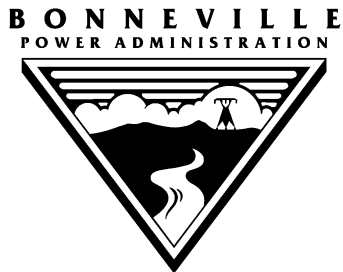


**Bonneville Power Administration**  
**Long-Term Regional Dialogue**  
**Contract Policy**  
**Administrator's Record of Decision**  
**October 31, 2008**



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**Long-Term Regional Dialogue  
Contract Policy  
Administrator’s Record of Decision**

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## **1.0 INTRODUCTION**

### **1.1 RELEASE OF THE LONG-TERM REGIONAL DIALOGUE FINAL POLICY**

Since 2002 the Bonneville Power Administration (BPA) has been discussing BPA's post-2011 power supply role in the region with its customers and constituents. These discussions are known as the Regional Dialogue. The intent of the Regional Dialogue has been to develop BPA's Subscription power supply and marketing role for the post-2011 period and to do so in a way that meets key regional and national energy goals. Even though current BPA power sales contracts do not expire until the end of Fiscal Year (FY) 2011, BPA has emphasized that the timing of the process is critical to afford BPA's customers a reasonable amount of time between the execution of the new contracts to make informed decisions regarding how to serve their load, and load growth after the expiration of their existing BPA power sales contracts. It is important that there be adequate lead time to acquire power and/or develop new generation resources. Such decisions, once made by BPA's customers, will serve to notify BPA whether it will need to acquire additional power. By signing the new power sales contracts now, BPA and customers will gain certainty about long-term load serving obligations, while securing the benefits of the low-cost Federal system.

On July 19, 2007, BPA issued a Long-Term Regional Dialogue Final Policy (Policy). The accompanying Record of Decision (ROD) provides analysis and decisions supporting the Policy and responded to issues raised and comments received during the public comment period on the proposed Policy. The Policy set the parameters for policies and practices to inform the next phase of the Regional Dialogue process. The Policy addressed issues necessary to begin negotiating and offering new power sales contracts for service after FY 2011, defined the products and services BPA would offer in those contracts, and described the process and rate construct for designing and establishing a tiered Priority Firm (PF) power rate methodology. In particular, the Policy stated that BPA intended to execute new long-term power sales contracts with its regional customers and discussed in some detail service to existing and new preference customers. The Policy did not address sales to direct-service industrial customers (DSIs), sales to Investor-Owned Utilities (IOUs), or development of a new Residential Exchange Program. The Policy stated that BPA would conduct a rate proceeding pursuant to section 7(i) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act) to establish a long-term Tiered Rate Methodology (TRM).

This Contract Policy ROD (CP ROD) affirms the Policy and ROD's decisions on long-term Federal power supply, contracts and marketing issues, and the direction established in the Policy for all aspects of products and contracts that are not specifically changed in this document. This CP ROD clarifies certain aspects of the Policy, explains adjustments that have occurred to the Policy based on BPA's review of public input received in negotiations and public comment since publication of the Policy. It also supports BPA's execution of the post-2011 power sales contracts BPA provided to its

customers. The Regional Dialogue contracts contain provisions for implementing the Policy and BPA's other policies applicable to the sale of Federal power. Issues related to the development of the TRM are being addressed in the 7(i) process for the TRM and are not addressed in this CP ROD.

This CP ROD is not a contract and does not create contractual rights and obligations. Aside from TRM issues being addressed in the TRM rate process, the matters contained within the Policy, as addressed in the ROD and supplemented and clarified in this CP ROD, regarding the post-2011 power sales contracts will be effective upon BPA's execution of the new power sales contracts. This CP ROD also includes comments made by parties to the TRM process to the extent they pertain to the contracts.

During the contracting process, numerous policy issues were raised that had not previously been addressed in the Policy. This CP ROD will address those policy issues. Additionally, this CP ROD identifies contract implementation issues raised and addressed through negotiation and contract development.

## **1.2 PUBLIC PROCESS**

Following the release of the Policy in July 2007, BPA began a series of public discussions on the implementation details for new products, contracts, and the TRM. BPA held a public meeting on the content of the Policy and accompanying ROD on July 31, 2007, and provided a Service to Publics Overview on August 7, 2007. These provided a high-level overview of the implementation details that needed to be addressed. Fifteen months later, most key implementation steps have been completed or nearly completed, including negotiation and development of new power sales contracts, review and reconsideration of some aspects of BPA's 5(b)/9(c) Policy, completion of the 7(i) rate process establishing the TRM, and providing final templates of new long-term BPA power sales contracts to customers. The public processes for product, contract, and rate development are described below.

### **1.2.1 Product Guidebook**

In August and September 2007, BPA provided a framework for the power products to be sold under the post-2011 power sales contracts. In mid-September 2007, customers began submitting comments and proposals with suggested revisions to BPA's product framework. From September through November 2007, BPA and customers met in numerous public workshops to collaboratively discuss the details of the product framework and to revise proposals. In late November and early December 2007, BPA held additional public workshops to conclude discussions on products, with the exception of the Slice product, in order to prepare a Product Guidebook. In early February 2008, BPA released the *Regional Dialogue Product Guidebook: Background on Products, Rates, and Resource Support Services available to BPA's Public Utilities*, to provide customers with background on products prior to receiving draft contract templates in March.

## 1.2.2 Contracts

BPA began to develop its new Regional Dialogue contracts soon after it released the Policy in July 2007. BPA created a master template based in part on its existing Subscription power sales contract. The master template formed the basis for the product-specific contract templates. At a public workshop on September 26, 2007, BPA laid out its objectives, schedule, and approach for drafting contracts. On October 17, 2007, at a public workshop, BPA issued the draft master contract template and invited comment by November 2. This draft contained the standard boilerplate language used among the various templates. Though additional workshops were scheduled to discuss the master template, none was held due to the parties' desire to use this time to discuss product and rate issues. On November 13, 2007, customer representatives proposed a specific contract organizational structure which BPA accepted in part and used in the next template draft issued on December 5, 2007.

On April 7, 2008, BPA issued drafts of the Load Following, Block, and Master contract templates. Then BPA held a number of public workshops taking comments on these templates. BPA requested comment on the templates, either at the workshops or in writing, no later than May 9, 2008. Based on initial comments received, updates were made to the Load Following, Block, and Master templates, which were reissued on May 16, 2008. Thirty-six written comments were received on the contract templates. Following review and consideration of these comments, BPA issued updated Load Following, Block, and Master templates on June 17, 2008, along with a summary of changes that had been made since the April 7 versions.

After internal work and continued comment from customers, BPA issued another round of updated templates on July 2, 2008. On July 14, BPA kicked off a series of intensive public workshops to collaboratively negotiate and finalize all of the contract templates. Throughout these workshops red-line drafts of the templates were posted on the BPA Regional Dialogue website and shared with customers to ensure the public could verify the changes that had been negotiated. BPA had planned to issue all final contract templates on August 1, 2008, but agreed, at the customers' request, to delay the date to allow for additional discussions. BPA released the final Load Following contract template on August 18, 2008. A Slice/Block template was issued on September 8, 2008, but negotiations extended into October as discussed in 1.2.5. The Priority Firm Block, New Resource (NR) Block, and Residential Purchase and Sale Agreement (RPSA) templates were issued on September 12, 2008. As each different product contract template was released, BPA account executives began working with customers to prepare customer-specific contracts and prepare for the customers' final contract signing by December 1, 2008. BPA expects to execute the new contracts received from the customers on or after that date and after execution of this ROD.

During this time BPA also developed additional NR Block and RPSA "bridge" templates to cover the term from October 1, 2008, through September 30, 2011, when the Regional

Dialogue NR Block and RPSA contracts become operational. The Bridge NR Block and Bridge RPSA templates were issued on September 5, 2008, along with a letter addressing public comment received on the Bridge NR Block contract and a Record of Decision for Short-Term Bridge Residential Purchase and Sale Agreement (RPSA) for the Period Fiscal Years 2009-2011 and Regional Dialogue Long-Term Residential Purchase and Sale Agreement (RPSA) for Period Fiscal Years 2012-2028. The public process for the RPSA templates occurred in BPA's Residential Exchange Program public process. *See* sections 2.4 and 2.10.

BPA intends to execute the long-term contracts that have been offered to its tribal, public body, cooperative utility, and Federal agency customers no later than December 2008. These Regional Dialogue contracts will provide each customer a Contract High Water Mark (CHWM), which will provide certainty as to how much power the customer will be able to purchase at BPA's lowest cost-based rates, the PF Tier 1 rates. The contracts will allow the customers to make informed choices regarding how to serve load beyond what is available to them at PF Tier 1 rates. BPA expects that most, if not all, eligible customers will choose to sign these contracts to establish certainty around their access to the benefits provided by low-cost Federal power. There is no alternative contract available at this time for consideration by customers that decide not to execute long-term contracts with a CHWM by December 2008; however, if necessary, BPA will later negotiate and offer a non-CHWM contract that also satisfies its obligations under 5(b) of the Northwest Power Act.

### **1.2.3 Tiered Rate Methodology**

The Policy stated that BPA would implement a tiered rate structure with the Regional Dialogue long-term power sales contracts. A tiered rate design for the PF rate was among the topics discussed during the numerous workshops in the latter half of 2007. BPA and customers met to discuss the details of High Water Mark (HWM) determinations, Tier 1 and Tier 2 rate design, and Resource Support Services. These discussions culminated in the Tiered Rate Methodology (TRM) Discussion Paper BPA issued on December 21, 2007. Interested parties were given until January 11, 2008, to provide feedback on the TRM Discussion Paper. BPA received a total of 18 comments.

Following the evaluation of these comments BPA released a Draft TRM on March 7, 2008, for public comment and discussion at a series of workshops conducted over the following 2 weeks. BPA received and agreed to a request from parties to use these workshops to edit the TRM prior to release of BPA's initial proposal. Six workshops were held to discuss and edit the March 7 draft. On May 6, 2008, the TRM section 7(i) process began with publication of BPA's initial proposal in the Federal Register. The initial proposal incorporated many of the ideas and solutions arising from the collaborative development process that preceded it. BPA's initial proposal consisted of the pre-filed written testimony of 19 witnesses and the TRM Initial Proposal. At the prehearing conference on May 12, parties proposed to waive *ex parte* prohibitions and



engage in TRM settlement discussions, and also proposed an expedited 7(i) process schedule to accommodate time spent in settlement discussions (and contract discussions).

BPA assured the hearing officer that as the TRM evolved in the settlement discussions BPA would discuss all changes in publicly noticed meetings, provide redline versions to all parties for review, and file a supplemental proposal in early July 2008 reflecting the results of the discussions. The hearing officer agreed with BPA's and the parties' request to waive *ex parte* prohibitions. The hearing officer set a second prehearing conference for July 9, 2008, at which point *ex parte* prohibitions would resume. TRM settlement discussions began May 19, 2008, and continued to July 9; 18 workshops were held. During these settlement discussions, BPA worked with rate case parties to edit the TRM Initial Proposal. On July 25, 2008, BPA issued its TRM supplemental proposal, which consisted of the pre-filed written testimony of 13 witnesses and the Tiered Rate Methodology Supplemental Proposal.

Four additional TRM meetings/settlement discussions were held in August 2008. On August 13, 15 parties filed direct testimony. BPA and the parties filed rebuttal on August 20. Cross examination was scheduled for August 25, but all parties waived cross examination and agreed to enter evidence into the record by stipulation. Following an additional settlement discussion on September 12, 2008, parties filed their briefs on September 18, and oral arguments before the Administrator occurred September 26, 2008.

The final TRM and associated ROD will be issued before contracts are signed. The TRM ROD will be based on the Administrator's consideration of the record developed in the section 7(i) proceeding. The TRM will be used to set rates in post-2011 for power sold by BPA under the Regional Dialogue contracts.

#### **1.2.4 FY 2010 Resources for Establishing Contract High Water Marks**

As part of its TRM proceeding, on June 6, 2008, BPA sent a letter to interested parties regarding BPA's proposal to correct identified inaccuracies in the Subscription contracts FY 2010 resource numbers for its existing public agency customers. BPA enclosed several customer-specific proposed clarifications and corrections to the FY 2010 Existing Resource amounts that will be used in Contract High Water Mark (CHWM) calculations. BPA invited public comment on the proposed corrections prior to finalizing the numbers. The final numbers will be included as an attachment to the final TRM. Opportunity to submit comment on BPA's proposal ended on June 27, 2008. BPA received 31 comments.

In addition, on June 16, 2008, BPA sent another letter to interested parties informing them of Grays Harbor PUD's proposed purchase and use of the Weyerhaeuser Pulp Mill co-generation resource at Cosmopolis in Grays Harbor County, Washington, and asking for public comments. The public comment period ended on June 20, 2008. BPA received seven comments as a result of the Weyerhaeuser letter.

BPA informed the region by letter and closeout summary of its decisions on these resource issues on September 17, 2008. The summary was posted on BPA's website and included a table of the final resource amounts to be used in customers' CHWM calculations.

### **1.2.5 Slice**

The Administrator determined that he would offer a Slice product based on Alternative 2 as described in BPA's July 2007 Regional Dialogue Policy ROD at page 143. Development of BPA's contract template for the Slice and Block products was in part conducted in a separate forum to address specific features of that product that are dissimilar to BPA's other products and the drafting of the Load Following and Block contract templates. Development of the Slice/Block template occurred in a related public process and was coordinated to assure consistency among the contract types. Creation of the Slice/Block contract template began in August 2007, with BPA's presentation of a Slice product framework on August 29. Additional meetings were held from September through November 2007 to clarify technical and implementation details. Numerous workshops focused on Slice/Block contract drafting, a modeling framework, and Slice scheduling flexibility. In January and February 2008, BPA held workshops almost weekly to begin the Slice/Block contract template drafting, continue discussing scheduling flexibility, and address other Slice implementation issues.

On April 14, 2008, BPA issued a draft Slice/Block contract template for public comment. Additional workshops were held to discuss the draft template and seek customer feedback. BPA released an updated version of the template on May 16, 2008, followed by additional discussions with customers. In May and June 2008, BPA held 17 workshops to discuss Slice product issues and to review BPA's draft Slice and Block contract templates. As BPA continued to work with customers on contract drafting, additional draft templates were released on July 18, 2008, and August 19, 2008. A final Slice/Block Regional Dialogue contract template was issued on September 8, 2008. However, shortly after the September 8 version was published, representatives from customers interested in the Slice product requested an opportunity to comment on changes that had been made by BPA. Over the subsequent 6-week period, BPA and Slice representatives discussed and agreed to several additional revisions, culminating in a revised final template being completed on October 17, 2008.

### **1.2.6 Residential Exchange Program**

BPA proposed initial principles to govern the development of a new Residential Exchange Program (REP) and Average System Cost (ASC) Methodology in workshops held August 21 and 22, 2007. The 2008 Average System Cost Methodology Final Record of Decision, issued June 30, 2008, and the Short-Term Bridge Residential Purchase and Sale Agreement for the Period Fiscal Years 2009-2011 and Regional Dialogue Long-Term Residential Purchase and Sale Agreement for the Period Fiscal Years

2012-2028, and the Administrator's Record of Decision, issued September 4, 2008, describes the public process that followed these initial workshops for the development of a new REP and ASC Methodology. This CP ROD does not address any issues that were raised in the above-mentioned public process on the Residential Exchange Program or either of the RPSA agreements.

## **2.0 CONTRACT ISSUES**

### **2.1 SERVICE TO PUBLIC UTILITIES**

#### **2.1.1 Peak Net Requirement Calculation**

Under section 5(b)(1) of the Northwest Power Act, BPA is to sell electric power to meet the preference customers regional consumer load to the extent the load is not met by firm energy or peaking energy from the customer's own resources used for that load.

16 U. S.C. 839 c(b)(1). The legislative history of the Northwest Power Act regarding section 5(b) indicates that BPA should separately identify and calculate the firm energy capability of a customer's resources applied to its load from the peaking energy capability applied to that load. H. Rpt 96-976 96<sup>th</sup> Cong. 2d Sess. Part I. Preliminary internal BPA assessments of the Federal system's capability made since the Policy was released indicate that BPA may face capacity shortages for certain periods that would require it to acquire additional capacity supply beyond what the system may provide and what BPA may acquire to meet firm energy augmentation needs. Issues regarding capacity of the Federal system were discussed in several Regional Dialogue workshops. This issue is complex. BPA's overall capacity need is based in part on the potential additional capacity BPA will likely need to meet customer load growth, changes in system operations, planned additions of wind generation, and the integration of other resources. The potential future need has increased focus on capacity and requires BPA to look more closely at the issue of BPA peak net requirement obligations. The Policy did not specifically address the uses or calculation of a customer's peak net requirement load or any limit on peaking energy deliveries. BPA included provisions on developing a new or revised methodology for its Federal system peak capability, its utility customers' peak energy contribution from their non-Federal resources, and BPA's peak net requirement obligation in the contract templates BPA released for public comment starting in April 2008.

BPA received comments on peak net requirement from Slice customers in a document dated May 9, 2008. (Slice Group, CON-022) Other customers stated their support of these comments in their individual comments. (Benton PUD, CON-012; Franklin, CON-018; Grays Harbor, CON-024) BPA received further comments from Slice customers in a document dated July 15, 2008, that addressed the breadth of the language on peak net requirement in the Slice contract. (Slice Group, CON-049) Additional comments were received by BPA in September and October 2008. Comments are addressed in detail below.

## **Issue 1:**

### **Whether BPA should include provisions on peak net requirement in Regional Dialogue contracts.**

#### **Public Comment**

The Slice customers stated that “the meaning and purpose of this contractual provision is unclear ....” (Slice Group, CON-049) The Slice customers noted that they have no objection to being subject to the statutory requirements for peak requirement that are required under section 5(b) of the Northwest Power Act but expressed concern that BPA may be intending to use the provision for other purposes. The Slice customers did not identify any other purpose. The Slice customers suggested that BPA delete the paragraph on peak net requirement from the contract and address the matter if and when the need arises. The Slice customers asked that BPA not require them to include peak net requirement amounts in their contract until BPA establishes a peaking standard. *Id.* The Slice customers also expressed concern in public meetings whether they would face a decrement in their purchases based on their contract’s stated peak net requirement. (Slice Group, CON-049) Through the course of discussions and negotiations on this issue Slice customers stated that they understood the purpose of the provision but had suggestions for how best to implement peak net requirement, particularly in the near term.

#### **Evaluation and Decision**

The Policy did not specifically address peak net requirement because the issue was not an area of focus during Subscription contracts and there was a general sense that the Federal system had enough capacity to meet the competing demands placed on it. As discussions progressed the attention to on those competing demands caused the parties to focus more on how much capacity the Federal system would be able to produce. In the TRM this resulted in the addition of Contract Demand Quantities and in the April 2008 drafts of the contract templates BPA added language addressing peak net requirement.

The Slice customers suggested that BPA wait until a future date to address BPA’s determination of its peak net requirement in the contract. BPA, however, believes it is reasonable and necessary to include a peak net requirement provision in the contracts in light of the uncertainty surrounding the regional issues on capacity. Through the course of public discussions on the contract templates, BPA has consistently explained that the purpose of the peak net requirement provision is to ensure that the contracts comply with section 5(b) of the Northwest Power Act, which requires that BPA evaluate both firm energy and peak net requirements. When BPA signed the Subscription contracts in FY 2000, BPA analysis showed that the Federal Base System (FBS) would have a surplus of capacity for the foreseeable future. Based on more recent BPA assessments, capacity constraints are a real possibility during the term of the Regional Dialogue contracts. Therefore, BPA believes it is necessary to include provisions on peak net requirement in the Regional Dialogue contracts. BPA collaborated with customers through a number of drafts of the contract language to try to address the concerns raised by customers that the provision was broader than necessary. Specifics on these provisions are addressed in issues 2-4 below.

The Slice customers' comment implies that BPA does not have a peaking standard. Such an implication is unfounded. BPA has reviewed the resource data included in Subscription contracts and recognizes that due to inconsistent contract implementation BPA did not always require peak data for customer resources in the Subscription contracts but, as noted earlier, those contracts were based on the then reasonable assumption that BPA expected surplus capacity to be available for the duration of those contracts. BPA recognizes that some of the confusion on whether there is a capacity standard likely was caused by what transpired under Subscription. BPA's Section 5(b)/9(c) Policy points to the declaration parameters for resources in the April 2000 Product Catalog for the standard that applies to peak net requirement declarations. The potential for shortages of capacity makes addressing peak net requirement more important in Regional Dialogue contracts than it was in Subscription. For this reason BPA has decided all Regional Dialogue contracts will address peak net requirement. However, the way the contracts address peak net requirement will differ between purchasers of the Slice or Block products and purchasers of the Load Following product. These differences are discussed below in Issue 4.

## **Issue 2:**

### **How will BPA address peak net requirement in Regional Dialogue contracts for Slice and or Block products?**

#### **Public Comment**

The Slice customers suggested that BPA delete the paragraph on peak net requirement from the contract and address the matter if and when the need arises. The Slice customers asked that BPA not require them to include peak net requirement amounts in their contract until BPA establishes a peaking standard. (Slice Group, CON-049) The Slice customers also expressed concern in public meetings about whether they would face a decrement in their purchases based on the stated peak net requirement. *Id.*

#### **Evaluation and Decision**

With a decision to address peak net requirement the next logical step was to establish the specific language that would go into the different contracts. Customers that are interested in purchasing Slice are more likely than other customers to have non-Federal resources. Customer resources are expected to have some amount of capacity that is used to serve their peak energy load. Because of this there was significant focus on peak net requirement issues in final contract negotiations with Slice customers during September-October 2008. The Slice customers raise a concern about how BPA might use the numbers if customers were required to include capacity information based on BPA's current standard for peak net requirement. Given that each utility would use information based on its own planning practices there would be a lack of uniformity in assumptions and potentially in data quality for resource declarations. In fact, a single resource owned by more than one utility would likely have different peak resource amounts declared because there is no obligation for the utilities to use the same planning practices. Based on this, BPA does not believe it would be reasonable or prudent to impose restrictions on BPA capacity deliveries to customers based on information that would be established

through the current declaration parameters. Imposing such restrictions based on customer information could result in different application across similarly situated customers.

BPA has decided to address its peak net requirement in the Regional Dialogue contracts but will not initially include peak information in the Slice and Block agreements. BPA understands the concerns expressed by the Slice customers regarding the inclusion of peak numbers prior to the establishment of a uniform peaking standard. To balance the customer concern with BPA's need to address the peaking issues the contract language in section 3.4.1 states that "the peak amounts for «Customer Name»'s Specified Resources will be stated at a future time in Exhibit A.

In addition, sections 3.4.2 and 3.4.3 of the contract state that there is the potential for imposing restrictions on peak deliveries based on a peak net requirement calculation but only after a public process to determine the peak standard. After the conclusion of this public process on a standard, information on the customer's peak resource amounts and its peak load amounts will be included in Exhibit A based on the consultation with affected customers and in accordance with the methodology adopted. Only then would a customer face possible reductions in BPA power deliveries during peak periods for peaking energy in excess of BPA's net peak requirement. Any such calculation would be based on updated calculations of all the elements needed to assess BPA's peak net requirement obligations.

### **Issue 3:**

#### **Whether the potential for imposition of restrictions due to net peak energy requirement load determinations materially alters the Slice Product.**

#### **Public Comment**

The Slice customers stated that Exhibit A, section 1(c), of the Slice contract "appears to be an attempt to have Slice purchasers contractually agree to a limitation on the capacity BPA commits to make available to them under the Slice contract, without revealing either the magnitude to the limitation, or how it will be computed." (Slice Group, CON-049) The Slice Customers contend that imposing such a limitation is a material change that would "alter the nature of the Slice Product." *Id.* The Slice Customers state that "BPA is seeking an unlimited call on the capacity that is an integral part of the Slice product ...." *Id.*

#### **Evaluation and Decision**

The April 2008 contract templates submitted by BPA included provisions that addressed peak net requirement. BPA has decided that including provisions addressing peak net requirement is a prerequisite for offering a Slice contract. In light of this the contract negotiations for the Slice product worked through a number of issues including refining the specific approach to include in the final Slice template. BPA disagreed with the Slice customer comments that imposing a limitation on capacity materially changes the Slice product. The new Slice product still provides power (firm energy and capacity) that is both requirements power and an advanced sale of surplus power. BPA believes that addressing BPA's peak net requirement obligation is necessary in order for the Slice

product to be legally sustainable under section 5(b) and 5(f) of the Northwest Power Act in light of the potential for capacity constraints during the term of Regional Dialogue contracts. The supposition in the Slice customers' comments that applying a peak net requirement limitation will create times when the Slice product will not provide enough power to meet their entire capacity needs is not convincing because even in the event that the peak net requirement limitation were imposed, it would be intended to bring deliveries down to, not below, the customer's peak needs. We note that inherent in a customer's decision to purchase Slice is an agreement that they will receive power shaped to the output of the Federal system, which at times will be insufficient to meet its loads. If a customer wants power shaped to its specific net requirement shape, it should consider BPA's Load Following product.

#### **Issue 4:**

**Will BPA address peak net requirement in Regional Dialogue contracts differently for Block and Slice products and for the Load Following product?**

#### **Public Comment**

The Slice customers stated that their understanding was that the language in Exhibit A, section 1(c), would apply to all preference customers. (Slice Group, CON-049)

#### **Evaluation and Decision**

Under Issue 1 above BPA decided that all Regional Dialogue contracts would address peak net requirement. In that decision BPA further noted that the approach would differ between Slice and Block, and Load Following contracts. While the specific provisions will be different under the products, BPA agrees with the Slice customers that provisions that address issues of peak net requirement need to be included in all Regional Dialogue contracts. Regardless of the type of product a customer purchases the customer will eventually be required to include peak information about their resources and loads in Exhibit A.

In addition, all contracts will include provisions addressing the possibility that BPA may update the standard for declaring peak information about resources. However, there are distinctions in the products that result in different treatments depending on whether power is provided on a planned basis (i.e., the Slice and Block products) or on an actual basis. Specific differences are discussed below.

Planned Net Requirements. As discussed in Issue 2 above, Slice and Block customers will not initially include peaking information in their contracts about their resources or loads but will have their contracts updated by BPA to include that information after the conclusion of a public process. Slice and Block products are sold on a planned net requirement basis, in which BPA's firm power supply obligation is fixed and the customer is responsible for meeting variations in its actual load. The Slice and Block contracts include the same language related to peak net requirement. For purchases on a planned net requirement basis, both Subscription and Regional Dialogue contracts include a calculation of net requirement for energy that includes the potential for reductions in the power amounts made available to the customer. Once BPA conducts

the previously discussed public process, the net requirement load calculation for the contract will include a peak calculation.

Actual Net Requirements. Under the Load Following product BPA sells firm power in amounts to supply all of the customer's retail loads on an actual metered load basis. That means that each customer receives exactly the hourly firm power amount it needs for load beyond power provided by its own non-Federal resources. These contracts obligate BPA to supply power to meet the variations in the customer's actual hourly load. If the customer has a non-Federal resource, then on each hour BPA accounts for the amount of firm energy and peaking energy from the non-Federal resource that a customer is required by its contract to provide to serve its total retail load. The Federal power the customer receives exactly equals its actual energy and peak net requirement. This key difference forms the basis for the difference in language from planned net requirement purchasers.

Because the declared resource amounts are applied to the customer's load based on whatever the resource actually produces or based on agreed hourly declared energy amounts, adopting a new standard for peak information would not affect the amount of power that BPA would need to provide for a Load Following customer. BPA already meets the hourly net requirement load amounts. Because a change in the standard would not affect the delivery amounts, BPA has decided to require peak resource information at the time Load Following customers sign their contracts. After a new peaking standard is adopted BPA will review whether the resource peak numbers initially included in the contract for these customers should be updated and, if so, will take appropriate steps to update the data in the contract.

BPA considered not including resource peak amounts initially for Load Following customers but BPA decided on a different treatment for two reasons: (1) the current standard provides some planning information about the resources and since power is provided on an actual net requirement basis the planning information is really all that BPA needs for these customers to calculate a peak net requirement load; and, (2) BPA finished the Load Following templates August 18, 2008, and produced contracts for most Load Following customers before the decision was made to wait to populate Slice and Block customer peak information. Those reasons would not have been convincing standing alone, but changes to the standard for peak resource declarations would not be as significant for Load Following customers since BPA's obligation to meet the hourly net load would remain constant under the Load Following contracts. This, however, would not be true if the customer were to exercise its one-time right under the contract to change the product it purchases from BPA. The Load Following contract explicitly requires an update of peak declarations if a customer decides to change products.

#### **Issue 5:**

**How does allowing Load Following customers to reshape the customer's non-Federal resources match the net requirements calculation?**



## **Public Comment**

Throughout the conversations that led to the development of the Product Guidebook in February 2008, Load Following customers asked for some resource shaping flexibility from BPA. They specifically asked that they be allowed to reshape their resource amounts into shapes that would provide benefits to BPA from its power system perspective and that would allow them to reduce their exposure to potential BPA demand charges.

## **Evaluation and Decision**

Based on the input received from customers, BPA has included several alternatives in the Load Following contracts for a customer to choose the shape of its Specified Resources applied to its retail load. These alternatives include the ability to directly apply the actual output of non-dispatchable resources to load in whatever shape that resource actually produces power, as well as several other alternative shapes. BPA recognizes the difference in value between the hourly shape of each resource through the application of Resource Support Services (RSS).

The amount that may be reshaped is the annual resource output established in Exhibit A of the contract. This ensures that the annual amount provided meets the amount required on an annual net requirement basis. The alternative shapes provided under the contract allow the customer to acquire the same services provided through RSS from a source other than BPA. Because the alternative shapes must be provided in a predefined hourly shape, such shapes provide hourly planning certainty for BPA. Regardless of the particular hourly shape that a Load Following customer chooses for its resources BPA will meet the remainder of its actual retail load on an hourly basis. BPA believes that by providing the alternative shapes the adjusted net requirement load will be in a shape that better meets the needs of both parties.

### **2.1.2 Customer Resource Amounts**

A number of resource issues were discussed during the Regional Dialogue process for contract implementation and are addressed below.

