

**Policy on Determining Net Requirements of Pacific Northwest Utility
Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act**

Administrator's Record of Decision

Bonneville Power Administration
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INTRODUCTION

This Record of Decision (ROD) accompanies the Bonneville Power Administration's (BPA) publication of its final policy regarding the amount of Federal power a utility customer may purchase under a BPA subscription power sales contract under sections 5(b) and 9(c) of the Pacific Northwest Electric Power Planning and Conservation Act (the Northwest Power Act), P. L. 96-501, 16 U.S.C. 839c(b)(1) and 839f(c); and section 3(d) of the Act of August 31, 1964 (the Regional Preference Act), P.L. 88-552, 16 U.S.C. 837b(d). This policy on determining the net requirements of BPA's customers is also referred to as BPA's "5(b)9(c) policy."

As BPA's existing long term power sales contracts expire, it is critical that BPA has in place a policy to guide the agency in making determinations of the net requirements of its utility customers in order to offer Federal power under the new contracts. For the most part, existing power sales contracts expire by October 1, 2001. In anticipation of this, BPA published in December 1998, its Power Subscription Strategy which is BPA's post-2001 power marketing strategy. The Subscription Strategy describes BPA's approaches to offering new contracts to all of BPA's regional customers. BPA proposed, as an implementing step to the offer of a new contract to each utility customer, a review of its policies on the determination of net requirements based on the utility customer's nonfederal firm resources used to serve its "regional firm power consumer loads." This term is used interchangeably with the terms "firm load" and "regional load" and other references to a BPA customer's service to retail consumers in the region.

The 5(b)9(c) policy is an important component to BPA's execution and implementation of new power sales contracts. Under section 5(b)(1) BPA is obligated to offer a contract to each requesting public body, cooperative, and investor-owned utility to meet the utility's regional firm load net of the resources used by the utility to serve its firm power consumer load. 16 U.S.C. 839c(b)(1). In making this determination, BPA has a corresponding duty to apply the provisions of section 9(c) of the Northwest Power Act, 16 U.S.C. 839f(c), and section 3(d) of the Regional Preference Act, 16 U.S.C. 837b(d).

BPA recognizes that the deregulation of wholesale power markets has impacted the application and use within the Pacific Northwest of nonfederal generation resources and contract resources. As will be discussed in further detail below, a utility's sale or disposition of its firm resources out of the region may affect the Administrator's obligation to meet the net requirements of other regional utility customers. Likewise, there have been changes in the laws of some states, such as Montana and Oregon, to restructure their electric utility industries. Such changes give rise to uncertainty about future sales or disposition of nonfederal resources by utilities subject to these new state laws. Because of these changes, and because of resulting actions taken by utility customers of BPA commensurate with such changes, the Administrator's obligation to meet requesting utility net requirements may be affected.

This ROD addresses the issues raised by commenters in two rounds of public review. Section I sets forth the pertinent statutory provisions interpreted here. Section II

describes the public review process used to develop the final 5(b)9(c) policy and discusses preliminary matters related to the policy. For the ease of the reader, Sections III and IV are organized in the same fashion as the final policy. Section III addresses the issues raised with respect to the section 5(b)(1) portion of the final policy on determining net requirements, and Section IV discusses the changes made to BPA's 1994 policy interpreting section 9(c). Section V discusses environmental compliance.

I. RELEVANT STATUTORY PROVISIONS

A. Section 5(b)(1) of the Northwest Power Act

Section 5(b)(1) of the Northwest Power Act contains BPA's obligation to provide service to its requesting utility customers for service to their firm power consumer loads in the Pacific Northwest. Congress established a calculation of what amount of Federal power BPA would have to offer to serve that customer's load. Section 5(b)(1) provides:

Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds –

(A) the capability of such entity's firm peaking and energy resources used in the year prior to the enactment of this Act to serve its firm load in the region, and

(B) such other resources as such entity determines, pursuant to contracts under this Act, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

16 U.S.C. 839c(b)(1).

Section 5(b)(1) issues addressed by this policy regard BPA's determination of this calculated "net" requirement load of a utility customer; the required application and continuing use of a customer's nonfederal generation resources, both hydro and thermal, to its consumer load; and the conditions upon which any resource used for load may be removed from service to load and replaced by BPA firm power service. The determination of customer resources, and changes to those resources over the term of the BPA power sales contract, affect the power planning and costs of BPA and its customers.

B. Section 9(c) of the Northwest Power Act

Other provisions of BPA's statutes also affect BPA's calculation of the customer's net requirement under section 5(b)(1). These provisions address the sale or disposition of power from a customer's resources, or the sale of the resource itself, to entities outside the region. Customers that export or dispose of power or nonfederal generation, out of the region, face a reduction in their electric power requirements when BPA makes its net requirements calculation under section 5, unless certain conditions are met.

Section 9(c) of the Northwest Power Act provides in pertinent part:

* * * The Administrator shall, in making any determination, under any contract executed pursuant to section 5, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

16 U.S. C. 839f(c). In addition, section 9(d) underscores the Congressional desire that the operation of section 9(c) is intended to measure the affect of, not dictate, utility decisions respecting the use of their regional nonfederal resources on BPA's total obligations to serve the loads of its Pacific Northwest customers:

No restrictions contained in subsection (c) shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. * * *

16 U.S. C. 839f(d).

C. Section 3(d) of the Regional Preference Act

A utility customer who sells or disposes of hydroelectric energy out of the region faces a reduction similar to section 9(c) under section 3(d) of the Regional Preference Act. Section 3(d) provides:

The Secretary, in making any determination of the energy requirements of any Pacific Northwest customer which is a non-Federal utility having hydroelectric generating facilities, shall exclude any amounts of hydroelectric energy generated in the Pacific Northwest and disposed of outside the Pacific Northwest by the utility which, through reasonable measures, could have been conserved or otherwise kept available for the utility's own needs in the Pacific Northwest. The

Secretary may sell the utility as a replacement therefor only what would otherwise be surplus energy.

16 U. S.C. 837b(d).

Under sections 9(c) and 3(d) BPA is directed to sell power which would otherwise be “surplus” as replacement for the exported power. The definition of “surplus energy” is “electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy.” 16 U.S.C. 839f(c), amending 16 U.S.C. 837(c). This limitation prevents BPA from selling firm “net requirements” power under Northwest Power Act section 5(b)(1) to replace Regional Preference Act section 3(d) hydroelectric power exports.

II. POLICY DEVELOPMENT PROCESS

A. The Two Public Review Processes

BPA provided two opportunities for public review and comment on the 5(b)9(c) policy. On May 6, 1999, BPA published its initial policy proposal, entitled “Opportunity for Public Comment Regarding Bonneville Power Administration’s Subscription Power Sales to Customers and Customer’s Sale of Firm Resources.” 64 Fed. Reg. 24,376. BPA held two public meetings to discuss this policy. The first meeting was held on May 27, 1999, in Spokane, Washington. The second meeting was held on June 2, 1999, in Portland, Oregon. On June 3, 1999, the thirty day comment period was extended by BPA through June 30, 1999. Comments critical of the initial policy proposal are generally addressed below in Section II.B.

After reviewing and considering the comments received on the initial policy proposal, particularly those that requested that BPA provide a second round of review and comment, BPA issued a revised policy proposal on October 28, 1999, entitled “Revised Draft Policy Proposal Regarding Subscription Power Sales to Customers and Customer’s Sales of Firm Resources.” 64 Fed. Reg. 58039. Section II.C. of this ROD addresses some preliminary issues raised by commenters. Sections III. and IV. address in detail the specific issues raised in response to the revised policy proposal.

B. Overview of and Response to Comments on the Initial 5(b)9(c) Policy Proposal

In sum, the initial draft provided BPA’s proposed method for calculating net requirements. The draft included an incentive to allow customers to reduce their contractual obligation on BPA by the amount of new renewable resources they develop, a proposal to permit the auction of a resource through a public process to determine whether a thermal resource could be conserved or otherwise retained for service to regional load, and a presumption that a customer had exported its resource or power which the customer had the burden of refuting.

Over 70 parties commented on BPA’s initial 5(b)9(c) policy proposal. To the extent that the first round of comments addressed a portion of the policy that was dropped, BPA will explain the reason for the change and note those comments; however, BPA will not provide any further evaluation of them. Because particular issues and recommendations were repeated in parties’ comments to the revised policy proposal, many of the issues and recommendations raised by parties in the first round of comment are addressed below in detail in Sections III. and IV. of this ROD.

Overview

Comments made by parties reflect a wide range of interests and concerns. For example, Avista commented that in making determinations under section 5(b), BPA should only require that section 5(b)(1)(A) resources be used, and not section 5(b)(1)(B) resources, to calculate a customer’s net requirements. Avista contends that counting section 5(b)(1)(B)

resources introduces a threat to the settlement of the residential exchange. *Avista, Stand01-024*. In its comments, Kootenai Electric Cooperative agrees that an accurate determination of a utility's net requirements is key to identifying the amount of Federal power an eligible customer can receive. Kootenai is concerned about giving utilities the opportunity to sell generating assets and then place their load on BPA, thereby causing BPA to incur additional costs to acquire resources to serve increased loads, raising the rates for priority firm power paid by other customers. *KEC, Stand01-027*.

The Oregon Public Utilities Commission (OPUC) understands the importance of the 5(b)9(c) policy. It also notes the State of Oregon's newly passed law, SB 1149, which has provisions that allow for a delay in the implementation of direct access in Oregon if such action would reduce access to Federal power. The OPUC strongly urges BPA to adopt policies that both allow for an uninterrupted flow of Federal power to investor-owned utility (IOU) residential consumers under any industry structure and minimally affect other IOU resource decisions. The OPUC believes there should be no reduction in net requirements in the event a utility offers direct access but remains the default supplier. If the IOU is not the default supplier, no reduction in net requirements should occur if the Commission commits in writing to assure that any revenue margins from any displaced IOU resource will be flowed through to consumers. *OPUC, Stand01-045*.

The OPUC expresses an equity concern related to IOU non-farm commercial and industrial consumers that will not be allocated any Federal system benefits and yet they bear risks associated with IOU long term resource decisions. The OPUC suggests a way to lessen this tension by allowing the IOU, if it needs to remove a resource, to select among its section 5(b)(1)(B) resources. As long as the IOU offers the power to all Pacific Northwest customers from the selected resource, on a short-term basis (*i.e.*, up to one year) at the fully allocated cost of the resource (including fixed plant), including a reasonable return computed at the Commission's last authorized level, then that resource could be removed from the net requirements calculation. Finally, the OPUC supports the finding that because the IOUs are waiving 5(b) rights to purchase full net requirements, and arbitrarily limit purchase amounts to meet the power offered by BPA for exchange settlement purposes, that power delivered to IOUs will not be decreased or interrupted during the term of the contract. *Id.*

Clark Public Utilities (CPU) commented that the intermingling of legal interpretations and rate treatments creates confusion and ambiguity. CPU recommended that BPA clearly identify those portions of the initial policy proposal that contain proposed rate treatments, and state that such rate treatments are intended to apply only for the 2001-2006 rate period. CPU believes that the policy proposal will require utility customers to purchase power from BPA in excess of a customer's statutory net requirements. CPU recommends that the policy provide customers with the ability to dispose or remove from retail load service nonfederal resources in amounts equal to the retail load loss suffered by the utility. Finally, CPU objects to the four rebuttable presumptions in the section 9(c) portion of the policy. *CPU, Stand01-036*.

PGP and PNGC argued that BPA should remove all of the discussion of the rate provisions contained in the initial policy proposal. *PGP, Stand01-061; PNGC, Stand01-047*. WPAG argued that the policy does not need to limit a public customer's right to purchase Federal power or direct how a customer's nonfederal resources will be used if BPA accepted the proposition that the power purchased for IOUs should be priced at the NR rate for the IOUs, and should make no power sales to the DSIs. *WPAG, Stand01-068*.

Finally, the PPC suggested in its comments that BPA publish a revision of the policy based on comment received, particularly if BPA anticipated making significant changes. *PPC, Stand01-033*.

Response

In response to the above comment, BPA will not limit its net requirements determination as suggested by Avista to discount a customer's section 5(b)(1)(B) resources. Such a proposal is inconsistent with BPA's statutory direction under sections 5(b)(1) and 9(c) of the Northwest Power Act. These sections require BPA to determine the net requirements of its customers based on the use of their nonfederal resources. Resources denominated as either section 5(b)(1)(A) or 5(b)(1)(B) resources are to be treated equally as continuing to be used by the customers unless discontinued for specific statutory reasons.

Kootenai generally supports the policy as proposed. BPA is aware of the impacts that customer generation and resource sales, disposition, and exports would have on BPA's net requirements obligations. BPA acknowledges the cost impact such actions would have on it and the resource acquisitions BPA would be obligated to make to meet an increase in load on the Federal system.

The OPUC has raised significant concerns that the initial policy proposal creates for it and its duty to implement retail access in the State of Oregon. The OPUC offered several recommendations aimed at maintaining or securing without reduction an amount of Federal power benefits, regardless of IOU resource decisions. BPA appreciates the jurisdictional and regulatory obligations and duties of the OPUC in the State of Oregon. As will be discussed in greater detail below, BPA is directed by statute to administer federal statutes. These statutes do not grant BPA the authority or the discretion to make exceptions regarding the net requirements determination affecting IOU customers due to changes in state law. To the contrary, BPA must administer these statutes in a consistent manner. Its determination must be made without distinctions based on the state a utility operates in or the type of utility customer -- public or private -- which is requesting Federal power under section 5 of the Northwest Power Act.

BPA agrees with the comment of PGP and PNGC to remove any reference to BPA rates in the policy. WPAG's comment suggesting a particular rate treatment for sales to IOUs and questioning service to DSIs contains issues that were part of the recently concluded BPA power ratesetting process. WPAG can pursue these issues in the review of BPA's final rate proposal when it is submitted to the Federal Energy Regulatory Commission

(FERC) for confirmation and approval. Judicial review of BPA's final power rates will also be available to WPAG.

In response to comments received on the initial policy proposal, BPA revised its proposed policy and issued the revised proposal for another round of public review and comment.

C. Preliminary Issues Raised in Comments on the Revised 5(b)9(c) Policy Proposal

After reviewing extensive public comments on the draft proposal, BPA decided to withdraw the proposal to allow customers to auction their ownership interest in generating plants to the highest bidder. BPA also dropped the rebuttable presumption regarding the export of resources. BPA returned to its prior policy on exports of making a factual finding in determining whether a customer has exported power from the region.

BPA received a number of preliminary comments which are not addressed by specific issues in Sections III. and IV. below. Some of the comments raise issues which are not particularly germane to the policy because they concern contract negotiations or contract provisions which this policy does not address. BPA nevertheless generally responds to these comments.

Issue: Whether the 5(b)9(c) policy should be limited in duration to the 2001-2006 period.

MAC commented that BPA should limit the scope of this policy to the period from 2001-2006. Power Resources Management (PRM) recommends that BPA revisit these issues for service after 2006. *MAC, 5(b)9(c)-009.*

Evaluation and Decision

While BPA recognizes that some parties may anticipate changes in legislation over the next few years, BPA has adopted this 5(b)9(c) policy to clarify certain determinations and statutory interpretation for BPA's next regional firm "net requirements" contracts. BPA realizes that customers may enter into contracts of varying length. BPA has already decided to offer subscription contracts for terms of up to 10 years. Power Subscription Strategy Administrator's Supplemental Record of Decision, 32-34 (Apr. 26, 2000). Limiting the effectiveness of this policy to the requested five year time period, or to any longer terms of specific contracts, is not appropriate for a policy of general application and future effect. BPA believes this policy implements the statutory provisions which will aid both BPA and customers experiencing changes in their regional loads and in the resources used to serve load over the term of the new power sales contracts and beyond. As such, the policy will continue to apply to a customer's export sales of power or sale of resources and to changes in the nonfederal resources a customer applies to its load under its contract. BPA may undertake future policy endeavors at the appropriate time.

Issue: Whether the 5(b)9(c) policy should become an exhibit to the post-2001 power sales contracts.

PGP commented that the policy should become an exhibit to BPA's power sales contract and that BPA should not be able to change the policy unilaterally. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA is not currently proposing that this policy become an exhibit to the contracts that it will offer to its customer. However, certain contract provisions will have the purpose of implementing this policy. Customers have an opportunity to review those contract provisions prior to executing contracts with BPA. BPA's policy is one that will generally apply to all utility customers' power purchases. There is no legal requirement that BPA make it a part of a contract. PGP appears to believe that if the policy were part of the power sales contract, then PGP could have a breach of contract action if BPA were to change the policy unilaterally. BPA does not desire additional claims under a breach of contract action by virtue of making the policy part of the power sales contract. This 5(b)9(c) policy is a statutory interpretation which BPA could change unilaterally if BPA determines it is necessary to do so. However, having initiated public review and comment processes on this policy, and deciding not to make the policy part of a contract exhibit, enables the Administrator to have the necessary flexibility to modify the policy in the future should circumstances not thought of here dictate a change. Any future change to this policy would occur only after additional public review and comment.

Issue: Whether the 5(b)9(c) policy should be subject to alternative dispute resolution.

PGP argues that any dispute over the policy should be subject to dispute resolution or arbitration under the contract. *PGP, 5(b)9(c)-021.* Grant County PUD complains about the heavy-handed legalistic language used in the draft policy to interpret the statutes. Grant complains that they are forced to challenge the BPA determinations in federal court over any good faith dispute. It requests the right to contest any BPA determination under the policy in front of a third party using a dispute resolution process. Grant also argues that interpretations of the statute contained in the policy should be subject to arbitration. *Grant PUD, 5(b)9(c)-011.* Tacoma expressed concern that there be consistency in the application of the policy to both newly formed and existing customers and that the net requirements determinations be applied uniformly. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

Making the policy subject to arbitration, as opposed to Federal court review, could lead to future distinctions in the application of the policy since arbitration does not necessarily create a precedent for the next dispute. BPA believes that because the policy will apply to all utility customers, it is best that the policy be reviewed if necessary by the United States Court of Appeals for the Ninth Circuit as a final action under the Northwest Power Act. 16 U.S.C. 839f(e). Any modification to the policy by the court would have prospective application to all section 5(b) contracts and all section 9(c) determinations.

This approach should also address Tacoma’s concern of consistency in application of the policy. However, many of the determinations BPA is required to make are factually driven by individual utility circumstances and decisions. BPA’s intent is to interpret this policy correctly and consistently, taking into account the factual distinctions that will undoubtedly arise in specific circumstances. This policy will apply equally to all utility customers, including newly-formed utilities.

Issue: Whether the 5(b)9(c) policy should apply to BPA’s Federal agency customers.

PNGC asserts that the policy should apply also to BPA sales of power to Federal agencies under section 5(b)(3). *PNGC, 5(b)9(c)-018.*

Evaluation and Decision

Under section 5(b)(3) BPA is authorized to sell Federal power to other Federal agencies. In 1981 BPA was directed to provide service to all existing Federal agencies who were customers holding contracts. BPA was given discretion to make additional sales to new Federal agency customers but was not required to do so. Legally, such “sales” are actually dispositions of a federal asset—electric power—to another bureau or agency of the Federal executive and are not true sales of property. As dispositions of a Federal asset, they are distinguishable from a sale to a nonfederal private or public entity. For the post-2001 period BPA has determined that it will offer new contracts to its existing Federal agency customers and sales to new Federal agency customers will depend upon specific requests and circumstances. BPA does not anticipate new sales.

The PNGC issue raised is whether such “sales” are subject to reductions under section 9(c) if a Federal agency exports a resource or power out of the region. Section 9(c) applies to the electric power requirements of a regional customer “which is a nonfederal entity having its own generation.” 16 U.S.C. 839f(c). BPA “sales” of Federal power to other Federal agencies, even though made under section 5 of the Northwest Power Act, are simply not sales made to nonfederal entities. Because those same agencies are not nonfederal entities having their own generation, such sales fall outside the ambit of section 9(c).

Issue: Whether the policy should limit the real time management of utility customer resource operations.

PGP comments that real time management of utility customer resource operations should not be limited or punished by the policy. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA does not intend to make the real-time, or hour-by-hour, operations of a customer’s nonfederal resource subject to the policy. However, hour-by-hour operations may establish a set of facts that could determine how the customer is using its resources for sale or for service to load were an issue to arise. The use of hourly scheduling

information, or “tagging” using NERC tracing may be used to determine how a customer actually used a resource over a relevant period of time. Such information may affect a party’s right to purchase Federal power for a current operating year or for future operating years as of the date of the determination. BPA’s responses to other issues below address the relevant time periods when BPA considers whether it would have increased obligations for additional load as a result of an export of a customer’s resource.

Issue: Whether the 5(b)9(c) policy should consider and address state electric utility restructuring.

BPA received several comments that revision of the policy should consider general electric utility industry restructuring by states. MPC and others commented that the revised policy proposal was a step backward from the initial draft in clarifying BPA policies for consistency with the competitive market. MPC feels that BPA is not addressing issues which result from competitive access to retail markets by other suppliers than just the existing vertical utility. *MPC, 5(b)9(c)-015*. NWEAC states that failure to address such issues may impede restructuring of the retail market in Oregon. Both NWEAC and MPC suggest that BPA should include the auction provision of the initial proposal in the final policy. *Id., NWEAC, 5(b)9(c)-026*.

