



## Department of Energy

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POWER BUSINESS LINE

March 26, 1999

In reply refer to: PS-6

### BPA's Response To Public Comment On Three Standard Contract Provisions

Comments received on the Bonneville Power Administration's (BPA) Subscription Strategy expressed a desire and need for some standardized contract provisions in the Subscription contracts. From January 7, 1999 through February 8, 1999, BPA provided the public the opportunity to review three key contract provisions: cost recovery, uncontrollable forces and dispute resolution. These provisions were chosen because BPA believed that varying the terms of these key provisions could shift risk between customers. It is BPA's desire that, even in bilateral Subscription contract negotiations, customers will not seek, nor will BPA agree, to further negotiate the language contained in these provisions.

BPA received comments from 13 interested parties representing public power utilities (9), the Direct Service Industries (2) and the Investor Owned Utilities (2). Comments were insightful and beneficial. After careful review and consideration, BPA is making some changes to the final language on the three provisions that will be used in Subscription Contracts. Immediately following this letter is a copy of the finalized language. The comments, and BPA's response to them, are summarized below.

#### General Comments

Following are comments that addressed the next steps BPA should take to get to Subscription contracts.

- The Public Generating Pool (PGP) felt that all contract provisions should be subject to bilateral negotiations.
- The Public Power Council (PPC) noted that their members do not want to engage Bonneville in a "big tent" regional process.
- The Washington Public Agencies Group (WPAG) concurred with BPA's judgment that the 3 provisions should be standardized and called on BPA to avoid further comment processes.
- Paul Murphy (representing Kaiser Aluminum & Chemical Corp., Goldendale Aluminum Co., Northwest Aluminum Co., and Reynolds Metals Co.) requested that BPA hold a meeting to discuss proposals BPA received in written comment on the three provisions.

- Avista Corp., Idaho Power Co., Montana Power Co., PacifiCorp, Portland General Electric Co., and Puget Sound Energy, Inc. (IOUs) continue to oppose BPA’s proposal to negotiate contracts bilaterally. They urge BPA to establish prototype contracts for use in purchasing core Subscription products.

In its Subscription Record of Decision, BPA recognized that there was not a regional consensus on BPA’s decision to conduct bilateral negotiations. Comments on the three provisions show that the spectrum of regional opinion on how BPA should establish contracts continues to exist, ranging from the view that all provisions should be subject to bilateral negotiations to the view of establishing a standard offer contract. BPA continues to believe that individually negotiated contracts are necessary in a competitive market and plans to implement this approach. However BPA is mindful of the concerns raised about this approach. BPA expects that its need to minimize administrative costs and to maintain equity in the Region will result in contracts that are quite uniform in all of their terms.

### **Comments on Cost Recovery**

Whatcom County Public Utility District commented that the cost recovery provision is a “very odd provision, and it is difficult to know what it means.” Several other comments made by public agency customers requested that the language be removed because of its ambiguities. The IOUs offered specific suggestions to improve the language aimed at ensuring that the uniform cost recovery provision prevents cost shifts.

After review and consideration of all comments, BPA has deleted the sentence stating: “Such rights or obligations, if any, shall be as if this Agreement had not been executed.” This language was a vestige of previous contracts that were signed while 1981 Power Sales contracts would have continued in effect. Including it created an unnecessary ambiguity. BPA believes the rest of the language captures our intent to preserve existing rights to assess cost recovery charges, if needed. This language will be included in all subscription contracts.

### **Comments on Uncontrollable Forces**

In addition to specific suggestions on language, comments on the uncontrollable forces provision focused on five areas. For each of these five areas, a synopsis of the comments and BPA’s response are shown below:

- *TBL/PBL split.* Several comments addressed how the uncontrollable forces provision could affect the relative responsibilities of BPA’s power and transmission business lines. BPA is aware that the functional separation of its power and transmission functions has an impact on the operation of the uncontrollable forces provision in the power sales contract. However, because BPA is still one legal entity and because the uncontrollable forces provision addresses all events beyond the reasonable control of a party, BPA will keep the uncontrollable forces provision in the new power sales contracts.

- *Negligence.* Comments noted that neither party should be able to claim an uncontrollable force when it is caused by their own negligence. Comments noted ambiguity or conflict between the first part of the provision and the last sentence which addressed negligence. BPA agrees that the concept of negligence needs to be addressed more clearly. BPA is adding language to the first paragraph of the provision that specifically addresses negligence and deleting the last sentence of the provision.
- *Best efforts.* Several comments addressed language requiring a party to make “best efforts” to avoid an uncontrollable force. WPAG stated that the standard is too rigorous since it would force a party to take “all steps without regard to the costs or consequences.” In response, BPA has chosen to replace “best efforts” with “reasonable diligence.” BPA believes a “reasonable diligence” standard is easier for the parties to apply and meet. The standard of reasonable diligence was also used in the uncontrollable forces provision in the 1981 power sales contract.
- *Distribution facilities.* Comments noted that the treatment of uncontrollable force unfairly focused on transmission and, as written, didn’t seem to include problems on the customers facilities or distribution system as uncontrollable forces. BPA agrees and has adjusted the provision to address distribution facilities of the customer.
- *Planned Outages.* Many of the comments noted that planned outages didn’t seem to fit the ordinary definition of uncontrollable forces since one of the parties had control over when to set the outage. Comments clearly showed that including planned outages was causing confusion. To clarify our intent, BPA added a section that describes the circumstances when planned outages would be considered an uncontrollable force.

### **Comments on Dispute Resolution**

BPA decided to make changes to the dispute resolution language based on comments received. Many comments expressed confusion about the language with respect to the distinction between arbitrable subject matter under the contract and final agency actions subject to judicial review. BPA is clarifying that contract disputes and contract issues between the parties that arise under the power sales contract will be subject to binding arbitration. The language now clearly states that final actions subject to section 9(e) of the Northwest Power Act shall not be subject to binding arbitration. The language no longer requires that all arbitrations take place in Portland, as long as parties can mutually agree to another location.

BPA also responded to concerns that the discovery rights in the original provision were too broad by allowing parties to agree to other discovery rights. Therefore, BPA has established some limits. Finally, a change was made to include language in the third section that allows for declaratory judgments in arbitration. It should be noted that the arbitration provisions for dispute resolution in a contract for a Slice of the System product will differ from this general provision.

**Conclusion**

BPA appreciates the time and effort that went into the responses received and believes that the suggestions have resulted in improvements to the standard language for these provisions that will be used in all Subscription Contracts. Thank you for your participation in this process.

Sincerely,

Ruth B. Bennett  
(Acting) Vice President Power Marketing