#### **Issue 1:**

**Whether the contract's inclusion and use of "unspecified resources" comports with section 5(b)(1) of the Northwest Power Act and whether the statute requires customers to specify the "actual" resources that will be used by the customer to serve its regional utility loads.**

#### **Policy Position**

Section 2.85 of the Regional Dialogue contract template states: "Unspecified Resource Amount" means an amount of firm energy listed in section 3 and 4 of Exhibit A [Net Requirements and Resources] that a customer has agreed to supply and use to serve its Total Retail Load. Under the contract, Unspecified Resource Amounts are a subset of a customer's Dedicated Resources, which are non-Federal generation, long-term power

contracts, and short-term power purchases that a customer is obligated to apply to serve its consumer load that is not served by BPA power, consistent with section 5(b)(1) of the Northwest Power Act. Under section 3 of the contract and Exhibit A, the customer lists its Dedicated Resources, that is, the generating resource amounts, long-term power contract purchase amounts and Unspecified Resource Amounts, which it will use to serve its load. As stated in BPA's March 2003 Clarifications issued on BPA's May 2000 5(b)/9(c) Policy, a customer can use all or a portion of an actual resource as an Unspecified Resource with just the amount of power and the duration stated in its Firm Resource Exhibit to serve its load. Clarifications, section 2, at 2. BPA's obligation to supply firm power is determined by subtracting the total of those amounts of customer resources, including the Unspecified Resource Amount from the customer's Total Retail Load. BPA's obligation is equal to the customer's Total Retail Load minus the customer's Dedicated Resource amounts.

### **Public Comment**

The Pacific Northwest Investor-Owned Utilities (Avista Corp., Idaho Power Co., PacifiCorp, Portland General Electric Co. and Puget Sound Energy, Inc. (IOUs, CON-054)) argue that the Unspecified Resource Amounts provision is not consistent with section 5(b)(1) and is unsound because there is no attribution of the amounts to "a particular" generating facility or power purchase contract. Specifically, they argue that the statute and legislative history of section 5(b)(1) means:

. . . [F]or purposes of determining the amount of power BPA is required and permitted to sell to a utility under a Northwest Power Act section 5(b) contract, that utility is not permitted to acquire and use actual resources to meet its firm load in the region without the recognition that such utility has determined under such contract to so use such actual resource.

*Id* They further argue that because the Unspecified Resource is merely an "amount" of firm power it is not a resource that can be dedicated to serve retail load under the statute because it is not "attributed to" a particular generating resource or contract resource. *Id*.

The PNW IOUs next argue that BPA's interpretation of section 5(b) as stated in 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, May 23, 2000, (May 2000 5(b)/9(c) Policy) recognized that only resources tied to actual generation may be used in determining a utility's net requirement load. They argue that the policy ". . . only permits, for use of determining a utility net requirements, use of actual resources." *Id*. While the IOUs acknowledge that the policy states that market purchases may be used and specified by a customer to serve its load, and that such purchases are "actual resources," they argue that the market purchases are somehow different and distinct from an Unspecified Resource Amount. They conclude their 5(b) argument by asserting that Unspecified Resource Amounts are "a dramatic departure" from the May 2000 5(b)/9(c) Policy that has to be explained. *Id*.

## **Evaluation and Decision**

The April contract templates included Unspecified Resources as an approach for a customer to use to meet its non-Federal resource obligations. This concept was also included in Subscription contracts and provides a way for a customer to establish specific amounts of non-Federal resource that the customer will dedicate to its load without establishing the source of the power. This allowed the customer an approach for non-Federal resources that both meets the requirements of the Northwest Power Act and provides access to market purchases. Section 5(b)(1) of the Northwest Power Act states in pertinent part:

Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative . . . and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds [5(b)(1)(A) the capability of such entity's firm peaking and energy resources used in the year prior to December 5, 1980, to serve its firm load in the region, and [5(b)(1)(B)] such other resources as such entity determines pursuant to contracts under this chapter, will be used to serve its firm load in the region.

BPA acknowledged that in 1980 when the Northwest Power Act was passed that an integrated utility would know and understand the sources of its power supply, primarily the installed generation owned by the utility and the long-term contracts for the purchase of output or capability from a resource supplier. The definition of resource in section 3(19) of the Northwest Power Act not only applies to section 5(b), but, more significantly, it applies to section 6 of the Act, and that section authorized BPA to acquire the output or capability of non-Federal generation by purchase under long-term contracts. As BPA's May 2000 5(b)/9(c) Policy pointed out in addressing "market purchase commitments," BPA was recognizing a new and different source of power for service to load that had developed out of changes in to the wholesale power markets as a result of passage of the Energy Policy Act of 1992, and the Federal Energy Regulatory Commission's Orders 888 and 889 issued in 1996. With these changes, a utility's power marketing function had available to it a source of electric power sold by Independent Power Producers (IPPs) from non-utility-owned resources, and marketers who did not own any generation and whose contracts did not necessarily identify any source, but only the stated purchase amount and point of delivery for the power.

BPA's May 2000 5(b)/9(c) Policy ROD, pages 37 to 41, addressed "market purchase commitments," or "market purchase contract resources" for the upcoming Subscription contracts and how BPA would include them as resources in calculating a customer's net requirement load. BPA stated the specific difference between these types of resources and a customer's other firm resources by contrasting them to the 1981 contract. BPA said:

BPA should better define what is meant by a "market purchase commitment". Under the 1981 power sales contract, a customer who wished to apply the power it bought under a non-Federal contract to its firm load had to meet several

conditions. The customer had to show that its non-Federal contract was a purchase of firm power, . . . Non-firm energy purchases, if any were not counted as part of a firm power contract. The customer had to show that it had a firm transmission path for delivery of the firm power to its load center. The customer had to show the contract's duration and . . . any rights the customer had to increase the amount of power purchased. Typically BPA would obtain a copy of the specific contract . . . . A general statement from the customer that it would buy power without specifying the amount duration, type of power, source and transmission path was not adequate to relieve BPA of its obligation to plan to serve the customer's load.

Unlike the conditions that had to be met for a firm power contract resource under the 1981 contract, a market purchase commitment is not subject to all of these conditions under BPA's new contract. The market purchase commitment is a specific amount of power that the customer dedicates to use [for its load] for the duration of a contract year or the rate period and which the customer must obtain under any and all conditions from the market and not from BPA. *The customer must identify the amount of power (broken into heavy and light load hour amounts, or as otherwise specified in the contract). The customer is obligated to meet this amount of its load with such purchases. BPA will not ask the customer to identify the specific source of the power purchased, or the type of power purchased or the specific contracts that make up the purchases from the market.* The market purchase commitment may be made up of one or more power purchases from the spot market. BPA will not supply, or stand by to supply, Federal power to meet the load that is served by the stated amount of the market purchase.

(May 2000 5(b)/9(c) Policy ROD at 38-39) (emphasis added)

BPA further stated:

The market purchases are a commitment by a customer not to place additional planned load requirements, such as load growth or other additions to load, on BPA for a specified rate period. Such planned additions to load will be met by planned purchases from the market in specified amounts. These market commitment purchases are different from the obligation of customers under the Slice contract to make balancing purchases to serve any loads not served by their Slice and or Block power from BPA. Those Load Following purchases must be made in accordance with the terms of the Slice contract, as well as, the customer showing sufficient planned market purchase resources to cover planned load changes.

*Id.* at 39. And,

\* \* \* [T]he market purchase commitments do reduce the amount of power BPA is obligated to supply to the customer in accordance with its contract . . . . The

customer should be mindful that some of BPA's products are based upon a BPA calculation of the amount of net requirements load determined for the first contract year and estimates of that load over the term of the contract. Under this type of product [Slice and Block] the customer will agree to the calculated amount of [BPA] power based upon the projected loads. *The customer will also agree to obtain sufficient amounts of firm power shown as either generating resources, specific contract resources, or as annual or rate period market purchase commitments to cover the loads not served by the BPA product.*

*Id.* at 40 (emphasis added). As the preceding May 2000 5(b)/9(c) Policy ROD excerpts demonstrate, BPA adopted and applied under its Subscription contracts three distinct categories of non-Federal firm power resources which a utility customer could apply to its regional firm consumer load in the contracts. These were actual specific generating resources, specific contract resources (contracts tied to power purchases from a specific resource), and market purchase commitments which were unspecific power purchased from the market and with no specific generation. Notably the market purchase does not identify a specific generation source, although it may come from such sources, nor require the customer to state any information about the purchase other than the amount of megawatts, their timing, and duration of the purchase.

BPA's policy has been in place and effective for over 8 years. In *Goldendale Aluminum Co. et al v. United States Department of Energy*, case nos. 00-7071; 00-70719; 00-70743; 00-70778, customers raised legal challenges to the May 2000 5(b)/9(c) Policy ROD and those claims were settled in March 2003. These claims included claims made by public utilities and by the IOUs on the lawfulness of the policy, including application of the policy. BPA's current 5(b)/9(c) Policy as modified by the 2003 Clarifications issued March 7, 2003, (5(b)/9(c) Policy) is not subject to further challenge and that policy includes BPA's adoption of the three categories of non-Federal resources a customer could apply to its load: specific generating resources, specific contract resources, and market purchase commitments.

BPA's 2003 Clarifications of its 5(b)/9(c) Policy include a provision that specifically stated:

2. A customer can use all or a portion of a resource as an unspecified resource (no identification beyond amount) to serve the customer's load under section 2(b) of Exhibit C [Net Requirements, Customer Resource, Unspecified Resource Amounts dedicated to serve total retail load] of the customer's BPA Power Sales Agreement, and such does not constitute a declaration of a specific resource under section 2(a) of Exhibit C [Net Requirement, Customer Resources, Declared output of specific customer resources] of such BPA Power Sales Agreement or under section 5(b) of the Northwest Power Act.

A customer may use all or a portion of a resource as an unspecified resource, stated in whole megawatt and megawatt-hour numbers. However, the portion of the resource used as an unspecified resource cannot be otherwise dedicated or

declared under section 2(a) of the customer's Power Sales Agreement to serve a portion of its consumer load.

This specific policy clarification on unspecified resources was accepted and agreed to by Pacificorp, Avista, Portland General Electric, and Puget Sound Energy as part of the settlement of all claims under the *Goldendale Aluminum* case challenging BPA's 5(b)/9(c) Policy. The March 2003 Clarifications were signed by the Administrator, published, and were not challenged by any party. BPA's Regional Dialogue contracts contain the same three basic categories of resources in Exhibit A as were included in the Subscription contract's Exhibit C: specific generating resources; specific contract resources, and Unspecified Resource Amounts.

Under the current power sales contracts these are denominated in Exhibit C as "Declared output of specific resources" which included both generation and contracts, and "Unspecified Resource Amounts committed to serve retail load," which includes three subparts: unspecified resources for balancing purchases; specific amounts committed for contract term; and amounts committed for 9(c) decrements. The IOUs argument fails to recognize the second subcategory and focused only on the "balancing purchases" category. They argue that unspecified resources do not include long-term non-Federal resources, in disregard to the March 2003 Clarification. However, BPA distinguished between market purchase commitments, denominated in the contract as "specific amounts committed for contract term" and balancing purchases, denominated in the contract as "unspecified resources for balancing purchases." BPA stated that a customer would have to provide both types of resources; one for short-term hourly needs each day and the other for planned load requirements for a contract year or rate period. (May 2000 5(b)/9(c) Policy ROD at 39) BPA's inclusion and use of Unspecified Resource Amounts as a long-term amount of power from actual generating resources that was not identified is the same in the Regional Dialogue contract as it is under the current Subscription contracts and BPA's Clarifications of its 5(b)/9(c) Policy.

In short, the IOUs' now want to argue in spite of the Clarification adopted in 2003 as litigation settlement that they executed, the same issue and claim that was raised and addressed under the Clarification to BPA's May 2000 5(b)/9(c) Policy. As shown by the above discussion of the May 2000 5(b)/9(c) Policy and the Regional Dialogue and Subscription contract provisions, the function and purpose of the Unspecified Resource Amounts is the same for the Regional Dialogue contract as it was for the Subscription contract. The customer commits or agrees to provide a specific amount of power for a specific duration by use of generation or market purchases without identification of the specific resource(s) used to supply the power. This firm power is obtained by long-term use of generation or market purchases from any number of providers from the ongoing open and active wholesale power market on the West Coast. BPA's adoption of this category of purchases used to serve a utility customer's retail load is recognition of the changes in the wholesale power industry since 1996 and is valid today. The IOUs' emphasis on balancing purchases to state that BPA's May 2000 5(b)/9(c) Policy did not address the use of power purchased from unspecific sources is incorrect. BPA adopted

both type of purchases as resources to be applied under the contract and explained the distinction between them.

As demonstrated above there has been no “dramatic departure” in legal interpretation or in the May 2000 5(b)/9(c) Policy. The May 2000 5(b)/9(c) Policy included a customer’s use of Unspecified Resource Amounts purchased from the market under the name “market purchase commitments.” The March 2003 Clarifications specifically stated that a customer could use generating resource and not identify its source. In settlement of litigation, the IOUs gave up their claims against BPA’s policy in 2003 and did not challenge the Clarifications, including BPA’s policy on market purchase commitments. The application of this type of resource, the Unspecified Resource Amounts, occurs under the current Subscription contract and will continue to occur under the Regional Dialogue contract.

## **Issue 2:**

**What alternatives will BPA provide for the addition of non-Federal resources in Regional Dialogue contracts.**

### **Policy Position**

BPA stated that terms for customer rights to add and remove new non-Federal resources would be developed in the contract and product development process. Any alternatives BPA decides to provide will be consistent with BPA’s 5(b)/9(c) Policy.

### **Public Comment**

This issue received significant discussion and input during the public meetings. In TRM briefs customers asserted that BPA had not provided sufficient flexibility in how resources could be added and applied. (NRU, TRM-12-B-NR-1, at 2-3; WPAG, TRM-12-B-WA-1, at 17-19) WPAG in its brief said “the provisions of the TRM and Regional Dialogue Contracts neither encourage nor facilitate the development of non-federal resources.” The brief went onto say that the notice and commitment periods were “overly long and inflexible to facilitate the development and dedication of new non-Federal resources. (WPAG, TRM-12-B-WA-1, at 17)

### **Evaluation and Decision**

The contract templates include several approaches that allow customer’s flexibility in how they apply their non-Federal resources. BPA worked with customers throughout the contract and product development process after the Policy was published to develop terms for the addition of new non-Federal resources. The alternatives provided in the contract evolved and numerous new alternatives were developed as a result. We believe that the alternatives provided offer many different ways for customers to develop resources and elect to apply their non-Federal resource output to serve their retail load. However, the contract is not designed with unfettered flexibility and the contract will require advance notice by the customer for four identified contract periods in which they can apply new resources.

An overarching goal is creating the certainty necessary for development of new resources. BPA believes that the 3-year notice and 5-year commitment are the minimum needed to make development of new resources by customers or BPA feasible. The contract gives Load Following customers a great deal of flexibility, while not subjecting other customers to cost shifts due to non-Federal resource choices of a few.

Additionally, BPA has agreed to comply with the resource adequacy requirements adopted by the Council in consultation with the region. Therefore, making significant reliance on the spot market to meet all above-RHWM load placed on BPA by Preference customers is not a reasonable option. Furthermore, BPA has a statutory obligation to not only serve the load placed on it by Preference customers, but to make cost-effective choices on resource acquisitions (consistent with the Council's Power Plan). BPA disagrees with WPAG's assertion that notice and commitment terms are too inflexible. Reducing notice and commitment periods might provide short-term market opportunities to customers that want to meet their own load growth but would make it significantly more difficult for BPA to make commitments to new physical resources to meet Tier 2 loads due to increased uncertainty about Tier 2 loads.

As another means of facilitating resource development by its utility customers, BPA proposed and established in its Regional Dialogue Policy and ROD the flat annual block as a benchmark shape for the addition of new resources. BPA affirms that decision, which will use that flat annual block shape to establish a neutral means of comparing non-BPA above-RHWM service options to the service that BPA is offering at Tier 2 rates. The flat annual block shape was the most straightforward approach and is the most observable shape in the market. A further benefit is that it is the least complex to price for purposes of calculating RSS and Resource Shaping Charges, regardless of the resource type. WPAG noted that this shape makes recourse to the market more attractive for the customer rather than developing actual generating resources. BPA does not agree with this distinction, since all power purchases in the market must also ultimately account for the costs of their source or generating resources. BPA believes that the approach structured creates parity between BPA's Tier 2 rates, purchases in the market, and purchases of resources that are combined with services from the market. All customer resource choices will be converted into the same benchmark shape. This conversion achieves BPA's goal of neutrality on resource options for above-CHWM load between BPA-provided service or to self-supply. Under Regional Dialogue and the direction that was set forth in the Policy and the RD ROD, the flat annual block shape aids this goal.

With the alternatives BPA has outlined, customers will have a great deal of flexibility with regard to how they apply resources to their retail load in the future. BPA believes the commitment in the Policy to develop the details for adding non-Federal resources to serve the customer's retail load has resulted in significant flexibility and a number of alternatives that will allow Load Following customers to meet their load in ways that meet their business needs, and will still hold a customer harmless from the choices any other customers make. These rules do not give the customer any contractual right to economically dispatch their resources from load service to arbitrage BPA's power rates when set. Such economic flexibility would not serve BPA's other Load Following



customers that do not have such opportunities. BPA's Regional Dialogue goal for resource development was anchored by an assumption that the Regional Dialogue contracts and TRM would result in the development of resources (by BPA or customers) to serve load, not financially benefit in the market by resale of their resources when the BPA price is lower than market.

### **Issue 3:**

**Whether the contracts provide customers flexibility for removing resources to accommodate state RPS and NLSL service obligations.**

### **Policy Position**

Section II.B.7 of the Policy indicated that the terms for customer rights to add and remove new non-Federal resources would be developed in the contract and product development process.

### **Public Comment**

Public power groups (PPC, NRU, PNGC, and WPAG) expressed concern about resource removal provisions proposed in early contract templates, arguing that such limited resource removal rights would give BPA "too much authority over customers' control of their own resource choices." (PPC, et al., CON-14) The Slice customers stated that "Non-federal resource removal is proscriptive in nature, and does not permit any customer the choice in managing its statutory requirements, such as resource portfolio standards." (Slice Group, CON-022) Similarly, NRU argued that establishing the order of resource removal may hinder a utility's ability to serve its above-HWM load in a manner appropriate to its needs, and may force a customer to violate a Renewables Portfolio Standard. (NRU, CON-15) Cowlitz argued that specifying an order of resource removal creates a number of unnecessary issues and proposed that it would be more appropriate to specify rules for removing resource amounts. (Cowlitz, CON-16)

### **Evaluation and Decision**

BPA's April 2008 contract templates included resource removal provisions that prescribed the order of resource removal. BPA reviewed the Oregon and Washington renewable resource standards that apply now to utilities above a certain size and found that the original policy which required removal of resources in a last-on-first-off basis would in some circumstances cause the removal of the renewable resources and application of non-renewable resources. This result could expose the customer to fines or charges imposed by the state legislation. After considering comments submitted by parties, particularly concerns expressed over a utility having to meet state RPS requirements, BPA modified the contract templates so that customers now may choose the order of resource removal and remarketing of resources used to serve their above-RHWM loads, which may include non-Federal resources or BPA Tier 2 rate power. The contract provision also allows customers to remove Existing Resource amounts, as a substitute for New Resources, if the customer is using New Resources to fulfill a state or Federal renewable resource standard or other comparable legal obligation. (*See* contract template, section 10.) BPA believes these changes reasonably accommodate the customers' needs.

**Issue 4:**

**How will non-Federal and Federal resources used by customers be treated beyond the term of Regional Dialogue contracts?**

**Policy Position**

The July 2007 Policy BPA stated it would clarify in contract development and negotiations its customer utilities' resource planning obligations for the last few years of the 20-year Regional Dialogue contract, such as how the notice and purchase commitments will operate during the last years (or beyond) of the contract.

**Public Comment**

Benton REA has expressed a concern regarding the use of non-Federal resources that are dedicated by the customer to serve load during the Regional Dialogue contract, but which may become uneconomical in a future contract period if BPA returns to a melded PF rate. Benton REA suggested that customers be allowed to purchase BPA's Federal power while remarketing their non-Federal resources. (Benton REA, CON-071) In a comment submitted by Inland Power & Light, a similar concern was expressed about the disposition of resources acquired to serve Tier 2 loads after the end of the Regional Dialogue contracts in FY 2028. (Inland, CON-064)

**Evaluation and Decision**

BPA's April 2008 contract templates did not address the disposition of new BPA or non-Federal resources after the contract expires. Benton REA is concerned that if customers elect to use non-Federal power to serve above-RHWM load, instead of buying power from BPA at a Tier 2 rate, and BPA returns to a melded rate design following the end of the Regional Dialogue contract, then power sold by BPA would become less expensive than the customer's resource. Benton REA suggested that customers should then be allowed to replace their non-Federal resource with Federal power and be allowed to remarket their non-Federal resource.

BPA's proposed Regional Dialogue contracts and its TRM are premised upon a tiering of BPA's Priority Firm power rates for the contract period through 2028. BPA's current 5(b) Policy supports these contracts and addresses the issue of a customer's continued use of its generating resources once they are applied to their retail load. Such resources are considered as continuing to be so used until their use is determined by the Administrator to be permanently discontinued due to obsolescence, retirement or loss. BPA's current 5(b)/9(c) Policy is not proposing any changes from this standard stated for its Subscription contracts and challenged by the customers in the Goldendale litigation on that policy.

BPA acknowledges the concerns and suggestions parties expressed. However, the proposed Regional Dialogue contracts do not set policy for contracts signed after Regional Dialogue contracts. The proper forum to address such issues will be when such policy is once again under review. Such discussions are proper to consider in future contract discussions when the future supply landscape is clearer and better understood by

the parties. It is BPA's future expectation that BPA and BPA's customers will begin working on a follow-on contract template to the Regional Dialogue contracts years in advance of the termination of Regional Dialogue contracts just as BPA has done through the Regional Dialogue process. These negotiations will need to address any changes to BPAs 5(b) Policy that may affect those contracts and these issues since they relate to power planning matters that will impact both customers and BPA after 2028.

The provisions of section 5(b)(1) of the Northwest Power Act apply regarding the discontinuance of customer resources. If a customer elects to acquire non-Federal power to serve its future loads through the execution of a non-Federal power supply contract that expires at the same time as their BPA Regional Dialogue contract and they have no right to continue such purchase, then under the current policy BPA would determine that the customer has lost its contract right to purchase and may therefore replace such loss with power sold by BPA. BPA discussed this treatment in its 5(b)/9(c) Policy ROD at pages 26-27. However, the treatment of the actual generation applied to a customer's retail consumer load is different in that a permanent discontinuance of the resource as defined by BPA's current 5(b) Policy is required. On the other hand, if a customer chooses to develop and own a non-Federal generating resource and specifically dedicates that resource to serve its load as a section 5(b)(1)(B) resource, then such a resource is required to be continuously used to serve the customer's load. Except for the statutory reasons allowed for permanent discontinuance, such a resource will continue to be counted in the calculation of a customer's non-Federal resources applied to its load when BPA calculates net requirements for purposes of the next BPA power sales contract. BPA has expressed this treatment in its 5(b)/9(c) Policy and the accompanying ROD at pages 49-74. Again, such treatment is consistent with and pursuant to statute and BPA's 5(b)/9(c) Policy.

The "supply cliff" issue that Inland Power & Light raises appears to be a consideration of the cost of service at or near the end of the Regional Dialogue contracts that may affect costs under the next contract. As a cost or price of service issue it is a matter that is appropriately addressed in the context of the next contract.

#### **Issue 5:**

**How should BPA address Public Utility Regulatory Policy Act, as amended, (PURPA) Resources in the Public Utilities' Regional Dialogue contracts?**

#### **Public Comment**

During contract negotiations in July 2008 customers asked that BPA include language in the contracts to address the possibility that they might be required to add PURPA resources during the term of the contract. To address the potential PURPA resource additions, BPA developed language which it included in the August 18, 2008, Load Following template. BPA received comments from NRU and PNGC on August 29, 2008, that suggested that the PURPA language was too restrictive and that customers should have the option to determine whether they add the PURPA resource as a specified resource or manage the resource as a part of a larger portfolio of unspecified resources.

They concluded by suggesting that BPA delete the paragraph on PURPA resources from the contract template.

### **Evaluation and Decision**

The April 2008 contract templates did not address PURPA. PURPA was modified by the Energy Policy Act of 2005, which changes some of the considerations for when and whether a utility must take a PURPA resource to its load. Nonetheless, there are circumstances when a utility may be required to take the specific resource and BPA's contracts need a mechanism to account for the customer's additions of PURPA resources. BPA is convinced through the course of the contract negotiations that contract language is needed to address the special circumstances of PURPA. The key distinction between PURPA and other customer resources is that the customer is required by law to take the output from the resource, unlike other resources. BPA was convinced that it would not be a good public policy outcome for a customer to be forced to add a PURPA resource in compliance with that statute and for the Regional Dialogue contract to then enforce a take-or-pay commitment for the amount of BPA power that the resource is displacing. To avoid this conflict, BPA proposed treating a PURPA resource as a specified resource in the Regional Dialogue contract because the customer is required to accept generation in the shape the resource actually produces. Consistent with this decision, BPA would treat the PURPA resource like other resources applied in the shape of their output, and would require that the customer purchase the Diurnal Flattening Service (DFS). BPA expects that customers will want to account for the costs associated with the DFS in their calculations of avoided costs.

While BPA understands that customers might want additional flexibility in how they characterize PURPA resources and treat them under the contract, PURPA resources are required to go to the customer's load without the same flexibility as other resources a customer may choose to purchase. BPA does not want to create a conflict between its contract and the PURPA statute, but must recognize that PURPA resources added by a customer are specific generation and are not part of a portfolio or other market mechanism. In order to accommodate both qualities of a PURPA resource under the Regional Dialogue contract, BPA has decided to include a contract provision that allows customers to add PURPA resources, but will retain the requirement that the resource be a specified resource requiring RSS.

### **Issue 6:**

**What is the extent of resource removal for New Resources in section 10 of the CHWM contracts.**

### **Public Comment**

Given the operation of resource removal and the changes in allowing the customer to choose its resource removals under the contract, this issue was raised following the development and discussion of those matters and release of contract templates.

### **Evaluation and Decision**

Section 10 of the CHWM contract provides for the removal of certain New Resources under limited circumstances that are tied to the calculation of a customer's net requirement. The defined term "New Resources" used in the templates could erroneously be read to include resource amounts added as a result of a BPA determination of a 9(c) decrement, or a customer resource added to serve its New Large Single Loads (NLSLs). BPA's 5(b)/9(c) Policy does not allow a customer to gain additional resource removal rights for any customer resources added for its 9(c) decrements. The purpose of the decrement (a reduction in BPA firm power service) is to ensure that BPA does not sell firm power to replace a customer resource that could have been conserved or otherwise retained for service to regional load. It would be illogical for BPA to decrement the amount of Federal power a customer is able to take under the 5(b)/9(c) Policy, only to have a customer use the contract's resource removal section of the contract to remove those non-Federal resources added for the decrement, or to remove other non-Federal resources made eligible for removal due to adding the 9(c)-related resources. The result could be essentially bringing back the same load to Federal firm power requirements service in contravention of the intended effect of the 9(c) decrement.

Removal of resources added for NLSLs could conceivably allow the customer to increase its PF purchases when the only additional load the customer has to serve is an NLSL. Because an NLSL is not part of the customer's general requirements which may be served at the 7(b) rates, allowing a customer to remove its resource would have the effect of increasing its general requirements load. Such a treatment of an NLSL load and resource applied to it would not meet the rate directives of the Northwest Power Act. Therefore, for purposes of resource removal in section 10 of the contract, any amounts of New Resources added for a 5(b)/9(c) Policy decrement or for an NLSL will not be removable under that section. BPA will be reduced the amount of removable resources under section 10 to account for any 9(c) decrements or other non-Federal resources for NLSLs made eligible for removal due to otherwise falling under the definition of New Resources.

#### **2.1.2.1 Consumer-Owned Resource Issues**

The Policy addressed how consumer-owned resources would be treated for CHWM purposes, giving a customer a one-time right to establish how existing consumer-owned resources in its service territory will be used during the term of the contract. Specifics of the declaration were not discussed and were left to future discussions and contract development.

#### **Issue 1:**

**Whether the contract reasonably accommodates the use and application of consumer-owned resource amounts?**

### **Public Comment**

Cowlitz requested that BPA provide flexibility in the contracts to better align approaches for applying consumer resources to the customer loads with the varying circumstances that can occur with consumer resources and how closely their output matches loads. (Cowlitz, CON-016; CON-050)

### **Evaluation and Decision**

The April 2008 templates addressed consumer-owned resources but only provided a couple of alternatives as to how the resources could be applied. When addressing consumer-owned resources BPA was looking for certainty about how the generation would be applied to load. One single consumer of Cowlitz controls over 105 MWs of resource that can be deployed to alter or vary its load. BPA considered the concerns raised by Cowlitz during the development of the contract and added alternatives to meet its requests. BPA believes the contract reasonably accommodates the use and application of consumer-owned generation, while balancing the cost and benefits of making such allowances without adversely affecting BPA's other customers. For example, the contract accommodates situations where consumer-owned resources serve onsite consumer load that is directly interconnected to the load. In addition BPA established alternatives that would allow the utility customer to specify hourly amounts of power BPA would provide for service to an onsite consumer load or hourly amounts of power that the consumer-resource would provide. In these instances the approach will be established at the time the contract is signed and will apply for the term of the contract.

### **Issue 2:**

**Whether BPA should allow consumer-owned resource declarations to change on a rate-period basis.**

### **Public Comment**

ICNU proposed the following contract provision to permit consumer-owned resource declarations to change rate period by rate period: "When BPA forecasts for the rate period market prices above the Tier 1 rate, then the utility (at the direction of the consumer) may apply consumer-owned generation to load in determining the utility's net requirement for the rate period. If BPA forecasts market prices below the Tier 1 rate, then the utility (at the direction of the consumer) may apply consumer-owned generation to load, provided the utility's net requirement is forecasted for the rate period to remain above its HWM." (ICNU, CON-046)

### **Evaluation and Decision**

The April 2008 contract templates did not contemplate the flexibility for changing the designation of consumer load to serve its load. In fact the contracts required that at the time the Regional Dialogue contract is signed, customers must establish the amount of generation from a consumer-owned resource that will be used to serve the utility's retail load. The Policy stated that "a utility customer that serves consumers that own and operate generation resources will have a one-time right at contract signing to establish how existing consumer-owned resources in its service territory will be used during the term of the Regional Dialogue contracts. ... [F]or purposes of service to load above a

customer's HWM, a customer is not precluded from purchasing consumer-owned generation to serve such load ...." ICNU's request would create an option for the consumer to apply its resource to load on a rate period basis rather than committing the resource to load service on a planning basis for the entire contract term. The customer's obligation to provide resources will be on at least a 5-year basis with 3-year's notice to BPA, and ICNU's suggestion establishes yet a different basis.

