entity is authorized to serve residential load and is actually serving such load is already implicit in the proposed definition of Qualified Entity and in the operation of the Settlement Agreement and the RPSA. The assignment provisions of Section 8 of the Settlement Agreements require the IOUs signing the Agreements to assign benefits back to BPA based on the amount of residential and small farm load in the region served by Qualified Entities. These provisions require Qualified Entities to be actually serving residential loads to be eligible for assignment of benefits. Section 8(a) of the RPSA requires Qualified Entities to provide invoiced amounts of residential load they served in a previous month to receive any REP benefits. These provisions ensure that Qualified Entities are actually serving residential and small farm loads in the Pacific Northwest.

EPUD believes that the proposed pricing treatment of IOUs under the Settlement Agreement violates the public preference clause, and is contrary to the Northwest Power Act and other statutes governing BPA. EPUD, IOURESEXC:023. EPUD does not elaborate on its statutory arguments. BPA therefore does not know the basis on which EPUD is making such arguments. Under the proposed Settlement Agreements, however, BPA will only be using wholesale power rates that have been established by BPA in a formal evidentiary hearing under section 7(i) of the Northwest Power Act and which have been granted either interim or final approval by FERC. The detailed justification for BPA's proposed rates is contained in the official record of BPA's 2002 Wholesale Power Rate Adjustment Proceeding, BPA Docket No. WP-02, and in the Administrator's ROD in that proceeding. *See* 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02. BPA believes that its proposed rates are well-founded and appropriate for use in the Settlement Agreements.

Central Lincoln notes that BPA's discussion of this issue in its May 5, 2000, paper distributed to customers and interested parties stated that it "[b]elieves the intent of Congress under section 5(c) is that benefits of the Federal Columbia River Power System are intended to flow to residential consumers." Central Lincoln, IOURESEXC:007. Central Lincoln argues that that seems to be the plain language of Pub. L. No. 96-501, a law that did not in any way anticipate the restructuring of any utility systems and certainly not the selling off of generating resources by large utilities. *Id.* Central Lincoln argues that, in the first place, no IOU or marketer would be entitled to make any economic profit from the passed-through energy and power from BPA's Exchange. *Id.* Central Lincoln argues that that part should not change, *i.e.*, any power purchased from BPA on behalf of residential and small farm consumers should not provide an economic profit to the direct seller. *Id.* If BPA is instead subsidizing with cash those same consumers, one hundred percent of the subsidy should be passed through to them. *Id.*

This concern is expressly addressed in Section 6 of the Settlement Agreements, discussed in greater detail below, in which Qualified Entities are required to pass all of the Settlement Agreement benefits to their residential and small farm customers.

Central Lincoln argues that for unbundled, divested, formerly full service utilities to be eligible, they should provide a declaration within their request (for either power or cash) of net service requirement above and beyond their former service capability. *Id.* Central Lincoln argues that this is needed so that BPA does not become some sort of regional default provider for any and all entities and, if that were the case, that some sort of region-wide “DRPA” arrangement would need to be set up, so it could sell to all of the residential and small form consumers in the region. *Id.* Central Lincoln appears to argue that the IOUs should be required to make a one-time request for firm power service under the IOU Block Sales Agreement based on their net requirements. BPA has included a provision in the contract requiring IOUs to agree to serve all amounts of their load not otherwise served by the firm power provided by BPA in their original contract. *See* IOU Block Sales Agreement, Exhibit C, Net Requirements, Section 2(b)(1).

Central Lincoln argues that the same entities as before should be eligible: but certainly on a capped basis. Central Lincoln, IOURESEXC:007. Central Lincoln argues that a one-time declaration should be made for power or cash, in order that BPA can get on with its planning instead of having to go to each IOU every one-to-five years and beg an answer. *Id.* Central Lincoln argues that otherwise the numbers will continue to be moving targets. *Id.* Under the Settlement Agreements, BPA determines IOUs’ allocations of power and monetary benefits at the beginning of the first five-year period and again before the second five-year period.

ESI argues that one of the potential Settlement participants, MPC, has announced that it will exit the electric utility transmission and distribution business. ESI, IOURESEXC:008. ESI argues that MPC has already sold its power generation assets and therefore has no real “ASC” to compute. *Id.* ESI argues that with its exit from the power distribution business, MPC will have no eligible customers to whom it must pass along the benefits of the REP. *Id.* Contrary to ESI’s argument, BPA believes it is reasonable to include a forecast of settlement benefits to MPC for a number of reasons. For example, ESI fails to note a number of significant points regarding MPC. Regardless of whether or not BPA has a policy for serving utilities that may have divested resources, there is a substantial basis for assuming that MPC would continue to have an obligation to serve residential loads during the rate period. MPC may have an obligation to serve, in which case it would have to acquire resources or use the resources it sold pursuant to a contract right. First, under Montana law, by default MPC continues to 2002 to supply retail load or consumers that do not elect to purchase from other suppliers. Mont. Code Ann. § 69-8-201(1)(b); (3); § 69-8-103(25) (1999). In addition, the law allows the public utilities commission to extend to 2004 the transition period wherein MPC would likely continue as the default supplier. *Id.* § 69-8-201(2)(a). In addition, the State of Montana has passed a statute establishing a default supplier that will serve residential loads. *Id.* §39-19-101-315. While MPC or another entity may become the default supplier under that statute at any time, there is no requirement to establish a default supplier under that

statute until the end of the transition period under the Montana restructuring statute. *Id.* § 39-19-103. Where MPC is the default supplier, it would be an exchanging utility serving residential load during the rate period. It would, therefore, be a proper participant in an REP settlement.

While ESI questions how benefits obtained from the settlement would be provided to a utility that has no power supply costs, MPC would need to acquire power to serve its load obligations. MPC would then have power supply costs. Such costs would be the basis for MPC's proposed ASC. Finally, MPC has an obligation to meet residential load to 2002, which is within the next contract period. BPA's Power Subscription Strategy proposes that the REP settlement benefits must be able to be assigned to the party serving the residential load. *See* Subscription Strategy at 9. Thus, even if MPC were no longer the supplier, it is likely that another eligible entity would be able to have the settlement benefits assigned to them.

As noted above, ESI argues that MPC has announced that it will sell its transmission assets and expects to be out of the power supply business within one to one and one-half years. ESI, IOURESEX:008. BPA understands that MPC plans to make MPC a subsidiary of Touch America and sell the company stock for the subsidiary to new owners. Sale of the company through a stock sale would transfer the existing obligations of the company under Montana statutes to the new owner. Montana's restructuring statute requires MPC or its successor to provide a default supply service during a transition period through 2002. The public service commission may extend such transition period until 2004 under the statute. While the public service commission is authorized by a subsequent statute to appoint another entity as the default supplier other than MPC, they are not required to make such appointment until the end of the transition period in the restructuring statute. BPA disagrees with that MPC has made it clear by its actions that MPC or its successor will not be serving residential load during the period starting October 1, 2001. While MPC management has made clear its obligation to change managers and owners of MPC, the successors to the company will have the obligation to serve the current residential consumers of MPC. There is a high likelihood that the PSC will ultimately select the owner of the distribution system, *i.e.*, MPC's successor, as the default supplier for MPC's current residential consumers. BPA believes MPC still represents the interests of MPC's residential consumers under Montana statutes until it transfers ownership of the company. Also, there are still many unresolved issues around the sale of the company that could result in the sale not being closed.

MPC still has obligations to its residential consumers under Montana law. BPA has no evidence that MPC does not intend to fulfill those obligations. It is reasonable for BPA to believe that MPC or any successor will meet the needs of the residential consumers of Montana. Further, the eligibility of a successor to MPC to receive benefits under the REP is a statutory question. BPA believes the intent of Congress under section 5(c) is that benefits of the FCRPS are intended to flow to residential consumers. Congress established the REP in a manner that the benefits flowed to those consumers through their electricity supplier. BPA believes that "Pacific Northwest electric utilities" for purposes of section 5(c) are those entities serving the residential and small farm loads of the region

as authorized by state law or order of the applicable state regulatory authority. BPA sees no intent of Congress to exclude residential consumers from receiving the benefits of the FCRPS based on how a state structures its electric power industry, and no evidence to conclude that any successor to MPC would be ineligible to receive REP settlement proceeds. There is no evidence that residential consumers of MPC will cease to exist or that those consumers will not be eligible for benefits under the REP. BPA believes MPC still represents the interests of MPC's residential consumers under Montana statutes until it transfers ownership of the company. MPC is still capable of entering a contract on behalf of those consumers.

In addition, MPC notes that it presently serves most of the eligible load in its distribution service territory. MPC, IOURESEX:004. It presently acquires the full power needs of its eligible load through a full requirements contract and Qualifying Facility contracts. *Id.* MPC argues that, therefore, for the purposes of entering into either an RPSA or a Settlement Agreement on behalf of its customers, it meets the definition of an eligible utility. *Id.* MPC notes that when full competition begins in the state of Montana, the MPSC will have selected a default supplier that will have the obligation to serve. *Id.* MPC argues that the possibility that MPC may not be selected as default supplier at some point in the future in no way compromises MPC's residential customers' rights under the Northwest Power Act. *Id.* MPC notes that the role of an eligible utility will appropriately flow to whatever entity is serving eligible load in the future whether the supplier is the default supplier or a competitive supplier. *Id.* MPC notes that the settlement contract has been structured to accommodate this eventuality. *Id.*

MPC notes that in BPA's 2002 Power Rate Adjustment Proceeding, both the DSIs and the PPC questioned the right of MPC to sign a Settlement Agreement with BPA for several reasons based on their perceptions of the restructuring process taking place in Montana. *Id.* MPC notes that BPA correctly concludes in its ROD that: "MPC still has obligations to its residential consumers under Montana law. *Id.* BPA has no evidence that MPC does not intend to fulfill these obligations. It is reasonable for BPA to believe that MPC or any successor will meet the needs of the residential consumers of Montana." *Id.* MPC notes that it has made explicit statements to this effect in its communications regarding the sale of the utility, and the MPSC is obligated to ensure that this is in fact the case. *Id.* MPC notes that at the present moment MPC is serving these loads and therefore has a right to enter into the Settlement Agreement on behalf of its customers. *Id.*

MPC notes that the DSIs have suggested that because MPC is being sold that this somehow compromises MPC's residential customers' rights to Federal benefits. *Id.* MPC notes that the sale of MPC is no different than the sale of either PGE or PacifiCorp, and no one has questioned the rights of *their* customers. *Id.* MPC notes that this is because there is no reason to question these customers' rights. *Id.* MPC argues that it does not matter who owns the serving utility, but rather that the utility is serving eligible load. *Id.*



The third criterion cited by some parties was that the utility must pass the settlement benefits directly to its residential and small farm load. *E.g.*, Central Lincoln, IOURESEXC:007. These parties did not elaborate further on this issue. This issue, however, is directly addressed by the proposed Settlement Agreements. Section 6 of the Settlement Agreements, entitled “Passthrough of Benefits,” provides:

- (a) Except as otherwise provided in this Agreement, Firm Power and Monetary Benefit amounts received by «Customer Name» from BPA under this Agreement shall be passed through, in full, to each residential and small farm consumer, as either: (1) an adjustment in applicable retail rates; (2) monetary payments; or (3) as otherwise directed by the applicable State regulatory authority.
- (b) Monetary payments shall be distributed to the Residential Load in a timely manner, as set forth in this section 6(b). The amount of benefits held in the account described in section 6(c) below at any time shall not exceed the expected receipt of monetary payments from BPA under this Agreement over the next 180 days. If the annual monetary payment is less than \$600,000, then «Customer Name» may distribute benefits on a less frequent basis provided that distributions are made at least once each Contract Year.
- (c) Benefits shall be passed through consistent with procedures developed by «Customer Name»’s State regulatory authority(s). Monetary Benefits and any cash benefits under section 5 shall be identified on «Customer Name»’s books of account. Funds shall be held in an interest bearing account, and shall be maintained as restricted funds, unavailable for the operating or working capital needs of «Customer Name». Benefits shall not be pooled with other monies of «Customer Name» for short-term investment purposes. Firm Power shall be delivered monthly, and only to Residential Load.

Clearly, the Settlement Agreements require all benefits received thereunder must be passed through to regional residential and small farm consumers.

The DSIs refer to their comments on BPA’s “Power Subscription Strategy Proposal.” DSI, IOURESEXC:012. These comments were addressed in BPA’s Subscription Strategy Records of Decision, which are incorporated by reference. *See* Power Subscription Strategy, Administrator’s ROD; Power Subscription Strategy, Administrator’s Supplemental ROD.

### **Decision**

*The proposed Settlement Agreements properly define “Qualified Entity” as “an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of «Customer Name»’s Residential Load.”*

## II. TOTAL AMOUNT OF PROPOSED SETTLEMENT BENEFITS

### Issue

*Whether the total amount of benefits and the proposed terms and conditions for settling the rights of regional IOUs to request benefits under the REP are reasonable.*

### Parties' Positions

Vanalco and the DSIs argue that total benefits under the proposed settlements are not reasonable in relation to the value of the RPSA. Vanalco, IOURESEXC:019; DSI, IOURESEXC:012. Vanalco and the DSIs argue that, in some cases, the Settlement would provide IOU-specific benefits where the IOU is not entitled to any payment under the RPSA. *Id.* Vanalco argues that the alleged settlement overpayment is tied to unlawful constraints in the section 7(i) rate process. Vanalco, IOURESEXC:019.

SUB argues that the total benefit to the IOUs should equal 1500 aMW in total physical and financial benefits and that in the second five years the total benefit should be 1800 aMW. SUB, IOURESEXC:003.

Vanalco, ESI, PPC, and Northwest Requirements Utilities (NRU) argue that the current RPSAs require utilities participating in the REP to eliminate any balance remaining in their deemer account at the end of the current contract before they can receive benefits under a Settlement Agreement. Vanalco, IOURESEXC:019; ESI, IOURESEXC:008; PPC, IOURESEXC:006; NRU, IOURESEXC:007.

PGE, PacifiCorp, MPC and PSE argue that the benefits proposed to be provided to regional IOUs in the Settlement Agreements are too small. PGE, IOURESEXC:021; PacifiCorp, IOURESEXC:011; MPC, IOURESEXC:004; PSE, IOURESEXC:018.

The OPUC argues that since the time of the Commissions' correspondence with BPA, the market price of power has increased significantly and therefore the value of the cash benefits portion of the settlement has decreased. OPUC, IOURESEXC:014. The Northwest Energy Coalition (NWECC) supports the aMW amount of the settlement, but takes issue with the calculation of the monetary portion of the settlement benefit. NWECC, IOURESEXC:020.

Idaho Power Company (IPC), Avista, the WUTC, and the Idaho Public Utilities Commission (IPUC) support the settlement of the rights of the IOUs under the REP on the basis recommended by the Commissions for subscription power, subject to an acceptable allocation of cash and power. IPC, IOURESEXC:010; Avista, IOURESEXC:001; WUTC, IOURESEXC:016; IPUC, IOURESEXC:015. Central Lincoln notes that BPA appears to have tried to accommodate the shifting needs of all or most entities that will be applying for REP benefits, in order to pass through those benefits to consumers. Central Lincoln, IOURESEXC:007.

PacifiCorp argues that BPA should provide a section 5(c) settlement option to any IOU requesting financial benefits only for settlement of BPA's FY 2002-2006 REP benefits. PacifiCorp, IOURESEXC:011.

PSE argues that benefits from BPA should be fairly allocated among the residential and small farm customers of the Pacific Northwest IOUs based upon average system cost. PSE, IOURESEXC:018.

### **BPA's Position**

The total REP settlement benefits proposed for the IOUs, as developed in BPA's Power Subscription Strategy and accompanying RODs, properly equal 1,900 aMW in the first five years and 2,200 aMW in the second five years. *See* Power Subscription Strategy, Administrator's ROD; Power Subscription Strategy, Administrator's Supplemental ROD. The total benefits under the proposed settlements are reasonable in relation to the value of the REP. The proposed settlement benefits have been fairly allocated among the residential and small farm customers of the Pacific Northwest IOUs. The proposed settlements properly provide some benefits to all IOUs given BPA's assessment of the uncertainties of the implementation of the REP during the contract period. The proposed settlements are not based upon unlawful constraints in the section 7(i) rate process. The current RPSAs do not require utilities participating in the REP to eliminate any balance remaining in their deemer account at the end of the current contract before they can receive benefits under a Settlement Agreement because the deemer issue is a part of the settlement. Despite increases in the market price of power, the total amount of benefits of the proposed settlements is still appropriate. BPA will offer a settlement option to any IOU requesting only financial benefits for settlement of FY 2002-2006 REP benefits.

### **Evaluation of Positions**

Comments claiming that BPA's proposed settlement benefits to the IOUs were too high were submitted by Vanalco (an aluminum company), the DSIs (a group of aluminum companies) and ESI (a consultant to the aluminum companies). Based upon their comments, these parties would like to eliminate the proposed IOU settlements, which include net requirements power sales to the IOUs as a component of the settlements. *See* Vanalco, IOURESEXC:019; DSI, IOURESEXC:012; ESI, IOURESEXC:008. If the aluminum interests were able to eliminate the IOU settlements, they hope to be able to obtain power that might become available as a result. *Id.* This is despite the fact that, unlike BPA's public agency and IOU customers, BPA has no statutory requirement to offer the DSIs requirements power sales contracts for the post-2001 period. While BPA is nevertheless offering the DSIs firm power under new firm power sales contracts, the DSIs would like even more power at the expense of the proposed IOU settlements.

Vanalco and the DSIs argue that total benefits under the proposed settlements are not reasonable in relation to the value of the REP. Vanalco, IOURESEXC:019; DSI, IOURESEXC:012. They argue that BPA's own analysis in its power rate case

demonstrates that total five-year benefits under the settlement exceed the total economic value of the REP by almost \$500 million. *Id.* Vanalco and the DSIs argue that the value of the Subscription settlement to the IOUs can be derived from page 88 of the Documentation for the Wholesale Power Rate Development Study, WP-02-FS-BPA-05A, the SUBSCR 01 table. *Id.* Vanalco argues that line 24 shows the IOUs' net exchange benefits under the Northwest Power Act to be \$240.6 million for the five-year rate period. Vanalco, IOURESEXC:019 (citing SUBSCR 01 table). Vanalco and the DSIs argue that line 19 of this same table shows the Subscription settlement cost to BPA associated with the 900 aMW "financial" benefit to be \$348.6 million for the five-year rate period. Vanalco, IOURESEXC:019; DSI, IOURESEXC:012. Vanalco and the DSIs argue that this amount is calculated as the difference between the block purchase (or market) price of 28.1 mills/kWh less the RL rate paid for the power (excluding the Conservation and Renewables Discount). *Id.* Vanalco and the DSIs argue that using this same logic (*i.e.*, the difference between market value and the RL rate) for the 1000 aMW of actual power provided by BPA produces an additional \$388.0 million of benefits. *Id.* Vanalco and the DSIs argue that, thus, the total five-year Subscription settlement is providing \$736.6 million in "below market benefit" to the IOUs as compared to the REP benefits under the Northwest Power Act of \$240.6 million; the five-year settlement value exceeds the REP value by \$496 million. *Id.*

In response to these arguments, it is helpful to review BPA's 2002 rate case forecast of the cost of the REP for the rate period. Basically, BPA's forecast was a comparison of the exchanging utilities' ASCs with BPA's forecasted PF Exchange rate. *See* 2002 Final Rate Proposal, Administrator's ROD, WP-02-A-02, Section 11. The difference between these two standards multiplied by the utilities' residential and small farm loads determines the amount of REP benefits. *Id.* These forecasted benefits were assumed to be reduced through forecasted in-lieu transactions for fifty percent of the residential and small farm loads of PSE, PGE and PacifiCorp (Utah Power Division). *Id.* BPA's rate case forecast of REP benefits was less than BPA's forecast of settlement benefits. However, for purposes of a settlement of the REP with regional IOUs, BPA cannot simply use the forecasted REP benefits as the sole determinant of settlement benefits. There are a number of contested issues regarding the REP that could significantly increase the amount of REP benefits during the rate period. These issues must be taken into consideration during the development of any settlement proposal. Indeed, in BPA's 2002 power rate case, BPA discussed a number of variables that affect potential REP benefits for the IOUs. Boling and Doubleday, WP-02-E-BPA-53, at 20. For example, the issue of deemer balances has not yet been resolved. *Id.* If such deemer balances did not exist or were small, this would not be an impediment to receiving benefits. *Id.* In the rate case, BPA's estimates of IOU deemer balances were BPA's preliminary calculations and had not been discussed with or verified by the IOUs. *Id.* at 19. In fact, the IOUs contested, and continue to contest, BPA's calculation of the deemer balances. *Id.* The issue of the existence of deemer balances and the amount of such balances, if any, must be determined in negotiations between BPA and the IOUs and will not be finally determined until BPA and the IOUs have discussed and resolved the issue or the issue is resolved through litigation. *Id.* BPA, however, is not intending to simply settle with these utilities now and worry about the problem later. The deemer balances, if any, are

not being forgiven by BPA. A settlement, by its very nature, is a settlement of all the issues pending between two parties regarding a particular subject matter. While deemer balances may be held in abeyance for the Settlement Agreement period, if utilities resume the traditional REP after the term of the settlement, the deemer issue must be resolved before the utility executes a new RPSA.

Also, while BPA used the current ASC Methodology for its rate case forecasts, the methodology may be revised during the upcoming rate and contract period. *Id.* If the methodology is revised and exchanging utilities are allowed to exchange greater costs, this would increase their ASCs and exchange benefits. *Id.* Vanalco argues that, first, revisions to the ASC methodology are mere speculation. Vanalco, IOURESEXC:019. Vanalco argues that BPA has an approved ASC Methodology and has no plans to modify it. *Id.* Contrary to Vanalco's arguments, however, revisions to the ASC Methodology are not merely speculative. As noted in BPA's RPSA ROD regarding proposed revision of the 1984 ASC Methodology, BPA concluded that BPA will begin regional discussions of whether the ASC Methodology should be revised during the currently proposed five-year rate and contract periods (FY 2002-2006). If, as suggested by the IOUs, BPA were to revert to the 1981 ASC Methodology, REP benefits for the upcoming rate and contract periods would be dramatically increased. Using a twenty-six percent escalation of ASCs to represent the 1981 ASC Methodology (the amount of average decrease in ASCs after adoption of the 1984 ASC Methodology) the average annual benefits for the five-year rate period would be approximately \$323 million. Total REP benefits for the rate period would be \$1.615 billion. Even assuming in-lieu transactions for fifty percent of the exchangeable loads, average annual benefits would be \$161.5 million and total REP benefits for the five-year period would be \$807.5 million. These figures still exceed the amounts of the proposed settlements.

Another variable, in-lieu transactions, is dependent on resources available at lower cost than the utilities' ASCs. 16 U.S.C. § 839c(c)(5) (1994 & Supp. III 1997). Increases in market prices reduce BPA's ability to conduct in-lieu transactions. Section 5(c)(5) of the Northwest Power Act provides, in pertinent part:

. . . the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to such utility as part of an exchange sale if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility.

*Id.* This acquisition of power from other sources is "in lieu" of the "purchase" that would otherwise occur under the REP, and is designed to provide a mechanism to limit the net costs of the REP. An in-lieu transaction is not mandatory and is implemented subject to the Administrator's discretion consistent with applicable law and the applicable RPSA. Given the recent increase in market prices, a source of in-lieu resources, BPA's rate case assumption of in-lieu transactions for fifty percent of the exchanging utilities' residential and small farm loads may be overstated. As noted above, in-lieu transactions are dependent on resources available at lower cost than the utilities' ASCs. Increases in market prices reduce BPA's ability to conduct in-lieu transactions because such increased

prices may be higher than the exchanging utility's ASC, or the prices may be so close to a utility's ASC that in-lieu transactions would create significant risk of disbenefit for BPA. In such a case, if market prices were greater than exchanging utilities' ASCs, BPA would be unable to conduct in-lieu transactions and the amount of REP benefits forecasted for the rate period would immediately be doubled. As BPA has publicly noted, market prices recently have become volatile and are trending upward. Current market prices for five-year flat blocks of power are approximately 42 mills/kWh. The IOUs' ASCs for all years of the rate period are below 42 mills/kWh, except for two IOUs whose ASCs are only 43 mills/kWh for one year of the rate period, FY 2006. Thus, BPA could not use the market as an in-lieu resource because it is not less costly than purchasing power from the IOUs at their ASCs. This uncertainty alone significantly increases the cost of the REP. Even if BPA could still conduct in-lieu transactions, however, increases in market prices would increase the cost of such transactions. BPA's rate case forecast of REP benefits does not reflect any cost of actually purchasing in-lieu resources. BPA assumed the cost of in-lieu resources would be lower than the PF Exchange Program rate and that the IOUs would elect to reduce their ASCs as allowed by contract to end their participation in the REP. Once the cost of in-lieu resources exceeds the PF Exchange rate, BPA would face additional costs of approximately \$55-60 million over the five-year rate period for each \$1/MWh that the cost of in-lieu resources exceeded the PF Exchange rate.

Vanalco argues, however, that higher market prices would also increase the value to the IOUs of the 1000 aMW direct sale component of the Settlement Agreement and would counterbalance any reduction in the in-lieu transactions under the RPSA. Vanalco, IOURESEXC:019. While higher market prices would increase the value of the power sale component of the proposed settlements, this only applies to a fixed amount of power: 1,000 aMW. These increased benefits are roughly \$44 million over a five-year period for each \$1/MWh that the cost of market purchases exceeds BPA's rate case forecast. In contrast, the increase of market prices above exchanging utilities' ASCs could preclude BPA from in-lieu transactions for half of the forecasted exchange load in the rate case, some 1300 aMW. Because BPA's forecasted cost of in-lieu resources is approximately \$3/MWh below the PF Exchange Program rate, the increased benefits of higher market prices under the Settlement Agreement would soon be less than the lost benefits under the REP.

Another variable concerns BPA's PF Exchange rate. REP benefits are determined by the difference between a utility's ASC and the PF Exchange rate. If the PF Exchange rate is reduced, exchanging utilities receive greater benefits. As noted in BPA's 2002 rate case, the IOUs contested a number of assumptions BPA used in developing the proposed PF Exchange rate. *See* 2002 Final Power Rate Proposal, Administrator's ROD. If the IOUs successfully challenge that rate, the rate could be reduced and REP benefits increased. *Id.* The possible impact of these changes is significant and must be considered in developing a settlement proposal. In BPA's 2002 rate case, the IOUs filed testimony stating the different issues that they contested regarding the PF Exchange rate. *See* Hoff, *et al.*, WP-02-E-AC/GE/IP/MP/PL/PS-03. The IOUs also stated the effect on REP benefits that would result if the rate were developed as they suggest. *Id.* The IOUs noted that proposed corrections to the DSI floor rate would increase REP benefits by

\$3,033,000 per year. *Id.* The IOUs noted that a correction of the IP/PF link by including revenue taxes in the margin would increase REP benefits by \$8,322,000 per year. *Id.* The IOUs noted that including the costs of Planned Net Revenues for Risk as uncontrollable events in the section 7(b)(2) rate test would increase REP benefits by \$54,555,000 per year. *Id.* The IOUs noted that including conservation in the FBS would increase REP benefits by \$111,950,000 per year. *Id.* The IOUs noted in their initial brief that failure to treat terminated plants as uncontrollable events would increase REP benefits by \$243 million per year. *See* Initial Brief of the Northwest IOUs, WP-02-B-AC/GE/IP/MP/PL/PS-01, at 24-27. The IOUs noted that, in summary, REP benefits would have increased to \$280 million per year if BPA's rates were developed as they proposed. *Id.* at 25. This amount of REP benefits is *substantially* greater than the proposed amount of settlement benefits. Even assuming that Vanalco and the DSIs were correct in placing the total five-year Subscription settlement benefits at \$736.6 million, this is far, far less than the forecasted \$1.4 billion of REP benefits calculated by the IOUs.

Vanalco argues, however, that BPA has a remarkable track record in sustaining its rates against any challenge. Vanalco, IOURESEXC:019. Vanalco argues that the risk that the PF Exchange rate will be set aside should be highly discounted. *Id.* Even assuming for the sake of argument that the potential impact of successful challenges to the PF Exchange rate were discounted, the magnitude of the potential effects of those challenges would still be significant. For example, even if the forecasted benefits were discounted by half of those forecasted by the IOUs, the amounts of the settlement and forecasted REP benefits would be approximately equal. This, however, would still ignore the other circumstances noted above that could contribute to increases in REP benefits.

In summary, BPA recognizes that there are a number of variables that could allow all IOUs to receive substantial REP benefits during the coming rate and contract period. Contrary to Vanalco's and the DSIs' argument, these variables dwarf the \$500 million difference between rate case forecasts of REP benefits and settlement benefits. It is therefore not appropriate to simply base a proposed settlement on forecasted rate case REP benefits.

Vanalco argues that, in some cases, the Settlement Agreement would provide IOU-specific benefits where the IOU is not entitled to any payment under the RPSA. Vanalco, IOURESEXC:019. Vanalco argues that BPA poses the Settlement benefits issues in terms of total benefits, but that the Settlement is not offered as all-in or all-out; an individual IOU may take the Settlement or the RPSA. *Id.* Thus, Vanalco argues that the reasonableness of the Settlement must also be reviewed on an IOU-specific basis. *Id.* Vanalco argues that, specifically, MPC, IPC and Avista have substantial deemer balances and relatively low ASCs. *Id.* Vanalco argues that yet each is offered a substantial settlement with cash payment and power delivery starting October 1, 2001. *Id.* Vanalco argues that BPA has failed to demonstrate that the prospective REP benefits to these IOUs justifies the settlement offer to these IOUs. *Id.* Similarly, the DSIs argue that one reason for allegedly excessive settlement benefits is BPA's proposal to provide benefits to IOUs whose average system costs would not qualify for benefits under the REP. DSI,

IOURESEXC:012. In response to these arguments, first, as noted previously, the determination of whether an IOU should receive REP settlement benefits is not based solely upon a utility's ASC. BPA worked with all interested parties in the region at great length to develop BPA's Power Subscription Strategy. The Strategy identifies the appropriate amount of benefits for settlement of the REP with all regional IOUs, all of whom have previously actively participated in, and received benefits under, the REP. *See* Power Subscription Strategy, Administrator's ROD; Power Subscription Strategy, Administrator's Supplemental ROD. BPA developed a proposed settlement amount based on a global approach to the settlement. This approach views the exchanging regional IOUs as a class and proposes a settlement with the entire class at the same time. The IOUs have comprised the primary recipients of benefits during the existence of the REP, receiving some 88.5 percent of REP benefits provided to all exchanging utilities, both public and private, during the 20-year term of the REP. The settlement thereby resolves virtually the entire REP for the rate and contract period. This provides great benefit to BPA, including financial stability for BPA's responsibilities under the REP, greater benefit certainty for the IOUs, reduced expenses associated with administering the REP, elimination of disputes related to implementation of the REP, greater rate certainty, and similar benefits. Taking a global approach to settlement of the REP with the IOUs is consistent with BPA's statutory authority. Section 2(f) of the Bonneville Project Act provides:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, *upon such terms and conditions and in such manner as [s]he may deem necessary.*

16 U.S.C. § 832a(f) (1994 & Supp. III 1997) (emphasis added). *See also id.* § 839f(a). The Bonneville Project Act and the Northwest Power Act thus provide that the Administrator may approach the settlement of the REP in a manner that settles with the entire IOU customer class and does not approach settlement on an individual IOU basis.

BPA also addresses in this ROD the issue of whether the ASCs of MPC, Avista, and IPC would allow such IOUs to receive prospective benefits under the REP. These arguments apply here and show that they may be recipients of REP benefits and are thus proper recipients of an REP settlement offer. Vanalco argues that because the settlement is not offered as all-in or all-out, the proposed settlement should be reviewed on an IOU-specific basis. Vanalco, IOURESEXC:019. First, there is nothing that precludes a BPA *settlement* from being based on a *class* of customers rather than individual customers. Indeed, section 2(f) of the Bonneville Project Act, as affirmed by section 9(a) of the Northwest Power Act, provides the Administrator with broad discretion to enter contracts, agreements and arrangements upon terms determined by the Administrator. 16 U.S.C. § 832a(f) (1994 7 Supp. III 1997); *id.* § 839f(a). This statutory authority permits BPA to develop the Settlement Agreement for the entire class of IOU exchanging utilities. In fact, BPA's Power Subscription Strategy reviewed the manner in which the



benefits of the FCRPS could be spread as broadly as possible, including among BPA's three major customer classes: BPA's preference customers, BPA's IOU customers, and BPA's DSI customers. Each group received benefits under BPA's Power Subscription Strategy. With regard to the IOUs, BPA's Power Subscription Strategy, after a long and extensive public process with all interested parties in the region, proposed a settlement with the entire class of regional IOUs. This proposal was comprised of total benefits of 1900 aMW, with a minimum of 1000 aMW provided in power sales and the remainder in monetary benefits. *See* Power Subscription Strategy; Power Subscription Strategy, Administrator's ROD; Power Subscription Strategy, Administrator's Supplemental ROD. The Power Subscription Strategy recognized that separate proceedings would be held to determine the allocation of the total benefits among the individual IOUs. These deliberations and conclusions are contained in BPA's Power Subscription Strategy, Administrator's Supplemental ROD. *Id.* The ROD proposed benefits to individual IOUs after reviewing many different considerations, including the amount of residential and small farm load eligible for the REP, the historical provision of REP benefits, the REP benefits received in the last five-year period ending June 30, 2001, rate impacts on qualifying customers, and the individual needs and objectives of each state. *See* Power Subscription Strategy, Administrator's Supplemental ROD, at 23-29. In addition, however, BPA reviewed the proposed settlement on an IOU-specific basis. As noted previously, this was addressed in greater detail in the discussion of the IOUs' eligibility. The issue of deemer balances raised by Vanalco is addressed below.

The DSIs argue that the Settlement Agreements improperly guarantee the continuation of settlement benefits even if the IOUs' residential consumers were to be served by entities that do not qualify under the Northwest Power Act for the REP. DSI, IOURESEX:012. This argument is incorrect. First, the regional IOUs currently serving regional residential and small farm loads are qualified to participate in the REP. In the event that another Qualified Entity were to serve part of an IOU's residential and small farm load, the definition of Qualified Entity ensures that the new entity must be qualified to participate in the REP. The definition of Qualified Entity in Section 2(i) of the Settlement Agreement is "an entity authorized under state law or by order of the applicable state regulatory authority to serve all or a portion of <<Customer Name>>'s Residential Load." The term Residential Load is limited to regional residential and small farm load, which is consistent with the REP. Since the residential and small farm load was previously served by an exchanging IOU, such load is regional load and previously received REP benefits. Once an entity has been authorized by State law to commence serving these loads, they are a Pacific Northwest utility under section 5(c) of the Northwest Power Act and are entitled to benefits if they meet the other conditions of section 5(c). *See* 16 U.S.C. § 839c (1994 & Supp. III 1997). Section 8 of the Settlement Agreement addresses the issue of assignment and contains many provisions designed to ensure that Qualifying Entities would be qualified to participate in the REP. Section 8 provides:

## 8. ASSIGNMENT

(a) «Customer Name» shall be required to assign benefits under this section 8 to BPA if another Qualified Entity serves Residential Load formerly served by «Customer Name» unless (i) BPA has approved an agency agreement for such Qualified Entity under section 8(c) or (ii) BPA has approved a state program for the passthrough of benefits by a distribution utility under section 8(c).

(b) 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 without the other Party's written consent. Such consent shall not be unreasonably withheld; **provided, however,** that «Customer Name» agrees it shall assign benefits under this Agreement subject to the following terms and conditions:

(1) «Customer Name» shall quantify an amount of Residential Load each month served by Qualified Entities that would have been eligible to receive benefits if served by «Customer Name», and provide written notice to BPA of such amount no later than five days prior to the beginning of a month. Such amount shall be determined in account months based on the amounts served by «Customer Name» and Qualified Entities in the last full calendar month prior to such written notice to BPA. An account month is the number of days of service to a Residential Load account during a month, divided by the number of days in such month.

(2) Based on the determination in section 8(b)(1) above, «Customer Name» shall assign to BPA during the month following such notice a share of the total benefits specified in section 4(a) above. Such share shall be the account months of Residential Load served by Qualified Entities divided by the account months of Residential Load of «Customer Name» that would be eligible to receive benefits, whether or not «Customer Name» continues to serve such Residential Load. For purposes of section 8(b)(1) and this section 8(b)(2), the Residential Load of «Customer Name» shall not include Residential Load receiving benefits over a new distribution system under section 8(d).

(3) The amounts of Firm Power and Monetary Benefit assigned to BPA shall be in the same proportion as «Customer Name» receives under this Agreement.

(4) If the passthrough of benefits is made to consumers under section 8(c) below, then «Customer Name» shall retain the

Monetary Benefits assigned to BPA under this section 8(b) and the amount of Firm Power determined under this section 8(b) to be assigned to BPA shall be retained by BPA and converted to dollars pursuant to section 5 above. «Customer Name» shall use such amount of dollars plus the Monetary Benefits to provide benefits to individual residential and small farm consumers under section 8(c) below.

(c) «Customer Name» may continue to pass through benefits to individual residential and small farm consumers under this Agreement not served by «Customer Name» if (i) «Customer Name» is acting as the agent under an agreement entered into between «Customer Name» and a Qualified Entity which has been approved by «Customer Name»'s applicable state regulatory authority and BPA, or (ii) BPA has approved a program developed by the applicable state regulatory authority providing for the passthrough of benefits received by «Customer Name» under this Agreement to all its residential and small farm consumers acting in its capacity as a distribution utility.

«Customer Name» may continue to act as an agent for a Qualified Entity until an RPSA is signed by BPA and the Qualified Entity. Such benefits shall be equal to each such consumer's share of the Qualified Entity's share of the Residential Load, as calculated under section 8(b) above. «Customer Name» may distribute such benefits on a less frequent basis than monthly, provided that distributions are made at least once each Contract Year.

(d) If a Qualified Entity eligible to purchase Firm Power acquires all or a portion of the distribution system serving the Residential Load of «Customer Name», «Customer Name» shall assign to BPA for the remaining term of this Agreement a share of the total benefits specified in section 4(a) above. Such share shall be based on the amount of Residential Load that would have been eligible to receive benefits from the new Qualified Entity for the 12-month period prior to the date of assignment divided by the total of Residential Load of «Customer Name» that would have been eligible to receive benefits during that same 12-month period regardless of who served such Residential Load. All provisions of this section 8, other than section 8(b)(2), shall apply to assignments under this section 8(d).

Settlement Agreement, Section 8. The issue of assignment is also addressed in Section 15 of the Block Sales Agreement:

**(b) 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. Such consent shall not be unreasonably withheld. BPA shall consider any request for assignment consistent with applicable BPA statutes. «Customer Name» may not transfer or assign this Agreement to any of its retail customers.

Block Sales Agreement, Section 15(b). The foregoing provisions implicitly ensure that settlement benefits will only be received by entities eligible to participate in the REP.

The DSIs argue that BPA proposes to provide benefits for the FY 2001-2011 period without any further analysis of the appropriate level of statutory benefits for such period or the ability to update its cost estimates or to evaluate the continued statutory entitlement of the recipients to any 5(c) benefits. DSI, IOURESEXC:012. Contrary to the DSIs' claim, BPA has conducted an analysis of the appropriate level of settlement benefits for the IOUs. This has been discussed in great detail previously. As BPA noted, the determination of appropriate benefits cannot be made by simple comparisons of ASCs with BPA's proposed PF Exchange Program rate. BPA has recognized that there are many factors that must be considered in determining the proper consideration for the IOUs' waiver of their rights to participate in the REP for the proposed contract period. BPA's settlement proposal reflects a reasonable approach to the determination of this proper consideration. Proposed provisions for updates of cost estimates of continued eligibility are not necessary given the structure of the Settlement Agreement, which already addresses those issues. For example, as noted previously, the Settlement Agreement ensures that only those entities that are section 5(c) regional utilities are eligible to be Qualified Entities under the Settlement Agreement. There is therefore no further need to check on continued eligibility. There are, however, continued checks on a utility's net requirements for purposes of providing sales of net requirements power to the utility. Similarly, with utilities' costs, BPA is making a determination prior to offering the settlement regarding the proper amount of the benefits for the contract period. Once established, these benefits are not intended to change, except as consistent with formulas in the Agreement. Otherwise, there would be no Settlement Agreement because the parties would never know if the other party would be willing to accept the continually changing distribution of benefits that might occur and, consequently, there would be no knowledge of whether the IOU was willing to waive its REP rights.

Notably, BPA has previously entered into some thirty Residential Exchange Termination Agreements with exchanging utilities during the past 20 years. None of those settlements contained provisions for updating costs or periodically reviewing eligibility. Instead, BPA and the utility negotiated a reasonable amount of settlement benefits to terminate the utility's participation in the REP for a significant period. Indeed, a notable number of these settlements have effective terms of 12 to 15 years, which are *longer* than the terms of the proposed Settlement Agreements. Nevertheless, BPA did not require revisiting the settlements during their respective terms. In addition, BPA's Power Subscription Strategy sought to establish five-year or 10-year power sales contracts with BPA's customers in order to provide stability to the region for the terms of such contracts. *See generally* Power Subscription Strategy. The Power Subscription Strategy noted that "BPA will offer a five-year and a 10-year settlement contract for subscription sales to the

IOUs.” *Id.* at 9. The intent of BPA’s Subscription Strategy would be defeated if parties could not rely on their agreements for the terms of those agreements. Instead of resolving power supply and other issues facing the region and providing needed stability, Subscription contracts would perpetuate existing problems and disputes. This is consistent with the Administrator’s authority to “enter into such contracts, agreements, and arrangements . . . upon such terms and conditions and in such manner as [s]he may deem necessary.” 16 U.S.C. § 832a(f) (1994 & Supp. III 1997).

Vanalco, ESI, PPC, and NRU argue that the current RPSA requires the participating utilities to eliminate any balance remaining in their deemer account at the end of the current contract before they can receive benefits under a new “Residential Exchange Contract.” Vanalco, IOURESEXC:019; ESI, IOURESEXC:008; PPC, IOURESEXC:006; NRU, IOURESEXC:007. ESI argues that three of the potential participants of the REP Settlement have deemer balances and BPA should not “settle” REP benefits with these utilities until they become eligible for benefits under the terms of their “Residential Exchange Contracts.” ESI, IOURESEXC:008. PPC argues that although BPA preserves pre-2001 deemer accounts in the RPSA, BPA makes no provision to recover deemer balances before allowing IOUs to receive financial benefits under the Agreement. PPC, IOURESEXC:006. The DSIs incorporate by reference their arguments on this issue that were made in BPA’s 2002 wholesale power rate case and in the development of BPA’s Subscription Strategy. DSI, IOURESEXC:012. BPA hereby incorporates BPA’s responses to such arguments in BPA’s 2002 Final Rate Proposal, Administrator’s ROD, WP-02-A-02, and BPA’s Power Subscription Strategy, Administrator’s ROD, and BPA’s Power Subscription Strategy, Administrator’s Supplemental ROD.

As noted above, Vanalco, ESI, PPC, and NRU argue that the current RPSAs require utilities participating in the REP to eliminate any balance remaining in their deemer account at the end of the current contract before they can receive benefits under a Settlement Agreement. Vanalco, IOURESEXC:019; ESI, IOURESEXC:008; PPC, IOURESEXC:006; NRU, IOURESEXC:007. The RPSA, however, does not support the interpretation suggested by the parties. Section 10 of the 1981 RPSAs provides in pertinent part that:

Upon termination of this agreement, any debit balance in such separate account shall not be a cash obligation of the Utility, but shall be carried forward to apply to any subsequent *exchange* by the Utility for the Jurisdiction under any new or succeeding agreement.

