

6450-01-P

DEPARTMENT OF ENERGY  
Bonneville Power Administration  
Opportunity for Public Comment

Regarding Bonneville Power Administration's Subscription  
Power Sales and Standards for Service

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of draft policy proposal.

SUMMARY: This notice announces a draft policy proposal to modify BPA's standards for service to permit the purchase of Federal power.

One of the BPA's current eligibility standards for potential public agency utility customers and privately owned companies selling to the general public requires the utility or company to own its own distribution facilities. BPA is proposing that it modify this standard to permit in the future that a customer either (1) own a distribution system, or (2) have an ownership-type lease arrangement for a distribution system. The reason for this proposal is driven by the Federal Power Subscription Strategy, ongoing changes to the electric power industry and increased interest by some regional parties in becoming eligible to buy Federal power at the PF rate.

This Notice on Eligibility and Standards of Service for Purchasing Federal Power will afford a 30-day public review and comment period on the proposal to permit ownership-type lease arrangements to be used by potential customers to meet one of the qualifications to purchase Federal power from BPA. BPA's proposal and background information on BPA's current eligibility requirements and standards for service regarding potential public agency and other customers follows below. BPA is also putting forward other concepts for consideration and invites comments on these as well.

DATES: Public meeting dates: May 27, 1999, and June 2, 1999. Close of comment date: June 11, 1999

ADDRESSES: If you are interested in commenting on the Eligibility and Standards for Service Policy Proposal, you have several options.

1. You can send written comments to Bonneville Power Administration, P.O. Box 12999, Portland, OR 97212, or you can fax comments to (503) 230-4019. If you wish to send your comments electronically, email comments to: [comment@bpa.gov](mailto:comment@bpa.gov). Comments must be received by close of business Friday, June 11, 1999.
2. You also can attend one or both of the two public comment meetings. One meeting will be held on Thursday, May 27, 1999, in Spokane, Washington, at Cavanaugh's Inn at the Park, 303 W. North River Drive. Another meeting will be held in Portland, Oregon, on Wednesday, June 2, 1999, at the Sheraton Portland Airport Hotel, at 8235 N.E. Airport Way. Both meetings will begin at 10:00 a.m. Comments also will be collected on the Determining Net Requirements 5(b) and 9(c) Policy Proposal. If any additional meetings are scheduled, the information will be posted on the web site listed below.

<http://www.bpa.gov/Power/subscription>

FOR FURTHER INFORMATION, CONTACT: Mr. Michael Hansen, Public Involvement and Information Specialist, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon 97208-3621, telephone (503) 230-4328 or 1-800-622-4519.

Information can also be obtained from your BPA Account Executive or from:

Ms. Ruth Bennett, Acting Vice President, Power Marketing, 905 N.E. 11th, P.O. Box 3621, Portland, OR 97208, telephone (503) 230-7640

Mr. Rick Itami, Manager, Eastern Power Business Area, 707 W. Main Street, Suite 500, Spokane, WA 99201, telephone (509) 358-7409

Mr. John Elizalde, Acting Manager, Western Power Business Area, 700 N.E. Multnomah, Suite 400, Portland, OR 97232, telephone (503) 230-7597

Mr. Steve Oliver, Manager, Bulk Power Marketing, 905 N.E. 11th, P.O. Box 3621, Portland, OR 97208, telephone (503) 230-3295

#### **SUPPLEMENTARY INFORMATION:**

In its Federal Power Subscription Strategy, dated December 21, 1998, the Bonneville Power Administration stated that new public agencies that form and qualify for service within the period of the subscription contract window would be offered power at the priority firm (PF) rate for the post 2001 rate period for their entire general requirements load obligation, except for any new large single loads. The strategy further states that new preference tribal utilities that form and qualify for service will be treated the same as other new public agency utilities with respect to the availability of power at the PF rate.

#### ***Public Body and Cooperative Customer Eligibility Under Bonneville Project Act***

To be eligible to purchase power from BPA on a preference and priority basis, an applicant must meet two fundamental statutory requirements found in the Act of August 20, 1937, (the Bonneville Project Act) P.L. 75-329. First, the applicant must meet the statutory definition of one or the other of the terms “public body” or “cooperative.” Section 3 of the Bonneville Project Act defines the term “public body” or “public bodies” to mean “States, public power districts, counties, and municipalities, including agencies or subdivisions of any thereof.” Section 3 also defines the term “cooperative” or “cooperatives” to mean “any form of nonprofit-making organization or organization of citizens supplying, or which may be created to supply, members with any kind of goods, commodities, or services, as nearly as possible at cost.”