NWEAC commented that it continues to support the comments made by the OPUC in its comments on the first draft proposal. BPA examined the proposal made by the OPUC and decided that it would not agree to actions states are willing to perform that would result in the uneven administration of federal law. *Id.* The OPUC urged BPA to adopt policies that both allow for an uninterrupted flow of federal power to IOU residential consumers under any industry structure and that minimally affect other IOU resource decisions. *OPUC, Stand01-045*. ICNU echoed MPC’s comments and added that the policy should be compatible with market access for industrial and commercial consumers while maintaining the ability of residential consumers of IOUs to continue to receive benefits from settlement of the residential exchange. They assert the policy fails to address retail load loss or a utility sale of generation assets due to state open access legislation. *ICNU, 5(b)9(c)-019*. NWEAC argued the proposed policy would prevent actual power from going to residential consumers and leave only a monetary benefit. *NWEAC, 5(b)9(c)-026*. PacifiCorp argues that the policy would not be effective in providing the certainty needed for the residential exchange settlement. PacifiCorp asks BPA to reconsider its earlier comments and the recommendation of Avista on the settlement. *PacifiCorp, 5(b)9(c)-016*.

Evaluation and Decision

These parties’ comments are critical of the direction taken in BPA’s policy. Indeed, the comments reflect a view that BPA’s policy is lacking because it fails to meet the changes that may impact BPA’s utility customers concerning their resources due to deregulation in Montana and Oregon. BPA recognizes that Montana and Oregon have passed new laws that deregulate the retail utility industries in those states. Of particular concern to these parties is the outcome state deregulation will have on access to Federal power by

the utilities and whether or not deregulation might limit access to the benefits of the Federal system by the retail consumers of such utilities. This concern is related to resource decisions that may be made by some utilities that could affect BPA's determination of its net requirements obligation. For example, utilities may make decisions that will result in exports of resources currently used to serve regional firm load. A utility's load may decrease due to retail consumers electing to be served by alternative suppliers. Certainly, it is difficult to predict just how deregulation will impact utilities in those states that choose to deregulate. On the other hand, sections 5(b) and 9(c) of the Northwest Power Act, and section 3(d) of the Regional Preference Act, are explicit in the direction they give BPA to make net requirements determinations that take into account the disposition of resources by nonfederal entities requesting firm power service from BPA. The Administrator is obligated to make such determinations in accordance with statute, notwithstanding the changes in state law.

Issue: Whether the 5(b)9(c) policy extends beyond the statutory language it interprets.

Several parties commented that BPA's proposed policy goes beyond statutory language and broadens its application to circumstances not intended or contemplated. *Tacoma, 5(b)9(c)-025; PNGC, 5(b)9(c)-018; EWEB, 5(b)9(c)-028*. WPAG commented that the statute materially differs from BPA's interpretation of these statutory provisions over the past 19 years. WPAG claims that BPA's interpretation misrepresents the provision of statute, applies arbitrary and irrational standards and, thus, will deprive customers of the right to obtain BPA service for loads previously served by a utility's resources. *WPAG, 5(b)9(c)-024*.

Cowlitz expressed concern that the policy significantly changes the language of the Northwest Power Act and that BPA should not revise the letter or intent of statutes. *Cowlitz, 5(b)9(c)-006*. The PGP asserts that many provisions fail to comply with the letter and spirit of the Northwest Power Act. *PGP, 5(b)9(c)-021*. The PGP argues that BPA's policy invites legal challenge due to its expansion of the statute through rulemaking. In addition, PGP asserts that the section 5(b) policy discriminates against Northwest utilities with generation. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

These parties assert that the policy goes beyond the language of the statute and applies to circumstances not intended or contemplated by statute. BPA disagrees. The policy regarding section 5(b)(1) net firm load requirements and the use of customers' own resources to serve load presents issues similar to, and of the same scope as, those which BPA addressed for its initial offer of power sales contracts under the Northwest Power Act. In 1980, Congress directed BPA to negotiate and offer initial contracts within nine months of the passage of the Act. *See* 16 U.S.C. 839c(g)(1). BPA addressed issues of statutory interpretation and contract terms simultaneously in a single process. BPA is again addressing statutory issues regarding section 5(b)(1) but, unlike nineteen years ago, is exercising its discretion to do so in a policy rather than as part of a negotiation of contract terms. Unlike 1981, BPA is not now obligated to negotiate policy with its

customers as a matter of contract and has instead followed a public review and comment process.

The scope of the issues addressed today is no greater than those addressed in policies adopted in 1981. BPA has based much of this policy proposal upon its understanding of those earlier policies. BPA remains charged with determining what the “net” firm consumer load obligations are that it must serve, to plan for such service and, if necessary, acquire new resources to serve such load obligations. Because BPA is proposing to set rates for five years, under the contract BPA must consider the planning impact on BPA from both changes in a customer’s regional consumer load and in the resources used by a customer to serve such load. Changes affecting customer resources raise no different a set of issues than they did in 1981 since BPA still must consider its resource and cost planning to serve load. The changes in the wholesale market over the intervening years makes such planning more imperative, not less.

To summarize, the policy makes no change in the language contained in applicable statutory provisions. BPA disagrees with the parties that its policy is inconsistent with, or changes, the language and meaning of applicable statutory provisions. The parties do not cite or give examples of any such change. The parties correctly point out that BPA’s policy applies to both energy and power. The application of the policy to both energy and power is consistent with BPA’s prior interpretations, such as BPA’s 1994 NFP 9(c) policy.

Issue: Whether the 5(b)9(c) policy should also interpret Northwest Power Act sections 5(b)(5) and 5(b)(6).

Tacoma comments that BPA failed to identify relevant subsections of section 5(b). Tacoma believes the provisions of section 5(b)(5) and section 5(b)(6) of the Northwest Power Act require BPA to provide the entire Federal Base System (FBS) to public body, cooperative, and Federal agency customers before placing any restrictions on the amount of power they purchase. Tacoma believes this provision overrides the language of section 9(c) and limits BPA’s consideration under section 9(c) of the statute to public agency loads only. Tacoma also argues that annual net requirements calculations are unnecessary until public agencies have purchased the entire FBS. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

BPA disagrees with Tacoma’s interpretations of subsections 5(b)(5) and (6) of the Northwest Power Act regarding their application. The language of subsections 5(b)(5) and (6) applies to BPA’s rights to restrict contract deliveries for planning insufficiency. Subsection 5(b)(5) directs the Administrator to include in contracts with utility customers a provision which enables the Administrator to “restrict his contract obligations to meet the loads referred to in the section in the future, if the Administrator determines, . . . that the Administrator cannot be assured on a planning basis of acquiring sufficient resources to meet such loads during a specific period of insufficiency.” Section 5(b)(6) directs the Administrator not to apply the provision under contracts until certain conditions are met;

limits the reductions to Federal agencies in such conditions; and directs that a formula be included in contracts for determining an annual allocation on a uniform basis during an insufficiency period.

Subsections 5(b)(5) and (6) contain no limitation on the application of other provisions that direct the sale of Federal power to nonfederal customers when there is no planning insufficiency. Neither do they provide an exclusive limitation on the Administrator's power sales obligations. The import of Tacoma's assertions would be to make the provisions of section 9(c) surplusage. In effect BPA would not make any reductions in BPA obligations due to a customer's export of its thermal resource(s) or power used to serve regional load. Further, the provisions of section 3(d) of the Regional Preference Act that direct BPA to reduce its obligations to correspond to customer exports of hydroelectric resources would be rendered meaningless except when BPA could not acquire additional resources. If Congress had intended section 9(c) to be applied in this way, there would be no need for the standards specified in that provision because the only standard would be whether the Administrator could obtain additional power.

Tacoma's assertion is further weakened simply by a reading of the plain language contained in sections 3(d) and 9(c). Besides directing the Administrator to make export determinations, that language also addresses what power BPA is to sell to a customer if the customer exported power or a resource which could have been used for or retained for regional loads. That power is surplus power, and is only provided by BPA as available. It is not firm power for which BPA must acquire resources. Congress directed BPA to only sell power which "would otherwise be surplus," as replacement for nonfederal power or resources exported. Congress did not direct BPA to go out and acquire additional resources on a planning basis in order to supply replacement power to utilities who export their nonfederal resources or power which are, or could be, used to serve regional load. Therefore, Congress directed BPA to replace such nonfederal resources or power only with "as available", temporary surplus.

Tacoma also asserts that section 9(c) applies only to BPA's determinations regarding section 5(b) loads. BPA rejects this argument. Section 9(c) states that the Administrator is to consider the impact of export of customer generation or power when "making any determination, under any contract executed pursuant to section 5, of the electric power requirements of any Pacific Northwest customer." 16 U.S.C. 839f(c). That language does not limit the application of section 9(c) to only section 5(b). Tacoma further argues that BPA need not obtain any information on its customers' annual loads or resources until some time after BPA determines that it will declare a planning insufficiency under sections 5(b)(5) and (6). Tacoma is simply wrong on this point. Section 9(c) applies to BPA's determination of a customer's net requirement load and, therefore, BPA's obligation to supply power to a customer under section 5(b)(1). BPA knows, as does Tacoma, that consumer load changes over time, as do customer resources. Since BPA's obligation to supply is statutorily limited by the "net" of the regional firm power consumer load of the customer less its resources, BPA obligations will change over time. Therefore, BPA will conduct at a minimum an annual review of changes in the customer's consumer loads.

Issue: Whether the 5(b)9(c) policy should apply to the Subscription settlement under the Residential Exchange Program (REP).

Avista urges BPA to revisit its decision not to adopt a separate policy for loads and resources of utilities which are part of the settlement of the REP. Avista argues the policy undermines the power delivery certainty necessary to support settlement which, Avista states, should not be reduced for any reason. At minimum, BPA must allow Avista to retain its determination of which 5(b)(1)(B) resources are dedicated to firm regional load to provide certainty for exchange settlement. *Avista, 5(b)9(c)-003*. Puget argues the policy works against achievement of regional consensus that is essential to retain in the long run the benefits of the FCRPS. Puget also claims that BPA has allocated too little power to residential and small farm customers. *PSE, 5(b)9(c)-005*. The PPC commented that the REP settlement transactions should be subject to the 5(b)9(c) policy. PPC does not want to see a “material adverse impact” on the ability of requirements customer to access cost based power from BPA. BPA should be mindful of the impact the policy may have on Oregon’s effort to deregulate. *PPC, 5(b)9(c)-012*. MAC commented that power sales to IOUs in settlement of exchange should be considered section 5(b) sales and subject to the policy. *MAC, 5(b)9(c)-009*. PacifiCorp comments that a separate 5(b) and 9(c) policies, or a different treatment of customer resources and loads under those statutory provisions, should be adopted for IOUs, and applied to power sold under a section 5(b) contract as “settlement”.

Evaluation and Decision

One of the goals of BPA’s subscription effort is to settle its obligation under section 5(c) of the Northwest Power Act to exchange power with its IOU customers for their residential and small farm loads. BPA has proposed to provide benefits either monetary or power as the settlement with its exchanging IOUs. The amount of power and dollars for each customer will be determined in a separate policy and contract negotiation process. The mix of monetary and power benefits for any one IOU customer may change over the period of the settlement and power purchase agreement. Some IOUs, given the particular circumstances and location of their systems, may receive a monetary benefit and no power. Others may get both. More than one type of power sale could be used as the basis for delivering the power benefit to the IOU eligible for that form of benefit. As noted above, a power sale could be made under section 5(b)(1) to an IOU to the extent that it has a “net” consumer load less its resources, or a power sale could be made as an “in lieu” power sale under section 5(c)(5).

BPA understands the concern of the IOUs in stating a need for certainty in the benefits to be provided as a settlement of obligations under the section 5(c) residential exchange. Avista basically argues for separate treatment of IOU resources and loads based on the proposition that their section 5(b) contract is part of a settlement of BPA’s obligations under section 5(c).

BPA believes that a settlement does not create a basis for a different policy interpreting sections 5(b)(1) and 9(c) for IOUs from that applicable to preference customer utilities taking service from BPA under section 5(b) of the Northwest Power Act. Although BPA has broad discretion in settling claims, BPA recognizes applicable statutory directives in doing so. The IOU settlements, because they involve the delivery of power under section 5(b) contracts for service to consumer load should be subject to the same factual and policy determinations as service to other customers for such loads. The right of an IOU to request service under a section 5(b) contract goes beyond firm power delivered “as part of the settlement” and may include other loads. Conversely, an IOU may take all of its residential exchange settlement benefits in money and not take any power for settlement, and still have a section 5(b)(1) contract to which this policy and interpretation will apply. To create a blanket exception to this policy for IOUs would be far too broad.

Moreover, the benefits of the settlement amount for each IOUs residential and small farm load will be available as either dollars or power depending upon the particular circumstances of each IOU as to their loads and resources for the power component and the result of the process on determination of their portion of the benefits. What is not available as power will be available as dollars. The IOUs, OPUC and PPC raised a concern over state deregulation and electric retail restructuring. To date the states of Montana and Oregon have passed restructuring legislation and the state of Washington has considered it but not done so. Both states which have passed legislation have enacted different approaches to retail restructuring. It is simply not possible for BPA in this policy to anticipate or account for all the various schemes of restructuring which the several states of the region may or may not pass, nor whether they may modify the form of restructuring even after enactment. These issues are beyond the scope of this policy.

The residential exchange settlement agreement and this policy will permit either monetary or power benefits to be provided to the IOUs for their residential and small farm consumers. Although the amount of power provided may change due to changes in resources or loads served, the amount of the benefits under the settlement will not. Thus, the concern raised by the IOUs, PUCs and PPC regarding state restructuring affecting the benefit of the settlement for residential and small farm consumers can be addressed by contract provisions which permit the conversion of the exchange benefit from power to dollars. BPA will not develop and adopt a separate 5(b) and 9(c) policy for purposes of the settlement. This policy will apply to power service under any section 5(b) contract, and for purposes of section 9(c) to any section 5 power sale for a customer’s electric power requirements.

III. POLICY ON DETERMINING NET REQUIREMENTS

The term “net requirements” means the amount of Federal power that a public utility, cooperative, or IOU is entitled to purchase from BPA to serve its regional consumer load. The definition is based on section 5(b)(1) of the Northwest Power Act. The 5(b)9(c) policy provides the guidance BPA will use in determining the customers’ net requirements. This section deals with comments directed at BPA’s application of section 5(b) of the Act.

A. Determination of the Amount of Federal Power for Sale Under Section 5(b)(1)

1. The amount of Federal power for sale

Issue: Whether BPA should offer two separate contracts to the IOUs for net requirements service under section 5(b)(1), one for residential exchange loads and one for non-residential exchange loads.

Avista and PacifiCorp suggest that BPA, in effect, make offers to its IOU customers of two different contracts for their net requirement load service. *Avista, 5(b)9(c)-003; PacifiCorp, 5(b)9(c)-016.* They propose one contract for power sold for retail residential and small farm consumer loads as the “settlement” of meeting BPA’s residential exchange obligations under section 5(c), and a second contract for other firm power consumer loads in the region which the utility may wish BPA to serve.

Evaluation and Decision

In its 1981 initial offer of power sales contracts under section 5(b)(1), BPA made a single individual contract offer to each requesting utility customer. BPA has made single contract offers to any newly qualified utility customers over the past 20 years. Each customer has only one “net” requirement load amount for all of its regional firm retail consumer loads. No distinction is made in section 5(b)(1) between net requirements load service among retail consumer load. BPA’s contract with an IOU for its regional load covers all the retail load the utility serves in the region. Nothing in the statute would relieve BPA of its service obligations or the utility from compliance with the terms of section 5(b)(1), whether or not the contract was offered as a means to achieve a “settlement” of other obligations.

Although BPA has discretion under section 2(f) of the Bonneville Project Act to enter into agreements to settle claims, BPA cannot immunize a sale of power under the authorizing statute by ignoring the statutory limitations or conditions attendant to such a sale. In short, BPA cannot agree to a new set of rules for a section 5(b)(1) sale to an IOU customer which would not account for the customer’s use of its own resources, changes in those resources, or changes in the customer’s retail consumer loads. BPA believes it would be problematic to meet its net firm load obligations under two separate contracts with an IOU that contain different terms and conditions. For example, the treatment of changes in retail load and customer resources could be substantially different and result

in oversupply or under-supply of Federal power to the customer contrary to statute. Further, contract administration would become complex, particularly if any of the load service goes to a new utility.

There is an alternative to taking two 5(b)(1) power sales contracts available to customers who settle their section 5(c) residential exchange rights. That alternative is to contract for an “in lieu” sale of power from BPA under section 5(c)(5) of the Northwest Power Act for the exchange load. Under an “in lieu” contract the amount of power provided is not dependent upon the same terms or conditions as a sale of power under section 5(b)(1). Notably, the amount of power sold to a customer under a section 5(c) contract is not dependent on changes in a customer’s total regional consumer loads, but is dependent on changes only in the residential and small farm sector loads. In consideration of the above, BPA will offer a single utility power sales contract to each of its public agency and cooperative, and investor-owned utility customers under section 5(b)(1). Service to all BPA utility customers under those contracts will be subject to this policy. Contracts under section 5(c) will not be subject to the section 5(b)(1) net requirements calculations.

(a) Establishment of the amount of a customer’s actual regional retail firm power load

Issue: Whether the calculation of a customer’s net requirements should include the customer’s regional wholesale loads, as well as retail loads.

Cowlitz, PGP, and Seattle commented that BPA’s definition of loads considered for inclusion in the “net” loads of utility customer requirements was too narrow. They argue BPA should include their wholesale power loads in addition to their retail consumer loads as part of the customer’s net load requirement. Cowlitz states the Northwest Power Act refers to “firm power load,” and thus the policy should not refer to “actual retail firm power load.” *Cowlitz, 5(b)9(c)-006; PGP, 5(b)9(c)-021; Tacoma, 5(b)9(c)-025; Seattle, 5(b)9(c)-031.* They add that interpreting “firm load” to mean retail consumer power loads is adding language to section 5(b)(1). Seattle asks BPA to acknowledge a sale of firm power from one requirements customer to another as firm power load as part of a utility customer’s firm load. Seattle believes this is reasonable because, for example, it must meet license conditions for its nonfederal generating projects--such as Seattle’s power sale with Pend Oreille PUD under the boundary Project license--which result in an increased requirement load of Seattle and a reduced requirement load of another BPA customer, such as Pend Oreille. *Seattle, 5(b)9(c)-031.* PGP states BPA’s determination of net requirements is too restrictive, excludes wholesale loads, and is legally inconsistent with the Northwest Power Act. PGP members have historical and future wholesale load obligations in the Northwest that result from FERC license requirements. However, PGP agrees that the policy’s provision regarding Declaration Parameters properly permits reduction in nonfederal resource output to serve wholesale loads. PGP argues BPA should revise “actual firm retail loads” to “firm power loads.” *PGP, 5(b)9(c)-021.*

Evaluation and Decision

These parties make arguments similar to those made by customers in 1981 during contract negotiations. BPA's interpretation then, as now, is that the utility firm power loads in the region which Congress directed BPA to serve were the utilities' retail consumer loads, not their wholesale power transactions with another utility. Several reasons support BPA's interpretation. First, serving a customer's wholesale loads is simply impractical. Power sold at wholesale for resale again at wholesale may be exported out of the region by the wholesale buyer. Loads served by Federal power under a section 5(b)(1) contract are to be loads "in the region." Even if the wholesale sale is for a load in the region not directly served by the utility seller but instead is served by the other utility, BPA could end up counting the load twice. The load would be part of the purchasing utility's requirement as retail consumer load and would also be in the selling utility's requirement as "wholesale firm load in the region." Therefore, the most practical way of avoiding such double counting is to include for each utility only the loads served as retail load by the utility for purposes of calculating BPA's net firm load requirement obligation to any one customer.

Second, a reading of statute supports BPA's interpretation that Federal power is for resale to a utility customer's retail consumers. Section 5(b)(1) states:

Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative . . . and to each requesting investor owned utility, electric power *to meet the firm power load* of such public body, cooperative or investor owned utility in the region to the extent *that such firm power load* exceeds

16 U.S.C. 839c(b)(1)(emphasis added). Although the customers are correct in regard to the language, they are not correct regarding the type of load the language encompasses. The purpose of this provision was to direct BPA to provide Federal power to meet the firm retail loads of BPA's utility customers in the region. That purpose does not include supporting customer's wholesale transactions on the market. This is consistent both with BPA's past contracts and with section 4(c) of the Bonneville Project Act which directs that BPA's public body and cooperative utilities be in the business of distributing power and be in all ways formed consistent with state law to purchase federal power for the distribution of such power. 16 U.S.C. 832c.