ICNU suggests that BPA should be indifferent to the utility applying the resource in this manner if the utility's load exceeds its Rate Period HWM. *Id.* The ICNU position would have limited validity in only one case—if the customer had not contracted with BPA to meet its above-RHWM load. However, if the customer has elected BPA to supply power to serve the customer's Above-RHWM load and BPA forecasts revenue requirements that must be recovered through power sold to the customer at Tier 2 rates, then BPA would not be indifferent to the consumer's application of its resource and BPA may face loss of those revenues. If the amount of load BPA was committed to meet and revenues from those sales were subject to a variance charge based on business decisions made by the owner of a consumer resource, BPA's risk of revenue loss or insufficiency would increase. BPA is unwilling to accept this additional fiscal risk or additional operational uncertainty on its power supply obligations.

ICNU further posits that BPA would benefit if the customer was able to apply a consumer-owned resource to reduce the amount of power the customer would purchase at Tier 1 rates, as long as market prices exceeded the Tier 1 rates. *Id.* Providing a utility the ability to control the option of whether or not to take the amount of power it is eligible to purchase at Tier 1 rates creates several types of risk for BPA and its other customers. Market prices forecast in a rate case likely will be different from market prices that actually occur in a particular rate period. BPA sets rates in advance of when a rate period begins and must build into rate design various contingencies for risk. Adding another type of risk mitigation for this very limited situation is not reasonable. ICNU's suggestion would diminish the resource planning benefit of negotiating and executing long-term power contracts with knowable supply obligations, which are designed to provide BPA and the customers with certainty for future resource planning. ICNU's suggestion would introduce additional uncertainty and run counter to several of the goals agreed upon in the Regional Dialogue process:

- Durability/Stability/Contract Enforceability
- Customer/Regional Support and Equity
- Certainty of Obligations for all Parties
- Promote Infrastructure Development Consistent with the Northwest Power Act
- Simplicity

BPA will not adopt ICNU's option as a right that will be established in Regional Dialogue contracts. However, BPA is open to considering arrangements much like ICNU suggested on a case-by-case basis. Such arrangements would only be considered where

BPA believed the economics could be designed in a way that provides benefits for both parties.

**Issue 3:**

**Whether BPA should adjust the generation amount used in the contract as a threshold for a utility to report consumer-owned resources.**

**Public Comment**

ATNI suggested encouraging the development of small resources by increasing the limit for reporting consumer-owned resources from 200 kilowatts to 1 MW. (ATNI, CON-047)

**Evaluation and Decision**

While ATNI did not express a reason for its suggested adjustment, it appears ATNI may be concerned about the potential administrative burden on customers of having to identify and report to BPA consumer-owned resources with a nameplate capacity of 200 kilowatts or more. BPA established the 200 kilowatt limit because it recognizes that there will be a number of small resources that are not worth the time and effort to track. This resource size threshold is admittedly a judgment call that balances a utility's administrative savings against the benefits of increased certainty about the load BPA is serving. A retail utility likely knows the resources that are affecting its load and distribution system. BPA does not believe that the administrative burden of forecasting and reporting resource output will be incrementally greater at 200 kilowatts than at 1 megawatt. Thus the contract templates will retain the 200-kilowatt reporting requirement. However, BPA does recognize that the administrative cost per MWh of output may be greater for a 200-kilowatt resource than for a 1 megawatt resource, and that determination of when the administrative burden is lower than the benefit of obtaining the information is more art than science. Because of this fact, BPA has not precluded increasing the resource reporting level at some time in the future if it can be done in a way that BPA believes provides net benefits.

**2.2 CUSTOMER RIGHT TO BILLING CREDITS AND RESIDENTIAL PURCHASE AND SALES AGREEMENT**

**Issue 1:**

**Whether it is reasonable to include a contract provision whereby the customer agrees not to request billing credits for resources that are developed to meet preference customers' load above their RHWM.**

**Policy Position**

Section II.B.12 of the Policy stated that it would be extremely difficult to make billing credits compatible with tiered rates without frustrating the broadly accepted goal of avoiding driving up the Tier 1 rate with the cost of new resources. Therefore, customers that sign CHWM Contracts will be agreeing not to request billing credits, as defined in



section 6(h) of the Northwest Power Act, for their new resources. This requirement does not apply to any billing credit contracts currently in effect.

### **Public Comment**

Several parties stated that the Regional Dialogue contract should not require preference customers to waive a right to billing credits that they are entitled to under law. (Mason 1, CON-002; Mason 3, CON-023; Grays Harbor, CON-024; Benton REA, CON-044; WPAG, CON-045; and Clark, CON-053)

### **Evaluation and Decision**

As provided for under section 6(h) of the Northwest Power Act, billing credits allow a requesting BPA customer to be reimbursed (through credits on its BPA power bill) for certain costs related to conservation or resource acquisitions that reduce BPA's load obligation. The costs to BPA of such billing credits are included in BPA's rates, so they are spread over BPA's customers. Because BPA allocates billing credit costs over all rates, the effect would be to shift the non-Federal resource costs incurred by a customer to serve its above-RHWM loads to Tier 1 rates, if customers were allowed to receive billing credits under Regional Dialogue contracts. Such an outcome is counter to the philosophy of tiered rates, which ensures to the extent possible that Tier 1 rates will not include costs of new resources. Therefore, BPA believes it is reasonable to include a provision in the contract whereby a customer agrees not to request any new billing credits agreements.

Customers entitled to participate in billing credits are not being forced to waive their rights to do so. (The same holds true for the residential exchange.) BPA is affording customers a choice. They can sign contracts that are based on tiered rates and, in exchange for the greater pricing certainty afforded by tiered rates, agree not to request billing credits and to participate only in a limited fashion in the residential exchange. Alternatively, BPA will provide customers contracts that are, as has historically been the case, based on melded cost rates, and that do not require the customer to limit its requests for billing credits or the residential exchange. In essence, customers are being asked to make their own decisions as to the pricing certainty they wish to enjoy. BPA believes that, for contracts structured around the discretionary construct of tiered rates, it is reasonable to have a contract provision under which customers agree to not request new billing credits during the term of the contracts since billing credits would defeat or frustrate the tiered rates pricing signals by shifting the cost of such credits onto other customers. This will help to ensure that BPA's lowest-cost tiered rate does not include costs of new resources. As for the residential exchange, the contract would not prohibit preference customers from participating in the exchange; they have the right to seek a residential purchase and sales agreement. The new power sales contracts require that customers not include the cost of resources added after September 30, 2006, to their average system cost. Like billing credits, BPA believes this is reasonable to help ensure that BPA's lowest-cost tiered rate does not include costs of new resource additions, which would frustrate the pricing construct of tiered rates.

**Issue 2:**

**Whether it is reasonable to include a contract provision whereby the customer agrees not to seek or receive Residential Exchange benefits pursuant to section 5(c) of the Northwest Power Act.**

**Policy Position**

The Policy in section II.B.13 stated, “An overarching reason for the Regional Dialogue proposal is to reduce the dilution of the low-cost Federal system with new acquisitions. This goal would be thwarted if customers’ higher-cost new acquisitions were to flow back to the Tier 1 rate through the Residential Exchange program (REP).”

**Public Comment**

WPAG expressed concern about BPA further limiting the participation of preference customers in the REP. WPAG stated that the contract template would prohibit any exchanging preference customer from including load growth occurring after FY 2010 in its exchange benefit calculation. WPAG argued that no such limitation has been imposed on IOUs participating in the REP, and no justification has been offered for this differing and discriminatory treatment of preference customers. (WPAG, CON-045) Clark supported WPAG comments and expressed the same concerns. (Clark, CON-053)

**Evaluation and Decision**

A primary goal of the Policy and the TRM is to ensure to the extent possible that Tier 1 rates do not pay the costs of resources forecast to be used to serve above-HWM loads. This policy goal would be thwarted if customers’ higher-cost new acquisitions were to flow back to the Tier 1 rate through the REP. Signing a new power sales contract would not prohibit public utility customers from participating in the residential exchange: public utility customers that elect to sign a CHWM contract will continue to have the right to a Residential Purchase and Sales Agreement. The new power sales contract does seek to ensure, however, that Average System Costs for customers with CHWM contracts will not include the cost of resources added after September 30, 2006. This is necessary to ensure that BPA’s Tier 1 rates are not increased by the cost of new resources. As for the assertion that it is discriminatory or unfair that preference customers are being asked to agree not to make a section 5(c) request during the term of the CHWM contracts since the IOUs are not being asked to do the same, BPA does not agree. The main point of distinction is that the IOUs are not being offered the same long-term CHWM power sales contract as the preference customers that will provide firm power at the Tier 1 rates for the next 20 years. If they were, it would be reasonable to require them to make the same election as is being required of preference customers. Preference customers that do not wish to take power under these contracts and thereby elect to only limited REP participation will be afforded non-CHWM contracts that do not place limits on REP participation.

## **2.2.1 Products Available to Requirements Customers**

### **Policy Position**

In section II.C.3 of the Policy BPA stated it would offer a Block product under Regional Dialogue contracts.

### **Public Comment**

During the Regional Dialogue workshops Tacoma Power raised implementation concerns that the Block product offered was too limited and that BPA needed to offer Block products that includes shaping flexibility. Tacoma explained that shaping capacity had worked well for them under the Subscription contract and asked that BPA make a product available to them that was as comparable as possible to the product they are purchasing under their current Subscription contract.

### **Evaluation and Decision**

After consideration of these comments, BPA revised its proposed contract language to add a version of Shaping Capacity as an option to this stand-alone Block product. Shaping Capacity allows a Block customer to reshape the energy it commits to purchase in Heavy Load Hours (HLH) from a flat hourly purchase into different hourly shapes on a prescheduled basis. Details and rules for the Shaping Capacity option are established in the Regional Dialogue Block contract.

## **2.2.2 Tier 2 Rate Alternatives**

### **Policy Position**

As indicated in section II.C.5 of the Policy, details of the Tier 2 rate alternatives were to be developed in the TRM. Comments received in the Regional Dialogue process pertaining to Tier 2 rate design and cost allocations were directed to the TRM rate proceeding. As was noted in section II.C.4 of the Policy, rules guiding implementation of service to load beyond the HWM, such as notice deadlines and purchase periods, are included in the contracts and are addressed in this CP ROD.

### **Public Comment**

NRU commented that, as proposed in early contract templates, customers cannot opt out of purchasing firm requirements power at the Tier 2 Load Growth rate. NRU proposed that contract templates be modified to allow customers to stop purchasing at the Load Growth rate with an appropriate notice, if they agree to pay any resulting stranded costs. (NRU, CON-015; CON-035)

### **Evaluation and Decision**

BPA recognizes that utilities represented by NRU would like to have an ability to move out of the Load Growth rate alternative if they are developing their own resources. BPA agrees there is a way to meet the request without creating risk for other customers of BPA. That way is to provide for adequate notice to BPA so that the long-term cost recovery for this rate alternative are not increased and not shifted to other customers.

Consistent with this aim, BPA modified the contract templates to provide customers the option to lock in place their purchase amounts of firm requirements power at the Tier 2 Load Growth rate in future years. The customer choosing to lock in place its purchase must provide notice prior to a rate case and agree to pay unrecovered costs.

NRU commented that, as proposed in early contract templates, customers have only one opportunity to sign on to the Tier 2 Load Growth rate and the Shared Rate Plan. NRU proposed that contract templates be modified to allow customers to have two opportunities to sign up for purchasing under the Tier 2 Load Growth rate. (NRU, CON-015) BPA agrees that this kind of flexibility would not impose additional costs on other customers and could be provided in a way that met the needs of all the parties without shifting risk between customers. BPA modified the contract templates to provide the customer a second election opportunity to purchase under the Tier 2 Load Growth rate and the Shared Rate Plan. The customer is required to provide BPA adequate notice for either election, and BPA reserved the right to create a second Load Growth rate, if necessary, to protect the interests of the early signers.

### **2.2.3 Changing Products**

#### **Issue 1:**

**Whether the contract should provide an opportunity for the customer to change its initial product selection.**

#### **Policy Position**

Section II.C.6 of the Policy stated that, “BPA will not include provisions in its contracts that provide an option to change products between Load Following, Block, or Slice.”

#### **Public Comment**

During the Regional Dialogue process several customers or their representatives raised strong concerns about not being able to change products in the event their product choice turned out to be economically or operationally unworkable. Several customers and customer representatives argued that it was unreasonable for the contracts to provide no opportunity to change the initial product selection given the 20-year duration of the contracts. They also stated that if a single opportunity to change the initial product selection was provided, it should not be subject to rigid timing limitations so that individual customers could choose when to exercise the option. (PPC, et al., CON-014; Grays Harbor, CON-024; LL&P, CON-025) Three parties stated that requiring all customers to change products on the same day would result in a product selection “cliff” that would benefit neither BPA nor the customers. (Mason 1, CON-002; LL&P, CON-025; Benton REA CON-044)

#### **Evaluation and Decision**

The April 2008 contract drafts included a contract provision that allowed a customer a one time right to change the product it purchases from BPA. This provision was added after significant discussion with the customers on the subject during product workshops.

Based on that customer input, BPA decided to revise the contract templates and allow customers a single opportunity to switch from an original product choice (Load Following, Block, or Slice) to another. Under the product change option, customers have the option to provide notice no later than May 31, 2016, that they wish to switch products with an effective date of October 1, 2019. The contract will not provide customers other opportunities to change their product choice because doing so involves a risk of considerable administrative uncertainty which thwarts the certainty in obligations for both parties that the contracts are intended to achieve. The Slice contract does include provisions that allow Slice customers to transfer to another product if certain provisions under the Slice contract are not met. BPA will remain open to additional product switching on a case-by-case basis as long it does not shift costs or risks to BPA and its other customers.

#### **2.2.4 Most Favored Nations**

##### **Issue 1:**

**Whether the Regional Dialogue contracts should include a “Most Favored Nations” clause.**

##### **Policy Position**

The Policy did not address this issue.

##### **Public Comment**

Springfield Utility Board (SUB) requested that BPA add a “Most Favored Nations” clause to Regional Dialogue contracts. (SUB, CON-010) SUB stated such a clause would be patterned after “miscellaneous” provision in section 20(c) in BPA’s 1981 long-term power sales contracts, which stated:

20(c) If Bonneville offers to enter into a written amendment of any other similar long-term power sales contract other than informal arrangements between parties...Bonneville shall offer to the Purchaser a corresponding amendment of this contract, to the extent such a corresponding amendment would be applicable to the Purchaser under this contract.

*Id.*, citing BPA’s 1981 long-term power sales contract. SUB argued that there are outstanding issues and power service products to be decided upon, that are not addressed in the contract templates, and BPA may enter into agreements on such issues after the long-term power sales contracts are signed. They argue these issues or decisions may disrupt the balance of interests that parties thought they had obtained when they were entering into the original contracts were signed. *Id.* SUB stated that adding a “Most Favored Nations” clause to preference customer contract templates would go a long way toward mitigating the substantial uncertainty all customers face in signing long-term contracts. *Id.*

## **Evaluation and Decision**

Neither the April 2008 contract templates nor the final contract templates include a “Most Favored Nations” clause. BPA recognizes the importance of providing certainty on the business deal customers will be agreeing to when they sign their Regional Dialogue contracts. For that reason, BPA established standard contract templates for these contracts and is in the process of establishing the rate construct for the tiering of rates in the TRM, with rules governing how rates will be established during the term of the agreements.

BPA’s Subscription contracts did not include such a provision because customers believed that more individualized terms were important. Conversely, the 1981 power sales contracts included a “Most Favored Nations” clause to ensure that if one party were offered any form of amendment then other parties would also be offered the same amendment if applied to their service. Given the request for individual contracts, BPA chose not to include such a provision in the Subscription Contracts. That type of clause made little sense in the rapidly changing wholesale utility market environment the region was facing, and there was a need to tailor aspects of the contracts to fit individual needs of customers. The reality the region faced then, and even now, is that a one-size-fits-all approach is impractical; a “Most Favored Nations”-type of clause would unnecessarily constrain the ability of all parties to transact changes needed for business. For example, there are times when adding a specific provision to address an individual customer’s situation provides benefits to BPA and all of its other customers, but making the same change for another customer could be costly for all. BPA does not believe it would be a prudent business decision to include a “Most Favored Nations” clause in the Regional Dialogue contracts. Therefore, BPA has decided not to include such a provision in its contract templates.

### **2.2.5 Other Contract Implementation Issues**

#### **2.2.5.1 Revision, Notice Deadlines, and Purchase Periods**

##### **Policy Position**

BPA’s contracts will require that notice be given by the customer for certain elections that are made as to its power purchases choices and for rate alternatives. Customers have the obligation to provide BPA with information on changes in their load and in the non-Federal resources annually so that BPA may perform its determination of its net requirement load obligation to the customer. Other determination need to be made by either BPA or the customer on a timely basis. The contract templates include provisions for implementing and managing those decisions.

##### **Public Comment**

Numerous parties expressed concern about contract revisions, notice periods, and resource purchase periods. Several parties argued that revisions to exhibits should be by mutual agreement. (Mason 1, CON-002; Ellensburg, CON-007; PPC, et al., CON-014; Grays Harbor, CON-024; PNGC, CON-026) Other parties argued that resource notice

deadlines and purchase commitment periods are too long, too inflexible, will impair the ability of customers to actually develop and use non-Federal resources, or that more options are needed. (Mason 1, CON-002; Mason 3, CON-023; United, CON-029; LL&P, CON-025) Other parties argued that the September 30 or October 1 deadline is too late in the annual process establishing the customer's net requirement for parties to come to an agreement on the Tier 1 Block power amount. (Benton PUD, CON-012; Franklin, CON-018; Grays Harbor, CON-024)

### **Evaluation and Decision**

Consistent with its 5(b)/9(c) Policy there are determinations regarding BPA's net requirement obligation to the customer that BPA will continue to make. Some determination will also require the timely input of a customer as to additional or new information needed for a determination. In response to comments and through the negotiation sessions, BPA and customer representatives agreed to revise certain parts of the contract templates. BPA's right to unilaterally modify the exhibits was limited where the customer had a choice to make, such as in its exercise of resource removal. In most cases, any changes to contract templates will reflect BPA determinations, customer elections, or choices that the customer has provided to BPA in writing. BPA recognizes that the original procedures for determining annual block amounts would have resulted in the customer finding out how much power it would receive from BPA the day before deliveries. Consequently, BPA moved up the timing for Tier 1 Block amount determinations by about 2 weeks. BPA revised contract templates giving customers the right to replace certain Tier 2 purchase obligations with non-Federal resources on a shorter timeline than stated Notice Deadlines and Purchase Periods providing customers additional flexibility. BPA concludes that the changes will better coordinate the role of the customer and BPA in implementing the various notice and changes that will be necessary to implement the contracts after execution. *See* section 2.1.2 for additional discussion of specific issues and more information.

### **2.2.5.2 Link between Contract and TRM**

#### **Issue 1:**

**Whether the contract and TRM work in concert.**

#### **Policy Position**

BPA intended for the provisions of the TRM and contract to work in concert.

#### **Public Comment**

Numerous parties argued for more clarity regarding the connection between contracts and the TRM. Several argued that the process for modifying the TRM should be established in the contract, and a few expressed the concern that changes should be subject to customer approval. (Mason 1, CON-002; NIPPC, CON-003; ATNI, CON-009; PPC, et al., CON-014; Pacific, CON-019; Snohomish, CON-021; Grays Harbor, CON-024; LL&P, CON-025; Benton REA, CON-044; ATNI, CON-047) Yakama Power

commented that terms from the TRM should be included in the contract or that a specific dated version of the TRM should be explicitly referenced. (Yakama Power, CON-034)

### **Evaluation and Decision**

In response, to clarify the connection between the TRM and the contract templates BPA added a provision to the contract requiring parties to amend the contract to reflect any changes made to TRM definitions.

BPA and customers also worked together on a provision that recites TRM definitions. This provision also specifies that any disputes over the meaning or implementation of the TRM shall be resolved pursuant to the terms of the TRM.

### **Issue 2:**

**Whether BPA's request that customers execute their Regional Dialogue CHWM contracts by December 1, 2008 and before the TRM is reviewed by the U.S. Court of Appeals for the Ninth Circuit is a violation of due process**

### **Policy Position**

Execution of new Regional Dialogue power sales contracts needs to be timed prior to the end of the year so that both BPA and the customers have the certainty needed to make resource decisions in 2009 for the post 2011 period. BPA currently is authorized by the DOE to execute contracts and BPA would like to avoid additional reviews which may occur with a new administration and delay execution and implementation of the contracts. The contracts are developed in coordination with BPA's new Priority Firm power rate design as proposed in the TRM and would implement that pricing. The TRM is being developed in a 7(i) proceeding and has its own timeline, so that contract execution and rate decisions cannot be directly linked.

### **Public Comment**

Clatskanie contends that forcing Clatskanie and other preference customers to execute post-2011 power sales contracts is problematic. Clatskanie Br., TRM-12-B-CK-1, at 14 Clatskanie will be forced to make a difficult decision: (1) execute a contract that does not recognize that the entire Wauna CF/CT load is entitled to service at the Tier 1 rate and, in effect, arguably waive the rights afforded to Wauna's CF/CT status; or (2) refuse to execute a contract because execution would cause a forfeiture of a right to a CHWM contract and therefore jeopardize its statutory right to purchase any power at Tier 1 rates. The onslaught of meetings from all processes creates circumstances that constitute a violation of constitutional due process because Clatskanie has been given no meaningful opportunity or time to be heard. Clatskanie has no opportunity to understand how the decisions between the two processes are interrelated and how they determine rights,

### **Evaluation and Decision**

BPA understands that customers may wish to petition the U.S. Court of Appeals for the Ninth Circuit for review of BPA's proposed contracts, and is of the view that a customer's execution (signing) of the new contracts will not act to in any way waive or otherwise deprive the customer of its right to raise claims that they could otherwise



timely raise to the Ninth Circuit. In this regard, neither Georgia Pacific's nor Clatskanie's Wauna CF/CT claims will be subject to a BPA waiver claim due to Clatskanie's execution of the new contract. As a consequence, Clatskanie will not be forced to make the difficult decision that it believed it faced, as noted above. Notwithstanding that this appears to address Clatskanie's real underlying concern, we will address the technical, legal arguments that Clatskanie raised.

BPA has conducted parallel public processes for its Regional Dialogue contracts and for the TRM. Clatskanie has participated in both processes and is fully aware of the issues, the timing, and the delineation of issues between these two processes. BPA is statutorily required by section 7 to conduct its ratemaking, rate design and pricing decisions in a section 7(i) proceeding and that is what has occurred here. *See, Central Lincoln PUD v. BPA*, 735F. 2d 1101, (9<sup>th</sup> Cir. 1984). Ratemaking is a statutorily separate function under section 7 of the Northwest Power Act from the offering and signing of contracts under section 5. Adoption of final rates by the Administrator is a statutorily distinct final action under section 9(e) of the Northwest Power Act. Congress distinguished between these two final administrative actions and it specified a particular process for BPA's adoption of rates. Congress did not tie the two together. BPA's rate processes and its contract negotiations processes have been conducted separately since 1980. There is no statutory obligation that a rate process or a contract process must be completed first and then challenged first for either action to be final. If one process concludes ahead of the other process, then that is wholly consistent with BPA's statutory obligations.

As to BPA violating a constitutional due process requirement, Clatskanie is merely arguing that the press of work before the agency creates an impairment of due process. BPA provided multiple opportunities for customers to give comment both on the contracts and on the TRM. Each process has been extensive. It is only Clatskanie's discomfort with BPA following the statutorily defined scheme separating rates from contract development that is the basis for this assertion. Clatskanie argues that they need to have a final Ninth Circuit decision on the TRM before they are able to decide whether to sign their contract with BPA. They argue that certain provisions are contrary to law and that they want to challenge them. Nothing in the contract precludes the Court's review of the contract terms under section 9(e) or Clatskanie's ability to raise issues on the TRM and, as indicated above, a customer's execution (signing) of the new contracts will not act to in any way waive or otherwise deprive the customer of its right to raise claims that they could otherwise timely raise to the Ninth Circuit.

Clatskanie argues that BPA has an obligation to "allow customers to make a good faith legal challenge" to the rate before they execute their CHWM contract. The issue raised by Clatskanie over what could be a difficult decision for Clatskanie is not a violation of due process and Clatskanie can bring a legal challenge on either the TRM under section 9(e)(1)(G) or the CHWM contract under section 9(e)(1)(B), once those respective decisions are final actions.

Issues concerning the TRM's rate treatment for a CF/CT load are properly raised in the TRM section 7(i) proceeding because those issues would concern rate design and pertain

to the proposed establishment of rates that will be applied to sales of power under the new power sales contracts. If Clatskanie wants to challenge a provision in its CHWM contract or BPA's execution of those contracts, then it may do so once BPA has taken a final action under section 9(e)(1)(B). Under section 9(e) of the Northwest Power Act, parties have rights to legally challenge final actions and decisions of BPA before the U.S. Court of Appeals for the Ninth Circuit, including the execution of power sales contracts and the adoption of final rates following review and approval by FERC. *See* 16 U.S.C. §839f(e)(1)(B), and 839f(e)(1)(G) and 839f(e)(4)(D). BPA's TRM and the CHWM contracts followed their individual processes, as defined by the Northwest Power Act. BPA has afforded due process to all parties in each of those processes. Congress defined the jurisdictional prerequisite for a final action in the adoption of BPA rates *as separate from* BPA's execution of its power sales contract—either of which could be separately challenged before the U.S. Court of Appeals for the Ninth Circuit. Congress' separation of these final agency actions does not create constitutional due process impairment.

### **2.2.5.3 Pacific Northwest Tribes**

#### **Policy Position**

BPA has proposed treating current tribal utilities the same as other preference entities under the Regional Dialogue Policy, the TRM and the contract templates, except for the provision of 40 aMW that was specifically earmarked for load growth and annexed loads of new tribal utilities.

#### **Public Comment**

A few parties commented that their legal status is independent of the resident state and noted that tribal utilities would likely be formed under the laws of a tribe, not under the laws of a state as stated in contract templates. (ATNI, CON-009; UIUC, CON-032; Yakama Power, CON-013; CON-34)

ATNI, UIUC, and Yakama Power also argued that contract language implementing tribal utilities' 40 aMW HWM exception is not adequately specified in the contract template. (ATNI, CON-009 & CON-047; UIUC, CON-051; Yakama Power, CON-034)

#### **Evaluation and Decision**

BPA's standards of service anticipate that the formation of a tribal utility will be consistent with and under the laws of the tribe. BPA's standards for service do not require that a tribal utility be formed under the laws of a state. BPA has revised the templates to address this concern. The Policy proposed that 40 aMWs of the 250 aMWs new public load augmentation amount be earmarked for new tribal utilities for a specified period of time. BPA agreed that the contract terms regarding this part of its policy could be clearer and revised the contract template language to clarify how the 40 aMW HWM exception for tribal utilities will work toward rate period and contract term limits established for new public load.

#### **2.2.5.4 CHWM and Annexation**

##### **Policy Position**

The Policy stated that a new public formed out of an existing public would receive a proportional share of the existing public's load. The April 2008 contract draft used the concept of proportionality for annexed levels as well.

##### **Public Comment**

Benton PUD expressed concern regarding adjustment and allocation of CHWM in the event of an annexation of one public's load by another public. (Benton PUD, CON-006) In Benton's first comment, it stated that the utilities should submit to BPA their proposals of how much HWM should be transferred. *Id.* If the utilities agree, the proposals would be identical. *Id.* BPA then would select the proposal that "in its sole opinion best meets the spirit and intent of Regional Dialogue." *Id.* In its second comment, Benton stated that if the two utilities can agree on how much HWM should be transferred, or the utility losing load can provide verifiable load data, BPA should consider that data to determine the amount of HWM to transfer. (Benton PUD, CON-042)

##### **Evaluation and Decision**

BPA agreed that receiving and considering information from the utilities involved could result in information that would be used to establish a superior policy outcome. Information on loads and resources of both utilities would result in the ability to make a better informed decision. Based on this, BPA added language to contract templates that provides an opportunity for utilities to offer information to BPA. The language further provided that, if the utilities involved in the annexation agree on the CHWM transfer amount, the agreed-upon amount will generally establish the transfer amount.

#### **2.2.5.5 Volume of Information Required to be Made Available to BPA**

##### **Policy Position**

The Policy did not address this issue.

##### **Public Comment**

Numerous parties commented about the volume of information and data that customers were required to make available to BPA, and argued that information required by BPA was in excess of that reasonably needed to administer the contract. (Snohomish, CON-021; Slice Group, CON-022) Other parties expressed concern about the level of detailed utility-specific information made publicly available. (Franklin PUD, CON-018; Grays Harbor, CON-024; Benton PUD, CON-012) Other parties proposed alternatives for obtaining needed information. Cowlitz County PUD proposed that BPA Power Services obtain needed information from BPA Transmission Services instead of requiring customers to duplicate data submittal. (Cowlitz, CON-050) WPAG proposed that, to the extent possible, BPA gather needed information from current reports that are prepared and issued by utilities. (WPAG, CON-045)

Two parties argued that the 10-year conservation plan and renewables resources reporting requirements were overly burdensome for small utility customers. NRU stated that it wanted to discuss waiving such requirements, perhaps based on utility size. (NRU, CON-015) ATNI proposed that for small utilities the reporting cycle for the 10-year conservation plan be changed to every 5 years instead of every 2 years to minimize administrative burden. (ATNI, CON-009)

### **Evaluation and Decision**

BPA discussed these issues with customers during negotiations and explained the reasons for the need for information. In some cases, the information requirements were pared back for final contract templates. BPA subsequently modified several provisions to reduce the need for customers to provide information already available to BPA. In response to Cowlitz's suggestion that Power Services obtain information from BPA Transmission Services, BPA worked with the customers and Transmission Services to establish and clarify the extent that information provided to Transmission Services could be used by Power Services. Regarding WPAG's proposal that BPA obtain information from current annual reports of the utilities, BPA does not find that annual reports alone are sufficient because they are not published or available on a timely basis to meet the needs of BPA and the information contained may lack a sufficient level of detail.

Regarding conservation reporting and NRU's comment, BPA revised the contract templates to exempt small customers with an average annual Total Retail Load of 25 aMW or less from (1) reporting to BPA a 10-year conservation plan; and, (2) providing BPA an annual forecast of generation from renewable resources used to serve their loads. Instead, such utilities will annually submit to BPA plans and reports that the utility prepares in its normal course of business. This will allow BPA to get the information it needs without inordinately impacting the limited resources of small utilities.

### **2.2.5.6 Interest Rates**

#### **Policy Position**

The Policy did not address this issue.

#### **Public Comment**

The City of Burley stated that the contract templates language regarding interest rates on late customer payments should be substantially the same as interest rate language on BPA payments to the customer. (Burley, CON-030) This issue was also raised by customers in comments on the Bridge RPSA template and the Long-Term RPSA template.

