

**BONNEVILLE POWER ADMINISTRATION’S RESPONSE TO COMMENTS
REGARDING INTERIM AGREEMENTS WITH INVESTOR-OWNED
UTILITIES AND PREFERENCE CUSTOMERS**

INTRODUCTION

A. Background

In section 5(c) of the Pacific Northwest Electric Power Planning and Conservation Act (“Northwest Power Act” or “NPA”), Congress established the Residential Exchange Program (“REP”). 16 U.S.C. §839c(c). The purpose of the REP is to provide utilities in the Pacific Northwest, primarily investor-owned utilities (“IOUs”), access to benefits from the Federal Columbia River Power System (“FCRPS”).

Section 5(c) provides that whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost (“ASC”) of that utility’s resources, the Administrator shall purchase such power and offer, in exchange, an equivalent amount of electric power to the utility. 16 U.S.C. §839c(c)(1). All benefits of the exchange must be directly passed through to residential and small-farm consumers of the exchanging utility. 16 U.S.C. §839c(c)(3).

Although the NPA states that the residential exchange is an exchange of electric power, the exchange has traditionally been implemented as a financial transaction. The net effect of this arrangement is that BPA provides monetary benefits to an exchanging utility based on the difference between the utility’s ASC and BPA’s applicable priority firm power (“PF”) rate, multiplied by the utility’s residential and small-farm consumer load. The REP has been administered through agreements known as Residential Purchase and Sale Agreements (“RPSAs”).

For many years, the IOUs vigorously disputed the level of benefits they received under the REP. In an effort to resolve these disputes, BPA and the region’s IOUs executed REP Settlement Agreements in October of 2000. In *Portland General Electric. et al. v. Bonneville Power Administration*, 501 F.3d 1037 (9th Cir. 2007) (“PGE”), and *Golden Northwest Aluminum Co., et al. v. Bonneville Power Administration*, 501 F.3d 1009 (9th Cir. 2007) (“GNW”), certain preference customers challenged the REP Settlement Agreements as well as BPA’s 2002-2006 firm power rates which allocated certain costs of the REP Settlement Agreements to preference customers’ rates.

On May 3, 2007, the Ninth Circuit issued its opinions in *PGE* and *GNW*. The Court found that the REP Settlement Agreements and the allocation of costs of the settlement agreements to preference customers’ rates were not in accordance with law. In *GNW*, the Court remanded BPA’s 2002-2006 rates back to BPA to set rates in accordance with the opinion. On July 16, 2007, the IOUs, as well as the Oregon Public Utility Commission and Washington Utilities and Transportation Commission, filed petitions for rehearing

and rehearing *en banc* in both *PGE* and *GNW*. On October 5, 2007, the petitions were denied.

On October 11, 2007, the Ninth Circuit issued its opinion in *Public Utility District of Snohomish County, Wash., et al. v. Bonneville Power Administration*, 506 F.3d 1145 (9th Cir. 2007) (“*Snohomish*”). In *Snohomish*, certain preference customers challenged amendments to various provisions of the REP Settlement Agreements. The Court remanded the amendments to BPA to determine how to treat the amendments in light of *PGE*. On the same day, the Court issued unpublished memoranda opinions in three related cases, challenging BPA’s Load Reduction Agreements with the IOUs. *Public Utility District No. 1 of Snohomish County, Wash. V. Bonneville Power Administration*, 2007 WL 2962344 (9th Cir. 2007) (unpublished); *Public Utility District No. 1 of Snohomish County, Wash. v. Bonneville Power Administration*, 2007 WL 2962352 (9th Cir. 2007) (unpublished); *Public Utility District No. 1 of Grays Harbor, Wash. v. Bonneville Power Administration*, 2007 WL 2962349 (9th Cir. 2007) (unpublished). The Court dismissed the two Snohomish cases for lack of jurisdiction, and dismissed the Grays Harbor case as moot.

B. BPA’s Response To *PGE* and *GNW*

On May 21, 2007, in response to *PGE* and *GNW*, BPA sent letters to the IOUs stating that BPA was “immediately suspending payments” under the REP Settlement Agreements. BPA stated that it was taking this action because of the legal uncertainty associated with continuing such payments. BPA explained that by law, a Federal Certifying Officer is personally responsible and accountable for certifying the legality of a proposed payment. 31 U.S.C. §3528. *PGE* and *GNW* raised substantial questions whether BPA’s Certifying Officer could certify that continued payments under the REP Settlement Agreements were lawful. As a result, beginning on May 21, 2007, the IOUs were forced to forego approximately \$28 million per month in benefits they had been receiving under the REP Settlement Agreements.

Although BPA did not request comments on its decision to suspend REP payments to the IOUs, 39 comments were received. These comments are found on BPA’s external web site.¹ Examples of some of the comments are as follows:

- On May 24, only 3 days after suspending payments, six members of the Pacific Northwest Congressional delegation sent BPA a letter “urg[ing] all of the parties to immediately come together in good faith in an effort to find [a] solution to these issues. We urge BPA to lead and facilitate that effort to the maximum extent possible.”
- On May 25, a letter from 13 members of the Congressional delegation was sent to the Administrator “to request that you immediately convene a series of meetings with regional stakeholders to resolve issues raised by the recent Ninth Circuit rulings that have resulted in your decision to suspend payments by BPA under the

¹ www.bpa.gov/corporate/public_affairs/Comment_Listings/2007/Residential_Exchange_Program/

[REP].” The delegation further stated that “the uncertainty of the current situation is simply untenable” and although “securing an agreement on this issue will be difficult . . . it is in the best interest of the region for all parties involved to make an immediate and intensive good faith effort to reach an accord within the region as soon as possible.”

- On May 25, 2007, the Pacific Northwest State Utility Commissioners, representing the Public Utility Commissions of the states of Oregon, Washington, Idaho and Montana stated that “more than three million households in the four Northwest states” are impacted by the suspension of REP benefits and most of these households “face rate hikes of 9.3 percent to 16.8 percent.” The Commissioners further stated that households served by PacifiCorp in Idaho faced rate increases of more than 25 percent, that PacifiCorp’s Idaho irrigator customers faced a 51 percent rate increase, and “the total of these rate increases represent a loss of over \$300 million in [REP] benefits each year.”
- On May 31, the Washington Public Utility Districts Association (WPUDA), representing 28 public utility preference customers in Washington, asked that “BPA engage immediately with public power and the investor-owned utilities in a good-faith effort to reach a resolution that allows the regional dialogue to move forward.”
- On June 4, Senator Ron Wyden of Oregon sent a separate letter stating that, given the magnitude of “completely unanticipated increases” in the electricity bills of residential and small-farm customers of the IOUs, “[i]t is imperative that BPA look for legally sufficient ways to restore some level of Exchange benefits as soon as possible while the longer term issues are being resolved.”
- On May 24, the Public Power Council, representing over 100 preference customers sent a letter to the Administrator stating public power representatives across the Northwest expressed “a strong and sincere commitment to working collaboratively with you and with investor-owned utilities to move quickly toward a long-term, stable solution regarding residential exchange payments.”
- On June 5, the IOUs sent a letter to the Administrator to “thank you for your responsiveness and the collaborative approach you and your staff have demonstrated as we begin to work our way through the federal power benefit issues arising from the May 3 rulings” The IOUs emphasized that “[t]ime is of the essence for our residential and small farm customers, who face significant bill increases beginning this month.”
- Separate letters by the mayors of 15 Oregon cities urged BPA to restore REP benefits as soon as possible.
- Members of the public, including Elders In Action, Oregon Heat, and the Aging and Long-Term Care of Oregon urged BPA to take action and expressed concern

over the impacts of higher electricity bills on low-income and fixed-income households that can not afford these rate increases.

As a result, BPA took action on two fronts. First, consistent with virtually every public comment received, BPA quickly convened meetings with IOUs and preference customers to address the impacts of *PGE* and *GNW*. In addition, on August 1, 2007, BPA held a public meeting with customers and constituents to discuss the residential exchange program and the impacts of *PGE* and *GNW*. The meeting was well attended and included IOUs, preference customers, public officials and consumers. Although the views expressed during the meeting were varied and divergent, there was unanimity on one critical point: Federal benefits to consumers, whether in the form of low-cost power or residential exchange benefits, was critically important to consumers and to the vitality of the PNW economy.

Second, BPA reviewed its current rates to determine what adjustments must be made to respond to *PGE* and *GNW*. BPA concluded that it was necessary to begin preparations for initiating a ratemaking proceeding conducted in accordance with section 7(i) of the NPA, to make the necessary long-term rate adjustments. On February 8, 2008, BPA issued a Federal Register notice reopening its 2007 wholesale power rate adjustment proceeding (“WP-07”), which established rates for fiscal years (FY) 2007-2009. The reopened rate proceeding is called the WP-07 Supplemental Rate Proceeding.

The WP-07 Supplemental Rate Proceeding is being held to specifically respond to *PGE* and *GNW* and will serve four primary purposes: (1) determine the amount of benefits that BPA’s IOU customers received, or would have received, from FY 2002 - 2008 as a result of the REP Settlement Agreements; (2) determine the amount of REP benefits the IOUs would have received under the REP in the absence of the REP Settlement Agreements; (3) address any difference between these two amounts; and (4) establish new power rates for FY 2009. The WP-07 Supplemental Proceeding also includes proposed revisions to BPA’s legal interpretation of section 7(b)(2) of the NPA, and BPA’s section 7(b)(2) Implementation Methodology.

C. BPA’s Proposed Interim Agreements

On December 17, 2007, BPA released for public comment two sets of draft prototype contracts, jointly referred to herein as Interim Agreements. BPA requested that comments be provided no later than January 7, 2008. The first set of draft contracts is intended to be executed by BPA and REP qualifying IOUs, and is entitled “Residential Exchange Interim Relief and Standstill Agreement.” The second set of draft contracts is intended to be executed by BPA and preference customers, and is entitled “Standstill and Interim Relief Payment Agreements.”

The purpose of the Interim Agreements, as explained more fully below, is to provide interim relief to electricity consumers throughout the Pacific Northwest while the WP-07 Supplemental Rate Proceeding is underway. The most important feature of the Interim

Agreements is that they are *interim*. All funds paid out under the Interim Agreements are subject to true-up upon conclusion of the section 7(i) rate proceeding.

In an attachment to BPA's December 17 notice requesting comments, BPA explained its rationale for offering the Interim Agreements. BPA explained that, while conducting a section 7(i) rate adjustment proceeding is legally required and necessary to respond to *PGE* and *GNW*, there are compelling practical concerns that point to providing temporary relief in the interim.

Under the current schedule, barring any delays, the WP-07 Supplemental Proceeding would not be completed until October 2008, at the earliest. This is because BPA is planning to issue its Record of Decision, which will include its final rates, on August 18, 2008. BPA's rates must then be submitted to the Federal Energy Regulatory Commission ("FERC") for confirmation and approval.

In the meantime, BPA's 2007 rates remain in effect and are recovering the full cost of the REP Settlement Agreements. Currently, BPA has approximately \$1.4 billion in reserves. Of this amount, approximately \$280 million reflects revenue collected from preference customers since March 31, 2007, due to BPA's suspension of REP settlement payments to the IOUs. These funds will continue to grow and could be used to provide immediate short-term rate relief to the IOUs' residential and small-farm consumers, and to preference customers, who are paying higher rates than necessary in light of *PGE* and *GNW*. This unique set of circumstances led BPA to the conclusion that it is far better to disburse a portion of these funds to provide interim relief for consumers throughout the region, rather than to allow these funds to accumulate while BPA completes its lengthy WP-07 Supplemental Proceeding.