RSPA, Section 10 (emphasis added). The contract language refers to a subsequent *exchange* under a subsequent agreement, that is, an agreement that continues the traditional *exchange* of power between BPA and the utility at the respective PF Exchange and ASC rates. The proposed IOU Subscription Settlement Agreements, however, do not include the traditional exchange of a utility’s power with power from BPA. Instead, the proposed Settlement Agreements are simply a payment of consideration for the termination of a utility’s participation in the REP. The 1981 RPSA, therefore, does not

require the payment of a deemer balance before executing a Settlement Agreement, but rather requires the payment of a deemer balance before continuing participation in the REP through a new RPSA. It is therefore appropriate to hold deemer balances, if any, in abeyance during the term of the Settlement Agreement. This argument is supported by MPC, which states that the deemer balance is not relevant to the Settlement Agreement. MPC, IOURESEXC:004. MPC notes that the present RPSA is clear that the deemer balance is only to be carried forward for the purposes of a follow-on RPSA. *Id.* MPC notes that the Settlement Agreement is not a follow-on RPSA and therefore this clause appropriately preserves the rights of both parties should an RPSA be entered into in the future. *Id.*

As noted above, Vanalco and ESI argue that three of the potential participants of the REP Settlement have deemer balances and BPA should not provide settlement benefits to these utilities until they become eligible for benefits under the terms of their RPSAs. Vanalco, IOURESEXC:019; ESI, IOURESEXC:008. As previously noted in BPA's 2002 wholesale power rate case, however, BPA's estimates of IOU deemer balances are BPA's calculations and have not been discussed with or verified by the IOUs. *See* 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, at 14-26 (citing the testimony of Boling and Doubleday, WP-02-E-BPA-53, at 19). In fact, the IOUs contest BPA's calculation of the deemer balances. *Id.* This argument is presented in great detail in the comments of Avista. Avista, IOURESEXC:001. The existence of deemer balances and the amount of such balances, if any, must be determined in negotiations between BPA and the IOUs and will not be finally determined until BPA and the IOUs have discussed and resolved the issue or the issue is resolved through litigation. *See* 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, at 14-26 (citing the testimony of Boling and Doubleday, WP-02-E-BPA-53, at 19). Due to the uncertainty of deemer balances, the IOUs' disagreement with BPA's preliminary calculation of such balances, and the dispute over the very existence of the balances, it is appropriate to simply hold this issue in abeyance during the term of any settlement. MPC notes that given the considerable controversy associated with all the deemer balances, their resolution would involve a long contentious process. MPC, IOURESEXC:004. MPC also notes that the settlement avoids this controversy. *Id.*

PPC, NRU and ESI argue that although BPA preserves pre-2001 deemer accounts in the RPSA, BPA makes no provision to recover deemer balances before allowing IOUs to receive financial benefits under the Settlement Agreement. PPC, IOURESEXC:006; NRU, IOURESEXC:007; ESI, IOURESEXC:008. These parties argue that because the Settlement Agreement is intended to settle BPA's post-2001 REP obligations, IOUs should be required to pay off their existing liabilities under the existing RPSAs before becoming eligible for new benefits. *Id.* NRU argues that if one owed fines at the public library, one could not check out more books until one paid one's fines. NRU, IOURESEXC:007. It is important to note that the deemer balances, if any, are not being forgiven by BPA. Indeed, the parties themselves note that BPA preserves the deemer balances for new RPSAs. PPC, IOURESEXC:006; NRU, IOURESEXC:007; ESI, IOURESEXC:008. As noted above, however, the 1981 RPSA provides only for carrying deemer balances forward to apply to any subsequent *exchange* by the utility under any

new or succeeding RPSA, not a new or succeeding settlement agreement. *See* RSPA, Section 10. A settlement, by its very nature, is a settlement of all the issues pending between two parties regarding a particular subject matter. It is clear from the record that the issue of deemer balances is a hotly contested issue between BPA and the IOUs. *See, e.g.,* Avista, IOURESEXC:001. BPA believes it is appropriate to include the issue of deemer balances within the scope of the proposed settlements and hold any such balances in abeyance during the term of the settlement. As the WUTC notes, any and all issues associated with the REP are appropriate for consideration and treatment in a settlement agreement. WUTC, IOURESEXC:016. The WUTC notes that any such agreement would strike a balance between the interests of BPA and the settling utility. *Id.* While BPA believes that it is appropriate to hold any deemer amounts in abeyance, BPA notes that if utilities resume the traditional REP after the term of the settlement, the deemer issue must be resolved before the utility executes a new RPSA.

In summary, BPA's reasons to hold any alleged deemer balances in abeyance include the preliminary nature of the alleged deemer balances; the fact that the alleged deemer balances have not been verified by the IOUs; the fact that the IOUs contest BPA's calculation of the deemer balances; that the existence of deemer balances and the amount of such balances, if any, must be determined in negotiations between BPA and the IOUs and will not be finally determined until BPA and the IOUs have discussed and resolved the issue or the issue is resolved through litigation; and that a settlement, by its very nature, is a settlement of all the issues pending between two parties regarding a particular subject matter, including, in this case, deemer balances.

In addition to the reasons presented in the foregoing discussion, a number of parties have also addressed arguments that oppose holding any alleged deemer accounts in abeyance for the term of the settlement. The IPUC states that while this proceeding is neither the time nor the place for litigation of the final disposition of the deemer balances, deferral of this issue is one aspect of the settlement that allows it to support it. IPUC, IOURESEXC:015. The IPUC notes that the wording in Section 9 of the draft Settlement Agreement states that as a result of entering this Agreement, neither BPA nor the utility "has prejudiced its right, if any, to assert that a deemer balance, if any, is required to be carried over" to any subsequent exchange agreement offered by BPA under Section 5(c) of the Northwest Power Act." *Id.* The IPUC is in full support of the treatment outlined in Section 9. *Id.* The IPUC states that resolution of this highly contentious issue as part of the settlement is one of the reasons for its support of the settlement. *Id.*

IPC also supports the settlement of the REP and BPA's proposal to hold all past deemer accounts in abeyance. IPC, IOURESEXC:010. IPC believes this is the only practical proposal to date that would actually result in residential and small farm customers of IPC receiving their fair share of the benefits of the FCRPS. *Id.* IPC is already on record having stated its belief that the change in the 1984 ASC Methodology was wrong and at the very least in place for much longer than necessary. *Id.* IPC notes that the change in methodology had a significant impact on the opportunity of IPC's customers to receive any benefits. *Id.* However, a settlement is not the time or place to engage in arguments over past methodology. *Id.*

Vanalco argues that the proposed settlements are inappropriate because there is no contract to settle. Vanalco, IOURESEXC:019. Vanalco argues that BPA claims essentially unfettered authority to settle claims under section 2(f) of the Bonneville Project Act:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as [s]he may deem necessary.

*Id.* (citing 16 U.S.C. § 832a(f) (1994 & Supp. III 1997)). Contrary to Vanalco's argument, BPA does not argue that its authority to settle issues under section 2(f) is unfettered. This authority, however, is extremely broad and was reaffirmed by Congress under section 9(a) of the Northwest Power Act. 16 U.S.C. § 839f(a) (1994 & Supp. III 1997). Such broad settlement authority has also been affirmed by the United States Court of Appeals for the Ninth Circuit. *Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 442-443 (9<sup>th</sup> Cir. 1989); *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158 (9<sup>th</sup> Cir. 1997); *Vulcan Power Co. v. Bonneville Power Admin.*, 89 F.3d 549 (9<sup>th</sup> Cir. 1996).

Vanalco argues that the authority granted BPA by section 2(f) of the Bonneville Project Act and section 9(a) of the Northwest Power Act is to settle contracts. Vanalco, IOURESEXC:019. Vanalco argues that all existing RPSA contracts have already been settled. *Id.* In response, however, section 2(f) of the Bonneville Project Act is not limited to settlements of RPSAs. Section 2(f) includes settlements as but one type of many different agreements that BPA may execute. 16 U.S.C. § 832a(f) (1994 & Supp. III 1997). When one removes the clause in section 2(f) that refers to settlements (*i.e.*, "including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder"), the statute states that:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements . . . and to make such expenditures, upon such terms and conditions and in such manner as [s]he may deem necessary.

*Id.* Thus, the Act allows BPA to enter into contracts, agreements, and arrangements upon such terms and conditions and in such manner as the Administrator may deem necessary. In BPA's Power Subscription Strategy, Administrator's ROD; in BPA's Power Subscription Strategy, Administrator's Supplemental ROD; in BPA's 2002 Final Power Rate Proposal, Administrator's ROD; in the current ROD, and elsewhere, the Administrator has repeatedly stated the reasons that the proposed agreements with the IOUs are necessary. In short:



The subscription strategy is BPA's attempt, through new power sales contracts with regional customers, to best meet all segments of our existing customers' needs — public power, residential and small farm loads of investor-owned utilities (IOUs) and direct service industries (DSIs) — while also achieving important regional environmental objectives. It comprehends not only public power preference but also regional preference. *This strategy enables us to serve residential and small farm consumers directly by providing power for sale to the IOUs and other purchasers qualified under BPA statutes to serve those consumers so that the benefits of the Federal Columbia River Power System flow throughout the region whether those consumers are currently served by public or private power. This strategy reflects BPA's very roots.*

BPA Power Subscription Strategy, at 5 (emphasis added). Thus, section 2(f) of the Bonneville Project Act and section 9(a) of the Northwest Power Act provide a sound statutory basis for the proposed Settlement Agreements. 16 U.S.C. § 832a(f) (1994 & Supp. III 1997); *id.* § 839f(a).

Vanalco argues that all existing RPSA contracts have already been settled. Vanalco, IOURESEXC:019. BPA, however, is not attempting to settle RPSAs for the current or past rate periods. BPA has already done so with many utilities, although there are a number of utilities with signed RPSAs that have not settled with BPA. The contract period at issue in the Settlement Agreements is the coming contract period, which is expected to be either five or ten years. Under section 5(c) of the Northwest Power Act, regional utilities have a statutory right to participate in the REP. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). Current RPSAs, which implement the REP, and current settlements of rights to participate in that program, will expire on July 1, 2001. In its 2002 Final Rate Proposal, Administrator's ROD, WP-02-A-02, in this ROD, and elsewhere, BPA has recognized that there are many administrative burdens and issues in dispute between BPA and the region's IOUs regarding implementation of the REP. BPA recognizes that these issues would apply to implementation of the program under any *new* RPSAs. BPA has proposed an arrangement where an exchanging utility may execute a new RPSA, or a proposed settlement of the utility's prospective rights to participate in the REP under a new RPSA, for a five- or 10-year period. The proposed settlements are clearly within the scope of section 2(f) of the Bonneville Project Act and section 9(a) of the Northwest Power Act. 16 U.S.C. § 832a(f) (1994 & Supp. III 1997); *id.* § 839f(a). Even if, contrary to the express language of section 2(f), one interpreted section 2(f) to apply only to *settlements* of "contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof," the proposed Settlement Agreements with the IOUs would still be within the scope of the statute. Under section 2(f), the Administrator is authorized to enter into such "contracts, agreements, and arrangements" upon such terms and conditions and in such manner as deemed necessary. The Administrator plainly has the authority to enter into RPSAs to implement the REP. *See id.* §§ 839c(c); 832a(f); 839f(a). Indeed, BPA has developed and will offer all regional IOUs an RPSA. The IOUs would be settling their rights to participate in the REP as reflected in the RPSAs before them. The Settlement

Agreements are thus settlements of the contracts the IOUs have a statutory right to sign in order to participate in the REP for the contract period. In addition, in the course of negotiations, the IOUs have indicated a number of objections to the proposed RPSAs. *See* BPA's 2002 RPSA ROD. At the same time, BPA and the IOUs were discussing the settlement of the utilities' rights to participate in the REP through the proposed RPSAs. Under Vanalco's argument, an IOU could simply execute an RPSA, thereby having a contract, and then immediately sign a Settlement Agreement. It makes little administrative sense to require the IOUs to sign the RPSAs and then sign the Settlement Agreements. As provided in section 2(f), the Administrator is authorized to enter into contracts, agreements, and arrangements "in such manner as [s]he may deem necessary." In this case, the Administrator has determined that it is necessary to offer both the RPSA and the proposed Settlement Agreements in the alternative, but at the same time.

Vanalco argues that the former RPSAs, with then-current ASCs, provided a basis for determining reasonable settlement payments. Vanalco, IOURESEXC:019. Vanalco argues that BPA has no actual baseline of its contractual economic obligation to each IOU to support its settlement amount. *Id.* In developing RPSA settlements over the past two decades, BPA was able to rely on existing 20-year RPSAs, which were first developed in 1981. BPA was able to determine exchanging utilities' initial ASCs because exchanging utilities made filings under the RPSA that permitted BPA to establish their ASCs. This is not the case in the development of the current Settlement Agreement. BPA's existing RPSAs have either been settled or will expire before the next rate and contract period. Therefore, BPA must forecast ASCs in order to determine whether the proposed settlements are reasonable. While previous Residential Exchange Termination Agreements generally had a then-current ASC that was used, in part, to determine settlement benefits, those settlements were not merely mathematical calculations and forecasts of future benefits based on ASCs and PF Exchange rates. In every settlement, there are issues that must be addressed and resolved because the parties do not have perfect knowledge of what will occur in the future. These issues were considered in previous settlements in addition to forecasted ASCs and PF Exchange rates. Furthermore, as noted previously, a substantial number of the earlier settlements were for periods of twelve to fifteen years, significantly longer than the current proposed Settlement Agreement. Therefore, there was great uncertainty regarding prospective benefits in those settlements. For example, the then-current ASC might not have evolved during the settlement period as assumed in developing the settlement. Or the exchanging utility might go out of business or be acquired by another entity during the term of the settlement. There are myriad uncertainties that can occur over the term of a settlement. Nevertheless, BPA made its best efforts to negotiate with the utilities and determine a reasonable amount of settlement benefits for the settlement period. It is the same with the currently proposed Settlement Agreements.

As discussed elsewhere in this ROD, BPA determined that the regional IOUs may reasonably be eligible to receive benefits under the REP in the coming contract period. BPA developed the proposed settlement benefits for all IOUs in BPA's Power Subscription Strategy Proposal, and increased those amounts in BPA's Power Subscription Strategy, and again refined those amounts in BPA's Power Subscription

Strategy, Administrator's Supplemental ROD. The settlement benefits for individual utilities were developed in a public process where all parties had an opportunity to comment. With regard to the allocation of settlement benefits among the IOUs, the 1998 Power Subscription Strategy states that "BPA will request comments from interested parties regarding the amounts of subscription power and benefits that should be provided to individual IOUs. The Commissions have indicated that they will collaborate on a recommendation on this topic, which BPA would welcome. BPA will then determine the appropriate amounts." *See* Power Subscription Strategy, at 9. BPA solicited the Commissions' views on the proposed allocation of settlement benefits and received a proposal from the Commissions. This was appropriate because the Commissions have traditionally been responsible for establishing retail electric rates for residential consumers of the regional IOUs, including the credit applied to those rates to reflect benefits of the REP as determined by BPA. The Commissions also have a statutory responsibility to the residential consumers of the IOUs in their particular state jurisdiction. Furthermore, because of these responsibilities, a joint recommendation by the Commissions would likely reflect a fair allocation of benefits among the residential consumers of the Northwest states and would enhance the likelihood of BPA delivering the benefits in a way that will work for each state and its consumers.

The Commissions collaborated and submitted a joint recommendation on the proposed allocation of the settlement benefits. Their recommendation reflected many different considerations, including the amount of residential and small farm load eligible for the REP, the historical provision of REP benefits, the REP benefits received in the last five-year period ending June 30, 2001, rate impacts on qualifying customers, and the individual needs and objectives of each state. BPA reviewed the Commissions' recommendation and determined that this proposal was a reasonable approach upon which to take public comment. After reviewing public comment, BPA proposed to offer regional IOUs benefits in the manner provided in more detail in BPA's Power Subscription Strategy, Administrator's Supplemental ROD. *See* Power Subscription Strategy, Administrator's Supplemental ROD, April 2000.

Vanalco and the DSIs argue that the proposed settlement violates section 5(c) of the Northwest Power Act. Vanalco, IOURESEXC:019; DSI, IOURESEXC:012. Vanalco and the DSIs argue that in section 5(c), Congress provided for a REP that would not diminish the amount of Federal power available to other customers. *Id.* Vanalco argues that under the guise of a settlement agreement, BPA would make a direct sale, without in-lieu purchases, to IOUs that would circumvent this congressional intent. Vanalco, IOURESEXC:019. Vanalco argues that all previous RPSA settlements have been cash-only; any new RPSA Settlement should also be cash only. *Id.* The DSIs recommend that BPA implement an REP settlement in a manner that does not impair BPA's ability to provide adequate power at reasonable cost-based prices to all of BPA's historical customers. DSI, IOURESEXC:012. These arguments are not persuasive. First, Vanalco and the DSIs attempt to characterize the proposed settlements as contracts that *implement* the REP, such as the RPSAs. They are not. It is the REP, through the RPSAs, that permits regional utilities to offer to sell power to BPA and for BPA to purchase such power and, in exchange, to sell an equal amount of power back to the utility. 16 U.S.C.

§ 839c(c)(1) (1994 & Supp. III 1997). This is the essence of the RPSAs. However, the proposed settlements are *not* contracts that implement the REP; they are proposed *settlements* of the REP. There is no statutory or other authority cited by Vanalco or the DSIs that requires settlements of the REP to be structured in any particular manner. Indeed, just the opposite is true. As noted previously, the Bonneville Project Act and Northwest Power Act expressly grant BPA great discretion in the development of contracts, agreements, and arrangements. Section 2(f) of the Bonneville Project Act provides:

Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as [s]he may deem necessary.

*Id.* § 832a(f). In short, the Administrator may develop the proposed settlements upon such terms and conditions and in such manner as she deems necessary. In this case, the Administrator has determined that the proposed settlements with regional IOUs, comprised of both a power sale and money, comprise the proper terms and conditions for the regional IOUs' waiver of their rights to participate in the REP for the contract period. While Vanalco argues that previous REP settlement agreements were comprised of cash only, this does not require BPA to structure the current proposed settlements of the REP in the same manner. The current proposed settlements address a completely different period of time under very different conditions than existed when previous settlements were negotiated. BPA plainly has authority to make power sales to the IOUs and it is reasonable to include such sales as a component of the proposed settlements. *Id.* §§ 839c(b)(1), (c)(1), and (f). BPA understands that Vanalco and the DSIs would like to preclude the proposed IOU settlements from containing power sales in order that Vanalco and the DSIs could attempt to take such power from the IOUs, despite the fact that the DSIs have no statutory entitlement to requirements power sales contracts for the next contract period. *Compare id.* § 839c(b)(1) with *id.* § 839c(d). This desire does not, however, require the Administrator to abandon proposed settlement terms that she has determined, consistent with section 2(f) of the Bonneville Project Act as affirmed by section 9(a) of the Northwest Power Act, are necessary for the settlement of the REP with regional IOUs. *Id.* § 839a(f); 839f(a).

Vanalco and the DSIs argue that the situation of providing power sales under the Settlement Agreement is worse in the 5 out-years. Vanalco, IOURESEXC:019; DSI, IOURESEXC:012. Vanalco and the DSIs argue that BPA proposes that the settlement amount of 2200 MW should be all power. *Id.* Vanalco and the DSIs argue that BPA contends that this 1200 MW increase in power sales to the IOUs in October 1, 2006, would be supplied from expiration of existing long-term surplus sales. *Id.* Vanalco and the DSIs argue that this is not correct; only 450-500 MW will return to the region by 2006, which may at best cover expected growth in PF loads. *Id.* Vanalco and the DSIs argue that the 1200 MW increase post-2006 in direct settlement sales to the IOUs is equal

to about 80 percent of the increase in benefits to the IOUs and this will decrease available power for other customers. *Id.* In response to these arguments, BPA's Power Subscription Strategy did not require that BPA would provide the post-2006 settlement benefits in power. Instead, the Power Subscription Strategy states that, only for purposes of IOUs signing 10-year settlements, BPA will offer benefits equivalent to 2,200 aMW for the 2007-2011 period. *See* Power Subscription Strategy, at 9. The Strategy states that BPA *intends* for this 2,200 aMW to be all power deliveries. *Id.* The Strategy expressly recognizes that the 2,200 aMW may *not* be provided all in power. *Id.* The Strategy notes that if BPA is unable to deliver all power for the 2007-2011 period, a mechanism will be used for determining a financial payment instead of power. *Id.* Thus, the claim that proposed post-2006 service would remove power from other customers is not accurate. Furthermore, BPA has a statutory responsibility to meet the net requirements loads of its preference customers. BPA will meet such loads regardless of the amount of power sales to IOUs under the Settlement Agreement. The Settlement Agreement power is therefore not taking power away from these customers. Also, as noted previously, the DSIs, unlike the preference customers and the IOUs, do not have a statutory right to net requirements service from BPA after 2001. *Compare* 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997) with *id.* § 839d. Furthermore, it does not matter whether BPA expected to supply power for the settlements from expiration of existing long-term surplus sales. If such power were not available, BPA would acquire power elsewhere. Once again, there is nothing in section 5(c) of the Northwest Power Act that precludes the Administrator from including power and cash components in the proposed IOU Settlement Agreements. *See id.* § 839c(c). Also, the Administrator has determined, consistent with section 2(f) of the Bonneville Project Act, that monetary payments and power sales are necessary for the settlement of the REP with regional IOUs. *Id.* § 832a(f).

Vanalco argues that the settlement overpayment is tied to unlawful constraints in the section 7(i) rate process. Vanalco, IOURESEXC:019. Vanalco argues that the settlement can be traced back to the September 2, 1999, and September 17, 1999, letters between BPA and the State PUCs, in which BPA essentially agreed to continue its support of the settlement in exchange, among other things, for the PUCs' agreement not to contest in the power rate case the BPA service proposal to the DSIs (the "Compromise Approach"). *Id.* Vanalco argues that these constraints on rate case parties prevented the development of a full and complete rate case record as required by section 7(i). *Id.* Vanalco argues that, in this context, the settlement amount, which Vanalco alleges exceeds the RPSA value by \$500 million, is not merely a settlement of the RPSA, but also payment for silence in the rate case. *Id.* Vanalco argues that the settlement should not be so entangled, rather it should be related only to the reasonable value of the RPSAs. *Id.* Vanalco's *ad hominem* attacks are not well founded. First, as BPA has explained at length, there are no overpayments in the proposed settlements. Furthermore, no party was unlawfully constrained from participating in BPA's 2002 rate case. There is no requirement that parties in BPA's rate cases must attack every position taken by BPA. Indeed, few, if any, do so. Parties have the right to choose which issues, if any, they wish to contest in the proceeding. If state commissions voluntarily chose to not challenge the Compromise Approach in the rate case, such was their right. There was certainly no chance that the Compromise Approach would go unchallenged in the rate case, as

Vanalco attacked the approach vigorously. *See* 2002 Final Rate Proposal, Administrator's ROD, WP-02-A-02, Section 15.5. Furthermore, the Commissions are not necessarily parties in BPA's rate cases. At the time of the referenced letter, BPA's 2002 rate case was already underway and all parties had already intervened. In fact, only two of the four primary regional commissions intervened as parties in BPA's 2002 rate case. Thus, even if two state commissions voluntarily chose to not challenge the Compromise Approach, two other commissions provided little to BPA because they were not participating in the rate case. Historically, the Commissions have participated in BPA's rate cases in a very limited manner. In any event, however, while two state commissions may have voluntarily chosen not to attack the Compromise Approach in the rate case, the interests of the Commissions with regard to the REP are the same as the interests of the IOUs. Both groups take positions that favor the maximization of REP benefits to residential and small farm consumers. The IOUs, however, did not agree to leave the Compromise Approach uncontested in the rate case. Therefore, even if two state commissions voluntarily chose not to challenge the Compromise Approach, parties with identical interests were free to do so. Furthermore, the fact that two state commissions voluntarily chose not to challenge the Compromise Approach in the rate case does not prevent the development of a full and complete rate case record. All parties to the rate case had the ability to challenge the Compromise Approach if they desired. If they did not desire to make such a challenge, whether from disinterest, informal agreement, or other reasons, such was their right. The Commissions' decision not to challenge the Compromise Approach did not affect Vanalco's rights in any manner whatsoever. Vanalco had the ability to challenge the Compromise Approach to the extent it desired. Indeed, Vanalco did so.

Vanalco argues that each IOU should be allowed to sign an RPSA and, then, in the context of a determination of actual ASC, BPA should determine an appropriate settlement amount on a case-by-case basis. Vanalco, IOURESEXC:019. Such an approach, however, is impractical for a number of reasons. First, even if utilities signed RPSAs and made Appendix 1 filings to establish ASCs, a settlement of the REP would not be based solely on forecasted benefits using the ASCs. As noted previously, there are a number of factors that must be weighed in making a determination regarding settlement amounts. Even in the foregoing circumstances, BPA would have to consider, for example, possible revision of the ASC Methodology, market prices in relation to the viability of in-lieu transactions, and challenges to BPA's PF Exchange rate. As discussed in greater detail above, these considerations could have a very significant effect on the amount of forecasted REP benefits and thus the amount of settlement benefits. Indeed, even if IOUs went through an RPSA and an Appendix 1 filing, the settlement amount could very easily be the same. These issues are difficult judgments that must be made by the Administrator. Section 2(f) of the Bonneville Project Act and section 9(a) of the Northwest Power Act provide the Administrator broad discretion in order to make these judgments. *See* 16 U.S.C. § 832a(f) (1994 & Supp. III 1997) and §839f(a).

Furthermore, the approach suggested by Vanalco would waste the time and resources of BPA, the IOUs, and other interested parties. If all of the IOUs were to sign Settlement Agreements, there would be no need for BPA to go through the administrative scenario

suggested by Vanalco. If the IOUs signed RPSAs, they would then make Appendix 1 filings with BPA. These filings establish the utilities' ASCs. The process for these filings, however, which includes discovery and comments by intervening parties, takes 210 days under the 1984 ASC Methodology. *See* 1984 ASC Methodology, Section I.M. When a final ASC report is issued by BPA, the IOU may appeal the determination to FERC. 16 U.S.C. § 839f(g) (1994 & Supp. III 1997). This step also requires the parties to expend their resources through receipt of comment from interested parties and a determination by FERC. An IOU may also appeal such ASC determinations to the United States Court of Appeals for the Ninth Circuit. 16 U.S.C. § 839f(e)(5) (1994 & Supp. III 1997). This step also demands that BPA, the IOU and interested parties spend time and money resolving the dispute. All of this effort would occur despite the fact that, as noted previously, BPA already has a source to use as a starting point for ASCs to assist in the determination of settlement benefits: BPA's recently forecasted ASCs in BPA's 2002 rate case.

The timing of this scenario also creates more difficulty for implementing BPA's Power Subscription Strategy. Instead of presenting simultaneous options to the IOUs of participating in the REP or entering a settlement of utilities' rights to participate in the program, either option to be executed by the end of the Subscription window, BPA would not be able to develop a settlement proposal until each IOU's ASC was established, first through BPA's ASC report after 210 days, then after FERC review of the ASC, and then after judicial review of the ASC. Even the delay for just BPA's ASC review would be seven months, placing BPA's ability to offer Settlement Agreements far closer to the time new agreements would have to be in place and giving utilities even less time to make their choice between their options. Furthermore, this approach would lead to major uncertainty during the next five-year period on the benefits that would be received by each IOU under the REP. It would also create a large uncertainty over the costs of the REP due to litigation BPA expects would be filed regarding the implementation of the REP.

The DSIs note that long prior to entering into the Letter Agreement, several DSIs submitted detailed comments to BPA regarding its "Power Subscription Strategy Proposal." DSI, IOURESEXC:012. The DSIs note that in the comments filed on behalf of Reynolds Metals Company, Kaiser Aluminum & Chemical Corporation, Northwest Aluminum Company and Goldendale Aluminum Company, the DSIs argue that BPA's proposal to substitute, in whole or in part, a direct sale of power to utilities for the REP established by section 5(c) of the Northwest Power Act is beyond BPA's statutory authority and the overall purposes of the Northwest Power Act. *Id.* The DSIs provided copies of their initial and supplemental comments to the Power Subscription Strategy Proposal. *Id.* The DSIs note that their comments regarding the means by which BPA proposes to provide benefits to residential and small farm consumers are applicable to BPA's current proposal and incorporate them into their comments by reference. *Id.* In response to these arguments, BPA also incorporates by reference BPA's responses to the DSIs' arguments in such forums.

ESI notes that one of the goals of BPA's Power Subscription Strategy is to spread the benefits of the FCRPS as widely as possible throughout the region. ESI, IOURESEXC:008. ESI argues that the proposed sale of power to "settle" the REP fails to spread more benefits to the region from the Federal investment in the Columbia River Power System. *Id.* ESI argues that one of the primary purposes of the Federal investment, as stated in the Bonneville Project Act, was to encourage private investment to stimulate the regional economy. *Id.* ESI argues that without the private investment necessary to use the Federal power, the Federal investment would provide no benefits to the region. *Id.* ESI argues that the private infrastructure that was constructed by the customers of the public utilities and the DSIs to use the power from the Federal investment is denied access to a minimum of 1,000 aMW of Federal power through these proposed sales. *Id.* ESI argues that each direct job that resulted from the private investment and the cost-based Federal power produces an average of 2.5 other jobs within the region. *Id.* ESI argues that these benefits are lost to the region when the REP becomes a power sale taken away from the publics and the DSIs, rather than a cash settlement to the IOUs as was contemplated in the Northwest Power Act. *Id.*

ESI's argument is not persuasive. ESI fails to mention a number of critical points. While ESI cites the Bonneville Project Act, a statute enacted in 1937 and which encouraged industrial development in the Pacific Northwest, ESI fails to cite the Northwest Power Act, which was enacted in 1980, some 43 years later. In the Northwest Power Act, Congress was not seeking to encourage further industrial development through access to low cost Federal power. Indeed, Congress *limited* the amount of power sold under such under such contracts to "an amount of power *equivalent* to that which such customer [was] entitled to under its contract dated January or April 1975 providing for the sale of 'industrial firm power.'" 16 U.S.C. § 839c(d)(1)(B) (1994) (emphasis added). Furthermore, the Northwest Power Act only requires that the DSIs be offered an initial long-term power sales contract. *Id.* § 839c(d)(1)(B). The DSIs executed 20-year power sales contracts in 1981. There is, however, no statutory requirement that BPA sell industrial firm power to the DSIs after 2001. This is in marked contrast to power sales to BPA's public agency customers and IOU customers, both of which have the statutory right to place their net requirements loads on BPA, within the 20-year initial contract period and thereafter. *Id.* § 839c(b)(1). If Congress had intended job creation in the manner described by ESI as the mechanism for determining whether benefits of the FCRPS as spread as widely as possible, it would have required continuing industrial firm power sales to the DSIs. BPA's proposed Subscription settlement ensures that power from the FCRPS goes, in part, to all residential consumers in the Pacific Northwest. There is no larger or more diverse constituency to receive FCRPS power.

ESI argues that at present BPA has accumulated about \$1 billion in cash reserves. ESI, IOURESEXC:008. ESI argues that at the same time, BPA is attempting to limit the amount of power available to the public utilities under BPA's Policy on Determining Net Requirements of Pacific Northwest Utility Customers under Sections 5(b)(1) and 9(c) of the Northwest Power Act (Section 5(b)/9(c) Policy), which is used to establish each utility's net requirements. *See also* Section 5(b)/9(c) Policy, Administrator's ROD. ESI argues that BPA has also limited the amount of power it will sell to the DSIs because the



supply of Federal power is limited and "cannot be expanded." ESI, IOURESEXC:008. ESI argues that BPA has more cash resources than it has power resources. *Id.* ESI argues that BPA should pay the exchange obligations in cash and sell the 1,000 aMW of Federal power to the traditional power customers of BPA. *Id.* In response to these arguments, first, BPA's public agency customers have a statutory right to service from BPA at for their net requirements loads. BPA's Section 5(b)/9(c) Policy does not limit service to public agencies below their statutory rights. *See* Section 5(b)/9(c) Policy, Administrator's ROD. Further, while BPA has limited the amount of power it will sell to the DSIs, the DSIs have no statutory right to industrial firm power after 2001. In addition, while BPA currently has strong levels of reserves, BPA requires such reserves to protect its financial position. BPA has previously seen similarly high reserve levels disappear in only two years. Also, BPA's reserves are not intended for the payment of settlement benefits to the IOUs. ESI's proposal to do so would be reckless and inconsistent with BPA's financial goals. Furthermore, BPA's rate case projected the use of BPA's existing cash reserves during the next rate period. If BPA made cash payments from reserves to settle the REP and offered additional power to the DSIs or public agencies, BPA would be required to raise its rates. In fact, BPA acknowledged in a letter to its customers on August 2, 2000, that loads of public utilities appeared to be exceeding rate case forecasts and were one component of a likely decrease in BPA's Treasury Payment Probability.

SUB argues that the total benefit to the IOUs should equal 1500 aMW in total physical and financial benefits and that in the second five years the total benefit should be 1800 aMW. SUB, IOURESEXC:003. BPA disagrees. BPA's intent in its Power Subscription Strategy Proposal was to spread the benefits of the FCRPS as broadly as possible, with special attention given to the residential and rural customers of the region. The Proposal presented a means of allowing the benefits of the FCRPS to flow throughout the region, whether currently served by public or private power utilities. The Proposal provided that residential and small farm loads of the IOUs, through settlement of the REP, would be provided access to the equivalent of 1500 aMW of Federal power for the FY 2002-2006 period. At least 1000 aMW of the 1500 aMW would be served with actual BPA power deliveries. The remainder would be provided through either a financial arrangement or additional power deliveries depending on which approach was most cost-effective for BPA. The public agencies noted that 1500 aMW of Federal power was an acceptable level for spreading benefits to the residential and small farm consumers of IOUs. On the other hand, the IOUs and the PUCs stated that at least 1800 aMW was the appropriate level. BPA noted that this level of sales, 1800 aMW, represented approximately 50 percent of IOU residential and small farm load in the region that was most recently actively participating in the REP. BPA noted that the determination of an appropriate offer for settlement of the REP is a difficult task, requiring the exercise of judgment based on all of the facts. After consideration of the Comprehensive Review, the public discussions during the Subscription process, and the comments of all interested parties, BPA determined that 1800 aMW was the appropriate amount of combined power and financial benefits for the settlement of the REP for the FY 2002-2006 period. In order to offer 1800 aMW, BPA concluded that it must provide for flat sales to the IOUs and must

establish a means for determining the monetary component of the settlements that provides BPA cost certainty during the rate period.

The Commissions, in a letter dated July 23, 1999, requested that BPA increase the amount of the settlement from 1800 aMW to 1900 aMW for the FY 2002-2006 period. This request was made in order the Commissions to arrive at a joint recommendation for allocating the settlement benefits among the IOUs for both the FY 2002-2006 and FY 2007-2011 periods. Many parties supported this increase for many reasons, including: (1) the increase is a wise policy decision and it helps to ensure that the regional interest in the system and preserving the system as a valuable benefit in the Northwest will be shared as broadly as possible among the region's voters; (2) the increase is appropriate in order for BPA to achieve the stated Subscription Strategy goal to "spread the benefits of the Federal Columbia River Power System as broadly as possible, with special attention given to the residential and rural customers of the region," *see* Subscription Strategy at 5; (3) the increase creates a fair and reasonable settlement to the REP for the IOUs; (4) the increase to the settlement staves off contentious issues surrounding the traditional REP as well as provides a fair allocation of power to the IOUs; and (5) the increase will help ensure an appropriate sharing of benefits of Federal power among the residential ratepayers in the Northwest. *See* Power Subscription Strategy, Administrator's Supplemental ROD at 11-23.

As noted above, SUB advocates making available only 1800 aMW of settlement benefits to the IOUs for the FY 2007-2011 period. SUB, IOURESEXC:003. BPA's Power Subscription ROD, however, shows that many public agencies, including the Public Power Council, supported providing 2200 aMW of benefits to the IOUs in this period. The Power Subscription Strategy ROD states:

Many public agencies and their representatives argue that the IOU residential load should have access to 2200 aMW of Federal power at a melded rate for the 2007-2011 rate period. NRU, SUB01-057; Snohomish, SUB01-090; PPC, SUB01-097; WMG&T, SUB01-099; Mundorf, SUB01-175.

Power Subscription Strategy ROD, at 52. In its evaluation of comments on BPA's Power Subscription Strategy Proposal, BPA noted:

Both *public agencies* and IOUs suggest that BPA make a more explicit commitment to make available 2200 aMW to IOUs for their residential and small farm consumers. This level of sales, 2200 aMW for the post-2006 period, represents approximately 50 percent of IOU residential and small farm load in the region. In the Subscription Proposal, BPA states that reaching the 2200 aMW level may be possible due to expiring contracts, after meeting its public agency contract obligations, and in the absence of significant reductions in system capability. However, this does not guarantee this amount of power being available. If BPA is to make a guarantee of 2200 aMW to the IOUs for their residential and small farm

consumers, it is necessary for BPA to plan its load obligations and resource availability accordingly. Therefore, BPA will offer to the IOUs two contract terms that address post-2006 energy availability.

*Id.* (Emphasis added). While SUB has argued that the settlement benefits for the FY 2007-2011 period should be limited to 1800 aMW, SUB does not provide any rationale for such a limitation. In contrast, after extensive regional discussions and the receipt and analysis of substantial public comment on BPA's Power Subscription Strategy Proposal, BPA concluded that 2200 aMW of benefits were appropriate for the FY 2006-2011 period. This was supported by commenting public agencies, IOUs and the Commissions. The DSIs opposed power sales to the IOUs, wishing to receive more Federal power for themselves. As BPA noted, however, "[T]he portion of the 2200 aMW comprised of power in the 2006-2011 period will depend in part on preference customer load obligations and any reductions in BPA's system capability." Power Subscription Strategy ROD, at 53. Thus, while BPA would like to make 2200 aMW of power sales to the IOUs for the second five-year period, some of the benefits may be monetary.

In contrast to the foregoing arguments of the aluminum interests and SUB, other BPA customers and constituencies argue that the benefits proposed to be provided to regional IOUs in the Subscription Settlement Agreements are too small. PGE argues that if the proposed settlement were truly a settlement of the rights of the IOUs to request benefits under the REP, PGE could perhaps agree that the amount of benefits offered is an acceptable compromise. PGE, IOURESEXC:021. PGE argues that BPA has distorted the REP so that the IOUs must consider settlement or risk being unable to provide any of the benefits of Federal power to its residential customers. *Id.* PGE argues that in addition to the amount of the benefits offered being inadequate, the terms and conditions are not reasonable either. *Id.* PGE argues, for example, that Exhibit C will create an administrative burden that will further reduce the amount of benefits available to the residential consumers of the IOUs. *Id.* PGE also argues that the unilateral right of BPA to determine net requirements and eligibility to purchase power means that the amount of benefits for residential consumers will unfairly remain uncertain for the duration of the contract. *Id.* In response to these arguments, first, BPA has not distorted the REP. BPA has properly implemented the REP through BPA's 1984 ASC Methodology, which was affirmed by FERC and the Ninth Circuit Court of Appeals; through BPA's rates, which also have been approved by FERC and affirmed by the Ninth Circuit when challenged; and through proper implementation of the RPSAs. Methodology for Sales of Electric Power to the Bonneville Power Administration, 29 FERC ¶ 61,013, 49 Fed. Reg. 39,293 (1994); Methodology for Sales of Electric Power to the Bonneville Power Administration, 30 FERC ¶ 61,108, 50 Fed. Reg. 4,970 (1985), and *PacifiCorp v. Fed. Energy. Regulatory Comm'n*, 795 F.2d 816 (9<sup>th</sup> Cir. 1986). These issues have been addressed in other forums. Also, Exhibit C may require significant information, but this information is necessary for BPA to properly implement its statutory directives and ensure that utility customers only purchase their net requirements from BPA and do not abuse their requirements rights at the expense of other customers. In addition, because BPA is required by law to make requirements sales, BPA is required to make "unilateral" decisions regarding these determinations. The rules governing BPA's implementation of

these requirements, however, have been the subject of extensive public comment and were developed in a public forum. Furthermore, BPA's Section 5(b)/9(c) Policy establishes a customer's right to Federal power under section 5(b)(1) of the Northwest Power Act. *See* 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997). Exhibit C of the IOU Firm Power Block Power Sales Agreement lays out the factual events that will result in reductions of Federal power deliveries. Even if such events occur, however, Section 5 of the Subscription Settlement Agreement provides a cash payment to the utility reflecting the value of the power returned to BPA. These cash payments preserve the benefits to PGE's residential consumers.

PGE is concerned about the requirement to sign up for ten years to receive benefits in the second five-year rate period. PGE, IOURESEXC:021. PGE's first concern is that its acceptance of this level of benefits for 10 years may be construed as agreement that the amount is adequate. *Id.* PGE continues to believe that the amount of benefits, which covers only about one half the residential load of the IOUs, is not equitable. *Id.* PGE notes that the settlement is only being considered because there is currently no viable alternative for its residential customers. *Id.* PGE intends to work with BPA and other stakeholders in the region to achieve a more equitable solution and does not want the Settlement Agreement to prejudice that effort. *Id.* In response to these comments, BPA does not view a utility's acceptance of the level of benefits proposed in the Settlement Agreement as an agreement that the amount of the settlement is adequate. The Subscription Settlement Agreement simply settles all rights under section 5(c) of the Northwest Power Act for the term of the agreement. BPA understands that PGE plans to seek a more equitable solution with BPA and other regional stakeholders. BPA agrees that if legislation were enacted that required BPA to attempt to amend PGE's Settlement Agreement for the second five years, BPA would make a good faith effort to amend the Settlement Agreement to conform to the new legislation.

PacifiCorp notes that it has consistently supported the settlement of the IOUs' rights to an REP as described in BPA's Power Subscription Strategy. PacifiCorp, IOURESEXC:011. Although PacifiCorp does not find the level of Subscription benefits appropriate, particularly when compared to the level of benefits that would be available under the REP with a properly calculated 7(b)(2) surcharge and IP-PF link, PacifiCorp will accept the amount of financial benefits in the settlement for the FY 2002-2006 period. *Id.*

With respect to the terms and conditions of the Subscription settlement, PacifiCorp has commented to BPA on particular provisions of the proposed contracts during discussions among BPA and the IOUs. *Id.* PacifiCorp also refers BPA to the general comments of PGE, which reiterate important shared concerns. *Id.* In addition, PacifiCorp shares Avista's and PSE's concerns that IOUs be permitted to preserve claims based upon BPA's implementation of the REP until settling utilities are assured that the Subscription settlement will not be successfully challenged. *Id.* PacifiCorp also refers BPA to PSE's contemporaneous comments on the Block Sales Agreements. *Id.* These arguments will be addressed in the respective issue sections of this ROD.

PacifiCorp argues that BPA should provide a settlement option under section 5(c) of the Northwest Power Act to any IOU requesting financial benefits only for settlement of BPA's FY 2002-2006 REP benefits. *Id.* PacifiCorp argues that the negotiation of an alternative section 5(c) Settlement Agreement between BPA and any requesting utility should be straightforward because the parties have negotiated such resolutions previously. *Id.* BPA is willing to provide a "cash only" settlement for any IOU that requests such a settlement. BPA does not believe the cash only settlement should be established on a basis different than BPA's proposal under the Power Subscription Strategy, Administrator's Supplemental ROD, April 2000. If PacifiCorp does not request a settlement based on monetary benefits only, BPA will offer PacifiCorp a Settlement Agreement based on BPA's methodology for allocating power deliveries to different IOUs. *See* Power Subscription Strategy, Administrator's Supplemental ROD, and the relevant section of the instant ROD.

MPC argues that BPA's allocation of benefits to the residential customers of the IOUs does not adequately reflect the relative rights of this class of regional citizens. MPC, IOURESEX:004. MPC argues that the limitation to approximately 42% of the eligible load represents an administratively imposed constraint on the legal rights of this class of customers. *Id.* MPC argues that the IOU residential customers' share should be equal to the share of total public residential utility load that is served by BPA resources, that is, the ratio of the total amount of power supplied by BPA to the publics and the total residential load served by the publics, should be the same ratio as that for the IOU residential load that should be receiving benefits from BPA. *Id.* MPC argues that this allocation would achieve the goal of rate parity that was envisioned by the Northwest Power Act, "in consideration of movement the competitive market [sic] as recommended by the Review." *Id.* BPA does not find MPC's argument persuasive. IOUs under BPA's Subscription proposal can continue to participate in the REP for their entire residential loads. The IOUs also have the ability to agree to a settlement of the REP in which they purchase power from BPA and receive a monetary payment from BPA. If the IOUs accept the settlement, all benefits from the settlement must be passed through directly to the utilities' residential and small farm loads. Also, the test for eligibility for the REP does not automatically preclude payment to any residential load. Furthermore, there is no statutory requirement that BPA must provide benefits in a Settlement Agreement that are in proportion to another customer class's load characteristics, or any similar criteria, for that matter. As noted previously, under section 2(f) of the Bonneville Project Act and section 9(a) of the Northwest Power Act, the Administrator is "[a]uthorized to enter into such contracts, agreements, and arrangements . . . and to make such expenditures, upon such terms and conditions and in such manner as [s]he may deem necessary." 16 U.S.C. § 832a(f); 839f(a) (1994 & Supp. III 1997). In this case, BPA's Power Subscription Strategy attempted to balance a range of regional interests and competing claims to BPA's power supply. For the IOU settlements, BPA had to develop what it considered to be proper consideration in exchange for the IOUs' settlements of their prospective rights to participate in the REP through the RPSAs. BPA's statutes direct where BPA should provide benefits under the Northwest Power Act, whether to public agency customers or IOUs. The Settlement Agreement is not being imposed on any IOU. It is purely voluntary. The proposed Subscription Settlement provides a fair amount of benefits to

residential consumers of the IOUs, reflecting the uncertainties regarding implementation of the REP.

MPC argues that BPA has proposed the correct valuation technique for the settlement benefits in theory, if not in practice. MPC, IOURESEXC:004. That is, if the IOU residential load is not served with Federal power, then the monetary benefit should be the equivalent of the difference between the cost of market power (consistent with the emerging competitive market) and preference power. *Id.* MPC argues that the practice of forecasting the value of this power for the contract period instead of using actual market prices has already proven inadequate, and the contract period has not yet begun. *Id.* MPC argues that the customer group taking the settlement option should be provided a choice of either a forecast or the actual difference between market and the PF rate. *Id.* The issue raised by MPC was previously addressed in BPA's Power Subscription Strategy. *See* Power Subscription Strategy, Administrator's ROD, at 58. BPA's Subscription Strategy Proposal for settlement of the REP provided for sales to IOUs and a monetary payment based on the difference between market and the applicable rate for settlement sales to the IOUs. BPA's proposed settlement began with the determination of an amount of power that would be reasonably sufficient to settle the REP. However, BPA recognized that it had a limited inventory of Federal power. BPA did not know the amount of power that would be purchased by preference customers in Subscription. While BPA can augment its firm inventory through power purchases, such augmentation would increase BPA's costs and thus BPA's rates, with consequent effects on BPA's competitiveness. Due to this uncertainty, BPA required flexibility in the structure of the Subscription settlement offer for the REP, which is accomplished through a combination of power and monetary benefits. The establishment of a monetary alternative is therefore important to the flexibility and viability of the proposed settlement.

There are a number of ways in which the market component of the financial formula could be established. BPA proposed, however, to establish this in BPA's 2002 rate wholesale power rate case. This afforded all interested parties the opportunity to address this issue in a formal evidentiary proceeding. This also provided BPA with a definition that would not cause BPA's financial risk to change during the FY 2002-2006 rate period. BPA proposed to base the monetary component of the settlement on the difference between the market forecast established in BPA's rate case and the rate for Subscription sales to IOUs. This would establish a fixed financial obligation for the proposed settlement that would not subject BPA to changing risk. BPA needs a predictable cost in order to ensure a high Treasury Payment Probability and competitive rate levels. If BPA used an actual market price to calculate the financial component, and not a mechanism to establish the cost (such as a market forecast), and BPA did not achieve a high enough level of planned net revenues for risk embedded in its cost-based rates to account for the risk associated with the uncertainty of the market, BPA's Treasury payments could be jeopardized.