### **Evaluation and Decision**

As explained on page 41 of the Record of Decision for the RPSA templates, having two different interest rates for these different types of transactions is reasonable. BPA does not apply the higher rate to disputed bills that is applied to late payments because of the basic premise behind both types of actions. If a customer decides not to pay its bill, BPA

does not receive any money, and the utility keeps the money to use it for other purposes. The higher interest rate provides a customer the incentive to pay BPA on time and imposes a reasonable penalty if it does not. Without this distinction, it might be possible that a customer's cheapest source of short-term capital might be attained by simply not paying its bill. BPA does not believe this would be a prudent business outcome and is therefore requiring the higher interest rate as a means of aligning the economics and the requirements of the contract for the customer to pay its bill. In the event of a disputed bill, however, the utility pays the amount in dispute to BPA and then works with BPA to resolve the dispute. In this case, BPA receives the funds, and the utility does not have the ability to use the money for something else. The most likely cause of a dispute on a bill that results in a refund is an inadvertent billing error. In this case the cause is not willful and a penalty rate should not apply. For this reason the interest rate for the refund is lower than late payments.

### **2.2.5.7 Resource Support Services**

#### **Issue 1:**

#### **Should BPA offer Resource Support Services?**

#### **Policy Position**

In the Policy BPA stated it "will offer services necessary to integrate renewable resources to meet a customer's regional firm consumer requirements load.... Integration services for other types of resources will also be discussed in those forums." (2007 RD Policy at 21)

#### **Public Comment**

During the course of discussions with parties on this topic over the last year (including written comments submitted by NRU) (NRU, CON-062) and specifically in the direct cases filed by both NRU (NRU, TRM-12-E-NR-1, at 3-4) and PNGC (PNGC, TRM-12-E-PN-1, at 6-8), commenters requested that during FY 2009 BPA develop in more detail the resource support services it will offer under the CHWM Contracts.

#### **Evaluation and Decision**

BPA has held several public workshops to discuss the possible RSS BPA was planning to offer under the CHWM Contracts. In February 2008, BPA issued a "Product Guidebook" that provided "background on Products, Rates, and Resource Support Services available to BPA's Public Utilities" under the CHWM Contracts. The descriptions of the RSS in this document represent the progress at the time that had been made in refining the RSS concepts. Some additional refining was done since, and more time is needed to address several remaining implementation details. Thus, BPA agrees with the commenters that FY 2009 would be well spent developing these services in more detail. Once these details have developed, BPA will be able to offer Exhibit D draft language reflecting the offered services in more refined fashion. BPA intends to do this prior to August 1, 2009, in order to give customers sufficient time to make their election regarding their above-RHWM service during the transition period (FY 2012-2014).

As of the date of this ROD, RSS includes:

- **Diurnal Flattening Service (DFS)** – a service that makes a resource that is variable or intermittent, or that portion of such resource that is variable or intermittent, equivalent to a resource that is flat within each Monthly/Diurnal period.
- **Secondary Crediting Service (SCS)** – a service that provides a monetary credit for the secondary output from an Existing Resource that has a firm critical energy component and a secondary energy component.
- **Forced Outage Reserves (FORS)** – a service that provides an agreed-to-amount of capacity and energy to load during forced outages of a qualifying resource.
- **Transmission Curtailment Management Services (TCMS)** – a service that BPA will provide to customers with a qualifying resource when a transmission curtailment occurs between such resource and the customer’s load.
- **Resource Remarketing Service (RRS)** – a service that will be offered through the Firm Power Products and Services (FPS) rate schedule and will be considered and negotiated on a case-by-case basis. The Resource Remarketing Service is designed to help customers manage the “lumpiness” of acquiring resources that are larger than their above-RHWM load. Customers will receive a credit for the excess power until their load growth catches up to the size of the resource purchased.

Related charges are:

- The **Resource Shaping Charge** is not a service, but rather a credit or charge that adjusts for the difference in value between a resource shape that is flat within each Monthly/Diurnal period (but not necessarily flat when comparing one Monthly/Diurnal period to another) and an equivalently sized flat annual block (flat for all hours of the Fiscal Year). This is calculated before the rate period and fixed. This is applied to both resources that have DFS applied and to resources that do not, but that are scheduled in shapes other than the flat annual block shape.
- The **Resource Shaping Charge Adjustment** is an end-of-month energy adjustment that ensures neutrality between the forecast and actual generation. The Resource Shaping Charge Adjustment is not a penalty rate and is calculated using the exact same rates used for calculating the Resource Shaping Charge. This will only be applied to resources receiving the DFS.

Several refinements have already been made to the general resource support service requirements described in the Product Guidebook and Final RD Policy, as follows:

1. RSS will be available for all new renewable projects that are dedicated to serve above-RHWM load in CHWM contracts. RSS will be available for other types of non-Federal resources for Load Following customers.
2. In all cases, these services will only be available for customers' Specified Resources, which ensures that these services are being used for resources that are intended for serving customers' Total Retail Load, and not a customer's market sales.
3. The Resource Remarketing Service is expected to be available to Load Following customers to accommodate those who purchase resources ahead of need and wish to have BPA manage the remarketing of these resources on their behalf until they grow into it. This service is only available for an amount of non-Federal resource that is less than or equal to the amount of above-RHWM load a customer is expected to have by the end of the purchase period that is not already planned to be served by BPA at a Tier 2 rate or by another non-Federal resource.
4. The Guidebook stated that customers would be required to have their resources that are located outside the BPA Balancing Authority (BA) scheduled on firm transmission to the BPA BA as a requirement of RSS. BPA is now allowing for renewable resources to be scheduled on non-firm transmission to the BPA BA. (Product Guidebook at 48)

## **Issue 2:**

### **How should BPA address possible delivery arrangements when providing the RSS for a non-Federal resource serving above-RHWM transfer load?**

#### **Policy Position**

The Policy did not address how the services BPA will offer to integrate non-Federal resources might accommodate delivery to transfer loads. The draft "Product Guidebook," issued February 2008, stated in reference to RSS that, "There are special circumstances presented by some customers served by transfer that present particular challenges for the provision of these services. BPA has not resolved all of these issues, but intends to continue working on them, so that if possible, all Load Following customers will have access to these services." (Product Guidebook at 48) BPA also stated, "In general, non-Federal resources located outside of BPA's BA will also be scheduled to the customer's load when the customer is located inside or outside BPA's BA (whether served by transfer or operating their own BA). An exception to this rule is when the customer is served by transfer and its resource is in their transferor's BA. In this instance, since BPA is requiring the resource to be scheduled to the BPA BA, there may not be the ability to schedule the non-Federal resource back to the customer's load. In these circumstances BPA will exchange Federal power for non-Federal power delivered to the BPA BA. There may be additional circumstances that allow for mutually agreeable alternatives for the scheduling of a customer's non-Federal resource(s)." (Product Guidebook at 49) BPA goes on to state that, "Unless otherwise agreed to by

BPA, resources located outside of the BPA BA must be scheduled on firm transmission to the BPA BA in order for BPA to provide a customer with RSS for its non-Federal resource.” (Product Guidebook at 49)

### **Public Comment**

In several public customer meetings, transfer customers expressed concern with the application of RSS to non-Federal resources of customers who take delivery by transfer, outlined in the Product Guidebook. Specifically, customers objected to the requirement that in order for BPA to provide RSS to a transfer customer’s non-Federal resource(s), that resource must first be scheduled to the BPA BA. Customers suggested that this requirement was overly broad, and that BPA should not create such a broad requirement when in many cases a customer could deliver a non-Federal resource located outside BPA’s BA directly to a transfer load, and BPA could provide RSS for that resource. Customers also objected to the large transmission costs these requirements would place on the customers, when often the requirement was unnecessary to provide the service(s).

Western Montana G&T (WMTG&T, TRM-12-E-WM-1, pp. 2-5) and NRU’s testimony stressed the importance of RSS for transfer customers, and predicted that few alternatives to RSS would exist in the market. WMT G&T also commented that BPA’s proposed requirement that in order to qualify for RSS a transfer customer must schedule their non-Federal resource(s) to the BPA BA placed customers served by transfer at an inherent disadvantage when trying to integrate non-Federal resources compared to customers directly connected to the BPA BA.

### **Evaluation and Decision:**

Providing services to integrate a non-Federal resource serving a transfer load may be problematic when the transmission used to deliver Federal power to that transfer load flows over a constrained transmission path. The requirement stated in the Product Guidebook, that in order to qualify for RSS all non-Federal resources must be delivered to the BPA BA, was intended to create a baseline requirement that could accommodate all non-Federal resources and all transfer loads.

Due to transmission constraints, any RSS BPA offers in the future will require special evaluation and consideration of the best plan of service for the delivery of non-Federal resources to transfer loads. However, BPA recognizes that the transmission constraints that complicate RSS for some transfer customers do not affect all transfer customers, and that in many instances the direct delivery of a non-Federal resource will be a mutually acceptable and beneficial delivery arrangement.

Consistent with the Policy, BPA will offer RSS to transfer customers for their non-Federal resources in order to encourage the development of customer resources and to the extent practical BPA will treat transfer customers the same as directly connected customers. However, generation needs to be sited and built in reasonable locations that minimize problems and existing transmission constraints must be a consideration for customers when they are making their resource decisions.



To the extent that it constitutes the best plan of service, any RSS BPA offers in the future will accommodate the delivery of a non-Federal resource directly to transfer load. In some cases there may be additional scheduling or transmission cost associated with providing RSS for the non-Federal resource that is delivered directly to the transfer customer. These costs of providing RSS will be paid for by the transfer customer.

When offering any RSS in the future, BPA will work with the transfer customer to develop the best plan of service for providing RSS that best fits the customer's resource choice and the existing circumstances of transmission constraints.

In other situations transmission constraints may make it physically impractical or financially unsound for BPA to provide RSS from the Federal system. In these circumstances BPA will consider alternate plans of service including the delivery of the non-Federal resource to the BPA system, and BPA's acquisition of services from a third party. BPA will attempt to provide RSS for all non-Federal resources serving transfer load, but where it is physically impractical, and BPA does not develop a viable alternate plan of service, customers may be required to wheel the non-Federal resource to the BPA BA in order to obtain RSS. Any costs of providing an alternate plan of service for the RSS will be paid for by the transfer customer.

### **2.3 SLICE PRODUCT**

Section III.A of the Policy stated that a Slice product similar to the Slice product under the Subscription contracts would be developed based on Alternative 2, as described on pages 41-45 of BPA's July 2007 Policy, and offered to BPA's preference customers as part of Regional Dialogue implementation. Near-final Slice/Block contract templates were offered September 8, 2008, with a revised final version being completed on October 17, 2008, that incorporated changes negotiated during the intervening 6-week period. The Slice product that was developed during the Regional Dialogue process follows section III of the Policy, was based on Alternative 2, and meets the 10 principles specified in the section. Implementation and contract issues introduced during negotiation and contract development are addressed below.

#### **Issue 1:**

**Whether the Slice product should be limited to 25 percent of the Tier 1 System Firm Critical Output.**

#### **Policy Position**

Section III.C.3 of the Policy indicated that BPA would increase the current amount of the Slice product (22.6 percent) to be made available to its preference customers, up to 25 percent of the planned FBS firm resource for FY 2012. (Note: The 25 percent factor will be applied to the amount defined in the TRM as the "Tier 1 System Firm Critical Output.")

## **Public Comment**

The Slice Customers commented that it was increasingly clear that the amount of Slice product available within the 25 percent cap proposed by BPA would be insufficient to accommodate their needs. (Slice Group, CON-067) The Slice Customers argued that they knew of no objective evidence or quantitative analysis that supports a seemingly arbitrary 25 percent cap to the availability of the Slice product. *Id.* Moreover, the Slice Customers claim, the circumstances that previously motivated BPA to restrict Slice product availability have changed with BPA's proposal to eliminate the substantial scheduling flexibility associated with the current Block product. *Id.* Dick Helgeson, representing a group of interested Slice customers, provided BPA a document that described 11 "changed circumstances," ranging from the significant interest in Slice to the demise of the PacifiCorp Peaking contract, that have occurred since BPA made its decision to limit Slice to 25 percent. From their perspective, these changes justify increasing the amount of Slice beyond the 25 percent limit. (Slice Group, CON-070) Springfield Utility Board (SUB) argued against a proposed increase from 1850 aMW (25 percent) to 2000 aMW of Slice, stating that such an increase would materially change the balance of interests that had been reached through the Regional Dialogue process. SUB also stated that the FBS has only so much flexibility and a decision to increase the amount of the Slice product would result in a cost shift to the Load Following product. Additionally, SUB indicated it would support an increased cap on the Slice product from 1,850 aMW to 2,000 aMW only if the incremental increase (150 aMW) is treated as a system obligation for purposes of the FBS operations being used to follow Load Following customers and this system obligation is set at cost-based rates. (SUB, CON-075)

## **Evaluation and Decision**

The issue of limiting the availability of Slice was addressed in the ROD dated July 2007, under Issue 4 of the Slice section. Public comment on this issue addressed in the ROD ranged from current Slice customers opposing any kind of limit on Slice, to non-Slice customers opposing any amount of increase in Slice above the current amount. BPA decided to increase the amount of Slice from 22.6 percent of the current firm energy capability to 25 percent of the post-FY 2011 firm energy capability, which represents an 18 percent increase in the amount of Slice relative to the amount sold for FY 2008. In subsequent discussions, BPA stated it would consider a modest increase to the 25 percent limit if the interest in Slice were substantially greater than expected.

BPA's decision to increase Slice to 25 percent was made in concert with the decision to refine the post-2011 Slice product based upon the "Alternative 2" concepts, which BPA anticipated would modestly reduce flexibility available to customers. This assumption is yet to be proven, and even with the Alternative 2 refinements, Slice customers will be insulated from changes in system operating conditions for 60 minutes preceding the start of each delivery hour through the end of each delivery hour, meaning, in effect, 2 full hours.

Slice customers continue to believe that the amount of Slice offered should be increased to meet all requests of potential Slice purchasers. The Slice customers provided an

argument that identified several changes in “conditions” from the date of the Policy which they asserted required a change in the amount of Slice offered by BPA. BPA responded to these assertions by letter to Mr. Helgeson dated October 1, 2008 with an attached analysis and response. BPA’s written response to the customer letter may be found in comment CON-070 and is specifically incorporated as a part of BPA’s response to these issues in this ROD.

BPA acknowledges that there is additional interest by customers in the Slice product. Based on the recent submittals of Good Faith Estimates (GFE) to BPA from 20 of its customers, it is evident that the potential interest in Slice is considerable, and greater than expected. However, BPA has learned one of the largest of these 20 customers has since decided not to purchase Slice and several others have indicated they are “on the fence” and may choose Load Following. Of the 19 remaining customers that submitted GFE’s, 17 indicated a need for exactly 60 percent of their load as Slice as their minimum, apparently making little effort to determine individually or objectively the amount of Slice that would be viable, and even though some of the current Slice customers currently operate with less than 60 percent Slice. These customers stated that the 60 percent minimum was primarily based on an economic comparison of the Slice product to the Block and Load Following products, rather than an operational need or issue. These products are offered to meet all or a portion of the customer’s net requirement load and are not offered to preference customers to maximize economic advantages of one product against another. Maximizing the economic benefit of one customer or one BPA product against another is not BPA’s purpose and is not consistent with the Slice principles adopted in the Policy.

Prior to BPA submitting its Policy and ROD in 2007, considerable time was spent reviewing and analyzing whether BPA should offer the Slice product at all in the post-FY 2011 period. BPA has the discretion to decide to offer or not offer a Slice product. BPA decided to offer the product based on Alternative 2 as described in its Policy, with some reduced flexibility and with a limit on the amount of Slice that would be offered. That conclusion was reached only after extensive review of the current product and regional discussion. BPA’s Administrator and the other senior BPA managers with program responsibility spent a considerable amount of time discussing the characteristics, advantages, and disadvantages of the Slice product as it exists today. BPA’s professional staff with responsibility for operating the Federal hydro system were intimately involved in these discussions, although the decisions were made by senior management. BPA’s conclusion with respect to the amount of operating flexibility and the limit on Slice availability was based on experience with the existing product and our in-depth understanding of the flexibility, constraints, and variability associated with operating the Federal hydro system. Factors such as the ending of the PacifiCorp capacity contract were known and considered in reaching this conclusion. BPA made these decisions as a package—in other words, BPA did not decide to limit flexibility separate from the decision as to the limit on Slice availability. BPA reaffirms the basis of these decisions and the linkage between the amount of the product and the flexibility in the product.

During negotiations on the Slice product, BPA offered to explore a higher limit for the amount of Slice availability and greater reductions in the product's flexibility but this alternative was not pursued. Slice customers seemed to prefer having a product with more flexibility even if less of it was offered by BPA. Consequently, the modestly reduced flexibility available to a Slice purchaser was fully anticipated when BPA determined to modestly increase the amount of the Slice product. This was a matter of interest not just to BPA and Slice purchasers, but also to other regional parties who have expressed strong points of view about the right amount of Slice sales. BPA was confident of its judgment and determined not to take significant time away from the broader effort of executing new contracts. As a result, BPA relied on the professional judgment of staff and senior management to make this decision. These decision-makers are highly experienced in managing the complexity of the Federal hydro system.

The Slice product has added great complexity to the already-complex management of the Federal hydro system. A fundamental factor BPA considered is that Slice adds substantially to the uncertainty of system obligations because Slice customers have the ability to modify their schedules up to 30 minutes prior to the hour of delivery. The uncertainty created by the sale of Slice is greater than the uncertainty of the Slice customers' net requirement loads alone: the Slice product contains not only the inherent uncertainty of load variations, but also the uncertainty of Slice customers' discretionary marketing decisions. This additional uncertainty occurs in an environment in which system operators already have substantial challenges managing the variability of a hydro system to perfectly match loads, resources, biological opinion requirements, navigation, flood control, and all other non-power requirements. The customers acknowledge this uncertainty, and offered to include a provision in the contract that would allow BPA, with 5-hour notification, to select no more than 24 hours per year when the customers would modify their surplus marketing schedules in real-time, but only as a quid pro quo to BPA's agreement to increase Slice to 2300 aMW. BPA reviewed this proposal and determined that the ability to limit real-time change rights on 24 out of 8760 hours per year was of limited value.

BPA acknowledges the Slice customers' perspective that certain circumstances have changed since the July 2007 decision to limit Slice to 25 percent of the available Tier 1 system, or 1850 aMW. BPA does not agree that these changed circumstances lead to the conclusion that BPA should substantially increase the amount of Slice above amounts already considered. The issue of uncertainty created by Slice remains, and undoubtedly increases as the amount of Slice is increased.

Springfield Utility Board (SUB) submitted a comment to BPA on its possible consideration of an increase in the amount of Slice BPA might offer. SUB objected to BPA increasing the amount over 25 percent arguing that it would reduce system flexibility available to other customer and cost them more. BPA also discussed the potential increase from the 1850 aMW (25 percent) established in the Policy to 2000 aMW with representatives from NRU as well as interested Slice customers in order to assess the interests of all customer groups. NRU did not object. In terms of a cost-shift, altering the amount of Slice offered should not create a cost-shift, because the

amount of surplus revenue that factor into non-Slice rates changes proportionally with the number of MW shifted between Slice and non-Slice products. More Slice does mean less secondary revenue for BPA, but that reduced secondary revenue is spread across a proportionally smaller base of non-Slice customers.

Given the modest reductions in Slice product flexibility, BPA believes that increasing the amount of Slice product offered under the Policy up to 2000 aMW would be a reasonable change. The refinements made under Alternative 2 should help BPA better manage Slice uncertainty at a modestly higher amount than proposed under the Policy. Based on the consideration described above, BPA believes that further increases beyond 2000 aMW would not be prudent.

After considering all the issues, BPA has decided to offer up to 2000 aMW of Slice rather than the 1850 aMW (25 percent) planned FBS firm resource for FY 2012. This decision was relayed to customers who are currently interested in Slice through a letter from Steve Wright dated October 1, 2008. (See CON-070)

## **Issue 2:**

**What amount of compensation should Slice customers receive in the event BPA curtails Surplus Slice Output energy or capacity?**

### **Policy Position**

The Policy indicated that the Regional Dialogue Slice product would be similar to the original Slice product, but with a number of refinements. (2007 RD Policy at 26)

### **Public Comment**

The Slice Customers argued that BPA's proposed compensation to Slice customers in the event Surplus Slice Output energy or capacity is recalled by BPA under the Regional Preference Act is a major departure from the terms of the current Slice contracts. (Slice Group, CON-068) The Slice Customers stated that the current Slice contracts require BPA to recall surplus from other purchasers from inside and outside the Pacific Northwest (not just outside) and require BPA to pay Slice customers fair market value for both energy and capacity that is recalled. *Id.*

### **Evaluation and Decision**

There are two issues embedded in the public comments cited above. First is the issue of compensation for curtailed surplus, and second is the issue of concurrently recalling surplus sold not only to extra-regional entities, but also to regional entities. With regard to the second issue, BPA, after considering these comments, believe that it should not place the Slice surplus sale ahead of its other surplus sales in the circumstances of a curtailment of such sales. The transaction should be on an equal footing. Therefore, BPA agreed to modify the language to include other surplus sales to both extra-regional and regional non-preference utilities to the extent they are able to be curtailed under the terms of their contracts. With regard to the issue of compensation, there are several factors BPA considered on the issue: compensation only for curtailed energy and not the capacity, and whether to compensate at a posted rate rather than at market value. Slice

customers receive no contractual guarantee for the availability of surplus Slice energy or capacity, or for their selling price, and Slice customers do not pay a capacity charge within their Slice rates. If BPA were to compensate for both surplus components (energy and capacity) at a market value, BPA would effectively guarantee Slice customers their surplus and the opportunity cost, protecting them from risks associated with curtailment and creating a cost shift to non-Slice customers. Moreover, the market pricing is highly volatile and determination of market value is contentious, whereas, compensation at a posted rate is not. Therefore, BPA will compensate Slice customers for curtailed surplus energy at the same rate Slice customers actually pay for their energy.

### **Issue 3:**

**Whether BPA would agree to increase the “tolerance band” that is a component of the monthly Requirements Slice Output (RSO) test.**

#### **Policy Position**

The Policy stated the Slice product would be designed in accordance with the Alternative 2 concepts described on pages 41-45 of the July 2007 Policy. (2007 RD Policy at 27) The July 2007 Policy stated there would be a specific monthly test that would be traceable, repeatable, and documented for identifying power taken to customer load.

#### **Public Comment**

The Slice Customers stated that the tolerance band in the template is too narrow to ensure routine compliance, and requested an additional 5 percent larger tolerance band to make compliance more achievable. (Slice Group, CON-076)

#### **Evaluation and Decision**

The Slice/Block agreement contains a provision that requires each customer to deliver a specified amount of firm energy to their retail load each month as net requirement service. From BPA’s perspective, this provision defines the amount of Slice product that is used to serve the customer net requirement load on a monthly basis and is extremely important in differentiating the firm power sold for load from the surplus power sold as it is available in the month. This test substantiates BPA offering the Slice product as a net requirement product under section 5(b)(1), as discussed in BPA’s Subscription Strategy ROD at page 94. This contract provision is known as the Requirements Slice Output test, and is stated in section 5.6 of the agreement.

The RSO test included in the Slice /Block contract “template,” as referred to in the customer comments, allowed the customers to schedule less or more than the pre-defined amounts to their retail load, but only in very specific conditions. BPA recognizes that a customer’s load and actual non-Federal resource operations may vary from month to month and within the month. BPA used the Subscription contract’s provision as a base and modified it in response to our current Slice experience and to customer explanations of difficulties they face on an hour-to-hour basis with scheduling Slice to load. These difficulties arise from the differential in hourly shapes between available Slice energy (system output) and each customer’s load.

The contract provision establishes a monthly look back to see if a minimum amount of firm energy is delivered by each customer to its retail load in the month, but allows some leeway in cases when the total amount of Slice energy scheduled by a customer for a given month is less than or equal to 105 percent of their minimum to-load requirement. In this specific case, the customer would be allowed to deliver as little as 95 percent of the Slice energy scheduled for the month to its load. The 105 percent and 95 percent values are referred to as the “tolerance band.” After evaluating this 10 percent tolerance band, the customers concluded that given variations on their system and the Federal system output, they would likely have difficulty meeting the minimum to-load requirement in all cases, and requested that BPA expand the tolerance band to 15 percent, such that the trigger is established as 107.5 percent of the minimum monthly amount, and the leeway is established as 92.5 percent of the Slice energy scheduled for the month.

BPA understands the challenge that system load, resource, and Federal system variations impose on the Slice purchaser and the rapidity with which such variations may occur on a monthly basis. BPA believes that the Slice customer must be responsible for its use of the firm energy sold as requirements power and ensuring that it is used for its retail load. BPA also knows the complexities that can be faced by both BPA and the customer given system conditions and changes. BPA believes a slight adjustment of an additional 2.5 percent to the bandwidth is reasonable and still affords the basic benefit of the product to a customer’s retail loads. Therefore BPA decided to increase the tolerance band to a total of 15 percent as requested, noting that the trigger conditions needed to invoke the provision will likely be rare.

#### **Issue 4:**

**Whether BPA would agree to accept customer proposed changes to other contractual terms and provisions.**

#### **Policy Position**

This specific issue was not addressed in the Policy but was raised through the Regional Dialogue contract customer comment process.

#### **Public Comment**

Slice customer representatives submitted a “Final Slice Review Memo” and accompanying red-line Slice/Block template outlining numerous suggested changes to the agreement. The customers categorized these changes into several categories, ranging from “must have” issues, including surplus energy and capacity curtailment compensation, the RSO test tolerance band, non-Federal resource peak capability, and net peak requirement, to substantive and non-substantive revisions too numerous to list. (Slice Group, CON-076)

#### **Evaluation and Decision**

Several of the issues included in this particular customer comment submittal are discussed under the preceding issues above or elsewhere in this ROD and will not be

discussed in this section. This section addresses only those issues not addressed elsewhere in this ROD.

BPA evaluated the contract revisions suggested by the customers and decided most of the suggestions were not acceptable to BPA or not warranted, particularly given the timing of the suggestions within the overall Regional Dialogue contract process. These suggestions were brought forth to BPA on October 2, 2008; more than 3 weeks after BPA had declared the Slice/Block contract complete and posted the “final” version on its website, and less than 2 months before the deadline for contract signing. In addition, BPA recognized many of the suggested edits as a repetition of issues that had been addressed numerous times over the negotiation period that spanned more than half of 2008.

BPA has provided a written response to the customers that outlined which issues BPA would agree to, which ones BPA would not agree to, and why (*See* CON-076). BPA’s written response to the customers’ letter that is included in CON-076 is specifically incorporated as a part of BPA’s response to these issues in this ROD. In general, BPA determined the suggested changes that related to defined terms, such as Soft, Hard and Absolute Operating Constraints, Federal and Prudent Operating Decisions, would materially affect the provisions in which those terms are utilized, requiring additional negotiation and contract reconstruction.

The customers also suggested changes to several sections, such as the Take-or-Pay section (3.2), the Priority Firm Power Rates section (8.1), and the Definition of Preliminary Net Requirement section (10.1). BPA determined the suggested changes to section 3.2 did not change the sense of the provision, while changes to section 8.1 eliminated limitations of the provision by adopting other definitions, and changes to section 10.1 sought to add language that was not part of the original provision yet did not change the intent.

In addition, the customers suggested changes to Exhibit M and Exhibit N, which outline much of the implementation and operational provisions of the agreement. In Exhibit M, the customers suggested a change that appeared to grant the Slice Implementation Group a vote and possibly a veto on items such as the business processes BPA uses to manage, update, and maintain the Slice Computer Application. This is an area in which BPA needs sole discretion to make changes, as is stated in the contract. The customers requested and obtained a provision that requires the changes to be consistent with the Slice product description in section 5.1. Nonetheless, the customers appear to be concerned that BPA can and will use contract provisions to change the fundamental product. This product is based on power sold in the shape of the Federal system and a change in Federal system conditions or operations is part of the risk that customers buying Slice have. A sale of this product does not guarantee any particular amount of Federal power or system flexibility will be provided. This is simply not BPA’s intent. Sections 5.1 and 5.2 clearly state the customer’s rights under this contract. The amount of power that can be taken and when it can be taken based on system capabilities are implemented and accessed through the Slice Computer Application. That application is to be a reasonable representation of the Federal system and calculate capabilities



available to Power Services. It is not and cannot be immutable given changes in the system BPA faces now and in the future. This theme is reiterated and referenced in other parts of the contract.

With regard to Exhibit N, customers do not agree with BPA's right to impose penalties when a customer violates a hard or absolute operating constraint in its simulated operation of the system. This provision clearly states that BPA will do so only in cases where BPA would face consequences for actually violating a similar constraint. An underlying principle of the Slice product is that Slice customers face similar risks to BPA. Relieving them of such risk would not meet that principle. The customers also appear to believe such penalties should not have an impact more severe than an Unauthorized Increase charge. BPA does not agree that violations of operating constraints can or should be reduced to a dollar payment particularly when such violations would have real consequences to the Federal operating agencies. The penalty for violating a hard or absolute operating constraint in a simulated operation should not be limited to a financial penalty related to the UAI rate.

Overall, BPA gave serious consideration to the customers' four "must have" issues, as addressed above in this ROD. BPA could not reasonably agree to every change, and believes it made reasonable accommodations. In addition, BPA agreed to make three corrections for errors or omissions the customers had identified.

## **2.4 SERVICE TO DIRECT-SERVICE INDUSTRIES**

BPA and DSI representatives met several times in 2007 to try to establish whether and to what degree DSI service should be provided to the DSIs during the 20-year Regional Dialogue period. In a February 19, 2008, letter to interested parties BPA proposed delaying further discussions until late summer or early fall 2008 because BPA and the DSIs were too far apart to have productive public discussion of service alternatives. BPA received four written comments on the proposed delay and implemented the delay as proposed. During late summer 2008 BPA and DSI representatives met and developed a proposal to share with the Region for discussion and comment. BPA currently plans to conclude the public process on the DSI Proposal around January 2009. Any issues associated with DSI service will be addressed in a separate ROD.

## **2.5 RENEWABLE RESOURCES**

Section VII of the Policy stated BPA's goal for the support of renewable resources as ensuring development of its share of cost-effective regional renewable resources. This goal has largely remained unchanged except for four developments:

- (1) BPA has decided to provide Renewable Energy Certificates (RECs) associated with specified Tier 1 renewable resources to BPA's preference customers signing CHWM Contracts. BPA will provide the RECs annually on a pro-rata basis at no additional charge, rather than marketing them (whether independently or in

conjunction with Environmentally Preferred Power or EPP) and collecting Green Energy Premiums as contemplated in the Policy. As a result of this change, revenues associated with Green Energy Premiums will be greatly reduced in FY 2012-2016 and eliminated altogether in FY 2017 after existing EPP purchase options expire. BPA will fund renewable Research Development & Demonstration projects through general rates. The cost of renewable resources acquired after April 1, 2007, that are part of FBS augmentation will not be offset by Green Energy Premiums when included in the Tier 1 rates as contemplated in the Policy.