The key to the Interim Agreements is that the relief provided is interim. The level of benefits provided under the Interim Agreements will be superseded by BPA's final determinations rendered at the conclusion of the section 7(i) rate proceeding. At that time, all payments will be trued up so total benefits provided to each IOU and preference customer are precisely what they would have been regardless of the Interim Agreements.

D. The Level of Benefits

The administrative record from BPA's 2007 (WP-07) power rate adjustment proceeding will form the basis for BPA's decisions regarding IOUs that are eligible to receive REP benefits and the level of benefits under the Interim Agreements. In the WP-07 Final Proposal, BPA forecast that under the traditional REP, the IOUs would have received REP benefits of \$29.4 million in FY 2008, assuming certain disputed issues were left undecided. BPA refrained from deciding these disputed issues because it was assumed that REP benefits would continue to be paid under the REP Settlement Agreements. Therefore, resolution of the disputed issues was unnecessary.

One of the key issues that was left undecided was whether, in calculating the level of REP benefits, BPA should include a portion of the output of Mid-Columbia ("Mid-C")

hydro resources sold to IOUs in the section 7(b)(2)(D) resource stack. If BPA had determined that the Mid-C resources should not be included in the resource stack, the forecast of REP benefits to IOUs would have been approximately \$261.2 million for FY 2008.

As a result, based on evidence in BPA's 2007 rate case record, REP benefits could have been as low as \$29.4 million or as high as \$261.2 million in FY 2008 in the absence of the REP Settlement Agreements. BPA believes that an equitable approach to determining the appropriate level of interim benefits to the IOUs is to take a neutral stance on the Mid-C issue and assume a 50-50 chance that the issue could be decided either way. This approach leads to a base level of interim benefits to the IOUs of \$145.3 million. This \$145.3 million is scaled back to the extent that an IOU would receive more under the interim payments than it would have received under the REP Settlement Agreement. The end result is that, in total, eligible IOUs would receive \$131.1 million in interim relief.

For preference customers, BPA initially determined that there was up to \$191 million available for payment under the proposed Interim Agreements. This number was derived by subtracting the \$145.3 million, discussed above, from \$336 million, the annual cost of the REP Settlement Agreements that BPA is currently collecting in its PF rates. However, some commenters pointed out that, because BPA has scaled back the proposed interim benefits to the IOUs from \$145.3 million, to \$131.1 million, then there is an additional \$14.2 million available to provide payments to preference customers.

As explained below, BPA agrees with these comments and, therefore, the amount available for payment to preference customers under the final Interim Agreements is \$205.2 million for FY 2008. The amount of each individual payment to preference customers under the Interim Agreements would vary by customer. Generally, each individual preference customer's interim payment would be determined by applying a ratio of the participating customer's share of BPA's total FY 2007 PF revenue to the aggregate \$205.2 million. The result would be paid to the preference customer to begin the process of refunding overpayments resulting from the REP Settlement Agreements.

As noted, BPA's objective in offering the Interim Agreements to IOUs and preference customers is to provide interim relief. Consistent with this objective, both agreements contain "true-up" provisions. Under these provisions, payments made under the IOU and preference customer Interim Agreements will be trueed-up to the amounts determined to be due and owing at the completion of BPA's section 7(i) rate proceeding.

Lastly, both Interim Agreements contain a "stay of litigation" provision which require signatories to temporarily suspend litigation over the legality of the Interim Agreements. The reason for the stay provision is relatively straight-forward: BPA is offering the Interim Agreements to provide interim relief to consumers of IOUs and preference customers alike while the WP-07 Supplemental Proceeding is underway. BPA has no interest in generating a new round of divisive litigation or increasing acrimony among IOUs, preference customers, and BPA. No final determinations have been made and the

actual level of benefits to all customers will be determined and trued-up at the conclusion of the section 7(i) administrative process. For this reason, and as explained more fully below, BPA believes the Interim Agreements are not final actions for purposes of judicial review under the Northwest Power Act. As such, BPA is asking parties to suspend litigation over the interim relief and instead focus attention on the longer-term solutions being addressed in the WP-07 Supplemental Rate Proceeding. All rights of all signatories to challenge the level of REP benefits and payments to preference customers at the conclusion of the section 7(i) process will be preserved.

E. Comments on the Proposed Interim Agreements

BPA received 31 written comments in response to its December 17, 2007, proposal to offer Interim Agreements to the IOUs and preference customers. The comments reflect a diverse mix of positions.

With respect to preference customers, many customers expressed support for the Interim Agreements, albeit with modifications. These preference customers include the Public Power Council (representing more than 100 preference customers), Pacific Northwest Generating Cooperative (representing 15 preference customers), Northwest Requirements Utilities (staff), Seattle City Light, Snohomish County Public Utility District, Eugene Water & Electric Board (“EWEB”), Tacoma Power, Franklin Public Utility District, and Ferry County Public Utility District.²

The Pacific Northwest IOUs, representing the positions of PacifiCorp, Pacific General Electric (“PGE”), Puget Sound Energy, Idaho Power, Northwestern Energy, and Avista also expressed support for the proposed Interim Agreements. So did the Idaho Public Utilities Commission, and the Washington Utilities and Transportation Commission. However, these commenters qualified their support because they believe the level of benefits to the IOUs were too low.

Certain other preference customers oppose the Interim Agreements. Most of these customers express concerns about whether BPA has the legal authority to execute the Interim Agreements and generally oppose BPA providing any interim relief to the IOUs. These customers include Canby Public Utility District, Grays Harbor Public Utility District, Western Public Agency Group, Public Utility District No. 1 of Mason County, Benton Rural Electric Association, and Pend Oreille County Public Utility District. Kittitas PUD expressed support for some sort of interim relief, but expressed its lack of support for the proposed Interim Agreements. Certain other commenters did not expressly state whether they support or oppose the proposed Interim Agreements, but provided comments on specific provisions of the agreements. These commenters include

² EWEB, Seattle, Tacoma and NRU state in their comments that they agree with the PPC comments, including edits. PNGC and Franklin state that they support the PPC and Slice/Block comments. Snohomish states as well that it supports the PPC comments other than those dealing with interest rates, as well as the Slice/Block comments. Consequently, when reference is made in this document to PPC comments or Slice/Block Comments, that reference should be taken to incorporate the support of these other entities as just noted.

the Slice Customers, Public Utility District No. 1 of Skamania County, and Cowlitz County Public Utility District.

In addition, opposition to the Interim Agreements was expressed by the Association of Public Agency Customers (“APAC”) representing certain industrial customers of preference customers, as well as the Citizens Utility Board of Oregon (“CUB”). Individual commenters included David Vige, expressing support for the Interim Agreements, and Charles Pace, expressing opposition.

In general, BPA believes that virtually all commenters, regardless of whether they support or oppose the proposed Interim Agreements, have raised thoughtful, credible and legitimate issues. BPA appreciates the time and effort that went into these comments, especially given that comments were requested over a relatively short period of time during the holiday season.

As a result, BPA has made numerous and significant modifications to the proposed Interim Agreements in an effort to respond to these comments while still meeting BPA’s goal of providing interim relief to consumers. BPA has attached to this document a red-lined version of the proposed Interim Agreements that clearly identifies the revisions BPA has made in light of public comments. BPA believes it is in the best interests of the region to provide interim relief through the revised Interim Agreements and is hopeful that the revisions to the proposed Interim Agreements, discussed below, will ameliorate many if not all of the most significant concerns of commenters that voiced opposition.

BPA’S RESPONSE TO COMMENTS

A. Legal Issues

Issue 1:

Whether BPA has the statutory authority to execute the Interim Agreements with the IOUs and preference customers.

Comments

Numerous preference customers question whether BPA has the legal authority to execute the Interim Agreements with the IOUs. For instance, Canby Utility Board (“Canby”) states that, “BPA’s interim rate relief proposal will repeat the same legal errors cited by the Court” in *PGE* and *GNW*. Canby, at 2. WPAG comments that, although BPA’s objectives may be laudable, “good intentions do not make up for the lack of statutory authority to take these actions.” WPAG, at 4. Grays Harbor voices similar concerns. Grays, at 1. Even some in support of the Interim Agreements, such as EWEB, believe BPA should explain the basis for its legal authority, especially in light of *PGE* and *GNW*. EWEB, at 1.

On a similar note, Canby questions BPA’s legal authority to execute Interim Agreements with preference customers without first conducting a section 7(i) rate proceeding. Canby, at 3. In particular, Canby quotes BPA stating that it “cannot make any permanent adjustment to its rates to account for the cessation of the Settlement payment [to the IOUs] until it has completed its legally required administrative process.” *Id.*

BPA Response

BPA believes it has the statutory authority to execute the Interim Agreements with both the IOUs and preference customers. Further, BPA believes it is following the Court’s directions in *PGE* and *GNW*, and that the proposed Interim Agreements differ in material respects from REP Settlement Agreements under review in *PGE* and *GNW*.

In *PGE*, the Ninth Circuit reviewed BPA’s 2000 REP Settlement Agreements, which were agreements between BPA and the IOUs that settled BPA residential exchange obligations to the IOUs for the 10-year term of the agreements. The Court stated that “the question in this case is whether BPA’s authority to settle out of future power exchange contracts is bound by the requirements of the NWPA.” *PGE*, 501 F.3d at 1025. The Court answered this question affirmatively. In so doing, the Court reviewed BPA’s settlement authority under sections 9(a) and 2(f) of the NPA to determine if BPA properly utilized this authority in conjunction with the residential exchange provisions of sections 5(c) and 7(b) of the NPA.

As some commenters point out, the Court found that “BPA may not provide power under the REP program on whatever terms – whether good business or not – that BPA likes. It may enter into REP settlement contracts with IOUs, but only on terms that will protect the position of its preference customers, consistent with 5(c) and 7(b).” *Id.* at 1030. The Court concluded that BPA exceeded the scope of its settlement authority because, in executing the REP Settlement Agreements, BPA did not fully comply with these provisions. In *GNW*, the Court held that BPA improperly allocated costs of the REP Settlement Agreement to preference customers and remanded BPA’s rates back to BPA to set its rates in accordance with the opinion.

BPA believes it is in full compliance with both *PGE* and *GNW*. At the outset, it should be noted that this case is distinguishable from *PGE* and *GNW* because the Interim Agreements do not involve the exercise of BPA’s settlement authority. Whereas the agreements under review in *PGE* purported to settle all obligations between BPA and the IOUs under the REP for a 10-year term, the proposed Interim Agreements are short-term agreements that do not settle anything. Rather, the Interim Agreements are a mechanism to provide interim relief to preference customers and residential and small-farm consumers of the IOUs pending completion of the WP-07 Supplemental Rate Proceeding that will determine the actual level of benefits to both sets of customers. All rights of all parties to challenge the level of REP benefits to IOUs and refunds to preference customers are expressly preserved until the conclusion of the section 7(i) proceeding.