PSE argues that the total amount of benefits and the proposed terms and conditions for settling the rights of regional IOUs to request benefits under the REP are not reasonable. PSE, IOURESEXC:018. PSE argues that the total amount of benefits should be

increased, and the terms and conditions must be modified as PSE suggests. *Id.* PSE argues that the fair allocation of FCRPS benefits is critically important to the region. *Id.* PSE argues that BPA will allocate an estimated \$1 billion to \$2 billion a year of Federal power benefits, making it one of the most important economic decisions for the region. *Id.* PSE argues that, unfortunately, the unfairly low level of BPA proposed REP settlement benefits, as well as several unfair provisions in BPA's current draft contracts, will undermine the regional consensus that is essential to retain the benefits of the FCRPS in the region. *Id.* PSE argues that in a time of congressional action on electric industry restructuring, BPA's actions, unless changed, jeopardize regional preference. *Id.* PSE also argues that BPA's Subscription plan (intended to be implemented through the Settlement Agreement offer) treats 60 percent of the region's citizens as "second class" citizens. *Id.* PSE argues that unless changed, BPA will allocate less than 23 percent of the Federal power benefits to the 60 percent of the region's citizens served by Northwest IOUs. *Id.* PSE argues that BPA's proposals contravene the purpose and requirements of the REP provision of the Northwest Power Act. *Id.* PSE argues that that provision was enacted to provide an equitable share of the benefits of the FCRPS to all the region's residential and small farm customers regardless of whether they are served by government agencies, public agencies, or IOUs. *Id.* PSE argues that the provision was included to end the prospect of what Senator Hatfield called a regional civil war. *Id.*

PSE's foregoing arguments must be viewed in the context of the statutory framework that provides benefits to all of BPA's customers. The primary law establishing these obligations is the Northwest Power Act. 16 U.S.C. §§ 839-839h (1994 & Supp. III 1997). The implementation of the directives of the Northwest Power Act results in benefits of the Federal power system that flow to BPA's customers and, where applicable, to subsequent consumers of those customers. One of the most fundamental requirements of the Northwest Power Act is that public bodies and cooperatives have preference and priority to the purchase of Federal power to meet their net requirements. *Id.* §§ 832(a), 839c(a). This power is used to serve all requirements loads of such preference customers, including residential, commercial, and industrial loads (except for NLSLs). Preference customers also pay the PF Preference rate for their power purchases (except for NLSLs). BPA's rate directives establish the manner in which BPA must allocate costs in establishing the PF rate, which applies to BPA's preference customers and utilities participating in the REP. *Id.* § 839e(b)(1). BPA's preference customers, under law, are entitled to significant benefits from the Federal system. IOUs also have significant benefits under law. Like BPA's preference customers, IOUs may place their net requirements load on BPA. *Id.* § 839c(b)(1). Unlike BPA's preference customers, however, the rate directives for IOUs' requirements power are governed by section 7(f) of the Northwest Power Act, not section 7(b). *Compare id.* § 839e(f) with § 839e(b).

The IOUs may receive additional benefits from the Northwest Power Act. The primary manner in which IOUs receive these benefits is through the REP. *Id.* § 839c(c). Under the REP, BPA "purchases" power from each participating utility at that utility's ASC. The Administrator then offers, in exchange, to "sell" an equivalent amount of electric power to the utility at BPA's Priority Firm Exchange (PF Exchange) power rate. The amount of power purchased and sold is the qualifying residential and small farm load of

each utility participating in the REP. The Northwest Power Act requires that the net benefits of the REP be passed on directly to the residential and small farm customers of the participating utilities. Under the normal implementation of the REP, no actual power is transferred either to or from BPA. The “exchange” has been referred to as a “paper” transaction, where BPA provides the participating utility cash payments that represent the difference between the power “purchased” by BPA and the less expensive power “sold” to the participating utility.

Under the REP, exchanging utilities, including the IOUs, pay the PF Exchange rate for power purchased from BPA. This rate, however, may not be the same level as the PF Preference rate. The Northwest Power Act established what is called the section 7(b)(2) rate test. *See id.* § 839e(b)(2). This test is designed to protect preference customers from certain costs incurred under the Northwest Power Act, including REP costs. If the section 7(b)(2) rate test does not trigger, the PF Preference rate and the PF Exchange rate are equal. If the section 7(b)(2) rate test triggers, however, the PF Exchange rate is subject to a surcharge and is higher than the PF Preference rate. The lower the PF Exchange rate, the higher the exchange benefits. The higher the PF Exchange rate, the lower the exchange benefits. Where, as in the current rate case, the section 7(b)(2) rate test triggers, there is an increase in the PF Exchange rate and a reduction in REP benefits. This is the way that the Northwest Power Act works. In years when the 7(b)(2) rate test did not trigger, as has occurred periodically over the last 15 years, the IOUs received greater benefits. In years when the 7(b)(2) rate test triggered, the IOUs received lesser benefits. In summary, while different customer classes may receive greater or lesser benefits of the Federal system in any particular rate period, this is a result of the implementation of the power sale and rate directives of the Northwest Power Act. While some customer classes may receive greater benefits than other customer classes, BPA cannot unilaterally change the law.

PSE argues that the total level (1800 aMW plus 100 aMW) of settlement benefits falls short of satisfying BPA’s statutory obligations or producing a fair settlement of the REP or producing a fair end result. PSE, IOURESEXC:013. BPA disagrees. First, BPA has statutory obligations with regard to the REP. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). As noted previously, BPA is properly developing rates in its current rate case and proposes to properly implement the REP. In certain circumstances, however, implementation of the Northwest Power Act’s power sale and rate directives will result in providing a limited amount of benefits to exchanging utilities in any particular rate period. With regard to the proposed REP settlements, PSE has not cited any statutory obligations that BPA must follow in developing the proposed settlements. BPA has broad discretion to enter into settlements. *Id.* §§ 832a(f); 839f(a). *See Utility Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 442-43 (9th Cir. 1989); *Ass’n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158 (9<sup>th</sup> Cir. 1997); *Vulcan Power Co. v. Bonneville Power Admin.*, 89 F.3d 549 (9<sup>th</sup> Cir. 1996).

PSE argues that even with the increase, BPA is proposing a decrease in benefits for residential customers of IOUs while increasing benefits for BPA’s preference customers. PSE, IOURESEXC:013. Again, as explained above, the benefits provided to BPA’s



customer classes are based on the directives of the Northwest Power Act. BPA believes that it is properly implementing these directives. These directives, however, do not require that the benefits provided to each customer class will be equal. Benefits to each customer class will vary with the conditions that affect the implementation of BPA's statutory directives. Also, the Northwest Power Act does not specify any particular level of REP benefits for exchanging utilities. Congress recognized that there were factors that could reduce or eliminate REP benefits.

BPA also believes that the amount of power and monetary payments available in the Subscription settlement proposal is an appropriate level for settlement of the REP. BPA, its customers, and other interested parties in the region worked approximately two years in developing BPA's Power Subscription Strategy. From the inception of discussions regarding Subscription sales to IOUs, such sales involved the settlement of rights to the REP. BPA increased the proposed settlement amount from 1500 aMW to 1800 aMW in the Power Subscription Strategy and added another 100 aMW in the Power Subscription Strategy, Administrator's Supplemental ROD. Furthermore, BPA proposed its Power Subscription Strategy with a number of goals, including the goal of spreading the benefits of the FCRPS as broadly as possible, with special attention given to the residential and rural customers of the region. *See* Power Subscription Strategy, at 3-4. BPA believes that its Power Subscription Strategy achieves this goal. BPA's goal of spreading the benefits of the FCRPS as broadly as possible, with special attention given to the residential and rural customers of the region, is implemented in the Power Subscription Strategy by BPA's proposed settlements of the REP with regional IOUs. BPA's rate case has proposed rates that would implement the traditional REP and the proposed settlements. BPA's rate case forecasted REP benefits to the IOUs comprised approximately \$48 million per year during the rate period, although there are circumstances that could increase these benefits. In providing special attention to residential and small farm customers of the IOUs and giving them an additional option in access to Federal benefits, BPA forecasted REP settlement benefits to the IOUs that comprise approximately \$140 million per year during the rate period. To suggest that BPA is not providing a fair settlement to the REP for the IOUs is incorrect. In addition, it is important to recall that BPA is not requiring any regional IOU to execute the proposed Settlement Agreements. Any IOU may continue with the traditional implementation of the REP. BPA believes the proposed Subscription Settlement Agreements provide a fair amount of benefits to residential consumers of the IOUs reflecting the uncertainties regarding implementation of the REP.

PSE argues that the effect of BPA's proposal is to penalize the residential and small farm customers of the IOUs by providing benefits to DSIs that are not statutorily required. PSE, IOURESEXC:013. PSE argues that, as BPA itself acknowledged in its September, 1998, "Keeping Current" publication, "BPA is statutorily obligated to offer power to Northwest publicly owned utilities and to provide the benefits of federal power to IOUs' residential and small farm loads" but BPA "is not required to sell power to its direct service industries." *Id.* (quoting Keeping Current, September 1998). The Northwest Power Act, however, authorizes but does not require BPA to offer power to its DSI customers after initial 20-year contracts. BPA's proposal to provide power to the DSIs as

part of Subscription is reasonable for a number of reasons: (1) the DSIs have been customers of BPA for more than 60 years; (2) they have played a significant role in the development and health of the Northwest economy and (3) sales to the DSIs sustain critical jobs in the Northwest without significant impact to other customers' rates. BPA believes its proposed sales to the DSIs are a reasonable exercise of its authority under the Northwest Power Act.

PSE argues that BPA has also discriminated against the residential and rural customers of IOUs by making a "rate pledge" to preference customers. *Id.* PSE argues that under BPA's proposal, PSE's residential customers would receive for the FY 2002-06 period about \$50 million a year less than they did prior to the 1996 BPA rate case. *Id.* PSE argues that, at the same time, BPA proposes preference rates that are more favorable to the preference agencies than the 1996 PF rates. *Id.* PSE argues that BPA's plan will provide preference customers \$150 million a year more benefit than they received under BPA's 1996 PF Preference rate. *Id.* PSE argues that, in short, BPA is proposing a decrease in benefits for IOUs' residential customers and at the same time proposing an increase in benefits for its preference customers. *Id.* PSE argues that all REP benefits flow through to customers; none go to IOUs' shareholders. *Id.* Hence, BPA's unfair and discriminatory Subscription policy and draft RPSA and Settlement Agreement harm IOUs' residential customers, who are the majority of the families and small farms of the Pacific Northwest. *Id.* PSE argues that, in short, BPA is not serving the interests of the region and is undermining the regional consensus essential to preserving the Federal power benefits for the region in the face of competing claims on those benefits from the rest of the nation's citizens and their congressional delegations. *Id.*

The foregoing issues raised by PSE are based on the development of BPA's rates for power sales to BPA's public agency customers and BPA's IOU customers. Issues regarding the development of BPA's rates can only be addressed in a section 7(i) hearing to establish such rates. *See, e.g.*, 16 U.S.C. § 839e(i) (1994 & Supp. III 1997). One of the Subscription Strategy's goals is to provide rate stability and to avoid rate increases in the PF Preference rate. This goal has become generally known as the imprecisely worded "rate pledge." The Subscription ROD, however, specifically stated that rates would be decided in the BPA's rate case: "The Subscription Strategy does not establish any rates or rate designs. The establishment of rates and use of rate design can be determined only in a formal hearing under section 7(i) of the Northwest Power Act." *See, e.g.*, Power Subscription Strategy, Administrator's ROD, at 115. Also, as noted previously, one cannot simply look at calculations of benefits that are received by looking at rates for one customer class or another and conclude that overall benefits should be distributed differently. BPA must comply with the Northwest Power Act's rate directives. These directives establish two different rates that apply to BPA's sales to public agency customers and BPA's IOU customers participating in the REP. Under the REP, IOUs pay the PF Exchange rate for power purchased from BPA. This rate, however, may not be the same level as the PF Preference rate. The Northwest Power Act established what is called the 7(b)(2) rate test, which is discussed in greater detail in BPA's 2002 Wholesale Power Rate Adjustment Proceeding, Final Rate Proposal, Section 13. 16 U.S.C. § 839e(b)(2) (1994 & Supp. III 1997). This test is designed to protect preference

customers from certain costs incurred under the Northwest Power Act, including REP costs. If the 7(b)(2) rate test does not trigger, the PF Preference rate and the PF Exchange rate are equal. If the 7(b)(2) rate test triggers, however, the PF Exchange rate is subject to a surcharge and is higher than the PF Preference rate. The lower the PF Exchange rate, the higher the REP benefits. The higher the PF Exchange rate, the lower the REP benefits. This is the manner in which rates must be established by BPA under the Northwest Power Act. Where, as in the current rate case, the 7(b)(2) rate test triggers, it is not at all surprising that consumers of preference customers would receive greater “benefits” than the IOUs’ residential consumers. This is the way that the Northwest Power Act works. In years when the 7(b)(2) rate test did not trigger, as has occurred periodically over the last 15 years, the IOUs receive greater benefits. In years when the 7(b)(2) rate test triggers, the IOUs receive lesser benefits. Furthermore, as discussed elsewhere in greater detail, the REP does not guarantee any level of benefits. *See* BPA’s Power Subscription Strategy, Administrator’s Supplemental ROD, at 15-18; 2002 Final Power Rate Proposal, Administrator’s ROD, WP-02-A-02, at 14-1 to 14-11. The amount of power and monetary payments available in the Subscription settlement proposal is an appropriate level benefits for settlement of the REP. In summary, while different customer classes may receive greater or lesser benefits of the Federal system in any particular rate period, this is a result of the implementation of the directives of the Northwest Power Act. While it is unfortunate that some customer classes may receive greater benefits than other customer classes, BPA cannot unilaterally change the law.

PSE argues that by the mid-1970s, because of regional economic growth, BPA forecast that there would not be enough inexpensive Federal power for all citizens in the region. PSE, IOURESEXC:018. PSE argues that BPA responded to the regional growth by proposing to cut off all customers of the region's IOUs, and it issued Notices of Insufficiency. *Id.* PSE argues that this forced several utilities with the greatest population increases, including PSE, to find new power sources. *Id.* PSE argues that these new power sources cost substantially more than the Federal power system because of higher taxes and financing costs, new environmental laws, higher-cost fuel, and the enactment of PURPA. *Id.* PSE argues that this gap in costs between the existing low cost Federally funded regional hydropower and the new power sources created a potential gap in rates that the Congress intended to alleviate with the 1980 Northwest Power Act. *Id.* PSE argues that from 1960 to 1998, growth in residential customers in PSE's service area was 2.5 times that in the rest of the region, and from 1980 to 1990, PSE's area accounted for more than one-third of the region's growth. *Id.* PSE argues that as a consequence, PSE was faced with the need to make large resource acquisitions during the 1980s when new resource costs were high, and PSE has a relatively high average system cost as a result. *Id.* PSE argues that benefits from BPA should be fairly allocated among the residential and small farm customers of the regional IOUs. *Id.* PSE argues that, in that regard, utilities such as PSE, which experienced very high load growth in the 1980s when replacement resource costs were high, have average system costs that are relatively high. *Id.* PSE argues that a fundamental concept of the Northwest Power Act was to allocate benefits of Federal power to the customers of those utilities experiencing increased costs as they acquired expensive new resources to meet load growth in the region. *Id.* PSE argues that the effect of these high cost resource acquisitions will

continue to at least 2012. *Id.* PSE argues that, accordingly, for this period, BPA's allocation of Federal power benefits to residential and small farm customers should be based on average system cost. *Id.* PSE argues that continuing this allocation through 2011 should allow a reasonable period for new BPA legislation and transition to a new paradigm, in which access to BPA benefits is not necessarily based on average system cost. *Id.* PSE notes that BPA proposed to allocate 7/19ths of the IOUs' REP benefits to PSE's customers for the FY 2002-2006 period. *Id.* PSE argues that this fraction should not be reduced for the 2007-2011 period, in light of the continuing high average system cost faced by PSE. *Id.*

BPA previously recognized that PSE's proposal to allocate the Settlement Agreement benefits on the basis of ASC was one of many ways in which an allocation of benefits among IOUs might be determined. *See* Power Subscription Strategy, Administrator's Supplemental ROD, at 26. PSE's proposal focuses on a single element: utilities' ASCs. PSE, IOURESEXC:013. The Commissions' recommendation and BPA's proposal for the allocation of settlement benefits, however, rely on many different considerations, including the amount of residential and small farm load eligible for the REP, the historical provision of REP benefits, the REP benefits received in the last five-year period ending June 30, 2001, rate impacts on qualifying customers, and the individual needs and objectives of each state. BPA believes this is a more comprehensive basis on which to base an allocation than simply using forecasted ASCs. In addition, PSE's suggestion to rely on utilities' ASCs is troublesome. Residential Exchange Termination Agreements have been negotiated with all but one of the previously active exchanging utilities. Previously, an exchanging utility's ASC forecast was typically based on the costs included in its last approved ASC Report signed by the Administrator. Such costs were then adjusted to account for inflation, power purchases, and resource additions, and were then applied to forecasted loads for future periods to calculate the forecasted ASC. Because of the Residential Exchange Termination Agreements, BPA no longer receives cost and load data from utilities through ASC filings as was previously required and provided under the RPSAs. In addition, ASCs may change over the course of a settlement period. Thus, reliance solely upon ASCs would not be as thorough a basis for determining benefit allocations as reliance upon a number of relevant factors, which include ASCs as one such factor.

In addition, if BPA were to adopt PSE's proposed methodology, only a few IOUs would be allocated the large majority of the total settlement amount. This conflicts with BPA's stated Power Subscription Strategy goal to "spread the benefits of the Federal Columbia River Power System as broadly as possible, with special attention given to the residential and rural customers of the region." Further, the Commissions noted that their joint recommendation was based on many considerations, including historical REP benefits, which would implicitly reflect those IOUs with higher ASCs. Finally, PSE acknowledges that BPA's allocation proposal allocates 7/19ths of the proposed benefits to PSE's residential consumers for the FY 2002-2006 period, which is a substantial portion of the total benefits. The Commission's recommendation and BPA's proposal to slightly reduce PSE's benefits in the FY 2007-2011 period is based on the same consideration of the many factors identified by the Commissions in their proposal, and

still retains substantial benefits for PSE during that period. In summary, BPA's allocation proposal (based on the Commissions' recommendation) is a reasonable approach to distribute the benefits of the IOU Subscription settlements of the REP. The allocation supports BPA's stated Subscription Strategy goal to "spread the benefits of the Federal Columbia River Power System as broadly as possible, with special attention given to the residential and rural customers of the region."

PSE argues that BPA's power costs should be recovered through its power rates. PSE, IOURESEXC:018. PSE argues that BPA should not propose power sales contracts that prevent the collection of its power costs through power rates. *Id.* PSE argues that the Cost Recovery Adjustment Clause (CRAC) in BPA's power sales contracts should be unlimited, in order to recover all of BPA's power costs through its power rates. *Id.* PSE argues that BPA forecasts power rates that are significantly below market rates; it would be particularly unfair to limit the CRAC recovery to a level that results in BPA power rates that are below market but fails to recover power costs. *Id.* PSE argues that BPA is ignoring the Governors' Transition Board in this regard. *Id.* PSE argues that in a June 15, 1999, letter to BPA's Paul Norman, Mr. John Etchart wrote on behalf of the Transition Board, stating, "[W]e think the principle . . . that power customers should be paying rates sufficient to recover all power system costs up to a limit that approximates market rates before transmission customers are asked to share in meeting the power business' costs is fair and economically sound." *Id.* The only manner in which BPA's Subscription Settlement Agreement's Block Sale Agreement addresses the CRAC is in the following language:

## **11. COST RECOVERY**

- (a) 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 underrecovery charge pursuant to an applicable transmission rate schedule or otherwise applicable law.
- (b) BPA may adjust the rates for Contracted Power set forth in the applicable power rate schedule during the term of this Agreement pursuant to the Cost Recovery Adjustment Clause in the 2002 GRSPs, or successor GRSPs.

The CRAC is a rate mechanism, not a contract mechanism. BPA developed a CRAC in its 2002 Wholesale Power Rate Adjustment Proceeding. The CRAC is discussed in great detail in BPA's 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, Section 7.3. Because the CRAC can only be established in a section 7(i) hearing, BPA cannot change the CRAC in this forum. *See, e.g.*, 16 U.S.C. § 839e(i) (1994 & Supp. III 1997).

While, as discussed above, a number of parties believe the proposed settlement benefits are too high or too low, there are also a number of parties that support BPA's proposed Settlement Agreement benefits, although some are concerned about the use of BPA's five-year flat-block price forecast from BPA's 2002 rate case to calculate monetary benefits under the Settlement Agreements. IPC stated that it supports the allocation of settlement rights of the region's IOUs as recommended by the Commissions. IPC, IOURESEXC:010. Similarly, Avista continues to support the settlement of the rights of the IOUs under the REP on the basis recommended by the Commissions for Subscription power, subject to an acceptable allocation of cash and power. Avista, IOURESEXC:001. Also, Central Lincoln notes that BPA appears to have tried to accommodate the shifting needs of all or most entities that will be applying for REP subsidy benefits, in order to pass through those benefits to consumers. Central Lincoln, IOURESEXC:007.

Similarly, the WUTC believes total benefits and terms and conditions of the proposed settlements are reasonable and consistent with the proposal made by the States in the fall of 1999. WUTC, IOURESEXC:016. The WUTC believes that it is appropriate and beneficial for BPA to offer to settle REP rights on these terms for a number of reasons. *Id.* First, to the degree power is taken, settlement on subscription terms broadens the stake in the Federal system across the region. *Id.* Second, it provides BPA and the settling utility with some certainty about commitment and benefit levels. *Id.* Finally, it may benefit BPA and the settling utility by reducing some of the administrative burden attendant to administration of the REP. *Id.* The WUTC notes that to the degree that these are benefits to BPA, they may also be beneficial for BPA's other customers.

In addition, the OPUC noted that it appreciates BPA's creativity in seeking solutions to provide Federal system benefits to IOU residential and small farm customers. OPUC, IOURESEXC:014. The OPUC understands the difficulty in reconciling the tools offered under the Northwest Power Act with an electric industry that is undergoing structural change. *Id.* It is the OPUC's hope that the proposals developed by BPA will successfully act as a bridge to its end goal which is new legislation that: (a) treats all residential customers of the Pacific Northwest equitably independent of supplier; and (b) promotes a competitive market for electricity supply. *Id.* The OPUC notes that last year, in written correspondence, the Commissions provided an allocation of 1900 aMW of Federal system benefits among the PNW IOUs. *Id.* The correspondence also stated that if BPA provides the 1900 aMW, and BPA is fully subscribed, that the Commissions would support the amount as a reasonable settlement of the Subscription process. *Id.* The OPUC maintains that commitment. *Id.* The OPUC notes that, no doubt, some other parties may argue that the settlement offer is too rich. *Id.* The OPUC counters that since the time of our four-state commission correspondence, the market price of power has increased significantly. *Id.* This implies that the value of the cash benefits portion of the settlement has decreased. *Id.* The OPUC notes that the result is that the benefits offered to IOU residential customers is less than that offered to customers of public agencies. *Id.* The OPUC argues that benefits to IOU residential customers have become smaller in relative value because public agencies are served by a range of power products including shaping and Slice. *Id.* BPA understands the OPUC's argument. Issues regarding the use of a BPA rate case forecast for the market price of power are addressed elsewhere in this

ROD. While the market price of power has increased recently, BPA does not know the ultimate magnitude or duration of the increase. However, BPA believes that the proposed Subscription Settlement continues to provide a fair amount of benefits to residential consumers of the IOUs while reflecting the uncertainties inherent in the implementation of the REP.

The IPUC notes that although it knows that the total amount of benefits to be distributed is less than past historical amounts, the amount of the proposed settlement in the Subscription Strategy seems reasonable. IPUC, IOURESEXC:015. The IPUC also notes that it is painfully aware that past interpretations of the conditions for receiving REP benefits have concentrated all Idaho benefits on the customers of a single IOU. *Id.* The IPUC states that to customers of that Idaho IOU, nothing IPUC or BPA can do is likely to make those customers feel satisfied with the new set of conditions under which the benefits of the FCRPS are to be distributed. *Id.* The IPUC states that it knows that the proposed distribution of power and cash benefits combined will bring increased benefits to the aggregate of IOU customers in the State of Idaho. *Id.* On that basis the IPUC offers its support for the Subscription Strategy now being considered by Idaho's IOUs. *Id.*

The IPUC is concerned, however, that there are uncertainties that still need to be resolved by BPA, especially those concerning the methodology for determining net requirements and the method of evaluating the cash equivalents for power in the second five years (FY 2006-2011) of the proposed rate period. *Id.* The IPUC trusts that BPA will shortly be forthcoming with the additional facts necessary to allow Idaho IOUs to make sound decisions concerning acceptance of the Subscription Strategy benefits within the appropriate timetable. *Id.* In response to the IPUC, BPA notes that it published its Section 5(b)/9(c) Policy, Administrator's ROD, on May 23, 2000. This ROD further describes the reasoning behind BPA's Section 5(b)/9(c) Policy. BPA's proposed Settlement Agreement states that the monetary benefits for the second five years of the Subscription Settlement will be based on a forecast of market prices for that period established in BPA's rate case. *See* IOU Block Sales Agreement, Section 4(c)(2)(B). BPA's Power Subscription Strategy stated the same mechanism would be used in the second five years for determining monetary benefits as was used during the first five years. *See* Power Subscription Strategy, at 9.

The IPUC notes that the four states worked long and hard to fashion a Subscription proposal that would provide broader dispersion of benefits to IOU customers. IPUC, IOURESEXC:015. Part of the attractiveness of the proposal for Idaho was based on the fact that the allocation to Idaho provided for increased benefits in the second five-year period from FY 2006-2011. *Id.* The IPUC states that proposals to limit contracts to five years would necessarily lessen the ability of Idaho customers to fully participate in the spreading of benefits that was the goal of the Power Subscription Strategy. *Id.* BPA recognizes that a 10-year offer was a part of BPA's Power Subscription Strategy. BPA plans to offer a 10-year Settlement Agreement if requested by an individual IOU.

The IPUC notes that the terms of the four-state proposal called for allocation of 1900 aMW in some combination of power and cash. *Id.* The relative share of power was originally suggested as 1,000 aMW and it initially appeared as if power and cash were functionally equivalent. *Id.* The IPUC states that the cash equivalent value of power has remained at roughly the same value forecast when the four state proposal was fashioned but, in the meantime, the actual market value of power has risen considerably, thus making the cash equivalent less valuable (or the power more valuable). *Id.* The IPUC argues that in order for IOU customers to achieve the full measure of intended benefits under the subscription proposal, it is essential that some of the benefits be offered in the form of power. *Id.* The IPUC states that without any power, the benefit of the proposal to IOU customers would remain artificially capped at the now under-valued cash equivalent found in the Settlement Agreement. *Id.* In response, BPA notes that it will offer each IOU a pro rata amount of the firm power amount of the Settlement benefits (1,000 aMW) unless an IOU requests a settlement offer based on monetary benefits instead of power or a utility requests a settlement based on power deliveries under section 5(b) and it doesn't have a net requirement to support its full allocation of power. This issue is discussed in greater detail in the section of this ROD addressing limitations on physical deliveries.

NWEC supports the aMW amount of the settlement, but takes issue with the calculation of the monetary portion of the settlement benefit. NWEC, IOURESEXC:020. NWEC argues that the Subscription goal clearly was meant to provide an equivalent benefit to IOU residential customers as that given to preference customers. *Id.* NWEC argues that while that is true for the power portion of the settlement, it is not true for the monetary portion. *Id.* In NWEC's estimate, the monetary benefit is not worth the same as an equivalent power purchase at the PF Preference rate. *Id.* NWEC argues that this occurs because BPA is proposing to calculate the monetary benefit as the difference between the RL rate and its "Forward Flat-Block Price Forecast" established in the recent rate case. *Id.* NWEC argues that while the RL rate equals the PF rate, the forecast used--like any other forecast--is arbitrary, and will almost certainly turn out wrong. *Id.* NWEC argues that if the forecast turns out to be less than the real price, residential customers of the IOUs will be harmed. *Id.* NWEC argues that, on the contrary, if the forecast turns out higher than the real price, IOU customers will receive a windfall and BPA will be harmed--and as a consequence IOU customers will be stigmatized as receiving a "subsidy" which threatens BPA's competitiveness, noting that as was evident in the rate case, low market prices, coupled with moderate or high fish costs, threaten BPA's ability to keep its rates below market. *Id.* NWEC argues that BPA's calculation methodology for the monetary benefit is thus destabilizing both financially and politically. *Id.* NWEC argues that if market prices are high, making BPA flush financially both in absolute terms and in relation to the market, residential customers of the IOUs will find themselves facing increasing rates and in worse shape than their preference counterparts, contrary to the Subscription goals, and this will happen at the same time that BPA will be building huge reserves. *Id.* On the other hand, if market prices are low, BPA's financial health is endangered by the settlement more than it would have been from an actual power sale. *Id.* NWEC argues that BPA's methodology sets up, essentially, a positive feedback loop, which exacerbates any forecast error. *Id.* NWEC argues that using a methodology which



substitutes actual market prices (or true-up to actuals) for the forecast price solves this problem, and urges BPA to amend its proposal in this manner. *Id.* NWECC argues that in informal discussions of this issue with BPA executives, it learned that the agency preferred using a five-year forecast rather than actual prices (or a true-up to actual prices) because it provided BPA with "certainty." *Id.* NWECC argues that such "certainty" actually increases BPA's financial and political volatility and it reduces BPA's certainty. *Id.* In response to NWECC, BPA's proposed settlement begins with the determination of an amount of power that would be reasonably sufficient to settle the REP. However, BPA currently has a specific inventory of Federal power. BPA does not know the amount of power that will be purchased by preference customers in Subscription. While BPA can augment its firm inventory through power purchases, such augmentation would increase BPA's costs and thus BPA's rates, with consequent effects on BPA's competitiveness. Due to this uncertainty, BPA requires flexibility in the structure of the Subscription settlement offer for the REP, which is accomplished through a combination of power and monetary benefits. The establishment of a monetary alternative is therefore important to the flexibility and viability of the proposed settlement.

It must be remembered that BPA first concluded that reliance on a stable forecasted market price was necessary when BPA determined that the total amount of settlement benefits to the IOUs should be increased from 1500 aMW in BPA's Power Subscription Strategy Proposal to 1800 aMW in BPA's Power Subscription Strategy. *See* Power Subscription Strategy, Administrator's ROD, at 51. BPA concluded that "[i]n order to offer 1800 aMW, BPA must provide for flat sales to the IOUs and must establish a means for determining the monetary component of the settlements that provides BPA cost certainty during the rate period." *Id.* There are a number of ways in which the market component of the financial formula could be established. BPA proposed, however, to establish this in BPA's 2002 wholesale power rate case. Contrary to NWECC's argument, BPA's development of its five-year flat block price forecast was not arbitrary, but rather was based on extensive analysis, testimony, and other record support. *See* 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, Section 10.11. The development of the forecast afforded all interested parties the opportunity to address this issue in a formal evidentiary proceeding. This also provided BPA with a definition that would not cause BPA's financial risk to change during the FY 2002-2006 rate period. BPA was facing a substantial number of risks in BPA's rate case, for which BPA developed a risk mitigation strategy. BPA needed to limit BPA's risk in as many other areas as possible. BPA proposed to base the monetary component of the settlement on the difference between the market forecast established in the rate case and the rate for Subscription sales to IOUs. This established a fixed financial obligation for the proposed settlement that would not subject BPA to changing risk. BPA needed a predictable cost in order to ensure a high Treasury Payment Probability and competitive rate levels. If BPA used an actual market price to calculate the financial component, and not a mechanism to establish the cost (such as a market forecast), and BPA did not achieve a high enough level of planned net revenues for risk embedded in its cost-based rates to account for the risk associated with the uncertainty of the market, BPA's Treasury payments could be jeopardized. Furthermore, NWECC assumes that BPA will have substantial amounts of secondary energy in this scenario. This assumption is not

necessarily true. BPA could have larger than expected loads placed on BPA by public agencies under this scenario. BPA could also have smaller than expected amounts of secondary energy to sell in these markets for several reasons. First, BPA would likely rely on its secondary energy to meet its augmentation needs if it faced high market prices for purchases. Second, BPA would have lower amounts of secondary energy if public customers requested a large amount of Slice of the system, which includes a secondary energy sale. In summary, the use of actual market prices would subject BPA's efforts to recover its costs through revenues from power sales to additional risk, despite the fact that cost recovery is one of BPA's foremost statutory obligations. 16 U.S.C. § 839e(a)(1) (1994 & Supp. III 1997).

### **Decision**

*The total amount of benefits and the proposed terms and conditions for settling the rights of regional IOUs to request benefits under the REP are reasonable and provide proper consideration for such settlement.*

## **III. REDUCTION IN TOTAL AMOUNT IF UTILITY SIGNS RPSA**

### **Issue**

*Whether BPA should reduce the 1,900 aMW settlement amount by the amount of Subscription Settlement benefits allocated to an IOU if the IOU signs an RPSA.*

### **Parties' Positions**

The PPC and SUB argue that the Subscription Settlement Agreements should include provisions stating that the 1900 aMW of benefits should be reduced by the amounts offered to each IOU if they sign an RPSA. PPC, IOURESEXC:006; SUB, IOURESEXC:003.

### **BPA's Position**

If an IOU chooses to participate in the traditional REP instead of the settlement, BPA will reduce the total IOU Subscription settlement amount by the amount allocated to such IOU in the settlement offer made by BPA.

### **Evaluation of Positions**

PPC argues that the draft contracts must clarify the ramifications of IOU participation in the REP or Settlement; specifically, the 1900 MW should be decremented by the amount of Subscription Settlement power allocated to an IOU if the IOU signs an RPSA. PPC, IOURESEXC:006. Similarly, SUB argues that should any IOU not participate in signing a Settlement Agreement and instead pursue traditional REP benefits from BPA, the total benefits allocated to all IOUs should be reduced based on the amount of Subscription

settlement power allocated to any IOU that does not sign a Subscription settlement. SUB, IOURESEXC:003.

BPA initially concluded in its Power Subscription Strategy that, if an IOU chose to participate in the traditional REP, the Subscription Settlements for the IOUs would be reduced by the amount that would have gone to such utility. *See* Power Subscription Strategy, at 8. Because this initial language was imprecise, BPA clarified this language in its Power Subscription Strategy. Power Subscription Strategy, Administrator’s Supplemental ROD. The WUTC requested that BPA not change any offers to individual utilities based on decisions made by other utilities. WUTC, IOURESEXC:016. BPA agreed that the amount of reduction in total settlement benefits once BPA has made offers to individual utilities should be reduced by the amount of proposed settlement benefits offered to a utility if that utility elected to proceed with the REP. BPA changed the Power Subscription Strategy to read: “If an IOU chooses to request REP benefits under section 5(c), then the total IOU Subscription settlement amount would be reduced by the amount originally allocated to the exchanging utility, with the settlement amounts allocated to the other utilities remaining unchanged.” *See* Power Subscription Strategy, Administrator’s Supplemental ROD, at 29.

### **Decision**

*BPA will reduce the firm power and monetary benefit amounts provided in total to the IOUs by the settlement amount originally offered to an IOU if it chooses to take benefits under the REP, leaving the settlement offers to the other IOUs unchanged.*

## **IV. PHYSICAL POWER LIMITATIONS**

### **A. Deliveries of More than 1,000 aMW**

### **Issue**

*How should BPA limit physical deliveries to each IOU if the IOUs collectively request physical deliveries of more than 1,000 aMW and such deliveries are more power than BPA is willing to offer?*

### **Parties’ Positions**

The NWECA, WUTC, IPUC, OPUC, PacifiCorp, IPC, Avista, and PSE argue that BPA should provide as much power as requested by the IOUs and not limit deliveries to 1000 aMW of power. NWECA, IOURESEXC:020; WUTC, IOURESEXC:016; IPUC, IOURESEXC:015; OPUC, IOURESEXC:014; PacifiCorp, IOURESEXC:011; IPC, IOURESEXC:010; Avista, IOURESEXC:001; PSE, IOURESEXC:018. PGE and the OPUC argue that BPA should work with the Commissions to seek a consensus. PGE, IOURESEXC:021; OPUC, IOURESEXC:014. The WUTC, SUB, and PSE argue that BPA should allocate amounts of physical power based on the residential load of the

IOUs. WUTC, IOURESEXC:016; SUB, IOURESEXC:003; PSE, IOURESEXC:018. The IPUC argues that BPA should limit deliveries of physical power for each utility's share of total benefits based on the ratio of physical deliveries to total benefits (1000/1900) contained in the total benefits. IPUC, IOURESEXC:015. PacifiCorp and Avista argue that BPA should provide each utility a minimum allocation of power based on the ratio of power deliveries to total benefits times each utility's share of the total benefits. PacifiCorp, IOURESEXC:011; Avista, IOURESEXC:001. PacifiCorp argues that BPA should not shift power among the states until all the power requests in a particular state have been met. PacifiCorp, IOURESEXC:011. PacifiCorp believes BPA should allocate power among the IOUs for amounts in excess of their minimum allocation based on their requests for power. *Id.* IPC believes that BPA should allocate any remaining amounts of power in excess of each utility's minimum allocation of power based on utilities' initial allocations of power. IPC, IOURESEXC:010. Avista believes that BPA should allocate any amounts of power in excess of a utility's allocation based on the utility's residential loads and not based on the requests for power by the utility. Avista, IOURESEXC:001.

### **BPA's Position**

BPA has attempted to work with the IOUs to meet the needs of each utility. While BPA agrees with a number of the principles expressed by each party, BPA does not agree that any one single proposal meets all the principles that BPA should use to address this issue. BPA needs to make an offer to each utility as soon as possible in September to settle their rights to participate in the REP. BPA is unwilling to offer more than 1000 aMW of power. BPA will make an offer of power to each IOU unless that IOU asks BPA to offer a settlement providing monetary benefits instead of power benefits.

BPA believes the following principles should be met by any allocation:

1. Each IOU should receive an initial allocation of power.
2. Initial allocations of power should only be reduced if a utility unconditionally requests a settlement offer based on monetary benefits instead of power or a utility requests a settlement based on power deliveries under section 5(b) and it does not have a net requirement to support its full allocation of power.
3. Any allocation method should not shift power among the states unless all requests for power in a state have been met.
4. The allocation methodology should use the method designed by the Commissions and adopted by BPA for allocating the total benefits among the states and individual utilities to the maximum extent possible.
5. Once an allocation of power and monetary benefits is established for a utility, the settlement amounts to other utilities will remain unchanged prior to closure of the Subscription window regardless of the decisions by any one utility. BPA will offer to amend the Subscription Settlement Agreements of parties requesting firm power, but which do not receive their full request for firm power, to substitute additional amounts of firm power for monetary benefits based on any amounts of firm power

that become available where an IOU signs a Settlement Agreement taking monetary benefits in lieu of firm power.

### **Evaluation of Positions**

Many of the following comments raise identical issues; particularly, whether BPA should provide all the power requested by the IOUs and whether pro rata allocations should be used. These issues will not be addressed after each individual comment, but rather after all of the comments have been summarized below. Specific issues raised by a single party will be addressed immediately after that party's comments.

The WUTC notes that if the aggregate subscription amount exceeds 1,000 aMW, it hopes BPA would make an effort to meet as much as possible of the request. WUTC, IOURESEXC:016. The WUTC states that the subscription requests of the IOUs represent a meaningful commitment to the Federal power system. *Id.* The WUTC suggests that if that is not possible, it recommends that the requests be reduced on a pro rata basis taking into account the eligible load of the utilities requesting physical power deliveries. *Id.*

The IPUC notes that given that essential ambivalence over the form of the benefits, it would prefer to see BPA show a willingness to accommodate a desire by the IOUs for physical power beyond 1,000 aMW, if that should happen to be the sum of the individual choices made by IOUs. IPUC, IOURESEXC:015. The IPUC realizes there may be compelling conditions which would prevent BPA from making a willing offer, but hope that will be restricted to unusual circumstances. *Id.* The IPUC notes that if any reductions are necessary to restrict the amount of power to 1,000 aMW, utilities should be held to pro rata amounts based on the balance between power and cash in the original Subscription allocation (1,000 aMW of power out of a total of 1900 aMW). *Id.*

The OPUC argues that if BPA is fully subscribed, it is its understanding that BPA has not committed to provide more than 1,000 aMW of power to the IOUs. OPUC, IOURESEXC:014. The OPUC argues that if the IOUs request more than 1,000 aMW in power, it certainly hopes that BPA will strive to meet those requests. *Id.* The OPUC notes that the question posed suggests that BPA may be requested to supply an amount of power greater than BPA is willing to offer. *Id.* The OPUC's preference is for BPA to supply as much power as requested, up to at least 1450 aMW (the 1450 is midway between 1900 and 1000 aMW). *Id.* The OPUC argues that if BPA is unwilling to provide 1450 aMW in power, if requested, then the Commissions should try to work cooperatively with BPA to seek an allocation that best meets the specific circumstances facing each state and IOU. *Id.*

PacifiCorp urges BPA to meet the combined requests for delivery of power by settling utilities. PacifiCorp, IOURESEXC:011. PacifiCorp argues that in the event that utilities request more power than BPA is willing to offer, BPA should adopt the following approach. *Id.* To maintain the equitable sharing of power benefits among the four states, the initial pro rata shares of power should not shift power benefits between

states. *Id.* For example, Oregon's initial share of power equals 258 aMW for PGE and 133 aMW for PacifiCorp for a total initial Oregon pro rata share of 391 aMW of power. *Id.* If PacifiCorp requested zero power and PGE requested 490 aMW of power, PGE would receive a minimum of 391 aMW of power. *Id.* For a state to receive more power benefits than its combined utilities' initial pro rata shares, utilities in other states would have had to request less than their initial pro rata shares of power. *Id.* PacifiCorp provides the following example:

Assumptions:

PacifiCorp requests zero power benefits.

PGE requests 490 aMW of power benefits.

All other IOUs request their initial pro rata shares of power.

Utility's initial pro rata share of power = (utility's subscription benefit / 1,900 aMW) x 1,000 aMW.

Calculations:

Step 1

Oregon's pro rata share is 391 aMW based upon PGE's 258 aMW initial pro rata share of power plus PacifiCorp's 133 aMW initial Oregon pro rata share of power.

Step 2

At this point, 117 aMW' of the 1,000 aMW of power remains available. Therefore, 99 aMW of the 117 aMW is assigned to PGE, the only utility requesting more power than its allocation from Oregon's initial share.

Result:

PGE would receive 490 aMW of power benefits and 18 aMW of the 1,000 aMW of power remains unrequested.

*Id.* PacifiCorp argues that the number of scenarios as to how the IOUs will request their Subscription benefits (power versus financial) is very large. *Id.* PacifiCorp notes that this approach may require calculation of many consecutive pro rata allocations between states and among the utilities within a state to fully allocate all the power BPA makes available. *Id.* PacifiCorp argues that this approach would maintain the balance among states and utilities that the Commissions worked hard to achieve. *Id.* PacifiCorp argues that this will ensure that power benefits are not unfairly shifted between states and no request for power will remain unsatisfied if power benefits are available, including amounts of power made available by BPA in excess of the 1,000 aMW. *Id.*

IPC argues that if the IOUs, in aggregate, request more than 1,000 aMW and BPA is unwilling to increase the amount of physical deliveries, then the amount of power

requested above the utility's pro rata share should be divided according to each requesting utility's initial pro rata share of power. IPC, IOURESEXC:010. For example:

**Initial Pro-Rata Allocation:**

	<b>Utility Total Benefits</b>	<b>Physical</b>	<b>Financial</b>
<b>A</b>	900	474	426
<b>B</b>	500	263	237
<b>C</b>	500	263	237
<b>Total</b>	<b>1,900</b>	<b>1,000</b>	<b>900</b>

**Request:**

<b>A</b>	900	900	0
<b>B</b>	500	500	0
<b>C</b>	500	0	500
<b>Total</b>	<b>1,900</b>	<b>1,400</b>	<b>500</b>

**Allowed Take:**

<b>A</b>	900	643 (1)	257
<b>B</b>	500	357 (2)	143
<b>Cc</b>	500	0	500
<b>Total</b>	<b>1,900</b>	<b>1,000</b>	<b>900</b>

(1)  $=((1\ 000-(474+263))*(474/(474+263)))+474.$

(2)  $=((1\ 000-(474+263))*(263/(474+263)))+263.$

*Id.* However, IPC believes that if the requests for power are greater than the original 1,000 aMW, BPA should find a way to accommodate each utility's initial request. *Id.*

Avista argues that if the IOUs, in aggregate, request more than 1,000 aMW in actual power deliveries, in no event should BPA limit each individual utility's receipt of power to the extent that the total aggregate deliveries of power will be less than 1000 aMW. Avista, IOURESEXC:001. Avista argues that in the event such deliveries in excess of 1000 aMW are more power than BPA is willing to offer, BPA should apply the following principles regardless of how much power each utility has actually requested in excess of its initial pro rata share. *Id.* If a utility has requested more power than its initial pro rata share, such utility shall in no event receive less than its initial pro rata share, based upon total benefits received, of the 1000 aMW. *Id.* Mathematically speaking, no such utility, if it so requests, shall receive less than: (Total power & cash benefit allocation) x (1000/1900). *Id.* Avista argues that until each utility's requested level of power benefits is met or until the maximum aggregate amount of power BPA is willing to offer (which should be greater than or equal to 1000 aMW) is met, each utility should receive

additional power above its initial share, distributed in a pro rata fashion based upon the estimated average REP load served by the utility during the first five-year rate period (FY 2002 – FY 2006). *Id.* Avista argues that these principles should be independent of the actual percent of total benefits requested in power by a utility. *Id.* In other words, Avista argues that should BPA apply any limits to physical power deliveries in the event the aggregate requests exceed 1000 aMW, a utility requesting 80% of its total benefits in power should not be disadvantaged in receiving power with respect to a utility requesting 100% of its total benefits in power. *Id.*

PSE argues that if requests for power (rather than monetary benefits) by the IOUs are more than 1000 aMW, such requests should be filled by BPA as requested. PSE, IOURESEXC:018. PSE argues that if allocation of power is necessary, such allocation should be in proportion to the respective residential loads of such utilities. *Id.*

PGE argues that BPA should work in a cooperative fashion with the Commissions to reach a resolution of the problem. PGE, IOURESEXC:021. PGE notes that the Commissions have been actively involved in helping residential consumers obtain at least some benefits and appear willing to remain engaged until any problems are resolved and contracts are finalized. *Id.* PGE argues that for BPA to suddenly make a unilateral decision that could upset the balance struck by the Commissions could be harmful to the consensus that exists. *Id.* BPA notes that this issue has received a great deal of comment during the recent comment period. These comments include all comments submitted by the Commissions. BPA has carefully reviewed these comments and has used them in developing BPA's decision on this issue, as discussed in greater detail below. BPA is not able to defer this issue to the Commissions since BPA must make Subscription Settlement Agreement offers. Any process to develop an allocation methodology would require an amount of time that is not available before the Subscription window closes. The Commissions have known about this issue since May and BPA would have welcomed a joint recommendation.