Legislative history on section 5(b)(1) directly addressed these terms and stated, for purposes of the Act, the term "firm power load" is "intended to mean the power the customer is obligated to make continuously available to its purchasers (subject to the effect of force majeure or uncontrollable events clauses) The terms are used commonly by and among the Administrator and his customers and have been included and defined in the Administrator's contracts and are intended to be incorporated in new contract's offered under this act." S. Rep. No. 96-272, 96th Cong. 1st Sess., 26 (1979). BPA's 1981 firm requirements power sales contracts include a definition of firm power loads that excludes wholesale loads served by utility customers. This present BPA policy

does not change that definition. By using the terms “actual firm retail loads” BPA captures the same meaning as in the 1981 contract definition of firm load. Further, BPA aligns this policy with our standards of service that contain the principle of eligible retail consumer load served by the customer is that which is served from its distribution system, even if by transfer arrangements. This does not include the retail load of other utilities or wholesale “loads.”

BPA does not agree with the PGP that any authorized wholesale load is included in the definition of “firm power loads” under section 5(b)(1). BPA believes any wholesale loads or any wholesale obligations which arise from a utility’s power sale from its non-federal generating facilities must be served by the utility’s own resources, not Federal power. BPA has included a provision allowing customers to reduce the capability of their nonfederal resources dedicated to load by the wholesale obligations to other utilities from those resources existing at the time of the passage of the Act on December 5, 1980. The PGP agrees that this policy approach to treatment of wholesale power sales obligations of BPA customers is appropriate. Similarly, Seattle’s power sale to Pend Oreille would be treated as a reduction of Seattle’s firm resource, Boundary project, and a resulting increase in firm resource to Pend Oreille PUD for its firm load service. This provision is consistent with BPA’s treatment of such sales in the 1981 contract. In other words, BPA will account for these types of transactions on the nonfederal resource side, not on the load side of the “net” firm load requirements equation.

Issue: Whether as a matter of policy BPA should have the right to accept or reject a utility customer’s load forecast of its regional retail firm power load as the basis for BPA’s obligation to serve net requirements.

Cowlitz objected to BPA having the right to accept or reject the Cowlitz forecast and require actual measured loads as a backup. Cowlitz commented that it is in the best position to forecast its load. *Cowlitz, 5(b)9(c)-006*. Tacoma objected to the proposed language but accepted BPA’s right to review the reasonableness of the forecast. Tacoma proposed that if the load forecast is developed using accepted practice within the utility and is used in the normal course of business then BPA should accept it as appropriate. *Tacoma, 5(b)9(c)-025*. The PPC argues BPA should use the utility’s own load forecast. *PPC, 5(b)9(c)-012*. Grant similarly urges use of the customer’s load forecast, and suggests that disputes over the forecast be resolved with a neutral third party. *Grant PUD, 5(b)9(c)-011*. PNGC commented that the tone of the policy suggests that BPA is the main party who determines a customer’s requirements and how much power is sold to the customer. BPA should rely on a customer’s load forecast, provided it is reasonable in light of a customer’s past retail load and changes that are reasonably expected to occur. *PNGC, 5(b)9(c)-018*.

Evaluation and Decision

BPA alone holds the statutory responsibility under section 5(b)(1) to provide electric power to meet not only the retail firm load of one utility customer less its applicable resources, but the total net firm requirements load of all eligible customers. BPA must

provide and maintain an adequate power supply to fulfill its statutory obligations. In doing so, BPA must follow prudent and sound business practices in operating and acquiring the resources of the Federal system. Congress charged BPA with this duty, not its utility customers. The core of that duty is to ensure that the “net” retail firm load of all utility customers is met. In order to accomplish this task BPA must be able to plan and forecast customer loads using a variety of data sources. The determination of what load is required to be served is in the first instance BPA’s duty. This has been BPA’s past practice with its customers. For example, under the 1981 contract customers would provide information on their actual or planned loads to BPA. BPA would review this load information and accept or modify it. BPA’s policy continues this practice. BPA must retain the right to review the actual or planned load forecasts for purposes of establishing the amount of net requirements, since it ultimately affects BPA’s revenues, rates, and repayment of the Treasury.

BPA believes determination of the loads that are eligible for service under section 5(b)(1) is a policy question and a question of statutory interpretation. It is not a question that is capable of dispute resolution by a third party. As explained above, BPA policy in this area is not to change or limit the firm loads eligible to be served. Nonetheless, customers must provide sufficient information to BPA in order for BPA to make its determination of firm retail consumer loads. BPA will not agree to use arbitration regarding the initial determination of the customers’ net requirements. In subsequent annual determinations BPA will agree to third party dispute resolution with a customer to resolve a factual forecast error of the amount of eligible load, but not over what loads are eligible.

(b) Resources that must be applied for initial determination of net requirements under new contracts

Comments made by several parties raised general issues regarding the use of the Firm Resource Exhibit (FRE) for the 1998-99 operating year to establish a base line for a customer’s nonfederal contract and generating resources which must be applied to their regional firm consumer loads. The purpose of the FRE (Exhibit I) under the current contracts, together with the Assured Capability Exhibit (Exhibit J), is to identify a customer’s nonfederal power purchase contracts and generation and the amount of capability used to serve the customer’s firm power loads. Since section 5(b)(1) requires BPA to offer to serve only a customer’s retail consumer load “in excess of” the firm resource a customer applies, BPA’s obligation cannot be understood absent this information on a customer’s resources.

BPA’s decision to use the FRE for the 1998-99 operating year is based on several reasons. First, a starting point was needed and the 1998-99 FRE was the most recent. Second, under the terms of the 1981 contract as amended by Amendatory Agreement No. 7 and the 1996 contract, additions to a customer’s firm resources were fixed at this time, that is, new additions could only occur by the Administrator’s consent. Approximately five public agency customers elected not to amend or sign a new contract. Third, reductions in the amount of a customer’s firm resources also became fixed because BPA was no longer showing an annual planning surplus of federal resources over federal

loads. This precluded the customer's ability to give notice to remove a resource because it would exceed the term of the contract. Fourth, section 5(b)(1) requires that certain pre-1980 customer resources be applied and used to serve a customer's load. To the extent a customer has such resources they are also identified in the customer's FRE. Section 5(b)(1) also permits the customer to determine what post-1980 resources the customer will use to serve its load. These resources are also identified in the customer's FRE. Resources used formerly to serve load but removed under the 1981 contract prior to the Subscription Strategy, and thus not included in the 1998-99 FRE, are not required to be used for load under Subscription contracts.

Issue: Whether the expiration of the 1981 power sales contracts relieves the utility customers of the obligation to continue to apply to load their post-1980 resources used to serve load during the term of the 1981 contract.

Several parties argued that BPA has no legal basis for requiring customers to continue to apply any of their resources to their loads under section 5(b)(1). They contend that while section 5(b)(1)(A) requires customers to use their pre-1980 resources, their post-1980 resources declared to serve load under section 5(b)(1)(B) need no longer be applied upon termination of their existing BPA contracts. Because the contract under which they committed to use these resource will expire, they reason they are not required to continue the use of those resources to serve their regional loads in their next section 5(b)(1) contract and now may make an economic choice to sell those resources on the market.

Customers made the following comments. Dedicated resources are an obligation for the term of the contract commitment only. *NWasco, 5(b)9(c)-030*. By statute, only 5(b)(1)(A) resources are required to be declared under power sales contract. *Idaho Falls, 5(b)9(c)-008*. BPA's definition of section 5(b)(1)(B) resources is overly restrictive. Customers should be allowed to determine which resources will be used to serve its load anew. Resources in previous BPA contracts should not automatically be continued in post-2001 contracts. *Grant, 5(b)9(c)-011*.

WPAG argues that BPA's proposed policy conflicts with section 5(b)(1). Any section 5(b)(1)(B) resource dedication by the customer was made in the contract, and ends with the expiration or termination of that contract. BPA's policy eliminates any meaningful distinction between 5(b)(1)(A) and (B) resources and eliminates the ability for utilities to make resource decisions that are in the economic best interests of retail customers. Resource dedication in the 1981 contract was not intended to result in a life of the resource commitment. The contract provided broad latitude to the customer in determining which resources were to be used to serve its firm retail loads and how long resources were to be used. BPA should revise the proposed policy to recognize that declarations of section 5(b)(1)(B) resources under 1981 and 1996 contracts, expire upon termination or expiration of these contracts. *WPAG, 5(b)9(c)-024*.

The PGP argues that reliance on 1998-99 FREs is misplaced. For utilities that lose resources between 1998-99 and 2001-02, BPA is denying them their full net requirement entitlement. BPA is using FREs for a purpose they were not intended, and should only

use the methodology in section 5(b)(1). *PGP, 5(b)9(c)-021*. Grays Harbor contends that section 5(b)(1) of the Northwest Power Act provides the methodology to determine a customer's net requirements. Grays Harbor argues that the methodology is simply a comparison of the customer's loads to the customer's resources "whenever" a customer requests public preference power from BPA. This requires BPA to compare loads and resources at the time BPA offers to sell power, and does not allow BPA to compare loads that exist at the time of the request against historical resource capability. BPA's proposed policy will result in a comparison of Grays Harbor's load in 2001-2 with historical resource capability in 1998-99. That comparison will result in an incorrect net requirement allocation. *Grays Harbor, 5(b)9(c)-017*.

Evaluation and Decision

Section 5(b)(1) states in pertinent part:

Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative, . . . , and to each requesting investor-owned utility electric power to meet the firm power load of such . . . [customer] in the Region to the extent that such firm power load exceeds –

(A) the capability of such entity's firm peaking and energy resources used in the year prior to the enactment of this Act to serve its firm load in the region, and
(B) such other resources as such entity determines, pursuant to contracts under this Act, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of paragraphs A and B, any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource or loss of contract rights.

16 U.S.C. 839c(b)(1)(emphasis added). A statute has effect beyond the contracts that may implement it. It is axiomatic that statutes in effect at the time of a contract are read into that contract. S. Williston, *A Treatise on the Law of Contracts*, § 30:19 (4th ed. 1999). Customers were well aware of the provisions in their initial 1981 contracts with BPA and had a full year to consider and propose revisions to those contracts. The obligation to continue to use resources once they are applied to load under a contract is a statutory obligation, not simply one of contract.

Congress understood full well that if a customer could simply remove all resources from service to load at the end of a BPA contract and place the costs of providing service for load entirely upon BPA without any limitation, BPA could not refuse service and would face a dramatic increase in additional resource cost. Serving potentially thousands of megawatts in new load would threaten repayment of the U.S. Treasury and vastly expand the Federal system. This is not the result Congress intended.

Section 5(b)(1) does give the customer a choice for deciding whether or not to apply a post-1980 resource to load. It is a unilateral decision made by the customer. However, once the customer's decision is made and the resource serves its load, the statute deems that resource as being applied to serve the customer firm regional load for purposes of *both* subsections 5(b)(1)(A) and 5(b)(1)(B). In other words, the resource must continue to be used until permanently discontinued for statutorily stated events. The events which change this deemed "use" for calculating net requirement are five events. The Administrator grants consent to discontinue the use of the resource, or use of the resource is discontinued due to retirement, obsolescence, loss of the resource or loss of a contract right. However, there is no blanket right of the utility customer to simply withdraw resources from service to its load at the expiration of a BPA contract. The operation of the contract directs the opposite result, *i.e.*, all resources which were applied remain applied unless they fall under an exception permitting their discontinued service.

Customers are well aware of this language in the Act. In 1981, they had a full year to review the contract offers BPA made and to renegotiate its terms. The customers challenged the contracts in the United States Court of Appeals for the Ninth Circuit and entered into a settlement of that litigation over their contracts with BPA. At no time did they seek a limitation on the application or effect of this statutory provision. Nothing in the contracts suggests that the operative words of the statute highlighted above were limited or contradicted. Assertions made in comments that use of resources are limited as of the time service is requested, or solely for the duration of the contract, or that resources are not "automatically continued" would result in the highlighted words of the statute being rendered meaningless.

In response to the argument that BPA's reading eliminates any distinction between subsections 5(b)(1)(A) and (B), we agree that there is no distinction *after* a customer determines a resource will be used to serve its firm load in the region. There is no distinction because the statute says both categories of resources will be treated the same for purposes of calculating net requirements. There is a statutory distinction in the first instance, however, since a customer is given the option of not dedicating a post-1980 resource to serve its load unlike the requirement to continue to use pre-1980 resources.

As to the argument that the 1981 power sales contract provided broad ability for the customer to add or remove resources during the term of the contract, that contract did contain provisions for additions and removals of resources on specific notice and based on specified facts. It provided for agreement during its term between the Administrator and the customer to either add or remove a resource from serving customer load upon prior written approval. However, it contained no agreement that specified the resources applied to load would all be removed or changed at the termination of the contract. Moreover, the 1996 utility contracts and Amendatory Agreement No. 7 to the 1981 contract contained provisions which fixed the customer's resources and amounts committed to load for the remainder of the contract. As of 1998 the ability to add or remove resources for the remaining two years of the contract were limited solely to the Administrator's consent. Customers do not have any expectation of adding or removing

resources under the contract and may remove them only under the conditions expressed in the statute.

As to the resource commitment not being for the life of the resource, Congress' use of the terms obsolescence, retirement, and loss of resource or contract right suggest the contrary. Congress contemplated physical operating limitations that owners of long-lived resources could be expected to confront and made such allowances for them in the statute. In their plain meaning these terms are ending states. Congress was not saying a customer, having determined it will use its resource for service to its load, could remove the resource at any time it desired, or any time it was economically beneficial to do so. Such action is not consistent with the listed physical operating limitations imposed by section 5(b)(1).

Issue: Whether BPA should base its determination of a utility's net requirement on resource contracts which expire before the expiration of the power sales contract.

Forest Grove commented that it was concerned that use of the 1998-99 FRE will reduce the amount of Federal power that a BPA customer can buy based on power purchase contracts which expire before September 30, 2001. It believes that use of the 1998-99 FRE fails to recognize this fact and many of these contracts do not contain renewal provisions. Forest Grove urges BPA to base its initial determination of net requirement on known available resources in 2001. *Forest Grove, 5(b)9(c)-002.*

Evaluation and Decision

Nonfederal resources applied to a customer's regional firm consumer load include both power contracts as well as generation under subsections 5(b)(1)(A) and (B). BPA recognizes that many power purchase contracts customers have now will expire by September 30, 2001. The intent of the policy is that customers' power contracts that continue into the next contract period will continue to be applied to their loads. However, those contracts which expire and are not renewable or those contracts to which BPA has given its written consent to remove and which end prior to September 30, 2001 need not be replaced. The policy explicitly provides in section III.A.(1)(b)(1) that: "BPA will not, however, require customers to continue the use of resources identified in their 1998-1999 FREs for any one of the following reasons: (1) the customer's contractual resource(s) expires prior to October 1, 2001; . . ."

Issue: Whether there is a distinction between discontinued power purchase contracts and generating resources.

The PGP urges that BPA adopt a different method for determining a customer's resources dedicated to serve its load. PGP argues that the statute only allows BPA to consider section 5(b)(1)(A) and section 5(b)(1)(B) resources that have not been discontinued during the previous contract term. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA agrees with the PGP position as to power purchase contract resources used to serve firm load, if those contracts terminate or expire, and are not renewable. As to generating resources which the customer owns or to which the customer has resource capability rights, if such resources were serving the customer's loads then they remain available to the customer. BPA will deem these resources as continuing to serve customer load on an ongoing basis even after the expiration of the BPA contract. The customer's determination to use them for load service reduces the customer's firm load which BPA must serve in the region. Since such resources are not retired, obsolete, or lost, and since BPA has given no consent to remove the resources from service to load, the resources still serve the customer's load by operation of the statute.

If BPA previously determined that the resource was permanently discontinued due to obsolescence, retirement, or loss under the 1981 contract then those resources would not continue to be applied. If BPA gave its consent to remove the generating resource from application to the load for a portion of the contract then the resource would be available to the customer for service after the end of the BPA contract. Once a resource is applied to serve load under the statute, it is available for load service until retired, it becomes obsolete, or is lost. If BPA consented not to have the resource applied for a period of time under the 1981 contract, the basis for the consent was BPA's load/resource balance at the time and was not a permanent removal like loss or retirement. To the extent a customer has such resources section 9(c) of the Northwest Power Act and section 3(d) still apply to their disposition.

Under section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act if the customer has resources available to it and does not apply them to its load, BPA must evaluate whether the customer's decision not to apply the resource would result in BPA facing an increase in its firm power requirements. Resources which the customer has available and which were previously used to serve a customer's firm load in the region will be considered by BPA as continuing to be available to the customer for such service. Only if BPA has previously made a determination that the resource may be exported without a reduction in BPA's firm power requirement obligation, would BPA not review the customer's decision not to apply its own generating resource to its load.

Issue: Whether the utility customer decides which section 5(b)(1)(B) resources should be applied to load under post-2001 power sales contracts.

A number of public utilities argued that section 5(b)(1)(B) of the Northwest Power Act allows public utility customers to determine which resources that come into service after 1980 will apply to serve their load pursuant to contract. They argue that the dedication of a resource is only for the term of the contract and only for the amount of the resource committed, thus when the contract ends the dedication ends. They claim that BPA must accept their determination of which of these resources apply to any particular contract. WPAG noted that the 1981 contract would have included a survival provision if these decisions were meant to extend beyond the term of the contract. *Idaho Falls 5(b)/9(c)-*

008, Grant, 5(b)9(c)-011, WPAG, 5(b)9(c)-024, ; Tacoma, 5(b)9(c)-025; NWasco, 5(b)9(c)-030.

Evaluation and Decision

BPA believes the correct interpretation of the statute is that stated above. BPA will consider a customer's resource which is a generation resource, capability contract purchase, or power purchase contract which has previously been declared and applied to its load, and is not lost, retired, or obsolete, or been granted the Administrator's consent to be discontinued, remains available for continued use by the customer. Pursuant to statute BPA will consider such resources as continuing to be available into the BPA contract period for service to a customer's load unless BPA has consented to the permanent removal due to prior written consent. Resources removed pursuant to the Administrator's consent remain subject to section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act.

The end of a contract with BPA is simply not one of the five statutory conditions for permanent discontinuance of a customer's resource. To suggest or imply that it is, is to place BPA in the absolutely unreasonable position of having no basis upon which to forecast its loads, resources, and costs from one contract period to the next. Such logic does not address the problem Congress sought to solve in passing the Northwest Power Act. Congress did not intend for BPA to face dramatic fluctuations in the regional firm load it was obligated to serve and the resources it would be obligated to acquire to serve such load. Congress knew better than to direct BPA to operate in an environment with that kind of uncertainty. Rather than having BPA face the uncertainty and significant risk associated with customers having the right to remove their resources at the end of their contracts, BPA is not obligated to replace such resources by acquiring or purchasing additional federal resources. Although the customers may wish to make other economic choices at the end of a BPA contract, they may not have lowest cost Federal power to replace such resources.

WPAG argues that the BPA contract could have, but did not, require that customer resources applied to load would continue to be applied. WPAG's claim is not relevant. Section 5(b)(1) already mandates that customer resources will continue to be used. The contract created no limitation on the statute's deeming a customer's resource as continuing to be used for load absent the specifically enumerated conditions.

Issue: Whether prior BPA acceptance of a utility FRE containing a removal date of a contract resource constitutes Administrator consent under section 5(b)(1).

Canby argues that BPA's acceptance of a FRE with a resource removal date of September 30, 2001, constitutes in effect BPA's consent to permanently remove a resource from serving regional load. Canby requests BPA to confirm that the resource removal date in Canby's 1996 FRE is binding. *Canby, 5(b)9(c)-007.*

Evaluation and Decision

Canby provided extensive materials on its 1981 contract and the settlement entered into between Canby and BPA to resolve a claim filed by Canby against BPA in the U.S. Ninth Circuit Court of Appeals. BPA reviewed these materials and separately responded to Canby's position by letter. BPA agrees that it gave prior written approval to Canby to remove its contract with Portland General Electric (PGE) on or before September 30, 2001 as part of the terms of the settlement. The FRE, however, did not provide the basis for BPA's consent as claimed by Canby. As such, the PGE contract is not expected to be available to meet Canby's firm loads after that date. The contract termination will have the same effect as a contract purchase which expires at the end of the BPA contract and has no renewal provision.

Issue: Whether the portion of "all generating and contractual resources" actually applied to load should be the amount of megawatts used in determining net requirement.

Grant is concerned about the language "all generating and contractual resources." Grant requests BPA to clarify that the language refers to that portion of a customer's resource that is declared to serve its load, especially in terms of specific megawatt amount. *Grant, 5(b)9(c)-011.*

Evaluation and Decision

When a customer initially decides to use a generating resource, or a capability contract, or a power purchase contract for service to its load, the customer may decide to apply only a portion and not all of the firm power to serve its load. BPA agrees with Grant. This 5(b) policy uses the term "resource" to mean that portion of the firm power of the resource that a customer has determined will be used to serve its load under its FRE. To determine the resource's megawatt amounts used in service to the customer's load, BPA may use the Assured Capability Exhibit submitted by the customer that accompanies the FRE if the megawatt amounts are not clearly stated in the FRE.