For this reason, BPA believes it is adhering to the Court's direction that BPA must "protect the position of its preference customers, consistent with 5(c) and 7(b)." The precise level of residential exchange benefits to be provided to the IOUs will be determined in the section 7(i) rate proceeding, and the Administrator will make final decisions based on sections 5(c) and 7(b). Preference customers will be protected because they will be provided the full procedural safeguards of section 7(i) to state their cases why the Administrator's proposal is or is not consistent with sections 5(c) and 7(b).

The critical feature of the Interim Agreements is that the benefits are expressly subject to true-up. At the conclusion of the ratemaking proceeding, the precise level of residential exchange benefits provided to the IOUs will be determined, regardless of the Interim Agreements. The Interim Agreements simply provide short-term relief while the administrative process is underway. Whereas the REP Settlement Agreements under review in *PGE* locked-in REP benefits with the IOUs for a 10-year term, the proposed Interim Agreements provide short-term rate relief and are expressly subject to revision based on the outcome of the section 7(i) rate proceeding.

As explained above, BPA's current rates include costs associated with the REP Settlement Agreements. BPA has accumulated reserves of more than \$1.4 billion that are sitting in the BPA fund. Approximately \$280 million of this amount is the result of revenue collected from preference customers under BPA's 2007 rates to pay for the REP Settlement Agreements that were set aside in *PGE*. Until these rates are revised in the WP-07 Supplemental Proceeding, BPA will continue to collect revenue based on BPA's revenue requirement that includes the costs of the REP Settlement Agreements. BPA believes it is far better to disburse a portion of these reserves to its customers—preference customers and IOUs alike—in order to provide relief to consumers at the earliest possible moment rather than to let these funds continue to accumulate.

The Ninth Circuit has recognized that BPA's organic statutes "are permeated with references to the 'sound business judgment' Congress desired the Administrator to use in discharging his duties." *Association of Public Agency Customers, et al. v. Bonneville Power Administration*, 126 F.3d 1158, 1171 (9th Cir. 1997) ("*APAC*"). Section 9(b) of the NPA provides, in part, that "the Administrator shall take such steps as are necessary to assure the timely implementation of this Act in a sound and business-like manner." 16 U.S.C. §839f(b). The Federal Columbia River Transmission System Act instructs BPA to provide "the lowest possible rates to consumers consistent with sound business purposes." 16 U.S.C. §838g. The implementation of the Northwest Power Act includes providing REP benefits under section 5(c) of the NPA. The timely implementation of the NPA in a sound and business-like manner and the obligation to provide the lowest possible rates to consumers consistent with sound business principles supports BPA's decision to provide interim relief to the IOUs and preference customers alike. Although the precise level of benefits is being determined in the WP-07 Supplemental Rate Proceeding, it is clear that all such customers are entitled to some level of relief. By dispensing an interim level of benefits immediately and subjecting those benefits to true-up, BPA believes it is acting in furtherance of and consistent with its statutory responsibilities.

In this regard, Canby's comment regarding interim rate relief to preference customers is pertinent. As Canby notes, BPA has taken the position that it "cannot make any *permanent* adjustment to its rates . . . until it has completed its legally required administrative process." (Emphasis added). The key word in this sentence is "permanent." In the Interim Agreements, BPA is not making a permanent adjustment to its rates. BPA is providing temporary relief while the administrative process runs its course.

It is important to note that in *PGE* and *GNW*, the Court did not provide BPA any detailed instructions on remand. The Court's only explicit instruction was its statement in *GNW* that "we therefore remand to BPA to set rates in accordance with this opinion." Consistent with this instruction, BPA has initiated the WP-07 Supplemental Rate Proceeding which will insure that REP benefits to the IOUs are developed following the procedural protections intended by Congress and the Court in section 7(i) of the NPA. The Interim Agreements do not detract from BPA providing benefits as the Court instructed.

The vast majority of commenters, regardless of whether they support or oppose the proposed Interim Agreements, do not appear to question BPA's motives. On the contrary, they acknowledge that BPA's motives are sound, but contend that good motives cannot overcome statutory restrictions. However, the achievement of laudable goals that promote the purposes of the NPA are an important component of exercising sound business judgment. Congress vested BPA with statutory authority to run BPA like a business and exercise sound business judgment precisely because it could not foresee all eventualities that BPA would face. *APAC*, 126 F.3d at 1171. Moreover, the Ninth Circuit has recognized that BPA's statutory authority should be interpreted with flexibility when BPA is making business decisions that respond to unique factual circumstances, where no parties are injured by the action taken and the action is the result of voluntary participation by contracting parties. *Portland General Electric Co. v. Johnson*, 754 F.2d 1475, 1482 (9th Cir. 1985) ("[a] certain latitude must be allowed within which BPA can exercise a degree of business judgment with respect to temporary situations."); *California Energy Commission v. Johnson*, 754 F.2d 1470, 1474 (in the absence of the challenged "interim action," substantial revenue would have been lost and energy wasted "before the new rates went into effect.").

BPA strongly believes that its decision to provide short-term relief to customers as an interim measure, subject to true-up, is in the best interests of the region, the best interests of consumers, and is precisely the kind of sound business decision BPA is entrusted by Congress to make.

Issue 2:

Whether the scope of the stay of litigation provision of the preference customers' Interim Agreement should be modified, and if so, how should it be modified.

Comments

Many comments expressed concern about the scope of the stay of litigation provision in the preference customers' Interim Agreements, particularly sections 5(a)(3) and 5(a)(4), which were not part of the proposed IOU Interim Agreements. WPAG, at 1-2; NRU, at 2; Skamania, at 1; Canby, at 13-14; PPC, at 6; APAC, at 6; Franklin, at 2; Kittitas, at 1. Many preference customers argued sections 5(a)(3) and 5(a)(4) were unclear, and they served as a disincentive to signing the agreements. *Id.*

A number of commenters contend that BPA's approach to preference customers' Interim Agreements compares unfavorably with the approach taken in the IOU Interim Agreements, and that the two agreements should be more comparable. WPAG, at 1-2; NRU, at 2; Skamania, at 1; Canby, at 13-14; PPC, at 6. APAC expressed concern that preference customers executing Interim Agreements could lose benefits that accrue from litigation compared to those that do not execute the agreements. APAC, at 6. PPC asserted that the IOUs should suspend claims that BPA is in breach of contract because of the suspension of REP benefits, and the IOUs should also suspend claims that request refunds, credits, or other forms of financial relief so that they would parallel the preference customers' stay of litigation. PPC, at 6. To alleviate concerns that the language might somehow preclude later claims, Seattle asked for a tolling agreement that would waive or toll the running of the statute of limitations. Seattle, at 1.

Many argued that the stay of litigation provision in the preference customers' agreements should not preclude legal actions to respond to the IOU appeals, including their appeals to the U.S. Supreme Court. WPAG, at 3; NRU, at 2; PPC, at 4; Franklin, at 2. Others, such as Kittitas, argued they should not be precluded from challenging BPA's response to the Ninth Circuit decisions.

BPA's Response

The depth and breadth of the preference customers' concerns about sections 5(a)(3) and 5(a)(4) convinces BPA that the inclusion of these provisions might well encourage litigation rather than discourage it, as BPA had intended. BPA's primary objective is to provide IOUs and preference customers interim relief during the pendency of BPA's WP-07 Supplemental Rate Proceeding, without incurring litigation. BPA believes preference customers' objections are well taken and BPA's goal can be accomplished without the broad restrictions contained in sections 5(a)(3) and 5(a)(4) of the proposed Interim Agreements.

Therefore, based on customer comments, BPA will delete those provisions from the preference customers' Interim Agreements. The language of sections 5(a)(1) and 5(a)(2), which is also in the IOU Interim Agreement, will be retained and should suffice. This language is limited to suspending litigation over the Interim Agreements, and should lessen contentiousness over interim relief to preference customers and IOUs. In that regard, since both sets of agreements act as interim relief and standstill agreements, they will be denominated as such.

However, it should be noted that, BPA has no control over whether non-signatories will initiate litigation over the Interim Agreements. In order to assure comparable treatment of preference customers and IOUs that execute the Interim Agreements, BPA will provide that preference customer and IOU Interim Agreements will terminate in the event that BPA has not made the interim payments and is judicially precluded from making the payments to either IOUs or preference customers.

PPC requested that BPA confirm PPC's understanding that parties executing the Interim Agreements are not thereby foregoing rights to challenge BPA decisions as to the correct level of exchange benefits for any time period or the end result payments to IOUs. PPC, at 3; NRU, at 1. Franklin asks that BPA clarify that the stay is not a waiver. Franklin, at 2. BPA agrees on both counts. The agreements provide benefits on an interim basis to preference customers and residential and small farm customers of the IOUs, and those benefits will all be trued-up to BPA's final decisions in the WP-07 Supplemental Rate Proceeding. Parties do not waive or lose any right to challenge BPA's final decisions, including the decisions on what REP costs should have been included in rates. Section 7 of the Interim Agreements should be clear on this important point.

With regard to the question of the reach of the remaining language, *i.e.*, sections 5(a)(1) and 5(a)(2), BPA will be explicit that there is no prohibition on preference customers' responding to any IOU challenges by including in the Interim Agreements the language requested by the PPC. PPC, at 4. Consequently, the fact that BPA is including that language and other requested language to reassure customers that they are not giving up rights should not be read to imply that without the language there might have been some waiver.

Lastly, although BPA understands the concerns expressed by Seattle with respect to a tolling agreement, BPA believes it can do nothing meaningful in this regard. It is well established that the statute of limitation in section 9(e)(5) of the NPA is jurisdictional. BPA has no authority to waive the statute of limitations or create jurisdiction where it otherwise does not exist. Therefore, BPA cannot agree to the waiver language requested by Seattle. However, as discussed above, by executing the Interim Agreements, parties do not waive or lose any rights to challenge BPA's final decisions.

Issue 3:

Whether BPA's Certifying Officer can certify payments to the IOUs under the Interim Agreements, given that the Certifying Officer would not certify payments to the IOUs after PGE and GNW.

Comments

Canby states that, following *PGE* and *GNW*, BPA suspended payments to the IOUs under the REP Settlement Agreements because the BPA Certifying Officer could no longer certify that making such payments would be in accordance with law. Canby, at 3, 6, 18.

Canby states that if BPA starts making payments to the IOUs once again, the BPA Certifying Officer would be in a similar position. *Id.* at 18. Canby basically asks what has changed that would allow the BPA Certifying Officer to certify payments under the Interim Agreements, without incurring personal liability. *Id.*

BPA's Response

BPA believes there is a material difference between the legal posture of the Interim Agreements and the REP Settlement Agreements. BPA's Certifying Officer suspended payments under the REP Settlement Agreements because the Court determined those agreements were contrary to law. Given that the underlying contractual obligation to make payments was no longer valid, the Certifying Officer could no longer certify that continued payments to the IOUs would be valid and lawful.

In contrast, for the reasons described above, BPA believes the Interim Agreements are a proper exercise of BPA's statutory authority. The fact that some parties may question BPA's legal authority to execute the Interim Agreements does not render them unlawful. Because BPA believes the Interim Agreements are lawful and a court has not held otherwise, BPA believes the Certifying Officer would not be constrained from certifying payments under those agreements.

Issue 4:

Whether the Interim Agreements are final actions under section 9(e)(5) of the NPA.