NWEC argues that monetary benefits as calculated in BPA's proposed methodology are more destabilizing to BPA's revenues and the political consensus, and more fair to IOU customers, than physical deliveries. NWEC, IOURESEXC:020. NWEC argues that if BPA has the opportunity to deliver more of the settlement as power, it should do so. *Id.* NWEC argues that such a policy might cause BPA to have to increase the amount of augmentation it has planned for. *Id.* NWEC argues that since BPA's financial health varies directly with market prices (higher market prices increase reserves and vice versa), increased augmentation coupled with reduced monetary benefits reduces the agency's reserve volatility. *Id.* NWEC assumes that BPA's financial health is only impacted by market prices and that BPA will benefit due to any increase in those prices. NWEC assumes that higher market prices will result in increased surplus revenues that could be used to pay higher augmentation costs due to higher market prices. In response to these arguments, NWEC's assumptions do not address all the factors affecting BPA's rate case. If BPA has underforecasted its loads, as currently appears to be the case, higher market prices would negatively impact BPA's financial health and potentially use up any surplus revenues that NWEC would assign to augmentation. Other factors affecting the amount



of surplus revenues available to pay higher augmentation costs include the amount of the Slice product requested by other customers, which reduces the amount of surplus energy BPA has available. BPA therefore does not agree with NWECE's assumption that increased augmentation reduces the agency's reserve volatility.

NWECE argues that there is great reason to doubt BPA's market price forecast, besides the fact that it is simply very difficult to accurately predict prices 2-7 years in advance. *Id.* NWECE argues that BPA's forecast is four mills/kWh below its own marginal price forecast. *Id.* NWECE argues that BPA is assuming that it will be able to purchase five-year block power for well below the marginal price. *Id.* NWECE argues that this may or may not be true. *Id.* NWECE argues that there is just as much reason to think that five-year fixed contracts may require a premium, rather than a discount, compared to the spot price which Aurora forecasts. *Id.* NWECE argues that that has been the case previously, and could happen again. *Id.* NWECE argues that determining whether we will be in a "buyer's" (*i.e.*, fixed contracts sell at a discount) or "seller's" (*i.e.*, fixed contracts sell at a premium) market for the next few years is not a science. *Id.* BPA concurs with NWECE that forecasting market prices is not a precise science. BPA decided in its Power Subscription Strategy that it would limit the amount of augmentation it was willing to do for IOUs. *See* Power Subscription Strategy, at 9; Power Subscription Strategy, Administrator's ROD, at 58-60. This mechanism contributes to the necessary levels of Treasury Repayment Probability required by BPA.

Central Lincoln argues that quantity is the key to how BPA should limit physical deliveries to each IOU if the IOUs collectively request physical deliveries of more than 1,000 aMW and such deliveries are more power than BPA is willing to offer. Central Lincoln, IOURESEXC:007. Central Lincoln argues that if the total is a significant "more than," then it is probably time to turn to the "in lieu" provision in the law. *Id.* BPA does not clearly understand this argument. The "in lieu" provisions of section 5(c) of the Northwest Power Act apply to the administration of the REP through the RPSAs. BPA has reviewed comments on the proposed in lieu provisions of the RPSA, which are addressed in the separate RPSA ROD. The Settlement Agreements do not provide for the implementation of traditional in lieu transactions. Discussion of in lieu power sales as part of a Settlement Agreement is contained in a separate section below.

SUB argues that BPA should allocate 1,000 aMW (or the most economical physical delivery amount to BPA that is at or below the total benefit amount) on a pro rata basis based on each utility's residential load compared to the total residential load served by all IOUs requesting power. SUB, IOURESEXC 003.

A number of the foregoing comments suggest that BPA should meet the IOUs' requests for firm power, whatever their amount. BPA considered such requests in its Power Subscription Strategy and determined that the amount of firm power would be limited to 1000 aMW unless BPA determined that additional power deliveries were the most cost-effective approach for BPA. *See* Power Subscription Strategy, at 9. Recent events in the market have resulted in a near-term increase in market prices. BPA does not believe additional power deliveries would be the most cost-effective approach for BPA.

PacifiCorp, IPC and Avista have provided specific proposals for allocating any amounts of firm power not taken by an IOU. PacifiCorp, IOURESEXC:011; IPC, IOURESEXC:010; Avista, IOURESEXC:001. While BPA has adopted parts of their proposals, BPA does not believe any single proposal addresses all the principles that should be used to guide this decision. BPA did not agree with PacifiCorp's proposal to allocate any remaining amounts of power based on each IOU's initial request for firm power. *See* PacifiCorp, IOURESEXC:011. Using requests for firm power could lead companies to request more firm power than they want in order to maximize a potential allocation. IPC's proposal allowed amounts of power to be shifted among states based on each utility's initial pro rata allocation of power. IPC, IOURESEXC:010. Shifting the power among states before all requests for firm power in a state are met could upset the balance of state interests contained in the allocation methodology for total benefits. Avista argued that any remaining amounts of power should be allocated based on residential loads. Avista, IOURESEXC:001. This methodology could also upset the balance of state interests contained in the allocation methodology for total benefits.

As noted previously, BPA believes the following principles should be met by any allocation method:

1. Each IOU should receive an initial allocation of power.
2. Initial allocations of power should only be reduced if a utility unconditionally requests a settlement offer based on monetary benefits instead of power or a utility requests a settlement based on power deliveries under section 5(b) and it does not have a net requirement to support its full allocation of power.
3. Any allocation method should not shift power among the states unless all requests for power in a state have been met.
4. The allocation methodology should use the method designed by the Commissions and adopted by BPA for allocating the total benefits among the states and individual utilities to the maximum extent possible.
5. Once an allocation of power and monetary benefits is established for a utility, the settlement amounts to other utilities will remain unchanged prior to closure of the Subscription window regardless of the decisions by any one utility. BPA will offer to amend the Subscription Settlement Agreements of parties requesting firm power, but which do not receive their full request for firm power, to substitute additional amounts of firm power for monetary benefits based on any amounts of firm power that become available where an IOU signs a Settlement Agreement taking monetary benefits in lieu of firm power.

BPA believes that these five principles will maintain the balance of interests among the states adopted by BPA in its Power Subscription Strategy, Administrator's Supplemental ROD. BPA made a decision to allocate total benefits to the IOUs in each state based on a recommendation submitted by the Commissions. BPA found that the Commissions had properly considered many factors in developing their proposal and established a reasonable basis for a fair allocation of the settlement benefits.

BPA's first principle is necessary in order to establish a starting point for the power allocations. The first principle also helps to implement the third principle, which states that any allocation method should not shift power benefits among the states until all requests for power in a state have been met. Providing an initial allocation of power is necessary to ensure that BPA does not shift power among the states based on its offers to the IOUs.

BPA's second principle identifies the reasons that BPA would reduce the amount of power going to any IOU. BPA would reduce the amount based on a request by the utility. Requests to substitute monetary benefits for firm power in the initial allocations must be made on an unconditional basis and result in a signed Settlement Agreement substituting monetary benefits for firm power. BPA will offer firm power to a utility if it does not make an unconditional request for monetary benefits. BPA would also reduce the amount if a utility requested a settlement based on power deliveries under a section 5(b) contract and it did not have a net requirement to support the allocation of power requested.

BPA's third principle reflects BPA's determination that power should not be shifted among the states until all requests for power in a state have been met. This principle works in conjunction with the fourth principle of following the allocation methodology, proposed by the Commissions and adopted by BPA, to the maximum extent possible.

BPA's fourth principle identifies the basis for BPA's methodology for allocating power amounts among the IOUs. Use of the allocation methodology proposed by the states and adopted by BPA represents the best virtual consensus on a fair method for allocating the amounts of power to individual IOUs.

BPA's fifth principle recognizes a change proposed by the WUTC in BPA's Power Subscription Strategy. The WUTC requested that BPA not change any offers to individual utilities based on decisions made by other utilities. WUTC, IOURESEXC:016. BPA agreed that the amount of reduction in total benefits once BPA has made offers to individual utilities should be reduced by the offer made to a utility if that utility elected to proceed with the REP, without affecting the amounts offered to other IOUs. *See* Power Subscription Strategy, Administrator's Supplemental ROD, at 29. The same principle should apply if an individual utility negotiates an agreement with BPA to change an aspect of its settlement offer that was used by BPA to establish the initial allocation. BPA will not change the Settlement offers made to other IOUs based on the actions of other utilities during the Subscription window. This principle is necessary to bring the Subscription process to conclusion with final offers that each utility can consider.

BPA's fifth principle also addresses the concerns raised by a number of commenters that BPA should not reduce the amount of firm power delivered to the IOUs below 1000 aMW. BPA commits in this ROD to offer amendments to the Subscription Settlement Agreements offering to amend the Settlement Agreement to substitute firm power benefits for monetary benefits during the October 1, 2002, through September 30, 2006, period for any amounts of firm power offered to an IOU where the IOU signs a

Subscription Settlement substituting monetary benefits for firm power. BPA would offer the amendments based on the allocation principles described in this ROD.

BPA proposed in its Power Subscription Strategy to provide 1800 aMW of benefits (later revised to 1900 aMW in BPA's Power Subscription Strategy, Administrator's Supplemental ROD) with at least 1000 aMW of those benefits offered as power deliveries. *See* Power Subscription Strategy, at 9; Power Subscription Strategy, Administrator's Supplemental ROD, at 11-23. BPA stated that the additional benefits would be provided as power deliveries or monetary benefits, whichever appeared most economic to BPA. BPA believed it needed to limit the amount of power deliveries it would make available for settlement of the IOUs' rights based on the limited amounts of Federal power inventory. *See* Power Subscription Strategy, Administrator's ROD, at 55-56.

BPA believes that each IOU should receive an initial share of power based on the initial allocation of total benefits to a utility in a state, multiplied by the ratio of power provided by BPA to the total benefits. The allocation methodology adopted by BPA in the Supplemental ROD for the Power Subscription Strategy follows the principle of using the allocation methodology designed by the Commissions to the maximum extent possible. This methodology weighed a number of factors regarding the benefits individual IOUs would have received under the REP. BPA found the Commissions' proposal to be a reasonable method that reflected a fair allocation of benefits to residential consumers of the Pacific Northwest. *See* Power Subscription Strategy, Administrator's Supplemental ROD, at 25.

If an IOU unconditionally requests monetary benefits instead of power or an IOU does not have a net requirement to support its initial allocation of power under a section 5(b) contract, BPA will reduce the amount of power provided to that utility and replace the reduction with monetary benefits. BPA cannot offer amounts of firm power that exceed an IOU's net requirements and BPA is willing to limit the amount of firm power based on a utility's request. BPA agrees with PacifiCorp that the power benefits made available to a state should not be shifted to another state until all requests from that state have been met. BPA believes this is a sound principle based on the original interest expressed by Commissions that they would like to see as much of the benefit under the settlement provided as power instead of monetary benefits and the above-noted requests by most parties that BPA meet all power requests.

If an IOU does not have a net requirement to support its initial allocation of power, BPA will reduce the amount of power provided to that utility to its net requirements if the IOU requested a Settlement Agreement providing power deliveries under section 5(b). *See* BPA's Section 5(b)/9(c) Policy, Administrator's ROD, at 16-17. BPA will allocate the reduction in the initial power allocation for a utility to each state based on the ratio of the initial power allocation for a state to the utility's total power allocations for all states. This allocation will preserve the initial pro rata share of firm power deliveries to the consumers in each state. If the IOU requested a settlement providing power deliveries

under section 5(c), there would be no reduction in its initial allocation of power deliveries based on the IOU's net requirements.

In allocating any excess amounts of power to utilities in a state, BPA believes the best method to use is the one proposed by IPC. IPC proposed that BPA allocate among utilities with remaining unmet requests based on the utilities' initial allocations of power. IPC, IOURESEXC:010. Using this method provides the power to the IOUs in a state in a manner proportional to their original benefits and meets the principle of using the allocation methodology, proposed by the Commissions and adopted by BPA, to the maximum extent possible.

If the excess power for a state met all the requests for power of utilities in a state, the best method to use for allocating the remaining excess power is to allocate the power to those utilities with remaining unmet requests based on the total of their initial allocations of power for all states. This allocation would allocate the power to the other IOUs to meet any remaining unmet requests.

In summary, BPA will establish an initial power allocation for each IOU in each state. Such allocation for each state will be based on the IOU's pro rata share for that state of the total settlement benefits for all the IOUs multiplied by the ratio of the amount of power provided by BPA (1,000 aMW) to the total Subscription benefits (1,900 aMW). BPA will reduce the power allocation of an IOU in any state based on its request to substitute monetary benefits for firm power prior to execution of the Subscription Settlement. If an IOU's initial power allocation for all states exceeds its net requirements, for IOUs requesting a section 5(b) contract, BPA will reduce the power allocation of the IOU by a pro rata amount in each state equal to the amount that its initial power allocation for all the states exceeds its net requirement multiplied by the ratio of its initial power allocation for a state multiplied by its total power allocation for all states. BPA will allocate any excess amounts of power in a state to the utilities in that state based on the ratio of the initial power allocation to a utility for a state to the total power allocation of utilities with unmet requests in that state. Any remaining amounts of excess power allocation available after meeting all of the unmet requests for a state would be allocated to the IOUs in the region with remaining unmet requests for power based on their initial power allocations.

### **Decision**

*BPA will establish an initial amount of firm power for each IOU in each state. Any amounts of firm power not taken by a utility will be allocated by BPA to other IOUs in accordance with the principles and in the manner described above.*

## **B. Deliveries of Less Than 1,000 aMW**

### **Issue**

*Whether BPA should require IOUs to take power if the combined requests of all the companies for physical deliveries are less than 1,000 aMW.*

### **Parties' Positions**

Avista, PSE, PGE, PacifiCorp, IPC, the OPUC, the WUTC and the IPUC argue that BPA should not require IOUs to take power if the combined requests of all the companies for physical deliveries are less than 1,000 aMW. Avista, IOURESEXC:001; PSE, IOURESEXC:018; PGE, IOURESEXC:021; PacifiCorp, IOURESEXC:011; IPC, IOURESEXC:010; OPUC, IOURESEXC:014; WUTC, IOURESEXC:016; IPUC, IOURESEXC:015.

NWEC argues that monetary deliveries are very destabilizing to BPA and the region's political consensus if the forecast is not very accurate and that BPA's PNRR and CRAC were designed to deal with the risk of only 900 aMWs of monetary benefits. NWEC, IOURESEXC:020.

SUB argues that if the IOUs request less than 1,000 aMW, and the addition of financial benefits results in benefits which are less than the total benefits allotted to the IOUs, BPA should not require the IOUs to take additional power. SUB, IOURESEXC:003. NRU strongly encourages BPA to pursue Settlement Agreements involving a monetary transaction rather than RPSAs. NRU, IOURESEXC:002. Central Lincoln argues that BPA should resell its own surplus. Central Lincoln, IOURESEXC:007.

### **BPA's Position**

BPA believes that if IOUs' requests for power sales under the settlements fall below 1,000 aMW, BPA should not force the IOUs to purchase power such that the sales reach 1,000 aMW.

### **Evaluation of Positions**

Avista argues that it is not clear whether this question is being directed mainly to the IOUs, or to BPA's other customer classes. Avista, IOURESEXC:001. Avista notes that it will make a determination of whether to settle and thereby accept a Subscription Settlement Agreement with an allocation of cash and power benefits without respect to BPA's "requirements." *Id.* Avista assumes that BPA is asking what should be offered, and from Avista's standpoint, having not been able to participate in the REP for most of the past twenty years, for reasons which Avista judges as unfair, Avista would urge BPA to not foreclose settlement with Avista due to a perceived desire on BPA's part for a particular allocation of power and cash benefits. *Id.*

Similarly, PSE argues that it is not clear whether this question is being directed to the IOUs, or to BPA's other customer classes. PSE, IOURESEXC:018. PSE notes that it will make a determination of whether to settle and thereby accept a Settlement Agreement with cash and power benefits without respect to BPA's "requirements." *Id.* PSE assumes that BPA is asking what should be offered. *Id.* PSE argues, in that regard, if the combined requests of all companies for physical deliveries are less than the amount of physical deliveries offered by BPA, then BPA should provide physical deliveries as requested. *Id.*

PGE notes that BPA is offering "up to 1000 aMW" of power. PGE, IOURESEXC:021. PGE argues that BPA has no authority to require any entity to purchase from it. *Id.* PGE argues that BPA should work in a cooperative manner with the Commissions to determine the best allocation of the power. *Id.*

PacifiCorp argues that BPA should not require any IOU to take power rather than financial benefits. PacifiCorp, IOURESEXC:011. PacifiCorp notes that there are a number of reasons why an IOU may elect to take financial benefits over power, including, but not limited to, BPA's Section 5(b)/9(c) Policy, the availability of transmission service, and the administrative complexities of multistate or intra- and extraregional utilities. *Id.* PacifiCorp argues that if BPA's intent is to reach a reasonable settlement with each IOU, it would seem unreasonable to minimize or eliminate the option to take financial benefits when this option may fit an individual utility's unique circumstances best. *Id.*

IPC does not see any rationale for BPA to require an IOU to take more power than it requests unless BPA believes that it cannot increase the financial benefit above 900 aMW to offset the physical power deliveries under 1000 aMW. IPC, IOURESEXC:010. IPC argues that if BPA must stay at 900 aMW of financial benefits then BPA will have to resort to moving the IOUs to their pro rata share of physical power deliveries. *Id.*

The OPUC does not support BPA requiring IOUs to take more power if the sum of the requests is less than 1000 aMW. OPUC, IOURESEXC:014. Arguing that BPA, to a large degree, is dictating the terms and conditions of the RPSA, Block Power Sale Agreement, and the Settlement Agreement, the OPUC does not believe it is productive to also have BPA dictate to utilities that they must purchase at least 1,000 aMW in aggregate. *Id.* The OPUC notes that each IOU has its own specific concerns and circumstances and the OPUC believes it is preferable for BPA to work cooperatively with the Commissions on this issue. *Id.* The OPUC argues that the Commissions, on behalf of IOUs' residential consumers, have championed the position that Federal system benefits should be provided in power. *Id.* The OPUC has understood that the commitment was that BPA agreed to offer at least 1,000 aMW of benefits as power. *Id.* The OPUC argues that instead of concluding a decision on this issue, which may not even be necessary, BPA should continue to rely on the Commissions to help guide the process. *Id.* It is the OPUC's firm belief that the IOUs in aggregate will request at least 1,000 aMW. *Id.* The OPUC notes that given the recent trend in wholesale power prices, all

else being equal, the OPUC is even more committed to having benefits provided in power. *Id.*

The WUTC argues that a major part of the rationale for the proposal made by the states concerning treatment of the residential and rural loads of IOUs was to ensure that those customers held a stake in the future of the Federal power system. WUTC, IOURESEXC:016. The WUTC notes that purchases of actual power were seen as a good way to accomplish this. *Id.* The WUTC still believes this is an important objective. *Id.* However, the WUTC notes that the circumstances of the utilities may vary. *Id.* Consequently, the WUTC does not propose that each utility be required to take a pro rata, or some other, share of the 1,000 aMW. *Id.* The WUTC does not believe it is necessary to force this issue, particularly in light of the current value of power in the market. *Id.* The WUTC anticipates that, in aggregate, the 1,000 aMW will be subscribed even if some IOUs prefer to take the monetized option. *Id.* The WUTC argues that BPA should not require IOUs to take additional power if subscription for actual power falls below 1,000 aMW. *Id.*

The IPUC's first impulse is to consider physical power and monetary benefits as reasonable substitutes for one another. IPUC, IOURESEXC:015. The IPUC sees no *a priori* reason to prefer one over the other, or to prevent any of its Idaho IOUs from choosing the form of benefit that best fits its own evaluation of its available resources and needs. *Id.* The IPUC notes that its Idaho IOUs seem split on the issue, with one showing a clear preference for physical power, one showing a clear preference for monetary benefits, and one somewhat neutral but stating a preference for a pro rata balance of both power and monetary benefits. *Id.* The IPUC sees no reason to force this choice in either direction. *Id.*

In response to these arguments, BPA notes that it has developed its Power Subscription Strategy allowing BPA to decide whether to offer firm power or monetary benefits for the total benefits in excess of 1000 aMW. BPA would base such decision on the choice that was most cost-effective for BPA. If a number of IOUs elected to take monetary benefits instead of firm power, BPA believes such settlements are in the region's interest if BPA determines they are the most cost-effective means for BPA to settle claims surrounding the REP. Current increases in market prices make it appear that substituting monetary benefits for firm power deliveries is cost-effective for BPA. These substitutions would reduce the amount of firm power BPA must purchase in a volatile market. BPA sees no reason to require the IOUs to take deliveries of firm power if BPA offers the power and they do not wish to take it.

NWEC argues that monetary deliveries (unless BPA's methodology is modified as NWEC proposes) are very destabilizing to BPA and the region's political consensus if the forecast is not very accurate and that BPA's PNRR and CRAC were designed to deal with the risk of only 900 aMWs of monetary benefits. NWEC, IOURESEXC:020. NWEC argues that if substantially more should occur, BPA's TPP could be significantly lowered. *Id.* NWEC believes there are ample net requirements available among the region's IOUs to solve this problem. *Id.* NWEC argues that BPA should request the Commissions to



bring forth a satisfactory proposal to BPA that allows for physical delivery of at least 1,000 aMWs. *Id.* BPA does not agree that negotiated cash payments in lieu of firm power deliveries substantially change BPA's risk profile. BPA believes that a fixed financial obligation would not subject BPA to changing risks and would ensure a high Treasury Payment Probability. *See* Power Subscription Strategy, Administrator's ROD, at 59.

SUB argues that in the unlikely event that all IOUs sign Settlement Agreements, they request less than 1,000 aMW, and the addition of financial benefits results in benefits which are less than the total benefits allotted to the IOUs, BPA should not require the IOUs to take additional power. SUB, IOURESEXC:003. SUB argues that if IOUs request less than 1,000 aMW, but the addition of the request for financial benefits results in the total benefits allotted to the IOUs, then BPA should require IOUs to reduce their requests for financial benefits and purchase 1,000 aMW if it is more economical for BPA to do so. *Id.* SUB argues that if providing financial benefits is more economical to BPA (*i.e.*, can be done at a lower overall cost to BPA) then BPA should allow physical deliveries to be less than 1,000 aMW, otherwise BPA should comply with the Subscription ROD and sell at least 1,000 aMW. *Id.* SUB argues that if the IOUs request less than 1000 aMW, and the addition of financial benefits results in benefits which are less than the total benefits allotted to the IOUs, BPA should not require the IOUs to take additional power. *Id.* BPA agrees with SUB that a reduction in firm power deliveries to the IOUs below 1000 aMW should not be forecast to cost BPA more than it would cost to settle the REP by requiring power deliveries.

Central Lincoln argues that BPA should resell its own surplus. Central Lincoln, IOURESEXC:007. Central Lincoln argues that in spite of a periodic flurry of rumors of great surplus, such as the one that helped spur on the restructuring impetus in the West during the mid-90s, such surplus seems to magically disappear after some political goal has been accomplished. *Id.* Central Lincoln argues that in order for BPA to meet its revenue requirements on a reasonably planned basis, there have to be some ahead-of-time commitments on a use it or lose it basis. *Id.* Central Lincoln argues that in spite of the political needs of the Commissions, BPA (or any power supplier) cannot be expected to be at a daily beck and call of wholesale purchasers frequently changing their minds without any monetary penalty. *Id.* Central Lincoln argues that BPA does not stand in to protect the retail consumers of publicly owned utilities from the boards of those utilities, and it shouldn't be expected to do so for the small consumers of IOUs or marketers or some future incarnation of what used to be distribution systems either. *Id.* Central Lincoln argues that gaming the system shouldn't be encouraged by any entity claiming to represent the public interest. *Id.* BPA agrees with Central Lincoln that an BPA's obligations should be established when the Subscription Settlement Agreements are executed.

NRU argues that given BPA's robust current financial condition, it strongly encourages BPA to pursue Settlement Agreements involving a monetary transaction rather than RPSAs. NRU, IOURESEXC:002. NRU also argues that BPA should promote financial transactions over power sales agreements. *Id.* NRU argues that financial transactions are

preferable to building up large levels of reserves that will only lead to eventual turmoil for not only BPA, but also for its customers. *Id.* NRU argues that such financial transactions seem more advantageous in an era where market prices are rapidly escalating and when there are limited generation resources in the Northwest compared to growing loads. *Id.* In response to these arguments, BPA notes that BPA's Power Subscription Strategy provides that BPA would provide a minimum of 1,000 aMW of power and 900 aMW of monetary benefits. *See* Power Subscription Strategy, Administrator's Supplemental ROD, at 11-23. The IOUs, however, have requested more than 1,000 aMW, so this argument appears moot.

### **Decision**

*BPA will not require IOUs to take power if the combined requests of all the IOUs for physical deliveries are less than 1,000 aMW.*

## **V. ALLOCATION OF BENEFITS IN STATES WITH MULTI-STATE UTILITIES**

### **Issue**

*How should BPA allocate Settlement Agreement benefits in states served by multi-state utilities?*

### **Parties' Positions**

As noted previously, the Commissions provided BPA with a proposed allocation of the total benefits of the Subscription Settlement Agreements among the region's IOUs. This methodology proposed that the allocation of benefits among the states served by multi-state utilities would be based on the forecasts of the respective state residential and small farm loads at the time the IOU signs the Settlement Agreements, except for PacifiCorp's loads in Idaho. *See* Power Subscription Strategy, Administrator's Supplemental ROD, at 23-29. The benefits for PacifiCorp's Idaho loads were specified in the proposed allocation. *Id.* This proposal was adopted by BPA after an opportunity for public comment.

### **BPA's Position**

BPA adopted the Commissions' proposal on how to allocate the benefits among states served by multi-state utilities. Since there are no published forecasts of residential and small farm loads by state, BPA should use actual 1999 loads by state provided by the multi-state utilities.

**Evaluation of Positions**

The Commissions’ proposal, adopted by BPA, included a mechanism for allocating Settlement Agreement benefits among states served by multi-state utilities. *See* Power Subscription Strategy, Administrator’s Supplemental ROD, at 28. This mechanism provides that the allocation would be made among states based on the forecasts of the respective states’ residential and small farm loads at the time the IOU signs its Settlement Agreement, except for PacifiCorp’s Idaho benefits. BPA has reviewed the utilities’ FERC Form 1’s, the utilities’ websites, the utilities’ annual reports, the Energy Information Agency’s annual forecasts, the Energy Information Agency’s monthly forecasts, the Edison Electric Institute Utility Catalog, and the Commissions’ websites. None of these sources provided forecasts of the residential and small farm loads by state for the multi-state utilities.

Given the absence of forecasts of residential and small farm loads by state, BPA was forced to consider other alternative approaches. BPA canvassed the utilities and the Commissions for suggested sources of information to allocate the benefits among the states. Several utilities suggested using 1999 actual residential and small farm loads as the best proxy of residential and small farm load forecasts. These actual numbers are the most recent available and reflect accurate residential and small farm loads for a very recent year. Each of the utilities has provided BPA their 1999 actual residential and small farm loads by state as part of the negotiation process. The following allocation resulted for the multi-state utilities:

<b>Utility</b>	<b>1999 Actual Energy Use (as provided by utility)</b>	<b>Percentage of Total Residential Load</b>	<b>Share of 1900 aMW Total Benefits FY ‘02-‘06</b>	<b>Share of 2200 aMW Total Benefits FY ‘07-‘11</b>
<b><u>Avista</u></b>				
<i>Washington</i>	254.34 aMW	68.4%	62 aMW	102 aMW
<i>Oregon</i>	117.64 aMW	31.6%	28 aMW	47 aMW
<b>Total:</b>	372 aMW	100%	90 aMW	149 aMW
<b><u>IPC</u></b>				
<i>Idaho</i>	646.33 aMW	95.74%	115 aMW	215 aMW
<i>Oregon</i>	27.11 aMW	4.02%	5 aMW	9 aMW
<i>Nevada</i>	1.63 aMW	0.24%	0 aMW	1 aMW
<b>Total:</b>	675 aMW	100%	120 aMW	225 aMW
<b><u>PacifiCorp</u></b>				
<b><u>1/</u></b>				
<i>Washington</i>	199.03 aMW	23.92%	83 aMW	141 aMW
<i>Oregon</i>	633.27 aMW	76.08%	253 aMW	449 aMW
<b>Total:</b>	832.30 aMW	100%	336 aMW	590 aMW

1/ The Commissions’ proposal adopted by BPA did not reallocate benefits for PacifiCorp’s Utah loads.

## **Decision**

BPA will allocate Settlement Agreement benefits among states served by multi-state utilities based on 1999 actual residential and small farm loads supplied by the utilities except for PacifiCorp's Utah loads. The amount of benefits provided to PacifiCorp's Utah loads will be the benefits proposed in BPA's Power Subscription Strategy, Administrator's Supplemental ROD.

## **VI. SLICE**

### **Issue**

*Whether BPA should offer the Slice product to IOUs under the Settlement Agreement.*

### **Parties' Positions**

PSE contends that BPA should offer the Slice product to the IOUs participating in the Settlement Agreements. PSE, IOURESEXC:018. PSE claims that the decision to offer Slice only to BPA's public preference customers violates BPA's obligations under section 7 of the Northwest Power Act because the Slice rate is not a rate of general applicability and because the Slice rate does not comply with the cost recovery standards of section 7 as well. *Id.* PSE contends that Slice violates section 7 because the costs payable under the Slice contract are more limited than those allocated to loads of utilities under the REP. *Id.*

### **BPA's Position**

The decision to sell Slice only to BPA's public preference customers was made in BPA's Power Subscription Strategy and the corresponding Power Subscription Strategy, Administrator's ROD. *See* Power Subscription Strategy, Administrator's ROD, at 88-90. This decision was not intended to be revisited in the current examination of the Settlement Agreement offered to the IOUs. Questions regarding whether Slice violates the cost recovery standards of section 7 are also not part of this inquiry. The Slice rate was established in BPA's 2002 power rate case and all issues related to the Slice rate must be established in that forum. 16 U.S.C. 839e(i) (1994 & Supp. III 1997). The Slice rate is not being offered as part of the Settlement Agreement and questions regarding whether the rate complies with the provisions of section 7 are beyond the scope of the Settlement Agreement.

### **Evaluation of Positions**

PSE argues that BPA's Subscription Strategy treats the residential customers of IOUs as second-class citizens. PSE, IOURESEXC:018. PSE notes that BPA is offering the Slice product (and a number of other power products) solely to government and cooperatively owned utilities but not to IOUs. *Id.* PSE argues that BPA should offer each of these

products in the Block Sales Agreement to the IOUs for the benefit of their residential and small farm customers. *Id.* PSE contends that if BPA is going to offer a more valuable product to governmental and cooperative utilities under section 5(b) of the Northwest Power Act, it should offer the same product to IOUs. *Id.* PSE argues that under section 7(b) of the Northwest Power Act, BPA is required to adopt rates of general application for BPA power sales to meet the general requirements of Northwest preference agencies and BPA sales under the REP to regional utilities. *Id.* To comply with this requirement, PSE argues that BPA should offer the Slice product (and other BPA power products) to IOUs under the same terms and conditions that it is being offered to government and cooperatively owned utilities. *Id.* In addition to arguing that BPA must generally offer Slice to the IOUs, PSE also argues that BPA has limited the costs applicable to Slice compared to those allocated to REP. *Id.* PSE provides no specific explanation of what the cost limitation is or why this alleged inequity occurs.

Whether BPA's decisions to limit the eligibility to purchase Slice and the proper allocation of the costs to BPA's rates constitute, as alleged by PSE, violations of section 5 and 7 of the Northwest Power Act are matters that are beyond the scope of this proceeding. The decision to offer Slice as a requirements product to BPA's public preference customers was made in BPA's Power Subscription Strategy and the corresponding ROD. *See* Power Subscription Strategy, at 14; Power Subscription Strategy, Administrator's ROD, at 88-90. In the Power Subscription Strategy ROD, the Administrator stated the basis for limiting eligibility to purchase Slice as follows:

Under section 5(b)(1) of the Northwest Power Act, both preference (public body and cooperative) customers and IOUs are entitled to purchase net firm requirements power from BPA to the extent their firm regional consumer loads exceed their resource capabilities applied to that load. Under section 4(a) of the Bonneville Project Act, BPA is obligated to give preference and priority to public bodies and cooperatives in disposing of electric energy generated on the FCRPS.

The Slice product is a meld of requirements power, surplus (firm and nonfirm) power, and other power products and services. The requirements and surplus power provided to a Slice purchaser are operationally identical. A given set of operational conditions allows production of firm power that can be separated into categories of net firm load requirements, surplus firm, and nonfirm only by after-the-fact accounting.

Before nonfirm and surplus firm power can be offered to IOUs, it must first be offered to public bodies and cooperatives. When a Pacific Northwest public body or cooperative customer is the Slice purchaser, this priority presents no conflict. Any public body or cooperative purchaser of the Slice product would be entitled to first priority to nonfirm or surplus firm power as a share of FCRPS output. BPA has discretion as to which public agency customers may purchase surplus firm power or nonfirm in advance of its delivery.

However, if an IOU were the Slice purchaser, the priority to nonfirm and surplus firm power becomes an issue of competing requests from preference customers. In that situation, any nonfirm or surplus firm power generated on behalf of the IOU would have to be offered first to public bodies and cooperatives, before it would be available to the IOU purchaser. That requirement would necessitate inserting a procedural step into the Slice product that would potentially divert Slice power to a public body or cooperative purchaser. The additional step of offering the power to public bodies and cooperatives, and the potential diverting of Slice power, would greatly complicate the Slice product and would be incongruous to the concept and design of the Slice product. A “Slice” product with the additional procedural offering and the potential redirection of power would have a different cost basis, would provide a different set of benefits to its purchasers, and would alter the risks accepted by Slice purchasers and BPA. Such a product would differ greatly from BPA’s Slice product.

Under sections 5(b)(5) and (6) of the Northwest Power Act, BPA is unable to declare insufficiency for public customers until BPA's obligations to them exceed the capability of the FBS. A Slice sale to an IOU would commit FBS output to that customer by contract when such generation may need to be allocated to public agency or cooperative loads on a planning basis. A non-preference Slice sale may not comport with the requirement that BPA allocate FBS power first to serve all preference agency load when declaring an insufficiency of Federal resources to meet the public agency and cooperative utility loads.

BPA has offered in the Subscription Strategy to make a flat sale to IOUs as a special settlement offer. In return for the IOUs accepting this special product (a limited amount of power in a flat shape and a financial component), the IOUs would agree to settle the Residential Exchange Program.

BPA is obligated to meet requests for service to requirements of IOUs at a rate established pursuant to section 7(f) of the Northwest Power Act. BPA will not offer the Slice product to IOUs and will not develop a special “Slice” product for service to IOUs. BPA will not offer the Slice product for service to residential and small farm consumers of IOUs under a special settlement offer in exchange for agreement to settle the Residential Exchange Program.

Power Subscription Strategy, Administrator’s ROD, at 89-90. Furthermore, in BPA’s 2002 rate case, BPA explained that the type of power applicable to an IOU settlement sale was a very specific type of power. The IOUs argued that BPA had offered a 24-hour flat-block power product at the RL rate to the IOUs and offered shaped power (including

a flat-block power product with some shape) to preference customers at the PF Preference rate. *See* 2002 Final Power Rate Proposal, Administrator's ROD, at 14-14 to 14-15. BPA noted that BPA's proposed Subscription settlement sales to IOUs were consistently described in BPA's Subscription Strategy. *Id.* BPA's Power Subscription Strategy notes that:

In Subscription, BPA proposes a settlement [of the REP] in which residential and small farm loads of the IOUs would be assured access to the equivalent of 1,800 aMW of Federal power for the 2002-2006 period. Of this amount, at least 1,000 aMW will be met with actual BPA power deliveries. The remainder may be provided through either a financial arrangement or additional power deliveries, depending on which approach is more cost-effective for BPA.

BPA and each IOU will negotiate the physical and financial components of the Subscription amount, by year, in the negotiated subscription settlement contracts. Any cash payments will reflect the difference between the market price of power forecasted in BPA's rate case and the rate used to make such Subscription sales. The actual power deliveries for these loads will be in equal hourly amounts over the perio[d].

Power Subscription Strategy, at 9. The Power Subscription Strategy also states that:

BPA is also making an offer to the IOUs for settlement of the REP comprised of a specified amount of power and monetary payments. The terms and conditions of the settlement proposal are prescribed in order to establish what BPA feels is an appropriate value for the settlement of the REP. Thus, most of the service alternatives available to preference customers continue to be available to the IOUs under traditional requirements contracts and rate schedules. The Subscription settlement power sales, however, are available only under the prescribed conditions.

*Id.* at 45. The Power Subscription Strategy then notes that "the actual power deliveries for the residential and small farm loads of IOUs will be in equal hourly amounts over the contract period." *Id.* In addition, the Power Subscription Strategy states:

Some parties argue that BPA should show flexibility in the shape of the sales to the IOUs for their residential and small farm consumers. In determining the shape of sales to the IOUs, however, BPA must view the shape of all BPA sales to customers and the impact of the shape of such sales on BPA's system. BPA anticipates meeting substantial loads of preference customers which have shaping needs throughout the year. BPA cannot operate as economically or efficiently as desired if all loads have changing load shapes. There are operational benefits to BPA of customers taking energy around the clock, all year, without a significant amount of variation. Because BPA desires to operate its system

efficiently, BPA is making this shape available to the IOUs. This will enable BPA to make direct power sales to the IOUs for their residential and small farm consumers while at the same time meeting the operational need of selling a significant flat-block of energy to regional loads. Further, BPA observes that its service to residential and small farm loads will be only a portion of the utility's total load, and such loads have baseload needs that BPA would be able to serve in this manner. It is important to note that the IOUs may request shaping services or other power products from BPA under the applicable rate schedule.

*Id.* at 46. BPA therefore concluded that a 24-hour flat-block sale was precisely the type of product that the Power Subscription Strategy envisioned would be offered to IOUs in the proposed REP settlements. *See* 2002 Final Rate Proposal, Administrator's ROD, WP-02-A-02, at 14-15. In summary, BPA's proposed Settlement Agreements are just that: *settlements*. BPA must determine the type of sale to include in the Settlement Agreement to reflect the proper consideration for the IOUs' waiver of rights to participate in the REP. The Administrator did so, concluding that flat-block sales are appropriate, not Slice sales, or partial requirements sales, or other types of BPA sales. *Id.*

PSE's rate arguments also were previously addressed by the Administrator. PSE argues that the costs applicable to the Slice rate are more limited than those applicable to the REP and thus violate the provisions of section 7(b)(1) of the Northwest Power Act. PSE, IOURESEXC:013. This argument is not legally sustainable and is factually incorrect. Similar issues were addressed by the Administrator in BPA's 2002 Final Power Rate Proposal, Administrator's ROD. In this ROD, the Administrator found that there was no legal basis for the application of the provisions of section 7(b)(1) to the REP. *See* 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, at 14-12 to 14-13. The Administrator stated:

BPA disagrees with the IOUs' argument that BPA's obligation to establish rates of general applicability necessarily obligates BPA to make these rates approximately equal for all customer groups. Section 7(b)(1) of the Northwest Power Act provides that "[t]he Administrator shall establish a rate or rates of general application for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest, and loads of electric utilities under section 839c(c) of this title . . ." 16 U.S.C. §839e(b)(1). This provision relates only to the establishment of rates that apply to BPA's net requirements sales to preference customers, at the PF Preference rate, and BPA's sales to utilities under the REP, at the PF Exchange rate. Under the REP, IOUs pay the PF Exchange rate for power purchased from BPA. This rate, however, may not be the same level as the PF Preference rate. The Northwest Power Act established what is called the 7(b)(2) rate test, which is discussed in greater detail in ROD chapter 13. 16 U.S.C. §839e(b)(2). This test is designed to protect preference customers from certain costs incurred under the Northwest Power Act, including



Residential Exchange costs. If the 7(b)(2) rate test does not trigger, the PF Preference rate and the PF Exchange rate are equal. If the 7(b)(2) rate test triggers, however, the PF Exchange rate is subject to a surcharge and is higher than the PF Preference rate. Even though the PF Preference and PF Exchange rates differ, they are rates of general applicability for the relevant sales to BPA's customer classes. Therefore, the fact that BPA develops rates of general application for sales to preference customers and sales to exchanging utilities, respectively, does not mean that those rates will be approximately equal.

*Id.* at 14-12 to 14-13. Further, PSE's contention regarding cost allocations between the Slice product and other products was also addressed in BPA's 2002 Final Power Rate Proposal ROD:

Rather than paying a set price per MW for the power, Slice purchasers will assume the obligation to pay a percentage of BPA's costs proportionate to the percentage of the FCRPS that the Slice purchaser elects to purchase. *Id.* at 42. The costs considered by the Slice contract are referred to collectively as the Slice Revenue Requirement. *Id.* The Slice Revenue Requirement will be comprised of all the line items identified in the 2002 power rate case revenue requirement, with certain limited exceptions. Mesa, *et al.*, WP-02-E-BPA-32, at 5. The exceptions to the PBL revenue requirement for Slice purchasers are:

- Transmission costs other than those associated with GTAs and with fulfilling System Obligations.
- Power purchase costs other than the net costs incurred as part of the Inventory Solution, which is discussed below.
- PNRR.

Wholesale Power Rate Development Study, WP-02-E-BPA-05, at 155.

BPA has excluded these items from the Slice Revenue Requirement because these costs are not attributable to the Slice product. *Id.* at 155.

*See id.* 16-1 to 16-2. The Slice rate, as well as the rates for BPA's other power products, are currently under review by FERC. BPA is not revisiting its rate decisions in this proceeding.

### **Decision**

*BPA's decision to offer the Slice product only to BPA's preference customers is addressed in BPA's Power Subscription Strategy, Administrator's ROD, and will not be revisited here. Similarly, issues regarding the establishment of the Slice rate must be addressed in a section 7(i) rate hearing, and were addressed in BPA's 2002 Final Rate Proposal, Administrator's ROD, and will not be revisited here. In the event that such*

*issues were appropriate to address in this forum, BPA hereby incorporates by reference BPA's Power Subscription Strategy and the two RODs accompanying the Strategy, the Power Subscription Strategy record, BPA's 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, and the 2002 rate case record.*

## **VII. STATUS OF DEEMER ACCOUNTS**

### **Issue**

*Whether IOUs with disputed deemer account balances should pay such balances to BPA before executing REP Settlement Agreements.*

### **Parties' Positions**

Avista and MPC argue that BPA has incorrectly calculated alleged deemer balances and improperly based such calculations on BPA's 1984 ASC Methodology. Avista, IOURESEXC:001; MPC, IOURESEXC:004. Avista and MPC argue that any alleged deemer balances should be held in abeyance in the Settlement Agreements. *Id.*

MPC, IPC, the IPUC and the WUTC argue that there is no requirement for any alleged deemer balances to be paid prior to executing a Settlement Agreement and that the issue of deemer balances is one that is properly subsumed within the scope of the Settlement Agreement for the contract term. MPC, IOURESEXC:004; IPC, IOURESEXC:010; IPUC, IOURESEXC:015, WUTC, IOURESEXC:016.

PPC, NRU, ESI and the DSIs argue that IOUs with alleged deemer balances should pay off such balances, if any, before receiving any Subscription settlement benefits. PPC, IOURESEXC:006; NRU, IOURESEXC:002; ESI, IOURESEXC:008; DSI, IOURESEXC:012.

### **BPA's Position**

BPA proposed that, because the Settlement Agreements are intended to settle all outstanding issues regarding the REP for the five- or 10-year settlement period, and because the deemer balances are a source of uncertainty and dispute between BPA and the IOUs, any alleged deemer amounts should be held in abeyance for the term of the settlement period.

### **Evaluation of Positions**

It is helpful to first provide some background regarding the implementation of the REP. Section 5(c) of the Northwest Power Act created the REP. 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). Section 5(c)(1) of the Act provides:

Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region.