Issue: Whether the removal of the Centralia resource from Grays Harbor PUD's FRE was a BPA determination as to consent or statutory discontinuance.

Grays Harbor argues that BPA's 1981 power sales contract is BPA's existing policy regarding the determination of net requirements. Grays Harbor argues that its removal of the Centralia resource from use to meet load under the 1981 contract is final. Grays Harbor believes any attempt to change decisions under the 1981 contract would be a retroactive application of an administrative rule. Grays Harbor contends that section 5(b) allows withdrawal of a resource without penalty where the withdrawal was made pursuant to, and in compliance with, the terms of the 1981 power sales contract. BPA should not punish Grays Harbor for removal of Centralia. *Grays Harbor, 5(b)9(c)-017.*

Evaluation and Decision

BPA agrees that Grays Harbor was allowed to remove its 52 megawatts of Centralia output under its 1981 contract based upon Bonneville's loads/resources balance showing a surplus condition. BPA did not, however, make any determination that the Centralia resource was permanently discontinued under the contract due to Administrator consent, retirement, obsolescence, or loss of resource or loss of contract rights. Indeed, the Centralia resource and the decision of the owners to sell the resource on the market demonstrates that the resource is neither obsolete, retired, or lost. BPA agrees that the removal is final for the remainder of the 1981 contract, but BPA did not agree that the resource would never again be available to Grays Harbor to serve its load.

In allowing Grays Harbor to remove the Centralia resource from its FRE, BPA noted that Grays Harbor remained an owner and would be subject to the strictures of section 9(c). Moreover, any determination as to the retirement, obsolescence, or loss of the resource would have affected the right of all the owners and not just Grays Harbor. If the owners of the Centralia resource had taken an action other than the offer and sale of the resource on the market, then perhaps there would be another basis available for BPA to meet Grays Harbor's load other than BPA's surplus condition. They did not. Under the 1981 contract, requests to have BPA supply additional power by removal of a resource are good only for the term of the agreement or until the utility seeks to add resources. There was, and is, no intention that BPA's surplus loads and resources condition would be available in any one year of the contract, nor that any and all customers could take advantage of that circumstance. Such BPA system conditions are circumstantial and clearly temporary. Under these circumstances, BPA believes such decisions only apply the consent of the Administrator for the remaining term of the contract. Since Centralia was a resource which was used by some owners to serve load prior to 1980, it is a resource that BPA will count as applying to the customer's load for purposes of the new power sales contract.

Issue: Whether BPA's determination of net requirement will be applied uniformly among existing and newly-formed utilities.

Tacoma commented that net requirements determinations may not be applied uniformly. As an example, Tacoma commented that a newly formed public utility may not be subject to the same limitations and restrictions on the use and disposition of historical resources as an existing public utility. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

BPA interprets the language in section 5(b)(1) as applying to an individual request of a specific utility for service to its load net of its resources. An individual public utility's circumstance as to its load or to its resources is not necessarily shared in common among all other public utilities which BPA serves. Some utilities may be similar in that they have no resources with which to serve their load. Some may be similar in that they each have different portions of the same generating resource applied to their loads. However,

no two utilities serve the same load. BPA determines net requirements on a utility by utility basis. BPA will not attribute a nonfederal resource owned by one customer and applied to its load to another customer unless there is a contractual or other legal basis to do so. Certainly, ownership or purchase of specific resources are individual customer decisions, and BPA looks simply at how each customer applies, or does not apply, what it has available to it. The statute does not require that a new customer in order to serve load formerly served by another utility purchase all or even any part of the generation which the former serving utility applied to load. Neither does it compel the former serving utility to sell any resource it owns, or any portion thereof, to the new serving utility. BPA will not attribute resources not owned or purchased by a utility to another utility. BPA will determine if an existing utility which has resources, if any, has applied that resource to the loads that it serves.

Issue: Whether the statutory discontinuance conditions apply to both section 5(b)(1)(A) and 5(b)(1)(B) resources.

WPAG argued that BPA's policy should state that during the term of any post-2001 BPA power sales contract, the statutory reasons (retirement, obsolescence, loss of resource or loss of contract right) allowing the discontinuance of the customer's resource from being used to meet its load would apply to both section 5(b)(1)(A) and 5(b)(1)(B) resources. WPAG, 5(b)9(c)-024.

Evaluation and Decision

For BPA determinations regarding the permanent loss of a resource, the loss of a contract right, the retirement or obsolescence of a generating resource or contract for the purchase of output, resource capability, or power, BPA agrees that the determination once made would apply for the portion of the resource owned or purchased by the customer for resources under both provisions of the Act. In other words, if a resource became obsolete under this policy and was permanently discontinued from use and shut down, then that determination would remove the customer's obligation under statute to apply it to load regardless of whether it were a section 5(b)(1)(A) or a 5(b)(1)(B) resource. However, as stated above, if the resource were removed based upon the Administrator's consent and the consent did not state that it was a permanent removal, then the agreement to take the resource out of service to load would be for the duration applicable under the power sale contract. In other words, the Administrator has discretion to and may by contract time-limit her consent to a customer removing a resource. Consent is not be construed as a permanent avoidance of the customer's obligation to apply the resource to load for all time, particularly if the resource continues to operate, or is capable of being applied to load at a later time.

(c) BPA's rationale for using a utility customer's 1998-99 Firm Resource Exhibit

Issue: Whether the use of the 1998-99 FRE is the better reflection of the actual nonfederal resources used to serve a utility customer's loads.

Several parties commented that the 1998-99 FRE was appropriate for a starting point for determining the customer's resources which would be applied to its load. *PPC, 5(b)9(c)-012; EPUD, 5(b)9(c)-019; PNGC, 5(b)9(c)-018*. Tacoma and the PGP do not support reliance on the 1998-99 FRE as the starting point for determinations. Tacoma argues that determinations made under previous contracts, including 1981 and 1996, are legally non-binding for new contracts. *Tacoma, 5(b)9(c)-025*. PGP urges BPA to retract its method and use a method closer to statute. *PGP, 5(b)9(c)-021*. PGP states that utilities did not know at the time of submission that the information in FREs would be used to "reduce" their net requirement entitlement after the contract expired. PGP adds that each submission may have been in response to BPA's 1996 rate design. *Id.*

Many parties also expressed concern that the information in the FREs be updated or corrected to reflect changes. 1998-99 FREs should serve as starting point, not as final word. *EPUD, 5(b)9(c)-019*. The PPC argues that BPA should accept any changes to FREs consistent with statutory provisions and coordinated planning processes. The PPC also noted that many resources are mislabeled in the FRE and that these mistakes should be corrected in implementing the policy. In doing so BPA should respect changes to FREs to allow them to be updated. *PPC, 5(b)9(c)-012*. BPA should permit corrections to current FREs when FREs for new power sales agreements are prepared and if necessary clarify its policy to permit such corrections. *PacifiCorp, 5(b)9(c)-016*. PNGC argued the contract should provide for annual updates in resource exhibits and for exchanges of information, including changes in resources for statutory reasons. *PNGC, 5(b)9(c)-018*. Prior to executing post-2001 contracts, Canby suggests that BPA ask utilities during the Subscription window to identify resources they want to dedicate to serve firm regional loads after October 1, 2001. *Canby, 5(b)9(c)-007*.

Evaluation and Decision

BPA believes the 1998-99 FRE and assured capability contract exhibits are the best reflection of the actual nonfederal resources that have been used by the customer to serve its loads. As stated above, there are several reasons the 1998-99 FRE establishes a baseline for determining customer resource use. BPA agrees with the PPC that it should respect changes from the 1998-99 FRE that were based on statutory reasons for discontinued resource service under the 1981 contract. BPA does not agree that changes based on BPA's consent under the 1981 contract should be reflected in reduction in the resources of the customer, unless BPA stated that the right to remove a resource was permanent.

BPA will review the FREs for any mistakes regarding the identification of the resource, mislabeling, and inaccuracies in resource amounts and make corrections which BPA

finds are reasonable to make. BPA will consider, individually, what updating changes have been made by a customer to its resources. BPA is aware that not all resources developed by customers after the passage of the Act have been used for meeting customer load. Some that have been used were withdrawn and exported based on factual determinations which BPA made. Those resources which are not used to serve regional load or which have been exported under a specific determination by BPA will not be included. If such resources are later available after termination of their export contract and are dedicated by a customer to serve its regional load, then this policy will apply to those resources.

BPA has previously addressed the statutory import of a customer determining it will use a resource for service to its load in the region under section 5(b)(1). One consequence of that decision is that BPA is directed to consider the resource as continuing to be applied and used until one of the statutory conditions relieve that application. The PGP's general statements and Tacoma's assertions that the contract exhibits are not binding into the next contract may be correct under contract law, however, they ignore BPA's statutory direction. The use of a prior FRE is a reasonable starting point for determining those resources which are "treated as continuing to be so used" as a matter of statute. 16 U.S.C. 839c(b)(1). BPA disagrees with PGP's claim that BPA is using FREs to reduce a customer's net requirement entitlement. It is simply not true. As explained previously, the FRE in the 1981 and 1996 contracts show the resources that customers use to serve their firm load. It is important on a planning and operational basis that BPA have such information that is specific to each customer so that BPA can meet not only its obligation to each customer but also its total regional load obligations. Regarding PGP's belief that customers used the FRE to add resources in response to BPA's 1996 rates, section 12 of the 1981 contract does not give customers the right to add or remove nonfederal resources based upon BPA's effective rates.

Regarding Canby's suggestion that BPA ask utilities what resources they wish to apply to their loads under the next contract, BPA will review with each customer what resources it has previously used and those resources which it may wish to add during the contract. As explained above an invitation to customers to remove any and all resources which they applied to their regional consumer loads would not be consistent with the statute and would expose BPA to the significant risk of acquiring high cost additional resources.

Issue: Whether the expiration of a contract resource during the Subscription window obligates the customer to replace that resource in the new contract.

Tacoma argued that if the expiration date of a contractual resource is known during Subscription, or there is a change in the quantity (up or down) of a resource, and the date of such change is known prior to the close of Subscription, then the customer should be allowed to decrement or increment the resource in the net requirements calculation. *Tacoma, 5(b)9(c)-02*. PPC and Tacoma argue that requirements power should be available to serve loads served with surplus power contracts that expire after October 1, 2001, at the expiration of those contracts without any rate distinction. *Tacoma, 5(b)9(c)-02; PPC, 5(b)9(c)-012*.

Evaluation and Decision

Contractual resources which expire and have no renewal or extension rights will be considered as not being available to serve load. A customer is not under a duty to replace a contract that has by its terms expired. However, a contract containing terms which permits continuation of service beyond a stated period is not necessarily expired. Nor are contracts that are voluntarily terminated before their expiration date expired contracts. In both instances, such contract resources may, depending upon the factual circumstances, still be treated as a continuing resource for which the customer, and not BPA, is to provide replacement. BPA agrees that requirements power should be available upon the expiration of Federal surplus contracts between BPA and the customer if such surplus contract was used to serve its firm load. The rate for such service is found in the applicable rate schedule.

Tacoma commented that if, during the Subscription window, there is a known change in a customer's resource (up or down) the net requirements calculation should take such change into consideration. BPA's policy is that the customer must provide adequate information on its known generation and contract resources. BPA will review the customer's forecast and make a determination of the amount of resources. The forecast should include known changes to resources of the customer. However, there may be certain rate applications for products which replace reductions in generating or contract resources. Those considerations are beyond the scope of this policy and ROD.

Issue: Whether BPA made the decision to use the 1998-99 FRE for purposes of a 5(b)9(c) policy in the 1998 Power Subscription Strategy.

Grays Harbor and PGP comment that the language in the 5(b)9(c) policy implies that the decision to require customers to use the resources included in their 1998-99 FRE was made in BPA's Power Subscription Strategy. *Grays Harbor, 5(b)9(c)-017; PGP, 5(b)9(c)-021*. They argue that the Subscription Strategy stated that BPA would provide requirements service for loads currently served by customer resources. They contend that the Subscription Strategy Record of Decision does not support the claim in the 5(b)9(c) policy that a decision to use the FREs was made in that document. Grays Harbor comments that BPA did not make the decision in the Subscription Strategy to use the 1998-99 FRE to determine which resources were currently serving load. Grays Harbor contends that if BPA adopts the use of the 1998-99 FRE it will risk legal challenge based on retroactively applying this administrative rule. *Grays Harbor, 5(b)9(c)-017*. PGP argues that the Subscription ROD does not expressly provide that BPA will rely on the 1998-99 FRE as a basis for "reductions" in a customer's net requirements. PGP quotes a paragraph from the ROD that states that regional loads served by section 5(b)(1)(A) and (B) resources at the date of the Subscription Strategy will be provided service at the PF surcharge rate. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

BPA agrees with Grays Harbor that the Subscription Strategy did not make the decision to use the 1998-99 FRE. That decision was made in this policy; however, decisions made in BPA's Subscription Strategy, and the fact the Strategy was completed in December 1998, relate to BPA's decision to use the 1998-99 FRE. BPA's Subscription Strategy stated that BPA would provide service for "all of their [customer's] regional load not currently being served either by customers' generating resources or long-term power purchase contracts that continue beyond 2001." Power Subscription Strategy at 6. This statement is clear. BPA expected customers to continue to use their existing resources. The Subscription Strategy Administrator's Record of Decision (Subscription ROD) also stated that for regional loads served on the date of the Subscription Strategy by 5(b)(1)(A) and (B) resources (generating and contract), that requirements service for loads that were previously served by a customer's resource would be made at a PF Surcharge rate. *Id.* BPA's decision to use the 1998-99 FRE as baseline is influenced by the date of the Subscription Strategy. For this reason, and the reasons given previously above, the 1998-99 FRE is a reasonable baseline to use. BPA's statement on customer resource replacement does not imply any BPA consent for the customer to remove such resources. The Subscription Strategy ROD made clear that such service would only be provided for a resource that has been lost, retired, or determined obsolete under the statute. Subscription ROD, at 24.

Issue: Whether Federal surplus firm power sales contracts applied to regional firm power consumer load are subject to this policy.

Idaho Falls states it is unclear which Federal surplus power sales contracts are targeted by the policy. The Northwest Power Act permits but does not require surplus and excess federal power to be dedicated to serving the purchasing utility's loads. Idaho Falls suggested that BPA clarify the policy to apply to only surplus that is dedicated to serve loads in the region. *Idaho Falls, 5(b)9(c)-008; WPAG, 5(b)9(c)-024.* WPAG suggests that this provision should be limited to those contracts that include express terms that require the surplus power to be used to serve load. WPAG suggests that the policy should be revised to require continued use of such surplus firm and excess federal contracts to serve customer's firm retail load only until their expiration. *WPAG, 5(b)9(c)-024.*

The PGP and Northern Wasco comment that BPA's requirement that customers use surplus firm power purchases to serve their retail loads is a unilateral amendment of their contracts. *PGP, 5(b)9(c)-021; NWasco, 5(b)9(c)-030.* They argue that BPA's customers are allowed to resell surplus power and should not be subject to retroactive ratemaking or decisionmaking by BPA. Furthermore, surplus power purchases from BPA in this rate period applied to retail loads in next rate period is inconsistent with the Northwest Power Act. PGP urges that BPA revise this section to entitle customers to continue taking power at up to the same rate of delivery as the 5(f) surplus power purchase, but as 5(b) requirements power and at BPA's lowest applicable cost based PF rate. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA has made several presubscription surplus or excess federal power (EFP) sales to certain Northwest customers to use as a firm resource to serve their regional load, and not to resell the power on the wholesale market. BPA agrees that there are other secondary (surplus) power sales which have been made that do not have similar provisions requiring the use of the power in the customer's load and which permit the customer to resell the power. There should not be a confusion over each use.

If the customer has made a surplus power purchase from BPA which does not contain terms requiring the customer to use the power for a specific load, or in its loads generally as a firm resource, then this policy does not create that obligation for those contracts. However, if the customer has a surplus contract that requires the Federal surplus power sold to be used for a regional retail load of the customer, then this policy requires the customer to do so. In other words, those contracts will be considered firm contract resources of the customer to be applied to its load and thereby reduce its net requirement load on BPA. BPA intends this policy to include a provision on the use of surplus power covering BPA surplus power sales contracts that are intended to be used to serve a customer's regional loads. BPA has modified this policy provision to apply to surplus firm power contracts containing contract terms specifying they be used to serve a customer's retail firm power load(s). Surplus or secondary sales without such contract terms are not included. Surplus or excess federal power sales contracts which do not include renewal or extensions, will only continue to be used for loads until their expiration date. BPA will not revise the policy to permit replacement of such contracts as suggested by PGP.

Issue: Whether power purchase contract terms beyond calendar year 2001 should be construed as continuing to be applied to load under new contracts.

Tacoma commented that the phrase, "terms which extend further than one year beyond 2001" is unclear. Absent clarification, Tacoma stated it could not make constructive comment. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

BPA intended that the above language apply to federal sales of surplus power. This language was deleted from the final policy.

(d) Dedication of additional generating and contract resources, commitment to apply market purchases, and term of resource commitments

Under section 5(b)(1), BPA does not plan to purchase power or to acquire resources for that portion of a customer's load which is met by the customer's own resources. Those customer resources may be either actual generation or power purchase contracts of various duration. In order for BPA to prudently plan for its cost of service for the loads

BPA has the obligation to meet, and for it to operate in a sound business like manner, BPA must have basic information about a customer's resources in order to achieve a high degree of certainty regarding the customer's resources used to meet that portion of the load served by customer resources. For example, if a customer changes the amount of its resources by adding or reducing them, then BPA's obligation to serve the customer's net requirements fall or rise which in turn affects BPA's costs and cash flow. Thus, changes in BPA's load obligations means changes in the risks and costs which BPA has during a rate period.

For the post-2001 contract period, customers have asked for stable rates and BPA has proposed that its new rates be effective for a 5 year period from 2001 to 2006. Substantial changes in customer resources during the contract period can shift substantial costs and risks to BPA. Such changes may impact BPA's ability to meet its annual Treasury repayment, or in reduced funding for other purposes. In order for stable rates to work, a customer's resource obligations and commitments must also be stable and not impose unanticipated risks for the period. The certainty of both the amount and duration of the customer's commitment or dedication of its nonfederal resources to its loads is a critical part of this stability.

Grant commented that BPA should remove this section because its inclusion in the policy exceeded BPA's authority and that BPA's only legitimate interest is ensuring that preference power is properly sold and used. *Grant, 5(b)9(c)-011*. BPA agrees that it has a statutory interest to ensure that preference power is properly sold and used, but that is not BPA's only interest in adopting this policy. As explained above, BPA has statutory interests in the use of the customer's resources, particularly those that are used for meeting the customer's firm load, including the amount of power they produce, and their duration. Grant fails to recognize that BPA is obligated only to sell its Federal power to the extent Grant does not use nonfederal resources which it must apply or has previously applied to its load. BPA's interests and responsibility are to maintain an adequate power supply while not expending more federal dollars to provide Federal power to replace customer resources which have been used and continue to be able to meet the customer's load. BPA rejects the comment made by Grant that how a utility meets its consumers' electric needs is of no concern or consequence to BPA. To the contrary, the information BPA requires and the determinations BPA must make are necessary to administer those provisions of section 5(b)(1) that require BPA to have an understanding of its power supply obligation. Therefore, it is of concern and consequence to BPA that it have customer resource information.

Issue: Whether it is appropriate for the 5(b)9(c) policy to require a five year dedication of market purchase contract resources.

A number of parties commented that the provision requiring a resource to be dedicated for a five year period is too restrictive to work with the Slice product. *Cowlitz, 5(b)9(c)-006; MAC, 5(b)9(c)-009; Grant, 5(b)9(c)-011; PGP, 5(b)9(c)-021; Tacoma, 5(b)9(c)-025*. Cowlitz commented that the five year requirement to apply a market purchase is too narrow and rigid to work with the Slice product, making it difficult to implement the

Slice contract. *Cowlitz, 5(b)9(c)-006*. PGP commented that this provision is inconsistent with the Slice prototype contract because Slice capability will fluctuate over time and “market purchase amounts” cannot be declared for the entire 5 year period. Also the policy does not accommodate reductions in output of the Slice power product. *PGP, 5(b)9(c)-021*. MAC commented that this provision creates particular difficulties for Slice customers. MAC suggested that BPA revise this provision to ensure that purchasers can take the Slice product and make other purchases and sales to accommodate surpluses and deficits. *MAC, 5(b)9(c)-009*.

Grant stated that the requirement to use market purchases for entire the 5 year rate period is at odds with the one-year market resource declaration provision in the Slice draft contract. *Grant PUD, 5(b)9(c)-011*. EPUD said it is unclear whether a customer can make market purchases of only 5 years. EPUD and PPC commented that it should be the customer’s choice to make market purchases of any length without losing 5(b) rights. *EPUD, 5(b)9(c)-020; PPC, 5(b)9(c)-001*. PPC added that BPA needs to clarify what is meant by “market purchases.” *Id.* Tacoma proposed that the policy allow customers to elect market purchases only in years when required, and only to the extent needed to relieve BPA of its 5(b) obligation. *Tacoma, 5(b)9(c)-025*.