Comments

Canby asks BPA to clearly state whether BPA believes the Interim Agreements are final actions under the NPA, in which case its rights to litigate under section 9(e)(5) of the NPA would be triggered. Canby, at 4-5, 15. Canby and Cowlitz assert that BPA should add a provision to the contracts stating it is not taking a final action under 9(e)(5) of the Northwest Power Act, and that it will not argue that customers waived their rights to challenge the Interim Agreements. Canby, at 4; Cowlitz, at 4.

BPA's Response

BPA's position is that the Interim Agreements are not final actions. To determine if an action taken by BPA is a final action, the Ninth Circuit often turns to general principles of finality. *Industrial Customers*, 408 F.3d 638, 645-46; *Puget Sound Energy, Inc. v. United States*, 310 F.3d 613 (9th Cir. 2002).

In *Industrial Customers*, the Court explained that the doctrine of finality "is concerned with whether the initial decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury." 408 F.3d at 645. *See also Puget*, 310 F.3d at 624 (same). This Court further observed that, in accordance with *Bennett v. Spear*, 520 U.S. 154 (1977), an agency action is final when two conditions are met. "First, the action

must mark the ‘consummation’ of the agency’s decision-making process – it must not be of a merely tentative or interlocutory nature . . . Second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow.” *Industrial Customers*, 408 F.3d at 646. *See also Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992) (“The core question is whether the agency has completed its decision-making process, and whether the result of that process is one that will directly affect the parties.”). Additionally, “if an initial agency action may be modified or reversed during administrative reconsideration or review it is rendered non-final while such review is pending.” *Puget*, 310 F.3d at 625.

The Interim Agreements satisfy neither prong of the *Bennett v. Spear* test: the Interim Agreements are not the culmination of an administrative process. On the contrary, the administrative process has only just begun in the WP-07 Supplemental Rate Proceeding. It is in that proceeding that the rights and obligations of preference customers and IOUs related to the REP will be determined on a final basis. The Interim Agreements are simply an interim step to provide relief while the administrative process is underway. Similarly, all benefits provided under the Interim Agreements are expressly subject to revision through the true-up provision. Upon conclusion of that administrative process, BPA will have taken a final action and parties will have the right to review all aspects of BPA’s REP determinations. However, at this juncture, BPA believes there is no final action.

Issue 5:

Whether BPA’s decision to base the level of REP benefits under the Interim Agreements on taking a “neutral position” on the Mid-Columbia issue is consistent with PGE and GNW.

Comments

Canby questions BPA’s legal authority to make REP payments to the IOUs based on an amount that has not been determined in the WP-07 Supplemental Rate Proceeding. Canby, at 3-4. Grays Harbor states that “[o]nly after conducting the rate proceeding will Bonneville have the information to determine the amount of the Residential Exchange benefits payments to qualifying IOUs.” Grays, at 2. Skamania finds it “troubling and inconsistent that BPA chooses to indiscriminately consider only certain assumptions while ignoring other facts from the WP-07 rate proceeding” to arrive at the proposed level of IOU benefits. Skamania, at 1. According to Skamania, “BPA has already taken a position on the Mid-C issue previously and the result was in the favor of the publics. How is it that, now, BPA wishes to remain neutral on the Mid-C issue.” *Id.* at 2. APAC contends that BPA’s claim that it is taking a “neutral position” on the Mid-C issue is “questionable” because BPA’s only determination on that issue has been favorable to preference customers. APAC, at 4.

BPA's Response

In determining the level of benefits to provide IOUs and preference customers under the Interim Agreements, BPA relied on information developed in BPA's WP-07 rate proceeding. In the WP-07 rate proceeding, BPA forecast that under the traditional REP, the IOUs would be entitled to \$29.4 million in benefits in FY 2008, assuming BPA did not decide whether to include a portion of the output of the Mid-C hydro resources in the 7(b)(2)(D) resource stack. BPA did not decide the Mid-C issue in the WP-07 rate proceeding because BPA was operating under the assumption that the REP Settlement Agreements were valid. If the REP Settlement Agreements were valid, the precise level of benefits to provide to IOUs under the traditional REP was unnecessary to resolve.

If BPA had addressed the Mid-C issue and determined the Mid-C resources would *not* be included in the resource stack, the REP benefits to the IOUs would have been approximately \$261.2 million in FY 2008. If BPA had determined the Mid-C resources *would be* included in the resource stack, then REP benefits to the IOUs would have been \$29.4 million in FY 2008. Therefore, REP benefits to the IOUs, based on the WP-07 rate case record, could have been \$29.4 million to \$261.2 million.

BPA's reason for taking a neutral position on the Mid-C issue at the present time is that the Mid-C issue will be a centerpiece of the WP-07 Supplemental Rate Proceeding where it will be thoroughly addressed, debated and resolved. Therefore, BPA believes an equitable approach to determining the level of interim benefits is to remain neutral on this pivotal issue and assume a 50-50 chance that it could be decided either way.

Preference customers are correct in noting that the issue had previously been decided by BPA in a manner that supported their position. And, it may be that the issue will be decided that way again. But then again, it may be decided differently. At this juncture, the manner in which the issue will be resolved is unknown and BPA will not prejudge the outcome. BPA believes that assuming a 50-50 chance is the only way to remain neutral on this contested issue.

Some commenters contend that by establishing the level of interim benefits in this manner BPA is repeating the same mistakes that led the Ninth Circuit to set aside the REP Settlement Agreements. Canby, at 3. However, as discussed above in Issue 1, BPA believes the Interim Agreements and REP Settlement Agreements are materially different, primarily because the REP benefits provided under the Interim Agreements are interim benefits subject to true-up. The REP benefits under review in *PGE* and *GNW* were locked in place for the 10-year term of the contract. BPA is in the process of fully complying with the Court's directives in *PGE* and *GNW* by conducting the WP-07 Supplemental Rate Proceeding. In that proceeding, all procedural safeguards that protect preference customer rates will be followed and all amounts provided under the Interim Agreements will be true-up to the actual levels determined at the conclusion of that proceeding.

Moreover, all rights of the preference customers to challenge BPA's final decisions regarding the Mid-C issue and the actual level of REP benefits are preserved and are subject to challenge at the conclusion of that administrative process. At this juncture, BPA is attempting to afford a measure of relief to residential and small farm consumers of IOUs and preference customers throughout the Pacific Northwest without deciding or biasing any issues in dispute. BPA believes that taking a neutral position on the Mid-C issue is an equitable way to proceed in order to provide interim relief.

Lastly, APAC suggests that "there is a real and substantial risk that BPA would be unable to collect some or all of the interim payments provided to IOUs" after conducting the true-up. BPA understands APAC's concern, but believes the IOU Interim Agreements contain clear, express and unequivocal language that safeguards BPA and preference customers from any overpayments to the IOUs that may result from the Interim Agreements. Section 9 of the Interim Agreement clearly provides that if overpayments to IOUs cannot be offset against REP benefits otherwise owing them over three years, then the IOU has an unconditional obligation to pay the remaining amount within 12 months. BPA believes section 9 provides BPA and preference customers adequate protection.

Issue 6:

Whether providing temporary rate relief to residential and small-farm consumers of the IOUs through the Interim Agreements creates a short-term solution at the cost of providing an appropriate long-term solution to the allocation of the benefits of the Federal hydro system.

Comments

The Citizens' Utility Board (CUB), representing the interests of consumers of Oregon IOUs, states that it is "not interested in early, temporary rate relief for IOU residential and small farm customers at the cost of an inequitable long-term resolution that creates a huge, unjustifiable gulf between the consumer-owned customer haves and the investor-owned customer have-nots in terms of citizen access to the benefits of the federal hydro system in the Northwest." CUB, at 1. According to CUB, the proposed "regional settlement" is inadequate because, among other things, there is no escalator provision for IOU REP benefits and IOU customers will receive benefits that are "a miniscule portion of the federal system." *Id.* at 2. CUB also states that the benefit amount is not necessarily the correct amount, and it is troubled by the waiver provision of section 5(a) of the Interim Agreements, as well as section 10(d).

BPA's Response

BPA shares CUB's concern that there is no benefit to temporary rate relief for IOU customers if it comes at the cost of "an inequitable long-term resolution" of the REP benefits issues. Similarly, BPA has no interest in creating an "unjustifiable gulf" between customers of preference customers and customers of IOUs. However, BPA does not believe the Interim Agreements cause these consequences. On the contrary, every

effort is being made to bridge the existing gulf identified by CUB and ameliorate these concerns.

The long-term solution to REP benefit issues is being fully and comprehensively addressed in the ASC Methodology reconsultation process and the WP-07 Supplemental Rate Proceeding. In those forums, all issues related to providing REP benefits to the residential and small-farm consumers of the IOUs, and refunds to preference customers on a long-term basis will be aired. BPA believes that a short-term interim solution and a long-term comprehensive solution dovetail and are not mutually exclusive.

CUB contends that it is critical that REP benefits to the IOUs include some provision for an escalator, and that without an escalator, Oregon's share of REP benefits will decline over the next 20 years. At this juncture, BPA takes no position on this proposal because this is precisely the kind of issue that should be raised in the ASC Methodology reconsultation process and the WP-07 Supplemental Proceeding. BPA urges CUB to fully participate in those proceedings and present its arguments in those forums.

CUB further contends that the level of benefits to the IOUs in the Interim Agreement may not be the right amount. BPA does not disagree. However, it is for that reason that the level of benefits provided in the Interim Agreement is subject to true-up at the conclusion of the rate proceeding. The actual and appropriate level of benefits to be provided to the IOUs will be determined conclusively at the end of that process.

Lastly, CUB objects to section 5(a) of the IOU Interim Agreement, pertaining to a stay of litigation, and section 10(d) regarding the pass-through of REP benefits. With respect to the stay of litigation provision, BPA refers CUB to Issue 2, above, where the rationale for this provision, as revised, is fully addressed. With respect to section 10(d), BPA has decided to withdraw this provision in light of legitimate concerns raised by CUB and other commenters.

Issue 7:

Whether, in lieu of providing interim relief, BPA could effect final relief for customers on a much more expedited basis than it currently plans through the full section 7(i) hearing process.

Comments

Canby states that the Ninth Circuit's opinions are now eight months old and recommends that BPA replace its proposal for interim relief in favor of one that provides final relief on a more expedited basis. Canby, at 3, 9. Grant seems to express similar sentiments, stating that it is disappointed that BPA is not "first addressing and properly framing how BPA plans to address overpayments made by public power customers beginning October 2001." Grant, at 1. Kitittas makes similar comments. CUB opposes any temporary fixes. CUB, at 1.

On a related note, WPAG states that BPA should just provide payments to preference customers through rebates or rate change. WPAG, at 1. APAC states that BPA can immediately remove REP costs from power rates, that BPA's authority to collect settlement costs ceased with the issuance of the Court's opinions, and that the statutory process for setting future rates does not apply to current rates. APAC, at 3. APAC also states BPA should just base collections of REP costs on the \$29 million number developed in the WP-07 rate case. *Id.* at 2-3. Finally, APAC states that if BPA insists on moving forward with the Interim Agreements, it should make payments using moneys previously collected and also reduce current rates to eliminate settlement costs. *Id.* at 6-7.