*Id.* § 839c(c)(1). The REP was created to provide regional utilities' residential and small farm customers a form of access to low-cost Federal power. *See* H.R. REP. NO. 96-976(I), at 29 (1980), *reprinted in* 1980 U.S.C.C.A.N. 5989, 5995; H.R. REP. NO. 97-976(II), at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6023, 6032. Under the REP, each electric utility may elect to sell power to BPA at the "average system cost [ASC] of that utility's resources" and, in return, BPA sells the same amount of power back to the utility at BPA's PF Exchange rate. 16 U.S.C. § 839c(c)(1) (1994 & Supp. III 1997). The amount of power purchased and sold is equal to the qualifying residential and small farm load of the exchanging utility. In most circumstances, no actual power is exchanged. Rather, in the case where BPA's rate is lower than the ASC, BPA pays the utility the difference between the utility's ASC and BPA's PF Exchange rate in cash, which the utility then passes directly through to its residential and small farm customers. If a utility's ASC is less than the PF Exchange rate, the utility may elect to "deem" its ASC equal to the PF Exchange rate. By doing so, the utility avoids making actual payments to BPA. The amount that the utility would otherwise pay BPA is tracked in a "deemer account."

Section 5(c)(7) of the Northwest Power Act requires BPA to develop a "methodology" for determining each utility's ASC. *Id.* § 839c(c)(7). BPA consults with interested parties in the region in developing the methodology, but the Administrator must establish the methodology, subject to review and approval by FERC. *Id.* Section 5(c)(7) of the Northwest Power Act provides:

The "average system cost" for electric power sold to the Administrator under this subsection shall be determined by the Administrator on the basis of a methodology developed for this purpose in consultation with the [Northwest Power Planning] Council, the Administrator's customers, and appropriate State regulatory bodies in the region. Such methodology shall be subject to review and approval by the Federal Energy Regulatory Commission.

*Id.* The Northwest Power Act provides that utilities' ASCs shall not include:

- (A) the cost of additional resources in an amount sufficient to serve any new large single load of the utility;
- (B) the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after December 5, 1980; and
- (C) any costs of any generating facility which is terminated prior to initial commercial operation.

*Id.*, § 839c(c)(7)(A)-(C).

BPA established its initial ASC Methodology (“1981 ASC Methodology”) pursuant to section 5(c)(7) of the Northwest Power Act in a ROD issued on August 26, 1981. Average System Cost Methodology, Administrator’s ROD, Bonneville Power Administration (August 1981). BPA filed the 1981 ASC Methodology with FERC on August 27, 1981, and FERC granted interim approval effective as of October 1, 1981. Sales of Electric Power to the Bonneville Power Administration, Filing Rate Schedules, Interim Rule, 46 Fed. Reg. 50,517 (1981), corrected 46 Fed. Reg. 55,952 (1981). FERC ultimately granted final approval of the 1981 ASC Methodology on October 6, 1983, retroactive to October 1, 1981. Sales of Electric Power to the Bonneville Power Administration, Methodology and Filing Requirements, 25 FERC ¶ 61,005, 48 Fed. Reg. 46,970 (1983) (codified at 18 C.F.R. 301.1 (1997)).

Beginning in 1983, BPA’s DSI customers and public agency customers requested a change in the ASC Methodology based on numerous concerns, including perceived abuses in the system related to the attempted inclusion of terminated plant costs in ASC in violation of section 5(c)(7) of the Northwest Power Act. BPA addressed many issues in revising the ASC Methodology, including the source data for the ASC Methodology, the determination of whether transmission costs should be considered resource costs, the subsidization of construction work in progress, the treatment of equity return, the treatment of income taxes, the determination of generating resources includable in computing ASC, the treatment of affiliated fuel costs, conservation costs includable in ASC, and the functionalization between subsidized and non-subsidized accounts. *See* Average System Cost Methodology, Administrator’s ROD, Bonneville Power Administration (June 1984) (hereinafter “1984 ASC ROD”). On October 7, 1983, BPA initiated the ASC consultation proceeding by publishing a “Request for Recommendations” in the Federal Register. Reconsultation of Average System Cost Methodology, Request for Comments and Recommendations, 48 Fed. Reg. 45,829 (1983). After reviewing comments, BPA published a “Proposed Methodology for Determining the Average System Cost of Resources for Electric Utilities Participating in the Residential Exchange.” *See* Proposed Methodology for Determining the Average System Costs of Resources for Electric Utilities Participating in the Residential Exchange Program Established by Section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act, 49 Fed. Reg. 4,230 (1984). In conjunction with the proposal, BPA also published an “Issue Alert” that summarized the issues. After further hearings and comments, BPA published the 1984 ASC ROD on June 4, 1984. The Northwest IOUs challenged the ASC methodology change in the FERC proceeding in which BPA sought approval of the revised methodology. FERC approved the ASC Methodology. Methodology for Sales of Electric Power to the Bonneville Power Administration, 29 FERC ¶ 61,013, 49 Fed. Reg. 39,293 (1984) and Methodology for Sales of Electric Power to the Bonneville Power Administration, 30 FERC ¶ 61,108, 50 Fed. Reg. 4,970 (1985). BPA and the IOUs have a continuing disagreement regarding the existence of deemer balances under the initial RPSAs. This disagreement is best reflected in the comments of Avista, which are presented below. These arguments will be addressed substantively in BPA’s RPSA ROD, but will not be addressed in this discussion.

Avista's comments are included here to document the nature of the dispute between BPA and the IOUs.

Avista argues that BPA's preliminary calculation of alleged deemer balances is incorrect and based improperly on calculations using BPA's 1984 ASC Methodology. Avista, IOURESEXC:001. Avista notes that BPA has not abandoned the use of the deemer balances, which arose from the revised 1984 ASC Methodology, and proposes to repeat this feature of the REP in the new RPSAs. *Id.* Avista alleges that through a uniform surcharge to all REP customers, BPA proposes to implement the results of the section 7(b)(2) rate test in a manner that affects customers of lower-cost utilities similar to the implementation of the 1984 ASC Methodology. *Id.* Avista argues that as a result of these discretionary decisions by BPA, Avista's customers would not qualify for any exchange benefits whenever the rate test triggers by any significant amount. *Id.* Avista's position continues to be that the administration of the REP can be fairly achieved by revising the ASC Methodology or fixing the ASC at the outset of the exchange period for a shorter exchange agreement, abandoning the use of the deemer account, and fairly applying any surcharge under section 7(b)(2) of the Northwest Power Act to avoid geographical disparity in administration of benefits. *Id.* As noted above, BPA's responses to Avista's arguments regarding the ASC Methodology are addressed in BPA's RPSA ROD. Avista's arguments regarding the section 7(b)(2) rate test involve an issue that is not being decided in this forum and, by law, can only be resolved in a hearing conducted pursuant to section 7(i) of the Northwest Power Act. 16 U.S.C. § 839c(c)(1) (1994 & Supp. III 1997). All issues regarding BPA's implementation of the section 7(b)(2) rate test, including issues raised by Avista, were addressed in great detail in BPA's 2002 Final Rate Proposal, Administrator's ROD, WP-02-A-02, Section 13. BPA's responses to Avista's arguments regarding the payment of deemer balances before participation in the traditional REP through the RPSA is addressed in BPA's RPSA ROD. The issue to be addressed below is whether any alleged deemer balances should be paid by exchanging utilities before executing REP Settlement Agreements.

Avista notes that the changes in BPA's ASC Methodology removed, among other costs, income taxes and return on equity from the ASC calculation. Avista, IOURESEXC:001. Avista argues that BPA's rationale for changing the ASC Methodology was to correct alleged abuses in ASC calculations, in particular the treatment of terminated nuclear plant costs. *Id.* Avista notes that a number of Northwest IOUs challenged this change, and BPA's decision was upheld on appeal in the United States Court of Appeals for the Ninth Circuit. *PacifiCorp v. Fed. Energy Regulatory Comm'n*, 795 F.2d 816, 823 (1986). Avista argues that the court upheld the 1984 ASC Methodology as a "temporary" change to address the terminated plant cost issue and that the court did not sanction permanent implementation of the 1984 ASC Methodology. Avista, IOURESEXC:001. Avista alleges that the court permitted BPA to exclude income taxes and return on equity as a means of preventing inclusion of certain terminated plant costs in average system cost. *Id.* Avista notes that the costs of these unfinished nuclear plants will be completely written off by all of the IOUs prior to BPA's next rate period beginning in 2001. *Id.* Avista argues that BPA's rationale for excluding income taxes and return on equity from the ASC Methodology no longer applies. *Id.*

Avista notes that it was not responsible for the alleged abuses referred to by various customers and BPA. Avista, IOURESEXC:001. Avista states that it has no record of BPA ever directing a complaint to Avista concerning abuses in its administration of the 1981 RPSA ASC computation. *Id.* Avista states that BPA referenced examples of abuses by utilities other than Avista, citing BPA's 1984 ASC ROD, at 13. *Id.* Avista notes that during the hearings on the methodology change, BPA indicated that it was trying to stop abuses while maintaining a viable exchange program. *Id.* Avista quotes a statement by BPA's Administrator at the time, Peter T. Johnson:

It is certainly not the intention of Bonneville or of myself to wipe out the exchange. Some people have suggested that is the intent of this action of Bonneville to reform the average system cost methodology. Absolutely not the case at all. One of the underlying philosophical points of the Regional Power Act was to bring relative wholesale rate parity to all ratepayers of the Region, whether they were in public power or private power B [sic] reasonably free access to the benefits of the Federal Base System which I am telling you I am trying to protect.

\* \* \* \*

Again, I am not wiping out the exchange. It is an exceedingly important objective in the Regional Power Act by Congress. My object is not to legislate; it is to interpret the law fairly and to apply it consistently.

What we are doing at the present time is reforming abuses to which the current methodology has been put.

*Hearings in the matter of Proposed Methodology For Determining the Average System Cost of Resources for Electric Utilities Participating in the Residential Exchange Established by Section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act, Before the Bonneville Power Administration, April 20, 1984, p.7, lines 6-15 and p.8, lines 7-12 (introductory comments by Peter T. Johnson, Administrator, Bonneville Power Administration).*

Avista notes that, in comparison to the other regional utilities, Avista received very few benefits prior to 1984. Avista, IOURESEXC:001. Avista states that the total benefits received by Avista's residential and small farm customers prior to 1984 amounted to \$6.73 million. *Id.* Avista states that after the change in ASC in 1984, no benefits were received by Avista's customers. *Id.* Avista notes that during the period after 1984, Avista accumulated a deemer balance that BPA now calculates at \$93.8 million. *Id.* Avista states that it has not independently verified BPA's calculation of the deemer balance. *Id.* Avista cites total REP benefits paid to the residential and rural customers of the Northwest IOUs under the 1981 ASC Methodology compared to the 1984 ASC Methodology and estimated deemer balances. *Id.* Avista states that these figures show that Avista's REP benefits were eliminated after FY 1983 and that Avista incurred an alleged deemer balance of over \$93 million. *Id.*

Avista notes that not only did Avista no longer receive any positive benefits after 1984, but the change in ASC caused Avista to begin accruing a large deemer balance. *Id.* Avista argues that it is unfair to insist that deemer balances from the 1981 to 2001 contract period for the REP be carried over to the post-2001 period. *Id.* Avista argues that BPA's currently calculated deemer balances are not the result of comparing a participating utility's true average system cost with BPA's, as anticipated by the enabling legislation and the initial 1981 RPSAs. *Id.* Avista argues that the large deemer balances result, in large measure, from the 1984 modification of the ASC methodology. *Id.* Avista argues that, by way of example, before the change in methodology, Avista had an average system cost of 24.9 mills/kWh. *Id.* Avista notes that BPA's PF Preference rate at the time was 22.3 mills/kWh. *Id.* Avista states that after the change in methodology, according to BPA's calculations, Avista's ASC for the REP dropped to approximately 19.5 mills/kWh. *Id.* Avista argues that its true average system cost was higher as evidenced by the ASC calculations in Avista's 15-year sale to PSE, filed with and accepted at FERC at rates ranging between 29.05 and 32.33 mills/kWh for the period 1987 through 1994. *Id.*

Avista argues that the deemer balances calculated as of 2001 using the 1984 ASC Methodology should not be carried over to post 2001 contracts. *Id.* Avista alleges that by using the 1984 ASC Methodology year after year, BPA has artificially created insurmountable deemer balances which, in Avista's case, for all practical purposes, permanently precludes participation by its customers in the REP. *Id.* Avista notes that in Section 12 of the new proposed RPSA, BPA appears to be proposing that a deemer balance be carried over. *Id.* Avista argues that the effect of the 1984 ASC Methodology change, notwithstanding Peter Johnson's comments, is that BPA has "wiped out" the REP for Avista's customers. *Id.* Avista states that at the average annualized rate that Avista's customers were receiving benefits prior to 1984 (\$3.365 million per year), and not counting any additional interest added to the deemer balance, it would take more than 28 years for Avista to work off BPA's currently-calculated deemer balance of \$93.8 million. *Id.*

Avista argues that the question of whether the deemer balance based on a revised ASC Methodology would carry-over is a question of the parties' intent in making the contract. *Id.* Avista notes that the deemer account mechanism was created by the 1981 Residential Purchase and Sale Agreement. *Id.* Avista notes that there is no mention of a deemer account in the Northwest Power Act. *Id.* Avista states that while Avista agreed in 1981 that its deemer balance, if any, would be carried over to the next contract, Avista believed that the intent was that the balance resulting from the original methodology be carried over, or a balance resulting from a revised ASC methodology that reflected minor modifications, such as changed accounting procedures, arrived at through regional consensus. *Id.* Avista argues that to claim, as BPA has, that it could substantially lower a utility's average system cost for sixteen of the twenty years of the contract, over the objection of the participating utilities and the Commissions, and then carry the resulting deemer balance over to future exchange programs renders the agreement wholly unilateral. *Id.* Avista argues that it does not believe that this was the intent of the 1981

contract. *Id.* Avista also argues that none of BPA's customers ever envisioned that BPA could unilaterally make such a drastic change to a negotiated contract, citing the DSIs' comments to FERC in the proceeding for the initial 1981 ASC Methodology. *Id.*

Avista notes that in 1993, Avista terminated its RPSA with BPA based upon the trigger of the section 7(b)(2) rate test. *Id.* Avista notes that notice of this termination was given to FERC. *Id.* Avista notes that it had previously suspended its exchange with BPA in 1987 based upon an earlier trigger of the section 7(b)(2) rate test. *Id.* Avista argues that at the time of termination, BPA attempted to get Avista to agree to carry over its deemer balance to any new REP contract. *Id.* Avista argues that BPA proposed carry-over language as a condition of agreeing to termination. *Id.* Avista argues that it did not agree with this condition, and sent its notice of termination without the language BPA requested. *Id.* Avista argues that it had the right to terminate its 1981 Residential Purchase and Sale Agreement under the conditions of that Agreement, citing section 9 of the RPSA. *Id.* Avista argues that it was and is inappropriate for BPA to attempt to insist upon an agreement to carry over the deemer balance as a condition of agreeing to termination. *Id.* Avista argues that by attempting to require Avista to agree to the carry-over at that time, BPA was inserting an additional issue into the negotiation: specifically, the issue of whether the deemer balance carry-over provisions applied to any balance which might result from a significantly changed ASC methodology. *Id.* Avista believes that it is entitled to a fair hearing of that issue, in court if necessary. *Id.* Avista intends to argue against language asking it to waive its claim such as that inserted into new agreements for administration of the REP post-2001. *Id.*

Avista argues that there are policy reasons why the revised ASC Methodology should not be used by BPA for purposes of calculating Avista's customers' exchange entitlements post-2001. *Id.* Avista argues that since Avista's ASC is among the lowest of the six Northwest IOUs, any general modification of the ASC Methodology (including the 1984 change) that results in across-the-board partial elimination of REP costs strikes first at participation by Avista's customers in its eastern Washington and northern Idaho service territories for no justifiable reason. *Id.* Avista states that during the periods after 1984, BPA paid over \$2.25 billion in benefits under the program to other geographic areas, principally along the Interstate 5 corridor, without any benefits reaching customers in Avista's service area. *Id.* Avista argues that carrying over the artificially created deemer balances will sustain this inequity essentially forever, keeping generations of customers from receiving any benefit from the Federal power system. *Id.*

In contrast to Avista's comments regarding deemer balances, other parties have advocated the payment of deemer balances before a settlement is offered. PPC argues that although BPA preserves pre-2001 deemer accounts in the RPSA, BPA makes no provision to recover deemer balances before allowing IOUs to receive financial benefits under the Settlement Agreement. PPC, IOUEXC:006. PPC argues that because the Settlement Agreement is intended to settle BPA's post-2001 REP obligations, IOUs should be required to pay off their existing liabilities under the existing RPSAs before becoming eligible for new benefits. *Id.*



Similarly, NRU argues that BPA is facilitating an opportunity for the IOUs with negative deemer accounts to avoid reconciling what they may owe BPA and that this is not fair. NRU, RESEXC: 007. NRU argues that if one owed fines at the public library, one could not check out more books until one paid one's fines. *Id.*

ESI also argues that the current RPSAs require the participating utilities to eliminate any balance remaining in their deemer account at the end of the current contract before they can receive benefits under a new "Residential Exchange Contract." ESI, RESEXC:008. ESI argues that three of the potential participants of the REP Settlement have deemer balances and BPA should not "settle" REP benefits with these utilities until they become eligible for benefits under the terms of their "Residential Exchange Contracts." *Id.*

The DSIs incorporate by reference their arguments on this issue that were made in BPA's 2002 wholesale power rate case and in the development of BPA's Subscription Strategy. DSI, IOURESEXC:012. BPA hereby incorporates BPA's responses to such arguments in BPA's 2002 Final Rate Proposal, Administrator's ROD, WP-02-A-02; BPA's Power Subscription Strategy, Administrator's ROD; and BPA's Power Subscription Strategy, Administrator's Supplemental ROD.

As noted immediately above, PPC, NRU and ESI argue that the current RPSAs require utilities participating in the REP to eliminate any balance remaining in their deemer account at the end of the current contract before they can receive benefits under a new "Residential Exchange Contract." PPC, IOURESEXC:006; NRU, IOURESEXC:007; ESI, IOURESEXC:008. The RPSA, however, does not support the interpretation suggested by the parties. Section 10 of the 1981 RPSAs provides in pertinent part that:

Upon termination of this agreement, any debit balance in such separate account shall not be a cash obligation of the Utility, but shall be carried forward to apply to any subsequent *exchange* by the Utility for the Jurisdiction under any new or succeeding agreement.

RSPA, Section 10 (Emphasis added). The contract language refers to a subsequent "*exchange*" under a subsequent agreement, that is, an agreement that continues the traditional *exchange* of power between BPA and the utility at the respective PF Exchange and ASC rates. The proposed IOU Subscription Settlement Agreements, however, do not include the traditional exchange of a utility's power with power from BPA. Instead, the proposed Settlement Agreements are simply a payment of consideration for the termination of a utility's participation in the REP. The 1981 RPSA, therefore, does not require the payment of a deemer balance before executing a Settlement Agreement, but rather requires the payment of a deemer balance before continuing participation in the REP through a new RPSA. It is therefore appropriate to hold deemer balances, if any, in abeyance during the term of the Settlement Agreement. This argument is supported by MPC, which states that the deemer balance is not relevant to the settlement contract. MPC, IOURESEXC:004. MPC notes that the present RPSA is clear that the deemer balance is only to be carried forward for the purposes of a follow-on RPSA. *Id.* MPC notes that the settlement contract is not a follow-on RPSA and therefore this clause

appropriately preserves the rights of both parties should an RPSA be entered into in the future. *Id.*

As noted above, ESI argues that that three of the potential participants of the REP settlement have deemer balances and BPA should not provide settlement benefits to these utilities until they become eligible for benefits under the terms of their RPSAs. ESI, IOURESEXC:008. As previously noted in BPA's 2002 wholesale power rate case, however, BPA's estimates of IOU deemer balances were BPA's preliminary calculations and had not been discussed with or verified by the IOUs. 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, at 14-26, citing the testimony of Boling and Doubleday, WP-02-E-BPA-53, at 19. In fact, the IOUs contest BPA's calculation of the deemer balances. *Id.* This argument is presented in great detail in the comments of Avista, as previously noted in greater detail. Avista, IOURESEXC:001. The existence of deemer balances and the amount of such balances, if any, must be determined in negotiations between BPA and the IOUs and will not be finally determined until BPA and the IOUs have discussed and resolved the issue or the issue is resolved through litigation. *Id.* Due to the uncertainty of deemer balances, the IOUs' disagreement with BPA's preliminary calculation of such balances, and the dispute over the very existence of the balances, it is appropriate to hold this issue in abeyance during the term of any settlement. MPC notes that given the considerable controversy associated with all the deemer balances, their resolution would involve a long contentious process. MPC, IOURESEXC:004. MPC notes that the settlement avoids this controversy. *Id.*

PPC, NRU and ESI argue that although BPA preserves pre-2001 deemer accounts in the RPSA, BPA makes no provision to recover deemer balances before allowing IOUs to receive financial benefits under the Settlement Agreement. PPC, IOURESEXC:006; NRU, IOURESEXC:007; ESI, RESEXC:008. These parties argue that because the Settlement Agreement is intended to settle BPA's post-2001 REP obligations, IOUs should be required to pay off their existing liabilities under the existing RPSAs before becoming eligible for new benefits. PPC, IOURESEXC:006; NRU, IOURESEXC:007; ESI, IOURESEXC:008. NRU argues that if one owed fines at the public library, one could not check out more books until one paid one's fines. NRU, IOURESEXC:007. It is important to note that BPA's proposed deemer balances are not being forgiven by BPA. Indeed, the parties themselves note that BPA preserves the deemer balances for new RPSAs. PPC, IOURESEXC:006; NRU, IOURESEXC:007; ESI, IOURESEXC:008. As noted above, however, the 1981 RPSA provides only for carrying deemer balances forward to apply to any subsequent exchange by the utility under any new or succeeding RPSA, not a new or succeeding settlement agreement. *See* RSPA, Section 10. A settlement, by its very nature, is a settlement of all the issues pending between two parties regarding a particular subject matter. It is clear from the record that the issue of deemer balances is a hotly contested issue between BPA and the IOUs. *See, e.g.,* Avista, IOURESEXC:001. This supports that it is appropriate to include the issue of deemer balances within the scope of the proposed settlements and hold any such balances in abeyance during the term of the settlement. As the WUTC notes, any and all issues associated with the REP are appropriate for consideration and treatment in a Settlement

Agreement. WUTC, IOURESEXC:016. The WUTC notes that any such agreement would strike a balance between the interests of BPA and the settling utility. *Id.*

In addition to the reasons presented in the foregoing discussion, a number of other parties have also supported holding any alleged deemer accounts in abeyance for the term of the settlement. The IPUC states that while this proceeding is neither the time nor the place for litigation of the final disposition of the deemer balances, deferral of this issue is an important element of the settlement. IPUC, IOURESEXC:015. The IPUC notes that the wording in Section 9 of the draft Settlement Agreement states that as a result of entering this Agreement, neither BPA nor the utility "has prejudiced its right, if any, to assert that a deemer balance, if any, is required to be carried over" to any subsequent exchange agreement offered by BPA under Section 5(c) of the Northwest Power Act." *Id.* The IPUC is in full support of the treatment outlined in Section 9. *Id.* The IPUC states that resolution of this highly contentious issue as part of the settlement is one of the reasons for its support of the settlement. *Id.*

IPC also supports the settlement of the REP and BPA's proposal to hold all past deemer accounts in abeyance. IPC, RESEXC:010. IPC believes this is the only practical proposal to date that would actually result in residential and small farm customers of IPC receiving their fair share of the benefits of the FCRPS. *Id.* IPC is already on record having stated its belief that the change in the 1984 ASC Methodology was wrong and at the very least in place for much longer than necessary. *Id.* That one change in methodology had a significant impact on the opportunity of IPC's customers to receive any benefits. *Id.* However, a settlement is not the time or place to engage in arguments over past methodology. *Id.*

In summary, BPA's reasons to hold any alleged deemer balances in abeyance include the nature of the alleged deemer balances; the fact that the alleged deemer balances have not been discussed with or verified by the IOUs; the fact that the IOUs contest BPA's calculation of the deemer balances; that the existence of deemer balances and the amount of such balances, if any, must be determined in negotiations between BPA and the IOUs and will not be finally determined until BPA and the IOUs have discussed and resolved the issue or the issue is resolved through litigation; and that a settlement, by its very nature, is a settlement of all the issues pending between two parties regarding a particular subject matter, including, in this case, deemer balances. While BPA believes that it is appropriate to hold any deemer amounts in abeyance, BPA notes that if utilities resume participation in the traditional REP after the term of the settlement, the deemer issue must be resolved before the utility executes a new RPSA.

### **Decision**

*BPA will hold any deemer accounts in abeyance during the term of an IOU's Settlement Agreement.*

## VIII. PASSTHROUGH OF BENEFITS

### Issue

*Whether the Settlement Agreement ensures that any benefits received under the Agreement will be passed through to residential and small farm consumers.*

### Parties' Positions

Whatcom County PUD argues that the overriding principle of the REP settlements must be the direct passthrough of benefits to residential and small farm consumers of exchanging utilities. Whatcom, IOURESEXC:022.

### BPA's Position

The REP Settlement Agreements expressly require the passthrough of benefits to the residential and small farm consumers of the IOUs. The Settlement Agreements also expressly provide BPA with audit rights to ensure that benefits are passed through only to eligible consumers.

### Evaluation of Positions

Whatcom County PUD argues that regardless of the final policy adopted or the specific terms and conditions of the Settlement Agreements, the overriding governing principle must be the direct flow through of benefits to residential and small farm consumers of exchanging utilities. Whatcom, IOURESEXC:022. Whatcom further argues that no contractual mechanism should be adopted that allows the opportunity for either utilities continuing to exchange or those opting for settlements to receive benefits absent the assured passthrough of these benefits to eligible consumers. *Id.* Whatcom's concerns are directly addressed in the Settlement Agreements. Section 6 of the Settlement Agreements governs the passthrough of settlement benefits to residential and small farm consumers. Section 6 provides, in pertinent part:

- (a) Except as otherwise provided in this Agreement, Firm Power and Monetary Benefit amounts received by «Customer Name» from BPA under this Agreement shall be passed through, in full, to each residential and small farm consumer, as either: (1) an adjustment in applicable retail rates; (2) monetary payments; or (3) as otherwise directed by the applicable State regulatory authority.
- (b) Monetary payments shall be distributed to the Residential Load in a timely manner, as set forth in this section 6(b). The amount of benefits held in the account described in section 6(c) below at any time shall not exceed the expected receipt of monetary payments from BPA under this Agreement over the next 180 days. If the annual monetary payment is less

than \$600,000, then «Customer Name» may distribute benefits on a less frequent basis provided that distributions are made at least once each Contract Year.

Benefits shall be passed through consistent with procedures developed by «Customer Name»'s State regulatory authority(s). Monetary Benefits and any cash benefits under section 5 shall be identified on «Customer Name»'s books of account. Funds shall be held in an interest bearing account, and shall be maintained as restricted funds, unavailable for the operating or working capital needs of «Customer Name». Benefits shall not be pooled with other monies of «Customer Name» for short-term investment purposes. Firm Power shall be delivered monthly, and only to Residential Load.

\* \* \*

*See* Settlement Agreement, Section 6. As noted in Section 6, not only does the Settlement Agreement require settlement benefits to be passed through to residential and small farm consumers, it also requires that such benefits be distributed to consumers in a timely manner. In addition, Section 6 requires that benefits be held by the utility in an interest bearing account, that the benefits be held in as restricted funds, and that the benefits will not be pooled other funds of the utility. In addition to Section 6, however, Section 7 provides BPA with audit rights regarding the passthrough of settlement benefits. Section 7 provides:

BPA retains the right to audit «Customer Name» at BPA's expense to determine whether the benefits provided to «Customer Name» under this Agreement were provided only to «Customer Name»'s eligible Residential Load. BPA retains the right to take action consistent with the results of such audit to require the passthrough of such benefits to eligible Residential Load. BPA's right to conduct such audits of «Customer Name» with respect to a Contract Year shall expire 60 months after the end of such Contract Year. As long as BPA has the right to audit «Customer Name» pursuant to this Agreement, «Customer Name» agrees to maintain records and documents showing all transactions and other activities pertaining to the terms of this Agreement with respect to which BPA has audit rights.

*Id.*, at Section 7. As noted in Section 7, not only does BPA have the right to audit the utility to ensure that settlement benefits are passed through, BPA has the right to take action consistent with the results of an audit to require the passthrough of benefits to eligible residential and small farm consumers.

## **Decision**

*The Settlement Agreements properly require the passthrough of settlement benefits to residential and small farm loads and provide BPA the ability to ensure that such benefits are only passed through to such loads.*

## **IX. SECOND FIVE-YEAR RATE GUARANTEE**

### **Issue**

*Whether the Settlement Agreements provide appropriate pricing for the second five-year period.*

### **Parties' Positions**

SUB objects to any language which guarantees IOUs access to lowest cost PF power beyond the five-year period which is above the initial amount allotted to the IOUs in the first 5 years. SUB, IOURESEXC:003. SUB argues that BPA should structure the IOU contracts such that they are similar to the block products offered to consumer-owned customers. *Id.* PPC argues that, in a number of places, the Settlement Agreement improperly ensures that IOUs will qualify for what is defined in the Agreement as the "Lowest PF Rate." PPC, IOURESEXC:006. PPC argues that BPA prejudges the outcome of the next rate case period, FY 2007-2011, by a contractual guarantee to the IOUs of the "Lowest PF Rate." *Id.*

### **BPA's Position**

The Settlement Agreements provide appropriate pricing for the settlement benefits in the second five-year period.

### **Evaluation of Positions**

SUB objects to any language that guarantees IOUs access to lowest cost PF power beyond the five-year period which is above the initial amount allotted to the IOUs in the first 5 years. SUB, IOURESEXC:003. SUB argues that such language would, in effect, give IOUs a stepped up block of power that is priced at a level equivalent to the lowest cost PF rate. *Id.* SUB argues that consumer-owned utilities are not guaranteed this in the second five years for a similar stepped up block of power. *Id.* SUB objects to any contractual language in the IOU contracts that grants access to lowest-cost BPA power, which BPA has denied preference customers for similar block service. *Id.* SUB argues that it and other preference customers have repeatedly requested that they be allowed to purchase a 10-year block of power that increases in the second five years and have all of the power be priced at the lowest cost BPA rate. *Id.* SUB argues that BPA has denied those requests. *Id.* Similarly, the PPC argues that BPA has not offered consumer-owned

utilities equivalent guarantees that they will be eligible for the "Lowest PF Rate" from FY 2007-2011. PPC, IOURESEXC:006.

SUB is incorrect in its characterization of the IOU Settlement Agreements. In BPA's Block Power Sales Agreement with *public* utilities, BPA has contractually committed to provide the Lowest Cost PF Rate for the second five-year period to public utilities for the contractual amount of power purchased during the first five years. BPA has not made such a contractual promise to the IOUs. Also, BPA does not make *any* power sales to the IOUs under the Settlement Agreements at the PF Preference rate. While BPA has agreed to provide the IOUs with the Lowest *RL* Rate for the second five years, BPA has not contractually committed to provide that rate for any specified amount of firm power. BPA will determine how much firm power to offer the IOUs during the second five-year period. *See* Settlement Agreement, Section 4(b)(2). While BPA will attempt to provide increased amounts of firm power deliveries to the IOUs, BPA has made no contractual commitment to do so. BPA stated in its Power Subscription Strategy that, subject to establishment in a section 7(i) hearing and consistent with BPA's rate directives, firm power provided under the RL rate would be at a rate approximately equal to the PF Preference rate. *See* Power Subscription Strategy, at 16. BPA has also included a contractual provision stating that the Lowest RL rates shall be approximately equal to the Lowest PF rates. This provision, however, is not a contractual promise to establish a rate at this level since it is also expressly conditioned on being subject to establishment in BPA's rate case and subject to BPA's statutory requirements. *See* IOU Block Sales Agreement, Exhibit A, Section 3(c). These requirements are different than the contractual promise to public customers to provide the Lowest PF Rate, without condition, for the second five years of the contract period for the amounts of contractual power purchased during the first five years.

SUB argues that BPA should structure the IOU contracts such that they are similar to the block products offered to consumer-owned customers. SUB, IOURESEXC:003. SUB argues that to do otherwise violates consumer-owned utilities' preference rights. *Id.* SUB states that the amounts purchased by IOUs in the first five years would be guaranteed to be priced at a level equivalent to the lowest cost BPA power in the second five years. *Id.* SUB argues that rates for any amounts purchased in the second five years that are above the amounts purchased in the first five years should be handled such that either (1) the IOU contracts are silent regarding the rate charged for amounts that step up in the second 5 years, or (2) the IOU contracts should state that the rate charged for amounts that step up in the second five years will be determined in BPA's 2006 power rate case. *Id.* BPA's contracts with the IOUs have not established the rates for the IOUs in the second five years. BPA has stated an interest to seek a rate level for the amounts of firm power provided to IOUs in settlement of the REP that is approximately equal to the Lowest PF Rate, subject to BPA's ability to do so in a manner that is consistent with BPA's rate directives and subject to a section 7(i) hearing. BPA's interest in establishing such a rate does not violate consumer-owned utilities' preference rights because the contractual agreement does not interfere with power sales to BPA's preference customers. Also, BPA's Settlement Agreement power sales are subject to preference

rights. Furthermore, the rates for sales to IOUs under the Settlement Agreements will be established in BPA's 2006 power rate case.

PPC argues that the pricing treatment of IOUs under the Settlement Agreement violates the public preference clause, and is contrary to the Northwest Power Act and other statutes governing BPA. PPC, IOURESEXC:006. PPC argues that in a number of places, the Agreement ensures that IOUs will qualify for what is defined in the Agreement as the "Lowest PF Rate." *Id.* (citing Section 2(e), page 2). PPC argues that consumer-owned utilities do not have equivalent rights to the "Lowest PF Rate." *Id.* PPC argues that BPA has proposed a number of devices -- TAC, TACUL, and SUMY -- which expose a significant fraction of the requirements load of consumer-owned utilities to market-based power prices, without the rate guarantees and price certainty that BPA proposes to extend to IOUs. *Id.* PPC also argues that while BPA is offering an additional 400 aMW of power and/or financial benefits to the IOUs over and above the 1500 aMW initially agreed upon, BPA is unwilling to provide any more than 75 aMW of power at the "Lowest PF Rate" to any newly-formed consumer-owned utilities. *Id.*

In response to PPC's arguments, BPA's Power Subscription Strategy spoke in general terms about the level of the RL and PF Preference rates. The Power Subscription Strategy did state, however, that rates for sales to public agency customers made after the Subscription window closes would be subject to a "targeted adjustment charge." *See* Subscription Strategy, at 15. The Power Subscription Strategy did not state that such a charge would apply to the RL or PF Exchange Subscription rates. Further, the Power Subscription Strategy did not say that the RL rate would be eligible for all of the same rate adjustment features of the PF Preference rate. Indeed, this is consistent with the fact that the RL rate is not subject to a number of charges that apply to the PF Preference rate, such as the TAC, TACUL, SUMY, and other charges. This is because such settlement sales must be established during the Subscription window and are for a fixed amount and shape of power during the rate period. Doubleday *et al.*, WP-02-E-BPA-44, at 13. For example, the RL and PF Exchange Subscription rates do not include the TAC because all IOU settlement sales must be concluded during the Subscription window. *Id.* Other charges to the PF Preference rate are not applicable to the settlement sales for similar reasons. *Id.* BPA's power sales to IOUs at the RL rate are for 24-hour flat-block power only. Furthermore, while purchasers of power at the RL rate are not subject to charges that do not apply because of the type of power provided, BPA's preference customers have access to the full panoply of products available at the PF Preference rate. BPA's application of the RL rate to the IOU settlements is not superior to preference customers' purchases of a variety of products at the PF Preference rate. Furthermore, it is worth noting that if a preference customer were to purchase the product being offered to the IOUs under the proposed settlements during the Subscription window, it would pay exactly the same rate for such power.

BPA has not made any contractual promise to sell power to the IOUs at the Lowest PF Rate. IOUs are not eligible to purchase requirements power under the PF Preference rate schedule. (IOUs, however, can purchase power from BPA in the traditional REP under the PF Exchange Program rate and can purchase settlement power under a section 5(c) in



lieu sale, which is made under the PF Exchange Subscription rate.) BPA's contractual statement regarding establishment of an RL rate equal to the Lowest PF Rate is subject to the preference rights of consumer-owned utilities and the establishment of such a rate in BPA's rate case consistent with BPA's rate directives. BPA has not offered *any* firm power deliveries to IOUs at the Lowest PF Rate. All power deliveries to IOUs take place at the RL rate or the PF Exchange Subscription rate. Both rates have been and must be established in a BPA rate case, which is a formal evidentiary hearing held in accordance with section 7(i) of the Northwest Power Act. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997).

While the Lowest PF Rate does not apply to any power sales to IOUs under the Settlement Agreements, there are circumstances where the PF rate can be used for other purposes. The Settlement Agreements with the IOUs are a settlement of the rights of their consumers to benefits under the REP, established under section 5(c) of the Northwest Power Act. *See* 16 U.S.C. § 839c(c) (1994 & Supp. III 1997). Settlement Agreement deliveries of firm power to the IOUs require them to relinquish any rights on behalf of their consumers under section 5(c) of the Act. *See id.* BPA has used the Lowest PF Rate as referenced by the PPC above as a proxy for determining the *cash* value of the IOU Settlement Agreements. BPA has agreed to make cash payments if it can not meet the rate targets it established for firm power deliveries to settle the REP under its Power Subscription Strategy during the contract term. *See* IOU Settlement Agreement, Sections 4(c)(2)(c) and 5(b)(3). BPA's use of the Lowest PF Rate is only as part of a formula for establishing cash payments to settle disputes over the REP and is not a rate for any power sales. *See id.* Use of the Lowest PF Rate as a bookend for establishing a formula for the payment of monetary benefits is consistent with BPA's statutory authority. As noted previously, "the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as [s]he may deem necessary." 16 U.S.C. § 832a(f) (1994 & Supp. III 1997); *see also id.* § 839f(a) (1994 & Supp. III 1997).

The PPC is incorrect in suggesting that consumer-owned utilities are paying higher rates than IOUs. PPC, IOURESEXC:006. Any net requirements purchases by the IOUs above the limited amounts of power provided pursuant to the Settlement Agreement are made at the NR rate. *See* Power Subscription Strategy, at 16. Any rates for firm power sold to the IOUs, including the amounts offered in settlement of the REP, will be established in a section 7(i) proceeding and will be subject to BPA's statutory requirements. Any concerns of the PPC regarding those rates should be raised in BPA's relevant rate case.

PPC argues that particularly egregious is the fact that BPA prejudices the outcome of the next rate case period, FY 2007-2011, by a contractual guarantee to the IOUs of the "Lowest PF Rate." PPC, IOURESEXC:006. PPC states that Section 4(b)(2)(C) of the Settlement Agreements provides that in order to calculate the monetary benefits from FY 2007 to 2011, if the RL rate is above the "Lowest PF Rate" (defined as the lowest applicable cost-based power rate provided under the PF rate schedule), then the monetary

benefits will be calculated using the “Lowest PF Rate.” *Id.* This argument is misplaced. The noted language does not show any predecision regarding BPA’s next rate case. BPA’s rates for power sales are developed by BPA in hearings conducted under procedures established in section 7(i) of the Northwest Power Act. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997). In BPA’s next relevant rate case, BPA will establish all of its wholesale power rates, including the PF Preference rate and the RL rate. The PF Preference rate will apply to all net requirements sales to BPA’s preference customers. The RL rate will apply to all net requirements sales made to the IOUs as part of the REP Settlement Agreements. BPA, through the Settlement Agreements, is not providing a contractual guarantee to the IOUs of the “Lowest PF Rate” for any *net requirements power sales*. Indeed, nowhere in the Settlement Agreement is there any provision of a net requirements power sale to the IOUs at the PF Preference rate. This is because BPA does not make net requirements power sales to the IOUs under the PF Preference rate but rather under the RL and NR rates. PPC is comparing apples and oranges. As noted in the contract language quoted by PPC, the “Lowest PF Rate” is not used for power sales, but only used as a default source of identifying one of the elements used in determining the payment of monetary benefits under the Settlement Agreement. In simple terms, monetary benefit payments to the IOUs are calculated based on the difference between BPA’s 2002 rate case five-year flat-block market forecast and the RL or PF Exchange Subscription rate. In BPA’s 2002 rate case, the RL and PF Exchange Subscription rates were determined to be equal to the PF Preference rate for a 24-hour flat block product. In determining the proper consideration for the settlement of the IOUs’ REP rights, such consideration, from the monetary benefit standpoint, was the difference between the RL/PF Exchange Subscription/PF Preference rate price levels and BPA’s 2002 rate case five-year flat-block market forecast. The equal nature of the rates provided that a monetary benefit would provide benefits similar to a power sale to a preference customer. Because BPA recognizes that it is possible that the RL rate could change in BPA’s next rate case and might be higher than the PF Preference rate, BPA wanted to provide for such a circumstance in the Settlement Agreement. Thus, if the RL rate is above the “Lowest PF Rate” in BPA’s 2006 rates, the monetary benefits will be calculated using the “Lowest PF Rate” to preserve the value of the settlement relative to benefits received by preference customers from their purchases from BPA at the PF Preference rate.

### **Decision**

*The Settlement Agreements provide appropriate pricing for the second five-year period.*

## **X. ANNEXED LOAD**

### **Issue**

*Whether preference utilities that acquire "annexed" load that was previously eligible for exchange benefits should be able to serve such load at the PF Preference rate.*

## **Parties' Positions**

Whatcom argues that preference utilities that acquire "annexed" load, that has previously been eligible for exchange benefits, should be able to serve such loads at the PF rate. Whatcom, IOURESEXC:022.

## **BPA's Position**

BPA's Power Subscription Strategy provides that if public agencies annex loads and the agency's power sales contract for serving such load is signed before the Subscription window closes, the load will be served at the PF rate. *See* Power Subscription Strategy, at 7. BPA's Power Subscription Strategy provides that if public agencies annex loads that were previously served at PF, and the agency's power sales contract for serving such load is signed after the Subscription window closes, the load will be served at the PF rate. *Id.* However, annexed loads that were previously an IOU residential and small farm load, and where the agency's power sales contract for serving such load was signed after the Subscription window closes, will be subject to a Targeted Adjustment Charge (TAC). *Id.* If the annexed load was previously an IOU residential and small farm load that was receiving BPA power or other benefits under the Power Subscription Strategy, the annexed load will continue during the rate period to receive its prorated share of the power delivery or financial benefits as if it had remained an IOU residential and small farm load. *Id.* at 9. Such annexed loads for which contracts are signed after the Subscription window closes will be subject to a TAC for the portion of the load in excess of its prorated share of Subscription benefits.

## **Evaluation of Positions**

Whatcom County PUD argues that under BPA's current definition of "annexed load," as contained in the draft 2002 power sales contract prototypes, a preference customer desiring to increase its net requirements on BPA to serve new residential or small farm customer load considered to be "annexed" load must pay a tiered rate (PF + TAC) for this power. Whatcom, IOURESEXC:022. Whatcom argues that this rate is generally considered to be a proxy for market-priced power. *Id.* Whatcom argues that in the instance of a customer(s) considered "annexed" by a preference utility and who formally received exchange benefits via its IOU power provider, such customer(s) might face higher power costs solely due to loss of exchange benefits on the one hand and exposure to a tiered rate on the other. *Id.* Whatcom argues that it is conceivable that PF +TAC could be higher than the published PF Exchange rate or rate for in-lieu power available to IOUs participating in the REP or Settlement Agreements. *Id.* In the example above, the residential or small farm load loses monetary benefits. *Id.* Whatcom believes that preference utilities that acquire "annexed" load, that has previously been eligible for REP benefits, should be able to serve these loads at the PF rate. *Id.* If TAC is applied, then the resultant tiered rate should in no case be higher than the PF Exchange rate or in-lieu power rate, whichever is lower. *Id.*

In response to Whatcom's arguments, if a public agency acquires annexed load after the Subscription window, then it pays for power for that load at the PF rate plus a TAC. This is appropriate because BPA would not have factored such new load into its planning and BPA would be required to go to the market to meet such load. By making power sales at the PF rate plus the TAC, BPA is compensated for its additional costs and is kept whole. Otherwise, BPA would incur additional costs that were not expected to be paid and such costs would not be borne by the party creating the costs, but would be unfairly shifted to BPA's other customers. The PF Exchange rate would not apply because the power sale from BPA to the public agency is not a sale of power under the REP. BPA's in lieu power rate for the normal implementation of the REP is also the PF Exchange rate. Again, this rate would not apply because BPA's power sale to the public agency is not a sale of in lieu power to an exchanging utility. Just as these rates do not apply to BPA's requirements sales to public agencies, it is inappropriate to use such rates as a cap on the PF rate plus the TAC.

The public agency will be eligible to receive Subscription benefits for the amount of residential and small farm load annexed from an IOU. The IOU Settlement Agreement requires the IOU to return a pro rata share of its Subscription benefits back to BPA. See IOU Settlement Agreement, Section 8. BPA uses the aMW amount of total benefits (power and monetary) assigned to BPA to reduce the amount of annexed load that is subject to BPA's TAC. These benefits, however, would not be available if the IOU had signed an RPSA.

### **Decision**

*Loads annexed by public utilities after the Subscription window closes are eligible for a prorated share of Subscription Settlement Agreement benefits. The benefits that a residential and small farm load receives under the REP are not assignable if the load is annexed. BPA has determined that utilities annexing loads after the Subscription window closes should pay the increased costs BPA faces to serve the load.*

## **XI. GENERAL COMMENTS**

### **A. Consistency of IOU and Public Agency Contracts**

#### **Issue**

*Whether the proposed settlements are being treated in a different manner than the contracts provided to public agencies.*

#### **Parties' Positions**

The OPUC believes that BPA is treating the IOU contracts differently than public agency contracts; for example, the public comment opportunities provided for the Settlement Agreement and RPSA were not provided for the public agency contracts. OPUC,

IOURESEXC:014. As evidence of its assertion, the OPUC points to different treatments of policy development for New Large Single Loads (NLSLs) and in-lieu power purchases, respectively. *Id.*

### **BPA's Position**

BPA has traditionally provided for public comment on BPA's previous Residential Exchange Termination Agreements. Also, BPA intends to use a prototype contract for contract offers under the REP. Because all the utilities in the region that could potentially participate in the REP could not be at each session where the development of contract language is discussed, BPA put the RPSA out for a thirty-day public comment period.