- (2) BPA has clarified that the RECs associated with renewable resources whose costs are recovered through Tier 2 rates will be proportionally transferred at no additional charge to those customers subject to the applicable Tier 2 rate. The Policy envisioned Tier 2 as a means for customers to make power from renewable resources a substantial component of their resource portfolios but did not expressly provide for RECs associated with Tier 2 purchases.
- (3) BPA intends, in the absence of carbon regulations or legislation directly affecting BPA, to convey the value of any future Carbon Credits associated with resources whose costs are recovered in Tier 1 or Tier 2 Rates to BPA's customers signing a CHWM Contract on a pro rata basis, in the same manner as described for Tier 1 RECs and Tier 2 RECs. The Policy was silent on Carbon Credits.
- (4) BPA has decided to reserve the right to terminate customers' contract rights to both Tier 1 RECs and Carbon Credits, but only if BPA needs them for compliance purposes and if (without the recall) BPA would have to incur incremental costs for compliance. In addition, BPA has included language that assures that other customers, including REP and DSI customers, are not disadvantaged in the ratemaking process by BPA's treatment of RECs and carbon credits.

Thus, BPA included in Exhibit H to the contract template a provision that sets forth the disposition of RECs and future Carbon Credits.

#### **Issue 1:**

**Whether it is reasonable to convey RECs as part of the CHWM contracts instead of selling them separately or in conjunction with Environmentally Preferred Power (EPP).**

#### **Policy Position**

The Policy did not address this issue.

#### **Public Comment**

PPC proposed that all attributes associated with renewable resources in BPA's system (including Renewable Energy Credits and any future Carbon Credits), should pass through to the purchasers of the power from those resources. (PPC, CON-074) In the same vein, Renewable Northwest Project commented that BPA should offer RECs via

long term contracts. (RNP, CON-073) PPC further suggested that renewable resource attributes should pass through on a proportional basis, with customers receiving a share of such attributes based on the portion of the system output they purchase from BPA. (PPC, CON-074) PPC proposed that preference customers would not pay any additional premium for those attributes because, PPC suggests, the costs of those attributes are already included in the costs of the resources that are accounted for in rates. *Id.*

Similarly, Snohomish suggested that “a new paradigm is in order” regarding “the allocation of environmental attributes.” (Snohomish, CON-072) Specifically, Snohomish commented that environmental attributes for BPA Tier 1 renewable resources should be allocated to utilities based on their High Water Mark and pro rata share of the Federal System. *Id.*

PNGC commented that BPA should eliminate EPP as the primary way of distributing RECs to preference customers. (PNGC, CON-057) In place of EPP, PNGC suggested that “BPA should develop an approach that provides preference customers with access to RECs from renewable resources from both Tier 1 and Tier 2 power purchased from BPA.” *Id.* Similarly, Renewable Northwest Project expressed concern that EPP and other BPA proposals would not be useful in helping utilities meet renewable energy standards. Renewable Northwest Project also noted that utilities without load growth were not likely to need renewable energy deliveries, but rather would need to purchase long-term RECs alone. (RNP, CON-073)

### **Evaluation and Decision**

BPA largely agrees with PPC’s proposal concerning RECs. RECs and Carbon Credits are relatively new market and regulatory concepts. They are not a statutorily defined component of Federal power service and are not electric power. However, because preference customers who enter into CHWM contracts will be purchasing power from BPA which may have certain RECs and Carbon Credits associated with it, it is reasonable to transfer the rights to such RECs and Carbon Credits to CHWM contract holders along with the power they purchase.

Accordingly, BPA will provide RECs which are not otherwise obligated to EPP customers under contracted purchase options and which BPA has determined are associated with certain resources whose output is used to establish Tier 1 System Capability to BPA’s preference customers signing CHWM contracts. BPA will provide such RECs on a pro-rata basis at no additional charge rather than marketing them and collecting Green Energy Premiums as contemplated in the Policy. As a result of this change, revenues associated with Green Energy Premiums will be greatly reduced in FY 2012-2016 and eliminated thereafter. BPA will fund renewable Research Development & Demonstration projects through general rates.

With regard to Carbon Credits, BPA generally agrees with PPC’s proposal subject to certain limitations. Future carbon regulations or legislation may have direct effects on BPA, whether through compliance costs, an increase in the value of BPA’s power relative to market, or in other ways not currently contemplated. Accordingly BPA

intends, in the absence of carbon regulations or legislation directly affecting BPA, to convey the value of any future Carbon Credits associated with resources whose costs are recovered in Tier 1 or Tier 2 Rates to BPA's customers signing a CHWM contract on a pro rata basis, in the same manner as described for Tier 1 RECs and Tier 2 RECs.

Additionally, for both Carbon Credits and Tier 1 RECs, BPA must take steps to deal with the possibility of future compliance programs that may impose incremental costs upon BPA. Accordingly, BPA has added a termination provision governing preference customers' contract rights to Tier 1 RECs and Carbon Credits. Specifically, in section 8 and Exhibit H of the CHWM Contract, BPA has reserved the right to terminate customers' contract rights to both Tier 1 RECs and Carbon Credits, but only if BPA needs them for compliance purposes and if (without the recall) BPA would have to incur incremental costs for compliance.

Finally, with regard to EPP, BPA understands PNGC's suggestion and the concerns expressed by RNP. Due to Renewable Portfolio Standards passed in Washington and Oregon, many of BPA's customers have been given responsibility to develop renewable resources and retail green power programs to reduce carbon footprints. To that end, BPA's customers would be better served by directly receiving RECs from BPA as part of their Tier 1 purchase at no additional charge, rather than being exposed to the market uncertainties associated with EPP, market price fluctuations, and the probability of BPA selling-out of EPP. Accordingly, BPA will begin phasing out EPP sales and instead convey RECs to customers through the mechanisms put in place by Exhibit H of the Regional Dialogue contracts.

#### **Issue 2:**

**Whether Firm Requirements Power purchased at a Tier 2 Rate should include RECs at no extra charge.**

#### **Policy Position**

The Policy did not address this issue.

#### **Public Comment**

A number of commenters suggested that BPA should provide access to the RECs associated with a preference customer's Tier 2 purchase(s) and should do so at no additional charge. (NRU, CON-015; PNGC, CON-057; NRU CON-062; Inland Power, CON-064; PPC, CON-074) Further, PPC commented that attributes of resources supporting Tier 2 rates should pass through to those customers purchasing power at those specific rates proportionally to the amount of power purchased under those rates. (PPC, CON-074)

#### **Evaluation and Decision**

BPA has responded to commenters' input on this topic by adding section 4 to Exhibit H. Section 4 provides that customers who choose to purchase Firm Requirements Power at a Tier 2 Rate will receive a pro rata share of the RECs that are associated with the resources whose costs are allocated to the Tier 2 Cost Pool for such rate. In doing so,

BPA retains discretion to make the determination of whether there are RECs associated with the power it acquires from resources whose costs are allocated to the Tier 2 Cost Pool for such rate. The question of what resources can give rise to a REC is based on varying state definitions of what resources are considered “renewable.” BPA retains the final authority to decide whether there are RECs associated with the resource.

### **Issue 3:**

**Whether providing Tier 1 and Tier 2 Environmental Attributes (including RECs and Carbon Credits) to BPA’s preference customers is equitable.**

### **Policy Position**

The Policy did not address this issue.

### **Public Comment**

OPUC and the IOUs argued that the value of Tier 1 and Tier 2 Environmental Attributes should not be allocated solely to PF Preference rate customers but rather should be equitably allocated among all BPA customers that pay the costs of resources from which Environmental Attributes are derived. (OPUC, CON-005; IOUs, CON-008; CON-054) The IOUs’ basic argument is that BPA’s proposed allocation does not take into account the fact that the costs of power resources acquired by BPA are assigned to various rates, including both the PF Preference rate and the PF Exchange rate. (IOUs, CON-008) The IOUs contend that the PF Exchange customers are entitled to an equitable share of the value of the Environmental Attributes to the extent that they bear the costs of electric power resources associated with those Environmental Attributes. *Id.* The IOUs later argued that PF Exchange customers are entitled to a “full share”—if, as, and when PF Preference customers share in any Environmental Attributes (or the value thereof) and in any carbon emission credits and similar carbon instruments (or the value thereof), associated with BPA resources. (IOUs, CON-054) The IOUs contended that failure to reflect this full share would be inequitable and would also be contrary to the provisions of the Northwest Power Act, including particularly the provisions of section 7 thereof with respect to the allocation of costs and benefits. *Id.*

Additionally, the IOUs argued that it was not apparent that the terms of the proposed Exhibit H (in the Master Regional Dialogue Contract Template) were consistent with applicable provisions of Federal law or regulations that govern the disposition of Federal property. (IOUs, CON-008)

And finally, the IOUs asserted that adoption of Exhibit H as originally proposed would be arbitrary and capricious or otherwise contrary to law. *Id.*

OPUC proposed that BPA should transfer RECs and any other credits to all BPA 5(b) and 5(c) customers. (OPUC, CON-005) For 5(c) customers, OPUC proposed, the proportion of credits going to such customers would equal the relative share of exchange loads to total BPA 5(b) and 5(c) loads, but no greater than 15 percent -- roughly the historic share of total BPA benefits assigned to residential and small farm consumers of the PNW investor-owned utilities. *Id.*

OPUC also proposed, for an alternative, that BPA market or monetize the RECs and any other environmental credits (not transfer the credits) and adjust the PF Preference Rate and correspondingly the PF Exchange Rate downward to reflect the benefit from the environmental attributes associated with the power resources. *Id.*

### **Evaluation and Decision**

BPA intends to provide RECs and Carbon Credits in a manner that comports with BPA's legal authorities and responsibilities, will satisfy BPA's customers and constituent groups, and will meet BPA's responsibilities under any future legislation or regulations. BPA appreciates the position raised by the OPUC and IOUs in their comments, and met with the IOUs to develop additional language for Exhibit H that addresses the concern raised by the OPUC and the IOUs. As a result, BPA has added section 9 to Exhibit H which explicitly reserves BPA's ratemaking authority to determine and factor in a share of the value and/or cost of any or all of the RECs and Carbon Credits for the purpose of: (1) determining applicable wholesale rates pursuant to section 7(c)(2) of the Northwest Power Act; and (2) establishing the rate(s) applicable to BPA sales pursuant to section 5(c) of the Northwest Power Act in a manner that BPA determines provides an appropriate sharing of the benefits and/or costs of the Federal system and comparably reflects treatment of RECs and Carbon Credits in the calculation of a utility's average system cost of resources.

## **2.6 TRANSFER SERVICE**

### **2.6.1 Administrative Roles and Responsibilities**

#### **Issue 1:**

**Should BPA allow transfer customers to contract directly with the third-party transmission providers for service to their transfer served loads, and then reimburse these customers for the cost of obtaining Transfer Service? Or should BPA continue to be the contract holder for all Transfer Service?**

#### **Policy Position**

In section VIII.C of the Policy, BPA committed to initiate a separate process, within 6 months of Policy adoption, to discuss the interest of transfer customers in holding contracts with third-party transmission providers for service to their transfer served loads, with BPA retaining the cost responsibility for this transmission service. BPA recognizes that in some instances it may be desirable for customers to hold their own transfer contracts. BPA would need a process to reimburse customers holding their own transfer agreements for Federal power and qualifying non-Federal power. Arrangements would have to provide a strict limitation on BPA's cost exposure and clearly allocate risks and responsibilities associated with the service to the customer. BPA did not make a decision at that time as to whether the customer should be the contract holder.

## **Public Comment**

Customers' representatives acknowledged that there are many complicated issues associated with a customer holding a transmission contract for which BPA is financially liable. During a Transfer Service workshop held September 4, 2007, the participants agreed to defer this issue until after the Regional Dialogue contracts have been signed and the participants agreed that the discussions in that workshop and a previous workshop were sufficient to meet BPA's commitment in the July 2007 Policy to initiate a separate process. In a document prepared by the PPC for discussions regarding BPA's obligation to provide Transfer Service for non-Federal power, it was proposed that as a matter of principle, "BPA policies should permit either BPA or the Customer to acquire transmission services to serve requirements load." (PPC, CON-060)

## **Evaluation and Decision**

In agreeing to defer this issue until after the Regional Dialogue contracts are completed, BPA neither agreed to allow customers to hold their own transfer contracts, nor agreed to a specific timeline for a process to evaluate this issue. BPA did indicate it would reengage on this issue if an individual transfer customer requests the ability to hold its own transfer contract. In that event the same issues of BPA's cost exposure and the need to clearly allocate risks and responsibilities, as discussed in the July 2007 Policy, will have to be addressed.

### **2.6.2 New and Annexed Load**

#### **Issue 1:**

**What is BPA's statutory authority for obtaining Transfer Service for new public customers and annexed loads?**

#### **Policy Position**

The Policy did not specifically address the statutory authority BPA is relying on to obtain Transfer Service for new public customers and annexed loads.

#### **Public Comment**

Pacific Northwest IOUs claim that BPA has failed to explain its legal authority for providing and paying for Transfer Service for new and annexed loads and such legal authority is not apparent from the statutes. The IOU's went on to state that BPA should not provide Transfer Service to annexed loads and new publics, and asserted that providing such Transfer Service would be an unjustified and unwarranted subsidy that will provide a financial incentive for annexation of investor owned utilities' service territories. (IOUs, CON-054)

#### **Evaluation and Decision**

BPA policy regarding service to new publics is consistent with section 5(b)(1) and 5(b)(4) of the Northwest Power Act, 16 U.S.C. §§ 839c(b)(1) and 839c(b)(4). Under these sections BPA is required to sell power to any public body or cooperative, consistent with preference and priority under the Bonneville Project Act, provided that the public

body or cooperative complies with the Administrator's standards for service. Providing Transfer Service to new public customers, subject to the limitations and requirements set forth in the Regional Dialogue contract and in this policy, is within the Administrator's discretion. Since BPA has a long history of obtaining and paying for Transfer Service to deliver power to its public body and cooperative customers, it follows that BPA is willing to provide similar service to new public body and cooperative customers, with certain limitations intended to control cost.

This issue and BPA's rationale for obtaining transfer service to a limited number of new publics were discussed in the 2002 Final Power Rates ROD. WP-02-A-02 at 8-10 to 8-14. These same rationales are still relevant and are incorporated by reference herein.

It is worth noting that under the Subscription policy BPA did not obtain Transfer Service for annexed loads, but a similar rationale applies to BPA's policy regarding Transfer Service for annexed loads. Section 5(b)(1) of the Northwest Power Act states that, "Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative... electric power to meet the firm power load of such public body, cooperative...." When a customer annexes or obtains new load through other means and requests that BPA sell additional power to meet the additional firm power load, the Northwest Power Act requires BPA to serve the additional firm load subject to additional restrictions contained in the Act. As with new publics, providing Transfer Service for annexed loads is within the Administrator's discretion, just as other decisions regarding the terms of service offered to customers are within the Administrator's discretion.

BPA's policy and the Regional Dialogue contract make it abundantly clear that BPA will not obtain Transfer Service for new customers or annexed load until the customer has a legal right to serve the load and has acquired the facilities necessary to serve it. All disputes between publics and IOUs, or between a public and another public, must be resolved with a final legal action prior to BPA committing to obtain Transfer Service. This approach to Transfer Service for new public customers and annexed loads may provide a slight financial incentive as the IOUs suggest, but should be only a minor portion of the cost considerations of an annexation or the formation of a new utility. If BPA refused to obtain Transfer Service for new customers or annexed loads, as the IOUs suggest, that policy would be a financial disincentive. BPA's policy on new customers and annexed load is intended to take a neutral position, but retains certain limitations to provide for cost control.

The history behind BPA's overall Transfer Service policy stems from the fact that BPA built the Federal transmission system to provide regional transmission facilities to integrate Federal and non-Federal power, and to interconnect with other utility systems to transmit such power to existing and potential regional and interregional markets. *See* Bonneville Project Act, 16 U.S.C. §832a(b); and Transmission System Act, 16 U.S.C. §838b. These transmission services were provided on a rolled-in, average cost basis, but the FCRTS was not extended to all of BPA's customers. BPA did not construct transmission facilities to some preference customers when it was less expensive to acquire Transfer Service over existing non-Federal transmission facilities. This decision



resulted in lower overall network transmission rates that benefited all of BPA's customers and the decision is consistent with the Administrator's authority under the Transmission System Act regarding decisions to construct additions to the transmission system to provide service to the Administrator's customers. Transmission System Act, 16 U.S.C. §838b.

In the Regional Dialogue contracts the primary premise of BPA's Transfer Service policy attempts to place Transfer Service customers on an equal footing with directly connected customers, to the extent possible, recognizing that often the geographic location of some customers makes a truly level playing field impossible. BPA's policy on Transfer Service for new customers and annexed loads is consistent with this premise, because directly connected new customers and directly connected existing customers that annex load are able to obtain transmission service, subject to local constraints, without paying a "pancaked" rate for multiple legs of transmission service. The IOU's claim, that obtaining Transfer Service for new customers and annexed load is an unjustified and unwarranted subsidy, is unfounded and unsupported. BPA's policy regarding Transfer Service for new customers and annexed load is consistent with BPA's overall policy on Transfer Service, which is within the Administrator's discretion to offer specific terms of service to customers. The IOUs have not challenged BPA's statutory authority to obtain and pay for Transfer Service in general. Quite to the contrary, the IOUs and BPA have a long standing relationship in which the IOUs provide Transfer Service to BPA to serve BPA transfer customers.

## **Issue 2:**

**Should BPA retain the 50 aMW per rate period limitation placed on Transfer Service for new customers and annexed load?**

### **Policy Position**

BPA's commitment to provide Transfer Service for new and annexed load described in section VIII.F of the Policy provides for a cumulative megawatt cap of 50 aMW per rate period and 250 aMW during the term of the contract. No exceptions to these limits were described.

### **Public Comment**

In written comment, ATNI suggested that the 50 aMW cap for additional Transfer Service for annexed loads and new publics per rate period is inconsistent with the new customer exception for new small utilities. (ATNI, CON-055) They suggest the cap be removed to the extent it will limit new utilities otherwise permitted to purchase Federal power under the policy. Yakama Power and Umpqua Indian Utility Coop. both expressed support for ATNI's comments on this matter. (Yakama Power, CON-013; Umpqua, CON-032)

In subsequent written comments ATNI also suggested that the 50 aMW cap for additional Transfer Service for annexed loads and new publics per rate period should be exclusive of the up to 40 aMW of Contract HWM reserved for new tribal utilities, during the term of the Regional Dialogue contracts. (ATNI, CON-009)

### **Evaluation and Decision**

BPA is willing to provide Transfer Service for new and annexed loads, but only for the proposed incremental 50 aMW per rate period. Consistent with ATNI's comments, BPA recognizes that this cap does not explicitly accommodate the Contract HWM exception for new small utilities that excludes the first five new public utilities less than 10 aMW from the cap for new and annexed loads, nor does it parallel the 40 aMW Contract HWM exception for new tribal utilities. However, while BPA sought to accommodate new and annexed loads with this Transfer Service cap, BPA does not anticipate that all new and annexed loads will need Transfer Service. It is BPA's assessment that the 50 aMW per rate period cap for new customers and annexed loads will provide cost protection for BPA while reasonably accommodating new customers and annexed loads served by Transfer Service.

### **Issue 3:**

**What should BPA require before providing Transfer Service to new utilities and annexed load?**

### **Policy Position**

BPA committed to arrange and pay for Transfer Service to new customers and annexed loads in the following situations: (1) if the annexation is not disputed and the utility losing load and service territory provides written consent to the annexation and transfers any rights and ownership interest in the distribution facilities and properties in the annexed territory; or (2) if the relinquishing utility is opposed to the annexation, once a state or court has made a final determination that the utility has the legal right to serve the annexed load.

### **Public Comment**

The Investor-Owned Utilities suggested that if BPA is committed to acquire and pay for Transfer Service in the case of annexation or new public formation, then BPA should only provide this service in situations where the gaining and losing utilities mutually agree to the annexation or service by the new public. (IOUs, CON-054)

Representatives for existing and potential tribal utilities expressed concern with the requirements that an annexation, or a newly formed utility, will only qualify for Transfer Service benefits upon written consent by the utility losing the load, or by a state or court determination of the legal right for the gaining utility to serve the load. They recommended that consideration should be made on a case-by-case basis rather than create policy language that may not be workable in every situation. (ATNI, CON-055)

Benton Rural Electric Association commented that the whole annexed load section creates an incentive for "cannibalization amongst BPA preference customers." (Benton REA, CON-044)

## **Evaluation and Decision**

Consistent with the July 2007 Policy ROD, regarding Transfer Service for new and annexed loads, it is BPA's current intention to remain neutral in the event of an annexation or formation of a new public utility. Furthermore, BPA's current view is that its role should be to neither unduly encourage nor unduly prejudice the acquiring or relinquishing utilities. To achieve this neutrality, BPA will arrange and pay for the network component for Federal power deliveries under Transfer Service contracts to serve a new public load, or an existing transfer customer's annexed load, acquired after execution of the Regional Dialogue contract, when the party losing the load consents in writing or the right to serve the load has been legally decided without a chance for appeal.

BPA prefers this requirement to the suggested requirement of mutual agreement because of its finality and general applicability. Similarly BPA prefers this requirement to the suggested approach of a case-by-case commitment because of the clear distinction this criterion provides. In BPA's assessment, this requirement achieves BPA's stated goal of neutrality in the event of an annexation or formation of a new public utility.

As to Benton REA's suggestion that BPA's annexation policy creates an incentive for "cannibalization amongst BPA preference customers," i.e., an incentive for one BPA preference customer to annex load from another BPA preference customer, BPA policy is the same as it has been under the Subscription contract. BPA does not want to influence the outcome of a dispute between its customers. BPA does recognize that such disputes may occur. Once the dispute over annexed load is resolved either through mutual agreement or final state or court action, BPA will provide Transfer Service to the annexed load when necessary, consistent with other policies and limitations.

### **Issue 4:**

**Should BPA remove the \$10 per megawatt-hour cost limitation placed on new customers and annexed load?**

### **Policy Position**

BPA's commitment to provide Transfer Service for new public and annexed load described in Section VIII.F.2.b. of the Policy contains a \$10 per megawatt-hour (MWh) limitation for network transmission charges associated with annexed loads or newly formed public utility customers. This limitation was proposed to discourage annexations of high transmission cost service areas and to limit BPA's overall Transfer Service cost exposure.

### **Public Comment**

During workshops held by BPA, customers urged BPA to eliminate the \$10 per MWh cost cap for wheeling to new and annexed loads. ATNI claims that this limitation will prohibit new publics that may have a CHWM from having the power delivered at a rate equal to other Bonneville customers and is inconsistent with the goal of equity between BPA transmission customers and Transfer Service customers. (ATNI, CON-055; CON-063)

## **Evaluation and Decision**

Based on discussions with customers and internal deliberations, BPA will remove the dollar cap, but retain the aMW cap for new customers and annexed loads. The aMW cap is necessary to maintain a cost control mechanism, but BPA recognizes that multiple caps may be overly complex and would add substantially to the burden of contract administration.

### **Issue 5:**

**With regard to providing Transfer Service for new public customers that form after the Regional Dialogue contracts are signed, how should BPA decisions regarding the standards for service influence the expansion of Transfer Service?**

### **Policy Position**

BPA's Policy stated that "in the interest of efficiency and cost saving, in those situations where it is feasible and economically viable, BPA will encourage customers to build facilities to directly connect to the BPA grid and thus avoid transfer service cost." (2007 RD Policy at 38) In addition, BPA stated in the 2007 Policy ROD that "in general BPA's policy is to not expand transfer service." (2007 Policy ROD at 222)

### **Public Comment**

As discussed in issue 2 above, the IOU's commented that BPA should not provide Transfer Service to new publics. The IOU's went on to assert that providing such Transfer Service would be an unjustified and unwarranted subsidy that will provide a financial incentive for annexation of investor owned utilities' service territories. (IOUs, CON-054) As discussed above in Issue 3, ATNI has questioned whether the annexed load and new public customer transfer MW cap will be high enough to support the formation of additional tribal utilities. Also, Skagit PUD commented that it is seriously considering forming an electric utility and purchasing power from BPA under the Regional Dialogue contract. (Skagit, CON 043)

## **Evaluation and Decision**

While Skagit PUD's comment did not address Transfer Service, if Skagit and/or some of the new tribal utilities form, BPA will be faced with determining whether or not the standards for service have been met, in order for the new utility to qualify to purchase Federal power. As part of this determination, BPA will consider the general policy to not expand Transfer Service. This does not mean that BPA will not provide Transfer Service to new publics that require Transfer Service, provided that the annexed load and new public aMW cap on Transfer Service has not been exceeded. It does mean that in some situations BPA expects new publics to obtain not only distribution facilities, but in some cases the transmission facilities necessary to allow the new public to directly connect to BPA transmission, rather than relying on Transfer Service.

These situations will arise if a new public is formed from the existing service territory of a third-party transmission provider and there are distribution or transmission lines owned by the third-party transmission provider that would only be used to provide service to the

new public after it is formed. In these situations the new public should condemn or obtain by other means the facilities necessary to connect directly to the BPA transmission facilities. If a new public forms and there are intervening facilities that are used to serve both the new public and the load of the third-party transmission provider, BPA will provide Transfer Service consistent with other requirements and limitations of the policy discussed above and in the July 2007 RD Policy.

By requiring new publics to obtain the facilities necessary to directly connect to BPA's transmission system instead of relying on Transfer Service, BPA will be consistent with the policy to not expand Transfer Service, while ensuring that IOUs and other third-party transmission providers do not end up with isolated facilities as a result of new publics forming. This policy will encourage new publics to obtain the facilities necessary to support their utility and will result in fewer new publics requiring Transfer Service, thus minimizing the impact of new publics on the annexed load and new publics' aMW cap.

### **2.6.3 Delivery of Non-Federal Power**

#### **Issue 1:**

**What is BPA's statutory authority and justification for obtaining Transfer Service for non-Federal power?**

#### **Policy Position**

The Policy did not specifically address the statutory authority BPA is relying on to obtain Transfer Service for non-Federal power. The Policy did discuss BPA's justification for providing some support for Transfer Service of non-Federal power stating, "BPA has concluded that assistance is necessary for these customers to have real power supply choices to serve load growth, which is an important objective of this Policy. Absent some payment for transmission of non-Federal power, customers served by transfer will face strong economic incentives to purchase exclusively from BPA at Tier 2 rates." (2007 RD Policy at 39)

#### **Public Comment**

The IOU's commented that, "BPA has failed to explain its legal authority for obtaining and paying for Transfer Service for new and annexed loads-including, in particular, Transfer Service for non-Federal power-and such legal authority is not apparent from the statutes." The IOU comment went on to claim that BPA has failed to adequately explain its rationale for its Transfer Service policy. (IOUs, CON-054)

#### **Evaluation and Decision**

BPA's legal authority and rationale for serving new public and annexed loads is discussed in section 2.6.2, Issue 1, above. BPA's legal authority to obtain and pay for Transfer Service for non-Federal power is within the Administrator's discretion to offer contractual terms to public and cooperative customers. The IOU's claim that there is no apparent legal authority in the statutes giving BPA the authority to obtain and pay for Transfer Service for non-Federal power, but the IOUs do not suggest that there is

anything in BPA's statutes that would prohibit BPA from obtaining and paying for Transfer Service for non-Federal power.

This issue was also addressed in the 2002 Final Power Rates ROD, except that in that instance the issue involved the rate treatment for obtaining Transfer Service for non-Federal power and rolling the cost into the Network Transmission rate. WP-02-A-02 at 9-1 to 9-3. The reasoning at that time for making a limited commitment to obtain Transfer Service for non-Federal power was based on putting Transfer Service customers and directly connected customers on equal footing and to promote competition in bulk power markets. This reasoning is very similar to the goal of the Regional Dialogue policy to encourage the development of regional generation infrastructure.

In addition, BPA's policy regarding Transfer Service for non-Federal power is consistent with section 5(b)(1) of the Northwest Power Act, including the limitations on BPA's obligation to sell power to public bodies and cooperatives contained in section 5(b)(1)(B). By providing some Transfer Service support for customer's non-Federal resources that are committed to serve the customer's load under the terms of the Regional Dialogue Power Sales Contract, BPA is ensuring that these resources are delivered to the customer's load and thereby lessening the obligation to provide Federal power to serve that portion of the customer's load.

As stated above, one of BPA's stated goals in the Regional Dialogue Policy is to encourage the development of regional infrastructure. As BPA concluded in the July 2007 Policy, transfer customers need some assistance with transmission of non-Federal power in order to make non-Federal power a viable option over reliance on BPA's Tier 2 power product. In the Regional Dialogue contract, BPA offers to obtain and pay for a limited amount of Transfer Service for non-Federal power provided that the transfer customer meets several specific requirements, such as, requiring the resource to be designated as a Network Resource, requiring the resource to be delivered to the last third-party transmission system, and requiring the customer to pay for additional costs associated with the delivery of the non-Federal resource. These requirements are intended to provide cost protection for BPA, as well as to ensure that the Transfer Service of the non-Federal power will fit with the contractual relationships BPA currently maintains with the third-party transmission providers. At the same time, BPA will be providing assistance to transfer customers so that non-Federal power is a viable option.

Most of the Transfer Service BPA obtains from third-party transmission providers is taken under their Open Access Transmission Tariff (OATT). FERC regulations do not restrict the ability of one party (BPA in this case) to hold the transmission contract that is being used to serve another party's load, i.e., BPA's transfer customers. Transfer providers with OATTs on file with FERC are required to offer service to all eligible customers and cannot discriminate against customers based on the origin of the customer's power supply, provided it meets the other requirements of the OATT. BPA is an eligible customer and the IOUs have a legal obligation to provide OATT Transfer Service to BPA regardless of whether the power being delivered to BPA's customers is Federal or non-Federal. BPA expects the IOUs obligation to provide Transfer Service

will continue through the term of the Regional Dialogue contract. In fact, under the OATT structure as provide by FERC, it would be much more difficult for all parties involved for BPA to hold the transmission contract for the delivery of Federal power while BPA's customers hold a transmission contract for delivery of the non-Federal power, potentially to the same points of delivery, over the same load meter.

Based on these practicalities, BPA's rationale for supporting Transfer Service for non-Federal power, the third-party transfer provider's legal obligation to provide this transmission service, and the consistency of BPA's policy with the requirements of the Northwest Power Act, BPA's decision to obtain and pay for Transfer Service for non-Federal power is justified and within its legal authority.

### **2.6.3.1 Elimination of the "up to" Cap for the Transfer of Non-Federal Resources**

#### **Issue 1:**

**Should BPA eliminate the "up to" cap associated with the wheeling of transfer customers non-Federal resources?**

#### **Policy Position**

BPA will only support Transfer Service for non-Federal power deliveries up to the amount BPA would have paid for delivery of Federal power at the Tier 2 rate.