BPA has indicated that a Federally recognized tribe that forms a cooperative utility pursuant to its tribal constitution and laws would be eligible for preference status. Further, a tribe with the legal right could serve non-tribal members within its reservation boundaries, but would otherwise need to comply with state law for service outside the tribe's jurisdiction.

For potential public customers who will resell Federal power to retail consumers, the second requirement is that a public body or cooperative applicant be in the public business of selling and distributing the Federal power to be purchased from BPA.<sup>1</sup> If not presently in business, section 4(c) of the Bonneville Project Act directs BPA to afford the prospective customer a reasonable time, as determined by the Administrator, to allow it to get into the public business of selling and distributing power. BPA may not deny the request of a preference applicant that has not yet obtained necessary financing to get itself into the business of selling and distributing electric energy until after the reasonable time has passed.

Finally, section 4(d) declares several policies regarding the preferential status of public bodies and cooperatives. They reinforce the directives found in section 4(c)<sup>2</sup>. First,

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<sup>1</sup> Section 5(a) of the Bonneville Project Act authorizes the Administrator to sell Federal power at wholesale to public bodies for direct consumption of the Federal power. In order to receive Federal power for its own use a potential public body end use customer needs to meet BPA's standards for service specific to direct consumption. BPA is not proposing any changes in its current standards for this class of potential customers.

<sup>2</sup> Section 4(c) provides in pertinent part: "An application by any public body or cooperative for an allocation of electric energy shall no be denied, or another application competing or in conflict therewith be granted...on the ground that any proposed bond or other security issue of any such public body or cooperative, the sale of which is necessary to enable such prospective purchaser to enter into the public business of selling and distributing the electric energy proposed to be purchased,..."

Section 4(d) provides in pertinent part: "It is declared to be the policy of the Congress, as expressed in this chapter, to preserve the said preferential status of the public bodies and cooperatives herein referred to, and to give to the people of the States within economic transmission distance of the Bonneville project reasonable opportunity and time to hold any election or elections or take any action necessary to create such public bodies and cooperatives as the laws of such states authorize and permit, and to afford such

preference to public bodies and cooperatives is to be preserved. Second, people are to be given reasonable opportunity and time to hold any elections or to take any other necessary action to create a public body or cooperative. Third, once created the public body or cooperative is to be afforded a reasonable time and opportunity to authorize and issue bonds or to arrange other financing necessary to construct or acquire necessary and desirable electric distribution facilities, and to become in all other respects qualified purchasers and distributors of Federal power. To date, BPA has interpreted section 4(c) and 4(d), particularly the language “to construct or acquire necessary and desirable distribution facilities,” to require that the applicant own its distribution system.

Regarding nonpreference applicants for Federal power which will be resold to the general public, BPA has required that such entities be properly formed under state law, including compliance with any approvals, filing or regulatory orders to which such businesses are subject under the laws of the states. BPA has required that such private utilities also own their own distribution system for making retail resale of Federal power. This requirement is based on section 5(a) of the Bonneville Project Act which distinguishes between a privately owned public utility buying Federal power for resale to the general public from other sales to private persons.<sup>3</sup> It is not based on sections 3 and 4 discussed above.

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public bodies or cooperatives reasonable time and opportunity to take any action necessary to authorize the issuance of bonds or to arrange other financing necessary to construct or acquire necessary and desirable electric distribution facilities, and in all other respects legally to become qualified purchasers and distributors of electric energy available under this chapter.”

<sup>3</sup> Section 5a of the Bonneville Project Act provides in pertinent part: “Subject to the provisions of this chapter and to such rate schedules as the Secretary of Energy may approve, as provided in this chapter, the administrator shall negotiate and enter into contracts for the sale at wholesale of electric energy, either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons and for the disposition of electric energy to Federal agencies. Contracts for the sale of electric energy to any private person or agency other than a privately owned public utility engaged in selling electric energy to the general public, shall contain a provision forbidding such private purchaser to resell any of such electric energy so purchased to any private utility or agency engaged in the sale of electric energy to the general public, and requiring the immediate canceling of such contract of sale in the event of violation of such provision.”