BPA's Response

Canby's claim that BPA has been slow to respond to the Court's decisions is unwarranted. First, BPA suspended REP benefits to the IOUs on May 21, 2007, 2 weeks after the opinions were issued. Second, shortly after suspending payments, BPA initiated meetings with preference customers and IOUs to begin discussions on actions to take to ameliorate the gravity of the situation and the impacts of the opinions on consumers throughout the region. As noted, within days of BPA suspending REP payments, BPA received extensive written comments from customers and constituents voicing a wide range of opinions. Those comments were reflected in verbal comments BPA received in a well-attended public meeting, held on August 1, 2007, on the REP issues.

Third, petitions for rehearing or rehearing en banc were filed in both *PGE* and *GNW*. The Ninth Circuit did not rule on the rehearing petitions and issue its mandates until October 2007, at which time the decisions became final. It would have been premature for BPA to attempt to provide any affirmative relief to preference customers prior to the time the mandates were issued. Lastly, as noted earlier, the Ninth Circuit issued its rulings in four related cases in October 2007, shortly after issuing its mandates in *PGE* and *GNW*. See *Introduction*, at 2. These four cases challenged BPA's Load Reduction Agreements with PacifiCorp and Puget, which were the basis for substantial payments by BPA to these IOUs and necessarily would have to be considered in connection with the Court's remand order in *GNW*.

Once the Court issued its mandates, BPA promptly took the action necessary to initiate a formal section 7(i) hearing, affording all parties the opportunity to review BPA's proposal and formally present their positions to BPA. The legal and technical issues at play, as well as the diametrically opposed positions of various parties, strongly indicate that an expedited process, such as a 90-day process, would not allow BPA and regional parties adequate opportunity to address the numerous, complex, inter-related and far-reaching issues that needed resolution. For this reason, the suggestions of APAC and WPAG that BPA should attempt to provide immediate rate relief for preference customers by simply removing REP Settlement Agreement costs from preference customers' rates, in the absence of a full section 7(i) evidentiary hearing on the myriad of related issues, is not a viable alternative.

The issues that necessitate resolution in a section 7(i) proceeding include the Mid-C issue, which, as discussed above, is an issue that was left undecided in the WP-07 rate case because of the existence of the REP Settlement Agreements. However, the Mid-C issue alone could mean the difference between roughly \$29 million and \$260 million in benefits. APAC's suggestion that BPA just charge rates based on the \$29 million figure ignores the fact that BPA reserved judgment on the Mid-C issue in the WP-07 rate proceeding and that the issue is vigorously contested. Other critical issues to be resolved in the section 7(i) proceeding include implementation of section 7(b)(2) of the Northwest Power Act, 16 U.S.C. §839e(b)(2); and amortization of any overpayments to the IOUs in prior periods. These are the sort of issues that, in BPA's experience, do not lend themselves to expedited resolution. *See* BPA's Procedures Governing Bonneville Power Administration Rate Hearings, 51 Fed. Reg. 7611 (March 5, 1986).

As Mark Gendron, BPA's Vice-President for Requirements Marketing, explained in a letter to Canby in November 2007:

As you know, in response to the recent rulings of the United States Court of Appeals for the Ninth Circuit, BPA plans a rate case starting in December to conduct a "look-back" examination covering the FY 2002-2008 period, as well as to re-establish rates for FY 2009, in order to address issues raised for the entire period by the Court's rulings. The Court's rulings present BPA with an extraordinarily complex and difficult set of issues—legal, as well as equitable—so it is incumbent upon the agency to deal with them deliberately, openly, and objectively. Given, among other things, the various load and other assumptions that were built into BPA's various rate determinations, including BPA's decision to establish adjustment clauses to revise the initial set of rates developed for FY 2002-2006, BPA is re-examining what rates would have been without a settlement and will make a proposal for public review and comment based on that re-examination. . . .

BPA will be addressing the issue of the proper level of REP benefits for the FY 2002-2008 period in the rates process noted above. This issue does not currently seem nearly as clear-cut as your letters suggest, for several reasons. First, the Court did not decide the proper level of REP benefits for the FY 2002-2006 period. Rather, it remanded this issue and many others to BPA for decision through BPA's processes. Very complex, technical issues are presented when we consider what rates and residential exchange benefits would have been without the REP settlements, not to mention the difficult legal issues associated with BPA's rulemaking authority to retroactively determine rates and ASCs, the effect of REP settlement provisions dealing with remedies, and the legal issues and risks that prompted the settlements in the first place.

Second, in its subsequent rulings of October 11, 2007, the Court dismissed the petitions challenging the Load Reduction Agreements, and remanded the Reduction of Risk Discount provisions to BPA for review in light of the Court's May rulings. The Load Reduction Agreements were the source of roughly

\$200 million the IOUs received annually from BPA in the FY 2002-06 period. This is well over half of the payments they received. Third, in BPA's 2002 rate case BPA simply did not conduct all the analysis necessary to determine what the proper level of REP benefits would have been absent a settlement, because at the time BPA revised its 2002 rates in supplemental proceedings, BPA knew that the IOUs had already executed the REP settlements. BPA would surely have been presented with very different arguments by the IOUs and other parties concerning the appropriate and legal approaches to revising the rates.

Third [sic], the court rulings did not address BPA's FY 2007-2009 rates at all. In its November 5 letter, Canby offers its interpretation of the law with regard to the current rate period. BPA respects Canby's right to express its views, but the determination of the appropriate application of law will, as noted above, be determined in the upcoming rates proceeding and any subsequent legal challenges to final decisions associated with that proceeding.

For all these reasons, BPA believes it acted promptly in response to *PGE* and *GNW*, and that the resolution of the REP benefits and payment issues do not lend themselves to a quick or expedited resolution.

B. Contract Issues

Issue 1:

Whether the Interim Agreements should include additional language on Slice audit rights.

Comments

The Slice/Block customers state that BPA should include language that clarifies that section 5(a)(3) of the preference customers' Interim Agreements does not limit Slice customers' audit rights, including their rights to audit REP costs. Slice/Block Customers at 2-3. Franklin states that BPA should clarify that customers are not waiving or staying any Slice audit rights by virtue of the Interim Agreements, and affirm Franklin's understanding that it may exercise its right to audit BPA's FY 2007 costs, including REP costs. Franklin, at 2.

BPA's Response

BPA agrees that section 5(a)(3) is unclear and has removed section 5(a)(3) from the Interim Agreements. The audit rights of Slice/Block customers under the Slice/Block Agreements are unaffected by the Interim Agreements.

Issue 2:

Whether the Interim Agreements should provide assurances concerning the impacts of secondary power sales on the allocation of the Definitive Payment Amount or customer percentages.

Comments

Snohomish states that BPA should ensure in the Interim Agreements that differing treatments of revenues from secondary power sales in the Slice and non-Slice agreements do not unfairly impact the allocation of the Definitive Payment Amounts between the Slice/Block and non-Slice/Block customers. Snohomish, at 2; Slice/Block Customers, at 2.

BPA Response

The Interim Agreements have been carefully structured to ensure that BPA does not commit to any decisions on rate issues outside the rate case where they must be decided. Issues associated with the Definitive Payment Amounts, including their allocation, are rate case issues, so they cannot and will not be disposed of in the Interim Agreements. For present purposes, it is not BPA's intent that differing treatments of revenues from secondary power sales in the Slice and non-Slice agreements should unfairly impact the allocation of the Definitive Payment Amounts between the Slice/Block and non-Slice/Block customers. However, BPA also believes that customers may well have different views on this issue and different opinions on what is "fair" or "unfair." BPA would be receptive to those opinions and would fully consider them in the context of the WP-07 Supplemental rate case.

Issue 3:

Whether the amount of interim relief to preference customers should be increased in total by \$14.2 million.

Comments

Numerous preference customers assert that, since BPA is limiting IOU interim relief to no more than the IOUs would have received under the REP Settlement Agreements, then an additional \$14.2 million is available that should be added to the amount of interim relief provided to preference customers. NRU, at 1; PPC, at 4; Skamania, at 2; Franklin, at 1.

BPA Response

BPA agrees. In determining the amount of interim payments, BPA has attempted to adhere to the neutrality principle stated in its proposal. In other words, BPA proposed

that, based on the WP-07 rate case record, payments to the IOUs would be no greater than they would have been if BPA were to assume a 50/50 percent probability that it could decide the Mid-C issue either way. BPA also proposed that the difference between that amount and the amount of REP settlement costs included in preference customer rates would constitute the total amount of interim payments to preference customers.

However, preference customers have pointed out that BPA is further constraining the IOU interim payments for each IOU to no greater than the amount the IOU would have received pursuant to the REP Settlement Agreements. The result is that payments to the IOUs under the Interim Agreements would be \$14.2 million less than the 50/50 number would indicate. Given that all payments will be subject to the true-up that results from BPA's final decisions in the WP-07 Supplemental rate case, and further given BPA's assumption of a 50/50 probability that it could decide the Mid-C issue either way, the result of adding \$14.2 million to the preference customer interim payments means that, all else being equal, there is a 50 percent probability that the \$14.2 million will be returned by the preference customers and a 50 percent probability that it will be retained by them. (Note that this does not factor in the reduced probability of return due to the fact that the preference customer true-up is based on 2007 and 2008.) Nothing in that equation warrants excluding the \$14.2 million from preference customers, and the \$14.2 million is available to provide interim relief. Given that the preference customers argue strongly for its inclusion, BPA will increase the total interim payment amount to preference customers by \$14.2 million

Issue 4:

Whether the IOU true-up should be based on the "greater of" the REP amount determined at the conclusion of the WP-07 Supplemental rate proceeding or the REP Settlement Agreement benefits.

Comments

Canby questions the definition of the term "Definitive Benefit Amount" in section 2(h) of the IOU Interim Agreements, which allows BPA to determine true-up payments to IOUs based on the *greater* of the REP benefits determined in the WP-07 Supplemental rate proceeding or the REP Settlement Agreement benefits. Canby believes BPA should cap the IOU true-up at no more than what the REP Settlement Agreements would have allowed. Canby, at 3; 13. Grays Harbor agrees. Grays, at 3. In addition, Canby expresses concern that since BPA would pay a true-up amount to the IOUs before judicial review of the Administrator's WP-07 Supplemental record of decision, the money would already have been paid before the Court could determine the legality of BPA's actions. Canby, at 3. Cowlitz asserts that if the IOU REP Settlement Agreements are upheld, the IOUs should get the settlement amounts, not the greater of REP or settlement amounts. Cowlitz, at 2.

BPA's Response

BPA agrees that the definition of the Definitive Benefit Amount should be revised because it is unclear. BPA's intent was as expressed by Cowlitz, that is, if the REP Settlement Agreements are ultimately upheld, then they govern the amount of benefits to be paid; if the REP Settlement Agreements are not upheld, then the Administrator's final decision on REP benefits in the WP-07 Supplemental rate proceeding governs the amount of benefits to be paid. Under this approach, the IOU's true-up amount is based on what they are legally entitled to, whether it is pursuant to the REP Settlement Agreements or the Administrator's final decisions in the WP-07 Supplemental rate proceeding. The definition of Definitive Benefit Amount will be revised to reflect this understanding.

Canby is incorrect that there is a risk that BPA will pay the IOUs an amount based on the true-up and that the true-up will be reversed on appeal. Section 9(b) of the IOU Interim Agreement ensures that payments are not made until the time for seeking judicial review has passed and, if review is sought, then not until a final decision is rendered.

Issue 5:

Whether the definition of Settlement Agreements should refer to future amendments.

