CON-045

# COMMENTS OF THE WESTERN PUBLIC AGENCIES GROUP

# IN RESPONSE TO THE

# DRAFT LOAD FOLLOWING CONTRACT TEMPLATE

## Introduction and Scope of Comments

These comments are submitted on behalf of each of the utilities of the Western Public Agencies Group ("WPAG") in response to a letter of Mark Gendron dated June 16, 2008, soliciting comments on the draft Regional Dialogue Contract Templates, including the Load Following Contract ("LF Contract"). A list of the utilities that comprise the WPAG, and on whose individual behalves these comments are submitted, is attached. These comments respond to the LF Contract draft dated 07/02/08, and which has been available for review for less than two weeks. To the extent that the sections commented upon herein appear in other contract templates, such as the Master, Block, and Block/Slice Contract Templates, these comments should be read as being addressed to those templates as well. Given the brief period of time the draft contracts have been available and the fact that the LF Contract will be under discussion and subject to revision two weeks after the close of this comment period, any failure to comment on any aspect of the LF Contract does not constitute as agreement thereto.

These comments will address four topics: (i) Section 12, the forced waiver of statutory rights to participate in residential exchange and billing credits, and the unduly discriminatory treatment of preference customers that elect to participate in the residential exchange under the terms prescribed by BPA; (ii) sections 18 and 19, the unduly burdensome provisions which make non-federal resource development under the LF Contract unattractive to preference customers; (iii) section 22, which makes it clear that enforcement of the LF Contract terms by the customers is left to BPA's discretion; and (iv) section 23, the "no warranty" provision.

## 1. Section 12 – Forced Waiver of Statutory Rights

Section 12.1 requires customers to "forego" their statutory right to participate in the billing credits program established by Congress in § 6(h) of the Northwest Power Act. This is not a voluntary waiver, but one that is being required under the threat that if a customer does not "agree" to such a waiver, it will have no access to a Contract High Water Market power sales agreement ("CHWM Contract") with BPA, with the result that the cost of and access to a cost based BPA power supply will be at jeopardy. The threat is that after BPA has signed CHWM Contracts with all other preference customers, it will then decide how to deal with those that chose to insist on retaining their statutory rights to billing credits, and that such treatment will be far less favorable than that received by those who agreed to such a waiver.

Congress did not grant BPA the authority to condition access to billing credits based on the type of power contract a preference customer signs with BPA. Congress directed BPA to offer billing credits by stating:

> If a customer so requests, the Administrator shall grant billing credits to such customer . . .

16 U.S.C. § 839d(h)

Similarly, in section 12.2 of the LF Contract, BPA seeks to limit both the vintage of the resources a preference customer can include in the calculation of its Average System Cost ("ASC") used to determine its residential exchange benefits, as well as limiting the residential and small farm load it can include when calculating its residential exchange payments.

As with the billing credits "waiver", the surrender of the statutory right of preference customers to exchange resource costs with BPA for the benefit of their residential and small farm customers is cast as an "agreement" to limit residential exchange benefits. However, this "agreement" to forego residential exchange benefits is no more voluntary than is the "waiver" of the statutory rights to billing credits. It is made under the implied threat that if the "agreement" to forego residential exchange benefits is not forthcoming, the pricing of and access to federal power at cost will be in jeopardy.

In section 12.2, BPA further limits preference customer participation in the residential exchange. If a preference customer agrees to limit the vintage of the resources it includes in the calculation of its ASC to those in the firm resource exhibit of its Subscription contract with BPA as of September 30, 2006, as demanded by BPA, in addition it must limit the residential and small farm load it uses to calculate benefits to the FY2010 load used to calculate its CHWM. Simply stated, this provision will prohibit any exchanging preference customer from including load growth occurring after FY 2010 in its exchange benefit calculation. No such limitation has been imposed on IOUs participating in the residential exchange, and no justification has been offered for this differing and discriminatory treatment of preference customers.

As with the statutory billing credits program, Congress did not endow BPA with discretion on whether to offer the residential exchange. BPA was directed to do so by § 5(c) of the Northwest Power Act, which provides in part:

> Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power . . .

16 U.S.C §839c(c)

Neither § 6(h) nor § 5(c) give BPA the authority to hold the price and power supply available to a preference customer hostage to a surrender of their statutory rights under these two provisions. BPA was directed by Congress to offer these programs, and it can neither coerce their surrender, nor can it force preference customers to participate in them under terms that differ materially from those available to IOUs. As laudable as BPA may consider the implementation of its Tiered Rates Methodology to be, the implementation of a BPA policy goal does not empower it to force the surrender of statutory rights, nor to administer a statutory program in a way that deprives preference customers of benefits available to other participants. Sections 12.1 and 12.2 are beyond BPA's statutory authority and are contrary to the clear statutory directives of §§ 5(c) and 6(h) of the Northwest Power Act.

## 2. Sections 18-19 – Burdens on Non-Federal Resources

The timing and length of the notice periods required to bring non-federal resources to load are major hurdles to non-federal resource development, particularly to preference customers that have not previously developed a non-federal resource. In addition, sections 18 and 19 of the LF Contract impose a plethora of new forecasting and reporting obligations for preference customers that pursue non-federal resources to serve their post-2010 load growth.