### *Standards for service*

The Northwest Electric Power Planning and Conservation Act on 1980, P.L. 96-501, section 5(b)(4) directs the Administrator to require all potential customers requesting a contract for firm power under section 5(b) of the Act to comply with the Administrator's standards for service in effect on December 5, 1980, or as subsequently revised.<sup>4</sup> BPA has traditionally made its determination regarding eligibility for preference and meeting BPA standards for service on a case-by-case basis and communicated its standards and assessment of a party's qualifications in correspondence to parties seeking to purchase Federal power under section 5(b). The following describes the standards for service, including the eligibility requirements under sections 4(c) and (d) of the Bonneville Project Act, applicable to potential public agency customers.

As a practical and legal matter, BPA's determination of a customer's eligibility to purchase preference power is included in an overall review to determine if the customer is in compliance with the Administrator's standards for service. To comply with the existing standards for service an applicant must:

1. Be legally formed in accordance with local, state and Federal laws;
2. Own a distribution system and be ready, willing and able to take power from BPA within a reasonable period of time;
3. Have a general utility responsibility within the service area;
4. Have the financial ability to pay BPA for the Federal power it purchases;
5. Have adequate utility operations and structure; and
6. Be able to purchase power in wholesale, commercial amounts.

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<sup>4</sup> Section 5(b)(4) of the Northwest Power Act provides, "Sales under this subsection shall be made only if the public body, cooperative, Federal agency or investor-owned utility complies with the Administrator's standards of service in effect on December 5, 1980 or as subsequently revised."

Following is a more detailed explanation of the existing criteria.

*Legal formation*

BPA will request an applicant to demonstrate that all required steps under applicable law have been taken to authorize its formation as a public body or cooperative. It also ensures that the applicant is in the public business of buying and distributing, at retail, power to be purchased from BPA, or is in the process of going into such a business. The applicant must provide copies of filings of certificates and approvals from designated officials, such as by-laws and articles of incorporation, regulatory approvals as required, and information on whether public elections were required and held. This standard is applicable to potential new preference customers and to new private utilities selling to the general public.

*Distribution function*

This criterion assures that BPA sells power consistent with the legal requirement that it be sold to public bodies and cooperatives engaged in the public business of buying and distributing power through distribution facilities owned by the customer. The performance of the distribution function by the party applying for preference status has been viewed as an assurance that the purposes of selling Federal power on a preference basis are realized. The same considerations are applicable to BPA sales to privately owned utilities selling Federal power to the general public. That is, they have a distribution system and are able to provide the power to retail consumers. Parties that do not own, operate and maintain, or control the costs of the distribution may face the issue of how to demonstrate that they are able to provide the benefits of cost based Federal power to retail consumers. This standard is applicable to potential new preference customers and to new private utilities selling to the general public.

BPA must give the applicant a reasonable opportunity to achieve ownership including time needed to finance the acquisition or construction of the necessary distribution. In general, state law grants public bodies the power of eminent domain allowing them to acquire the distribution facilities of another utility through condemnation. In general, cooperatives have been able to construct or purchase their own systems through low-cost financing obtained from loans made by the Federal Rural Electric Administration (predecessor to the Rural Utility Service).

*General utility obligation to serve*

This criterion assures that Federal power will be sold by the applicant in a non-discriminatory manner for the benefit of the general public and particularly of domestic and rural consumers. BPA has always required that a customer serving retail consumer load have a “utility responsibility” to serve. This means that any retail consumers may request and obtain service from the potential customer, limited only by service area or franchise allocation restrictions. An applicant must have obtained authorization to serve certain loads or areas prior to receiving power from BPA for service to such loads or areas. Any legal action that challenges such service must be resolved by final order before BPA begins service. This standard is applicable to potential new preference customers and to new private utilities selling to the general public.

*Financial health and ability to pay*

This criterion assures BPA that the applicant is able to pay for the power it receives. BPA examines the applicant’s authority to collect money for the services it renders to its retail consumers—the ability to bill—and the applicant’s authority to sue and be sued. BPA reviews the applicant’s organizational structure to see if there is a financial officer and staff that performs a billing and collection function. BPA will also examine, particularly in



the case of a municipal or tribal applicant, whether the applicant has the authority to segregate utility funds from a general fund, if one exists. This standard is applicable to potential new preference customers and to new private utilities selling to the general public.

#### *Operations and Structure*

This criterion is used to provide BPA reasonable assurance that the applicant has the ability to fulfill responsibilities and duties under a power sales contract. BPA examines the applicant's ability to perform utility functions such as metering, billing, or operation and maintenance on utility facilities, or contract for such functions and control the costs of such functions. This standard is applicable to potential new preference customers and to new private utilities selling to the general public.