Comments

Canby questions why the definition of the IOU Settlement Agreements in section 2 of the proposed IOU Interim Agreements includes agreements that "may be heretofore or hereafter amended." Canby, at 15. Canby asks BPA to explain if it is contemplating amending the existing IOU contracts and, if this is error, to delete the clause. Cowlitz agrees and also contends that other language is ambiguous and in need of clarification. Cowlitz suggests revisions to the definition of Settlement Agreements in section 2(s) of the preference customers' Interim Agreements, which would clarify that customers are not being asked to waive rights to challenge later amendments. Cowlitz, at 3-4.

BPA's Response

The concerns expressed by Canby and Cowlitz are reasonable. BPA will replace the definition of "Settlement Agreements" in section 2(s) of the Interim Agreements with the language proposed by Cowlitz, which includes deleting references to agreements that "may be heretofore or hereafter amended."

Issue 6:

Whether the Interim Agreements should provide for interest on payments to IOUs later found to be excessive.

Parties' Positions

Cowlitz asserts that IOUs should be charged interest on any overpayments under the Interim Agreements that are later found to be excessive. Cowlitz, at 2.

Comment

Sections 9(a)(1) and (2) of the proposed IOU Interim Agreements address true-up payments and provide for interest on the BPA True-up Payment Amount and the Customer True-up Payment Amount. In either case, the true-up payments cover the difference between the amount a customer receives as an interim payment and the amount the customer is entitled to, as finally determined at the conclusion of the WP-07 Supplemental rate proceeding, subject to judicial review. Cowlitz posits a situation where BPA's final decision is later judicially overturned and suggests that the agreement should specify that interest should be owed on the difference between the amount that was paid to the customer and the amount that should have been paid to the customer.

BPA's Response

BPA believes that the agreement is clear that interest accrues, as suggested by Cowlitz. Section 9(a)(3) provides that interest accrues from the Interest Accrual Date until paid. Section 2(m) provides that Interest Accrual Date "means the date on which the Interim Period Payment is made to «Customer Name»." Since the IOU or BPA True-up Payment Amount is subject to judicial review and not paid until there is a final decision, the final payment amount, and interest on it, will reflect the Court's decision if judicial review occurs.

Issue 7:

Whether changes should be made to the true-up mechanisms.

Comments

A number of miscellaneous issues were raised in connection with the true-up. Kittitas states that it does not want to be in position of lowering then increasing rates. Kittitas, at 1. Canby states the stay of litigation provision expires on the date BPA issues its ROD, but the agreement extends through payment of true-up payments. Based on this, Canby asks if there is a window of opportunity to sue. Canby, at 14. Franklin notes that IOU's have up to 4 years to repay, but preference customers have only 7 months. Franklin asks whether the IOU and preference agreements should be treated the same in this regard and, if not, for BPA to explain the reason for the different treatment. Franklin, at 2. APAC also asserts there should be consistent true-up mechanisms. APAC, at 1.

BPA's Response

BPA appreciates Kittitas' concern about the disruption that may be involved in initially lowering, then possibly increasing electric rates. The need for a true-up means that participating utilities may face this situation, depending on BPA's final decisions regarding the Definitive Payment Amount. For Kittitas, this risk may be mitigated by the fact that the true-up for preference customers is based on what the REP costs should have been in 2007 and 2008. BPA was advised by negotiators for preference customers that REP costs to the IOUs were overpaid in 2007, such that combining 2007 and 2008 in the true-up would reduce the likelihood of a preference customer having to pay a true-up amount.

Canby is correct that under the Interim Agreements, the litigation stay expires on the date BPA issues its final ROD. However, BPA's rates, including all determinations contained in the final ROD, are not final actions subject to judicial review until BPA's rates are confirmed and approved by FERC. Therefore, the only litigation window is the 90-day timeframe that begins to run after FERC confirms and approves the WP-07 Supplemental rates.

Canby also questions why the date of the litigation stay and the contract term are different. The reason is that the former ensures that parties lose no rights to challenge BPA's final actions, whereas the latter (the term of the contract extends through the payment of the true-up amount) assures that all true-up payment obligations incurred pursuant to the agreements remain contractually binding.

With regard to the timing for repayment of true-up amounts, Franklin is correct that there is a timing difference between IOUs and preference customers for the true-up payment, as well as other differences, as observed by APAC. These differences are due to the type of payments involved. The IOUs will have ostensibly passed through the interim payments as REP benefits to their residential and small-farm customers. Any amount of overpayment to the IOUs will offset future, and at this point unknown, REP benefits. The timing of IOU recovery of overpayments from their ratepayers is a matter of state ratemaking. Even so, BPA determined that three years should be a sufficient period to offset any overpayment against future REP benefits, and if that is insufficient to effect a complete offset, then the IOU has an unconditional obligation under section 9(e)(2) of the agreement to pay the remaining amount within twelve months.

Preference customers, on the other hand, are in a different position because they are not constrained by the same state ratemaking restrictions. As a result, preference customers are better positioned to unilaterally increase rates if necessary to recover funds that, based on BPA's final true-up decision, may have been excessive. If the interim benefits are passed through to consumers in the seven months between March and September, recovering the benefits over a similar period of time would appear to be reasonable. However, the agreement specifies that the charge for overpayments will be determined in the WP-07 Supplemental rate case and that the charge "shall be applicable for *at least* a

period of seven (7) months.” (Emphasis added.) Arguments that the charge should extend over a period of time greater than seven months can be made in the rate case.

Issue 8:

Whether changes should be made to the interest provisions.

Comments

Snohomish observes that for IOUs, interest on true-up payments accrues as soon as the Interim Period Payment is made, but interest accrual is delayed for publics until the later of October 1, 2008, or after the Definitive Payment ROD. Snohomish, at 2. Snohomish seeks to understand BPA’s rationale for the different treatment. Snohomish also notes that the preference customer agreements provide for interest on payments only if a party chooses to pay over time, whereas true-up amounts paid under the IOU agreements will include interest regardless of whether the party chooses to make the payment as a lump sum or spreads the payment out over time. Snohomish comments that the IOU and public agreements should be parallel in this regard. Snohomish, at 2.

Snohomish further asserts that if a BPA lump sum payment is not sufficient to offset the current bill, interest should be added to the remaining balance until paid. Snohomish, at 2. Nevertheless, Snohomish states that all interest rate questions should be reserved for the section 7(i) rate proceeding where they can be thoroughly aired, rather than through the Interim Agreements. Snohomish, at 2. Finally, Snohomish states that BPA needs to clarify “unpaid balance” and “outstanding balances” terms in IOU agreements. Snohomish, at 2. Canby also questions why the BPA true-up payment for preference customers does not include interest. Canby, at 13.

BPA’s Response

The proposed IOU agreements provide that if BPA underpaid an IOU (*i.e.*, the net of the Interim Payments and what the IOU should have received results in a BPA True-up Payment Amount), the interest on the underpayment accrues from the date on which the Interim Period Payment was made to the IOU (Definition 2(n), Interest Accrual Date). The proposed preference customer agreements provide that if the preference customer overpaid BPA (*i.e.*, the net of the Standstill Payments and the Settlement costs included in rates for FY 2007-2008 results in a BPA True-up Payment Amount), interest on the overpayment accrues from the later of October 1, 2008, or the True-up Effective Date (per section 8, a date based on either a court order upholding the settlements or issuance of a Definitive Payment ROD by BPA).

The different interest accrual dates for preference customers and IOUs is based on the fact that preference customers effectively receive the benefit of interest on monies held by BPA. Since BPA is self-financed, any overpayments by preference customers either earn interest in the BPA fund or are used to make payments for costs that would otherwise have to be recovered in preference customer rates. Once BPA determines the

amount of the overpayment, interest will accrue on that amount if BPA determines to refund that amount as credits over time rather than in a lump sum.

The proposed IOU agreements provide that if BPA overpaid an IOU (*i.e.*, the net of the Interim Payments and what the IOU should have received results in an IOU True-up Payment Amount), interest on the overpayments accrues from the date on which the interim payment was made to the IOU (Definition 2(n), Interest Accrual Date). The proposed preference customer agreements provide that if the preference customer underpaid BPA, (*i.e.*, the net of the Standstill Payments and the Settlement costs included in rates for FY 2007-2008 results in a customer True-up Payment Amount), interest on the customer underpayment accrues from the later of October 1, 2008, or the True-up Effective Date (per section 8, a date based on either a court order upholding the settlements or issuance of a Definitive Payment ROD).

Again, BPA believes this treatment is reasonable due to the difference between the IOUs and preference customers and their respective relationships to BPA. In the case of the IOUs, interest appropriately accrues from the earlier date since the IOU should not have received the overpayment when it did. In the case of preference customers, interest appropriately accrues from the later date since it is only at that point that the amount of the underpayment by the customers can be ascertained. In addition, BPA has a very high degree of confidence that BPA will have recovered its total costs in 2007 and 2008, such that monies received through secondary marketing and other activities are sufficient to cover any imputed interest costs attributable to the underpayment by the preference customers.

Snohomish also states that if there is a BPA True-up Payment Amount, and BPA chooses to pay it in a lump-sum, but the lump sum credit exceeds the preference customer's current bill, then interest should be added to the remaining balance until paid. Snohomish, at 2. As an academic matter, BPA agrees since in this situation, the corresponding amount that the IOU "owes" to BPA, *i.e.*, the IOU True-up Payment, would be earning interest, so it is reasonable that interest be paid on the remaining balance of the lump-sum payment to each preference customer. However, as a practical matter, this introduces significant additional accounting and billing work due to the calculation and payment of interest. Consequently, to avoid those problems but solve the issue raised by Snohomish, BPA will revise the language so that a one-time payment is by electronic funds transfer, which is the method for making the Standstill payment.

BPA does not agree with Snohomish that all interest rate questions should be reserved to the rate case. Here, parties contemplating whether to sign the agreements reasonably need to understand the consequences of overpayment or under-payment. On the other hand, if a preference customer believes that its rates should, for whatever reason, be changed to recognize that refund amounts attributable to past overpayments should carry interest, it has the opportunity to make that argument in the rate case.

Finally, Snohomish states that BPA needs to clarify "unpaid balance" and "outstanding balances" terms in the IOU agreements. Snohomish, at 3. The term "unpaid balance"

would be more descriptive if it were changed to “declining balance,” so that change will be made. Otherwise, the use of those terms in section 9(a)(3) refers back to calculations made in section 9(a)(1) and 9(a)(2) and, we believe, their meaning is apparent in context.

Issue 9:

Whether BPA and preference customers should be granted the right to collect overpayments from the IOUs directly.

Comments

APAC asserts that the IOU repayment obligation will be thwarted if an IOU decides to limit or cease transactions with BPA. APAC, at 5. Consequently, APAC believes BPA and preference customers should be granted the right to collect overpayments from IOUs directly.

BPA’s Response

BPA disagrees with APAC that there is a meaningful risk that the IOU repayment obligation will be thwarted if the IOU decides to limit or cease transactions with BPA. Section 9(a)(2)(C) imposes an absolute contractual obligation on the IOU to repay any overpayments, independent of any transactions it does with BPA. It provides in section 9(a)(2)(C) that if, at the end of the 3-year offset period, the customer’s “True-up Payment Amount (plus interest) has not been set-off in its entirety, then [the Customers] shall pay to BPA any remaining portion.” If timely payment is not made, BPA can sue to collect the underpayment. BPA believes that this provision provides sufficient contractual protection to cover any risk of non-payment or late payment.