#### **Public Comment**

Customers urged BPA to eliminate the "up to" cap which is one of the limitations proposed in the Policy as a cost control measure for the wheeling of transfer customers' non-Federal resources. Comments submitted by the PPC stated that BPA's proposal to impose multiple limitations on the transfer of a customer's non-Federal resources is confusing and unnecessary, and appears to call into question BPA's commitment to provide the service to transfer customers. (PPC, CON-059)

At a transfer customer meeting on February 5, 2008, customers submitted a document containing proposed principles for non-Federal Transfer Service. This document states: "Cost control is the purpose for BPA's proposal to cap its obligations to obtain and pay for transfer service for non-Federal resources. The dollar, MW and comparative caps, however, are overlapping and the multiple expressions of what is essentially the same cap. These multiple caps will be complicated to administer and do not provide sufficient additional cost protection to warrant their use. Because they are overlapping, they are also confusing and likely to lead to future disputes." (PPC, CON-060)

The customers requested that BPA adopt and apply only the proposed annual and aggregate MW caps.

#### **Evaluation and Decision**

The Policy contained certain limitations on BPA's commitment to provide Transfer Service for non-Federal resources. The first of these limitations would have capped BPA

support for delivering non-Federal power at the amount BPA would have paid to deliver Federal power. BPA proposed to calculate the costs of delivering Federal power in each general rate case. The transfer customer would then be responsible for costs above this rate case calculation attributed to the delivery of non-Federal power.

This limitation was intended as a BPA cost control measure that would partially insulate all power customers from incremental costs BPA might incur to accommodate a single customer's resource choice. BPA has subsequently decided to drop this limitation, due in part to implementation complexities. BPA believes that other limitations on its commitment to provide Transfer Service for non-Federal resources will provide effective cost control. Multiple caps would be confusing and add substantially to BPA's and customers' administrative burden.

### **2.6.3.2 Elimination of the Dollar Cap on Transfer of Non-Federal Network Resources**

#### **Issue 1:**

**Should BPA eliminate the “dollar cap” associated with the wheeling of transfer customer's non-Federal resources?**

#### **Policy Position**

The second limitation on BPA's commitment to provide Transfer Service for non-Federal resources described in the Policy contained two additional caps, a cumulative dollar cap of \$650,000 per fiscal year, escalated at 3 percent per year, and a cumulative megawatt cap of 41 megawatts per fiscal year. These caps were based on the forecast load growth at all transfer points of delivery, and were established to control costs.

#### **Public Comment**

Customers expressed concerns that the financial cap would further disadvantage transfer customers versus those connected to the main grid, and unduly limit their future resource options or leave a bias toward Federal power. Customers indicated that while there is uncertainty about the magnitude of non-Federal transmission rates in future years, the FERC OATT requires cost-based rates, so the dollar cap is unnecessary and redundant if the MW cap is retained.

#### **Evaluation and Decision**

Based on discussions with customers and further internal deliberation, BPA has decided it is appropriate to remove the dollar cap but retain the megawatt cap as a cost-control backstop mechanism. This limitation should trigger only for extraordinary load increases, and should not unduly reduce customers' incentive to develop new generating resources. Foregoing the dollar cap removes an unnecessary hurdle for customer resource development if there is broad inflation or higher costs across the energy sector. In addition, removing the dollar cap will make Transfer Service easier to administer.



Further explanation of how BPA proposes to administer the 41 megawatt annual cap is provided in section 2.6.3.3 below.

### **2.6.3.3 Implementation of the Megawatt Cap for the Transfer of Non-Federal Resources to Serve Transfer Customer's Above-Rate Period HWM Loads**

#### **Issue 1:**

**How should BPA implement this non-Federal megawatt cap?**

#### **Policy Position**

BPA did not discuss implementation of this megawatt cap in the Policy, and only stated that BPA would support Transfer Service of non-Federal power deliveries for transfer customers to serve above rate period HWM load in the amounts of 41 megawatts per Fiscal Year, and 697 megawatts in the last year of the Regional Dialogue contract.

#### **Public Comment**

During several public meetings, customers generally expressed interest and concern regarding the manner in which BPA would implement any caps on transfer of non-Federal energy. Customers noted that the process and parameters around any such caps would have a material effect on their resource planning and acquisition processes. To this end the Public Power Council provided BPA a set of suggested guidelines for implementation of the megawatt cap, which included the ideas of a “first come, first served” approach and ongoing accommodation of previous requests as the cap grows each fiscal year. (PPC, CON-060)

In addition to these broad suggestions, PNGC expressed concern about how this cap would be implemented, noting that the proportional scheduling section of the Regional Dialogue contract allows for the transfer of non-Federal resources in excess of the above rate period HWM of a utility. PNGC suggested an increase to the cap to accommodate this potential added delivery. (PNGC, CON-039)

#### **Evaluation and Decision**

As described in the Policy, the amount of non-Federal Transfer Service that BPA will support financially is limited by a megawatt cap, which is a cumulative cap of 41 megawatts per fiscal year, summing to a maximum of 697 megawatts in the last year of the Regional Dialogue Contract. In order to ensure that customers understand how the megawatt cap will be implemented BPA will use the following parameters and processes to implement the megawatt cap:

- Under the terms of the Regional Dialogue contract, customers wanting BPA to obtain Transfer Service for non-Federal resources must request that BPA obtain Transfer Service for the non-Federal resource at least 1 year prior to the commencement of deliveries from the resource to the customer's transfer load. BPA will develop a standard format and form for making these requests. When BPA receives a completed form, BPA will date stamp the request, and that date

will be the date of record for determining the applicability of the megawatt cap to the customer.

- BPA will obtain Transfer Service to deliver all non-Federal resources serving transfer customers above-RHWM for which customers have signed a separate agreement, consistent with the principles in Exhibit G of the Regional Dialogue contract. However, should this megawatt cap be surpassed, BPA will pass on the cost of such Transfer Service to the customer until there is room under the cap to accommodate the customer's non-Federal resource. At the beginning of each fiscal year BPA will increase the cap by 41 megawatts. BPA will give priority to customers in order of their request date for service, and BPA will cease passing through the costs for Transfer Service as the cap increases on a first come first served basis.
- For purposes of determining the amount of megawatts associated with each request, BPA will use the amount of above-RHWM load served by Transfer Service that a customer meets with non-Federal power, as stated in Exhibit A of the Regional Dialogue contract.
- The megawatt cap is a mechanism for determining cost responsibility. If a request exceeds the amount available under the cap, BPA will offer to obtain the service but pass through the portion of transfer costs associated with the amount of the non-Federal resource that exceeds the cap. In this way, a resource may be partially accommodated by the cap, and in such a circumstance BPA will pay for the maximum megawatt amount of Transfer Service for non-Federal resources allowed by the megawatt cap for that fiscal year.
- Once a customer's request has been recognized as below the megawatt cap threshold, BPA will arrange and pay for the transmission of the non-Federal resource consistent with the terms of the Regional Dialogue contract and the separate agreement specific to that resource. If a customer replaces a non-Federal resource, a new request will be required, and a new exhibit will be prepared for the separate agreement. In this situation, the date of record for determining the applicability of the megawatt cap will be the date associated with the original resource. If the replacement resource is larger than the first resource, the additional capacity of the replacement resource will be tied to the date of the request for the replacement resource. Under this approach once a customer has qualified under this megawatt cap, that service is transferable to other non-Federal resources.
- If a customer ceases to serve any portion of its above-RHWM load with a non-Federal resource that has qualified under the megawatt cap, BPA will adjust the capacity available under the cap so that it reflects that customer's new, lower non-Federal resource amount. Any new request made by that customer will be given a new date of record for determining the applicability of this megawatt cap.

BPA recognizes that the July 2007 RD Policy that established the megawatt cap for non-Federal Transfer Service did not contemplate the delivery arrangements of customers served on multiple transmission systems. BPA agrees with PNGC that, given the flexibility accommodated for these customers, a strict interpretation of the language in that Policy is not consistent with the method used to determine the 41 MW per fiscal year.

Therefore, in the cases where a customer served by multiple transmission systems chooses to serve its above-RHWM load with a non-Federal resource, BPA will decrement the cap based on the share of that customer's load served by transfer. While BPA appreciates the concern PNGC raises, it is BPA's assessment that this accommodation for customers served by multiple transmission systems maintains the intent of the cap, and that elimination or modification of this cap is not necessary due to this accommodation.

#### **Issue 2:**

**Should BPA provide for an automatic re-opener for the megawatt cap based on a de-rating of the FCRPS or a significant amount of new utilities forming that require Transfer Service?**

#### **Policy Position**

The Policy did not address this issue.

#### **Public Comment**

ANTI and other customers claim that the caps on the amount of Transfer Service for non-Federal power will not be workable over the long term. These customers requested a re-opener, if caps are insufficient due to a de-rating of the FCRPS for purposes of serving loads at tier one rates, or if new utilities require unplanned amounts of Transfer Service to deliver power to new PODs. (ATNI, CON-009; & CON-047; UIUC, CON-32; Yakama Power, CON-13; Benton REA, CON-044; IOUs, CON-054)

#### **Evaluation and Decision**

BPA's support of wheeling of non-Federal energy is being offered with some limitations. In the July 2007 Policy, BPA concluded that a customer's decision in acquiring energy supplies should not be biased by BPA's practice of arranging Transfer Services for only Federal power. Support of customers' diversification was limited to 41 megawatts per fiscal year of non-Federal Transfer Service, based on then-current forecasts for future load growth, in order to limit cost exposure. The concern expressed by ATNI overlooks two important points. First, there is no basis to assume that all above-RHWM loads will require Transfer Service. If a new public utility formed and sought service from BPA, it would first need to acquire an adequate distribution, and if necessary, transmission system in order to meet BPA's standards for service. Whether a potential customer has met BPA's standards will be determined case by case, and will be evaluated using joint-utility planning standards. That evaluation may conclude that there is no compelling

reason to rely on an intervening system for delivery of Federal or non-Federal power to a new customer.

Second, adjusting the limits upward is inconsistent with the goal of cost control. Cost control and sharing of risk have been central themes of Regional Dialogue Policy development. A reduction of FCRPS is a risk all parties must share.

BPA, in an effort to provide a planning paradigm for its power customers, has established a basis that is reasonable and fair with respect to Transfer Services. New customers need to evaluate all prospective costs prior to making irrevocable decisions, including whether or not Transfer Services will be necessary. Furthermore, BPA's support of non-Federal energy wheeling was never intended to be open-ended. Based on these considerations, BPA will not commit to a re-opener simply because the future does not unfold as hoped.

#### **2.6.3.4 Separate Agreement Addressing Transfer Service for Non-Federal Power**

##### **Issue 1:**

**Should BPA develop a separate agreement to address any non-Federal resource(s) a transfer customer acquires to serve load, or should these arrangements be included as part of the Regional Dialogue contract?**

##### **Policy Position**

This issue was not addressed in the Policy. Through the process of developing contract language intended to capture the limitations and details surrounding BPA's commitment to deliver non-Federal resources, BPA staff was confronted with the fact that transfer customers' non-Federal resource choices will cover a wide variety of possibilities.

##### **Public Comment**

In public meetings customers understood BPA's need to account for this wide variety of possibilities, but based on their need for certainty, customers recommended that BPA include a contract template for a separate agreement as an attachment to the Regional Dialogue contract.

##### **Evaluation and Decision**

BPA's solution to this problem was to propose that a separate agreement should be negotiated with each transfer customer. The separate agreement will contain the specific requirements and arrangements for that customer's non-Federal resource deliveries. Because of the wide variety of possible non-Federal resources and the particular requirements that the different third-party transmission providers may impose, it is not possible to draft the separate agreements until a customer notifies BPA of its resource choice, provides the details associated with the resource, and the third-party transmission provider informs BPA of any additional terms and conditions associated with the resource.

Because of all these variables BPA decided not to include a separate agreement template as an exhibit to the Regional Dialogue contract as customers requested. Instead, BPA has included a list of principles for developing these separate agreements in Exhibit G of the Regional Dialogue contract. BPA will develop a separate agreement template that contains boilerplate terms, but the substantive terms will not be included in the template because they are resource-specific. Some of the principles may not be applicable to all resources and thus should not be included in that customer's separate agreement. Having all the principles in Exhibit G of the Regional Dialogue contract, rather than attaching a contract template to the Regional Dialogue contract, will provide the necessary flexibility to adjust to the particular circumstances of each customer's resource choice, and all the principles will be available to adjust the separate agreements as these resource choices change.

Under this process, the customer will notify BPA when the customer has chosen to pursue acquiring a non-Federal resource. Based on the principles contained in Exhibit G, BPA and the customer will develop a separate agreement containing the specifics of the non-Federal resource, as well as the necessary transmission arrangements needed to deliver that resource to the customer's load. If the customer accepts the agreement, BPA will obtain and pay for Transfer Service to deliver the customer's non-Federal resource consistent with the terms of the separate agreement and the megawatt cap described above in section 2.7.3.3. If the customer decides to add additional non-Federal resources, exhibits containing the specific arrangements for the additional resources will be negotiated and added to the separate agreement.

## **Issue 2:**

**Should the provisions of Governing Law and Dispute Resolution apply to the separate agreement for transfer of non-Federal power?**

## **Policy Position**

This issue is not addressed in the Policy.

## **Public Comment**

Benton REA commented on the provision contained in section 14.6.7 of the Regional Dialogue contract that states, "The terms of the agreement BPA offers to customer shall not be subject to section 22, Government Law and Dispute Resolution." Benton REA does not agree with this provision of the contract, and contends that the agreement for the transfer of non-Federal deliveries should allow the same enforcement rights as other parts of the Regional Dialogue contract. (Benton REA, CON-044)

## **Evaluation and Decision**

As discussed above, BPA will enter into separate agreements with transfer customers to wheel non-Federal power to serve the customer's above-RHWM load. The principles and process for these separate agreements are contained in Exhibit G of the Regional Dialogue contract. Under this process the customer will notify BPA of its resource choice and provide the necessary details, so that BPA can make a request to the third-party transmission provider to include the customer's resource as a Network

Resource. Typically transmission providers offer wheeling services in accordance with established Open Access Transmission Tariff's (OATT's) that BPA must comply with in order to maintain the transmission contract. During the development of these separate agreements the transfer customer and BPA will have an opportunity to work through all the pertinent details of each resource and BPA will provide information to the third-party transmission provider for the studies needed to add the customer's resource as a Network Resource. This process will result in the third-party transmission provider offering BPA an amended transmission agreement that reflects the addition of the customer's resource and any necessary terms and conditions associated with that resource, including any additional upgrade costs. BPA will offer the customer a separate agreement which will reflect the terms and conditions of the offer made by the third-party transmission provider consistent with the principles in Exhibit G of the Regional Dialogue contract.

The separate agreement for transfer of the non-Federal resource will contain its own dispute resolution clause, which will be effective once the separate agreement is signed. BPA will not allow the separate agreement itself to be subject to the dispute resolution provisions of the Regional Dialogue contract, because the service is provided by the third-party transmission provider and there are numerous variables that are not under BPA's control. The separate agreement will be negotiated between BPA and the transfer customer and the customer will be able to evaluate the viability of its resource choice during this negotiation and can decide to either sign the separate agreement or make other arrangements. If this process and the unsigned separate agreement are subject to the Regional Dialogue contract dispute resolution provisions, this process will not work and BPA would risk incurring significant costs from the third-party transmission provider, that in accordance with the principles in Exhibit G and other aspects of this policy should be borne by the transfer customer.

### **2.6.3.5 Requirement to Designate Non-Federal Resources as Network Resources**

#### **Issue 1:**

**Should BPA require that all non-Federal resources acquired by transfer customers, including market purchases, be designated as Network Resources prior to providing Transfer Service?**

#### **Policy Position**

The Policy did not address this issue.

#### **Public Comment**

In public meetings in which the principles of non-Federal Transfer Service were discussed, some customers expressed concern over the requirement that, prior to BPA agreeing to obtain and pay for Transfer Service of non-Federal resources, the resource must be designated as a Network Resource or its equivalent for non-OATT Transfer Service. Customers also questioned the one-year notice requirement and the requirement that the resource acquisition period must be for at least one year in duration.

## **Evaluation and Decision**

Most Transfer Service BPA obtains from third-party transmission providers is Network Service provided under an Open Access Transmission Tariff (OATT). Network Service is usually the preferred option for delivering firm resources to firm load. The OATT contains specific requirements regarding the resources used to serve Network Loads. In order to obtain Transfer Service for non-Federal resources, BPA will require that the resource be designated as a Network Resource under the terms of the third-party transmission provider's OATT.

This will ensure that the resource is delivered to customer's load on firm transmission, which will limit curtailments to only reliability situations rather than economic transmission congestion. Designating the non-Federal resource as a Network Resource will also limit BPA's exposure to additional administrative expense and complication associated with scheduling non-Federal resources on non-firm transmission. In addition this requirement will ensure that there is a firm resource available to serve the customer's above-High Water Mark load, which will limit the customer's risk of incurring an Unauthorized Increase (UAI) penalty charge and BPA's risk of having to serve the customer's above high water mark load with Federal power.

The customer's non-Federal resource will need to be designated as a Network Resource prior to BPA offering the separate agreement discussed in section 2.7.3.4 above. BPA will work with the customer to compile all the necessary information for designating the non-Federal resource as a Network Resource, and then BPA will submit the designation request to the third-party transmission provider. Any additional requirements for designation of the non-Federal resource imposed by the third-party transmission provider will be reflected in the separate agreement.

BPA has included the 1-year notice and 1-year duration requirements to the principles of non-Federal Transfer Service to accommodate the time needed for this process. The 1-year notice will provide time for the third-party transmission provider to perform necessary studies and time for BPA and the customer to draft and sign the separate agreement. If the third-party transmission provider determines that system upgrades are needed to accommodate the customer's non-Federal resource, it may take longer than a year to get the non-Federal resource designated as a Network Resource, and in these situations, BPA will not obtain Transfer Service for the non-Federal resource until the required upgrades are complete.

Because of the process required to designate a Network Resource, it is logical that the customer must commit to obtaining the non-Federal power from that resource for at least 1 year. This does not preclude transfer customers from using Unspecified Resources as defined in the Regional Dialogue contract, provided that the Unspecified Resource is used for at least 1 year. In addition, based on customer comments, BPA added a section to the principles of non-Federal Transfer Service that will allow customers that have a designated Network Resource to displace the Network Resource with a market purchase if the customer meets the requirements specified in the principles of non-Federal Transfer

Service (*See* Regional Dialogue contract Exhibit G, section 15) and the displacement is consistent with the requirements of the third-party transmission provider's OATT.

For some BPA Transfer Service customers, the contracts BPA holds with third-party transmission providers are not OATT Network Agreements, usually because these contracts are grandfathered contracts that have not been converted to OATT service. In these instances, the arrangements for Transfer Service of non-Federal resources will need to use firm transmission, and many of the requirements will be the same as designation of a Network Resource. BPA will work with the customer and the third-party transmission provider to determine the best plan of service for adding the non-Federal resource to the customer's resource portfolio.

### **2.6.3.6 Exceptions to the Rule of Transferring Non-Federal Power over Intervening Transmission Systems**

#### **Issue 1:**

**Should BPA make any exceptions to this policy if the “intervening Transmission system” is insignificant and has resulted from BPA decisions regarding the plan of service for transfer customers?**

#### **Policy Position**

BPA policy regarding Transfer Service for non-Federal power states that BPA will only provide Transfer Service over the third-party transmission provider's system in which the customer is located. If any other transmission is needed to deliver the non-Federal resource to the customers load, the customer is responsible for obtaining and paying for the additional transmission.

#### **Public Comment**

In open meetings, customers pointed out that BPA's policy, to only obtain and pay for Transfer Service across the third-party transmission provider system in which the customers load is located, could be unduly restrictive for customers located in Sierra Pacific's balancing authority area. Existing transmission service arrangements from BPA's balancing authority area to Sierra Pacific's balancing authority area involve two additional transmission arrangements funded by BPA power services—one through PacifiCorp for their transformer at the Malin Substation, and another through BPA Transmission Services for the Southern Intertie portion of the BPA system. The rule as proposed would seem to require these customers to contract on their own for the additional transmission pieces, if the customers purchase non-Federal generation interconnected to the BPA main grid. (Wells, CON-031)

#### **Evaluation and Decision**

BPA does recognize the layered nature of some current arrangements to deliver Federal power. The policy was developed with the broad goal of establishing a framework within which all transfer customers could find themselves. As is often the case, however, individual circumstances affecting individual customers were not clearly identified and



addressed. It is not BPA's intention to knowingly place any transfer customer in a poorer position vis-à-vis other transfer customers in terms of diversifying power supplies. To do so would potentially frustrate the purposes behind the policy, which is encouraging development of regional electrical infrastructure. At a minimum, in the case of Wells and Harney Electric Cooperative, BPA will strive to replicate, for qualifying non-Federal energy, the wheeling path used to deliver Federal power, subject to the other constraints placed on Transfer Service. Furthermore, BPA does not recognize the Southern Intertie capacity used to serve these two customers as an intervening system in the context of Transfer Service. Therefore, it will remain with BPA, if necessary, to utilize Southern Intertie capacity to meet contractual obligations to Wells and Harney, including providing service for non-Federal energy.

#### **Issue 2:**

**Should BPA make an exception to the rule regarding transfer of non-Federal power over intervening Transmission systems for customers located in Southeast Idaho?**

#### **Policy Position**

The Policy stated that BPA may, at its discretion, consider other alternatives for non-Federal power deliveries on a case-by-case basis.

#### **Public Comment**

Southeast Idaho customer representatives expressed a desire to have the South Idaho Exchange agreement treated as if it were part of Transfer Service to those customers, such that BPA should commit to deliver non-Federal power using the South Idaho Exchange as if it were another transfer agreement. Customers claim that this is consistent with the concept of a level playing field for transfer customers. (ICUA, CON-061)

#### **Evaluation and Decision**

The South Idaho Exchange is not a transfer agreement, and does not fit under the umbrella of Transfer Service policy. It is a power supply arrangement, and BPA's counterparty under the agreement is not considered a transmission function, so is not subject to the same transmission obligations as a FERC-jurisdictional transmission function. BPA cannot therefore unilaterally facilitate integration of non-Federal resources under the South Idaho Exchange and may not be able to replicate a similar exchange arrangement for non-Federal resources. The level playing field the customers seek would require extensive new transmission improvements across South Idaho, which would not be cost-effective. BPA will nevertheless work with customers otherwise served via the South Idaho Exchange on resource development and integration and BPA remains open to evaluating other alternatives on a case-by-case basis.

### **2.6.4 Proportional Scheduling**

#### **Issue 1:**

**In cases where a customer's load is served across multiple transmission systems, where should a Customer's new non-Federal resources be delivered?**

**Policy Position**

BPA policy regarding the delivery of customer non-Federal resources to serve above-RHWM load required that the resources must be delivered to the customer's load, but did not discuss situations where a customer may be taking service from multiple transmission systems.

**Public Comment**

During the course of contract drafting BPA shared draft language addressing proportional scheduling at several public customer meetings. In addition, BPA worked with customers likely to be significantly impacted by this section, most notably PNGC, to clarify this aspect of delivery for customers with load served by multiple transmission systems.

In a comment, PNGC noted that initial drafts regarding proportional delivery to each transmission system were onerous, and generally expressed a need for increased flexibility in allowable alternatives. In public customer meetings this sentiment was repeated. (PNGC, CON-039)

In early drafts of the proportional scheduling section of the contract, for purposes of defining any cost shifts from the customer to BPA, BPA established a customer's baseline delivery arrangement as a pro rata delivery of the customer's non-Federal resources serving above-RHWM load to each transmission system, based on the percentage of the customer's load in each transmission system. In public meetings, customers generally expressed that when establishing this baseline, BPA should not examine a customer's load served by a transmission system, but rather the load growth associated with that transmission system.

**Evaluation and Decision**

BPA will only require that new dedicated non-Federal resources are treated in this manner. Existing resources may continue to serve customer load consistent with the manner of delivery identified in the Subscription contracts.

In response to concerns raised by PNGC and others, and in order to facilitate the development of resources by customers served over multiple transmission systems, BPA will allow a customer's non-Federal resources serving above-RHWM load to be delivered, in whole or part, to that customer's load interconnected to any transmission system, provided that the load is sufficient to sink the resource, and the timelines and other requirements outlined in the contract are met. BPA will evaluate any cost shifts from the customer to BPA, attributable to the customer's preferred delivery method, and charge the customer accordingly. In order to assess these cost shifts BPA will establish baseline delivery percentages and amounts.

When establishing baseline delivery amounts BPA will examine load growth on each transmission system rather than total load, consistent with customer suggestions.

## **Issue 2:**

**What should BPA include in its determination of cost shifts associated with a customer's elections to deviate from the baseline proportional delivery of non-Federal resources?**

### **Policy Position**

The Policy did not specifically address this issue; however, the Policy did generally outline the goal of prevention of cost-shifts to the various rate pools.

### **Public Comment**

PNGC proposed that in order for BPA to assess a charge to prevent a cost shift, the cost should be "known and verifiable." In contract drafts BPA had included the more broad statement that any cost shifts to BPA attributable to a non-Federal resource serving load in proportions other than the baseline delivery amounts would be quantified and recovered through a charge to the customer. In public customer meetings other customers expressed support for the broad inclusion of cost shifts, and commented that any limitation to these cost shifts, including "known and verifiable," would result in more costs shifted to BPA, which would then be passed on to other customers in the Tier 1 rate pool. (PNGC, CON-039)

### **Evaluation and Decision**

After identification of the issue of delivery from multiple transmission systems, BPA recognized that, depending on the transmission system a non-Federal resource is delivered to, a customer may be exposed to more or less delivery cost. Such costs may include, for example, the required payment of third-party transmission system losses for non-Federal power serving transfer loads, which is the responsibility of the customer when non-Federal resources are being delivered to the transfer load, but if Federal power is delivered to the load instead, BPA is responsible for the cost of the losses. Without the proportional scheduling requirements and cost shift protections described in Issue 1 above, a customer served by multiple transmission systems could avoid any such costs; the costs would shift to BPA to be recovered through the BPA Tier 1 rate pool.

BPA recognizes PNGC's goal of clarifying the types of costs that may be included in a charge to the customer as beneficial to the public interests. To address this lack of clarity BPA has included in the contracts categories of cost shift BPA anticipates will be included in these charges.

However, BPA will not limit the charges BPA assesses to those cost shifts that are known and verifiable as PNGC suggests. It is BPA's assessment that any cost the customer would be exposed to under baseline delivery arrangements should be borne by the customer, regardless of how resources are delivered. Placing the limitations of known and verifiable on these cost shifts could cause BPA to bear a single customer's avoided cost in certain situations.

## 2.7 NO WARRANTY

### Issue 1:

**Whether BPA should retain the “No Warranty” clause that was in the initial draft Regional Dialogue contract template.**

### Policy Position

BPA’s Policy provides in part as follows in connection with providing certainty as to the tiered rates construct:

. . . Thus, BPA will not warrant or represent that the contract is immune from costs imposed by court order or agency regulations of a general and public nature.

The contract will state that it is the parties’ intent to structure a durable commercial relationship based on existing statutory requirements and to provide customers as much protection against change in those requirements as possible. However, BPA will not warrant or represent that the contract is immune from subsequently enacted legislation.

(2007 RD Policy at 50) BPA’s initial draft of the Regional Dialogue contract template followed up on this, but went further and included a “no warranty” provision that stated:

### No Warranty

Nothing in this Agreement, or any dispute arising out of this Agreement, shall limit the Administrator’s responsibility to recover costs and timely repay the U.S. Treasury or to take actions that are effectively required by a court order. It is the Parties’ intent to structure a durable commercial relationship that is based on existing statutory requirements and to provide Customer with protection against change to those guiding states as is reasonably possible. However, BPA will not warrant or represent that this Agreement is immune from costs imposed by subsequently enacted legislation.

### Public Comments

BPA received numerous comments expressing serious concern over the “no warranty” provision in the Regional Dialogue contract template and requesting BPA remove the provision from the contract. (Mason 1, CON-002; Skamania, CON-004; Ellensburg, CON-007; Yakama Power, CON-014; LL&P, CON-025; Benton REA, CON-044; WPAG, CON-045; Clark, CON-053)

Several customers commented that this provision is a step backward from the Subscription contract, which did not contain such a provision. (Mason 1, CON-002; Skamania, CON-004; Yakama Power, CON-014; LL&P, CON-025; Benton REA, CON-044; WPAG, CON-045) Customers argue that the “no warranty” provision eliminates any defenses they would have to resist agency or regulatory change, and it

diminishes the customer's ability to enforce their contractual rights. (Mason 1, CON-002; Yakama Power, CON-014; LL&P, CON-025; Benton REA, CON-044)

Additionally customers raise concern that this language brings into question the permanence of the Tiered Rate Methodology and certainty of cost-based rates for the term of the contract. (Mason 1, CON-002; Ellensburg, CON-007; LL&P, CON-025; Benton REA, CON-044) Similarly, WPAG states that, "section 23 of the LF Contract creates an attractive nuisance that will draw the attention of every political enemy of preference and cost based rates. By so doing, it will diminish the hold that preference customers, and the region, have on the benefits of the federal power system." (WPAG, CON-045)

### **Evaluation and Decision**

After considering concerns raised by customers in written comments and in public meetings, BPA reviewed the language in light of the Policy and decided to remove the "no warranty" provision from the Regional Dialogue contracts because the language is unnecessary to state in the contract. BPA understands customers' concerns that including such a clause may be misconstrued by a court as the customer's agreement to future regulatory or other change that may impact the customer's contractual relationship with BPA.

BPA believes it is unnecessary to include the "no warranty" provision in the Regional Dialogue contract for the following reasons:

First, the Tiered Rate Methodology (TRM), not the contract, governs cost recovery, and the TRM is absolutely clear that BPA retains its authority to respond to court order and to recover costs, including doing so through change to the TRM if necessary. The contract specifies that the TRM will be binding on the parties in accordance with its terms, so the contract clearly preserves and in no way detracts from BPA's authority to recover costs and respond to court order.

Second, with regard to any warranty as to future regulation or legislation, BPA's intent is clearly stated in the Policy. The Policy states BPA "will not" warrant certain matters and removal of the contract language is consistent with that—BPA has not warranted the matters. (2007 RD Policy at 50)

Finally, BPA has included in section 23.7 of the Regional Dialogue contract template the contract language that is required by the BPA Refinancing Section of the Omnibus Consolidated Revisions and Appropriations Act of 1996, P.L. No. 104-134, 110 Stat. 1321, 1350. That language assures customers cost-based rates.

For these reasons, BPA does not believe the "no warranty" language is necessary in the contract and therefore will not include such language in Regional Dialogue contracts.