### **Evaluation of Positions**

The OPUC observes that there appears to be different treatment for public agencies than for IOUs with regard to developing final contract language. OPUC, IOURESEXC:014. For example, only the draft RPSA, Settlement Agreement and Block Power Sales Agreement were distributed for public comment. *Id.* Another example of differing treatment involves the issue of NLSLs compared to how BPA is handling in-lieu provisions. *Id.* These differences, however, occur for simple, logical reasons, as discussed below.

First, with regard to the public comment process for BPA's proposed Settlement Agreements, BPA has previously negotiated and implemented approximately thirty Residential Exchange Termination Agreements to terminate utilities' participation in the REP. These settlements have involved both IOUs and public agencies participating in the REP. In each such case, BPA has conducted a public comment process to solicit the views of all interested parties on the proposed settlements. Because the Subscription Settlement Agreements are settlements of IOUs' rights to participate in the REP, they were put out for public comment. The Block Sales Agreement is an exhibit to the Settlement Agreement. Also, a number of parties raised contract issues regarding the Settlement Agreement during BPA's 2002 power rate case. The comment period on the Settlement Agreement gave the parties an opportunity to raise these issues with BPA based on the proposed contract language in the Settlement Agreements.

BPA placed the RPSAs out for public comment because they are a prototype contract designed to implement the REP. As contract language for the REP was developed in discussion sessions with individual parties, a thirty-day comment period was necessary to allow all parties to participate in its final development.

The OPUC is also concerned about different processes for developing NLSL requirements and in-lieu requirements. The OPUC's understanding is that BPA is planning on having a separate public process for establishing the definition of NLSL. Power sales contract language for the public agencies simply states that an NLSL is as defined in the Act. *Id.* However, for in-lieu provisions, BPA is proceeding down a different path. *Id.* The OPUC states that BPA is including its interpretation of what

constitutes an in-lieu resource, and notice provisions, in its contracts. *Id.* If the IOU wants to sign the contract then the IOU must accept at that time BPA's definition of the in-lieu provisions. *Id.* These apparent differing approaches concern the OPUC and raise questions as to whether residential and small farm customers of IOUs are perceived by BPA as a "customer" in a similar fashion as BPA perceives its public agencies. *Id.*

BPA has properly treated the Settlement Agreement and the RPSA differently than its power sales contracts. The main policy issues in the power sales contracts are contained in BPA's Section 5(b)/9(c) Policy. BPA put draft power sales contracts out for customer comment during December of 1999. Because the final contract language did not address significant policy issues, BPA did not believe further public comment was necessary. BPA has not placed the final drafts out for additional comment.

The OPUC also argues that BPA is proposing differing treatment with regard to the issue of NLSLs as compared to the issue of in-lieu transactions. With regard to NLSLs, BPA has proposed to conduct a public process. In response to the comments of the OPUC and several IOUs, however, BPA has also proposed to conduct a separate public process regarding the development of rules governing in-lieu transactions. *See RPSA ROD.* Thus, these issues will be treated in a similar procedural manner for BPA's customers and other interested parties. In addition, public agencies are also eligible to participate in the REP and would be affected by BPA's development of in-lieu rules just as the IOUs would.

### **Decision**

*BPA properly made the proposed Settlement Agreements and RPSAs available for public comment. BPA is treating the development of rules for NLSLs in the same general procedural manner as the development of rules for in-lieu transactions.*

#### **B. Effect of BPA's Section 5(b)/9(c) Policy on Settlement Benefits**

### **Issue**

*Whether the proposed Settlement Agreements provide meaningful and secure benefits in light of BPA's Section 5(b)/9(c) Policy.*

### **Parties' Positions**

Avista is concerned that it could lose benefits due to the operation of BPA's Section 5(b)/9(c) Policy. Avista, IOURESEXC:001. Avista is concerned that it could be forced to alter its wholesale marketing program that provides benefits to all its retail customers to retain access to power provided under the Settlement Agreement for its residential and small farm consumers. *Id.*

## **BPA's Position**

BPA's proposed Settlement Agreements provide firm power and monetary benefits as noted in BPA's Power Subscription Strategy. In the event a participating IOU is unable to continue its purchase of firm power, the Settlement Agreement provides a mechanism to provide cash payments to or from the IOU based on the value of the firm power retained by BPA.

## **Evaluation of Positions**

It is Avista's intent and desire to enter into a settlement of the REP, assuming contract terms that provide meaningful and sustainable benefits to Avista's residential and small farm customers can be mutually agreed upon. Avista, IOURESEXC:001. While it continues to be Avista's desire to enter into a Settlement Agreement with BPA, certain terms of the Settlement Agreement are unacceptable to Avista in their present form. *Id.* The ability to have absolute certainty with respect to the benefits of the proposed Settlement Agreement continues to be a key consideration in Avista's decision whether or not to accept the settlement. *Id.* In particular, it is not clear what the effect of BPA's recently issued Section 5(b)/9(c) Policy will be on power and/or cash benefits under the settlement. *Id.* Avista argues that the Settlement Agreement, in conjunction with the Section 5(b)/9(c) Policy, must provide for meaningful, secure benefits in order to qualify and function as a settlement. *Id.*

While BPA understands the concerns expressed by Avista, BPA does not believe the proposed Settlement Agreements create a basis for a different policy interpreting sections 5(b)(1) and 9(c) of the Northwest Power Act. The Section 5(b)/9(c) Policy applies equally to the purchases of IOUs and public agencies taking service from BPA under section 5(b)(1) of the Northwest Power Act. *See* BPA's Section 5(b)/9(c) Policy, Administrator's ROD, at 16-17. The proposed Settlement Agreement includes a contractual provision for providing cash payments based on the value of firm power retained by BPA if BPA is no longer able to deliver firm power to Avista during the term of the settlement. In determining whether to enter the settlement, Avista must determine whether those provisions provide meaningful and secure benefits to its residential and small farm consumers over the term of the settlement chosen by Avista.

## **Decision**

*The Settlement Agreements provide meaningful and secure benefits to the residential and small farm consumers of the IOUs despite the marketing decisions made by IOUs and the impact of those decisions on the ability of the IOU to purchase firm power from BPA under section 5(b) of the Northwest Power Act.*

## C. Supplementation of Benefits

### Issue

*Whether the proposed settlements preclude participation of the residential and small farm consumers of IOUs in any restructuring or restoration of Federal power benefits for those consumers during FY 2007-2011.*

### Parties' Positions

PacifiCorp argues that to facilitate participation by IOUs in the Settlement Agreements, BPA should clarify that it will not treat the execution of 10-year settlements as a waiver of the right to participate in the benefits of any restructuring or restoration of Federal power benefits for residential and rural customers of IOUs during the FY 2007-2011 period. PacifiCorp, IOURESEXC:011.

### BPA's Position

The proposed Settlement Agreements satisfy the rights of a participating IOU to receive benefits under the REP for the term of the Settlement Agreement (five years or 10 years). The proposed settlement for the FY 2007-2011 period provides an increase in the amount of benefits provided to the IOUs compared to the amount provided during the FY 2002-2006 period. If Congress passes legislation changing the statutory provisions providing benefits to residential and small farm consumers of IOUs, BPA will implement the statutory changes as directed by Congress.

### Evaluation of Positions

PacifiCorp and other IOUs believe that Congress intended BPA to provide greater benefits to residential and small farm consumers served by IOUs than the benefits that would be provided by BPA's proposed implementation of the REP. *E.g.*, PacifiCorp, IOURESEXC:011. They also believe the level of benefits provided to residential and small farm consumers served by their utilities should be greater than the amount of benefits BPA proposes to offer under the Settlement Agreements. *Id.* They argue that BPA should change its implementation of the REP or seek changes in its statutory authority to provide a greater share of the benefits of the FCRPS to these consumers. *Id.*

PacifiCorp believes that equitable resolution of regional issues requires restoration of a fair share of Federal power benefits to PacifiCorp's rural and residential customers. PacifiCorp, IOURESEXC:011. PacifiCorp argues that negotiations to provide such benefits should commence once Subscription contracts are signed -- whether provided through the REP, by supplementing the proposed Subscription benefits, or by adopting a new method of spreading Federal power benefits. *Id.* To facilitate participation by IOUs in the Subscription settlement, BPA should clarify that it recognizes the need to address such equity and restructuring issues and will not treat the execution of 10-year



settlements as a waiver of the right to participate in the benefits of any restructuring or restoration of Federal power benefits for residential and rural customers of IOUs during the FY 2007-2011 period. *Id.*

BPA has offered the proposed Settlement Agreements in recognition of the profound disagreements on how BPA should implement the REP. Other regional parties believe that BPA's statutes direct BPA to provide a greater share of the benefits of the FCRPS to their consumers. BPA does not believe there would be broad regional support for reopening Settlement Agreements with the IOUs and BPA will not commit to take such actions unless it is directed to do so by Congress. It would clearly be inappropriate to allow the IOUs to receive the Settlement Agreement benefits and to receive, in addition, benefits from a similar program that would essentially provide double benefits to the IOUs, unless expressly directed by Congress. IOUs executing five-year Settlement Agreements, however, will not have limited their options for the second five-year period (except the guarantee of a 2,200 aMW total benefit amount). For IOUs executing 10-year Settlement Agreements, BPA will not treat the execution of 10-year settlements as a waiver of the right to participate in the benefits of any restructuring or restoration of Federal power benefits for residential and rural customers of IOUs during the FY 2007-2011 period, if so directed by Congress.

### **Decision**

*BPA will not commit to supplement the level of the benefits during the FY 2007-2011 period if an IOU selects a 10-year Subscription Settlement offer. BPA will act as directed by Congress. Any decisions by BPA to supplement the benefits provided in the Settlement Agreements will be made in the future.*

## **D. Appeal Rights**

### **Issue**

*Whether the proposed Settlement Agreements properly address the reservation of the IOUs' appeal rights.*

### **Parties' Positions**

Avista and PSE note that the proposed Settlement Agreements require the exchanging utility to forego any claims under the REP. Avista, IOURESEXC:001; PSE, IOURESEXC:018. These IOUs request to expressly preserve the right to file specific challenges to aspects of the REP. *Id.* They also asked BPA to provide a contractual warranty that it is authorized to enter into all aspects of the Settlement Agreements. *Id.*

### **BPA's Position**

BPA's proposed Settlement Agreements require participating IOUs to terminate all existing legal challenges to implementation of the REP. IOUs were allowed to

participate in litigation filed by other parties. BPA recognized that the residential and small farm consumers of the IOUs could be exposed to receiving no benefits under the REP if the Settlement Agreements were held invalid. BPA has therefore eliminated the provision requiring IOUs to forego their challenges to implementation of the REP. BPA has clarified that the Settlement Agreements will require participating IOUs to give up benefits under the REP for the term of the Settlement Agreement as long as the validity of the agreement is upheld. It would make little sense to proceed with litigation regarding the REP when the validity of the Settlement Agreements would render such issues moot.

BPA has proposed a new provision stating that both parties would seek to negotiate a new mutually agreeable settlement if the proposed Settlement Agreements are held invalid. The parties also propose that if a court holds the Settlement Agreements invalid, they would agree that any benefits paid by BPA under the Settlement Agreement, from the start of the agreement until the court holds the agreement invalid, would satisfy the exchanging IOUs' rights under the REP for that period to the maximum extent allowed by law.

### **Evaluation of Positions**

Avista notes that the current draft of the Settlement Agreements would require a settling party to agree not to commence any claims regarding ASC or the traditional RPSA, citing Section 3(b) of the draft prototype Settlement Agreement. Avista, IOURESEXC:001. Avista notes that unless BPA could agree to toll the statute of limitations in the Northwest Power Act, some provision needs to be made for a "placeholder" appeal. *Id.* Avista's understanding is that BPA cannot agree to toll the provisions of section 9(e) of the Northwest Power Act. *Id.* Consequently, until Avista knows for certain that there is no successful challenge to the Subscription Settlement, Avista argues that it will be necessary to have a claim on file to preserve Avista's right to have its concerns about the traditional RPSA addressed. *Id.*

Avista notes that should there be a challenge that is ultimately successful but not resolved before benefits are to be paid to Avista's customers, there would arise the question of how to handle previously expended amounts. *Id.* Avista argues that the Settlement Agreements should specify that the participating utility is not obligated to refund funds to BPA that have not or cannot be recovered by the customers receiving the benefits under the Settlement and that it is not Avista's responsibility to obtain repayment. *Id.* Alternatively, Avista argues that funds could be held by BPA until final resolution of any challenge, subject to payment of interest by BPA. *Id.* Avista argues that in either case, BPA's representation of authority in Section 15 should be stated more strongly by amending the Section 15 language as follows:

Each of the Parties represents that it is authorized to enter into this Agreement, and its exhibits, and that the obligations such Party has undertaken under this Agreement and its exhibits are valid, lawful, binding, and enforceable obligations and within the authority of such Party

to undertake. Each of the Parties also represents that all necessary approvals in respect to its authority to execute this Agreement and its exhibits have been obtained.

*Id.*

BPA recognized that its proposed provisions requiring all claims under the REP to be withdrawn would lead to substantial exposure for the residential and small farm consumers of IOUs if the Settlement Agreements were held invalid. BPA was unwilling to agree with PSE's proposal that PSE could reserve the right to pursue active litigation on the REP. BPA decided the prudent course of action would be to allow the IOUs to file challenges to the REP. BPA and the IOUs recognize, however, that it would make little sense to litigate any challenges to the RPSA or other components of the traditional REP until challenges, if any, to the Settlement Agreements were resolved. Where the Settlement Agreements are upheld, challenges to the RPSA and other components of the REP would be moot. BPA and the IOUs intend to take appropriate actions to avoid litigating potentially moot issues pending resolution of any litigation challenging the Settlement Agreements. BPA will require each participating IOU to agree that it is not entitled to any increased benefits as the result of any litigation challenging aspects of the REP for the term of its Settlement Agreement as long as the provisions of the Settlement Agreement remain in force.

BPA also recognized that both BPA and the IOUs would be placed in a difficult position if the Settlement Agreement were held invalid and the court required a refund of benefits previously passed through to the residential and small farm consumers of IOUs. If the Settlement Agreements were held invalid, it would also likely commence the active pursuit of litigation on the appropriate amount of benefits under the REP. BPA and the IOUs agreed that the prudent course of action if the Settlement Agreements were held invalid would be to settle any claims under the REP for the period from the start of the Settlement Agreement until the court ruling based on the terms of the proposed Settlement Agreement. In other words, to the maximum extent allowed by law, BPA and the IOUs would retain their respective benefits from the Settlement Agreement for any benefits that were already provided. BPA noted that while it could express its intent in the Settlement Agreement, any such commitment would be subject to the court's ruling.

### **Decision**

*BPA will modify the prototype Settlement Agreements to remove any requirement for IOUs to forego all legal challenges regarding the REP. BPA will require any participating IOU to forego any benefits that would otherwise result from challenges to the REP while the Settlement Agreement is in effect. BPA will also include an agreement, to the maximum extent allowed by law, to settle any claims under the REP on the same basis as the Settlement Agreements for the period from the start of those agreements until a court ruling holding them invalid.*

## **E. Consistent Application of Forecasted Market Prices**

### **Issue**

*Whether, where BPA relies on forecasted market prices, the number should be consistently applied to all determinations.*

### **Parties' Positions**

Avista argues that BPA should use the same forecast of market prices for power for all determinations under the Northwest Power Act. Avista, IOURESEXC:001.

### **BPA's Position**

BPA should use the same forecasts of the market price of power when forecasts are made at the same time and for consistent purposes.

### **Evaluation of Positions**

Avista notes that the cash benefit is determined on the basis of a forecasted market price for power. Avista, IOURESEXC:001. Avista states that the market price for power is also used to determine whether a resource could be conserved for use in the Pacific Northwest pursuant to section 9(c) of the Northwest Power Act. *Id.* Avista argues that to the extent that BPA relies on forecasted market prices, the number should be consistently applied to all determinations. *Id.*

BPA agrees that it should use the same market forecast for specified periods when determinations are made at the same time. BPA's forecast of the market price of power for paying monetary benefits is based on BPA's rate case five-year flat-block market price forecast, which reflects the cost to purchase power in the market for a specified period when such power is purchased over a period of 12 to 24 months. Purchases for the same period made at a later time may be the same or may have changed based on market conditions at that time. BPA does not believe that market prices will necessarily be the same if the determination is made in a later period in time from an original forecast. When determinations are made for different periods or at different times, the market forecasts will not necessarily be the same.

### **Decision**

*BPA's market price forecasts for different purposes will be made on the basis of known facts at the time of the forecast. Forecasts of the same market made at the same time will be made on a consistent basis.*

## **F. Notice Period for Decrements of Power under Section 9(c) of the Northwest Power Act**

### **Issue**

*Whether IOUs should receive a minimum of 12 months notice for any decrement under section 9(c) of the Northwest Power Act that affects the delivery of actual power.*

### **Parties' Positions**

Avista argues that BPA should provide a minimum of 12 months notice for any reductions in Federal power deliveries due to section 9(c) determinations. Avista, IOURESEXC:001. Avista believes this notice period is necessary to protect its commercial and industrial customers from increased costs as a result of changes in power supply. *Id.*

### **BPA's Position**

BPA has clarified the provisions in its Block Sales Agreement that apply to reductions of Federal power sales due to section 9(c) determinations. Such reductions are made in accordance with BPA's Section 5(b)/9(c) Policy. The policy anticipates that companies exporting resources from the region will report those exports to BPA prior to the start of the export so that any reductions in Federal power sales occur concurrently with the export of the non-Federal resource. Provision of a 12-month notice of reductions would be inconsistent with BPA's Section 5(b)/9(c) Policy. Furthermore, continued sales of Federal power for 12 months to replace the export of a non-Federal resource that could have been conserved or otherwise retained to serve regional loads would not meet the intent of the statute.

### **Evaluation of Positions**

Avista notes that pursuant to Section 4 of BPA's Section 5(b)/9(c) Policy, the customer must notify BPA when it intends to export a resource. Avista, IOURESEXC:001. Avista notes that BPA then must notify the customer of the results of its section 9(c) determination within 30 working days from the date that BPA receives the notification. *Id.* See Section 5(b)/9(c) Policy, Section 11. Avista argues that what is unclear from the Section 5(b)/9(c) Policy is when BPA will decrement the customer's net requirement upon a finding of export. Avista, IOURESEXC:001. Avista argues that it is obligated to protect its customers that do not receive REP benefits from potential harm that could result from a section 9(c) decrement that decreases the delivery of actual power under the Settlement Agreement and thus affects Avista's power supply plan. *Id.* Avista argues that the shorter the notification period, the harder it becomes to plan for reductions in physical power delivery. *Id.* Avista therefore believes it is appropriate that Avista receive a minimum of 12 months notice for any section 9(c) decrement that affects the delivery of actual power. *Id.* Avista argues that any shorter notice period does not allow

Avista to adequately protect its commercial and industrial customers from increased costs as a result of changes in the power supply and undermines the settlement. *Id.*

BPA's Section 5(b)/9(c) Policy does not allow a 12-month notice of reductions in Federal power sales as a result of a section 9(c) determination. Such reductions should occur at the start of the export or as soon as possible after the export is discovered. All issues regarding the Section 5(b)/9(c) Policy should have been raised in the public process that was held prior to establishing the policy. This public process provided interested parties substantial opportunities to raise any and all relevant issues. BPA is not revisiting its Section 5(b)/9(c) Policy in this forum. Furthermore, BPA does not agree that a short notice period places any increased risk on Avista's commercial and industrial customers. Under the terms of the Settlement Agreement, BPA provides cash payments based on the market value of any Federal power BPA retains due to the export of non-Federal power. If Avista reports its exports in a timely manner, there is no financial risk to Avista. Avista is made whole for its purchases in the wholesale market to replace reductions in Federal power.

### **Decision**

*BPA will not provide a 12-month notice of any reductions in Federal power due to a section 9(c) determination. IOUs are able to protect the interests of their customers by following the provisions of BPA's Section 5(b)/9(c) Policy.*

## **G. Amendment or Termination for Legislative Change**

### **Issue**

*Whether the Settlement Agreement should include a "re-opener" provision to allow for amendment or early termination that may be necessary to conform with any new or amended statutes governing or restructuring BPA.*

### **Parties' Positions**

Avista and IPC argue that the Settlement Agreements should include a "re-opener" provision to conform to any new or amended statutes governing BPA. Avista, IOURESEXC:001; IPC, IOURESEXC:010.

### **BPA's Position**

BPA will act to implement any direction provided by Congress in any new or amended statute. Any attempt to draft a "re-opener" or termination provision would be necessarily vague and create uncertainty in the settlement.

## **Evaluation of Positions**

Avista and IPC recommend that the Settlement Agreement include a re-opener provision to allow for amendment or early termination that may be necessary to conform with any new or amended statutes governing or restructuring BPA. Avista, IOURESEXC:001; IPC, IOURESEXC:010. Avista argues that this is necessary to retain flexibility to ensure the region can act to more equitably distribute benefits of the Federal power system. Avista, IOURESEXC:001. As noted previously, BPA is proposing to settle the claims of IOUs under the REP for either a five-year or 10-year period, at the choice of each IOU. Avista and IPC suggest that BPA should include a provision requiring BPA to renegotiate a 10-year settlement if Congress passes a statute affecting BPA that does not specifically address the REP. Throughout the contract negotiation process, BPA has maintained that the IOUs must settle all issues under existing legislation implementing the REP and in accordance with the terms and conditions of the settlement offer. This applies to a five or 10-year Settlement Agreement term. If legislation is enacted that would indirectly affect the Settlement Agreements or if changes in the region occur where it makes sense to revisit the Settlement Agreements, both parties can address those changes on a mutually agreeable basis. However, BPA believes that a contract provision regarding new statutes that indirectly affected the Settlement Agreements would be vague and unnecessary. The possible types of changes Congress could make are myriad and could not be specifically addressed in the Settlement Agreement. Any contract provision that would, by its nature, be somewhat vague, would simply lead to further disputes.

## **Decision**

*BPA will not include a contract re-opener provision in the 10-year Settlement Agreements. IOUs may choose a five-year or 10-year Settlement Agreement. Customers wishing to guarantee renegotiation of the Settlement Agreement can select a five-year settlement.*

## **XII. MPC SETTLEMENT AGREEMENT WITH SECTION 5(C)(5) POWER SALE**

### **Issue**

*Whether BPA should make Settlement Agreement power sales to MPC under section 5(c)(5) of the Northwest Power Act.*

### **Parties' Positions**

MPC argues that the section 5(c) contract option is appropriate because otherwise the basic purpose of Subscription will not be realized. MPC, REDSA:003. MPC argues that forcing IOUs to take only monetary benefits would undermine the equitable allocation of

benefits goal of Subscription. *Id.* MPC also argues that BPA has the authority to make the section 5(c) sale to MPC. *Id.*

PPC argues that MPC should provide evidence of an updated ASC that demonstrates that (1) MPC qualifies for REP benefits; and (2) an in-lieu transaction is appropriate. PPC, REDSA:004.

SUB submitted comments that were included in SUB's previous comments and are addressed in the relevant sections of this ROD. SUB, REDSA:002.

### **BPA's Position**

BPA's Power Subscription Strategy states that power sales for settling the REP with regional IOUs would be based either under section 5(b) or 5(c) of the Northwest Power Act. *See* Power Subscription Strategy, at 8. On MPC's request, BPA prepared a proposal for a Negotiated In Lieu Sale to settle MPC's right to benefits under section 5(c) of the Northwest Power Act. BPA's proposal reduces the amount of the exchange sale to a negotiated amount, modifies the shape of the power delivery, and provides a cash payment. In lieu of taking delivery of power from MPC, BPA will purchase power from the wholesale market at a cost BPA forecasts to be less than MPC's ASC.

### **Evaluation of Positions**

On July 28, 2000, BPA sent a letter to interested parties regarding a request by MPC to be offered a Settlement Agreement in which the power component would be made under section 5(c) of the Northwest Power Act, instead of a sale of requirements power under section 5(b) of the Act. BPA's letter noted that on May 5, 2000, BPA asked for public comment on BPA's proposed contracts for implementing the REP, including a request for comments on a proposed IOU Settlement Agreement. The Settlement Agreement BPA offered for comment on May 5 contained benefits comprised of proposed power sales and monetary payments. The power sales proposed under the Settlement Agreement were net requirements sales under section 5(b) of the Northwest Power Act. However, BPA stated in its Power Subscription Strategy, released on December 21, 1998, that power sales in its proposal for settling the REP would be based on either section 5(b) or 5(c) of the Northwest Power Act. *See* Power Subscription Strategy, at 8. In the background document included with BPA's May 5 letter, BPA noted that it had not prepared a prototype Settlement Agreement based on a power sale under section 5(c) of the Northwest Power Act, but that it would consider such proposals if they were made.

In a letter dated July 27, 2000, MPC requested that BPA provide a settlement offer including firm power benefits under section 5(c) of the Northwest Power Act. BPA prepared a draft Settlement Agreement reflecting a section 5(c) power sale. The proposed settlement, attached to BPA's July 28, 2000, letter, is very similar to the proposed agreement that BPA issued for public comment with BPA's May 5, 2000, letter. Instead of providing for a Block Sales Agreement for a specified amount of firm power under section 5(b) of the Northwest Power Act, the proposed section 5(c) prototype



agreement provides a specified amount of firm power under a Negotiated In Lieu Agreement.

As noted above, BPA's July 28 letter asked for public comment on a prototype agreement to provide firm power under section 5(c) of the Northwest Power Act, in addition to monetary benefits, to settle the rights of MPC under the REP. The Northwest Power Act provides that BPA may, in lieu of purchasing any amount of electric power offered by an exchanging utility at its ASC, acquire an equivalent amount of electric power from other sources if BPA's cost of acquisition is less than the cost of purchasing the electric power offered by the utility. 16 U.S.C. § 839c(c)(5) (1994 & Supp. III 1997). The letter also noted that in BPA's 2002 power rate case, MPC was forecasted to have a relatively high ASC. BPA also forecasted the cost of purchasing from the wholesale power market, one source of an in-lieu resource, in BPA's rate case. The cost of this in-lieu resource was less than MPC's expected ASC. The letter noted that BPA's proposed Settlement Agreement with MPC under section 5(c) specifies an amount of in-lieu power that BPA will purchase and provide at the PF Exchange Subscription rate in addition to an amount of monetary benefits in settlement of MPC's rights under the REP. Finally, BPA's July 28 letter noted that the proposed section 5(c) Settlement Agreement is largely based on the proposed settlement with power offered under section 5(b). The differences between the two Settlement Agreements were specifically marked in the proposed section 5(c) Settlement Agreement attached to BPA's letter.

In response to BPA's request for comments, MPC notes that the first goal of the Subscription process is to "spread the benefits of the FCRPS as broadly as possible, with special attention given to the residential and rural customers of the region." MPC, REDSA:003. MPC states that the region has essentially agreed that the IOUs should receive an allocation of 1900 aMW to be divided between power and financial benefits and allocated to the individual companies. *Id.* MPC argues that what is at issue here is the fair allocation of these benefits to the residential customers of the IOUs that have moved to customer choice. *Id.*

MPC notes that since MPC's customers are not eligible to purchase power under section 5(b) contracts due to BPA's Section 5(b)/9(c) Policy, without the section 5(c) contract option the basic purpose of Subscription would not be realized for MPC's eligible residential customers. *Id.* MPC states that the benefits of the BPA system are essentially defined by the difference between the market value of power and BPA's cost-based rate. *Id.* MPC argues that recent events have clearly demonstrated that the \$28.1/MWh market forecast on which the financial benefits are based is well below what the market will actually be for the period of the contract. *Id.* MPC argues that BPA has shown that it feels this is the case by recently calling for increased flexibility to change BPA's 2002 power rates during the rate period in order to maintain Treasury Payment Probability. *Id.* MPC argues that forcing customers that are moving to customer choice to take lower benefits in the form of taking 100% forecasted financial benefits would significantly undermine the equitable allocation of benefits goal of Subscription. *Id.*

MPC notes that the Subscription process is a delicately balanced temporary solution to the allocation of benefits in the region. *Id.* MPC argues that the offering of a section 5(c) contract to MPC for its customers is required to ensure that their share of benefits can be delivered. *Id.* MPC states that it is imperative, and in the region's best interest, that BPA implement this contract to ensure the delicate balance is not disrupted in the final moments of Subscription. *Id.*

MPC notes that BPA clearly has the authority to offer MPC a section 5(c) contract. *Id.* MPC notes that section 5(c)(5) of the Northwest Power Act allows BPA to acquire "power from other sources" for in-lieu purposes and BPA's 2002 Final Power Rate Proposal, Administrator's ROD, establishes the appropriate PF Exchange Subscription rate for this purpose. *Id.* MPC notes that BPA's Federal Register notice, dated August 13, 1999, which commenced BPA's 2002 rate case, states that the PF Exchange Subscription rate "appl[ies] to eligible customers purchasing power under Subscription settlement of the Residential Exchange Program for all five years of the rate period." *Id.* MPC argues that by approving the applicable rate, the Administrator has created a rate under which MPC can, in settlement of its customers' rights, make such a purchase. *Id.* MPC argues that the rate case ROD, and the extensive public process that supports it, therefore essentially provides the Administrator with necessary authority to proceed with section 5(c) sales. *Id.*

MPC states that since the question as to whether BPA can offer a section 5(c) contract has essentially been resolved with the final rate case ROD, the remaining question is whether the section 5(c) contract provisions are adequate. *Id.* MPC argues that since the section 5(c) contract is essentially equal to the section 5(b) contract, to the extent the section 5(b) contract is adequate, the section 5(c) contract should also be adequate. *Id.* MPC supports the proposed changes that BPA has made to the section 5(c) contract relative to the section 5(b) contract as those necessary to efficiently administer the contract. *Id.* MPC states that since BPA has acquired comments on the section 5(b) contracts already, the decisions made regarding those contracts should be pertinent to the section 5(c) contracts as well. *Id.*

PPC argues that because MPC's ASC is not referred to, or defined in, the prototype Settlement Agreement, BPA appears to ignore the Northwest Power Act's requirement to incorporate an electric utility's ASC in determining REP benefits. PPC, REDSA:004. BPA has not ignored MPC's ASC in determining REP benefits. First, BPA must determine an exchanging utility's ASC in order to calculate the utility's benefits under the traditional REP. A settlement of an exchanging utility's rights to participate in the REP, however, does not require an actual determination of a utility's ASC because, for example, there may not be actual ASCs in effect at the time of a settlement and forecasted ASCs must be used. Fundamentally, BPA must determine the appropriate consideration for a utility's agreement to waive participation in the REP. This consideration may consider, in part, forecasted future REP benefits, which can be based on a formal determination of a utility's ASC or a forecast of a utility's ASC. Furthermore, a utility's ASC need not be included as a provision in a Settlement Agreement or a Block Sales Agreement. It is something that is considered by BPA in

determining REP eligibility and benefit determinations, but these determinations are not required to be made in a contract provision. BPA has made these determinations in the process of developing the proposed Settlement Agreement, as explained in great detail in this ROD. As discussed in greater detail below, BPA has reviewed MPC's ASC at great length in developing BPA's proposed Settlement Agreement offer and has determined that it supports MPC's receipt of REP and Settlement Agreement benefits.

In most of the past 20 years, exchanging utilities' ASCs were readily available because the utilities were active participants in the REP. BPA would forecast utilities' ASCs in BPA's rate cases for purposes of determining BPA's prospective REP costs for a coming rate period. The record in BPA's 2002 power rate case established forecasted ASCs for exchanging utilities for the period of FY 2002-06. In the rate case, an exchanging utility's ASC forecast was typically based on the costs included in its last approved ASC Report signed by the Administrator. Boling and Doubleday, WP-02-E-BPA-30, at 5. Such costs were then adjusted to account for inflation, power purchases, and resource additions, and applied to forecasted loads for future periods to calculate the forecasted ASC. *Id.* Because of Residential Exchange Termination Agreements, BPA no longer receives cost and load data from utilities through ASC filings as was previously required and provided under the RPSAs. *Id.* BPA therefore used a variety of data sources and approaches to determine ASCs. *Id.*

BPA's first step in developing ASCs was to identify which of BPA's many public agency and IOU customers might have ASCs that would be high enough to ensure positive exchange benefits and should therefore be evaluated in detail. *Id.* at 6. Utilities that executed Residential Exchange Termination Agreements that extend through 2011 were eliminated. *Id.* BPA then determined a proxy for the new PF Exchange rate. *Id.* Utilities' ASCs would need to exceed this rate in order to receive positive exchange benefits. *Id.* In developing the proxy rate, BPA noted that the section 7(b)(2) rate test triggered in BPA's 1996 rate case, and the 1996 PF Exchange rate was 32.7 mills/kWh. *Id.* BPA then reviewed some of the fundamental elements of the 1996 section 7(b)(2) rate test to determine whether it was likely that the trigger for the PF-02 rate period would be similar, and therefore the PF Exchange rate would be similar. *Id.* BPA noted that BPA's generation costs after revenue credits had remained relatively flat since the 1996 rate case; that exchanging utilities' ASCs were increasing over time; and that the value of reserves credit for the DSIs had diminished. *Id.* These factors suggested that the new trigger amount and the new PF Exchange rate would likely be at least as high as the previous trigger amount and 1996 PF Exchange rate. *Id.* Based on ASCs that were current or forecasted at the time the Residential Exchange Termination Agreements were negotiated, BPA assumed that PSE, PGE, the Pacific Power and Utah Power Divisions of PacifiCorp, and MPC might have relatively high ASCs. *Id.*

To forecast ASCs for PacifiCorp (the Pacific Power and Utah Power Divisions), PSE, PGE, and MPC, BPA developed a Microsoft Excel-based model to replace the ASC forecasting function that was performed by a mainframe computer model in BPA's 1996 rate case. *Id.* at 7. The starting point expense data used as the basis for forecasting rate period ASCs were essentially the same data used in BPA's 1996 rate case. *Id.* Plant

replacement factors were adjusted to reflect the most current five years of plant retirement activity, and expenses were adjusted using current escalators. *Id.* In addition, given possible industry restructuring and uncertain market conditions, BPA assumed for ASC forecasting purposes that utility load growth would be satisfied with purchased power. *Id.* at 7-8. Such purchases were assumed to be at 28.1 mills/kWh, BPA's forecast of five-year flat-block purchases, plus a transmission charge. *Id.* at 8. The testimony of Oliver *et al.*, WP-02-E-BPA-20, describes the derivation of the five-year flat-block price forecast. *Id.* See also ROD section 10.11. This forecast of market prices is appropriate because exchanging utilities will make long-term purchases to meet load growth. Boling and Doubleday, WP-02-E-BPA-30, at 7. Even though market prices have increased recently, this would be a factor that would increase an exchanging utility's purchased power costs, and thus ASC, and make it even more likely to participate in the REP. BPA based the transmission charge on the PTP rate (currently \$1.00 per kW-month), which was assumed to increase to \$1.48 per kW-month in BPA's next TBL rate case. *Id.* The \$1.48 rate was assumed to be constant through FY 2010. *Id.* BPA then assumed an energy loss rate of 2 percent and flat delivery. *Id.* Converting these adjustments to an energy-only charge resulted in a rate of 2.07 mills/kWh. *Id.* BPA then assumed that the foregoing energy losses were valued at 28.1 mills/kWh, resulting in a cost of transmission with losses of 2.63 mills/kWh in FY 2002. *Id.* The load forecast for MPC was based on utility forecasts submitted to BPA in March 1998. *Id.* MPC's forecasted average ASC in BPA's 2002 rate case for the five-year rate period was approximately 35 mills/kWh. This is very close to BPA's PF Exchange Program rate of approximately 36 mills/kWh. When higher market prices of 42 mills/kWh are added to the calculation, MPC's forecasted ASC rises to an average of 37.7 mills/kWh. This is nearly two mills higher than BPA's PF Exchange Program rate and would make MPC eligible to receive REP benefits. BPA, however, must also review additional information that could affect MPC's ASC during the rate period.

In December 1999, MPC concluded the sale of its existing hydroelectric facilities and its existing thermal plants to PP&L Montana. MPC retained ownership of the contract rights to its PURPA resources. MPC received from PP&L Montana a right to receive power in the amount of its existing loads through June 2002. After that date, MPC will be required to purchase all of its power on the wholesale power market. MPC will be required to purchase both its capacity and energy needs. Purchase of its capacity needs would be expected to increase the market price for its energy purchases from 42 mills/kWh to 43.72 mills/kWh.

BPA has recalculated MPC's ASC based on its generation sale and purchase from PP&L Montana. BPA has removed the generation production plant, generation plant replacements, generation plant additions, operations and maintenance expenses for thermal plants, and fuel costs from its calculation; reduced the amount of general plant, accumulated depreciation, cash working capital, materials and supplies, return on investment, depreciation expense, and taxes attributable to generation; and eliminated surplus revenues. BPA has replaced these expenses with purchase power costs from PP&L Montana equal to BPA's calculated ASC for FY 2002 for the period through June 2002. BPA then assumed that MPC must purchase its power needs from the market in

excess of its PURPA resources after June 2002. When higher market prices of 43.72 mills/kWh are added to the calculation of MPC's ASC to replace MPC's hydroelectric and thermal resources, MPC's forecasted ASC rises to an average of 48.25 mills/kWh.

While MPC's foregoing ASC is clearly high enough for MPC to qualify for REP benefits and for an in-lieu transaction (because the cost of a market power in-lieu resource is less than MPC's ASC for the five-year in-lieu period), MPC's ASC could be even higher during the rate period. BPA used the current ASC Methodology for its rate case forecasts, but the methodology could be revised during the rate period. Indeed, as noted elsewhere in this ROD, BPA will be conducting regional discussions during the rate period regarding whether the 1984 ASC Methodology should be revised. If the methodology is revised and exchanging utilities are allowed to exchange greater costs, this would increase their ASCs and exchange benefits. *Id.* The IOUs have advocated a return to BPA's 1981 ASC Methodology, which, if adopted, would significantly increase prospective REP benefits. When BPA moved from the 1981 ASC Methodology to the 1984 ASC Methodology, the ASCs for exchanging utilities were reduced by an average of 26 percent. Assuming that moving back to the 1981 ASC Methodology were to increase ASCs by an average of 26 percent, this would substantially increase exchange benefits. For example, a rough calculation of MPC's ASC, assuming reversion to terms of the 1981 ASC Methodology, but not reflecting higher purchased power costs, results in an ASC of 44.0 mills/kWh for the Montana jurisdiction. A rough calculation of MPC's ASC, assuming reversion to terms of the 1981 ASC Methodology, and also reflecting higher purchased power costs and the sale of MPC's existing hydro and thermal generation, results in an ASC of 60.8 mills/kWh for the Montana jurisdiction. MPC would clearly be eligible for REP benefits under BPA's 2002 PF Exchange Program rate and equally eligible for an in-lieu transaction. Thus, while PPC argues that BPA has ignored MPC's ASC, the foregoing analysis demonstrates BPA's thorough review of MPC's ASC in determining eligibility for REP benefits and in-lieu transactions.

PPC argues that because MPC has sold all of its resources to PP&L Montana, it is not clear that MPC is an electric utility with an ASC qualifying it for REP benefits. PPC, REDSA:004. PPC argues that MPC is removing itself from the electric utility business, which would disqualify it from receiving REP benefits. *Id.* BPA disagrees with these arguments and believes it is reasonable to include a forecast of settlement benefits to MPC for a number of reasons. For example, PPC fails to note a number of significant points regarding MPC. First, under Montana law, by default MPC continues to 2002 to supply retail load or consumers that do not elect to purchase from other suppliers. Mont. Code Ann. §§ 69-8-201(1)(b); 69-8-201(3); & 69-8-103(25). In addition, the law allows the MPSC to extend to 2004 the transition period wherein MPC would likely continue as the default supplier. Mont. Code Ann. § 69-8-201(2)(a). In addition, the State of Montana has passed a statute establishing a default supplier that will serve residential loads. Mont. Code Ann. § 39-19-101 to 315. While MPC or another entity may become the default supplier under that statute at any time, there is no requirement to establish a default supplier under that statute until the end of the transition period under the Montana restructuring statute. Mont. Code Ann. § 39-19-103. Where MPC is the default supplier,

it would be an exchanging utility serving residential load during the rate period. It would, therefore, be a proper participant in an exchange settlement.

Also, it is BPA's understanding that MPC plans to become a subsidiary of Touch America and sell the company stock for the subsidiary to new owners. Sale of the company through a stock sale would transfer the existing obligations of the company under Montana statutes to the new owner. Montana's restructuring statute requires MPC or its successor to provide a default supply service during a transition period through 2002. The public service commission may extend such transition period until 2004 under the statute. While the public service commission is authorized by a subsequent statute to appoint another entity as the default supplier other than MPC, they are not required to make such appointment until the end of the transition period in the restructuring statute. Furthermore, BPA disagrees with PPC that MPC has made it clear by its actions that MPC or its successor will not be serving residential load during the period starting October 1, 2001. While MPC management has made clear its obligation to change managers and owners of MPC, the successors to the company will have the obligation to serve the current residential consumers of MPC. There is a likelihood that the PSC will ultimately select the owner of the distribution system, *i.e.*, MPC's successor, as the default supplier for MPC's current residential consumers. MPC notes that the sale of MPC is no different than the sale of either PGE or PacifiCorp, and no one has questioned the rights of those utilities' customers to REP benefits. MPC, IOURESEXC:004. MPC notes that this is because there is no reason to question these customers' rights. *Id.* MPC argues that it does not matter who owns the serving utility, but rather that the utility is serving eligible load. *Id.* BPA believes MPC still represents the interests of MPC's residential consumers under Montana statutes until it transfers ownership of the company. Also, there are still many unresolved issues around the sale of the company that could result in the sale not being closed.

MPC still has obligations to its residential consumers under Montana law. BPA has no evidence that MPC does not intend to fulfill those obligations. It is reasonable for BPA to believe that MPC or any successor will meet the needs of the residential consumers of Montana. Further, the eligibility of a successor to MPC to receive benefits under the REP is a statutory question. BPA believes the intent of Congress under section 5(c) is that benefits of the FCRPS are intended to flow to residential consumers. Congress established the REP in a manner that the benefits flowed to those consumers through their electricity supplier. BPA believes that "Pacific Northwest electric utilities" for purposes of section 5(c) are those entities serving the residential and small farm loads of the region as authorized by state law or order of the applicable state regulatory authority. BPA sees no intent of Congress to exclude residential consumers from receiving the benefits of the FCRPS based on how a state structures its electric power industry, and no evidence to conclude that any successor to MPC would be ineligible to receive REP settlement benefits. There is no evidence that residential consumers of MPC will cease to exist or that those consumers will not be eligible for benefits under the REP. BPA believes MPC still represents the interests of MPC's residential consumers under Montana statutes until it transfers ownership of the company. MPC is still capable of entering a contract on behalf of those consumers.

In addition, MPC notes that it presently serves most of the eligible load in its distribution service territory. *Id.* It presently acquires the full power needs of its eligible load through a full requirements contract and Qualifying Facility contracts. *Id.* MPC argues that, therefore, for the purposes of entering into either an RPSA or a Settlement Agreement on behalf of its customers, it meets the definition of an eligible utility. *Id.* MPC notes that when full competition begins in the state of Montana, the MPSC will have selected a default supplier that will have the obligation to serve. *Id.* MPC argues that the possibility that MPC may not be selected as default supplier at some point in the future in no way compromises MPC's residential customers' rights under the Northwest Power Act. *Id.* MPC notes that the role of an eligible utility will appropriately flow to whatever entity is serving eligible load in the future whether the supplier is the default supplier or a competitive supplier. *Id.* MPC notes that the settlement contract has been structured to accommodate this eventuality. *Id.*

MPC notes that in BPA's 2002 power rate case, both the DSIs and the PPC questioned the right of MPC to sign a Settlement Agreement with BPA for several reasons based on their perceptions of the restructuring process taking place in Montana. *Id.* MPC notes that BPA correctly concluded in its ROD that: "MPC still has obligations to its residential consumers under Montana law. BPA has no evidence that MPC does not intend to fulfill these obligations. It is reasonable for BPA to believe that MPC or any successor will meet the needs of the residential consumers of Montana." *Id.* MPC notes that it has made explicit statements to this effect in its communications regarding the sale of the utility, and the MPSC is obligated to ensure that this is in fact the case. *Id.* MPC notes that at the present moment MPC is serving these loads and therefore has a right to enter into the Settlement Agreement on behalf of its customers. *Id.*

PPC argues that an ASC is necessary to determine whether an in-lieu transaction is allowable and it is not clear that MPC's updated ASC, given BPA's latest expectations of its cost of power acquisitions, would allow for an in-lieu transaction. PPC, REDSA:004. Section 5(c)(5) of the Northwest Power Act provides:

Subject to the provisions of sections 839b and 839d of this title, in lieu of purchasing any amount of electric power offered by a utility under paragraph (1) of this subsection, the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to such utility as part of an exchange sale if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility.

16 U.S.C. § 839c(c)(5) (1994 & Supp. III 1997). As noted previously, BPA forecasted MPC's ASC in BPA's 2002 power rate case and used this forecast for purposes of making an initial proposal regarding the proper consideration that should be provided by BPA for MPC's waiver of its rights to participate in the REP. As noted in BPA's July 28, 2000, letter, BPA noted in BPA's 2002 power rate case that a number of utilities were expected to have an ASC that exceeded BPA's forecast of the cost of an in-lieu resource.