Issue 10:

Whether the definition of “Expiration of Stay Date” should be changed as suggested by the PPC.

Comments

PPC expresses concern that the current definition of “Expiration of Stay Date” only refers to the date of the Definitive Payment ROD and may not cover the possibility that determinations are made at different times, whether due to settlements or otherwise. PPC, at 5. Snohomish shares this concern and supports PPC’s suggestion to clarify the definition so that it is clear that any ROD that comes to a final resolution regarding IOU REP amounts will terminate the Interim Agreements. Snohomish, at 1.

BPA’s Response

BPA will include the proposed language in the Interim Agreements because, although BPA believes it is extremely unlikely that a final determination of IOU REP amounts will

be made other than in a Definitive Payment ROD, the added assurance provided by PPC's proposed language is not unreasonable. Inasmuch as PPC's language provides three different events that would trigger the expiration, it is reasonable to add additional language specifying that the earlier of the three events triggers the expiration. This additional language will better comport with the clarity sought by Snohomish.

Issue 11:

Whether section 10(d) of the IOU Interim Agreements should be removed.

Comments

The state utility commissions and the Citizens Utility Board argue that BPA should delete section 10(d) of the Interim Agreements regarding the pass-through of interim benefits. WUTC, at 2; CUB, at 3; IPUC, at 1; OPUC, at 1. The WUTC represented that Avista and Puget did not object to removing the provision. APAC argues that this provision creates a risk that customers will not receive the benefits of the interim payments. APAC, at 5-6.

BPA's Response

Section 10(d) of the proposed IOU Interim Agreements provided that the IOUs need not pass through interim payments to their customers unless and until they had received adequate assurances from their state regulatory authorities that they could recover overpayments in the case of a true-up. The commenters contend this is a matter for the public utility commissions and not within BPA's authority.

BPA has not traditionally stepped between IOUs and their utility commissions in determining how REP benefits are passed through to residential and small farm consumers. However, BPA has sought to ensure that benefits are in fact directly passed through to consumers as required by section 5(c)(3) of the Northwest Power Act, 16 U.S.C. §839c(c)(3). In this case, the issue is not a matter of passing REP benefits through to consumers but rather a matter of recovering overpayments from consumers. Nevertheless, BPA agrees that this is a matter to be resolved between each IOU and its public utility commission. BPA will remove the provision.

Issue 12:

Whether payments to multi-jurisdictional utilities should be distributed on a state-by-state basis.

Comments

The OPUC asserts that interim payments to multi-jurisdictional utilities should be disbursed on a state-by-state basis rather than having such payments disbursed to each IOU in a lump sum. The IPUC disagrees and contends that, for purposes of the interim

payments, BPA should continue using the lump sum approach, which was the allocation method followed prior to BPA suspending REP benefits. IPUC, at 1-2.

BPA's Response

At the time that BPA suspended payments to the IOUs as a consequence of the Court's invalidation of the REP Settlement Agreements, payments were being made to PacifiCorp in a lump sum. PacifiCorp would then allocate those payments to its territories within the Pacific Northwest. The OPUC appears to be suggesting that BPA should make interim payments on a state-by-state basis, while the IPUC contends that BPA should adhere to the allocation method that was in place when payments were suspended.

BPA will make a single lump sum interim payment to each of the IOUs as BPA has done in the past. BPA's payments are based on data from its WP-07 rate case, and BPA will inform PacifiCorp of the underlying state-by-state data used to calculate the total payment.

Issue 13:

Whether greater clarity should be provided concerning the timing and coverage of the Definitive Benefit ROD.

Comments

Canby states it is unclear how many RODs BPA intends to issue at the conclusion of the WP-07 Supplemental rate proceeding and questions why there shouldn't be just one. Canby, at 14. Grays Harbor expresses concern that customers may lose rights through the stay of litigation if BPA's ROD is issued later than 90 days after the close of the rate proceeding or if decisions concerning the REP, including past overpayments, are made on a different time track than reflected in the Definitive Payment ROD. Grays, at 5- 6.

BPA's Response

The preference customers proposed Interim Agreement defines Definitive Payment ROD as "a final record of decision in which the Administrator makes, in addition to any other final decisions, a final determination on the Definitive Payment Amount." Section 2(h). "Definitive Payment Amount" means the resulting difference, if any, between the Settlement Costs and the Residential Exchange Program Costs, all as determined by the BPA Administrator in the Definitive Payment ROD." Section 2(e).

The IOU's proposed Interim Agreements use the terms Definitive Benefit ROD and Definitive Benefit Amount. Sections 2(i) & (h). Due to these definitions, BPA believes it is clear that all decisions pertinent to calculation of amounts owing, whether by BPA or to BPA, will be determined in a single final ROD. Nevertheless, to avoid any confusion, BPA will use the term Definitive Payment ROD in both the preference customer and IOU

Interim Agreements. Further, to alleviate any concern that BPA might not issue the ROD, the definition will no longer say “the Administrator makes” but will say “the Administrator will make.”

The concern expressed by Gray’s Harbor about issuance of the ROD longer than 90 days after close of the rate proceeding fails to recognize BPA’s historic practice in rate proceedings of using the ROD as the vehicle to express the Administrator’s final decisions in establishing BPA’s final rates, *i.e.*, the proceeding does not close until a final ROD is issued. Nonetheless, to alleviate the concern expressed by Gray’s Harbor, the Interim Agreements will provide that the underlying proceeding will not be considered closed until the Administrator issues the Definitive Payment ROD.

Issue 14:

Whether the ROD or Interim Agreements should specify the same or comparable treatment of non-signing preference customers.

Comments

WPAG notes that customers who sign the Interim Agreements have the benefit of the interim payments, while those who do not sign do not have the benefit. WPAG suggests that BPA should act in a manner that places all preference customers in the same financial position, whether or not they sign. WPAG, at 2. NRU and PPC state the ROD should specify that interest will be accorded non-signers. NRU, at 2; PPC, at 2. Benton states BPA must afford non-signers interest on any outstanding balance owed to the utility. The Slice/Block customers and Seattle state the ROD should state that all non-signing Slice/Block customers will be placed in the same financial position as those that signed, with the only difference being the timing of their respective refund (or payment) obligation. Slice/Block Customers, at 4; Seattle, at 2. Canby comments that BPA should state that non-signers will receive a refund plus interest. Canby, at 12-13.

BPA Response

The comments express a widespread concern that customers who do not sign the agreements should not be put at a financial disadvantage because of not signing. While the concepts of “financial disadvantage” and “same financial position” are vague, BPA understands the underlying concern that there should be some recognition of the time value of the interim payment amount BPA retained because the customer did not sign.

BPA believes this issue is an appropriate issue to resolve in the context of the WP-07 Supplemental rate proceeding. BPA will propose that (a) an interim payment that was not paid to a customer because it did not sign the agreement will earn interest from the date it would have been paid had the customer signed the agreement; and, (b) payments will be made to non-signers on the same basis as payments are made to those who signed. Whether the interest rate should be BPA’s rate of interest or a rate reflecting a lower rate of interest earned by preference customers is one that parties can raise in the WP-07

Supplemental rate case. If there are other interest issues of concern or other dimensions to this issue not addressed herein, those issues can be addressed in the rate proceeding as well. In addition, BPA affirms, as requested by WPAG, that preference customers signing the Interim Agreement are not entitled to any over-collection amounts greater than or in addition to those it would have received had it not signed the Interim Agreement.

MISCELLANEOUS COMMENTS AND BPA'S RESPONSES

Slice/Block customers provide suggestions for how the language of section 6 of the Interim Agreements should be clarified. Slice/Block Customers, at 3. Response: BPA agrees.

Slice/Block customers and Snohomish provide suggestions for how the Exhibit B language regarding revenues should be clarified. Slice/Block Customers, at 3; Snohomish, at 3-4. Response: BPA agrees. Snohomish made suggestions for the introductory language and paragraph "1" of Exhibit B, and those changes will be made. Snohomish and the Slice/Block Customers both suggested changes to paragraph "2" of Exhibit B with different language but similar intention, so BPA will make the changes suggested by the Slice/Block Customers since it is the larger, more representative group.

Slice/Block Customers state that BPA should clarify and explain the purpose of Exhibit B and section 6 of the Interim Agreements. Slice/Block Customers, at 4. Response: BPA agrees. The purpose of the last paragraph of section 6 of the Interim Agreement is to ensure that Slice Customers that execute the Interim Agreement are not subject to a true-up collection under the Slice/Block Agreement for amounts already collected under the Interim Agreement, and do not receive an additional payment for amounts already paid to them under the Interim Agreement. The purpose of Exhibit B of the Interim Agreement is to ensure that the differing treatment of revenues from secondary power sales in the Slice and non-Slice contracts does not unfairly impact the allocation of the Definitive Payment Amount between purchasers of Slice and non-Slice power products.

WPAG suggests that the following defined term be added to the agreement so that each preference customer will know the percentage used to determine each preference customer's Standstill Payment Amount made pursuant to the proposed agreement: "<<Customer Name> Percentage' means ____ percent, which is the percentage used to calculate the Standstill Payment." WPAG, at 3. Response: Attachment A to the proposed agreements sets forth the Standstill Payment Amount, but the agreement does not state the percentage used to arrive at that amount. While that percentage amount would be determined easily enough by dividing the Standstill Payment Amount by the total eligible for payment, BPA will include that information in Appendix A with the statement "____ percent is the percentage used to calculate the <<Customer Name>> Standstill Payment."

Franklin states that there should be consistency between the eighth and eleventh “whereas” clauses in both the preference customer and IOU Interim Agreements; and that these clauses should either be deleted or made consistent. Franklin, at 3. Response: BPA agrees and will make them consistent.

Franklin also states that the tenth “whereas” clause in the proposed IOU Agreements should be deleted since it is unnecessary and could be inappropriate in light of the WP-07 Supplemental Rate Proceeding. Franklin, at 3. Response: The 10th whereas clause indicated that there is substantial evidence in the existing WP-07 rate case record to support the conclusion that it is more likely than not that the IOU will ultimately be entitled to receive REP benefits during FY 2008. As indicated earlier, the amount of relief that BPA is making available under the IOU and preference customer Interim Agreements is based on evidence in BPA’s 2007 rate case record that there are significantly different REP benefits that could have been provided to the IOUs in the absence of the REP Settlement Agreements. Given that BPA has already clarified the basis for the amount of payments, the tenth “whereas” clause is unnecessary and will be deleted.

Snohomish comments that the definition of “Settlement Agreements” in the preference customers’ Interim Agreements should not use the general term “parties.” Snohomish, at 1-2. Response: BPA agrees, and has changed the language to make it a clear reference to the parties to the Settlement Agreements.

Snohomish suggests that the terms “Definitive Payment Amount” and “Definitive Payment ROD” are circular. Snohomish, at 1. Response: While the definitions are related in terms of identifying where decisions will be made, they are not circular. The Definitive Payment ROD is the document that contains BPA’s final decisions on the Definitive Payment Amount and BPA’s rationale for making those final decisions. The Definitive Payment Amount is the difference between Settlement Costs and Residential Exchange Costs, “all as determined by the BPA Administrator in the Definitive Payment ROD.” Consequently, BPA believes it is apparent that when the Definitive Payment ROD definition refers to the Definitive Payment Amount, it is referring to the actual dollar amount.