Evaluation and Decision

As stated earlier, a customer’s resource (generating resource, or a contract power purchase resource) is treated under the statute and by this policy as continuing to be applied to load, absent one of the five specific conditions stated in the statute. Those conditions are the Administrator’s consent to remove the resource, retirement, obsolescence, loss of the resource or loss of contract right. The only two conditions that apply to a contract power purchase resource are loss of contract right and the Administrator’s consent to remove the resource from service to load. Parties expressed concerns regarding a type of contract power purchase resource, called market purchases.

BPA should better define what is meant by a “market purchase commitment.” Under the 1981 power sales contract, a customer who wished to apply the power it bought under a nonfederal contract to its firm load had to meet several conditions. The customer had to show that its nonfederal contract was a purchase of firm power, that is, power available on a continuous basis on all hours to the customer. Nonfirm energy purchases, if any, were not counted as part of a firm power contract. The customer had to show that it had a firm transmission path for delivery of the firm power to its load center. The customer had to show the contract’s duration and notify BPA of any rights the customer had to increase the amount of power purchased. Typically BPA would obtain a copy of the specific contract so as to understand coordinate terms and conditions which may affect BPA’s obligations to supply the customer’s load. A general statement from the customer that it would buy power without specifying the amount, duration, type of power, source and transmission path was not adequate to relieve BPA of its obligation to plan to serve the customer’s load.

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

Several comments were received by public utility customers interested in the Slice product. They are concerned that the effect of making market purchase commitments for the rate period would not coordinate with the Slice purchaser's obligation to purchase from the market for the contract year. These parties believe that having to declare purchases for a five year period is inflexible, rigid, and too uncertain given the uncertainty in the Slice product. There appears to be confusion between the application and use of market purchase commitments and treatment of the customer's obligation under the Slice contract to make sufficient power purchases in any one contract year to balance its resources, including the power from Slice with its hourly loads on every hour of the year.

Slice produces a variable amount of power for the customer to use in load, dependent upon BPA's system generation. If the Slice power is not sufficient to cover load in any hour then the customer will use its planned resources, both generation and contract, to meet the load. Further, depending upon the variability of the customer's own resources and loads, the customer will have to manage its resources to meet its loads on every hour. In certain circumstances this can mean that the customer must make additional balancing purchases of power from the market on the day or hour when it is needed. BPA is not asking the customer to identify as part of its market purchase commitment those purchases necessary to balance hourly load with resource, *i.e.*, balancing purchases to meet hourly and daily load fluctuation. Rather, the market purchase commitment is a planned amount of power, determined in advance annually or for the rate period.

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

EPUD argued that a customer should be able to make market purchases of any length without any “deterioration” of their section 5(b)(1) “rights” to buy Federal power. Under this policy customers do not lose their rights to buy Federal power under section 5(b)(1) by agreeing to provide market purchase commitments. However, the market purchase commitments do reduce the amount of power BPA is obligated to supply to the customer in accordance with its contract for the contract year or for the five year rate period. Customers should be mindful that some of BPA’s products are based upon a BPA calculation of the amount of net requirements load determined for the first contract year, and estimates of that load over the term of the contract. Under this type of product, the customer will agree to the calculated amount of power based upon the projected loads. The customer will also agree to obtain sufficient amounts of firm power shown as either generating resources, specific contract resources, or as annual or rate period market purchase commitments to cover the loads not served by the BPA product.

Products like the firm Block and Slice will supply a calculated amount of power to the customer and will not increase with changes in the customer’s load. The customer will have the obligation to meet changes in load. The products do not include any load growth service, nor any load following, load variance, or load regulation service. In effect, the customer agrees to provide those services either from its own nonfederal resources, or from the market. BPA is not proposing that the customer have a “choice” as to whether or not it will supply its own load. By choosing a product that does not include the load variance service, the customer is choosing to supply the remainder of its load not supplied by BPA from its own sources. BPA will not plan additional resources or purchases nor standby with power to meet any portion of the customer’s load for which the customer has an obligation to serve under its contract with BPA.

Tacoma suggests that BPA modify the policy to allow customers to “elect” market purchases only in the years, and at the times, when needed to relieve BPA of its 5(b)(1) obligation to serve load. The intent of Tacoma’s suggestion that BPA be relieved of its obligation is consistent with BPA’s intent in the policy. However, Tacoma’s proposed mechanism cannot provide BPA with the certainty needed for planning BPA’s obligations to a customer during the rate period. It is not BPA’s intent to have the customer over-purchase; but rather, it is intended that the customer and BPA have planned resources or purchases sufficient to cover the planned consumer loads. The specific amounts of planned market purchase commitments for estimated loads will clearly place the obligation to buy with the customer, not BPA. To the extent customers do not identify resources committed to serve their loads, BPA has the obligation to plan service to such loads. BPA would not be prudent under this policy to leave this question unanswered until the year when a load increase occurred.

The PGP stated that the provision on market purchase commitments does not accommodate reductions in the amount of the Slice output. PGP did not provide any further explanation for its comment. This policy does treat the Slice purchaser as having an obligation under the terms of the Slice contract to replace any reduction in its Slice output with an annual or multi-year nonfederal market purchase commitment. Otherwise,

the risks assumed by the Slice parties would be different under this policy from those risks used in the 2002 power case for Slice, and different from the terms of the contract.

Issue: Whether the application of additional utility generating or contract resources to serve load over the term of the new power sales contract is allowed under the 5(b)9(c) policy.

MAC commented that it believes the 5(b)9(c) policy allows a customer to elect to apply additional resources above those resources which the customer must apply or is already using to serve loads. MAC proposed that a utility should be able to combine market purchases and generating resources over the period of the contract. A customer should be able to specify a market purchase for a portion of the upcoming contract period and during the contract period be able to replace that “market” purchase with a contract or generating resource so long as the customer’s contractual commitment are met. MAC argued that BPA should be indifferent to how customers meet their load obligations “exclusive of their purchases from BPA.” *MAC, 5(b)9(c)-009*. Further, MAC states its understanding that customers will be allowed to develop their own generating resources during the contract period and not dedicate them to serve their own load. Under such a condition a utility would specify that it is meeting its load through market purchase commitments or Federal power, which may or may not include purchases from the resource developed by the customer. MAC asks BPA to advise on this understanding. *Id.*

Evaluation and Decision

As to the first issue MAC raises, the policy will permit a customer to apply nonfederal resources which are newly developed by the customer to its loads, as long as the resources are specified initially in the contract. Thus, under a BPA contract a customer can specify a newly developed resource which is planned to serve its load in a designated contract year. In the contract years that do not specify the resource, BPA would have the obligation to meet the load. At the start of the contract year designated by the customer to apply its resource to load, the customer assumes the obligation to meet that portion of its load and thereby relieve BPA of its obligation. If the new generating resource is not available on time, the customer is obligated to purchase power to meet that portion of its load.

As to the second issue, MAC suggests that a customer should be able to substitute a new generating resource for a specified market purchase commitment in the out years of a contract. A customer may substitute a new generating resource, or a resource that becomes available to it after an export contract has expired, for a market purchase commitment as long as the amount of planned power is equal to the market purchase. However, BPA is not indifferent to the type of resource, generating or contract, which is used to meet the customer’s load. As explained above, and as will be made clear in following issues, BPA has a clear responsibility to determine whether to replace nonfederal resources with Federal power under the Northwest Power Act. This

responsibility depends upon whether the resource is a generating resource or a contract purchase.

To the extent MAC's proposition is that the provision should be indifferent about how customers meet their load obligations and consider a replacement of market purchase with a contract or generating resource if it is for newly built or acquired generation resources, then BPA agrees only if the contract or resource has not been declared or dedicated for use to serve regional load. If MAC's proposition is broader than that so as to include existing contract and generation resources applied and used to serve regional load, then BPA does not agree with such a proposition. BPA reads section 5(b)(1) to differentiate between generating resources and contract resources. Generating resources continue to be applied and are only removed from service due to obsolescence, retirement, loss of the resource, or Administrator's consent. Contract resources continue to be applied until there is a loss of contract rights or the Administrator's consent. Expiration of a contract obligation is not equivalent to the duration that a generating resource is treated as used to serve load, *i.e.*, until obsolescence, retirement, or loss of the resource. Under this policy, BPA does not give its consent to the removal of a generating resource which is used now, or is later applied to load, by the artifice of "replacement of a market purchase." Because the statute treats generating resources differently than contract purchases, BPA will not equate market purchases with generation applied by the customer.

MAC is correct in its understanding that a customer may develop a resource and may choose not to use it to serve its own loads. The customer may choose to sell the output of its resource to another BPA customer to serve its regional load. The customer owning the resource may do this without dedicating the resource to serve its own load. If the output of the resource is sold to another BPA customer for service to its load then that customer must dedicate it as a purchase contract resource. MAC should recognize that once the utility uses the resource to serve its own loads, the resource becomes subject to section 5(b)(1), and section 9(c) and 3(d) if the resource is exported from the region.

Issue: Whether the 5(b)9(c) policy should permit multiple 5(b)(1) contracts.

PGP commented that the policy refers to a customer's section 5(b)(1) contract. PGP argues that customers can have multiple contracts under section 5(b)(1). PGP contends that some customers may have more than one 5(b)(1) contract, and the provision should reflect that. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA has addressed this issue above. PGP is incorrect that BPA customers are entitled to more than one contract under section 5(b)(1) at any time. BPA offers its customers a range of products and a range of terms to allow customers to decide how much of their obligation they wish to place on BPA. PGP's interpretation of the statute would force BPA to have to administer numerous contracts all for the purpose of meeting the portion of the customer's loads not met by its own resources. Such an interpretation sacrifices

the efficiency, avoidance of conflicting or duplicative obligations, and ease of administration that BPA and its customers have benefited from under a single contract. Customers have no statutory right to multiple contracts for their BPA service under section 5(b)(1).

Issue: Whether the 5(b)9(c) policy permits adjustments to the use of customer generating resources if required by a FERC license.

PGP expressed a concern that the policy would not permit a customer to adjust its contract and generating resources during the term of the BPA contract as required under several FERC licenses. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

Under the Subscription contracts, BPA has requested customers to commit their resources for the same period of time as BPA makes a commitment to sell. Customers are free to select the term of their contract for all products for up to ten years, except for the Slice product. BPA requires a minimum term of 10 years as a condition for purchasing the Slice product so that BPA receives the risk mitigation benefits of the product. BPA does allow customers to increase their BPA purchases if they lose a resource due to a FERC relicensing order.

Issue: Whether the 5(b)9(c) policy clearly differentiates between the dedication and use of generating and contract resources that serve the customer's firm retail load.

WPAG observed that topics such as dedication of additional resources to serve a customer's firm retail load, use of short term market resources to serve customer's firm retail load, and dedication of additional resource capability after the effective date of contract to serve customer's firm retail load are not clearly differentiated. WPAG made observations on a customer's ability to declare resources to serve firm retail load and asserts that the consequences of such declarations are not explicitly stated. *WPAG, 5(b)9(c)-024.*

WPAG wants BPA to state that a customer may dedicate, when the BPA contract is executed, section 5(b)(1)(B) resources to serving its load in addition to resources required under the policy. Additional resource declarations should continue to be applied until the BPA contract terminates or expires, or until removal of the resource is permitted under section 5(b). If a customer wishes to declare additional generating or contractual resources to serve firm retail load after execution of the BPA power sales contract, it should be able to pursuant to renewable resource provisions. WPAG asks that this provision indicate that a customer may use unspecified resources, such as market purchases, to serve any portion of the customer's firm retail load that is not covered by other firm resources declared under section 5(b)(1) for the term of power sales contract. In doing so, there should be no customer obligation to make any such declaration or provide such resources after expiration or termination of the power sales contract. *Id.*

Evaluation and Decision

BPA believes that it has clarified this provision as published in the final policy. It does not permit the addition of resources during the term of the contract. At the time of contract execution, a customer may elect to dedicate other generating resources or contract resources under section 5(b)(1)(B). Dedication of such resources are in addition to existing section 5(b)(1)(A) and (B) resources the customer is required to continue using. WPAG asserts that the additional generating and contractual resources should continue until the contract terminates or expires, or until the removal of the resource is permitted under the provisions of section 5(b). BPA does not agree with WPAG that the additional generating or contract resources should continue only until the contract terminates or expires. Once the customer makes its unilateral decision to dedicate the resource, that resource remains dedicated and must continue to be used to serve load for its remaining life, unless BPA consents to removal of the resource or another event of allowing removal under the statute occurs.

This provision of the policy allows customers to contractually commit to serve their loads with unspecified market purchases. This commitment is to make market purchases for the term that BPA establishes rates of general application. The amount of the market purchase commitments may be specified for the rate period or calculated annually in accordance with the contract terms. The customer does not have to provide resources for loads served by unspecified market purchase commitments at the end of a rate period when BPA has established rates of general application. The commitment of market purchase resources may be shorter than the term of a customer's contract.

Use of market purchase commitments does not create an obligation for continuing use under section 5(b). Such use may create an obligation under section 9(c) if the customer later exports the resource it was using to serve its load.

(e) Determination of resource capability of customer resources

As stated in the preceding section, BPA does not plan for the purchase or acquisition of federal resources to meet that portion of load which will be met by a customer's own nonfederal resources. For power purchased from the market by the customer, BPA only needs to know the amount of megawatts in heavy and light load hours for each month that the market purchase commitment will be made on a planned basis, or as otherwise specified in the contract. Additional power purchases made for load during a month that are unplanned will be the customer's obligation unless they have purchased a load following product from BPA. For a customer's nonfederal generating resources used to serve its load, BPA needs to know the firm power capability of the resource. BPA will describe the level of information needed for different products in the Declaration Parameters. The customer's resources are the other side of the coin to BPA's obligation to supply power. The purpose of the declaration parameters is to measure the amount of nonfederal resource against which BPA will measure its load service and provide power. The declaration parameters are similar to the assured capability exhibit which BPA used

under its 1981 contracts to measure a customer's resources. These measurements are important for both rate application and charges.

Issue: Whether it is appropriate to use median water planning as provided for under the Declaration Parameters to determine customer net requirement.

IPC commented on BPA's proposal to use the Declaration Parameters to determine the capability of its resources. IPC is concerned that BPA will assess the capability of IPC's hydroelectric resources using median water planning under the Declaration Parameters. IPC asks that BPA not use median stream flow to estimate capabilities of IPC's hydro. IPC points out that it only uses median water planning in assessing whether to make long term investments, and it relies on market purchases to serve its loads during critical water. IPC believes its hydroelectric resources should be evaluated in the same manner as other utilities in the region. IPC claims that net requirements should be computed for customers consistently throughout the region, and IPC should not be singled out for different treatment that is disadvantageous to its residential and small farm loads. *IPC, 5(b)9(c)-001.*

Evaluation and Decision

IPC is concerned because it is not a signatory to the Pacific Northwest Coordination Agreement and uses standards different than critical water planning for its loads and for certain purposes. IPC provided an explanation of its planning. IPC argues that BPA should apply a uniform standard for all of its determinations and not single it out. Contrary to IPC's claim, BPA will apply the same standard to IPC's loads and resources as applied to other customers. The Declaration Parameters provide a uniform standard for the planning basis. When claiming a certain amount of capability for its resources, the customer must show the basis for its use of the amounts by showing how those amounts have been used in other planning documents and decisions. An example of such a showing is IPC's prior submission of resource planning information to the Idaho utility commission. For each customer, BPA will review such information and the basis for it. IPC may show plans to purchase power to serve its loads during critical water. Based on that and other information, BPA may conclude that IPC uses critical water planning for load service. BPA will make an individual determination with information provided by IPC of the capabilities of its resources and net load requirements.

Issue: Whether it is appropriate to require utility customers to declare diurnal resource capability as set forth in the Declaration Parameters.

A number of parties commented that they should not be required to meet the provisions of the Declaration Parameters requiring a diurnal declaration of resource capability. *Cowlitz, 5(b)9(c)-006; PGP, 5(b)9(c)-020; Seattle, 5(b)9(c)-031.* Cowlitz believes it should only have to provide monthly peak capabilities and monthly amounts of energy. Other Slice customers believe they should only be required to provide monthly amounts of energy. *PGP, 5(b)9(c)-020; Seattle, 5(b)9(c)-031.* Block purchasers believe they should only be required to provide HLH and LLH amounts of energy for their resources.

Cowlitz proposed that BPA modify its policy to require “resource declarations shall be consistent with the product that is being purchased.” Cowlitz disagrees that the same declaration procedure must be used for every product offered. *Cowlitz, 5(b)9(c)-006*.

Evaluation and Decision

Section 5(b)(1) permits a customer to add resources that are either firm energy or firm peaking energy (capacity with energy) for service to its loads. BPA has historically required customers to supply a monthly peak capability for their resources and monthly amount of firm energy. Cowlitz is correct that different BPA products have differing requirements for information about customer resources and some require HLH and LLH energy by month. BPA has modified its policy to use the Declaration Parameters specified in the BPA’s Power Products Catalog to establish the amount of power available from the customer’s generating and contractual resources. BPA will use its historical standard of monthly peak and monthly energy as a minimum standard. BPA will require additional resource information by contract for customer resources where the operation of the customer resource during the year impacts the amount of Federal power they can purchase on any hour.

Issue: Whether BPA should as a matter of policy, and not contract, determine the utility customer’s resource capability.

Grant argued that BPA should eliminate any policy requirements for determining the resource capability of customer resources. Grant believes resource capability can be negotiated in the contracts. Grant stated the policy section was unnecessary, and would give BPA the ability to make arbitrary decisions regarding a customer’s resource output. Grant stated that resource output is variable, and BPA should work with customers. *Grant PUD, 5(b)9(c)-011*.

Evaluation and Decision

In 1980, Congress directed BPA to negotiate and offer initial section 5(b), (c) and (d) power sales contracts with its utility, federal agency, and direct service industrial customers. Congress gave BPA a mandated deadline to offer the initial contracts within nine months of passing the Northwest Power Act. BPA found it most efficient to include the treatment of a customer’s nonfederal resources as part of the negotiation process. Unlike 1980, BPA is not required now to conduct policy development through contract negotiation.

The policy BPA has developed here is in many instances based on the policy that has been in place under the 1981 contracts. One resource treatment though has changed significantly. The 1981 contract provided that customers could make certain changes in their resource commitment based on circumstances and notice periods to which the Administrator gave consent. With the recent and significant changes in the wholesale power market, neither BPA nor the customer face the same circumstances for power supply and resource acquisitions as existed 20 years ago. The certainty BPA needs today

from its customers regarding their resource commitments is critical to maintaining stable rates for five year rate periods. Therefore, the voluntary consent to remove resources is not generally included, other than on a specific case-by-case basis as part of the policy.

There can be no certainty for BPA's contract obligations without some technical basis for understanding the customer's nonfederal generating resource capability to produce firm power. The Declaration Parameters of the policy use a calculation based on the assured capability determinations that were part of Exhibit J of the 1981 contracts. They are neither arbitrary nor capricious and there is no obligation to negotiate them.

The methods used to determine resource capability is a policy matter of region-wide significance. BPA recognizes the complexities involved in making such a determination. BPA believes that the determination of resource capability must use the same principles for each customer and be based on each customer's unique factual situation. BPA's policy allows for modification in the Declaration Parameters if a better method of making the determination arises. This provision in the policy assures other customers that BPA will apply these new methods on a region-wide basis.

As to Grant's particular concern with hydroelectric resources, BPA recognizes that Grant has a particularly difficult problem forecasting the critical period capability of its resources on a diurnal basis. However, all other customers who have hydroelectric resources on the Columbia system face a similar difficulty. A range of forecasted capability may be a reasonable forecast. The proposed Declaration Parameters allow Grant to change that forecast on a year-by-year basis for its hydroelectric resources included in Pacific Northwest Coordination Agreement planning.

Issue: Whether BPA should consider "fine-tuning" the Declaration Parameters.

The PPC and Tacoma proposed that the Declaration Parameters be fine-tuned to reflect the needs of different products. *PPC, 5(b)9(c)-012; Tacoma, 5(b)9(c)-025*. PPC suggested that Declaration Parameters be used to fine tune the starting point for generating and contractual resources used to serve retail loads post-2001. *PPC, 5(b)9(c)-012*. PPC added that it is reluctant to agree to the approach because product catalog and declaration parameters have not been finalized. The PPC also suggested that any changes in the Declaration Parameters be reopened for public comment when changed. *PPC, 5(b)9(c)-012*. PGP commented that some PGP members plan to buy Slice and Block products, so Declaration Parameters should not be limited to the Actual Partial product, which is complex and a different type of contract. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

BPA will consider "fine-tuning" the Declaration Parameters if there is a need to do so. The Declaration Parameters will recognize the difference in BPA's products. The customer should assume that if it purchases a product that requires peaking capacity information and another which does not require that information, the customer will provide the peak capacity information for all of its resources used for load service. The

product catalog is merely an information document describing the basic elements of the product. The customer should consider the draft contract as the basis for the Declaration Parameters application. BPA has taken comment on the drafts of its contracts and will not put out the Declaration Parameters for public comment.