#### *Commercial quantities*

Because BPA is directed to sell power at "wholesale," BPA has generally required that customers purchase power in wholesale, commercial amounts of one megawatt or more. This standard is applicable to potential new preference customers and to new private utilities selling to the general public.

#### *Connection to BPA transmission system*

The BPA standards for service have also addressed matters related to the configurations and operations of electrical facilities. Requirements for interconnection to the BPA transmission system are governed by the Open Access Transmission Tariff. The Transmission Business Line is currently revising its Interconnection Standards. These aspects of standards for service are not addressed in this Notice.

***BPA proposal to change its standards for service***

The advent of retail electricity deregulation in the wholesale market and in some western states at retail, as well as the interest of some tribes and other parties in forming and operating an electric utility, has prompted BPA to assess whether or not a change in its existing standards for service may be warranted. Some parties have questioned whether BPA should continue to require that preference customers who serve retail consumers own and operate a distribution system. A similar issue arises as to BPA's sales of Federal power to new private entities, as to the legal distinction between a utility selling to the general public and other sales.

In response, BPA is inviting comments from interested parties on this proposal to allow ownership-type lease arrangements which, in addition to direct ownership of a distribution system, qualify a potential public agency customer to be able to purchase PF power. All other eligibility criteria would continue to apply. BPA proposes that a potential new customer who would sell power to retail consumers may use an ownership-type lease arrangement in order to provide for distribution to retail consumers. A customer could lease a distribution system for delivery of Federal power to retail consumers. In this concept, in order to qualify as an ownership-type lease, the agreement would 1) be a long term arrangement for the life of the facilities or for a duration equal to the term of the BPA power supply obligation, and 2) give to the preference customer the right to operate, maintain and have repairs performed on the system, as well as have complete decision authority over costs of the distribution system. In addition, the customer would perform, or be responsible for, all other utility functions such as meter reading, billing, retail rate setting, and other services and functions provided by a serving utility. The proposal is to have the potential customer and the distribution owner enter

into an arms length commercial transaction. The potential customer should have the ability under such transactions to have a third party provide for the system maintenance functions in an open competitive process.

This proposal to use an ownership-type lease arrangement is consistent with Department of Energy policy which allows the use of a lease by a potential public agency customer to obtain a distribution system. See DOE General Counsel, "Request of City of Needles for Reinstatement of Sales of Federal Power for Benefit of Its Citizens" (Nov. 21, 1978). This policy was affirmed in *Salt Lake City et al. v. Western Area Power Administration, et al.* 926 F.2d 974 (10th Cir. 1991).

***For discussion: Concepts regarding standards for service***

In addition to the ownership-type lease arrangement, some parties have suggested other concepts which may meet the standards for service requirement. The concepts presented below are for discussion purposes. BPA is not making a proposal regarding these concepts.

*Contractual capacity rights*

A customer could obtain long-term contracts for use of capacity on distribution facilities or for access to distribution according to state law which assure delivery of Federal power to retail consumers. The distribution owner would operate and maintain the distribution system. The preference customer would contract for use of distribution and would perform, or be responsible for, meter reading, billing, retail rate setting and all other services normally provided by a serving utility.

*The utility's obligation to serve*

Retail access legislation may raise issues regarding the standard for service requirement that a customer have a general utility responsibility or obligation to serve. An obligation

to serve standard is linked with the distribution function. Decisions made regarding distribution should guide the issues on a customer's obligation to serve standard.

Following are variations on the obligation to serve depending on how the utility accomplishes the distribution function:

- If a utility contracts for long-term capacity rights on the distribution system or has access to a distribution system according to state law, the distribution owner would operate, maintain, and have complete decision authority over costs. In this case the leasing utility should have the obligation to serve, if it has the distribution capacity or can obtain the necessary capacity to serve the load. If the leasing utility does not have and can not obtain the necessary capacity, then the distribution owner would potentially have the obligation to serve.
- Another concept would be to rely on governing law, including retail access law, to determine who will have the obligation to serve in specific circumstances.

Responsible Official: Mr. Fred Rettenmund, Customer Account Executive, Power Business Line, is the official responsible for the development of the draft policy proposal for modifying BPA's standards for service to permit the purchase of Federal power.

Issued in Portland, Oregon, on April 26, 1999.

/s/ Judith A. Johansen  
Administrator and Chief Executive Officer