Snohomish suggests section 11(a) of the Interim Agreements be clarified by adding “of the Definitive Payment Amount” at the end of the sentence. Snohomish, at 3. Response: BPA agrees and will make the requested clarification.

Grays Harbor comments that, since the IOUs have signaled that they may seek Supreme Court review of the Ninth Circuit’s opinions invalidating the REP Settlement Agreements, it is a double standard to include in the preference customers’ Interim Agreements the recital that the Interim Agreements are necessary so that regional discussions are not hampered. Grays, at 7. Response: BPA will delete the recital.

Mason and the Oregon Department of Energy make a number of comments concerning past and future REP benefits paid to the IOUs. Response: These comments do not

concern the Interim Agreements, *per se*, which are structured to be neutral on the issues raised by Mason and the Oregon Department of Energy. The broader issues they raise will be addressed in the WP-07 Supplemental rate proceeding, regional consultations on the ASC Methodology, and various Regional Dialogue forums.

Cowlitz states that the definition of Settlement Agreements should be changed since they are not for the Benefit Period, but overlap it. Response: BPA agrees.

Canby questions why there are different standard provisions in the IOUs' and preference customers' Interim Agreements. Canby, at 14. Snohomish asserts that there should be similar confidentiality provisions in both sets of Interim Agreements. Snohomish, at 3. Response: The different provisions were due to comments by some preference customer attorneys that changes should be made to the provisions. The preference customer attorneys did not believe that the Information Exchange and Confidentiality provision was needed in the preference customer agreements. BPA will conform the IOU agreement standard provisions to the preference customer agreement standard provisions except that (1) the "Amendments" language in the IOU agreement needs to reflect the fact that they have a different Exhibit B, and (2) the "Entire Agreement" language of the IOU agreement needs to be clear that the REP Settlement Agreement, the 2001 Agreement, and the Financial Settlement Agreement are not superseded. However, BPA will not delete the Information Exchange and Confidentiality provision from the IOU agreement; rather, if a preference customer request inclusion of the provision in its agreement, BPA will do so.

Canby asks why some sections survive termination or expiration of the agreements. Response: The term of both proposed agreements is until all true-up payments have been made pursuant to section 9. Section 11 of the preference customers' Interim Agreements also provides the customer an election to terminate in instances specified therein. The expiration date refers to the Expiration Stay Date, which is defined in both agreements as the date on which BPA issues its Definitive Payment ROD. Sections 6, 7, 8 and 9 specify that they survive termination or expiration of the agreements. All these sections contemplate that the agreement has been in force and the survival term ensures that (a) all parties abide by and do not repudiate their representations and acknowledgements, (b) all parties do not assert that a waiver of rights actually occurred, and (c) all payment obligations are determined and incurred under the contracts and remain as obligations until satisfied.

Canby asks BPA to explain the difference in the proposed IOU agreements between "Benefit Amount" and "Definitive Settlement Benefit Amount" as defined in sections 2(f) and 2(g) respectively. Canby, at 13. Response: The difference is that the former refers to 2008 REP benefits, if any, owing in the absence of the REP Settlement Agreements, while the latter refers to 2008 REP benefits owing under the REP Settlement Agreements in the event a court issues a final order sustaining the REP Settlement Agreements. A number of the IOU's have filed a petition for *certiorari* in U.S. Supreme Court to obtain review of *PGE* and *GNW*. The different terms were developed because BPA needs to anticipate different outcomes in the event their petition is granted.

APAC comments that BPA should consider the needs of all BPA stakeholders and not unduly benefit or prejudice any one group. APAC, at 1. Response: BPA believes it is doing precisely what APAC requests, that is, considering the needs of all customers and attempting to balance these various needs. It is for that reason that BPA seeks to provide interim relief to preference customers and IOUs alike. At the same time, BPA understands that consumers of its customers may have different needs and be dissimilarly situated. As part of that, BPA understands and appreciates that many commercial and industrial consumers face competitive pressures that may cause them to seek effective rate relief sooner, whether through refunds or otherwise, than may be the case with other consumers. BPA has designed the Interim Agreements so that they would be truly neutral, while providing interim benefits to the vast majority of BPA customers at the earliest possible moment.

The IOUs comment that section 9(a)(1) of the IOUs Interim Agreement would be more clear if “(including interest)” followed the phrase on “equal monthly amount payments.” IOUs, at .2, n. 1. Response: BPA agrees and will make the requested clarification.

Franklin asserts that the timing of the customer payment should be after the customer’s bill, not after the ROD, and that payments should be consistent with current contract provisions. Franklin, at 2. Response: Section 9(a)(2) of the proposed Interim Agreement provided that if the customer elected to make a lump-sum payment to BPA, it must make such payment no longer than 30 days after issuance of the Definitive Payment ROD. Franklin’s suggestion regarding timing is reasonable since it will synchronize payments, and make this administratively easier for the parties. The last sentence will be revised to indicate that the lump-sum payment must be made to BPA no later than the date payment is due on the first power bill that is issued to the customer after the date of issuance of the Definitive Payment ROD.

Franklin notes that section 8(a) of the Interim Agreements, referencing a court order that upholds the now-invalidated REP Settlement Agreements, makes no reference to a “final” order or opinion. Franklin, at 2. Response: The change proposed by Franklin is reasonable and will be made.

Franklin observes that provisions in the proposed IOU Interim Agreements include language regarding final judicial review, but the proposed preference customers’ Interim Agreements do not. Franklin comments that BPA should be consistent or explain the differences. Franklin, at 2. Response: Franklin correctly observes that the proposed IOU Interim Agreements (sections 2(f), 2(g), and 2(h)) include language regarding final judicial review, but there are no comparable provisions in the preference customers’ Interim Agreements. This is explained by reference to section 9 in each agreement. The preference customers’ Interim Agreement bases the timing of true-up payments on BPA’s issuance of the Definitive Payment ROD (or resumption of settlement payments if the REP Settlement Agreements are upheld on appeal). Section 9(b) of the Interim Agreements provide for the situation where a court later invalidates BPA’s determination of the Definitive Payment Amount or Customer Amount.

The proposed IOU agreements, on the other hand, provide that a true-up payment is not owed until after the time has passed for the filing of a petition for review of the determinations underlying the true-up payments or, if a petition for review is filed, until final judicial review. The calculus for the distinction is two-fold. First, as noted earlier, the true-up for preference customers is based on what the REP costs should have been in 2007 and 2008, not just the 2008 period covered by the interim payments. Preference customer negotiators believed that REP costs were overpaid in 2007, such that combining 2007 and 2008 in the true-up would mitigate the possibility of a preference customer having to pay a true-up. In other words, since it appeared more likely that BPA would owe them money, the agreement is calculated to get the money from BPA sooner. Second, the IOU agreements provide for judicial review before making or receiving payments because the IOUs face regulatory delay and uncertainty regarding recovery of the monies from their residential and small farm customers.

Mr. Charles Pace states that the proposed Interim Agreements are based on rates and analysis that, according to *GNW*, failed to consider certain information regarding fish and wildlife costs. Pace, at 2. Response: *GNW* concerned BPA's rates for the FY 2002-2006 period. The Interim Agreements will only be in effect for FY 2008, and all interim payments or benefits provided under the Interim Agreements will be true-up based on final decisions in the WP-07 Supplemental rate proceeding. BPA will consider new information regarding fish and wildlife costs in connection with its re-opened WP-07 Supplemental Rate Proceeding.

Mr. Charles Pace states that BPA should revise the recitals in the Interim Agreements to reference the specific Ninth Circuit decision dealing with fish and wildlife costs. He also states BPA should address the impact of the opinion on fish and wildlife costs in this document. Pace, at 2. Response: The decision Mr. Pace references is one of a number of consolidated petitions addressed in the *GNW* decision. Because *GNW* is already listed in the recitals, it is unnecessary to change the recital to separately identify this additional case. With respect to fish and wildlife cost issues, they will be fully addressed in the WP-07 Supplemental Rate Proceeding.

Mr. Charles Pace suggests that BPA document the legitimate need for interim relief on a customer-by-customer basis for both IOUs and preference customers. Pace, at 2-3. Response: As indicated earlier, shortly after suspending REP benefits to the IOUs in May, 2007, BPA received extensive written comments on the need to alleviate the impacts of *PGE* and *GNW* on preference customers and residential and small farm customers of the IOUs. On August 1, 2007, BPA held a public meeting on the REP program and similar comments were received. Consumers, public officials, representatives of IOUs, representatives of preference customers, and others were unequivocal that Federal benefits to consumers, whether in the form of low-cost power or residential exchange benefits, was vitally important, and that the inclusion of too many costs in rates or the withdrawal of all REP benefits was having significant adverse impact on consumers. BPA's organic statutes directs BPA, among other things, to provide consumers the lowest possible rates consistent with sound business principles, to implement these statutes on a timely basis, and to extend the benefits of the Federal

system through the REP. 16 U.S.C. § 838g; 16 U.S.C. §§ 839c(c), 839e(a)(1). In light of the numerous comments received, BPA believes there is ample evidence to support the need for interim relief in the form of the Interim Agreements to all preference customers and eligible IOUs.

Mr. Charles Pace suggests that as an alternative to the proposed Interim Agreements, BPA should consider interest multipliers or direct relief to IOUs in the form of supplies of physical power. Pace, at 3. *Response:* Although there may be a variety of alternative methods to provide interim relief to preference customers and IOUs, the Interim Agreement is a reasonable way to meet BPA's objectives. BPA does not believe that providing the IOUs with power is preferable because of numerous uncertainties associated with deliveries of power. For example, if BPA were to provide power, it would either be resold or used to serve native load, all at an imputed cost reflecting then-current market conditions. Preference, scheduling, transmission and other commercial aspects of a physical power sale would have to be addressed. When it comes time to conduct the true-up, it would be extremely contentious and difficult to unwind the power transactions, in part because the market value of the power would likely be different. BPA believes the Interim Agreements serves BPA's goals and will be much simpler and more efficient for all parties to administer than deliveries of power.

Mr. Charles Pace states that given Judge Redden's opinions, it is not reasonable to conclude that money being collected through current rates will necessarily accrue to preference customers, that IOUs will share benefits proportionately, or that the Regional Dialogue will be completed on schedule. Pace, at 3-4. *Response:* BPA agrees that there are many unknowns and uncertainties related to BPA's rates, REP benefits, and Judge Redden's opinions. However, BPA must move forward to implement its statutory responsibilities in a sound and businesslike manner. All else being equal, BPA believes it is reasonable to assume that preference rates would likely be reduced if the costs of the REP Settlement Agreements that were included in preference customers' rates exceed REP costs that should have been included in their rates. On the other hand, BPA has not ruled out the inclusion of cost increases in rates that could offset any REP cost decrease. In the WP-07 Supplemental rate proceeding, BPA has committed to exploring whether rates should include different fish and wildlife costs than those currently included. The proposed agreements in no way changes that commitment since the Interim Agreements call for true-ups that will reflect final decisions made in the WP-07 Supplemental rate case.

Issued at Portland, Oregon, this 21st day of February 2008.

/s/ Stephen J. Wright

Stephen J. Wright
Administrator and Chief Executive Officer