## **2.8 DISPUTE RESOLUTION**

### **Issue 1:**

**Whether BPA should allow for binding arbitration as a matter of right, rather than only if BPA agrees to it on a case-by-case basis.**

### **Policy Position**

Section 22 (Governing Law and Dispute Resolution) of the Regional Dialogue contract template states that a dispute may be resolved via binding arbitration only if the dispute is not within the exclusive jurisdiction of the Ninth Circuit and if BPA determines that the issue falls within the parameters of BPA's Binding Arbitration Policy.

### **Public Comments**

Several customers express dissatisfaction with BPA's approach to binding arbitration in the Regional Dialogue contracts. (Mason 1, CON-002; ATNI, CON-009; DOE Richland, CON-017; Pacific, CON-019; Snohomish, CON-021; Slice Group, CON-022; Grays Harbor, CON-024; LL&P, CON-025; UIUC, CON-032; Benton REA, CON-044; WPAG, CON-045; Clark, CON-053) Customers state that the Regional Dialogue contract provides for less enforceability through binding arbitration than the Subscription contract did and therefore this is a step backward from Subscription. (Mason 1, CON-002; Pacific, CON-019; Slice Group, CON-022; Grays Harbor, CON-024; LL&P, CON-025; Benton REA, CON-044) Similarly, some customers commented that customers should have the right to resolve any dispute via binding arbitration without limitation. (Grays Harbor, CON-024; LL&P, CON-025) Several customers express strong dissatisfaction that binding arbitration is only available if BPA agrees to it on an issue and is not available as a matter of right. (Mason 1, CON-002; Pacific, CON-019; Snohomish, CON-021; Slice Group, CON-022; Grays Harbor, CON-024; LL&P, CON-025; Benton REA, CON-044; WPAG, CON-045; Clark, CON-053) WPAG and Clark state that BPA has the authority to enter binding arbitration, but nonetheless BPA has chosen not to commit to binding arbitration in the Regional Dialogue contract. (WPAG, CON-045; Clark, CON-053)

Customers state that BPA is making important determinations pursuant to the contract and the customer has no ability to dispute or contest those determinations to a third party neutral. (Mason 1, CON-002; Pacific, CON-019; Grays Harbor, CON-024; Benton REA, CON-044) Snohomish and the Slice Group expressed dissatisfaction that BPA will only consider using binding arbitration on matters of fact. (Snohomish, CON-021; Slice Group, CON-022) Several customers comment that BPA's approach to binding arbitration is not commercially reasonable and is not a workable approach in a business environment. (Snohomish, CON-021; Slice Group, CON-022; WPAG, CON-045; Clark, CON-053)

### **Evaluation and Decision**

In affording rights to its customers under a Federal contract, BPA just like other Federal agencies must comply with Federal statutes that address those rights. As many customers

commented, the availability of binding arbitration is more limited under the Regional Dialogue contract than it was in Subscription. One of the reasons BPA's approach to binding arbitration has changed is that since the date Subscription contracts were executed, BPA has learned that the Administrative Dispute Resolution Act of 1996, 5 U.S.C. §§ 570a-584 (ADRA), applies to BPA. Another reason that BPA has scaled back its use of binding arbitration is due to BPA's experience implementing the sweeping binding arbitration provision contained in the Subscription contract. As BPA saw in Subscription, a sweeping binding arbitration provision may result in parties seeking the ability to arbitrate issues of policy, the impact of which can reach well beyond the immediate parties to impact other BPA customers that are not parties to the dispute. For this reason and related policy reasons, section IX of the July 2007 Long-Term Regional Dialogue Final Policy (July 2007 Policy) sets forth various considerations that BPA must take into account in deciding which issues are appropriate for binding determination by a third party. Many of the considerations set forth in the July 2007 Policy are also included in the ADRA and Department of Justice guidance on the ADRA.

The ADRA, which amended the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA), governs the United States government's use of binding arbitration. Therefore, binding arbitration can only be used by BPA in compliance with the ADRA to resolve contract claims. WPAG and Clark's assertion that BPA has unlimited authority to enter binding arbitration is simply incorrect. (WPAG, CON-045; Clark, CON-053) BPA's authority to enter binding arbitration to resolve contract claims that arise out of power sales contracts is limited by the ADRA.

The ADRA requires an agency to adopt a guidance policy on the use of binding arbitration before entering binding arbitration to resolve any contract claims. 5 U.S.C. § 575(c). The policy must contain the various requirements and limitations stated in the ADRA, and must be approved by the United States Department of Justice. *Id.* BPA is in the process of obtaining DOJ approval of a Binding Arbitration Policy so that any binding arbitration under Regional Dialogue contracts will comply with the ADRA and the CDA. BPA's Binding Arbitration Policy will contain the approved requirements and limitations required by the ADRA. Such requirements and limitations are summarized as follows (*See* 5 U.S.C. §§ 572 & 575):

1. An agreement to enter binding arbitration must be made voluntarily. The agency cannot force any party to enter binding arbitration.
2. Money damages are the only type of relief allowed against the agency.
3. Before entering binding arbitration, Parties must enter a specific agreement to engage in binding arbitration which must set forth the precise issue in dispute, the amount in controversy, and the maximum monetary award allowed.
4. Binding arbitration is not available to resolve a dispute if:
  - a. the determination may set precedent for other case(s);
  - b. it involves a question of government policy;
  - c. it involves a matter for which BPA seeks to maintain consistent results;
  - d. it significantly impacts people/entities not party to the dispute; or
  - e. a public record of the proceeding is needed.

BPA understands that customers want the opportunity to use binding arbitration and BPA is willing to consider agreements using binding arbitration to the extent BPA's policy and the law allows. Accordingly, BPA is in the process of finalizing a Binding Arbitration Policy as required by the ADRA so that BPA may agree to binding arbitration on disputes that fall within the parameters of the ADRA and the Policy.

**Issue 2:**

**Whether parties should be required to take a dispute (that is not subject to binding arbitration) to non-binding arbitration before they may take the dispute to court for judicial review.**

**Policy Position**

The initial draft of the Regional Dialogue contract required that non-binding arbitration be used to resolve disputes that: (1) were not final actions or implementation of final actions within the exclusive jurisdiction of the Ninth Circuit, or matters of policy; and, (2) were not resolved via binding arbitration. Thus, if a matter was not within the exclusive jurisdiction of the Ninth Circuit or a matter of policy and was not subject to binding arbitration, a party was required to take the dispute to non-binding arbitration before seeking judicial review.

**Public Comments**

During public meetings in the summer of 2008, BPA received oral comments on this matter. Some customers stated that they do not want non-binding arbitration to be a requirement before they may seek judicial review. WPAG and Clark stated: "If BPA does not consent to binding arbitration, the customer must go through non-binding arbitration before it can even get the matter to court. The result of this is that for contract disputes that BPA does not wish to take to binding arbitration, it will take literally years to get the matter before a neutral decision maker for a binding decision." (WPAG, CON-045; Clark, CON-053)

**Evaluation and Decision**

BPA believes customers' request to not require non-binding arbitration before a customer seeks judicial resolution is a reasonable request because a customer may determine, due to expediency or for other reasons, that it is in the customer's best interest to forego non-binding arbitration and proceed directly to judicial resolution. Therefore, BPA has modified the non-binding arbitration provision in section 22 of the Regional Dialogue contract to allow customers the right to forego non-binding arbitration and move directly to judicial resolution if the customer so desires.

**Issue 3:**

**Whether section 22.4 (Arbitration Remedies) of the Regional Dialogue contract should be modified to allow for types of remedies for contract claims against BPA other than money damages.**



### **Policy Position**

Section 22.4 (Arbitration Remedies) contains a sentence that states, “The payment of monies shall be the exclusive remedy in any arbitration proceeding pursuant to this section 22.” The contract contains this sentence because the only type of contract remedy for contract claims allowed against the United States is money damages.

### **Public Comment**

Benton REA raised concerns that the only type of arbitration remedy allowed under the contract is money damages. (Benton REA, CON-044) Benton REA states, “In some cases the remedy may be a change in a BPA policy, procedure or contract provision. Limiting the remedy to money only seems to preclude these other options.” *Id.*

### **Evaluation and Decision**

The purpose of this language is to limit the remedies available under this contract to the remedies that are available by law. The United States has sovereign immunity and cannot be subject to suit unless Congress has waived its sovereign immunity. *United States v. Mitchell (Mitchell)*, 463 U.S. 206, 212 (1983); *Puget Sound Power & Light Co. v. United States (Puget)*, 23 Cl.Ct. 46, 57 (1991) (*citing cases*) (“[T]he Supreme Court has long adhered to the classic jurisdictional doctrine...that the United States, as a sovereign, cannot be sued without its own express consent granted by Congress...”). For breach of contract claims the Tucker Act, 28 U.S.C. § 1491, has waived sovereign immunity only for monetary relief against the United States, not equitable or declaratory relief. *Mitchell*, 463 U.S. at 212; *North Star Alaska v. United States (North Star)*, 9 F.3d 1430, 1432 (9th Cir. 1993) (*citing cases*) (“Generally speaking the Tucker Act does not permit the claims court to grant equitable or declaratory relief in a contract dispute case.”); *Electric Lightwave, Inc. v. Richardson (Electric Lightwave)*, 106 F.Supp.2d 1063, 1065 (D. Or. 1999). Accordingly, the only remedy available against BPA for contract claims that arise under Regional Dialogue contracts is the payment of money. Therefore the sentence limiting remedies against BPA to money damages for contract claims must remain in the contract. This analysis does not foreclose other arbitration outcomes when a contract claim is not involved. For example, if parties agree to submit an issue of fact to arbitration for a mere determination of that particular fact, and the dispute is not a contract claim for money damages, then the arbitration outcome would be the arbitrator’s determination of such fact.

### **Issue 4:**

**Whether BPA should change contract language to state that specific performance is not available against either Party as opposed to stating that specific performance is not available against BPA.**

### **Policy Position**

Section 22.4 (Arbitration Remedies) of the Regional Dialogue contract contains a sentence that states: “Under no circumstances shall specific performance be an available remedy against BPA.” The contract contains this sentence because the United States has not waived sovereign immunity as to specific performance and thus specific performance is not allowed against the United States.

## Public Comment

ATNI and UIUC state that specific performance should not be available against either the customer or BPA, and ask that BPA edit the sentence at issue to read: “Under no circumstances shall specific performance be an available remedy against either Party.” (ATNI, CON-009; UIUC, CON-032)

## Evaluation and Decision

BPA has sovereign immunity as explained in the Evaluation and Decision section of the previous issue. The only contract remedy the United States has waived sovereign immunity for is monetary relief. *Mitchell*, 463 U.S. at 212; *North Star*, 9 F.3d at 1432 (citing cases) (“Generally speaking the Tucker Act does not permit the claims court to grant equitable or declaratory relief in a contract dispute case.”); *Electric Lightwave*, 106 at 1065. The United States has not waived sovereign immunity for a court to grant specific performance and thus specific performance is not available against BPA. *White v. Administrator of General Services Admin.*, 343 F.2d 444, 445-6 (9<sup>th</sup> Cir. 1965); *Doe v. Civiletti*, 635 F.2d 88, 89 (2<sup>nd</sup> Cir. 1980) (refers to “the well-established rule that the Federal courts do not have power to order specific performance by the United States of its alleged contractual obligations.”) Therefore, the Regional Dialogue contract states: “Under no circumstances shall specific performance be an available remedy against BPA.”

However, the law allows for specific performance against non-Federal entities. Additionally, public body Tribal utility customers have no claims of sovereign immunity under the Regional Dialogue contract. Section 22 of their contracts explicitly states: “«Customer Name» agrees that it will not assert as a defense to any claim by BPA hereunder, its sovereign immunity, and said immunity is hereby expressly waived for any obligations, liabilities, or duties owed by «Customer Name» to the Bonneville Power Administration, United States Department of Energy, under this Agreement.” BPA’s customers under this contract, like the preceding contracts, are required to make choices, provide information, and perform actions that are vital to BPA’s implementation of both the contract and its statutes. The non-performance by the customer can have consequences to BPA implementing Congress’ statutory directions that are not recompensed by money damages. To the extent the contract imposes an action causing choice by the customer; refusal to do so would not just affect the one customer but can affect many others.

Further, it is important to recognize that BPA, as the Pacific Northwest marketer of Federal power, has historically worked with its utility customers to ensure that disputes under contract get resolved quickly and, in particular, before they reach the point where the parties seek legal redress for contract claims involving damages. In such instances, BPA and utility customers have reached agreement on how the parties will conduct themselves under the contract. On the one hand, the parties remain free under the terms of the contract to reach solutions that do not compel BPA to specifically perform. On the other hand, BPA is not willing to relieve its customers of their obligations under the contract to specifically perform. In doing so, BPA believes it is important that its

customers fully perform their obligations and duties under the contract and, if necessary, be compelled to specifically perform. Accordingly, BPA will not make the change to the contract language that ATNI and UIUC requested.

## **2.9 MISCELLANEOUS ISSUES**

### **2.9.1 Transmission Scheduling Service**

#### **Issue 1:**

**Should BPA provide a bundled power and transmission scheduling service for Load Following customers who take the majority of their energy needs from BPA?**

#### **Policy Position**

In the Policy BPA stated that “BPA will explore in the Product Development Process the feasibility and desirability of a bundled power and transmission product.” (2007 RD Policy at 21) After exploring this product, BPA considered offering a transmission scheduling service under the Regional Dialogue contracts. This service was requested by Load Following customers and would enable BPA to use the inherent resource flexibilities of customers’ network transmission service rights in order to manage BPA’s power resources efficiently. In addition, the transmission scheduling service would provide seamless scheduling for customer’s resources to load for Transfer Service customers.

#### **Public Comment**

During public discussion with customers regarding the feasibility and desirability of a bundled power and transmission product, customers were concerned that if, at some point, BPA Transmission required Load Following customers within the BPA Balancing Authority Area to schedule, this would be a hardship on many of the smaller utilities who are not staffed for a real-time shift. Customers appeared undecided on whether they wanted to relinquish their Network Integration Transmission Service Agreement to BPA Power Services or simply wanted BPA Power Services to provide scheduling of the Federal energy deliveries to load. Customers went on to suggest that while there may be reasons why BPA should not offer a bundled power and transmission product, some of the same benefits may be achieved if BPA managed the transmission scheduling of their Network Integration Transmission Service Agreements through a transmission scheduling service.

Over several public customer meetings BPA developed and shared contract language describing the transmission scheduling service, including the required participants and specific aspects of the service, and received customer feedback and suggestions.

#### **Evaluation and Decision**

As part of BPA’s commitment under the Policy, BPA evaluated both a bundled power product option and alternatively an option under which BPA Power Service provides

transmission scheduling service for Load Following customers served under a Network Integration Transmission Service Agreement with Transmission Services.

Working with interested customers, BPA determined that having BPA Power Services hold the customer's Network Transmission agreements was not the best alternative. It is necessary for customers to maintain a contractual relationship with BPA Transmission Services, because BPA Power Services will not be able to properly represent individual customer issues as they relate to BPA Transmission Service policy and practices.

However, to accommodate customer requests BPA will provide a transmission scheduling service to some customers. BPA will limit availability of this service to Load Following customers that hold Network Integration Transmission Service Agreements because of the significant coordination and product related challenges that BPA Power Services would face performing the transmission scheduling for non-Load Following customers and customers using point-to-point transmission.

In addition, BPA has determined that customers for whom this service is available and who also meet one or more of the following criteria will be required to take the scheduling service: all transfer customers; all customers taking Diurnal Flattening Service or Secondary Crediting Service from BPA for any resource, and all customers purchasing any amount of energy at a Tier 2 rate. This set of customers is highly dependent on BPA to serve their hourly loads and meet their commitments under the Regional Dialogue contracts.

The requirement to take scheduling services is expected to reduce the complexity of implementing the Load Following power product and the Diurnal Flattening Service. Having Power Services provide transmission scheduling services for these customers will enable Power Services to ensure there is coordination and information flow necessary to ensure the customer's load is being met in any hour. BPA currently provides scheduling for Load Following customers served by transfer to meet BPA's responsibilities as the contract holder of the third-party transmission agreement for Transfer Service.

For customers for whom this service is available; i.e., Load Following customers that hold Network Transmission Agreements with Transmission Services, but do not meet any of the other stated criteria, BPA will offer the transmission scheduling service but will not require the customer to take it.

If a customer takes the transmission scheduling service, BPA's Power Services will be the interface between the customer and BPA's Transmission Services for purposes of scheduling the delivery of energy from a resource to a customer's load. If required as part of transmission scheduling, Power Services will forecast the customer's hourly load and submit all E-TAGs necessary to deliver the customer's resources to its load.

The customers will continue to manage the non-scheduling aspects of their Network Integration Transmission Service Agreement. In addition, customers will be responsible for providing hourly generation forecasts to BPA for any non-Federal generation they

have acquired to serve their load, as well as any needed transmission wheeling to deliver a non-Federal resource to load.

**Issue 2:**

**Should BPA make limited exceptions for certain transfer customers to the rule that all transfer customers must take the transmission scheduling service?**

**Policy Position**

As stated in the original drafter notes for the Regional Dialogue contract, all customers with any transfer load are required to take the transmission scheduling service.

**Public Comment**

In customer meetings and in public comment Cowlitz requested that it be excused from the requirement that all transfer customers take the transmissions scheduling service. Cowlitz noted that a very small percentage of its load is served by transfer, and that no interchange scheduling is required to serve that load. In addition, Cowlitz noted that while this load is technically served by transfer, it is not located in a transfer provider's Balancing Authority Area. (Cowlitz, CON-016)

**Evaluation and Decision**

BPA agrees with Cowlitz that for transfer customers who do not require interchange scheduling there should be a minimum transfer load threshold when determining the requirement. BPA believes a 2 percent threshold in these cases is appropriate. This would mean that if 2 percent or less of a customer's load is served by transfer, no interchange scheduling is required to serve that load, and the customer does not meet the other requirement criteria, BPA will not require that customer to take the transmission scheduling service. A customer in this situation may still choose to take the service.

**2.9.2 Treatment of Hungry Horse Reservation Power for Customers that Join a Joint Operating Entity**

**Issue1:**

**Whether BPA will allow sales of Hungry Horse Reservation power for Western Montana preference customers that become members of a Joint Operating Entity.**

**Policy Position**

This issue was not addressed in the Policy.

**Public Comment**

The Pacific Northwest Generating Cooperative (PNGC), which is a Joint Operating Entity (JOE), asked how BPA would treat sales of Hungry Horse Reservation power if Western Montana customers join PNGC JOE.

## **Evaluation and Decision**

BPA has a statutory obligation to market the power generated at the Hungry Horse project in accordance with the Hungry Horse Dam Act, 43 U.S.C. 593a, as reaffirmed by the Northwest Power Act, 16 U.S.C. 839g(f). BPA will offer power available from the Hungry Horse project to eligible Montana customers consistent with the Administrator's Redistribution of Available Hungry Horse Reservation (HHR) Power Record of Decision, dated December 9, 1996, which established a first priority to HHR power for preference customers in Western Montana. Regional Dialogue contracts for eligible customers with load in Western Montana will include a contract provision that establishes that a portion of the power service BPA provides for these customers is HHR power because they are eligible to receive HHR power as a first priority. BPA anticipates that the amount of requirements load it serves in Western Montana will equal or exceed the available HHR power and that BPA sale of power to the eligible Western Montana customers will satisfy the geographical preference in use of the HHR. A Western Montana customer does not lose its status as an entity eligible for service from the HHR by joining a JOE. The fact that a Western Montana customer establishes membership with PNGC and has its BPA power provided through that JOE would not in any way reduce that customer's eligibility for and its allocation of the Hungry Horse Reservation. The directive of the JOE is that it is able to buy only the amount of power its member is eligible to buy from BPA. The JOE will simply pass through the allocation of HHR to the eligible customer who is a JOE member. BPA will include a provision in the JOE contract that acknowledges the fact that all or a portion of the power provided under the agreement for members who are from Western Montana shall include the member's portion of power available to BPA from Hungry Horse Reservation.

### **2.9.3 Off-Site Renewables Option**

#### **Issue 1:**

**What should the duration be for Plum Creek's off-site renewable for the Green Exception (GE) since it qualified for the exception by December 31, 2006.**

#### **Policy Position**

In the Regional Dialogue process BPA proposed a time limit for the consumer's application of off-site renewable resources to an NLSL—December 31, 2006, except for consumers who had made all necessary arrangements for service by that date. In the Policy and the ROD, BPA stated its decision to sunset this off-site renewable Green Exception option. (2007 RD Policy at 25 and 133) Only one consumer qualified for the Green Exception (GE), Plum Creek a consumer within the Flathead Electric Cooperative system.

#### **Public Comment**

Discussions with customers showed that there was potential ambiguity in the Regional Dialogue Policy and related ROD language that raised the question of how long BPA was extending the GE for Plum Creek.

## **Evaluation and Decision**

Through this ROD, BPA is clarifying that the GE applies through the term of the Regional Dialogue contract, subject to the terms for the GE in Flathead Electric's contract. The Policy and ROD state that the GE exception for the Plum Creek load would survive the sunset provision for the GE exception since the requirements for the exception had been met prior to December 1, 2006. (See section II.E.3.a of the 2007 Policy and ROD at 132-134) This applies to the current Subscription contract and presents the issue of whether the GE for Plum Creek would then continue to apply into the CHWM Contracts. This issue was addressed specifically in the Policy and ROD. As clarification on the Policy, BPA notes that the statement on page 134 of the ROD that the GE would be available for the term of Flathead's contract (as long as certain conditions continue to be met) was referring to the CHWM Contract. BPA will require the same conditions for the off-site renewable option for Plum Creek in the CHWM contract with Flathead as are included in Flathead's Subscription contract, and modified only as needed to accommodate the CHWM contract terms. This was certainly intended since the ROD primarily addresses service during the term of the CHWM Contract. If Plum Creek still qualifies for the GE exception when CHWMs are calculated, then the Plum Creek load being served at PF will not be considered as NLSL load and will not be removed from Flathead's load used to calculate the CHWM. (2007 Policy ROD at 134) If Plum Creek loses its GE, then the treatment of the load under the CHWM contract will be as an NLSL.

### **Issue 2:**

**If Plum Creek still qualifies for the GE exception to the NLSL Policy when CHWMs are calculated, will Flathead's CHWM reflect the NLSL-exempt Plum Creek load for the duration of the CHWM contract?**

### **Policy Position**

The ROD states that Flathead would receive the benefit of the GE for "as long as [Plum Creek] qualifies for the GE. This treatment is equivalent status to being served at the PF rate under the previous rate schedules." (2007 Policy ROD at 134) It does not address the specific details of how the CHWM amounts provided to Flathead would be treated if the GE is no longer in effect for Plum Creek.

### **Public Comment**

This issue of how to treat the CHWM provided for the GE amount surfaced during the discussions on the GE in discussions with Flathead Electric Cooperative.

## **Evaluation and Decision**

Absent the GE exception, all of Plum Creek would become load served at the NR rate and the policy rationale of including Plum Creek load served at PF rates in Flathead's CHWM would no longer exist. Essentially the Flathead CHWM would be higher than it otherwise would have been based on a load that had temporarily been met at a PF rate and has returned to being only eligible for power at NR rates from BPA. BPA has decided not to retain this artificially high CHWM for the duration of the contract. Instead, BPA has decided to include a contract provision in the Flathead CHWM

Contract that reduces its CHWM by the amount the GE increased its CHWM if Plum Creek no longer qualifies for the GE.

## **2.9.4 Total Retail Load**

### **Issue 1:**

**Whether the TRM definition of Total Retail Load (TRL) excludes load that BPA is obligated to serve under the Northwest Power Act.**

### **Policy Position**

The Policy did not address this issue.

### **Public Comment**

In its brief in the TRM, Clatskanie argues that the term “TRL” would exclude portions of existing retail loads served by the utility and that qualify as load that BPA must serve under section 5(b)(1) [of the Northwest Power Act] and BPA Tier 1 rate level. (Clatskanie, TRM-12-B-CK-1, at 11) BPA believes this is a contract issue as the definition in the TRL was designed to mimic the language of the contracts and is therefore addressing this issue in the CP ROD.

### **Evaluation and Decision**

Clatskanie raises an issue that was briefly addressed during negotiations in a public workshop. Clatskanie contends that in the TRM proposal BPA has revised its prior legal interpretation of the term “Total Retail Load.” *Id.* Clatskanie claims that BPA significantly deviated from Section 5(b)(1) of the Northwest Power Act in redefining the retail load it will serve under this section, and contends that section 5(b)(1) does not specify that BPA will determine the total retail load based on BPA’s own forecast, allow BPA to exclude retail loads that BPA does not agree to serve simply because such loads are not on a utility’s distribution system, and BPA’s newest definition of “TRL” ignores BPA’s prior legal interpretation of this rule. *Id.* at 12-13

Clatskanie states that it is aware of other retail load directly connected to BPA’s transmission system where there are little if any customer owned facilities used to serve “the industry.” *Id.* at 12. Clatskanie states that preference utilities are obligated to serve the station service loads of “those generators” and thus purchase power at point of interconnection between BPA’s transmission lines and the “new power generation facilities.” Clatskanie states that while preference customers do not have any distribution facilities to serve such loads, those loads are part of the preference customer’s retail loads that BPA is obligated to serve under section 5(b)(1). Therefore, Clatskanie contends that BPA’s “attempt to reserve discretion to serve such loads” is contrary to section 5(b)(1) and Congressional intent.

First, BPA notes that the definition of TRL that is being used in the TRM is the same as the definition of TRL that is used in the proposed new power sales contracts. Second, BPA understands the problem Clatskanie has raised but disagrees with Clatskanie’s



argument. Clatskanie's arguments are wrong and have no support in law. Congress expressed that it had no interest in defining the manner and terms under which the Administrator would offer to market power to regional customers. Specifically, section 5(b)(1) contains no directive or mandate as to how BPA is to establish the terms in contract by which it will offer to sell Federal power when requested. As provided for in section 5(a) of the Bonneville Project Act,

Contracts entered into with any utility engaged in the sale of electric energy to the general public shall contain such terms and conditions, . . . as the administrator may deem necessary, desirable or appropriate to effectuate the purposes of this Act and. . . .

16 U.S.C. § 832d(a). Congress did not require a single comprehensive definition by statute or regulation of the terms "firm power load" since the complexity of the terms would be extremely lengthy and unnecessarily inflexible. *See* Sen. Rep. 96-972, 96<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1979) at 26. As this demonstrates BPA has discretion to define the term TRL in the contract, as it does to define all other terms.

Clatskanie also contends that BPA has made prior legal interpretations of "this rule." (Clatskanie, TRM-12-B-CK-1, at 13) Clatskanie argues that BPA must follow its prior legal interpretation that allowed a utility's retail load to be interconnected to "a" distribution system. Again, Clatskanie is wrong to suggest that BPA's contracts create binding rules or interpretations of law that preclude the Administrator from including new terms in contracts that he determines are necessary, appropriate, or desirable. Congress noted only that terms such as TRL should be consistently applied in the contracts so that customers are equitably treated. *See* Sen. Rep. 96-972, 96<sup>th</sup> Cong. 1<sup>st</sup> Sess. (1979) at 26. This has been the case ever since the 1981 power sales contract was executed pursuant to enactment of the Northwest Power Act. Moreover, the term TRL as defined is consistent with BPA's Policy on Standards for Service, issued in 1999, which formally adopted standards for service an entity must comply with to be sold power. *See* section 5(b)(4) of the Northwest Power Act. A bright line standard that must be met is a utility must own the distribution necessary and used to deliver Federal power to its retail load.

The retail load that is physically served from the distribution system owned by the utility forms its regional firm power load for which that utility has the right to request a contract for Federal power from BPA to serve such load under section 5(b)(1) of the Northwest Power Act.

(Standards for Service Policy, at 5) 2.79(3) states that Total Retail Load excludes "any loads not on «Customer Name»'s electrical system or not within «Customer Name»'s service territory, unless specifically agreed to by BPA." This language is about wholesale loads which are served by the utility as in the Grant PUD and City of Grand Coulee instance. It is wholly reasonable because it allows a customer to request service for the kind of off-system load described by Clatskanie and it allows BPA to fully understand the circumstances that exist for this kind of unique service request before BPA determines whether to serve it. At the same time, this language is needed to

preclude attempts to have BPA serve loads that are not in fact part of the TRL of a customer. BPA will not agree to terms that would invite customers to include loads as part of their TRL that are not physically connected to the customer. In the case that Clatskanie describes there are apparently wind project loads that are located within the service territory of a customer that needs retail station service. Those loads are evidently, according to Clatskanie's testimony, not presently connected to any retail distribution system. Therefore, the way that TRL is defined does not exclude load the customer is obligated to serve as part of its TRL and makes it important that a Load Following customer discusses its plans with BPA as to how it will serve load that is not physically connected to its distribution system; e.g., are there plans to construct the needed distribution system and when will such construction be completed and ready for energization? This allows both the customer and BPA to be in the best possible position to determine whether to supply such load.

### **2.9.5 Power Sales Contracts for IOUs**

Under section 5(b) of the Northwest Power Act, IOUs may request contracts for the purchase of firm power from BPA to serve their net requirement load. Final contract templates were released September 12, 2008, and will be offered to IOUs who, subject to contractually specified notice provisions, may elect to make power purchases from BPA under the New Resource Firm Power (NR) rate. Other than comments received from the IOUs or other parties on specific contract policy topics and issues discussed above in this ROD, BPA did not receive other substantive policy comments on its proposed IOU contracts.

## **2.10 THE NATIONAL ENVIRONMENTAL POLICY ACT**

### **2.10.1 Introduction**

BPA has assessed the potential environmental effects that could result from implementation of the Long-Term Regional Dialogue Contract Policy by executing new power sales contracts, consistent with the National Environmental Policy Act (NEPA) 42 U.S.C. §4321, *et seq.* BPA has previously evaluated the environmental impacts of a range of business structure alternatives that included, among other things, a policy direction for BPA's sale of power products to customers, and contract terms BPA will offer for power sales. (Business Plan Final Environmental Impact Statement, DOE/EIS-0183, June 1995 (Business Plan EIS)) In August 1995, the BPA Administrator issued a Record of Decision (Business Plan ROD) that adopted the Market-Driven alternative from the Business Plan EIS. As discussed in more detail below, the Long-Term Regional Dialogue Contract Policy is a direct application of BPA's already-adopted Long-Term Regional Dialogue Policy that falls within the scope of the Market-Driven alternative and is not expected to result in environmental impacts that are significantly

different from those examined in the Business Plan EIS. The decision to implement this Contract Policy thus is tiered to the Business Plan ROD.<sup>1</sup>

### **2.10.2 Business Plan EIS and ROD**

The Business Plan EIS was prepared in response to a need for an adaptive business policy that would allow BPA to be more responsive to the evolving and increasingly competitive wholesale electricity market, while still meeting both its business and public service missions. Accordingly, BPA designed the Business Plan EIS to support a wide array of business decisions, including decisions related to the policy direction for BPA's sale of power products to its customers, and the contract terms used in those contracts. (Business Plan EIS, Section 1.4) BPA identified several purposes for consideration, including: achieving strategic business objectives; competitively marketing BPA's products and services; providing for equitable treatment of Columbia River fish and wildlife; achieving BPA's share of the NWPPC conservation goal; establishing rates that are easy to understand and administer, stable, and fair; recovering costs through rates; meeting legal mandates and contractual obligations; avoiding adverse environmental impacts; and establishing productive government-to-government relationships with Indian Tribes. *Id.* Section 1.2; Business Plan ROD, Sections 5 and 6.