Issue: Whether utilities should be able to revise the resource capability of their resources on an annual basis.

PGP commented on the need to make annual revisions in resource capability due to changes in resource capability based on coordinated planning. PGP noted that hydro-based utilities must revise annually their declared resource exhibits for changes in coordinated planning. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA recognizes that a customer's hydroelectric resources may experience changes in generating capability due to environmental or other operational constraints. This policy allows the PGP members to adjust the resource capability of their resources on an annual basis. For customers who purchase a load variance product, BPA will allow a change in the contracted amount of Federal power based on changes in the capability of the customer's nonfederal resource. Customers who do not purchase the load variance product agree to replace any change in the capability of their hydro resource, or other resource, by obtaining nonfederal resources or power as replacement for the amounts lost.

Under some products a customer may adjust its monthly declarations of nonfederal resource capability to allow it to adjust for changes of its nonfederal resource. This policy recognizes that change. Thus, a purchase of Federal power based on annual amounts of net load, that would otherwise be reduced due to a reshaping or an increase in nonfederal resource capability during any monthly diurnal period, would be maintained.

Issue: Whether a minimum amount of load and resource information is sufficient for determining net requirement.

The PPC and Tacoma commented that Customers should provide only minimally required information for any chosen product. *PPC, 5(b)9(c)-012; Tacoma, 5(b)9(c)-025.* To the extent load and resource information is required, a customer should provide only the minimum information necessary to determine net requirements for the products actually purchased. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

BPA will need the minimum amount of information which a customer is being asked to provide regarding its generating and contract resources, and its market purchase resources. BPA needs this information in order to have certainty and predictability of the Federal contract obligations it has to its customers. Without this information, BPA could

not be assured of the cost and risks of its obligations for the rate period. Nor would BPA be assured of the needed certainty of its obligations under its contracts.

2. Reductions in initial determination of net requirements due to section 3(d) and section 9(c)

BPA received no comments from parties on this section of the policy.

B. Statutory Discontinuance for a Customer's Generating and Contractual Resources

BPA received numerous comments from its public agency customers that BPA should not interpret section 5(b)(1) regarding the standards for obsolescence, retirement, or loss of a resource or contract rights. Many of these parties commented that the language in the statute is sufficiently self-defining, or that BPA lacked the authority to make embellishments on the statute. One customer group suggested that BPA use its interpretation, while others simply proposed the elimination of this section of the policy. Some felt that the provisions rewrote the statute, and were unnecessary, not objective, inconsistent with each other, or should be deferred to another body.

BPA understands that parties, particularly public utilities, are concerned about their continued ability to purchase Federal power at competitive rates. The amount of power they must provide for their own load affects the amount of power they are eligible to buy from BPA under section 5(b)(1) for their loads. BPA also understands that the application of a customer's nonfederal resources and the risk of those resources is the other side of the coin for BPA's obligation to provide power to the customer. The fewer the resources a customer applies the greater the customer's firm load BPA must carry. Reductions or removal of customer resources under section 5(b)(1) can mean larger cost risks in purchases and acquisitions of resources by BPA. Ultimately these costs and risks are spread back to the customer, but a balance must be struck in who bears what risk regarding changes in customer resources.

BPA must operate in a sound and prudent business manner when meeting the loads of its customers. Ignoring potential changes in either Federal resources, or in customer resources, serving regional loads would ignore risks and would not be prudent. One purpose of this portion of the policy is to provide some certainty regarding cost risks to BPA, to utility customers, and to non-utility customers. Unanticipated and unexpected costs could also impact BPA ability to make its Treasury payments timely. BPA is establishing rates for a five year period, seven years in advance of the last rate year. By further defining the events affecting a customer's resource, for which a customer may obtain additional Federal power service, BPA provides a further level of certainty regarding the respective obligations of BPA and its customer.

Canby, Idaho Falls, Grant, PGP, and Northern Wasco argue that BPA does not have the authority to interpret section 5(b)(1) of the statute. They argue that BPA cannot establish policies to further define how to implement the words of the statute. They contend the

Northwest Power Act does not provide BPA with authority to determine that a customer's resource is obsolete, retired, or lost. PGP commented that rules for discontinuance must be reasonable, consistent with statutory requirements, and subject to neutral dispute resolution. *PGP, 5(b)9(c)-021*. The PGP suggests language to substitute for all of section III.B. *PGP, 5(b)9(c)-021, p.11-12*. The PPC opposes BPA adopting policy that embellishes statutory language and changes the intent of law. PPC contends the analysis the policy requires is not necessary or appropriate. *PPC, 5(b)9(c)-012*. EWEB found the provisions on discontinuance of customer resources to be internally inconsistent. EWEB claims it may be violating the language and intent of statute. EWEB believes the language in the Act is broad and self-defining. *EWEB, 5(b)9(c)-028*. Grant, a member of the PGP, stated similarly that BPA should stick to the wording of statute and not try to expand BPA's statutory authority. *Grant, 5(b)9(c)-011*.

Federal agencies charged with the administration of specific statutory directives have the latitude to interpret such provisions and to fill in any gaps left by Congress. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). BPA has interpreted other provisions of the Northwest Power Act and adopted policies which provide definition or explanation of the application or meaning of words in the Act. *See, e.g., Public Utility District No.1 of Douglas County, et al. v. BPA*, 947 F.2d 386 (9th Cir. 1991)(challenge by mid-Columbia customers and other utilities to BPA policy interpreting the word "measure" and "impose upon" as used in section 4h (11)(A) of the Northwest Power Act). BPA's interpretations of Northwest Power Act provisions are reviewable in the United States Court of Appeals for the Ninth Circuit under a standard of " arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law" under the Administrative Procedures Act. *See, e.g., Utility Reform Project, et al v. BPA*, 869 F.2d 437 (9th Cir. 1989) (challenge by consumer group and public utilities to BPA settlement of claims on WNP-3 involving interpretation of the meaning of "exchange" and "sale" under the Northwest Power Act and the Bonneville Project Act). Although a court reviews questions of statutory construction *de novo*, the court affords substantial deference to an agency charged with administration of the statute in issue. Such deference is especially appropriate under the statutes that BPA administers, where the enabling legislation is highly technical and BPA was closely involved in drafting much of the legislation. *Id.* at 442. BPA's interpretations will be upheld if they are reasonable. The court does not need to find that BPA's interpretation of the statute is the only reasonable one or even if it is the result the court would have reached if the issue had first arisen before the court. *See Aluminum Company of America v. Central Lincoln P.U.D.*, 467 U.S. 380 (1984).

The interpretation of section 5(b)(1) regarding BPA's obligation to provide Federal power in excess of the customer's resources used to serve its own load, and the continuation of the use of those nonfederal customer resources to serve load due to specific circumstances is a technical determination driven by factual circumstances unique to the customer's system, BPA's system, Federal and state regulation of resources, and the wholesale power market. BPA's policy proposes an interpretation of the terms obsolescence, retirement, and loss of resource or contract right so that customers and BPA will have guidelines for how BPA will determine the occurrence of

those events. This policy gives individual meaning to each of those terms and does not leave for the future any misunderstanding by customers how BPA will apply those terms of the statute.

Given the complexity of the issues surrounding the use and continuation of generating resources, and the complexity of the wholesale power market today, BPA does not agree that the terms are self-defining as many of our public utility customers assert. An issue addressed below further illustrates the lack of common understanding about the loss, retirement, or obsolescence of a resource. One party asserts that the open public sale of a generating resource constitutes the loss of that resource for its use since as a minority owner in the resource it cannot prevent its sale. Other parties suggest that obsolescence cannot be permanent and that economic considerations, such as “cost effectiveness,” are applicable to a resource being obsolete. In spite of the fact that a resource continues to operate and produce power for the market, comments made by parties suggest that BPA should replace it due to its obsolescence, retirement, or loss. Such an outcome is unwarranted under BPA’s statutes.

PNGC commented that it is counterproductive to create detailed definitions for “obsolescence,” “retirement,” “loss of resource,” and “loss of contract rights.” These standards may not allow BPA and its customers to make reasonable judgments and decisions in the future. *PNGC, 5(b)9(c)-018*. BPA does not agree with PNGC’s view that the definitions it has provided are counterproductive or may preclude reasonable judgments or decisions in the future. To the contrary, the definitions will provide a base from which both BPA and the customer can assess their future actions regarding their own resources and obtain some certainty as to the risks associated with a particular choice or decision affecting a resource. BPA has provided further definition on how the statute operates since its passage in 1980. The proposed interpretation of the statutory discontinuance provisions of section 5(b)(1) are only providing further clarification of the policies included in the 1981 contract on how these provisions should be interpreted.

1. Statutory discontinuance for generating resources

Issue: Whether there should be only one standard for statutory discontinuance.

PGP argues that BPA should adopt one standard for obsolescence, retirement, loss of resource, and loss of contract rights. PGP finds the different standards of treatment arbitrary. PGP argues that an economic factor should be applied in all circumstances. Different standards for different resources appear to be purely arbitrary. Policy should reflect an objective test that considers economic factors in each standard. *PGP, 5(b)9(c)-021*. Cowlitz agrees that BPA should adopt a single standard for all of these terms.

Evaluation and Decision

PGP argues that a single standard that includes an economic factor should be applied for all of the conditions enumerated in the statute. The circumstance of a resource being lost, obsolete or retired would basically depend upon whether a less expensive alternative

resource were available from another source, including BPA. However, Congress could have used a single general term such as termination, but instead chose to use three words: retirement, obsolescence and loss. Each word has a different meaning. The term “loss” has the plain meaning of “an act or instance of losing” and “setbacks, destruction,” and the word “lost” has the meaning of “no longer in one’s possession” and “unable to act, function, or make progress . . . physically destroyed.” Webster’s II New Riverside University Dictionary (1988). As the term “loss” relates to generating resources, BPA has interpreted it to mean loss resulting from physical destruction. As the term “loss” relates to rights under contracts, BPA has interpreted it to mean the customer no longer has the right to use or have possession of the power sold under the contract. BPA believes that contract resources should be used through their entire term. BPA does not believe BPA’s other customers should be forced to provide power to replace nonfederal contracts that have turned out poorly. BPA has modified its standard on loss of contract to require an extension of a contract only if it is unilaterally available to a customer.

BPA’s interpretation of this section of the statute is consistent with the position taken by the PPC during the drafting of this section of the act. A PPC document, Exhibit 4 [draft bill S. 885] dated March 30, 1979, clearly supports BPA’s position. In its comment to amendment no. 3 (section 5), PPC stated that subsection (a) [subsection 5(b)(1)(B)] insures that each utility will be given the unilateral right to determine which of its firm resource will be used to serve its load in the future. PPC added that subsection 5(a)(1) [subsection 5(b)(1)] requires that firm resources used to serve firm load will continue to be used except for obsolescence, retirement, or loss of resource or contract right or unless the Administrator agrees to allow such a firm resource to be removed. PPC stated the purpose of this subsection is to give a better long-range planning capability to the Administrator as he determines the extent of the load he will be required to purchase resources or conserve resources to meet. *Id.* In an accompanying comment on section 5, the PPC stated that the firm resource committed to utility load will remain so unless it is too old, lost, or BPA agrees to its removal.

The term “obsolescence” has the plain meaning of “to wear out; the process of becoming obsolete” and obsolete has the meaning of “to wear out; no longer in use; outmoded in style, design or construction.” Webster’s II New Riverside University Dictionary (1988). BPA interprets resource obsolescence as being worn out such that the design or mechanism producing the electricity no longer is operable. The term “retirement” has the plain meaning of “an act of retiring” and “to retire” has the plain meaning of “to withdraw” and “to remove from active service.” Webster’s II New Riverside University Dictionary (1988). BPA interprets resource retirement as an act by the customer of permanently withdrawing the resource from use to serve load.

Based on this plain meaning interpretation of the specific words used in the statute, BPA believes there is a reasonable basis to distinguish between the three words and the four events described in the statute. Loss of resource and loss of contract rights are events which are caused by extraneous events that affect a customer’s resource. On the other hand, retirement of a resource is an action and decision taken by the utility. For obsolescence, the customer must show that the resource has exceeded its useful life and

the customer finds that it is unable to obtain the mechanical parts needed to operate it, the fuel to power it, or the physical facility has deteriorated to a state that it can no longer be operated.

For the two events caused by actions other than by the utility, BPA has modified its policy to apply the same standard to the two extraneous events. This standard requires the customer to use “best efforts,” that is, to take all possible actions designed to continue the service, or keep the resource in service. For example, if a contract contains a provision exercisable by the purchaser that permits the continuation of the power service exercisable, then the contract right to the power is not “lost” when the purchaser fails to exercise the clause and continue the purchase. Conversely, if the contract has no extension or renewal provision, and expires on a date certain, then upon expiration, there is no contract right. If a customer terminates a contract early, then that is an action taken by the customer and is not a “loss of contract right.” If a generating resource is shut down by a customer yet remains capable of being operated, then it is not “lost” nor “obsolete.” If a generating resource were destroyed by force majeure, then it would be considered “lost.”

To illustrate another example, a customer may decide to “retire” a generating resource yet to continue to operate it. BPA’s policy distinguishes this choice from other events. In this example, the customer merely “retires” the resource from use to serve its own load but continues to operate it for other uses. Under BPA’s interpretation of the term “retirement,” the “retirement” must be permanent. The decision to retire resources should mean permanent shutdowns because resource operators and customers have options to displace the operation of their resource on a short-term basis, or to run them on minimum schedules to maintain their license. If a retirement were not permanent, BPA would be faced with having to replace the “retired” resource by making purchases of power from the market, other resources, or, in a worst case, actually buying power provided by the “retired” resource.

A customer’s decision to retire a generating resource is based on what BPA believes to be a “commercially reasonable” standard regarding whether a resource should continue to be operated. The policy has the customer demonstrate the cost of improvements, replacements or betterments needed to continue operations of the resource. This cost is combined with the variable operating costs of the resource. This is then compared to the reasonable economic return expected over the anticipated remaining useful life of the resource with its improvements. In part, BPA agrees with the PGP comment that a single standard should apply. BPA agrees the same standard should apply to similar events causing a resource to no longer be available to serve a customer’s load.

Issue: Whether there should be a differentiation between generating and contractual resources.

Cowlitz argues that the statute does not differentiate between generating and contractual resources. Cowlitz uses that as a basis to argue that BPA should have a single provision for both types of resources. Cowlitz claims the policy limits economic choices available

to customer And urges BPA to use a “commercially reasonable efforts” and not a “best effort” standard. Tests of obsolescence, retirement, loss are inconsistent and should be consistent with each other and not subjective standards. *Cowlitz, 5(b)9(c)-006*.

Evaluation and Decision

Section 5(b)(1) states in part:

In determining the resources which are used to serve a firm load, for the purposes of subsections (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, . . . unless such use is discontinued because of *obsolescence, retirement, loss of resource, or loss of contract rights*.

16 U.S.C. 839c(b)(1). The statute separately identifies the events which lead to a discontinued use of a resource. Congress separately identified loss of resource from a loss of contract rights. Congress clearly understood the distinction between resources and contracts. The term “resource” was defined by Congress in subsection 3(19) when used in the statute to mean either “(A) electric power, including the actual or planned electric power capability of generating facilities, or (B) actual or planned load reductions resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure.” 16 U.S.C. 839a(19). Loss of resource under section 5(b)(1) means loss of electric power from generation. The use of a disjunctive “or” separates that element of the list from the loss of contract rights and establishes that Congress understood each to be a different and separate consideration for discontinued use. Cowlitz’s argument that there is no differentiation between generating resources and contractual resources is groundless. BPA will distinguish the use of a contract right to buy power to meet load as distinct from a generating resource of the customer. BPA has explained in the preceding section the reasons for the distinction between the standards for obsolescence or loss of a resource which is based on “best efforts” and the standard for retirement which is based on an economic evaluation. Neither of these standards are subjective.

BPA has had a best efforts standard for loss of generating resource and loss of contract in its 1981 contract for 20 years. BPA required its mutual agreement for retirements or the determination of obsolescence. BPA believes the standards provide a consistent interpretation. For events under the statute that occur due to external factors, the customer must use best efforts to attempt to maintain the output of the resource. If, as a result of best efforts, the cost to fix the resource and to run the resource is more than purchasing from the market, BPA expects the customer may retire the resource. BPA expects the customer will make the decision to repair and run, or to replace, the resource based on the costs and debt obligations the customer has since that is the prudent business decision.

As shown above, contract resources are different than generating resources. Generating resource owners are expected to run their resources without regard to the past amounts of

capital they have sunk into the resource. Contract resources are required to be used as long as they are available to the customer. They are not eligible for retirement although customers are free to replace them with more economic contract purchases if such purchases are available to the customer to do so.

Issue: Whether BPA should consider other factors as affecting discontinuance.

Seattle comments that the standards BPA is proposing to determine whether a resource is lost, obsolete, or can be retired are not realistic. Seattle states that many factors, including environmental restrictions, mitigation, or litigation among co-owners, can eliminate or change the output of a resource. *Seattle, 5(b)9(c)-031.*

Evaluation and Decision

BPA has modified its proposed standards on statutory discontinuance to address some of the factors that Seattle described. BPA believes the policy establishes a clear standard for local decision-making. The range of factors identified by Seattle ultimately can be summarized by a plan to modify operation of a resource to address all the factors impacting operation. Once that plan is developed, customers must decide whether to continue to operate a resource or retire the resource in light of other market alternatives. BPA believes the policy provides the guidance to local decision makers to engage in the balancing identified by Seattle.

Issue: Whether BPA's interpretation of statutory discontinuance is reasonable.

Idaho Falls commented that the policy interpretation inserts additional and onerous criteria into those provided in law. BPA should not rewrite provisions of Federal statute. The policy result is to diminish to the point of eliminating the likelihood of a customer removing any nonfederal resource once it has been dedicated. Idaho Falls urged BPA to eliminate the proposed interpretation of statutory discontinuance criteria and to implement the statutory removal criteria only as written. *Idaho Falls, 5(b)9(c)-008.* The way in which this policy defines statutory terms is so extreme that a nonfederal resource will never be removed from service to customer's firm retail load. BPA is seeking to repeal statutory provisions by administrative rule. These provisions substitute BPA's judgment for that of the utility. Any semblance of economically rational decision making for a customer's nonfederal resources is eliminated. Decisions to remove a resource should be made by the utility since it worked for 20 years under the first contract, and there is no demonstrated reason it would not work in the future. *WPAG, 5(b)9(c)-024.*

Evaluation and Decision

Both the Idaho Falls and WPAG comments suggest that the criteria BPA has adopted is too onerous and that BPA should go back to the criteria for discontinuance of a resource that is in the 1981 contract. WPAG suggests that no nonfederal resource will ever be permitted to be removed. Idaho Falls says the criteria diminishes the likelihood of a customer removing a resource to the point of elimination. There are three responses to

these comments. First, regarding what is in the 1981 contract, the criteria stated in subsection 12(b)(8) of that contract permits permanent removal of a nonfederal resources due to loss of resource or loss of contract rights resulting from factors beyond the reasonable control of the customer and which the best efforts of the customer is unable to remedy. BPA has previously responded to customers regarding the loss of resources under the current contract. For example, the Yelm hydroelectric project was damaged and not operating after floods. The customer was permitted to permanently discontinue its use as a result. Likewise, section 12(b)(8) permits the permanent discontinuance of a customer's firm resource because of obsolescence or retirement to the extent the customer consults with BPA regarding such discontinuance and BPA agrees in writing to such discontinuance. The standards in this policy are based upon those in the contract as noted above along with the noted changes.

Second, customers can hardly argue that the wholesale power market and its risks have not changed over the past 5 years. Notably, FERC has issued orders on open access transmission that have transformed the way power is being marketed today. Such change has also impacted how generating resources are now developed and used. Just five years ago many BPA's customers were trying to remove load from BPA by use of the provisions in section 12(b) of the contract. Several even filed litigation against BPA over the right to make resource changes. BPA has learned from that experience and finds such broad rights to change BPA load obligations during a rate period to be imprudent. In order for BPA to have stable rates for the next five year rate period, BPA must know what are its obligations to serve loads and it must know what risks of changes in those obligations to expect. Customers cannot both have fixed cost-based rates for five years and the ability to vary BPA's contract obligations to supply load due to changes in their own resources during the same period, except as permitted under the conditions for statutory discontinuance. Changes in a customer's resources means changes in BPA's obligations to serve loads and changes to BPA's costs of serving load.

Third, BPA has set out reasonable definitions and standards for the various events that might occur. They are based on the plain meaning of the words used in the statute and based on BPA prior experience. As pointed out above, if one circumstance may not be factually supported, then another may be. Nothing in this policy prevents a customer from asking for a determination under any of the standards. Also, as pointed out above, BPA is not giving consent to changes in the resources a customer uses for load. There is simply too much risk that BPA's planned costs will be affected by such changes in a substantial way. Customers' nonfederal resources used for load are treated by the Act as continuing to be used for a customers' loads. Nothing in the Northwest Power Act requires the Administrator to give consent to removal of a nonfederal resource. Such requests will be handled on a case-by-case circumstance based on the particular facts. Nothing prohibits the Administrator from limiting her consent. The remaining occurrences for removal are factual determinations based on the showing that may be made by a customer in any particular instance and do not foreclose the removal of a resource if the circumstances are met.