Section 18.1.2.1 requires the preparation and submission of a biennial conservation plan with biennial conservation targets. Section 18.2.2 requires the submission of an annual long-term renewable resource plan with expected acquisitions, including fuel type, amounts of power and capacity expected to be purchased. The customer will also be required to report annually amounts of power generated by renewable resources for a year, including project name, fuel type, location, date of contract, project energization date, capacity and capacity factor. All renewable energy credits purchased will be subject to annual reporting, including quantity, fuel types, location and energization date. Section 19 imposes an undefined data and information reporting obligation on preference customers developing non-federal resources that has no limits, and consists in essence of anything BPA or PNUCC wants the utility to produce.

All of the foregoing document production obligations are waived for customers placing all of their load growth on BPA. While it can be seen that there may be practical reasons for waiving these obligations for preference customers that do not develop non-federal resources, two observations can be made about this differential approach. First, this is only a partial list of reporting requirements under the LF Contract. The preparation and submission of this information will add a substantial burden to smaller utilities that are considering non-federal resource development for the first time. And when compared with the fact that electing BPA as the sole load growth supplier will absolve a customer of these reporting responsibilities, this

approach will provide smaller preference customers with a strong incentive to skip the burdens of non-federal resource development and just go with BPA.

The need for the frequency and volume of this information should be re-evaluated. If it is needed for operational or billing purposes, that is one thing. If it is simply wanted because it may be useful for some as yet undetermined use, it should be eliminated for now. To the extent BPA can get the information from reports currently prepared by the utilities, it should do so. Overloading preference customers who develop non-federal resources with burdensome and voluminous reporting obligations is not the way to encourage the development of non-federal resources by preference customers.

### 3. Section 22- Lack of Contract Enforceability

Section 22 purports to provide mechanisms for resolving disputes that arise under the LF Contract. Unfortunately, this section is written in a confusing manner that makes its application difficult to discern with certainty. However, based on a careful reading of its terms, the following appears to be the case regarding dispute resolution:

- Matters committed by statute to the exclusive jurisdiction of the 9th Circuit will continue to go there for resolution.
- All contract disputes will be subject to resolution through arbitration.
- Binding arbitration is only available if BPA agrees to submit to it.
- By default, all contract disputes that do not go through binding arbitration are subject to non-binding arbitration.

The consequence of these provisions is that the preference customer with a contract dispute has no way to obtain a binding resolution of the matter without BPA's consent. If BPA does not consent to binding arbitration, the customer must go through non-binding arbitration before it can even get the matter to court. The result of this is that for contract disputes that BPA does not wish to take to binding arbitration, it will take literally years to get the matter before a neutral decision maker for a binding decision. And recourse to the 9th Circuit to resolve contract disputes is neither practical nor will it produce timely resolution of disputes. From a purely business perspective, this is not a workable approach.

This is not a matter where BPA cannot offer binding arbitration in order to provide a timely resolution of contractual disputes. BPA has the authority to do so, but appears to have elected to retain complete discretion on whether it will permit the contract to be enforced in accordance with its terms by a neutral third party. By so doing, BPA has deprived the preference customers who will sign the LF Contract of any practical means of enforcing the contract in a timely fashion for business purposes. This is a large step backwards from the current Subscription

Contract, and demonstrates BPA's unwillingness to concede any discretion whatsoever in order to create a more workable business relationship with its preference customers.

BPA should reconsider its position on this matter. Matters statutorily committed to the 9th Circuit should remain so under the contract. However, disputes over contract matters should be subject to binding dispute resolution, subject to any specific carve out that BPA can articulate that is necessary for the conduct of its business. The blanket exclusion of binding dispute resolution whenever BPA wants it is not a practical approach for conducting business under the LF Contract,

4. **Section 23 – No Warranty**

Rather than securing the benefits of the Federal power system for preference customers for the future, the language of section 23 of the LF Contract creates an attractive nuisance that will draw the attention of every political enemy of preference and cost based rates. By doing so, it will diminish the hold that preference customers, and the region, have on the benefits of the Federal power system. The WPAG utilities have previously urged BPA to remove this section from the LF Contract and all other templates, and repeat that request again. This section must be removed in its entirety from the LF Contract.

**Conclusion**

The WPAG utilities appreciate the opportunity to comment on the draft contract templates, and look forward to negotiating with BPA contracts which accurately and clearly capture the transaction between BPA and the preference customers, and which will fairly balance their interests.

## ATTACHMENT A

The utilities that comprise the Western Public Agencies Group are Benton Rural Electric Association, Tanner Electric Cooperative, the Cities of Port Angeles, Ellensburg and Milton, Washington, the Towns of Eatonville and Steilacoom, Washington, Alder Mutual Light Company, Elmhurst Mutual Power and Light Company, Lakeview Light and Power Company, OHOP Mutual, Parkland Light and Water Company, Peninsula Light Company, Public Utility Districts No. 1 of Clallam, Clark, Grays Harbor, Kittitas, Lewis, Mason, Skamania and Wahkiakum Counties, Washington, Public Utility District No. 3 of Mason County, Washington and Public Utility District No. 2 of Pacific County, Washington.