One of those utilities was MPC. BPA also forecasted the cost of purchasing from the wholesale power market in BPA's rate case. This forecasted market price was less than MPC's expected ASC. These forecasts were established in a formal evidentiary proceeding where all parties had an opportunity to address any issue regarding the ASC forecasts and forecasted market/in-lieu resource prices. BPA's determinations are documented at great length in BPA's 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, and the supporting record. Based upon these forecasts, MPC's forecasted average ASC for the rate period was approximately 35 mills/kWh. BPA's forecasted five-year flat-block price forecast was 28.1 mills/kWh. Because MPC's forecasted ASC was close to BPA's PF Exchange Program rate and the IOUs had challenged that rate, which could potentially reduce the rate and thereby allow MPC to exchange, BPA felt that a proposed Settlement Agreement with MPC was appropriate. BPA, however, needs to review changed circumstances in evaluating its earlier conclusions. As discussed in greater detail above and below, BPA's subsequent review makes MPC's REP and in-lieu eligibility much more clear.

As noted previously, PPC argues that given BPA's latest expectations of its cost of power acquisitions, it is not clear that MPC would qualify for an in-lieu transaction. PPC, REDSA:004. BPA recently noted that market prices had become more volatile and were on an upward trend. Current market prices for a five-year flat block of power are around 42 mills/kWh. Since the time BPA developed its rate case forecast, MPC has sold its existing hydroelectric and thermal generation. MPC will be required to purchase most of its capacity and energy needs from the wholesale market. Purchase of power at a higher load factor reflecting its capacity needs will result in higher costs than purchases of flat blocks of power. BPA forecasts MPC's ASC reflecting higher market prices and the sale of MPC's existing hydro electric and thermal generation to be 48.25 mills/kWh. BPA's forecasted in-lieu resource cost for the same period is 42 mills/kWh. Again, because the cost of the in-lieu resource is lower than MPC's forecasted ASC, BPA may in-lieu MPC for up to its entire residential and small farm load during the rate period. 16 U.S.C. § 839c(c)(5) (1994 & Supp. III 1997).

Furthermore, the issue of MPC's eligibility to receive REP benefits cannot be based on ASC forecasts alone. The IOUs are contesting a number of assumptions BPA made in developing the proposed PF Exchange Program rate. MPC, IOURESEXC:004. In determining REP benefits, exchanging utilities receive the difference between their ASC and BPA's PF Exchange rate. If BPA retains those assumptions and the IOUs successfully challenge that rate, the rate could be reduced and exchange benefits increased. *Id.* In the case of MPC, if the IOUs' rate case arguments were successful on appeal, BPA's PF Exchange Program rate would be far below MPC's forecasted ASC, resulting in substantial REP benefits for MPC's residential and small farm consumers. BPA must consider such factors when determining the proper consideration for an IOU's waiver of its right to participate in the REP. PPC also argues that by reviewing its 2002 wholesale power rates, BPA has admitted that BPA's rate case forecasts, including the possibility of an in-lieu transaction with MPC, are incorrect. PPC, REDSA:004. PPC is concerned that BPA not weaken its financial position and expose public power utilities to additional financial risk by offering new generous deals to other entities. *Id.* PPC's



arguments are not convincing. BPA's recent review of its wholesale power rates noted that market prices had become more volatile and were on an upward trend. This does not mean that BPA's rate case conclusion of a possible in-lieu transaction with MPC is incorrect. For example, as noted previously, higher market prices and greater market purchases mean a much higher ASC for MPC, which makes MPC eligible for greater REP benefits and also makes MPC more vulnerable, not less vulnerable, to an in-lieu transaction. Furthermore, an in-lieu transaction with MPC also would not weaken BPA's financial position or expose public power utilities to additional financial risk by offering a generous new deal. First, BPA's settlement proposal for MPC is not a "generous new deal." BPA's proposed REP settlement with MPC has been considered by BPA since the inception of BPA's Power Subscription Strategy, subject to BPA's confirmation that MPC would be eligible for such a settlement by meeting all applicable criteria. BPA's settlement with MPC was assumed in BPA's 2002 power rate case, thereby reflecting the costs of the MPC settlement in BPA's proposed 2002 power rates. Those rates met BPA's goal of not increasing rates for BPA's preference customers during the rate period. Furthermore, the proposed MPC settlement would not weaken BPA's financial condition because the total amount of settlement benefits proposed for MPC is relatively small. MPC's allocation of settlement benefits is 24 aMW for the five-year rate and contract period, of which only 13 aMW would be provided in power, out of a total of 1900 aMW of IOU settlement benefits. This is also only 13 aMW out of BPA's total power sales to all customers of approximately 11,000 aMW. In addition, BPA is reviewing rate options such as a revised Cost Recovery Adjustment Clause in order to protect BPA's financial condition. Foregoing BPA's proposed settlement with MPC would have virtually no effect on BPA's financial condition.

### **Decision**

*BPA will offer limited Settlement Agreement power sales to MPC under section 5(c)(5) of the Northwest Power Act. BPA does not intend its conclusions regarding an in-lieu transaction for MPC to provide any precedential effect either in support of, or opposed to, BPA's development of an In-Lieu Policy.*

## **XIII. SETTLEMENT FOR JULY 1, 2001, THROUGH SEPTEMBER 30, 2001**

### **Issue**

*Whether BPA should provide benefits to regional IOUs' residential and small farm consumers for the period between June 30, 2001, and September 30, 2001.*

### **Parties' Positions**

Current RPSAs and REP settlement agreements are only effective through June 30, 2001. PSE, IOURESEXC:018. BPA's new RPSAs and Settlement Agreements will not be effective until October 1, 2001. *Id.* PSE argues that provision must be made for

residential and small farm benefits for IOUs during the “gap” period from June 30, 2001, through September 30, 2001. *Id.*

### **BPA’s Position**

BPA should negotiate a settlement of REP benefits with the IOUs for the period from June 30, 2001, through September 30, 2001. BPA should propose and limit settlements to those IOUs that were actually receiving benefits under the REP or Residential Exchange Termination Agreements (PSE, PGE, and PacifiCorp) during the current rate period.

### **Evaluation of Positions**

PSE states that inasmuch as REP benefits (or settlement benefits) of PSE and other IOUs continue only through June 30, 2001, provision must also be made for residential and small farm benefits for those utilities during the “gap” between June 30, 2001, and September 30, 2001. PSE, IOURESEXC:018. PSE argues that benefits during this three-month period should be no less than a pro rata amount based on the 1996 (*i.e.*, pre-settlement) REP benefits. *Id.* PSE argues that this is consistent with BPA’s proposed preference rates for FY 2002-2006, which are in fact more favorable to the preference agencies than the PF rates in effect for 1996 and subsequent years. *Id.* BPA agrees that it is appropriate to settle the amount of REP benefits in the “gap” for those IOUs that are actually receiving benefits under the REP or through Residential Exchange Termination Agreements during the current rate period. While PSE argues that BPA should provide not less than \$26.5 million of benefits to PSE for the three-month period, BPA does not agree with PSE’s proposal. BPA does not believe it makes any sense to establish a settlement for a three month period in 2001 based on a pro rata amount of the negotiated benefits for the period from October 1, 1996, through June 30, 2001. The average system costs of the utilities have changed between 1996 and 2001. Also, the amount of residential and small farm loads for each of the utilities varies by quarter. In addition, the benefits provided to the utilities during the first year of the settlement were based on a one-time allocation by Congress of benefits under the REP. *See* H.R. Rep. No. 104-293, at 92 (1995). BPA believes the negotiated settlement amounts should be based on the facts that exist for each utility during the relevant three-month period in 2001. BPA does not expect to receive any requests for participation in the REP from other IOUs during this period. BPA will therefore develop a proposal based on BPA’s estimate of the IOUs’ respective ASCs during this period and BPA’s 1996 PF Exchange Rate, which is in effect during this period.

Contrary to PSE’s claims, BPA does not believe its proposed rates for preference customers for FY 2002-2006 have any bearing on a settlement of the REP for the “gap” period. The PF Preference rate is not used in the determination of REP benefits. Further, IOUs’ purchases of power from BPA in the REP are made at the PF Exchange rate, not the PF Preference rate.

## **Decision**

*BPA will negotiate monetary REP settlement payments for PSE, PGE and PacifiCorp for the three-month period from July 1, 2001, through September 30, 2001.*

## **XIV. SETTLEMENT AGREEMENT SECTION-BY-SECTION REVIEW**

### **A. General Issues**

#### **Issue**

*Whether the Settlement Agreements should be limited to five-year terms.*

#### **Parties' Positions**

PSE argues that the term of all Subscription contracts, including the Settlement Agreement, should be limited to a short duration, *i.e.*, no longer than five years. PSE, IOURESEXC:018.

#### **BPA's Position**

In BPA's Power Subscription Strategy, BPA proposed that it would offer five-year and 10-year contracts to all customers, including the IOUs, in settlement of the IOUs' rights to request REP benefits under section 5(c) of the Northwest Power Act.

#### **Evaluation of Positions**

PSE argues that the term of all Subscription contracts, including the Settlement Agreement, should be limited to a short duration, *i.e.*, no longer than five years. PSE, IOURESEXC:018. One of the goals of the BPA's Subscription Strategy is to spread the benefits of the FCRPS as broadly as possible, with special emphasis given to the residential and rural consumers of the region. BPA's Power Subscription Strategy proposed that would offer five-year and 10-year contracts to all customers, including the IOUs' Settlement Agreements. BPA's five-year offer guarantees 1,900 aMW in benefits for the first five years and provides no guarantee of a specific benefit amount in the next five years. Under the 10-year contract offer, BPA is offering and guaranteeing 1,900 aMW of power and financial benefits for the FY 2002-2006 rate period and 2,200 aMW of intended power benefits for the FY 2007-2011 rate period. These different term options provide the IOUs with choices to best fit their individual needs and expectations for the coming five- and 10-year periods. The IOUs, however, are not obligated to sign a 10-year contract with BPA. Furthermore, BPA's Power Subscription Strategy notes that having power sales contracts of varying terms makes good business sense because it reduces BPA's exposure to future revenue cliffs. *See* Power Subscription Strategy, at 18-19. In other words, if all contracts expire at the same time, BPA has no knowledge of which loads will return for the coming rate period. On the other hand, if some contracts

are in effect through the first rate period and into the second, BPA has a known base in determining its power supply and other responsibilities for the second period.

### **Decision**

*BPA will offer regional IOUs Subscription Settlement Agreements for five-year and 10-year terms.*

## **B. Section 1. Term**

### **Issue**

*Whether rate protections, extension rights and renewal rights available to other customers should be made available to the IOUs in the Settlement Agreements.*

### **Parties' Positions**

Avista and PSE argue that rate protections, extension rights and renewal rights available to other customers should be available to customers under this Agreement. Avista, IOURESEXC:001; PSE, IOURESEXC:018. Avista and PSE argue that failure to include this provision would be arbitrary and unreasonable. *Id.*

### **BPA's Position**

BPA has provided the IOUs with virtually identical rate protections to those provided other customers purchasing the same type of power product, and BPA has not included extension rights or renewal rights in any BPA power sales contracts.

### **Evaluation of Positions**

Avista and PSE argue that rate protections, extension rights and renewal rights available to other customers should be available to customers under this Agreement. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA has included rate protections in the IOU Block Sales Agreement that are virtually identical to the rate protections offered to other customers for the same product. Section 1(c) of Exhibit A to the IOU Block Sales Agreement provides:

“Lowest RL Rate” means the lowest applicable cost-based power rate provided under the applicable RL rate schedule as applied to «Customer Name»’s Contracted Power purchases under this Agreement at 100 percent annual load factor. The Lowest RL Rate shall be selected by «Customer Name» from the RL rate that are available and from which the Parties agree «Customer Name» is eligible to purchase under at the time «Customer Name» makes its selection as specified in this exhibit.

This is virtually the same language provided in Section 1(c) of the Priority Firm Power Block Power Sales Agreement, which references the “Lowest PF Rate.” Similarly, Sections 3(a) and 3(b) of Exhibit A to the IOU Block Sales Agreement provide:

(a) **Right to Lowest RL Rates**

«Customer Name» is contractually guaranteed through «\_\_\_\_\_» the Lowest RL Rates established in a successor BPA power rates proceeding for its RL Contracted Power purchases under this Agreement. This section shall not be construed to waive, alter, or amend any right that «Customer Name» may have under applicable statutes. *(Drafter’s Note: Insert the actual Expiration Date from section 1 of the body of this Agreement.)*

(b) **Revisions to Residential Load Firm Power Rates**

BPA agrees that the 5-Year Rates available to «Customer Name» consistent with this exhibit shall not be subject to revision during their respective terms, except for the application of a Cost Recovery Adjustment Clause as provided in the applicable RL applicable rate schedule and GRSPs and this Agreement.

This is virtually the same language provided in Sections 3(a) and 3(b) of the Priority Firm Power Block Power Sales Agreement, which reference the “Lowest PF Rate.” These rate protections contractually guarantee that BPA will offer the Lowest RL Rates developed in successor rate proceedings through the term of the Agreement. BPA has not included extension rights or renewal rights in any BPA power sales contracts. References to the “lowest rate,” of course, do not mean that a utility can review the actual prices paid by individual utilities and select the lowest price paid by a utility due to, for example, its particular load characteristics or other characteristics. Instead, it is a reference to the applicable rate that applies to the type of sale being made for the type of customer being served.

**Decision**

*Rate protections, extension rights and renewal rights available to other customers have been made available to the IOUs in the Settlement Agreements.*

**C. Section 2. Definitions**

**Issue**

*Whether the definitions in the Settlement Agreement should be amended as proposed by the commenting parties.*

## **Parties' Positions**

Avista and PSE propose adding a clarifying phrase (“during the term of this Agreement”) to the definition of “Contract Year.” Avista, IOURESEXC:001; PSE, IOURESEXC:018.

PSE suggests adding a definition for “Deemer Account,” as it is referenced in the Agreement. PSE, IOURESEXC:018

Avista proposes adding definitions for “Expiration Date” and “Extension Election Date,” allowing the utility access to more favorable contract provisions in the future. Avista, IOURESEXC:001.

Avista and PSE argue that the “Residential Load (RL) Rate” should be the WP-02 RL Rate for the first five Contract Years and should be a rate no greater than the Lowest PF Rate at 100% load factor thereafter. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

## **BPA's Position**

BPA's positions on the proposed changes are contained in the “Evaluation of Positions” section below.

## **Evaluation of Positions**

Avista and PSE's suggested clarifying phrase (“during the term of this Agreement”) to the term “Contract Year” is appropriate because it further clarifies the definition to note that the terms of the Settlement Agreement apply only to Contract Years within the term of the Settlement Agreement.

PSE's suggested definition for “Deemer Account” is appropriate because it clarifies a significant term that is used in the Settlement Agreement. PSE's proposed definition is also consistent with the Deemer Account mechanism previously used by BPA in the administration of the REP.

Avista's proposal to add definitions for “Expiration Date” and “Extension Election Date” is not appropriate. These definitions would add uncertainty to the effective term of the settlement. BPA has repeatedly maintained that the IOUs must settle all issues under existing legislation regarding implementation of the REP. A 10-year settlement of the IOU's REP benefits under the Northwest Power Act should be a 10-year settlement. BPA has, however, agreed to provide the IOUs the ability to terminate their Settlement Agreements within 30 days of FERC's interim approval of BPA's wholesale power rates that are effective October 1, 2001. This provision allows IOUs the option to proceed with the RPSA instead of the Settlement Agreement if BPA revises the rates for such period in a manner an IOU finds unacceptable.

Avista's and PSE's proposal that the “Residential Load (RL) Rate” should be the WP-02 RL Rate for the first five Contract Years and should be a rate no greater than the Lowest

PF Rate at 100% load factor thereafter is not necessary and not appropriate. BPA's proposed RL rate, including any additional cost recovery features as applicable, already will be the rate in effect for the first five years of the Settlement Agreement as presently drafted. BPA cannot say that the RL rate for the second five years will be no greater than the Lowest PF Rate. BPA will not know the levels of the RL and PF Preference rates until BPA has concluded its next relevant rate case. As noted in this ROD, BPA's rates must be established in a section 7(i) hearing and must be consistent with BPA's statutory rate directives.

### **Decision**

*BPA will include proposed changes to the definitions in the Settlement Agreements consistent with the foregoing discussion.*

#### **D. Section 3: Satisfaction of Section 5(c) Obligations and Settlements of Disputes**

### **Issue**

*Whether the Settlement Agreement section on satisfaction of section 5(c) obligations and settlement of disputes should be amended to allow IOUs to preserve their rights in the event of successful challenges to the Settlement Agreement.*

### **Parties' Positions**

Avista argues that the provisions regarding satisfaction of section 5(c) obligations and settlements of disputes needs additional language to ensure that Avista's rights to address the RPSA are preserved in the event that the Settlement Agreement is successfully challenged. Avista, IOURESEXC:001.

PSE argues that the Settlement Agreement should specify that, until all potential challenges to the Settlement Agreement have been waived or dismissed, an IOU may make and advance any argument, in any applicable forum, to protect its rights under the Settlement Agreement or its alternative rights in the event the Settlement Agreement is successfully challenged. PSE, IOURESEXC:018. PSE argues that this provision is necessary to allow the IOUs to respond to any attack on the Settlement Agreement or the basis of the Settlement Agreement on appeal. PSE or any other IOU must have the right to establish all alternatives to the Settlement Agreement. *Id.*

### **BPA's Position**

BPA's Power Subscription Strategy states that one of the conditions of the Settlement Agreement is that the IOUs will waive the right to request further benefits under section 5(c) of the Northwest Power Act for the term of their Agreement.

## **Evaluation of Positions**

Avista and PSE argue that the provisions regarding satisfaction of section 5(c) obligations and settlements of disputes needs additional language to ensure that the IOUs' rights to address the REP are preserved in the event that the Settlement Agreement is successfully challenged. Avista, IOURESEXC:001; PSE, IOURESEXC:018. Section 3(a) of the Settlement Agreement provides that the benefits provided under the Agreement satisfy all of BPA's obligations during the contract period under or arising out of section 5(c) of the Northwest Power Act. This includes, for example, issues regarding the ASC Methodology, the RPSA, ASC Reports, issues regarding the development of the PF Exchange Program rate, and other issues related to the REP. BPA understands the concerns of the IOUs regarding the possibility that the Settlement Agreement might be held invalid on appeal, even though BPA believes that the Settlement Agreement is quite reasonable and is consistent with applicable law. Absent any ability to challenge BPA's decisions regarding the REP, BPA recognizes that the customers of the IOUs would potentially receive no benefits under the REP for the period both parties thought the Settlement Agreement would be in effect.

To address this issue, BPA has modified the Settlement Agreement to include language providing that, should the Settlement Agreement be held invalid, the IOUs' section 5(c) rights will be preserved (*see* Settlement Agreement Section 3(b)). Additional language reflects that both BPA and the IOUs agree to negotiate in good faith a new mutually satisfactory agreement, if possible, in satisfaction of the IOUs' section 5(c) rights (*see* Settlement Agreement Section 3(c)). In the event that the Settlement Agreement is upheld, the IOUs agree that they would not be permitted to benefit from the results of any of their challenges to REP-related issues.

## **Decision**

*The Settlement Agreement section on satisfaction of section 5(c) obligations and settlement of disputes will be amended to allow IOUs to preserve their rights in the event of successful challenges to the Settlement Agreement.*

### **E. Section 4. Settlement Benefits**

#### **Issue**

*Whether the Settlement Agreement should make all power products available to regional IOUs; whether each IOU should be able to specify the monetary benefits for each year; and whether monetary benefits in the second five years should be determined by a comparison of the market price to the RL rate.*

#### **Parties' Positions**

PSE argues that all of the various power products available to preference customers should be available, at an IOU's option, under the Settlement Agreement. PSE,



IOURESEXC:018. PSE argues that an IOU should be able to specify the portion of benefits under the Agreement provided as monetary benefits for all Contract Years. *Id.* PSE argues that during the term of the Settlement Agreement after the first five Contract Years, an IOU should be able to elect monetary benefits and should have the option to have its monetary benefits determined by the amount, if any, by which the market price of power to meet residential load is greater than the cost of such power at the Lowest PF Rate. *Id.*

The OPUC supports and appreciates the contract language in Section 4(b)(2) of the Settlement Agreement that provides for consultation between the IOU and BPA regarding the amount of power offered by BPA for the time period October 1, 2006, through September 30, 2011. OPUC, IOURESEXC:014. Allowing for communication and cooperation between the IOU and BPA will aid a smooth implementation of the second five-year contract period. *Id.* The OPUC notes that consultation will also allow the OPUC the opportunity to consider the BPA offer given its statutory responsibility under Oregon's SB 1149. *Id.*

### **BPA's Position**

The Settlement Agreement is BPA's offer to settle the IOUs' rights under section 5(c) of the Northwest Power Act. The Settlement Agreement is an offer of a specific amount and shape of power, and monetary benefits. The Settlement Agreement power sale offer is properly limited and should not make all power products available to the IOUs. Individual IOUs should not be able to specify the monetary benefits for each year. Monetary benefits in the second five years should be determined by a comparison of BPA's then-current rate case market price forecast to the RL rate.

### **Evaluation of Positions**

PSE argues that all of the various power products available to preference customers should be available, at an IOU's option, under the Settlement Agreement. PSE, IOURESEXC:018. PSE ignores that the power sale is a component of a *settlement* offer. Regional parties worked for years in developing BPA's Power Subscription Strategy. Through extensive public processes, BPA determined to offer a flat-block of power as the power component of the Settlement Agreement. This type of power sale, in conjunction with monetary benefits, provides the proper consideration for the IOUs' settlement of their rights under section 5(c) of the Northwest Power Act. Other types of power sales would impose different costs on BPA, costs that were not forecasted in BPA's 2002 rate case in order to establish rates to recover all of BPA's total system costs. While the power component of the Settlement Agreement is a flat block, the flat block power is provided to the IOUs on the same terms and conditions as a sale of the same product to a preference customer, except for applicable rate schedules, which are statutorily prescribed to be different. Even with regard to rates, however, the prices for a flat block purchase under the different RL and PF rate schedules are the same for IOU Settlement Agreement participants and for preference customers.

PSE argues that an IOU should be able to specify the portion of benefits under the Settlement Agreement provided as monetary benefits for all Contract Years. PSE, IOURESEXC:018. This argument is not convincing. BPA is offering the Settlement Agreement to all of the regional IOUs. These utilities, under PSE's proposal, would each be able to change the amount of power and monetary benefits in each of the five initial contract years. This would place BPA in the exceptionally difficult position of not knowing whether it would have to acquire resources to meet the IOUs' power requests or, having acquired such resources, not being able to use them because one or more IOUs later chose not to purchase power under the settlement. This would also create an administrative nightmare for BPA. Each of the seven IOUs, in each of the initial five contract years, would have two options for which BPA would be forced to immediately adapt. Instead, BPA has proposed that the IOUs would submit requests to BPA and the amount of power and monetary benefits would be set for the initial five years of the contract through an equitable allocation method. Section 4(b)(2) of the Settlement Agreement provides for consultation between individual IOUs and BPA regarding the amount of power offered by BPA for the time period October 1, 2006, through September 30, 2011.

PSE argues that during the term of the Settlement Agreement after the first five Contract Years, an IOU should be able to elect monetary benefits and should have the option to have its monetary benefits determined by the amount, if any, by which the market price of power to meet residential load is greater than the cost of such power at the Lowest PF Rate. PSE, IOURESEXC:018. BPA offered in its Power Subscription Strategy to provide an amount of firm power and an amount of monetary benefits during the first five years of the Subscription period. During the second five years BPA agreed to try to provide all power deliveries. If BPA were unable to provide power deliveries, BPA stated it would provide monetary compensation. *See* Power Subscription Strategy, at 9. PSE argues for a different settlement than BPA's offer in the Power Subscription Strategy in which the individual IOUs would control the distribution of the Federal benefits. BPA is statutorily obligated to establish rates that recover, in a sound, businesslike manner, its total costs. 16 U.S.C. § 839e(a)(1) (1994 & Supp. III 1997). In order to manage its financial health, BPA must determine its ability to provide power and monetary benefits during the second five-year period. BPA cannot place this decision solely in the hands of the individual IOUs. It is worthy of note, however, that the IOUs have a number of options under the Settlement Agreement to manage their power purchases and monetary benefits. For example, Section 4(b)(2)(C) of the Settlement Agreement provides that:

(C) If the RL Rate calculated at 100 percent annual load factor for the period from October 1, 2006, through September 30, 2011 exceeds the Lowest PF Rate for the same 100 percent annual load factor during such period, «Customer Name» may, by written notice to BPA within 30 days after BPA published its power rate case ROD, notify BPA that it will convert its entire Firm Power purchase under the Firm Power Block Power Sales Agreement to Monetary Benefits, pursuant to section 4(c) below

(except as provided in section 5(a)(6) below), for the remaining term of this Agreement.

Furthermore, Section 4(c)(2)(C) of the Settlement Agreement provides, with regard to the determination of monetary benefits in the second five-year period, that:

**(C) Exception to Use of RL Rate in Sections 4(c)(2)(A) and 4(c)(2)(B)**

If, for the purposes of the formulas shown in sections 4(c)(2)(A) and 4(c)(2)(B) above, there is: (i) no RL Rate in effect; or (ii) the RL Rate exceeds the Lowest PF Rate, then the Lowest PF Rate shall replace the RL Rate in such formulas. Use of the Lowest PF Rate in such event shall apply to Monetary Benefits provided in accordance with sections 4(b)(1)(B), 4(b)(2)(C), and 4(c)(1).

BPA believes that these features, while not providing the IOUs unilateral authority to determine their Settlement Agreement benefits in the second five-year period, help to address PSE's concerns.

**Decision**

*The Settlement Agreement properly limits the power product available to the IOUs under that Agreement to a flat block power sale. It would be inappropriate for the Settlement Agreement to permit each IOU to specify the monetary benefits for each year of the contract period. Monetary benefits in the second five years will be determined by a comparison of BPA's forecasted rate case market price to the RL rate, subject to Section 4(c)(2)(C) of the Settlement Agreement.*

**F. Section 5. Cash Payments if Firm Power Cannot Be Delivered**

**Issue**

*Whether Settlement Agreement Sections 5(a)(1), (2), (3), (4) and (5) should include a provision for increasing the IOUs' monthly cash payment amount by adding in an amount expressed in MWh of any firm power reduction that may occur under the conditions described in Settlement Agreement Section 5(a).*

**Parties' Positions**

PSE and Avista suggest that Settlement Agreement Sections 5(a) (1), (2), (3), (4) and (5) should each include a sentence increasing their monthly cash payment amount by adding in an amount expressed in MWh of any firm power reduction that may occur under the conditions described in Section 5(a) of the Settlement Agreement. PSE, IOURESEXC:018; Avista, IOURESEXC:001.

The OPUC supports and appreciates the creative solutions (such as the "put right") BPA has developed to ensure that benefits can continue to be provided in the event conditions occur under which firm power cannot be delivered due to insufficient net requirements. OPUC, IOURESEXC: 014. Without these provisions, the OPUC would very likely not support the Settlement Agreement. *Id.*

### **BPA's Position**

BPA's position on the proposed changes is contained in the "Evaluation of Positions" section below.

### **Evaluation of Positions**

As noted above, PSE and Avista suggest that Settlement Agreement Sections 5(a) (1), (2), (3), (4) and (5) should each include a sentence increasing their monthly cash payment amount by adding in an amount expressed in MWh of any firm power reduction that may occur under the conditions described in Section 5(a) of the Settlement Agreement. PSE, IOURESEXC:018; Avista, IOURESEXC:001. The Settlement Agreements provide for both power sales, generally net requirements sales at the RL rate, and monetary benefits. BPA, however, monitors utilities' net requirements to ensure that they are eligible to continue receiving net requirements power from BPA. The issue arises of how to continue to provide benefits under the Settlement Agreement when BPA reduces an IOU's net requirements and thus the amount of power sold to the IOU in the Settlement Agreement. BPA addressed PSE's and Avista's suggested additions to Sections 5(a) (1), (2), (3), (4) and (5) by modifying the definitions that are in the formula in Section 5(b). BPA has included Section 5 of the Settlement Agreement to ensure that the IOUs will continue to receive the economic value of the Settlement Agreement in the event conditions occur where firm power cannot be delivered to a customer. *See* Settlement Agreement, Section 5(a). BPA has designed such payment to reflect the value of the energy returned to BPA after deducting BPA's transmission costs for remarketing the energy. *See* Settlement Agreement, Section 5(b)(1). The OPUC noted that BPA had included an increased payment to the IOUs where an IOU offered BPA a "put right" that reduced BPA's costs in remarketing the energy returned to BPA. *See* Settlement Agreement, Section 5(b)(2). BPA also included two additional sections in Section 5(a) where firm power sales under the Block Sales Agreement are reduced.

### **Decision**

*Settlement Agreement Sections 5(a)(1), (2), (3), (4), (5), (6) and (7) include provisions for making monthly cash payments to the IOUs for reductions in firm power deliveries under the Block Sales Agreement that may occur under the conditions described in Settlement Agreement Section 5(a).*

## **G. Section 6. Passthrough of Benefits**

### **Issue**

*Whether monetary payments should be distributed in a timely manner consistent with terms set out in Settlement Agreement Section 6(b).*

### **Parties' Positions**

The OPUC supports the contract language in Settlement Agreement Section 6(b) that provides for the customer balancing account not to exceed expected payments that would be accumulated over 180 days. OPUC, IOURESEXC:014. This provision provides the OPUC with sufficient flexibility to meet its objectives regarding rate stability and public policy considerations while ensuring Federal system benefits are passed through to customers on a timely basis. *Id.*

PSE and Avista suggest adding language to Section 6(b) clarifying that monetary payments are to be distributed in a timely manner consistent with terms set out in Section 6(b). PSE, IOURESEXC:018; Avista, IOURESEXC:001.

### **BPA's Position**

BPA recognizes that the passthrough of firm power and monetary benefits amounts from the IOUs to residential and small farm consumers needs to allow for fiscal and administrative ease of implementation.

### **Evaluation of Positions**

PSE's and Avista's suggested addition to Settlement Agreement Section 6(b) is appropriate. The proposed language clarifies that the draft provisions of Section 6(b) comprise the timely nature of the passthrough of benefits. This is consistent with BPA's intent to make the passthrough of benefits to the IOUs' residential consumers as administratively and fiscally efficient as possible.

### **Decision**

*Monetary payments will be distributed in a timely manner consistent with terms set out in Settlement Agreement Section 6(b).*

## **H. Section 8. Assignment**

### **Issue**

*Whether the definition of Qualified Entity in the Settlement Agreement should reference an IOU's ability to purchase the lowest priced cost-based Federal power and whether*

*Section 8(b)(4) should be amended to clarify that the amount of Firm Power determined in Section 8(b) "to be assigned to BPA" shall be retained by BPA.*

### **Parties' Positions**

The OPUC supports and appreciates the contract language in Section 8 that describes the options in the event another Qualified Entity serves residential load formerly served by the IOU. OPUC, IOURESEXC:014. However, the OPUC has a concern about whether it has done everything it reasonably can to create checks and balances to ensure the OPUC can act as a gatekeeper for the distribution of Federal system benefits. *Id.* The OPUC proposes that the definition of Qualified Entity in the Settlement Agreements should include the requirement that the Qualified Entity be "authorized under state law or by order of the applicable regulatory authority to both serve all or a portion of [Customer's Name]'s Residential Load and purchase the lowest priced cost-based federal power on behalf of residential consumers served by distribution facilities of investor-owned utilities in Oregon." *Id.*

PSE and Avista suggest the addition of a phrase to Section 8(b)(4) clarifying that the amount of Firm Power determined in Section 8(b) "to be assigned to BPA" shall be retained by BPA. PSE, IOURESEXC:018; Avista, IOURESEXC:001.

### **BPA's Position**

BPA believes that it is necessary to provide for the assignment of benefits in the event that a Qualified Entity serves a residential load formerly served by an IOU. BPA does not believe it can condition eligibility of an entity to benefits under the REP on an order by a state commission.

### **Evaluation of Positions**

BPA's definition of a Qualified Entity in Section 2(i) of the Settlement Agreement requires that the entity be authorized under state law or by order of the applicable state regulatory authority to serve residential and small farm loads. The Northwest Power Act limits REP benefits to the actual amount of residential and small farm load served by a regional utility. 16 U.S.C. § 839c(c)(2) (1994 & Supp. III 1997). Once an entity has been authorized by state law to commence serving these loads, they are a Pacific Northwest utility under section 5(c) of the Northwest Power Act and are entitled to benefits if they meet the other conditions of section 5(c). There is no statutory requirement that the Qualified Entity also be "authorized under state law or by order of the applicable regulatory authority to . . . purchase the lowest priced cost-based federal power on behalf of residential consumers served by distribution facilities of investor-owned utilities in Oregon." BPA does not have the authority to exclude Qualified Entities based on an order by a state commission if that entity is otherwise authorized to serve residential and small farm loads in the Pacific Northwest.

BPA has structured the proposed Settlement Agreements to require that the benefits of the settlement be assigned to BPA if a new supplier begins serving the residential loads of the IOUs. BPA has allowed the states and the IOUs to develop agency relationships allowing the incumbent utility to administer the REP on behalf of the new supplier instead of assigning the benefits back to BPA. *See* Settlement Agreement, Section 8(c). BPA has also agreed that a state may develop a program providing for distribution of settlement benefits through a distribution utility as long as the state conditions the right to serve residential and small farm loads on the participation of new suppliers in such program. If a new supplier chooses to approach BPA for an RPSA instead of signing an agency agreement, or an agency arrangement or other program is not established by an IOU and state commission, BPA will provide an RPSA or negotiate a settlement with the entity at that time. Section 8(c) also stipulates that agency agreements for Qualified Entities or state programs for passthrough of benefits by a distribution utility need approval by the IOU's applicable state regulatory authority and BPA.

As noted above, PSE and Avista suggest the addition of a phrase to Section 8(b)(4) of the Settlement Agreement clarifying that the amount of Firm Power determined in Section 8(b) "to be assigned to BPA" shall be retained by BPA. PSE, IOURESEXC:018; Avista, IOURESEXC:001. The suggested revision to Section 8(b)(4) is appropriate as it clarifies the intent that the power assigned to BPA under Section 8(b) would be retained by BPA and not provided to another utility that might not be able to purchase power on the same terms and conditions as the IOU.

### **Decision**

*The definition of Qualified Entity in the Settlement Agreement will not require that the entity must be authorized under state law or by order of the applicable regulatory authority to purchase the lowest priced cost-based Federal power on behalf of residential consumers served by distribution facilities of IOUs in Oregon. Section 8(b)(4) will be amended to clarify that the amount of Firm Power determined in Section 8(b) "to be assigned to BPA" shall be retained by BPA.*

## **I. Section 10. Conservation and Renewables Discount**

### **Issue**

*Whether Section 10 of the Settlement Agreement should provide that the Conservation and Renewables Discount (C&R Discount) applies to the IOUs' monetary benefits "and Firm Power Sale."*

### **Parties' Positions**

PSE and Avista suggest a clarification in Section 10 of the Settlement Agreement that notes that the C&R Discount applies to the IOUs' monetary benefits "and Firm Power Sale." PSE, IOURESEXC:018; Avista, IOURESEXC:001.

### **BPA's Position**

The C&R Discount is a rate mechanism designed to encourage the development of more energy efficiency, renewable resources and new distributed energy technologies in the Pacific Northwest. BPA believes that the C&R Discount should apply to the monetary benefits and firm power benefits to be received by the IOUs.

### **Evaluation of Positions**

PSE and Avista suggest a clarification in Section 10 of the Settlement Agreement that notes that the C&R Discount applies to the IOUs' monetary benefits "and Firm Power Sale." PSE, IOURESEXC:018; Avista, IOURESEXC:001. The draft Settlement Agreement only referred to the application of the C&R Discount to the determination of monetary benefits. The C&R Discount, however, was intended to apply to the Settlement Agreement power sales. See BPA's 2002 Final Rate Proposal, WP-02-A-02, Appendix 1, Section 2.A.1.

### **Decision**

*Section 10 of the Settlement Agreement will provide that the C&R Discount applies to the IOUs' monetary benefits "and Firm Power Sale."*

## **J. Section 11. Governing Law and Dispute Resolution**

### **Issue**

*Whether the Settlement Agreement's provisions regarding governing law and dispute resolution should be amended.*

### **Parties' Positions**

Avista and PSE's comments on these issues are addressed in their IOU Block Sales Agreement section-by-section comments.

### **BPA's Position**

BPA's position on these issues is addressed in the section of this ROD that addresses the IOU Block Sales Agreements.

### **Evaluation of Positions and Decision**

Please see the section of this ROD that addresses governing law and dispute resolution for the IOU Block Sales Agreement.



## **K. Section 13. Standard Provisions**

### **Issue**

*Whether the Settlement Agreement language regarding procedures for handling confidential information provided to BPA's PBL should be amended.*

### **Parties' Positions**

Avista and PSE suggest changes to the Settlement Agreement language regarding procedures for confidential information provided to BPA's PBL. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

Information provided by the IOUs to the PBL that is subject to nondisclosure should be clearly marked as proprietary. The PBL will not disclose such marked material without notifying the IOU and giving it the opportunity to prevent its disclosure under Federal statutes.

### **Evaluation of Positions**

Section 13 of the Settlement Agreement is standard language contained in *all* BPA contracts. BPA believes the language contained in the Standard Provisions is sufficient to protect the proprietary nature of information provided to BPA by the IOUs. The standard language directs that information provided by the IOUs to the PBL that is subject to nondisclosure shall be clearly marked as proprietary. The PBL will not disclose such marked material without notifying the IOU and giving it the opportunity to prevent its disclosure under Federal statutes. The modifications suggested by Avista and PSE do not clarify the language significantly enough to warrant unilateral changes to standard provision language found in all of BPA's contracts.

### **Decision**

*The Settlement Agreement language regarding procedures for handling confidential information provided by the IOUs to BPA's Power Business Line is sufficient to protect the proprietary nature of information and will not be amended.*

## **L. Section 14. Necessary Action**

### **Issue**

*Whether a new provision should be added to the Settlement Agreement indicating each party's willingness to take all actions necessary or appropriate to carry out the Agreement.*

### **Parties' Positions**

Avista and PSE argue that a section needs to be added indicating each party's willingness to take all actions necessary or appropriate to enable it to carry out this Agreement. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

By entering into the Settlement Agreement, the parties have agreed to carry out the terms of the Agreement.

### **Evaluation of Positions**

BPA has a statutory obligation to ensure that the benefits of the REP Settlement Agreements are provided to the residential and small farm consumers of regional IOUs. By entering into the Settlement Agreement, both the IOU and BPA are agreeing to carry out its terms.

### **Decision**

*It is unnecessary for a new provision to be added to the Settlement Agreement indicating each party's willingness to take all actions necessary or appropriate to carry out the Agreement.*

## **M. Section 15. Authority**

### **Issue**

*Whether each party should represent and warrant that it is authorized to enter into the Settlement Agreement and the Block Sales Agreement.*

### **Parties' Positions**

Avista and PSE argue that each party should represent and warrant that it is authorized to enter into the Settlement Agreement and the Block Sales Agreement and all necessary approvals to execute this Agreement have been obtained. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

BPA is authorized to make net requirements firm power sales to the IOUs. BPA is authorized to enter into agreements implementing the REP. BPA is authorized to make in-lieu power sales to exchanging utilities. BPA is authorized to enter into other agreements, including settlement agreements.

### **Evaluation of Positions**

By executing the Settlement Agreement, the parties believe that they have the authority to do so. Reiteration of that belief in the Agreement is unnecessary. The legal basis for each party's authority is contained in relevant state or Federal law. Such laws exist regardless of the parties' representations in the Agreement. BPA is authorized to make net requirements firm power sales to the IOUs. 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997). BPA is authorized to enter into agreements implementing the REP. *Id.* § 839c(c). BPA is authorized to make in-lieu power sales to exchanging utilities. *Id.* § 839c(c)(5). BPA is authorized to enter into other agreements, including settlement agreements. *Id.* § 832a(f); *see also id.* § 839f(a). There is no appreciable value in adding the suggested section.

### **Decision**

*The parties will not be required to represent and warrant that they are authorized to enter into the Settlement Agreement and the Block Sales Agreement.*

## **N. Section 16. Signatures**

### **Issue**

*Whether the signature section of the Settlement Agreement should be clarified.*

### **Parties' Positions**

Avista and PSE suggest clarifications to the signature section regarding gender specificity and the authority of the individual signing the Settlement Agreement to represent their business or agency. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

BPA agrees that gender-specific references to each party's signatory are appropriate. BPA also supports a statement that an individual is authorized to sign on behalf of the respective business or agency.

### **Evaluation of Positions**

The suggested revisions to the Signatures Section are accepted by BPA as they clarify that the individuals signing the Agreement are authorized to do so.

### **Decision**

*The signature section of the Settlement Agreement will be clarified as discussed above.*

## **XV. BLOCK SALES AGREEMENT SECTION-BY-SECTION REVIEW**

### **A. General Comments**

#### **Issue**

*Whether recommended changes should be made to standard contract provisions in all prototype contracts and whether general contract provisions applicable to all power sales contracts should be negotiated.*

#### **Parties' Positions**

PSE and Avista argue that BPA should change a number of standard contract provisions in BPA's prototype contracts. PSE, IOURESEXC:018; Avista, IOURESEXC:001.

#### **BPA's Position**

BPA developed standard contract prototypes to minimize the cost of contract administration and limit the shifting of cost risks among BPA's customers.

#### **Evaluation of Positions**

Avista argues that the changes it has recommended for a number of sections generally apply to the standard form provisions and should be made to such provisions in all prototype contracts. Avista, IOURESEXC:001. Avista argues that where standard form provisions are not applicable to block sales to IOUs, Avista recommends deleting the provision and inserting the legend "intentionally omitted" in its place. *Id.*

Avista and PSE argue that BPA should negotiate acceptable "General Contract Provisions" applicable to all power sales contracts, including RPSAs, addressing topics such as delivery of power, power quality and characteristics, rate duration, equitable adjustment of rates, and power cost allocations. *Id.*; PSE, IOURESEXC:018.

BPA's contracts have a set of standard provisions that were developed in discussions with many of BPA's customers and are consistent across all Subscription contracts. This is consistent with the guidance BPA received in the public comment process on BPA's Power Subscription Strategy Proposal. After the Power Subscription Strategy ROD was published, BPA took public comment on cost recovery, uncontrollable forces and dispute resolution language. After the public comment period, the language on these provisions and other standard contract provisions were developed based on discussions with many customers and were used consistently in all Subscription contracts. BPA has made a limited number of changes to reflect the needs of specific customer groups and contracts. Standard language helps to limit potential shifts in risk between customers and helps to ease the burden of contract administration.

The contract provisions on power quality and delivery of power proposed by BPA have been modified from BPA's historic contract language to reflect the deregulating power industry. BPA has also explained its provisions on rate duration, equitable adjustment of rates, and power cost allocations in BPA's Power Subscription Strategy, Administrator's ROD, and BPA's Power Subscription Strategy, Administrator's Supplemental ROD. PSE and Avista have identified no substantive reasons why these provisions do not accomplish their intended purposes after several rounds of customer discussions. The provision proposed by PSE and Avista on the use of conservation as an FBS replacement resource was directly addressed in BPA's 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02, Section 13.2. BPA hereby incorporates this discussion by reference.

Avista argues that where standard form provisions are not applicable to block sales to IOUs, the provision should be deleted and the words "intentionally omitted" used in its place. Avista, IOURESEXC:001. While BPA has not used the language "intentionally omitted," BPA has deleted provisions that are not applicable to block power sales to IOUs.

### **Decision**

*BPA determined in its Power Subscription Strategy that BPA's Subscription contracts should contain certain standard contract provisions. BPA also decided that contract offers should be based on contract prototypes. BPA will address any modifications of prototype provisions on a case-by-case basis.*

### **B. Recitals**

#### **Issue**

*Whether the reference to "replacing prior contracts" in the recital section of the proposed Block Sales Agreement is appropriate.*

#### **Parties' Positions**

The OPUC requests clarification as to why the Block Sales Agreement replaces prior contracts ending September 30, 2001. OPUC, IOURESEXC:014. The OPUC notes that the Block Sales Agreement does not begin until October 1, 2001, so it is not clear why the contract would supersede contracts that are in force prior to that date. *Id.*

#### **BPA's Position**

The reference in the recitals to the Block Sales Agreement replacing previous contracts is a means of providing historical context, for contract administration purposes, for both parties to the Agreement. It simply makes it clear which contract is in effect.

## **Evaluation of Positions**

The OPUC requested clarification of the recital in the Block Sales Agreement referencing prior power sales agreements with IOUs offered under section 5(b) of the Northwest Power Act. OPUC, IOURESEXC:014. BPA has included the recital to identify the proposed Block Sales Agreement as the successor contract to the current section 5(b) power sales contracts of IOUs.

## **Decision**

*The recitals in the Block Sales Agreement properly contain the statement that such Agreements replace prior contracts available through September 30, 2001.*

### **C. Section 1: Term**

## **Issue**

*Whether any extension or renewal option that is made available to members of other customer classes should be made available in the Block Sales Agreement.*

## **Parties' Positions**

PSE and Avista argue that any extension or renewal option that is made available to any members of other customer classes should be included in the Block Sales Agreement. PSE, IOURESEXC:018; Avista, IOURESEXC:001.

## **BPA's Position**

The Block Sales Agreement is part of a settlement arrangement. Any rights to renew or extend the Agreement beyond the initial term of the Agreement should be based on BPA's determination of the appropriateness of renewing or extending the agreement when the proposed Agreement expires.