Issue: Whether BPA's determinations regarding obsolescence and retirement should be delegated to nonfederal entities.

PGE agreed with BPA's abandonment of the provision in the initial policy that customers must consult with BPA and obtain BPA's written agreement that a generating resource maybe considered no longer used due to retirement or obsolescence. PGE commented that when a state PUC allows or orders an IOU to retire a resource, BPA should clarify that its requirements are deemed satisfied. *PGE, 5(b)9(c)-014.*

Evaluation and Decision

BPA appreciates PGE's support for BPA's decision to drop the prior proposal to obtain written agreement. BPA concluded that such a process would be difficult to administer. While BPA respects the decisions of state public utility commissions, and the local boards of publicly owned utilities, the standards BPA has established under this policy are matters for the Administrator's determination under Federal law. There is no intent to delegate determinations on those matters to the states or to BPA's customers. Even the use of an advisory board would bring additional administrative process into a complex area for contract administration. Any factual determinations made by regulatory bodies (PUCs and governing boards) regarding the costs to continue to operate a resource will be considered, along with other facts as part of the information brought to BPA's attention for the determination. Certainly BPA may avail itself of information developed in a state regulatory review process.

(a) Definition of "obsolescence"

Issue: Whether BPA needs to interpret the word "obsolescence."

The PPC argues that BPA does not need to further interpret the word "obsolescence" under the statute. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

Several parties that commented on BPA's initial draft policy suggested that BPA change the interpretation it had used in the 1981 contract. BPA has proposed a clarification of the interpretation of the statute in response to comments that BPA's interpretations of statute are not clear. BPA's interpretation of obsolescence is clarified to be consistent with its interpretation of loss of resource and loss of contract. Obsolescence is a condition that occurs from events or actions outside the control of the customer. BPA's position is that prudent utility practice and the statute require customers to do what they can to fix their resources and continue to operate them.

BPA believes that the definition of obsolescence differs from that of retirement of a resource. The economic standards for a resource that can no longer physically operate and is discontinued is different from the economics of operating a resource throughout its remaining life. The latter comes into play under the statute when a customer makes a

decision to retire a resource. It is BPA's long held position that loss of resource is a catastrophic event and loss of contract right occurs when the contract runs out and the right can no longer be renewed. BPA does not agree with parties that commented that BPA's long held interpretation of loss of contract or loss of resource requires the customer to take any uneconomic actions. Congress did not intend for BPA to replace nonfederal resources of its customers with Federal power whenever customers saw a better economic choice or did not make prudent business decisions to keep their resources operating.

Issue: Whether there should be a cost-effectiveness/economic standard in the definition of obsolescence.

WPAG argues that the statute requires BPA to accept the decisions made by local utilities. WPAG contends that BPA's definition is inconsistent with cost effectiveness. The circumstances under the provision that warrant a finding of obsolescence are too limited, and do not include inability to economically comply with regulatory requirements, environmental standards, or to economically operate and maintain the resource. *WPAG, 5(b)9(c)-024*. PNGC and Tacoma argued that BPA's definition of obsolescence was not useful unless linked to some economic standard. *PNGC, 5(b)9(c)-018; Tacoma, 5(b)9(c)-025*. PNGC suggested that no definition was preferable to BPA's definition. *PNGC, 5(b)9(c)-018*. Tacoma stated that the obsolescence standard was not practicable if made completely independent of any consideration of price since it could never be satisfied under any circumstance. *Tacoma, 5(b)9(c)-025*. PGE commented that demonstration that operation of a resource is not economically feasible is appropriate and consistent with sound business practices. *PGE, 5(b)9(c)-014*.

Evaluation and Decision

As discussed above, the Administrator has the responsibility to administer and interpret section 5(b)(1) of the Northwest Power Act. Congress did not delegate the administration of the Act to BPA's customers. The Administrator is to determine that the events triggering a removal of a nonfederal resource from service to load to local utilities have been satisfied. The Administrator must make this determination as part of her obligation to serve not only the net requirements of the customer but also the total requirements of all BPA customers. This determination must rest with the Administrator, not the multiple types of utilities purchasing Federal power from BPA. Such a delegation would give rise to mixed and varied results depending upon each local utility board, utility commission, or board of directors and the standards they elect to impose in making their determination. Moreover, none of these entities necessarily have as their primary interest BPA's multiple public purposes and responsibilities, nor BPA's obligations to repay the U.S. Treasury.

The issue of whether a resource is still economical to operate may be part of the consideration of the retirement of a resource as explained above. However, the intent of the Act is not that BPA pick up the cost of replacement of any customer resource simply because the resource may cost more now to operate than earlier. For example, all

generating resources face increases in cost and are subject to regulatory changes. Were these considerations to be the standard then no certainty could be derived from any customer's obligation under the statute to provide its own resources. Certainly, where a customer decides it is better to sell the resource to another owner, rather than to operate it, a conclusion could not be drawn that the resource had become "uneconomic" to maintain or operate. The sale would establish continuing operation of the resource and intent of making a return on investment.

It is important to note that BPA interprets obsolescence to mean that a resource is permanently discontinued, and therefore removed from load service due to inability to operate the resource, at the end of its useful life. As specified in the policy, this provision includes lack of available replacement parts, deterioration of physical facilities, or lack of source of fuel supply. With each of these factors, a customer will need to assess the economics of whether or not to permanently discontinue operation of its resource. BPA has defined a standard that it believes includes an element for commercial reasonable economic evaluation under "retirement" as requested by WPAG and other customers.

Issue: Whether obsolescence means permanent discontinuance.

PGP commented that the statute does not include a requirement that "obsolescence" be permanent and found the interpretation of obsolescence extreme. Such a requirement may prohibit some BPA customers from entering into power contracts with BPA. PGP argues that no permanence condition must be attached to the obsolescence standard. PGP offered the following language: "Obsolescence must result from an inability to continue to operate a resource due to economic considerations." Factual conditions will differ on a case-by-case basis. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

As stated above, to be obsolete a resource must have passed out of use or no longer be usable for the production of power. A generating resource cannot be out of use and still able to produce power on a continuing basis. By definition the resource must not still be able to produce power, since if it could the customer remains able to use it to serve its load. In order to prevent the determination of a resource as "obsolete" that continues to generate power that is sold, but not used for load, or that the resource itself is sold, the customer must show that the condition of nonuse is permanent. The condition of permanence for this type of resource removal is contained in the current 1981 power sale contract subsection 12(b)(8). BPA will not agree to have customers remove a resource because it was "obsolete" one day and later return it to service when economically advantageous. BPA has a need for certainty regarding its costs of service and service obligations. Having a temporary "obsolescence" of a resource would not meet that need and would create significant cost uncertainties for the rate period. This definition does not prohibit customers from entering into a requirements contract with BPA, unless the customer chooses not to do so.

(b) Definition of “retirement”

Issue: Whether BPA should interpret the word “retirement.”

The PPC argues that no interpretation of what constitutes retirement is necessary under the statute. The PPC believes such determination should be left to the sole decision of the utility. They are concerned the standard under the contract will result in long protracted arguments. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

BPA has included in the definition of retirement an economic criterion in response to comments made by several parties. The decision to retire a resource because the anticipated cost of projected purchases from the market may be more economic over the life of the resource (rather than upgrading or repairing it) is one part of the planning standard. Some parties in their comments have suggested that BPA use a commercially reasonable economic standard. *See PNGC comment below.* Such a standard for retirement of a resource, assuming that the retirement is permanent, will have utilities seek to purchase Federal power based on their retirement decisions. This type of standard would shield the factors considered by the utility in determining that its resource should be retired. As a result, BPA would simply have to accept the utility’s decision as “commercially” reasonable and be obligated to replace the resource without question. Such a standard is neither fair nor workable from BPA’s viewpoint. BPA believes that what is reasonable is a standard that defines the criteria that should be considered in determining when a resource is retired. Such a standard places both BPA and its customers on notice of what retirement means and when it occurs. While establishing the standard may seem contentious, it will provide planning certainty and a consistent regional interpretation for BPA and its customers facing this decision across the region.

Issue: Whether the interpretation of the word “retirement” should include a standard of “commercially reasonable”.

PNGC suggests that there is no need to define a strict methodological standard for determining whether a plant can be retired. PNGC suggests a plant might be retired because it is no longer in compliance with environmental laws. PNGC suggests it is enough to require that a customer show that its retirement decision is commercially reasonable under the circumstances. PNGC prefers a more general standard of commercially reasonable, and that any disputes as to what it meant could be submitted to arbitration or mediation. *PNGC, 5(b)9(c)-018.*

Evaluation and Decision

As discussed above, a general standard of “commercial reasonableness” is neither fair nor workable from BPA’s viewpoint. BPA and its customers need certainty for purposes of determining whether BPA or the customer will have the obligation to meet consumer loads under their contract. Seldom do environmental compliance standards require the

nonoperation of the resource. In most instances, environmental compliance imposes modification to operations of the resource. BPA's standard does include a commercially reasonable standard which would consider such modifications. Removing the definition of that standard would subject the region to less certainty and potential disputes over the words "commercially reasonable." BPA has provided a formula allowing customers to assess the costs of capital additions, betterments, repairs, or reduced operating time to address any potential plant operation.

Issue: Whether the standard of "reasonable economic return" is appropriately stated in the definition of "retirement."

PGP proposes that BPA rewrite the second sentence of this section. PGP proposes the sentence read: "The customer will determine the reasonable economic return of the resource by adding the costs to the customer of replacing the resource with market purchases and the cost to permanently shut down the resource. The customer will compare that total to the cost of continuing to operate the resource." *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA agrees the sentence could be redrafted without losing its intent. BPA intends that the comparison be over the useful life of the resource and not shorter time periods. BPA modified the sentence to read: "The customer will determine the reasonable economic return of the resource by comparing the costs to the customer of replacing the resource with market purchases plus the cost to permanently shut down the resource against the cost of continuing to operate the resource."

Issue: Whether the determination of retirement should be left to local utility decisionmaking.

WPAG and Tacoma comment that BPA's proposed policy defining a commercially reasonable standard regarding the retirement of a resource infringes on the decision-making of local utilities. WPAG argues that BPA should not substitute its judgment for that of the utility. Retirement should include economic considerations. *WPAG, 5(b)9(c)-024.* BPA should return to the original language of statute and not attempt to apply tests to determine whether a resource is retired. Decisions about retirement should be made at utility level. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

BPA has not substituted its judgment for the utility in making decisions regarding its resource. BPA has established a standard that will determine when a utility may purchase Federal power to replace its resource. The utility is free to take whatever action it desires to take. The utility will make an independent decision. In the same vein, BPA must make an independent determination regarding its obligation to replace a retired nonfederal resource. Congress did not give the utilities an automatic right to take additional Federal power regardless of whatever action was taken by them. BPA believes

its standard regarding retirement of a resource is a commercially reasonable standard. Local utilities are still able to retire their resources for other reasons.

Issue: Whether the retirement of a resource should be considered a resource offer option.

Alcoa commented that the difference between retirement and out of market resources offered to BPA and all regional customers is unclear and could have very different results under the policy. The retirement test is subject to considerable dispute and could send the wrong signals to customers with borderline resources, particularly as the region becomes deficit. Treat retirement as a resource offer option. *Alcoa et al., 5(b)9(c)-004.*

Evaluation and Decision

BPA appreciates the concern raised by Alcoa in its comment. BPA believes that the retirement test in the policy is clear. Alcoa commented that the retirement of a resource should be treated as a resource offer option. That is, the owner should first offer the resource to BPA and all regional customers before they can retire their resource. BPA does not agree that owner must offer the resource before they retire it. Once the decision to retire a resource is made, that decision is one of permanent retirement such that the resource will not be made operable in the future. Customers will satisfy the criteria as described above. It is reasonable to assume that a customer might, before a resource is retired, seek to sell it to a willing buyer independent of a final decision to shut it down. But once the customer makes the final decision to permanently retire a resource consistent with the policy's criteria, there is not the additional requirement to make a resource offer.

(c) Definition of "loss of resource"

Issue: Whether the definition of "loss of resource" should include a "best efforts" standard.

Many parties objected to BPA's proposed continued use of a "best efforts" standard in conjunction with actions a customer must take to remedy a loss of resource or contract rights. Many parties commented that such a standard is economically burdensome or unreasonable, and others asserted it was commercially unacceptable or would produce absurd results. The PPC wanted the best efforts provision removed and would find a "commercially reasonable" actions standard acceptable. Alternatively they wanted it replaced with only a single prong test, that is, the loss being beyond the control of the customer. *PPC, 5(b)9(c)-012.* PPC and PNGC argue that BPA should not introduce a best efforts standard to repair the resource. They claim that "best efforts" overly burdens customers. PNGC suggested that the provision state that a "loss of a resource must result from factors beyond the reasonable control of the customer." *PNGC, 5(b)9(c)-018.* PGP commented that "best efforts" does not account for economic factors. BPA should use "commercially reasonable efforts." *PGP, 5(b)9(c)-021.* Tacoma commented that the "best efforts" standard assumes all efforts possible regardless of price. In Subscription

negotiations, BPA refused to accept best efforts for itself; customers should be treated no differently. *Tacoma, 5(b)9(c)-025*. The policy defines loss in terms of beyond the reasonable control of a utility and which cannot be remedied with best efforts. The standard is not economically rational and will lead to absurd results. *WPAG, 5(b)9(c)-024*.

Evaluation and Decision

BPA interpreted the language in section 5(b)(1) regarding what constitutes a loss of resource or contract for its initial contracts after the Act passed 20 years ago. BPA included the following language on removal due to loss of resource or contract rights in section 12(b)(8) of the 1981 contracts:

the use of such Firm Resource is permanently discontinued because of loss of resource or loss of contract rights resulting from factors beyond the reasonable control of the Purchaser and which the best efforts of the Purchaser are unable to remedy.

BPA is not proposing to change 20 years of consistent practice regarding the statutory discontinuance of a resource due to loss. Many of BPA's public utility customers commenting on the policy have proposed certain changes to the policy which do not provide certainty to BPA or its other customers who do not have nonfederal resources which are used for regional loads. In this policy BPA includes further definition of the standard established 20 years ago so that its public utility customers will understand the standard.

The PPC wants a single prong to the standard, that is, that the loss of a resource results from actions or events beyond the control of the customer. Although this standard is part of the current standard it requires no further action of the resource owner to cure the event and to maintain the availability of the resource. Further, as comments made by Grant and the PGP point out, a "loss" in their view would occur by virtue of an order, interim or final, on any aspect of the resource from environmental compliance to refit of machinery. This would be an open door to remove the resource, and cause BPA to acquire another resource or purchase power to replace the customer's loss. Those costs are not only unanticipated but would affect all of BPA's customers' rates. This is an untenable position. Therefore, something more than just an event is necessary. It is reasonable for a showing that the resource is actually lost, beyond a point of it ever again being used or available for load. It is not a secret that this standard has been in place for the past 20 years. And during these 20 years, there has been no demonstration that this standard is overly burdensome to the point that customers have been rendered economically harmed. BPA's standard has included the other prong of the customer taking actions and making best efforts to continue the resource in operation. This prong is a protection not only to BPA but to its other customers without resources.

WPAG argues that best efforts is not economically rational and will lead to absurd results. PGP argues that an economically reasonable standard such as "commercially

reasonable” actions should be adopted. Given that the plain meaning of “loss” is to no longer have the use of something, or to be destroyed physically, inclusion of a “best efforts” obligation is designed to have the customer demonstrate that the generating resource is beyond recovery or that the contract cannot be continued in any way. It provides assurance that the use of the resource is not there for the customer. BPA has not defined this provision of statute as an option from the market to provide the resource if it is advantageous in all circumstances to do so, nor as an economic advantage for the resource owning customer. Resource owners may decide to market or resell a resource, or to voluntarily terminate a contract, based on their view of economics. This policy does not prevent such decisions. However, this policy does say that once a resource is used for load it continues to be so used, unless the customer meets this standard. Federal power will only be available as replacement when the condition is met.

BPA does not believe the PPC and PNGC formulation meets the intent of the statute. Loss of resource has been defined by a best efforts standard for 20 years. PPC, PNGC, and other public utilities are trying to change the long established interpretation of the statute, not BPA. BPA has included an economic standard under retirement to address the concerns of public utilities that they would be forced to undertake actions that make no business sense. Further, BPA has historically used the best efforts standard for both generating resources loss and loss of contract rights.

Issue: Whether a partial loss of a resource constitutes a “loss of resource” under the statute.

The policy should allow customers to reduce their resource declarations for partial loss of resource in all events. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA recognizes that there may be circumstances where, due to final orders of a regulatory agency having jurisdiction over the resource and the customer which cannot be appealed, the resource capability may be reduced on a permanent basis. BPA also realizes that the reduction in power production may not be to zero. We also know that for hydro generation certain changes in operations due to fisheries, or other necessary changes, may result in only a shift of the generation to other periods and not in a loss of generation to the customer. BPA does not intend to have the latter changes result in replacement by BPA of the customer’s generation previously available. However, if a permanent and persistent reduction to the generating capability occurs which the best efforts of the customer are unable to remedy there would be a partial reduction which could be replaced by Federal power.

Issue: Whether Grays Harbor PUD’s sale of its share of the Centralia plant is a loss of resource.

Grays Harbor commented that BPA had not responded to its earlier letter regarding whether its decision to sell its share of the Centralia power plant based on the

representations of the future actions of other owners constituted a loss of resource. Grays Harbor stated that because it was a minority owner in the Centralia plant its only option was to agree to the sale. Grays Harbor claims this occurrence was beyond its reasonable control. *Grays Harbor PUD, 5(b)9(c)-017*.

Evaluation and Decision

Grays Harbor requests BPA to determine that the share of Centralia generation owned by it, some 52 average megawatts, was lost due to the sale of Centralia plant by its owners. Grays Harbor claims the reason for the loss is that the commercial sale of the resource was beyond the control of Grays Harbor as a minority owner in the plant. It could not prevent the sale and therefore “lost” the resource. Grays Harbor asks that BPA affirm that it has lost the resource and that BPA will replace the “loss” with an increase in the net requirements obligation of BPA to meet Grays Harbor’s firm regional load. As analyzed below, BPA cannot do this.

BPA notes that this is a generation resource used for load preceding the Northwest Power Act for most of the owners of the resource and thus is a section 5(b)(1)(A) resource for those owners. For Grays Harbor, its share of power generated by Centralia was not needed immediately and was dedicated and used for load after the 1981 contract took effect. In 1998, Grays Harbor asked to have Federal power replace the resource and BPA removed the resource and provided power based on subsection 12(b)(9) of the contract permitting customers to remove resources when BPA had “surplus” power on a planning basis for an operating year under the contract. When BPA agreed to the removal of Centralia from Grays Harbor’s FRE BPA expressly informed Grays Harbor that ownership of the power remained with Grays Harbor and as such the utility continued to be subject to the Northwest Power Act regarding its future disposition. Subsequently the owners, including Grays Harbor, determined that they would either have to install additional expensive equipment at the plant to meet Clean Air Act standards or to sell the plant. They decided to offer the plant for sale and have now sold the plant.

Any determination for Grays Harbor would affect the other owners who share in the resource. The plant has continued to operate and has been used to meet the load of the former owners, except for Grays Harbor. To determine that the Centralia resource is “lost” to Grays Harbor but simultaneously require the other owners to apply it to their loads would be an anomaly in the extreme. The mere fact that a party is a minority owner is not a basis for determining that the event of sale is “beyond the control” of the customer. To do so would excuse any minority owner in a plant with shared ownership of its statutory obligation to continue to apply a resource used to serve its regional load. There would then be little reason not to permit removal based on a sale driven by the majority owner for any plant. In that case, the minority owner obtains the benefits of the sale and a risk free, no cost alternative to place its load on BPA. The cost exposure of such a proposition to BPA for replacing nonfederal generating capability is large.

Notwithstanding its minority ownership interest, a minority owner is an owner and assumes the risk of certain actions taken by all owners, including those which may affect

its interests. For purposes of requesting Federal power to replace its sold ownership interest, a minority owner may not erect a wall to shield itself from the actions of the other owners. As an owner Grays Harbor had the right and duty to see that sufficient safeguards were placed in the ownership agreement, or that it under took those risks in exchange for the benefits received. Here, Grays Harbor has benefited from both the production of power by the resource and from the sale. Grays Harbor should expect to face the consequence of the sale. BPA will not provide a further benefit to the other owners of Centralia or to Grays Harbor for the sale of the resource by selling additional Federal power to them at below market rates. The sale of a resource or a contract for power on the market is in no way a loss of the resource or a retirement of a resource. Rather, it is the direct opposite of those conditions.