BPA's Business Plan EIS evaluates six alternative business directions: Status Quo (No Action); BPA Influence; Market-Driven; Maximize Financial Returns; Minimal BPA; and Short-Term Marketing. Each of the six alternatives provides policy direction for deciding 19 major policy issues that fall into five broad categories: Products and Services, Rates, Energy Resources, Transmission, and Fish and Wildlife Administration. (Business Plan EIS, Section 2.4.) Four policy options, or modules, were also developed in the EIS to allow variations of the alternatives in key areas, including rate design. The alternatives and modules are designed to cover the range of options for the important issues affecting BPA's business activities, as well as the impacts of those options, and variations can be assembled by matching issues and substituting modules among the six alternatives. *Id.* Section 2.1.2. All of the alternatives and modules are examined under two widely different hydrosystem operations strategies that served as "bookends" for reasonably possible operations of the FCRPS. These alternatives thus represent a range of reasonable alternatives for BPA's business activities and BPA's ability to balance costs and revenues.

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<sup>1</sup> Although BPA is electing to tier its decision to the Business Plan ROD, BPA notes that this contract policy proposal is the type of action typically excluded from NEPA pursuant to U.S. Department of Energy NEPA regulations, which are applicable to BPA. More specifically, this rate proposal falls within Categorical Exclusion B4.1, found at 10 CFR 1021, Subpart D, Appendix B, which provides for the categorical exclusion from NEPA documentation of "Establishment and implementation of contracts, marketing plans, policies, allocation plans, or acquisition of excess electric power that does not involve: (1) the integration of a new generation resource, (2) physical changes in the transmission system beyond the previously developed facility area, unless the changes are themselves categorically excluded, or (3) changes in the normal operating limits of generation resources." Nonetheless, BPA has laid out a strategy in the Business Plan EIS and ROD for NEPA compliance concerning future business-related decisions, and believes that a ROD tiered to the Business Plan ROD is an appropriate means for ensuring NEPA consideration of this contract policy proposal.

The Business Plan EIS focuses on BPA relationships to the market. (Business Plan EIS, section 2.1) Previous environmental studies for key BPA actions had shown that actual environmental impacts are determined by the market responses to BPA's marketing actions, rather than by the actions themselves. *Id.* Sections 2.1.5 and 4.1.2. These market responses discussed in detail in section 4.2 of the Business Plan EIS, are: resource (including conservation) development; resource operation; transmission development and operation; and consumer behavior. These market responses determine the environmental impacts, which include air, land, and water impacts, as well as socioeconomic impacts. *Id.* Figure 2.1-1 and Figure S-2.

With this knowledge, BPA used market responses as the foundation for the environmental analyses of alternatives and modules in sections 4.4 and 4.5 of the Business Plan EIS. Section 4.4.3 also included an illustrative numerical example. As can be seen from the environmental analyses summarized in Tables 4.4-19 and 4.4-20, differences in total environmental impacts among the alternatives are relatively small.

To determine the potential environmental consequences of the various alternatives, the Business Plan EIS identifies general market responses to key policy issues. *Id.* Table 4.2-1. The market responses for products and services are discussed for each of the alternative business directions, and the market responses for rates also are discussed. *Id.* Sections 4.2.1 and 4.2.2. The market responses and the environmental consequences are discussed both in general terms and in terms specific to each alternative. *Id.* Section 4.3. Table 4.3-1 details the typical environmental impacts from power generation and transmission. Section 4.4 presents the market responses and environmental impacts by alternative, under each of the two bookend hydro operation scenarios. Table 4.4-19 summarizes the key environmental impacts by alternative. *Id.* Section 4.4.3.8. In addition, Appendix B to the Business Plan EIS includes an extensive evaluation of rate design, including market response and environmental impacts. *Id.* Appendix B.

Each of the alternative business directions examined in the Business Plan EIS was also evaluated against the purposes for the action to determine how well each of the alternatives meets the need. *Id.* Section 2.6.5. Based on the evaluation of potential environmental impacts and the comparison of each alternative to the identified purposes, the Administrator adopted the Market-Driven alternative as the Agency's overall business policy in the Business Plan ROD. (Business Plan ROD, Section 6) The Market-Driven alternative strikes a balance between marketing and environmental concerns. It also assists BPA in maintaining the financial strength necessary to continue a relatively high level of support for public service benefits, such as energy conservation and fish and wildlife mitigation activities, while keeping BPA rates and the costs of other BPA products and services as low as possible.

Recognizing that the Administrator could select a variety of actions, BPA included many mitigation response strategies in the Business Plan EIS and accompanying ROD to address changed conditions and allow the Agency to balance costs and revenues. These response strategies include measures that BPA could implement to increase revenues (including rates), decrease spending, and/or transfer costs if its costs and revenues do not

balance. (Business Plan EIS, Section 2.5; Business Plan ROD, Section 7) These strategies enable BPA to best meet its financial, public service, and environmental obligations, while remaining competitive. In the Business Plan ROD, the BPA Administrator decided to implement as many response strategies, or equivalents, as necessary to balance costs and revenues. (Business Plan ROD, Section 7)

The Business Plan EIS and ROD also document a decision strategy for tiering subsequent business decisions to the Business Plan ROD. (Business Plan EIS, Section 1.4; Business Plan ROD, Section 8) For each such decision, as appropriate, the BPA Administrator reviews the Business Plan EIS and ROD to determine whether the proposed subsequent decision falls within the scope of the Market-Driven Alternative evaluated in the EIS and adopted in the ROD. If the proposed decision is found to be within the scope of this alternative, the Administrator may tier his decision under NEPA to the Business Plan ROD. (Business Plan ROD, Section 8) Tiering a ROD to the Business Plan ROD helps BPA delineate its business decisions clearly and provides a logical framework for connecting broad policy decisions to more specific actions. (Business Plan EIS, Section 1.4)

In 2007, BPA completed a review of the Business Plan EIS and accompanying ROD through a Supplement Analysis. The Supplement Analysis was prepared to assess whether the Business Plan EIS still provides an adequate evaluation, at a policy level, of environmental impacts that may result from BPA's current business practices, and whether these practices are still consistent with the Market-Driven alternative adopted in the Business Plan ROD. As part of the preparation of the Supplement Analysis, changes that have occurred in the electric utility market and the existing environment were evaluated, and developments that have occurred in BPA's business practices and policies were considered. The Supplement Analysis found that the Business Plan EIS's relationship-based and policy-level analysis of potential environmental impacts from BPA's business practices remains valid, and that BPA's current business practices are still consistent with BPA's Market-Driven approach. The Business Plan EIS and accompanying ROD thus continue to provide a sound basis for making determination under NEPA concerning BPA's policy-level decisions.

### **2.10.3 Relevant RODs Tiered to the Business Plan ROD**

Since 1995, over 40 strategic business decisions have been implemented through the Business Plan EIS and accompanying ROD. Several of these decisions and their RODs are directly applicable to the Contract Policy.

Power Subscription Strategy. In December 1998, BPA issued an Administrator's ROD for its Power Subscription Strategy, which is a strategy for distributing to BPA customers the electric power generated by the FCRPS, within the framework of existing law. The Power Subscription Strategy addressed the availability of power, described power products and contracts, and provided strategies for pricing, including risk management and cost recovery strategies to ensure that BPA's costs and public responsibilities are

met. The Power Subscription Strategy also further refined rate design approaches to be used to establish rates during subsequent power and transmission rate cases.

As part of its consideration of Power Subscription Strategy, BPA conducted a NEPA evaluation of the Strategy. This NEPA evaluation is described in the December 1998 NEPA ROD that was prepared and issued separately from the Administrator's Power Subscription Strategy ROD. Consistent with the approach laid out in the Business Plan EIS and accompanying ROD for tiering subsequent business decisions, the Administrator reviewed the Business Plan EIS and accompanying ROD to determine if the Power Subscription Strategy was within the scope of the Market-Driven Alternative evaluated in the EIS and adopted in the ROD. In the NEPA ROD, the Administrator noted that the Power Subscription Strategy is a direct application of BPA's Market-Driven approach adopted in the Business Plan ROD, and that the potential environmental impacts of the Power Subscription Strategy were adequately covered in the Business Plan EIS. (NEPA ROD, at 1, 16, and 22) The Administrator also noted that the risk management strategies in the Power Subscription Strategy are consistent with the mitigation response strategies in the Business Plan EIS and ROD. *Id.* at 10. The Administrator thus determined that the Power Subscription Strategy is clearly within the scope and consistent with the Business Plan EIS and the Market-Driven alternative adopted in the Business Plan ROD. *Id.* at 1-2. BPA thus tiered its NEPA ROD for Power Subscription Strategy to the Business Plan ROD.

Policy for Power Supply Role for FY 2007-2011. In February 2005, BPA adopted a policy on the Agency's power supply role for FY 2007-2011, which is also referred to as BPA's Near-Term Regional Dialogue Policy. This Policy is intended to provide BPA's customers with greater clarity about their Federal power supply so they can effectively plan for the future and make capital investments in long-term electricity infrastructure if they choose. It is also intended to provide guidance on certain rate matters BPA expects to be addressed in the FY 2007-2009 rate period, while assisting the Agency in aligning its long-term strategic goals and its long-term responsibilities to the region.

As part of its consideration of the proposed Near-Term Policy, BPA conducted a NEPA analysis that reviewed each of the individual issues considered in the policy, as well as the potential implications of these issues taken together. For some issues, there were no environmental effects resulting from implementation and NEPA thus was not implicated. For other issues, the proposed approach was merely a continuation of the status quo, and NEPA was not triggered. For the remaining issues, the potential environmental effects have been addressed in the Business Plan EIS and are within the scope of the Market-Driven alternative adopted in the Business Plan ROD. Furthermore, the Near-Term Policy as a whole is consistent with the Market-Driven alternative. Accordingly, since the 2007-2011 Near-Term Policy falls within the scope of the Market-Driven alternative and would not result in significantly different environmental impacts from those examined in the Business Plan EIS, BPA tiered its NEPA decision for this policy to the Business Plan ROD.

BPA's Service to Direct Service Industrial (DSI) Customers for FY 2007-2011. In June 2005, BPA issued the DSI ROD that identified how BPA would provide power benefits to the region's DSI customers in FY 2007-2011. In this ROD, the Administrator decided to provide up to 560 aMW of benefits to three DSI aluminum companies at a \$59 million capped cost, and 17 aMW to a DSI paper mill at a rate approximately equivalent to, but in no case lower than, the PF rate. While some service benefits are to be provided, the decision reflects a trend of BPA ramping down service to DSIs.

The DSI ROD also included NEPA analysis for this decision. This analysis noted that BPA had already decided through the Near-Term Regional Dialogue policy process to provide eligible Pacific Northwest DSIs with some level of Federal power service benefits, at a known but limited quantity and capped cost, in the FY 2007-2011 period, with specific details to be worked out in a supplemental regional public process. The NEPA analysis also describes how the Business Plan EIS contains policy options, or modules, with one of these modules expressly designed to allow variations of the alternatives in providing service to DSIs. (Business Plan EIS, Section 2.1.2) The DSI modules in the Business Plan EIS include Renew Existing Firm Contracts, Firm Service in Spring Only, Declining Firm Service, and No New Firm Power Sales Contracts. The EIS thus contains analyses of policy modules that consider service to the DSIs ranging from no new contracts to 100-percent firm service. (Business Plan EIS, Sections 2.3.1.3 and 2.6.3.3) While all of these modules are applicable to the Market-Driven alternative, the Declining Firm Service module is intrinsic to this alternative. (Business Plan EIS, Section 2.2.3 and Table 2.3-2) Accordingly, the Administrator found that BPA's proposed service to DSIs for FY 2007-2011 falls within the scope of the Market-Driven alternative and is not expected to result in significantly different environmental impacts from those examined in the EIS. Therefore, the decision to provide service to BPA's DSI customers for FY 2007-2011 was tiered to the Business Plan ROD.

Long-Term Regional Dialogue Policy. BPA signed the Long-Term Regional Dialogue Policy Administrator's ROD in July 2007. This ROD adopted a policy on BPA's long-term power supply role after fiscal year (FY) 2011. This policy was intended to provide BPA's customers with greater clarity about their Federal power supply so they could effectively plan for the future and make capital investments in long-term electricity infrastructure. Through the Long-Term Regional Dialogue Policy, BPA established that it would offer new power sales contracts to all of its customers and conduct a future rate case before such contracts go into effect in FY 2012. Consequently, the Long-Term Regional Dialogue Policy ROD deferred decisions on several issues related to the rate case and contracts. In some cases, such as a tiered rate methodology and Residential Exchange, further public processes resulted in decision documents prior to this CP ROD. In the case of service to DSIs, further process will take place and any forthcoming decision will be documented through a separate process. This CP ROD documents decisions made regarding several other issues deferred in the Long-Term Regional Dialogue Policy ROD, such as some issues related to the Slice Product and Renewables.

In accordance with NEPA, the Administrator considered the potential environmental consequences for each of the policy issues that comprise the Long-Term Regional

Dialogue Policy. Some policy issues did not have the potential to result in environmental effects, thus NEPA was not implicated for these issues. Other policy issues represented a continuation of the status quo; therefore additional NEPA analysis of these issues was not necessary. For the remaining policy issues, potential environmental effects were analyzed in BPA's Business Plan EIS. All together, the policy issues addressed in the Long-Term Regional Dialogue resulted in a final policy that was consistent with the Market-Driven alternative analyzed in the Business Plan EIS and adopted in the Business Plan ROD. BPA, therefore, tiered the Long-Term Regional Dialogue Policy NEPA ROD to the Business Plan ROD.

WP-07 Wholesale Power Rate Adjustment Proceeding. In July 2006, BPA issued a ROD for the 2007 Wholesale Power Rate Adjustment Proceeding. The proceeding adopted power rates for the three-year rate period commencing October 1, 2006, through September 30, 2009; established replacement rate schedules and General Rate Schedule Provisions for those that expired on September 30, 2006; and established the General Transfer Agreement Delivery Charge for the period of October 1, 2007, through September 30, 2009.

BPA reviewed the Business Plan EIS and accompanying ROD to determine whether the WP-07 Wholesale Power Rate Adjustment Proceeding was adequately covered within the scope of the EIS and the Market-Driven alternative adopted in the Business Plan ROD. Based on this review, BPA determined the WP-07 Wholesale Power Rate Adjustment Proceeding to be a direct application of the Market-Driven alternative. The issues related to this proceeding remained consistent with the analysis of key policy issues related to power products and services identified for the Market-Driven alternative. (Business Plan EIS, Sections 2.2.3 and 2.6) Even with revisions, this rate proposal did not differ substantially from the types of rate designs considered and evaluated in the Business Plan EIS. *Id.* Sections 2.4.1.6 and 2.4.2.2, Appendix B. In addition, the rate proposal continued BPA's approach to power service and rates developed in the Power Subscription Strategy and provided for in subsequent power rate cases. The WP-07 Proceeding was found to be within the scope of the Market-Driven Alternative that was evaluated in the Business Plan EIS and adopted in the Business Plan ROD. Implementation of this rate proceeding did not result in environmental impacts significantly different from those examined for the Market-Driven alternative in the Business Plan EIS. Thus, BPA tiered its NEPA decision for the WP-07 Wholesale Power Rate Adjustment Proceeding to the Business Plan ROD.

2008 Average System Cost Methodology. In June 2008, BPA issued an Administrator's ROD for the 2008 Average System Cost Methodology (ASC) which, (1) redefined the types of capital and expense items included in the ASC; (2) established new data sources from which ASCs were derived; and, (3) changed the nature and timing of BPA's procedures for review of ASC filings by utilities participating in the REP.

BPA evaluated the revision actions to the ASC under NEPA and determined that further NEPA documentation was not necessary. These proposed actions were primarily administrative in nature and accordingly did not result in environmental effects. In



addition, implementation of the methodology resulted in no resource or transmission development, therefore, no substantial change in consumer or utility behavior occurred. The 2008 Average System Cost Methodology business activities were anticipated in BPA's Business Plan EIS and are consistent with BPA's Market-Driven approach adopted in its Business Plan ROD. (See Business Plan EIS, Table 2.4.1, on *Determination of Firm Loads* and the Market-Driven Alternative, page 2-36; see also *Delivery of Power Under Residential Exchange Agreements*, Business Plan EIS, page 4-10.)

Residential Exchange. In September 2008, BPA issued an Administrator's ROD for Short-Term Bridge Residential Purchase and Sale Agreement for the Period Fiscal Years 2009-2011 and Regional Dialogue Long-Term Residential Purchase and Sale Agreement for the Period Fiscal Years 2012-2028, making decisions regarding BPA's approach to Residential Exchange agreements.

BPA evaluated the proposed agreements under NEPA and determined that because the agreements represented a general continuation of existing REP benefits, the new RPSAs were not expected to result in a substantial change in consumer or utility behavior with the potential for environmental effects. BPA further found that the potential resource development and acquisition consequences of different scenarios under the REP were anticipated in BPA's Business Plan Environmental Impact Statement (DOE/EIS-0183, June 1995), and are consistent with BPA's Market-Driven approach adopted in its Business Plan ROD (August 15, 1995). (See Business Plan EIS, Table 2.4.1, on *Determination of Firm Loads* and the Market-Driven Alternative, page 2-36; see also *Delivery of Power Under Residential Exchange Agreements*, Business Plan EIS, page 4-10)

#### **2.10.4 Environmental Analysis for the Long-Term Regional Dialogue Contract Policy**

BPA has reviewed the various proposed actions contained in the Contract Policy proposal to determine whether they require consideration under NEPA and, if so, whether they are within the scope of the Market-Driven alternative adopted in the Business Plan ROD. This Contract Policy is largely the implementation phase of policy choices made by BPA in various recent RODs related to BPA's Long-Term Regional Dialogue Policy (see *Relevant RODs Tiered to the Business Plan EIS*, above). For the purpose of this NEPA analysis, each of the proposed actions discussed in this CP ROD can be categorized as one of three types of action: 1) decisions that are being deferred to a later date; 2) clarifications to or refinements of prior policy decisions that do not have the potential for environmental effects; and 3) clarifications to or refinements of prior policy decisions that do not result in environmental effects beyond those which were discussed in the Business Plan EIS and associated RODs.

There are two proposed actions in this CP ROD that involve deferring final decisions to a later date—Service to DSIs and certain administrative issues for Transfer Service.

Because there is no decision regarding service to DSIs being made in this CP ROD, NEPA is not triggered for this action. However, this CP ROD provides a plan for final resolution of DSI-related issues. At the time of any final decision, BPA will conduct additional NEPA analysis as appropriate. The administrative issues for Transfer Service are likely to involve clarification or refinements that will not have the potential for environmental effects.

The other proposed actions in this CP ROD involve clarifications to or refinements of policy established in the Policy. Of these, BPA's proposed actions related to contract provisions for warranties and dispute resolution are merely administrative in nature. As such, they do not have the potential for environmental effects, and thus NEPA is not triggered for these actions.

The remaining clarifications to or refinements to policy represent the direct application of various aspects of BPA's already-adopted Long-Term Regional Dialogue Policy and do not result in environmental effects beyond those which were discussed in the Business Plan EIS and associated RODs. This CP ROD contemplates implementation of contract provisions consistent with Long-Term Regional Dialogue Policy, and the current policy choices being made in this CP ROD do not change the already-established overall policy direction.

For example, the Long-Term Regional Dialogue Policy ROD documented a decision regarding renewables, namely, that BPA would ensure the development of its share of all cost-effective regional renewable resources and provide necessary integration services to public power customers that acquire non-Federal renewable resources to meet public power load growth. (Long-Term Regional Dialogue Policy NEPA ROD at 16) The policy concerning renewables in the CP ROD carries out this decision and provides greater definition of how this policy will be implemented in the contracts, particularly concerning the contractual treatment of any Renewable Energy Certificates and Carbon Credits associated with the renewable energy acquisitions BPA might make.

In addition, the NEPA ROD prepared for the Long-Term Regional Dialogue Policy explains how the potential environmental impacts of BPA's actions related to renewable energy development were considered and analyzed in the Business Plan EIS. (Long-Term Regional Dialogue Policy NEPA ROD at 16) That NEPA ROD also explains why the policy decision to acquire renewable energy resources is within the scope of the Business Plan EIS and is consistent with the Market-Driven Alternative adopted in the Business Plan EIS ROD. (Long-Term Regional Dialogue Policy NEPA ROD at 16) Because the CP ROD does not significantly change BPA's planned approach concerning renewables, the clarifications and refinements in the CP ROD concerning BPA's renewable policy do not alter this conclusion. In addition, these clarifications and refinements do not introduce the potential for an environmental effect that has not been previously considered. Accordingly, the CP ROD does not include actions that would result in environmental effects beyond those already considered in BPA's Business Plan EIS and associated RODs.

This same evaluation of BPA's contract actions for renewables also applies to other actions in this CP ROD which are of a similar nature. These issues include: Service to Public Utilities (a refinement of policies established in preceding RODs on Subscription, Long-Term Regional Dialogue and the policy on 5(b)/9(c)); Slice Product (a refinement of the Slice product from the Subscription ROD); Treatment of Hungry Horse Power (clarification from the Hungry Horse Reservation Power ROD); Transfer Service (refinements to the policy decision in the Long-Term Regional Dialogue ROD); and Off-site Renewables (clarification from the Long-Term Regional Dialogue ROD). In every case in this CP ROD where there are clarifications to or refinements of existing policies, the overall policy direction set in prior decision documents is not changed, and the clarifications and refinements do not introduce the potential for an environmental effect that has not been previously considered. The environmental effects and relationship to the Business Plan EIS have already been established in the Business Plan EIS itself and/or subsequent RODs tiered to the Business Plan EIS and accompanying ROD.

BPA also has reviewed the various Contract Policy proposed actions taken together to determine whether the overall policy is consistent with the Market-Driven alternative adopted in the Business Plan ROD and whether the policy would result in any significantly different environmental impacts from those already described in the Business Plan EIS. As described in the Business Plan ROD, the Market-Driven alternative was selected as BPA's business direction because it allows BPA to: (1) recover costs through rates; (2) develop rates that meet customer needs for clarity and simplicity; (3) continue to meet BPA's legal mandates; and, (4) avoid adverse environmental impacts. Under BPA's market-driven approach, BPA markets competitively-priced power products and services, continues to offer cost-based firm requirements power products that meet Northwest Power Act obligations, and intends to adopt a tiered rate structure. (Business Plan EIS, Section 2.2.3) The business activities that will occur as a result of the Contract Policy remain consistent with the analysis of key policy issues related to BPA sales of power products and services and contract terms for power sales discussed in the Business Plan EIS and the Market-Driven alternative. (Section 4.2.1.4, Table 2.4-1) There are a number of other potential contract provisions not discussed in this CP ROD which are unique to individual customers and would be negotiated on a case-by-case basis, but none would be outside the scope of this broader contract policy proposal and therefore they would not result in any effects beyond those already considered.

Based on this review, BPA determines that the proposed actions contained in the Contract Policy either do not trigger NEPA, or are clarifications or refinements to existing policies where the environmental effects have been analyzed in the Business Plan EIS and/or subsequent RODs tiered to the Business Plan EIS and ROD. Therefore, these contract policies are within the scope of the Market-Driven Alternative and will assist BPA in accomplishing the goals of the Market-Driven Alternative identified in the Business Plan ROD.

### **2.10.5 Public Comments**

There have been a number of public processes related to this Contract Policy. Throughout these processes there was one comment submitted regarding the National Environmental Policy Act. The comment, from Canby Utility dated July 15, 2008, requested that this ROD address the effects of the contract options and alternatives under NEPA. (Canby, CON-048) The preceding NEPA discussion regarding this Contract Policy is BPA's analysis of the potential environmental effects of the policy proposal.

### **2.10.6 NEPA Decision**

Based on a review of the Business Plan EIS and accompanying ROD, BPA determines that the Contract Policy falls within the scope of the Market-Driven alternative evaluated in the Business Plan EIS and adopted in the Business Plan ROD. The Contract Policy is not expected to result in environmental impacts that are significantly different from those examined in the Business Plan EIS, and will assist BPA in accomplishing the goals related to the Market-Driven alternative that are identified in the Business Plan ROD. Therefore, the decision to implement the Long-Term Regional Dialogue Contract Policy is tiered to the Business Plan ROD.

Issued in Portland, Oregon.

/s/ Stephen J. Wright  
Stephen J. Wright  
Administrator and  
Chief Executive Officer

October 31, 2008  
Date

## Attachment 1: Customer Comment Log

Log. No.	Commenter	Affiliation Abbreviation	Affiliation
CON-001	Borges	Canby	Canby Utility
CON-002	Taylor	Mason 1	Mason County PUD 1
CON-003	Kahn	NIPPC	Northwest & Intermountain Power Producers Coalition
CON-004	Wittenberg	Skamania	Skamania County PUD 1
CON-005	Hellman	OPUC	Oregon Public Utility Commission
CON-006	Gregg	Benton PUD	Benton PUD
CON-007	Titus	Ellensburg	City of Ellensburg
CON-008	Swanson	IOUs	Pacific Northwest Investor-Owned Utilities
CON-009	Schaff	ATNI	Affiliated Tribes of Northwest Indians
CON-010	Nelson	SUB	Springfield Utility Board
CON-011	Munz	Snohomish	Snohomish County PUD
CON-012	Gregg	Benton PUD	Benton PUD
CON-013	Williams	Yakama Power	Yakama Power
CON-014	Corwin	PPC, et al.	Public Power Council, NRU, PGP, PNGC, WPAG
CON-015	Stratman	NRU	Northwest Requirements Utilities
CON-016	Skeahan	Cowlitz	Cowlitz County PUD
CON-017	Krekel	DOE Richland	DOE-Richland
CON-018	Brost	Franklin	Franklin PUD
CON-019	Miller	Pacific	Pacific County PUD
CON-020	Wittenberg	Skamania	Skamania County PUD 1
CON-021	Miles	Snohomish	Snohomish County PUD 1`
CON-022	Mundorf	Slice Group	Slice Customer Group
CON-023	Wood	Mason 3	Mason County PUD 3
CON-024	Lovely	Grays Harbor	Grays Harbor PUD
CON-025	Rego	LL&P	Lakeview Light & Power
CON-026	Scott	PNGC	PNGC Power
CON-027	Elg	Idaho Falls	Idaho Falls Power
CON-028	Di Grazia	Wells	Wells Rural Electric Company
CON-029	Williams	United	United Electric
CON-030	Monson	Burley	City of Burley
CON-031	Angell	Wells	Wells Rural Electric Company
CON-032	Doan	UIUC	Umpqua Indian Utility Cooperative
CON-033	Murphy, et al	Murphy, et al	Murphy, et al
CON-034	Williams	Yakama Power	Yakama Power
CON-035	Stratman	NRU	Northwest Requirements Utilities
CON-036	Boyle	Benton REA	Benton Rural Electric Association
CON-037	Dawsey	Benton REA	Benton Rural Electric Association
CON-038	Schneider	Hittle & Assoc.	D.Hittle & Associates, Inc.
CON-039	Scott	PNGC	PNGC Power
CON-040	Timmons	Port Townsend	City of Port Townsend
CON-041	Parker	Jefferson	PUD #1 of Jefferson County (WA)
CON-042	Gregg	Benton PUD	Benton PUD

<b>Log. No.</b>	<b>Commenter</b>	<b>Affiliation Abbreviation</b>	<b>Affiliation</b>
CON-043	Johnson	Skagit	PUD #1 of Skagit County
CON-044	Porter	Benton REA	Benton Rural Electric Association
CON-045	Mundorf	WPAG	Western Public Agencies Group
CON-046	Early	ICNU	Industrial Customers of Northwest Utilities
CON-047	Schaff	ATNI	Affiliated Tribes of Northwest Indians
CON-048	Borges	Canby	Canby Utility
CON-049	Mundorf	Slice Group	Slice Group
CON-050	Skeahan	Cowlitz	Cowlitz PUD
CON-051	Doan	UIUC	Umpqua Indian Utility Cooperative
CON-052	Toulson	Snohomish	Snohomish County PUD No. 1
CON-053	McGary	Clark	Clark Public Utilities
CON-054	Kari	IOUs	Investor-Owned Utilities
CON-055	Stensgar	ANTI	Affiliated Tribes of Northwest Indians
CON-056	Saven	NRU	Northwest Requirements Utilities
CON-057	Presscott	PNGC	PNGC Power
CON-058	Presscott	PNGC	PNGC Power
CON-059	Corwin	PPC	Public Power Council
CON-060	Not Signed	PPC	Public Power Council
CON-061	Williams/Gossett	ICUA	Idaho Consumer-Owned Utilities Association
CON-062	Saven	NRU	Northwest Requirements Utilities
CON-063	Schaff	ATNI	Affiliated Tribes of Northwest Indians
CON-064	Rettenmund	Inland	Inland Power & Light Company
CON-065	Doan	UIUC	Umpqua Indian Utility Cooperative
CON-066	Bingaman	US Senate	United States Senate
CON-067	Slice Group	Slice Group	Benton PUD, Clatskanie PUD, Central Lincoln PUD, Cowlitz PUD, Clallam PUD, Emerald PUD, Clark PUD, EWEB, Franklin PUD, PNGC Power, Gray's Harbor, Seattle City Light, Idaho Falls Power, Snohomish PUD, Klickitat PUD, Tacoma Public Utilities, Lewis PUD, Pacific County PUD, Pend Oreille PUD
CON-068	Helgeson	Slice Group	Slice Group
CON-069	Stratman	NRU	Northwest Requirements Utilities
CON-070	Helgeson	Slice Group	Slice and Potential Slice Customers and BPA Response
CON-071	Dawsey	Benton REA	Benton Rural Electric Cooperative
CON-072	Toulson	Snohomish	Snohomish County PUD No. 1
CON-073	Shimshak/Dragoon	RNP	Renewables Northwest Project
CON-074	Thompson	PPC	Public Power Council
CON-075	Nelson	SUB	Springfield Utility Board
CON-076	Mundorf	Slice Group	Slice Group and BPA Response
CON-077	Helgeson	Slice Group	Slice Group
CON-078	Oliver	BPA	BPA Response to Slice Group

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