

Eligibility and Standards for Service to Purchase Federal Power

Introduction

In its Federal Power Subscription Strategy, released in December 1998, the Bonneville Power Administration states that new public agencies that form and qualify for service within the subscription window will be offered power at the priority firm (PF) rate 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.

One of the BPA's current standards for service for potential public agency utility customers requires the ownership of 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. BPA has prepared this proposal in consideration of ongoing changes in the electric power industry, the Federal Power Subscription Strategy and increased interest by some regional parties in becoming eligible to buy federal power at the PF rate.

By early April, BPA will publish its formal proposal in the Federal Register. This will begin a formal 30-day public review and comment period. The purpose of this paper is to describe BPA's proposal and to give you background information on BPA's current eligibility requirements and standards for potential public agency customers. BPA is also putting forward other concepts for consideration and invites comments on these concepts as well.

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 Bonneville Project Act. First, the prospective applicant must meet the statutory definition 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 could not create a cooperative inconsistent with state law for service to non-tribal members or outside the tribe's jurisdiction.

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. 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 an 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 largely restate the directives found in section 4(c). First, 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 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.

Existing standards for service

With passage of the Northwest Power Act in 1980, 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 Dec. 5, 1980, or as subsequently revised. BPA has traditionally made its determination regarding eligibility for preference and 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 of service an applicant must:

1. Be legally formed in accordance with 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.

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. This includes copies of filings of certificates and approvals from designated officials, such as by-laws and articles of incorporation, and information on whether public elections were required and held.

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 customers. Parties that do not own, operate and maintain 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 customers.

BPA must give the applicant a reasonable opportunity to achieve ownership including time needed to finance the acquisition or construction of the necessary distribution facilities. 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 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.

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 customers – 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.

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.

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.

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 BPA Transmission Business Line (TBL) is currently revising its Interconnection Standards. These aspects of standards for service are not addressed in this paper. Questions can be referred to your TBL account executive, or you can call (360) 418-2089 to be referred to a TBL account executive.

BPA proposal to change its existing standards for service

The advent of retail electricity deregulation in some western states 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 informally questioned whether BPA should continue to require that preference customers who serve retail customers own and operate a distribution system.

In response, BPA is inviting comments from interested parties on the proposal to be published in the Federal Register to allow ownership-type lease arrangements to qualify a potential public agency customer to be able to purchase priority firm power. 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 of federal power to retail consumers. In this concept, the preference customer would operate, maintain and have complete decision authority over costs. In addition, the customer would perform all other utility functions such as meter reading, billing, retail rate setting, and other services and functions normally provided by a serving utility. The proposal to use a lease arrangement is consistent with Department of Energy policy which allows the use of a lease by a potential public agency customer to secure 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 may meet the standards for service requirement. These concepts are presented here for discussion. BPA has not made a legal or policy determination regarding the concepts outlined below.

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 have responsibility 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 contracting or 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 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.

Opportunity for public comment

A 30-day formal comment period will begin after the proposal has been published in the Federal Register (early April). Bonneville will hold at least one public meeting to discuss the proposal and take comment. Once the Federal Register notice has been published, we will send customers, constituents, Tribal representatives, and other interested parties a notice of the public meeting and provide the dates of the public comment period.

Following the close of the comment period, BPA will evaluate the comments it has received from all parties and publish a Record of Decision on this issue.