## **Evaluation of Positions**

BPA is unaware of any extension or renewal option in the contracts of other customer classes. Because there are no extension or renewal rights in other proposed Subscription contracts, it is not possible to offer such terms in the Block Sales Agreement. In addition, BPA is offering a settlement of PSE's and Avista's rights to benefits under section 5(c) of the Northwest Power Act for the term of the Agreement. Renewal rights or extensions of such an agreement are not consistent with the structure of the settlement. The settlements are for a specified period of time and cannot be automatically extended or renewed. Subsequent settlement agreements would have to be negotiated between BPA and the IOU.

## **Decision**

*There are no extension or renewal rights in other proposed Subscription contracts that should be applied to the Block Sales Agreement. Such provisions would also be inappropriate given the structure of the Settlement Agreements.*

### **D. Section 2: Definitions**

#### **Issue**

*Whether the definitions in the Settlement Agreement should be amended as proposed by the commenting parties.*

#### **Parties' Positions**

Avista and PSE argue that BPA should specify that, absent consent of the customer, no modification of the rate schedules or GRSPs will apply to purchases under the Agreement until October 1, 2006, at the earliest. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

Avista and PSE propose adding a clarifying phrase (“during the term of this Agreement”) to the definition of “Contract Year.” *Id.*

Avista and PSE suggest adding a definition for “General Rate Schedule Provisions” that limits the scope of the GRSPs that can be established in the rate case for any Contract Year after Contract Year 2006. *Id.*

Avista and PSE suggest adding a definition for “Net Requirement.” *Id.*

Avista and Puget suggest adding a clarifying phrase to the definition of “PBL.” *Id.*

Avista and PSE argue that the “Residential Load (RL) Rate” should be the WP-02 RL Rate for the first five Contract Years and should be a rate no greater than the Lowest PF Rate at 100% load factor thereafter. *Id.*

#### **BPA's Position**

BPA's positions on the proposed changes are contained in the “Evaluation of Positions” section below. BPA agrees with some of the proposed modifications of the prototype language suggested by Avista and PSE.

#### **Evaluation of Positions**

Avista and PSE argue that BPA should specify that absent consent of the customer, no modification of the rate schedules or GRSPs will apply to purchases under the Block Sales Agreement until October 1, 2006, at the earliest. Avista, IOURESEXC:001; PSE,

IOURESEXC:018. The rates that apply to Settlement Agreement power sales during the first five years will be the rates that are established by BPA and approved and confirmed by FERC. Customer consent is not necessary. All customers have a right to participate in BPA's section 7(i) hearings in the event that any modification of BPA's rate schedules or GRSPs occurs. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997).

Avista and PSE suggest adding a definition for "General Rate Schedule Provisions" that limits the scope of the GRSPs that can be established in the rate case for any Contract Year after Contract Year 2006. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA believes the GRSPs are adequately defined in Section 3 of the IOU Firm Power Block Power Sales Agreement. More importantly, just as BPA's rate schedules must be established in a section 7(i) hearing, BPA's GRSPs are part of its wholesale firm power rates and also must be established in a section 7(i) hearing. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997). Agreeing to contractually limit the scope of the GRSPs to existing provisions would impair BPA's ability to establish rates in accordance with its statutory directives. BPA cannot prejudge its next rate case and therefore cannot contractually commit to prevent the development of new GRSPs that may be necessary in order to establish rates that recover BPA's costs and meet such other obligations. This can only be determined in a formal evidentiary hearing to establish rates under section 7(i) of the Northwest Power Act. *Id.*

Avista and PSE argue that the "Residential Load (RL) Rate" should be the WP-02 RL Rate for the first five Contract Years and should be a rate no greater than the Lowest PF Rate at 100% load factor thereafter. Avista, IOURESEXC:001; PSE, IOURESEXC:018. The RL-02 rate is the rate that applies to power sales to IOUs under the Settlement Agreements during the first five years. This rate was established by BPA in a formal evidentiary hearing and has been submitted to FERC for confirmation and approval. The proposed term of the RL-02 rate is five years. As noted previously, BPA cannot contractually agree that it will establish a future rate for a future period at a particular level. Such determinations can only be made at the time of development of new rates for the new rate period as determined in a formal evidentiary hearing under section 7(i) of the Northwest Power Act. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997).

Avista and PSE propose adding a clarifying phrase ("during the term of this Agreement") to the definition of "Contract Year." Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA believes it is not appropriate to modify the definition of "Contract Year" because it is a term that is defined in standard language in all of BPA's contracts. The language in the contracts precisely specifies how to determine a "Contract Year." Furthermore, the specified term of the agreement accomplishes the intent of the suggested modification.

Avista and PSE also suggest adding a definition for "Net Requirement." *Id.* It is not necessary to add a definition of "Net Requirement" as it is adequately defined by BPA's statutes, BPA's Section 5(b)/9(c) Policy, and the terms of Exhibit C of the Agreement.



Avista and Puget suggest adding a clarifying phrase to the definition of “PBL.” *Id.* It is not necessary to change BPA’s definition of the PBL. The recital clauses of the Agreement already explain the role of the PBL in relation to the rest of the agency.

### **Decision**

*BPA will not place limitations in the Block Sales Agreement on BPA’s ability to modify its rates or GRSPs. It is not necessary to modify the definitions of “Contract Year” or “PBL” in the Agreement or to add a definition of Net Requirement.*

## **E. Section 3: Applicable Rates**

### **Issue**

*Whether the Block Sales Agreement should specify that the RL rate must be no greater than the lowest cost-based power rates for BPA’s sales of preference power.*

### **Parties’ Positions**

Avista and PSE argue that BPA should include contractual guarantees limiting the level of RL rates in comparison to rates for BPA’s sales of preference power. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA’s Position**

BPA cannot lawfully establish the level of the RL rate by contract or in the absence of a formal evidentiary hearing under section 7(i) of the Northwest Power Act.

### **Evaluation of Positions**

Avista and PSE argue that the contract should specify that the RL Rate must be no greater than the lowest cost-based power rates for BPA’s sales of preference power, in the shape of the Contracted Power, which is firm flat power at 100 percent load factor. Avista, IOURESEXC:001; PSE, IOURESEXC:018. Avista and PSE also argue that the differentials between the on-peak and off-peak pricing and energy and demand charges must properly reflect the lower cost of service of the product offered. *Id.*

BPA’s Power Subscription Strategy proposed a settlement of the rights of IOUs to receive benefits under the REP established under section 5(c) of the Northwest Power Act. Under that settlement, the IOUs would receive a specified amount of power at a rate expected to be approximately equivalent to the PF Preference rate. *See* Power Subscription Strategy, at 8. BPA made clear that the actual rate for power offered to the IOUs would be established in a section 7(i) rate proceeding. *See* Power Subscription Strategy, Administrator’s ROD, at 125-126. BPA cannot lawfully establish the level of the RL rate by contract and in the absence of a formal evidentiary hearing under section 7(i) of the Northwest Power Act. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997). BPA has

included language restating the intent of the Power Subscription Strategy in Exhibit A of the IOU Firm Power Block Power Sales Agreement: “Subject to establishment in BPA’s rate case, and subject to BPA’s statutory requirements, the Lowest RL Rates shall be approximately equal to the Lowest PF Rate.” *See* Block Sales Agreement, Exhibit A, Section 3(c).

Avista and PSE also argue that the differentials between the on-peak and off-peak pricing and energy and demand charges must properly reflect the lower cost of service of the product offered. Avista, IOURESEXC:001; PSE, IOURESEXC:018. This issue can only be addressed in a section 7(i) hearing and was addressed in BPA’s 2002 Final Power Rate Proposal, Administrator’s ROD, WP-02-A-02. BPA will not decide this issue anew in this forum. Instead, BPA will summarize BPA’s rate case findings. BPA’s ROD noted that it was clear that a 24-hour flat-block sale was precisely the type of product that the Power Subscription Strategy envisioned would be offered to IOUs in the proposed REP settlements. 2002 Final Power Rate Proposal, Administrator’s ROD, WP-02-A-02. BPA concluded it should therefore charge a price that applies to such a sale. *Id.* This is precisely what BPA did. In BPA’s 2002 rate case, BPA’s HLH and LLH energy rates (for both the RL and PF Preference rates) were derived by adjusting the monthly and diurnal energy prices from the Marginal Cost Analysis Study, WP-02-E-BPA-04, to assure that only the revenue requirement was collected. This was done because forecasted market energy prices would over-collect BPA’s revenue requirement. *Id.* Monthly HLH and LLH energy rates from the Marginal Cost Analysis Study, WP-02-E-BPA-04, were reduced proportionately until estimated revenues from energy charges equaled the balance of BPA’s revenue requirement. *Id.* During this process, the RL rate and the revenues forecasted under the RL rate were calculated assuming a flat annual load. *Id.*, citing Wholesale Power Rate Development Study Documentation, WP-02-E-BPA-05A, at 94.

Avista and PSE imply that the 24-hour flat-block product is BPA’s least expensive and most predictable product, because it has no hourly difference across the period of delivery. *See* 2002 Final Power Rate Proposal, Administrator’s ROD, WP-02-A-02. In BPA’s 2002 rate case, the IOUs argued that, by contrast, shaped products present unpredictable variations in service obligations and subject BPA to market price exposure. *Id.* While BPA agreed that the way a customer takes power affects the value of that power, BPA disagreed with the IOUs’ argument that the PF Preference and RL rates are dissimilar because of the products available under each. *Id.* Providing shaped requirements service, *i.e.*, full and partial requirements service, does cost more to serve than a flat block. *Id.* Nevertheless, the combination of the demand charge and the product-specific billing determinant equitably recovers the costs for these services. *Id.* A flat block and a shaped load pay different effective rates that reflect the different costs to serve. *Id.*

Avista and PSE imply that the PF and RL rates are based on the same demand and energy charges despite the fact that customers receiving flat-block power under the RL rate must incur additional costs to meet actual load. *Id.* As noted above, lower-valued products purchased from BPA have lower costs than higher-valued products purchased from BPA.

*Id.* Any customer, whether an IOU or preference customer, taking a flat-block product would incur the same additional costs to meet actual load. *Id.* In addition, as noted previously, the Subscription Strategy described the product that would apply to settlements of the REP with IOUs. *Id.* This is a specific product with a specific rate for a specific settlement. *Id.* The rate level for the settlement sales supports the proposed value of the settlement of the REP with regional IOUs. *Id.*

### **Decision**

*BPA will not contractually limit the level of the RL rate in the IOU Firm Power Block Power Sales Agreement. Such rate determinations must be established in a section 7(i) rate proceeding. BPA will not revisit power rate case issues in this proceeding. In the event such issues should be addressed in this proceeding, BPA hereby adopts BPA's 2002 Final Power Rate Proposal, Administrator's ROD, and the record compiled in that proceeding.*

## **F. Section 4: RL Firm Power Products**

### **Issue**

*Whether the IOUs should be able to purchase a power product other than a flat block of power under the IOU Firm Power Block Power Sales Agreement.*

### **Parties' Positions**

Avista argues that the Settlement Agreement power sales should not be limited to flat blocks of power. Avista, IOURESEXC:001. Avista also argues that IOUs should be eligible for the same products offered to preference customers. *Id.*

### **BPA's Position**

BPA has offered a flat block of power to the IOUs at the RL rate as part of its settlement of the REP. In addition to such settlement sales, IOUs may buy any requirements product that a public utility may buy (except Slice) at BPA's New Resources Firm Power (NR) rate, where the IOU can meet the resource characteristics for the product.

### **Evaluation of Positions**

Avista and PSE argue that power deliveries for IOUs' residential and small farm customers pursuant to the Settlement Agreement should not be limited to flat blocks of power, uniform for the term of the contract. Avista, IOURESEXC:001; PSE, IOURESEXC:018. Avista and PSE argue that such a shape does not reflect the shape of IOUs' residential and small farm loads. *Id.* Avista and PSE argue that, in general, IOUs should be eligible to buy the same products offered to preference customers subject to the same terms and conditions. *Id.* First, it must be noted that BPA's proposed Subscription settlement sales to IOUs are part of a settlement offer and are thus more limited than

general net requirements power sales. These proposed power sales were consistently described in BPA's Power Subscription Strategy. BPA's Power Subscription Strategy, at 9, notes that:

In subscription, BPA proposes a settlement [of the REP] in which residential and small farm loads of the IOUs will be assured access to the equivalent of 1,800 aMW of Federal power for the 2002-2006 period. Of this amount, at least 1,000 aMW will be met with actual BPA power deliveries. The remainder may be provided through either a financial arrangement or additional power deliveries, depending on which approach is more cost-effective for BPA.

BPA and each IOU will negotiate the physical and financial components of the Subscription amount, by year, in the negotiated subscription settlement contracts. Any cash payments will reflect the difference between the market price of power forecasted in BPA's rate case and the rate used to make such Subscription sales. The actual power deliveries for these loads will be in equal hourly amounts over the period. . . .

The Power Subscription Strategy, Administrator's ROD, also states that:

BPA is also making an offer to the IOUs for settlement of the REP comprised of a specified amount of power and monetary payments. The terms and conditions of the settlement proposal are prescribed in order to establish what BPA feels is an appropriate value for the settlement of the REP. Thus, most of the service alternatives available to preference customers continue to be available to the IOUs under traditional requirements contracts and rate schedules. The Subscription settlement power sales, however, are available only under the prescribed conditions.

Power Subscription Strategy, Administrator's ROD, at 45. The Power Subscription Strategy ROD then notes that "the actual power deliveries for the residential and small farm loads of IOUs will be in equal hourly amounts over the contract period." *Id.* In addition, the Power Subscription Strategy ROD states:

Some parties argue that BPA should show flexibility in the shape of the sales to the IOUs for their residential and small farm consumers. In determining the shape of sales to the IOUs, however, BPA must view the shape of all BPA sales to customers and the impact of the shape of such sales on BPA's system. BPA anticipates meeting substantial loads of preference customers which have shaping needs throughout the year. BPA cannot operate as economically or efficiently as desired if all loads have changing load shapes. There are operational benefits to BPA of customers taking energy around the clock, all year, without a significant amount of variation. Because BPA desires to operate its system efficiently, BPA is making this shape available to the IOUs. This will

enable BPA to make direct power sales to the IOUs for their residential and small farm consumers while at the same time meeting the operational need of selling a significant flat-block of energy to regional loads. Further, BPA observes that its service to residential and small farm loads will be only a portion of the utility's total load, and such loads have baseload needs that BPA would be able to serve in this manner. It is important to note that the IOUs may request shaping services or other power products from BPA under the applicable rate schedule.

Power Subscription Strategy ROD, at 46. It is therefore clear that a 24-hour flat-block sale was precisely the type of product that the Power Subscription Strategy envisioned would be offered to IOUs in the proposed REP settlements.

In summary, BPA has only offered a flat block of RL power as part of the REP Settlement Agreements. The IOUs are eligible to buy power in excess of their RL settlement power with the same products offered to preference customers (except Slice), subject to the same terms and conditions. These products, however, must be purchased at BPA's NR rate. BPA does not believe it can offer the Slice product to IOUs. *See* Power Subscription Strategy, Administrator's ROD, at 88; *see also* 2002 Final Power Rate Proposal, Administrator's ROD, WP-02-A-02.

PSE argues that if it elects a product other than the Block Sales Agreement (RL Only), the Block Sales Agreement draft should be replaced with a form of agreement appropriate for the product. PSE, IOURESEXC:018. BPA will replace the Block Sales Agreement draft with a new form of agreement when PSE tells BPA which product it wishes to buy.

### **Decision**

*BPA is only offering flat blocks of power at the RL rate as part of its proposed settlement of the REP. IOUs may buy any requirements product (except Slice) offered to preference customers at the NR rate and subject to the same terms and conditions.*

### **G. Section 4(b): RL Firm Power Product**

#### **Issue**

*Whether IOUs should be able to specify whether to take firm power or monetary benefits in the second five years of a 10-year settlement.*

#### **Parties' Positions**

Avista and PSE believe BPA should offer a settlement allowing the IOUs to choose whether to take power or money in the second five years. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

## **BPA's Position**

BPA's proposed Settlement Agreement allows BPA to determine whether firm power or monetary benefits are offered during the second five years.

## **Evaluation of Positions**

Avista and PSE argue that Section 4(b) of the Settlement Agreement should specify that the customer may elect to receive monetary benefits instead of power deliveries after the first five contract years under the Block Sales Agreement. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA's Power Subscription Strategy states that BPA intends that Settlement benefits to the IOUs in the second five years will be power deliveries. *See* Power Subscription Strategy, at 9. The proposed Settlement Agreement states that BPA will notify the IOUs by October 1, 2005, of the amount of firm power deliveries in the second five years. *See* Settlement Agreement, Section 4(b)(2)(A). BPA needs to retain this option because it will be trying to obtain sufficient resources to provide power deliveries to IOUs during the second five years. Providing an option to IOUs to not take power BPA may have acquired to serve them would expose BPA to potential financial risk. It would also make acquisition of power for those deliveries more difficult and would potentially frustrate the goal of the Power Subscription Strategy to provide power to IOUs for their residential and small farm consumers.

## **Decision**

*BPA will not provide an option for the IOUs to unilaterally elect to take monetary benefits instead of power offered by BPA during the second five years of the Settlement Agreement. Monetary benefits, however, may be part of the benefits provided during the second five years, depending on circumstances affecting BPA's ability to provide the intended power.*

### **H. Section 7: Delivery**

#### **Issue**

*Whether Section 7 of the Block Sales Agreement should provide for reimbursement to the IOUs for additional costs associated with the delivery of Contracted Power to customer points of delivery.*

#### **Parties' Positions**

PSE argues that BPA should pay the cost of congestion on the regional transmission system for power sales under the Settlement Agreement. PSE, IOURESEXC:018.

### **BPA's Position**

BPA's PBL is not offering a delivered product to any customer. Transmission costs of BPA's power from its generators to any given customer's distribution load will be paid by the customers.

### **Evaluation of Positions**

PSE argues that Section 7 of the Block Sales Agreement should provide for BPA to reimburse the customer for any additional costs to the customer for delivery of Contracted Power to points of delivery on the customer's distribution system, in excess of BPA's unconstrained main grid wheeling charge. PSE, IOURESEXC:018. BPA's PBL is not offering a delivered product to any customer. Transmission costs for delivery of BPA's power from its generators to any given customer's distribution load will be paid by the customers. BPA makes its requirements power products available to customers at points of receipt (PORs) located at BPA's generators or points where BPA purchases power. The IOUs were informed of their PORs on August 1, 2000. BPA has not included any congestion costs or network transmission costs in its power rates and believes those costs should be paid by the loads in a deregulated energy environment.

### **Decision**

*BPA will not reimburse customers for congestion costs and the costs of ancillary services necessary to deliver BPA power to a customer's loads.*

#### **I. Section 7(c): Delivery of Firm Power – Points of Receipt**

### **Issue**

*Whether scheduling firm power purchased under the Block Sales Agreement to a customer's distribution system is required by law and whether this requirement places unnecessary costs on consumers.*

### **Parties' Positions**

Avista argues that the provisions requiring Avista to schedule firm power purchased under the Block Sales Agreement to its distribution system is not required by law and places unnecessary costs on the consumers the settlement is designed to benefit. Avista, IOURESEXC:001.

### **BPA's Position**

Power purchased under section 5(b)(1) of the Northwest Power Act must be used to serve a customer's retail load. 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997).

## **Evaluation of Positions**

Avista argues that Section 7(c) of the Block Sales Agreement is inappropriately restrictive in mandating that transmission schedules be made to points of delivery on the customer's distribution system. Avista, IOURESEXC:001. Avista argues that by mandating that the customer shall have no flexibility under its transmission contract with BPA's Transmission Business Line, BPA's PBL is forcing the customer to bear increased transmission expenses under certain operating conditions. *Id.* Avista argues that this restriction has the unintended effect of increasing costs to be borne by retail customers for whom the Block Sales Agreement is intended to benefit, and may be perceived to be inappropriate collusion between BPA's business lines in order to increase BPA's transmission revenues. *Id.*

Avista states that it understands that BPA intends this restriction to assure that firm power delivered under the Block Sales Agreement is used to serve firm retail load. *Id.* However, Avista feels that gaining this assurance by mandating delivery restrictions is not possible unless the delivered power to the retail consumer is unbundled, which would be in direct violation of Section 6(d) of the Settlement Agreement. *Id.* Avista argues that the assurance that the delivered power is used to serve firm retail load comes from the fact that the firm power is within the customer's net requirement. *Id.* Avista notes that the firm power block purchase under the Settlement Agreement is to be solely for the use and benefit of residential and small-farm consumers; this requirement is fully and appropriately covered in the "passthrough of benefits" section of the Settlement Agreement. *Id.* Incorporating delivery restrictions in the Block Sales Agreement undermines the "passthrough of benefits" provisions of the Settlement Agreement and appears to be inappropriate collaboration between BPA's business lines for purposes of increasing BPA's transmission revenues. *Id.*

In response to these arguments, power purchased under section 5(b)(1) of the Northwest Power Act must be used to serve a customer's retail load. 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997). The provisions of Section 7(c) of the Block Sales Agreement are required as a result of unbundling BPA's power and transmission businesses. Under previous BPA contracts, power would be delivered by BPA to the customer's distribution system. Under BPA's Subscription contracts, BPA has placed that obligation on the customer. BPA does not specify the method the customer chooses to wheel the power to its loads. BPA has simply placed the requirement on the customer to actually take the power to its loads. The current administrative deregulation of the electric power markets has not changed BPA's governing statutes, which require requirements power to be used to serve retail loads. There is no foundation for Avista's *ad hominem* accusations of collaboration.

## **Decision**

*BPA will retain the requirement to wheel Subscription power to the customer's distribution system.*



## **J. Sections 9(b) and 9(c): Billing and Payment**

### **Issue**

*Whether receipt of payment should be required by BPA by the 20<sup>th</sup> day after the issue date of the bill and whether payment should be required on disputed bills. In addition, whether BPA should charge a greater interest rate for late payment than is provided for refunds of disputed amounts.*

### **Parties' Positions**

PSE argues for a different due date for payments and that BPA should lower its late payment charge. PSE, IOURESEXC:018.

### **BPA's Position**

Section 9 of the Block Sales Agreements on Billing and Payment is a standard contract provision. PSE's arguments do not provide a basis to change BPA's standard billing practices, which apply to all parties.

### **Evaluation of Positions**

PSE argues that receipt of payment should not be required by BPA by the 20th day after the issue date of the bill. PSE, IOURESEXC:018. PSE suggests that receipt of payment should be required by no sooner than the 20th day after the date of receipt of the bill. *Id.* PSE argues that with respect to disputed bills, payments should not be required with respect to amounts as to which there is a good faith dispute. *Id.* PSE also argues that the draft Block Sales Agreement provides for a late payment charge at a greater rate than provided for refunds by BPA of disputed amounts. *Id.* PSE argues that there is no basis for BPA charging and paying different interest rates in those two instances. *Id.*

BPA requires payment after 20 days of issuance of the bill because the customer has received the service and its obligation to pay for the service should not be tied to the customer's receipt of its bill, a factor unknown to BPA. Differences in receipt times would also result in differences in BPA's planned dates of receiving payment. Through BPA's proposed procedure, the customer knows the services it received and approximately how much it will need to pay. With regard to PSE's second argument, BPA requires payment of disputed bills in order to ensure the consistent receipt of revenues that are required to pay BPA's costs. Absent such a provision, parties could simply dispute their bills and BPA would receive no revenue for the period needed to resolve the dispute. Such periods could take months or years and seriously interfere with BPA's cash flow. Furthermore, under PSE's proposal, a customer could essentially borrow money from BPA by creating a billing dispute. In response to PSE's third argument, BPA requires a substantial late payment charge to avoid becoming a bank. If there were no late payment charge, customers could simply avoid making payments to

BPA and would suffer no penalty for such inaction. The late payment charge provides customers an incentive to make prompt payments to BPA, thereby assisting the agency's cash flow and ability to pay its costs. The late payment charge is at a greater rate than provided for refunds by BPA of disputed amounts. BPA established a higher charge for late payments to remove any incentive for customers to withhold payment when they have cash flow or credit problems by claiming a dispute. BPA expects them to pay their bills on time and will refund their money with interest if a dispute is resolved in their favor. The foregoing provisions regarding payment have been used by BPA for at least 20 years and have worked effectively.

### **Decision**

*BPA's proposed standard billing procedures are appropriate.*

## **K. Section 11: Cost Recovery**

### **Issue**

*Whether the Cost Recovery Adjustment Clause (CRAC) should be uniformly applied to all BPA power sales.*

### **Parties' Positions**

Avista and PSE argue for uniform application of any CRAC. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

BPA has developed standard language on cost recovery that is included in all contracts. The establishment of any CRAC is a matter for a section 7(i) rate hearing and cannot be prescribed by contract.

### **Evaluation of Positions**

Avista and PSE argue that any CRAC should be uniformly applied to all BPA power sales and this same principle applies to any refunds of BPA power rates under a reverse CRAC or otherwise. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA has developed a standard provision for all BPA power contracts regarding the CRAC. This provision states: "BPA may adjust the rates for Contracted Power set forth in the applicable power rate schedule during the term of this Agreement pursuant to the Cost Recovery Adjustment Clause in the 2002 GRSPs, or successor GRSPs." However, the manner in which a CRAC is applied to BPA's power sales is a ratemaking issue that must be established in a formal evidentiary hearing under section 7(i) of the Northwest Power Act. 16 U.S.C. § 839e(i) (1994 & Supp. III 1997). Indeed, this issue was recently addressed in BPA's 2002 Wholesale Power Rate Adjustment Proceeding, Administrator's ROD, WP-02-A-02, Section 7.3.

## **Decision**

*BPA will not include contract provisions describing the implementation of CRAC. The CRAC was established by BPA in BPA's 2002 wholesale power rates and GRSPs.*

### **L. Section 12: Uncontrollable Forces**

#### **Issue**

*Whether the uncontrollable forces language in the Block Sales Agreement should require parties to settle labor disputes; whether it should require that certain events are automatically uncontrollable forces or "may" be uncontrollable forces; and also whether BPA should change "any order of an administrative officer" to "any order of a governmental regulatory authority," to be clear that an order of BPA or the Department of Energy does not release BPA or the Department of Energy from its contractual obligations.*

#### **Parties' Positions**

PSE argues that no party should be required to settle a labor dispute to remove an uncontrollable force. PSE, IOURESEXC:018. PSE also argues that events identified as uncontrollable forces in the Block Sales Agreements do not automatically qualify as such forces. *Id.* PSE also believes BPA should clarify that BPA or the Department of Energy cannot order BPA to impair its performance under the Agreement as an uncontrollable force. *Id.*

#### **BPA's Position**

BPA agrees with PSE that nothing in the Block Sales Agreement should be construed to require a party to settle a strike or labor dispute. BPA agrees that events identified as uncontrollable forces may not be uncontrollable forces. BPA agrees that it cannot release itself from its contractual obligations. BPA is unaware of any authority of the Department of Energy to impair BPA's ability to perform its agreements.

#### **Evaluation of Positions**

PSE argues that the standard provision addressing "Uncontrollable Forces" should not require any party to settle a labor dispute. PSE, IOURESEXC:018. BPA agrees with PSE that the Uncontrollable Forces language does not require settlement of a labor dispute.

PSE argues that the standard provision should not imply that certain events are automatically "Uncontrollable Forces," but rather that they "may" be Uncontrollable Forces. *Id.* BPA agrees that any event must be evaluated against the contract standard of

an uncontrollable force. While identified events are often uncontrollable forces, there may be instances when such an event does not meet the contract standard.

PSE argues that the reference to "any order of an administrative officer" should be revised and clarified to "any order of a governmental regulatory authority." *Id.* This makes it clear that an order of BPA or the Department of Energy does not release BPA or the Department of Energy from its contractual obligations. *Id.* BPA should not be excused from its contractual obligations by any order of BPA or the Department of Energy. *Id.* BPA agrees that it cannot order itself to fail to perform under its contracts and create an uncontrollable force. BPA is currently unaware of any DOE regulatory authority that would allow DOE to order BPA not to perform its contracts. BPA, however, cannot contractually guarantee what authority Congress may provide DOE to affect BPA's actions during the term of the Agreement.

BPA's language on uncontrollable forces is standard language that is included in all contracts. BPA does not see a need to change the language based on PSE's comments because BPA has clarified the language through the foregoing discussion.

### **Decision**

*BPA's proposed language on uncontrollable forces is appropriate.*

## **M. Section 13: Governing Law and Dispute Resolution**

### **Issue**

*Whether the Block Sales Agreement correctly refers to existing law, whether standard dispute resolution provisions are necessary, and whether use of the CPR Institute of Dispute Resolution rules, procedures and neutrals is appropriate.*

### **Parties' Positions**

Avista and PSE argue that the governing law provision should be amended to clarify that the reference to Ninth Circuit jurisdiction is simply a reference to existing law and not a choice of forum provision. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

Avista and PSE argue that standard dispute resolution provisions are necessary for administrative ease and to avoid some customers being offered more favorable dispute resolution provisions than others. *Id.*

Avista and PSE argue that BPA's proposed exclusive use of the CPR Institute of Dispute Resolution rules, procedures and neutrals should be changed. *Id.*

## **BPA's Position**

The governing law provision does not provide parties a choice of forum but notes, consistent with law, that exclusive jurisdiction for review of BPA's final actions and the implementation of those actions currently lies in the United States Court of Appeals for the Ninth Circuit. Standard dispute resolution provisions are necessary for administrative ease and to avoid some customers being offered more favorable dispute resolution provisions. BPA's proposed exclusive use of the CPR Institute of Dispute Resolution rules, procedures and neutrals is appropriate.

## **Evaluation of Positions**

Avista and PSE argue that the governing law provision should be amended to clarify that the reference to Ninth Circuit jurisdiction is simply a reference to existing law and not a choice of forum provision. Avista, IOURESEXC:001; PSE, IOURESEXC:018. The governing law provision does not provide parties a choice of forum but notes, consistent with law, that exclusive jurisdiction for review of BPA's final actions and the implementation of those actions currently lies in the United States Court of Appeals for the Ninth Circuit. 16 U.S.C. § 839f(e)(5) (1994 & Supp. III 1997).

Avista and PSE argue that standard dispute resolution provisions are necessary for administrative ease and to avoid some customers being offered more favorable dispute resolution provisions than others. Avista, IOURESEXC:001; PSE, IOURESEXC:018. Avista and PSE argue that BPA should provide customers with several standard dispute resolution provisions providing different options, any of which each of BPA's customers may select for insertion in the agreement. *Id.* Avista and PSE argue that, most importantly, BPA should not, unless specifically agreed to and waived by a party, displace or limit a party's right to litigate any dispute in a court of proper jurisdiction. *Id.* Consequently, Avista and PSE argue that one option for dispute resolution should be a standard provision identifying the courts as the jurisdiction for resolution of contract disputes under the Subscription contracts (other than final actions establishing rates in a 7(i) process, which rates are incorporated by reference into a Subscription contract). *Id.* BPA agrees that standard dispute resolution provisions are necessary for administrative ease and to avoid some customers being offered more favorable dispute resolution provisions. Avista and PSE's proposal, however, does not implement this principle but rather violates this principle. If BPA provided customers with several standard dispute resolution provisions providing different options, any of which each of BPA's customers could select for insertion in the Agreement, the Agreements would be more difficult to implement administratively and would result in different customers having different dispute resolution rights.

Avista and PSE argue that BPA's proposed exclusive use of the CPR Institute of Dispute Resolution rules, procedures and neutrals should be changed. *Id.* Avista and PSE argue that the rules and procedures are not readily available, accessible or widely recognized as commercial arbitration procedures. *Id.* Avista argues that the CPR Institute advocates the use of industry executives rather than retired judges or others as neutrals in a dispute.

*Id.* BPA's power sales contracts have specified the use of the CPR institute procedures for the past five years in both public agency and DSI contracts. The CPR Institute offered a more flexible process for its arbitrations as well as world-recognized experts on their utility panel. Customers that have used its service have not objected to its procedures or expertise. The IOUs have not purchased power under their requirements contracts from BPA and were not interested in amendments that incorporated the CPR Institute provisions. There is no particular legal requirement to use one service or another, but the CPR Institute service has worked well. A better result would not necessarily be achieved from either another service or having more lawyers or judges on the arbitrator selection panel. BPA believes industry executives are well-suited to resolve disputes in the electric utility industry.

### **Decision**

*The governing law provision does not provide parties a choice of forum but notes, consistent with law, that exclusive jurisdiction for review of BPA's final actions and the implementation of those actions lies in the United States Court of Appeals for the Ninth Circuit. Standard dispute resolution provisions are necessary for administrative ease and to avoid some customers being offered more favorable dispute resolution provisions. BPA's proposed exclusive use of the CPR Institute of Dispute Resolution rules, procedures and neutrals is appropriate.*

## **N. Section 14(b): Insufficiency and Allocations**

### **Issue**

*Whether BPA's application of insufficiency provisions should trigger a cash payment under the Settlement Agreement.*

### **Parties' Positions**

Avista and PSE argue that insufficiency should result in conversion of Settlement Agreement power benefits to Settlement Agreement monetary benefits. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

BPA agrees with PSE and Avista that amounts of RL power provided under the Subscription Settlement Agreements should result in a cash payment if BPA is unable to deliver the power due to insufficiency.

### **Evaluation of Positions**

Avista and PSE argue that insufficiency should result in conversion of power benefits to monetary benefits. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA agrees and has included section 5(a)(3) in the Settlement Agreement. BPA offered the IOUs an

amount of power in settlement of their rights under section 5(c) of the Northwest Power Act. If BPA cannot deliver the power promised in the settlement, BPA should make cash payments in lieu of the power delivery.

### **Decision**

*BPA has modified the Settlement Agreement to provide a cash payment instead of power sales if BPA invokes its insufficiency provisions.*

## **O. Section 14(c): Priority to Pacific Northwest Customers**

### **Issue**

*Whether Section 14(c) should be modified to include only the first three sentences of section 9(c) of the Northwest Power Act.*

### **Parties' Positions**

Avista and PSE argue that “[o]nly the first three sentences of section 9(c) should be included [in Section 14(c) of the Block Sales Agreement] because only the first three sentences pertain to BPA’s statutory obligation to afford priority to Pacific Northwest customers.” Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA’s Position**

The first three sentences of section 9(c) of the Northwest Power Act are not the only provisions of section 9(c) relating to priority to Pacific Northwest customers. The reference to the entirety of section 9(c) is appropriate.

### **Evaluation of Positions**

Avista and PSE argue that “[o]nly the first three sentences of section 9(c) should be included [in Section 14(c) of the Block Sales Agreement] because only the first three sentences pertain to BPA’s statutory obligation to afford priority to Pacific Northwest customers.” Avista, IOURESEXC:001; PSE, IOURESEXC:018. This argument is factually incorrect. Sections 9(c) and 9(d) of the Northwest Power Act relate directly to regional preference. 16 U.S.C. §§ 839f(c) & (d) (1994 & Supp. III 1997). While the first three sentences of section 9(c) refer to regional preference, the following sentences also expressly discuss fundamental regional preference issues. These issues include the establishment of the electric power requirements of any Pacific Northwest customer, conservation or retention of energy to meet regional loads, and sales of surplus as replacement for excluded energy. See sections 3(b) & (d) of the Regional Preference Act, 16 U.S.C. §§ 837b(b) & (d) (1994 & Supp III 1997). Similarly, section 9(d) of the Northwest Power Act regards that sales from non-Federal resources must not increase the amount of firm power the Administrator is obligated to provide to any customer. 16 U.S.C. § 839f(d) (1994 & Supp. III 1997). See also 16 U.S.C. § 837b(b). In summary,

the provisions of section 9(c) and 9(d) of the Northwest Power Act relate to regional preference and are properly referenced in the Block Sales Agreement.

### **Decision**

*Section 14(c) of the Block Sales Agreement properly references the entirety of sections 9(c) and 9(d) of the Northwest Power Act.*

#### **P. Section 14(e): Use of Regional Resources**

### **Issue**

*Whether BPA should include a contractual provision requiring customers to report their export of regional resources.*

### **Parties' Positions**

Avista and PSE argue that BPA should not include a contractual provision requiring the reporting of the export of regional resources. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

BPA's Section 5(b)/9(c) Policy requires customers to self-report their export of regional resources. Unless a customer follows the procedures required by the Section 5(b)/9(c) Policy when exporting resources, BPA is required by law to reduce the amount of Federal firm power it sells to that customer. Because BPA's Section 5(b)/9(c) Policy relies on self-reporting by customers, BPA's contract for the sale of Federal power is the only means for requiring customers to make such reports.

### **Evaluation of Positions**

Avista and PSE argue that Section 14(e) of the Block Sales Agreement, which includes a provision requiring customers to report their export of regional resources, is too broad and unnecessary and should be deleted. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA believes this provision is essential to implement its Section 5(b)/9(c) Policy because BPA is required by law to reduce the amount of Federal firm power it sells to that customer if the customer exports its regional resources instead of using it to serve its own load. This provision is standard in all of BPA's Subscription firm power contracts.

PSE argues that BPA's PBL should not have access to valuable confidential commercial information about utility power marketing activities. PSE, IOURESEXC:018. BPA agrees that it is important to provide protections regarding access to confidential commercial information supplied by the IOUs. However, BPA must receive the required information in order to comply with its statutory responsibilities regarding sales of net



requirements power. This issue was addressed in negotiations between BPA and the IOUs and any information that a customer believes is confidential can be supplied under a confidentiality agreement restricting its release within BPA. *See* Block Sales Agreement, Section 15(c).

### **Decision**

*The Block Sales Agreement provision that requires the reporting of exports of regional resources is both necessary and appropriate. Confidential information can be supplied to BPA under a confidentiality agreement.*

#### **Q. Section 14(f): Section 5(b) Purchases**

### **Issue**

*Whether customers should be entitled to multiple contracts under section 5(b) of the Northwest Power Act.*

### **Parties' Positions**

Avista and PSE argue that section 14(f) of the Block Sales Agreement should state that other agreements for a customer's purchase of power pursuant to section 5(b) of the Northwest Power Act are not precluded. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

A customer is statutorily entitled to one power sales contract at a time under section 5(b)(1) of the Northwest Power Act. 16 U.S.C. § 839c(b)(1) (1994 & Supp. III 1997).

### **Evaluation of Positions**

Avista and PSE argue that Section 19(f) of the Block Sales Agreement should state that other agreements for a customer's purchase of power pursuant to section 5(b) of the Northwest Power Act are not precluded. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA believes that customers have no statutory right to multiple contracts for their service under section 5(b)(1) of the Northwest Power Act. As explained in BPA's Section 5(b)/9(c) Policy, Administrator's ROD, at 42, Avista's and PSE's proposal would require BPA to administer numerous contracts that all related to the same purpose: meeting the portion of a customer's loads not met by its own resources. This would be unnecessarily burdensome to BPA in the administration of its many power sales contracts.

## **Decision**

*The Block Sales Agreement will not include a contract provision allowing multiple section 5(b) contracts. All section 5(b) purchases must be made under a single contract.*

### **R. Section 15(c): Information Exchange and Confidentiality**

#### **Issue**

*Whether BPA should be required to use separate staff from those involved in marketing when reviewing customer information marked confidential.*

#### **Parties' Positions**

The OPUC argues that Section 15(c) of the Block Sales Agreement should be modified to preclude any BPA individual from reviewing confidential information if that individual is involved in marketing activities. OPUC, IOURESEXC:014.

#### **BPA's Position**

BPA will limit the access of information marked confidential to those BPA employees who need to process the information for the purpose it was requested.

#### **Evaluation of Positions**

The OPUC believes that Section 15(c) of the Block Sales Agreement should be revised to strengthen the protections afforded to customers. OPUC, IOURESEXC:014. The OPUC believes that Section 15(c) should ensure that the BPA staff that review materials marked "confidential" are not staff who are involved in BPA's marketing function. *Id.* In response to this argument, BPA is unwilling to commit to hire separate staff to process information under the Block Sales Agreement. BPA is trying to minimize its costs in a competitive environment. BPA will, however, limit access to confidential information to those employees that require such information to perform their responsibilities in implementing the provisions of the Agreement. The OPUC proposal also would be ambiguous as to which employees were involved in "marketing" and might preclude any BPA employee from reviewing the information that was knowledgeable about the purpose for which it was submitted.

## **Decision**

*Section 15(c) of the Block Sales Agreement properly provides that BPA will limit access to confidential information to those employees that require such information to perform their responsibilities in implementing the provisions of the Agreement.*

## **S. Section 15(k): WIES Agreement**

### **Issue**

*Whether the Block Sales Agreement should be amended to include the Agreement Limiting Liability Among Western Interconnected Electric Systems (WIES Agreement) by reference.*

### **Parties' Positions**

Avista and PSE argue that the WIES Agreement should be incorporated by reference. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

The WIES Agreement does not apply to PBL activities. BPA has proposed a hold harmless section that achieves the same purpose.

### **Evaluation of Positions**

The WIES Agreement is an agreement among transmission holders to maintain their transmission and distribution systems to a certain mutually agreeable level of standards. If parties to the agreement did so, other parties could not sue them for negligence. Avista and PSE argue that the WIES Agreement should continue in force between the parties, to the extent applicable under such agreement. Avista, IOURESEXC:001; PSE, IOURESEXC:018. BPA believes the WIES Agreement should stand on its own merits. Because it involves the construction and operation of the transmission system, the PBL is not the appropriate contracting party. The PBL does not conduct BPA's transmission activities. Such activities are conducted by the TBL.

### **Decision**

*The PBL will not incorporate the WIES Agreement into its power sales agreements by reference.*

## **T. Exhibit A: Rate Commitments**

### **Issue**

*Whether BPA should include contractual rate commitments in the Block Sales Agreement.*

### **Parties' Positions**

Avista and PSE argue that the IOUs need contractual rate commitments similar to preference utilities. Avista, IOURESEXC:001; PSE, IOURESEXC:018.

### **BPA's Position**

BPA has offered the IOUs the same rate commitments it has offered to preference utilities.

### **Evaluation of Positions**

Avista and PSE argue that the rate commitments in Exhibit A of the Block Sales Agreement, unlike the rate commitments in the preference agency draft contracts, do not provide adequate rate protection for IOUs and should be revised to include appropriate protections. Avista, IOUEXC:001; PSE, IOUEXC:018. BPA has included the same rate commitments for the IOUs that it has offered to its preference utility customers. BPA's preference utility customers have only been offered the right to BPA's lowest rate available for their customer class during a future rate period if a customer within the class contracts to purchase power during that period. BPA has offered the same right to the IOUs. In addition, given BPA's statutory directives, BPA cannot offer the same rate schedules for requirements power sales to BPA's IOU customers as to BPA's public agency customers (although it is possible that the rates would be at the same price level). BPA's rates for requirements power sales to IOUs are developed under section 7(f) of the Northwest Power Act while rates for requirements power sales to public agencies are developed under section 7(b) of the Act. *See* 16 U.S.C. §§ 839e(f), (b) (1994 & Supp. III 1997). Furthermore, the establishment of such rates can only be done in a formal evidentiary hearing conducted pursuant to section 7(i) of the Northwest Power Act. *Id.* § 839e(i).

### **Decision**

*BPA will not include additional contractual rate commitments in the Block Sales Agreement.*

#### **U. Exhibit C: Net Requirements**

### **Issue**

*Whether the requirements of Exhibit C of the Block Sales Agreement are unduly burdensome.*

### **Parties' Positions**

Avista and the OPUC argue that the provisions of Exhibit C are burdensome, intrusive, and unclear. Avista, IOURESEXC:001; OPUC, IOURESEXC:014.

## **BPA's Position**

BPA recognizes that the provisions of Exhibit C require a great deal of information. This information, however, is necessary to permit BPA to fulfill its statutory obligations regarding the determination of utilities' net requirements in order to determine the lawful amounts of firm requirements power sales that can be made to such customers. BPA does not believe that these requirements, once established, will be a burden to implement. While detailed, the requirements of Exhibit C are neither intrusive nor unclear.

## **Evaluation of Positions**

The OPUC notes that the provisions of Exhibit C exemplify the point that the Northwest Power Act does not mesh well with a trend towards a fully competitive wholesale market. OPUC, IOURESEXC:014. The OPUC argues that this information appears to be fairly intrusive, market sensitive and administratively burdensome. *Id.* BPA believes that the information asked for in the Exhibit C is necessary for BPA to fulfill its statutory obligations under section 5(b) of the Northwest Power Act to ensure that utilities are only permitted to purchase requirements power for their actual net requirements load.

Avista argues that the calculation of net requirements in Exhibit C should be revised to provide that BPA must use critical water for determining output for hydro resources throughout the region. Avista, IOURESEXC:001. BPA has agreed that a utility may use critical water planning. *See* BPA's Section 5(b)/9(c) Policy, Administrator's ROD, and Product Catalog Declaration Parameters. BPA will also allow the use of other prudent planning methods. *See* Product Catalog Declaration Parameters.

Avista argues that the relationship between BPA's Section 5(b)/9(c) Policy and the effect of this Policy on net requirements needs additional clarification. Avista, IOURESEXC:001. BPA believes its Section 5(b)/9(c) Policy and the Section 5(b)/9(c) Policy, Administrator's ROD, provide appropriate guidance about the relationship between the policy and a utility's net requirement.

## **Decision**

*The provisions of Exhibit C are necessary to permit BPA to fulfill its statutory obligations regarding the determination of utilities' net requirements in order to make lawful amounts of firm requirements power available to such customers.*

## **XVI. CONCLUSION**

I have reviewed and evaluated the comments received by BPA on the foregoing issues regarding BPA's proposed Residential Exchange Program Settlement Agreements with Pacific Northwest Investor-Owned Utilities. Based upon the record compiled in this proceeding, the decisions expressed herein, and all requirements of law, I hereby adopt the proposed Settlement Agreements. The evaluations and decisions used in the development of the proposed Settlement Agreements are consistent with the environmental analysis conducted for BPA's 1998 Power Subscription Strategy, and are consistent with BPA's Business Plan EIS and Business Plan ROD.

Issued at Portland, Oregon, this 4th day of October, 2000.

/s/ J. A. Johansen

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Administrator and Chief Executive Officer