Issue: Whether state or Federal regulatory changes affecting resource operations constitute “loss of resource”.

PGP comments that the language allowing removal of a resource if that loss is the result of “orders of a State or Federal agency affecting operation of the resource” is too restrictive. BPA should account for losses due to changes in resource made by something less than an order and should substitute “requires” for “orders.” The PGP notes that they and the Corps of Engineers change project operations based on requested operations by agencies with regulatory authority over the projects, although they are not ordered to comply. Their projects are also affected by actions taken by upstream operators based on similar requests. PGP commented that the policy needed to account for such loss in capability. *PGP, 5(b)9(c)-021*. Grant argues that it would not be able to purchase preference power to make up for generating losses at its projects caused by operations at Federal projects for fish protection. *Grant, 5(b)9(c)-011*.

Evaluation and Decision

BPA understands that there may be changes to the operation of a customer’s resource due to requests from Federal agencies for fisheries operations. Not all of these changes result in a permanent reduction in the power production capability of the mid-Columbia hydro resources. BPA does not intend that such changes to operations that merely shift power production from one time period to another to create a loss of the generating capability. In that case, the generating capability remains unchanged. In contrast, if the customer can demonstrate a permanent loss of planned generating capability at a resource due to requested operations by a State or Federal agency, then the policy would allow a reduction equal to and in the time period of the loss, *i.e.*, power production is not shifted from one time period to another. In this case, a customer may request additional amounts of Federal power to replace the part of the customer’s power production that is lost. BPA will clarify that a permanent loss in the planned capability of a resource based on requested operations by a State or Federal agency is a partial loss of resource. Since non-power operations of the Columbia River take priority over power operations, BPA will not require customers to use their best efforts to challenge those orders or requested operations from agencies with a management role in the river.

Issue: Whether the 5(b)9(c) policy’s list of events resulting in a “loss of resource” is exclusive.

The PGP asked whether the list of events describing loss of resource was meant as a list of inclusion or a list of limitation. The use of the word “including” is unclear as to whether it means limitation or inclusion. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA intended this list of events to be inclusive, not limiting. The policy now states that the list of events “include but are not limited to” such events.

Issue: Whether the definition of “loss of resource” should include an economic test as does the definition of “retirement”.

PGP commented that the loss of resource standard should include the economic test of retirement. They commented that they should not be required to fix a damaged resource where the cost of repair exceeded the reasonable economic return over the remaining life of the resource. They claim that the requirement that a resource be destroyed is arbitrary.. Determination of loss due to destruction should be similar to loss due to retirement. *PGP, 5(b)9(c)-021.* They urged BPA to include an economic test in loss of resource.

Evaluation and Decision

BPA has defined “loss” consistent with the current contract and the plain meaning of the term. If all terms in the statute had the same meaning then the words used would be surplusage. In statutory construction words are to be given their plain meaning and there is no economic component to the definition of loss. It means destruction of an object or thing. The loss of resource standard requires the customer to develop the plans to repair a damaged resource. If the cost of implementing those plans exceed the reasonable economic return over the remaining life of the resource, then the customer can make a showing to BPA that the resource should be removed under the retirement standard.

2. Statutory discontinuance due to loss of contract right

Issue: Whether the 5(b)9(c) policy criteria for statutory discontinuance for loss of contract right should include a best efforts standard.

Many parties objected to BPA keeping its best efforts provision for power supply contracts that are firm resources used to serve a customer’s regional retail load. WPAG argued that the policy imposes unrealistic standards on a utility without regard to adverse economic or operational consequences to the utility and its customers. WPAG contends that BPA is repealing by policy a right afforded utilities by statute. WPAG states that BPA should permit loads served by such resources to return to BPA for their power supply. *WPAG, 5(b)9(c)-024.* EPUD commented that the best efforts test implies that a

customer must take whatever price a nonfederal supplier is offering during negotiations or they run the risk of BPA decrementing their load. *EPUD, 5(b)9(c)-019*. PGP and Tacoma commented that the best efforts standard does not account for economic factors and recommended that BPA use “commercially reasonable efforts.” *PGP, 5(b)9(c)-021; Tacoma, 5(b)9(c)-025*. PPC opposes the use of the best efforts standard and the list of exclusions to contract rights. *PPC, 5(b)9(c)-012*. PNGC commented that this provision is too restrictive on customers and eliminates economic analysis that should be part of contractual decision making. *PNGC, 5(b)9(c)-018*.

Evaluation and Decision

As discussed above, the use of power purchases under a contract or the purchase of generating capability from a resource owner are firm resources which a customer can use to serve its regional load. Congress considered power purchases as resources and BPA has treated the loss of contract resources as similar to loss of generation. As mentioned previously, in the mid-1990s many of BPA’s customers sought to purchase their power supply from the market because the price of such power was at or below BPA’s posted rates. Since that time, however, BPA has observed the price of power available in the market increase. Today, the market is a more viable and economic resource than it was in 1981 when BPA’s initial contracts were executed. BPA recognizes, as result of market transformation, that BPA’s customers desire greater resource flexibility based on their commercial and economic interests. Nonetheless, to the extent a contract resource is available to the customer it is obligated to continue to apply it.

BPA has had a policy that before a customer can get Federal power to replace a contract resource it has used for load, it must show that it has lost the right to the supply of power for which it contracted. The customers have had a best efforts obligation to take actions to maintain their right to a power supply under contract. Actions such as replacement by the supplier or enforcement of specific performance in the event of breach by the supplier are examples of the ability of a customer to use best efforts to continue its right to purchase under contract. Also, exercising rights under the contract which the customer has to ensure a supply would be another. BPA does not dictate the business choice a customer may make regarding its contract. BPA will determine whether or not Federal power will be sold as replacement for a contract resource that is terminated prior to expiration of the contract, or not continued as a supply when that right exists by the terms of the contract.

Contrary to PPC’s comment, inclusion of a customer’s best efforts as a prong of the test for removal of the contract resource is not new and was part of the terms of the utility contract in 1981. When entering into a new contract for the purchase of power EPUD and PNGC point out a customer is well advised to consider its pricing terms. Once the customer has executed the contract and has applied that power supply to load, then BPA does not agree that price is a consideration for relieving the customer of its obligation under statute to supply that power to its load. BPA has set out the policy reasons for having a customer use a “best efforts” consideration for generating resources. This consideration also applies to contract resources. BPA recognizes that contracts have

legal distinctions from plant ownership and operation. BPA also understands that a contract may not be performed by the supplier and that BPA does not control the terms of any contract between a customer and its supplier. However, BPA relies upon the customer to obtain the performance of its power supply contract and expects the customer's power supply, obtained under the contract, is used in load. Although there is a distinction between the two types of resources, BPA requires the same degree of certainty for planning and costs regardless of the type of resource the customer applies to its loads.

Contrary to WPAG's assertion that the policy repeals the right by utilities to obtain Federal power, the policy reaffirms the current standard for loss of contract and does not ignore the possible economic risk to a utility's consumers from bad economic choices of BPA's customers. The policy does say that those risks are taken by the customer in securing a nonfederal power supply. Just a few years ago, many of BPA's customers were signing contracts at an index price based on their belief that the market price for power was falling. BPA is not required to relieve a customer of its economically bad choices and place additional costs on BPA's other customers. BPA believes a customer should use any contract resource that it has dedicated for its full term of the right to the supply.

Issue: Whether the contractual right to renew or extend contract resources is an appropriate standard for measuring statutory discontinuance for loss of contract right.

Forest Grove commented that the policy penalizes customers that may have resources which, due to contractual or economic factors, are no longer viable choices for meeting their load. Forest Grove finds it problematic to require customers with contractual arrangements to exercise any first right of refusal such contracts may contain for continued firm power purchases. Forest Grove contends that it places utilities in an untenable position of having to choose between an unfavorable contract renewal, or face economic penalty from BPA. As a result, suppliers will adjust their renewal strategy accordingly. *Forest Grove, 5(b)9(c)-002*. Milton-Freewater commented that its share of output from the Priest Rapids Dam will likely expire within the contract period of its next BPA power sales contract. Milton-Freewater states that it will need an additional amount of power from BPA "at the negotiated PF rate that we are purchasing the rest of our BPA power at." *Milton-Freewater, 5(b)9(c)-013*. PGP suggests deleting the last sentence of this provision because it claim it is unreasonable. PGP stated that the provision ignores normal business considerations and that BPA does not have the authority to require uneconomic decisions as a consequence of purchasing Federal power. The policy should include the loss of rights in the participation agreements associated with Mid-C resources as loss of contract, not loss of resource. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

Section 5(b)(1) of the Northwest Power Act requires that nonfederal resources customers dedicate to use for their loads are to continue to be used to serve load unless one of five conditions has been met. The issue raised by Forest Grove is whether there is a loss of

contract rights when a customer with a contract which includes a right to continue or renew the power supply does not exercise such right upon the expiration of the term of contract. While Forest Grove and PGP believe that BPA's policy creates an economic penalty for customer with such rights, BPA believes that failure to exercise a right to the power supply is not a loss of right and no loss of supply has occurred. BPA reads the provision on loss of contract rights to be a loss of the right to obtain a supply of power. A right of first refusal prevents the seller from offering the power supply to another purchaser. A customer with such a right is contractually assured of the continued availability of that particular supply of power. It is within the reasonable control of the purchaser to exercise and thus continue use of the nonfederal resource. Failing to exercise a right of first refusal to buy the supply is a voluntary decision that does not constitute a loss of resource or loss of contract rights.

Customers are obligated to continue using available resources. If they voluntarily decide to forego continued use of the resource then they are obligated to replace it with another nonfederal resource. BPA believes Congress intended that nonfederal resources would continue to be used until the power supply is no longer available to the customer to meet its load. Customers have the ability to make viable, economic decisions. They have always had a right to replace a nonfederal contract resource when it is determined uneconomic with a more economical resource. Simply because customers now view BPA's federal supply as more economical than their current nonfederal resources does not give them the right to discontinue use of those resources. Requiring customers to exercise a first right of refusal places the holders of contract resources in the same place as owners of generation who can only retire their resource when the cost to operate the resource exceeds the cost to purchase replacement power in the market.

This policy does not ignore a utility's normal business considerations or risks. The policy places them squarely on the customer if it has a continuing supply of power available by the exercise of a contract right or by operation of resources. As to the PGP and Milton Freewater comments on the mid-Columbia resources BPA is not determining at this time whether those resources will no longer be available to the customer on expiration since the right of first refusal of the purchasers under those agreements has not been adjudicated. FERC has clearly stated throughout recent proceedings regarding the offering of power from the Priest Rapids project that the current purchasers' rights of first refusal under the existing contracts will be determined in the future. If the parties to those contracts have the right to continue to use the power supply, and if they choose on their own not to do so, then they have not lost any right which constitutes a loss beyond the control of the party and which their best efforts could not cure.

The policy allows for the Administrator's consent to the permanent discontinuance of contract resources on a case-by-case basis under specific circumstances. Where a customer with a right to renew or extend a contract can demonstrate that the terms under the extended contract or replacement contract for the purchase of the same power as sold under its existing contract will so substantially and materially change as to deny the purchaser of the basic benefit of the bargain, then BPA will consider such a change to effectively constitute a loss of contract rights. In that case, the Administrator may grant

consent to a customer's permanent discontinuance of its contract resource upon its expiration.

Issue: Whether the price of nonfederal power under contract renewal provisions should be a factor in determining statutory discontinuance for loss of contract right.

Canby in its comments argued that it has a contract with PGE that does not have firm prices and binding contract beyond 2001. Although Canby does have a right under the contract to extend, it is conditioned upon the price for such power in the future. Canby argues that the obligation to offer power at some price does not meet BPA's definition of an assurable power supply. Canby notes that BPA's White Book does not show the Canby-PGE contract as a resource after September 30, 2001. Canby argues that a contract with no binding obligation regarding the price of service constitutes a loss of contract rights. *Canby, 5(b)9(c)-007.*

Evaluation and Decision

Canby's comment concerned a particular contract which it has with PGE. The issue raised by Canby is whether a right of the supplier to reprice a contract service without restriction constitutes a loss of contract. As stated above, BPA believes Congress intended the statute to address the assurance of a right to a power supply and not the economics of that supply. The concern of Congress when the Northwest Power Act was passed was in finding a mechanism to ensure sufficient power was available for loads in the Pacific Northwest to be served. This includes the available power supply provided by both Federal and nonfederal resources. Congress intended that if a customer has a right to a supply of power, that supply would continue to be used for load if it had been dedicated for load. Only by ensuring the availability of supply from both Federal and nonfederal resources, and balancing them, could the intent of Congress that regional retail loads be met be achieved.

Issue: Whether the 5(b)9(c) policy contains the appropriate tests to determine loss of contract right.

PPC proposes that BPA shorten the definition of loss of contract to any event where a customer experiences a permanent loss of contract right. *PPC 5(b)9(c)-012.* PPC argues that BPA should not introduce a "best efforts" standard to maintain a contract. PPC also opposes BPA's list of exclusions to contract rights and believes such clarification is inconsistent with BPA's stated standard that a contract is lost "due to factors beyond the reasonable control of the customer and which the best efforts of the customer are unable to remedy." *Id.* EPUD states that BPA should either delete the list of exclusions or further clarify the policy. *EPUD, 5(b)9(c)-019.* Tacoma commented that it does not believe BPA has a "right of discovery" regarding a customer's right to exercise renew a contract, right of first refusal, and changes in price. Tacoma suggests that such a right connotes BPA's exercise of market power over customers. *Tacoma, 5(b)9(c)-025.* EWEB commented that a customer may not renew a contract or exercise a right of first refusal for many reasons, such as changes in the quality or quantity of

power, inflated price, or other unreasonable contract terms. EWEB believes that BPA should not interject itself into customer's bilateral purchase negotiations and should not restrict the statutory right to purchase Federal preference power upon the loss of a contract (contract for Priest Rapids hydro). *EWEB, 5(b)9(c)-028*.

Evaluation and Decision

The PPC proposes a single prong as a test for loss of contract right. The same reasons for not having a single prong test as given above for loss of resource apply here. As stated above on loss of resource, such a proposal does not meet the policy interest to ensure a power supply under contract continues until it expires. Loss of contract has been defined by a best efforts standard for 20 years. PPC's proposal would allow voluntary terminations of contracts to be considered a loss of contract. PPC and other public utilities are trying to change a long established interpretation of the statute, not BPA.

BPA agrees with EPUD and the PPC to the deletion of the list of exclusions stated in the proposal. Instead of providing instances of application, the policy will express the standard only. BPA has also clarified the standard expressed in the policy. As noted above, BPA has included in the provision on loss of contract right an allowance for the Administrator to grant consent to a customer's removal of a contract resource on a case-by-case basis if it is demonstrated that a customer has effectively experienced a loss of its contract rights under a successor contract. The policy requires that there be a substantial and material change in the terms of the successor contract which deny the basic benefit of the bargain to the customer. BPA has also included an economic standard under retirement to address the concerns of public utilities that they would be forced to undertake actions that make no business sense.

Tacoma questions BPA's right to obtain information regarding its resource contracts with other suppliers. As BPA has discussed already, BPA has a responsibility to determine the net requirements of customers requesting power under section 5(b) of the Northwest Power Act. It is incumbent upon BPA to ascertain the use and availability of nonfederal resources that customers dedicate to their load, including contractual resources. BPA's interest in the information is to ensure that BPA does not provide Federal power to replace nonfederal resources whose use should continue. BPA is obligated to determine whether a contract resource meets the statutory standard of loss of contract right. A customer would only provide information on its contract if it were claiming that it had lost its rights to a power supply.

Regarding EWEB's comment that BPA not restrict the right to buy Federal power, BPA notes that if the customer has a resource then it is the customer's statutory and contract duty to supply power available from such resource. That requirement, if it can be called a restriction, was imposed by Congress when it obligated BPA to only supply power in excess of the customer's resources. BPA's last contract and its policy operate accordingly. Nor is BPA interjecting itself into the bilateral negotiations of the customer and seller. At the same time, however, BPA does not believe that a customer suffers a loss of contract rights by simply choosing not to exercise a nonfederal power supply.

Issue: Whether the 5(b)9(c) policy should include an economic test for resources under PURPA.

PacifiCorp argues that BPA should create an economic test to allow PURPA Qualifying Facilities (QF) contracts to be terminated and the load returned to BPA requirements service. PacifiCorp argues that customers should be able to terminate any contract with costs above market. PacifiCorp urges that BPA consent to the removal of such QF contracts even if BPA does not agree they fit within the definition of statutory discontinuance. BPA should include terminated QF contracts or permit removal of such resources upon contract termination based on satisfaction of a simplified economic test that QF contract constitute an above market resource. *PacifiCorp, 5(b)9(c)-016.*

Evaluation and Decision

BPA understands PacifiCorp's concern that some QF contracts have resulted in uneconomic purchases under today's market conditions. However, the fact that the price may be above market is not a basis for determining that the power supply which the contract represents is lost to the customer. One of the purposes of PURPA is to foster development of small renewable resources which the local utility must take. With the opening of the wholesale power market, such power purchases may no longer be necessary. Because the price of a PURPA resource may be above market does not give a basis to support a finding of a loss of contract rights. BPA does not agree that Congress intended in the Northwest Power Act that BPA regionalize the cost of these contracts by allowing customers to purchase requirements power to replace them. As noted previously, if a customer is able to get out of their uneconomical contracts they may do so. The customer can replace such a contract with any other nonfederal resource it determines is more economical. However, BPA does not adopt a policy that it will replace those contracts with Federal requirements service if terminated early.

Issue: Whether an economic test should be included in the determination of whether an extension of a contract is a loss of contract right.

PNGC commented that any extensions of contracts should include a component of economic reasonableness. PNGC argues that an option to purchase at market is of no value and should not be treated as a firm resource. *PNGC, 5(b)9(c)-018.*

Evaluation and Decision

PNGC argues that resources priced at market should not be considered a resource. BPA views any right to obtain a supply of power under contract as a resource which may be used for load. If the customer uses that power supply for its load and the contract includes an option to extend the power purchase contract, then the supply is not lost since the seller must offer the power to the customers. BPA does not agree that its policy should be based on the short term economic view that many parties share. The market

has indeed become a viable resource, as was manifest in the mid-1990s when many of BPA's customers chose to rely upon the market as a resource when it was less expensive than BPA's posted rates. An option to buy "at market price" may be a purchase which is below BPA's average price to public utilities for requirements power service. It would be contrary to recent experience to conclude that such options "had no value."

Regardless, BPA does not view price as a reason to conclude that a contract right is lost if such contract still gives the customer a right to a supply of power to be used for load. BPA has included a provision regarding Administrator consent to remove the contract resource on a case-by-case basis, if the right to extend the contract is based on pricing and other terms and conditions that are substantially and materially different from those in the original contract.

Issue: Whether BPA power purchase actions should be considered when making determinations under this policy.

The PPC commented that BPA's own actions of buying power for its other customers will cause market based contracts to increase while prohibiting preference customers from purchasing lowest cost power from BPA. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

PPC's comment relates to BPA's proposed power purchase for its DSI customers and for other planned power purchases during the rate period. PPC has raised its objections in comments made on the Subscription Strategy in 1998 and in the recently concluded BPA power rate case. BPA has previously determined that it would provide a specific level of firm service to the DSIs and include purchases in its rate case. This issue is outside the scope of this policy. PPC's objections have been made in the proper forum for BPA's consideration.

Issue: Whether inaccuracies contained in utility customer FREs should be corrected when implementing the 5(b)9(c) policy.

PPC commented that the distinction between generating resources and contractual resources in this provision is different from the provision contained in FREs. PPC observed that the FREs inaccurately identify resources. The policy should be implemented to reflect that actual circumstance rather than any mislabeling in support documents. *PPC, 5(b)9(c)-012.* A problem exists with labeling of mid-Columbia resources in the current FRE. *PGP 5(b)9(c)-021.*

Evaluation and Decision

As part of the implementation of this policy BPA will review the FREs of its customers. If a particular firm resource has been identified incorrectly as generation owned in contrast to generating capability purchased under contract, BPA will attempt to clarify the classification with information from the customer. However, the basic principles of this policy will apply to either type of resource such that resources or rights to a power

supply will be treated as continuing to be applied to load absent an event which meets the above tests.

C. Use of New Renewable Resources to Serve Retail Firm Power Loads

Issue: Whether the 5(b)9(c) policy should retain the 200 MW new renewable resource limit.

Klickitat commented that BPA should eliminate the 200 MW cap on renewable resource additions. Klickitat argues that eligibility for the renewable resources exception should be negotiated by contract and not tied to the conservation and renewable resources discount. The 200 MW limit will inhibit development of renewables, especially if it would be in place for up to 20 years. New low impact hydroelectric resources should meet standards for the conservation and renewables discount. BPA should provide a definition of renewables eligible for discount, and contractual flexibilities should be specified by contract, not by rate schedule, to give assurance to customers. *Klickitat, 5(b)9(c)-010.*

Evaluation and Decision

Under this policy BPA expects to have some certainty regarding the resources that a customer will apply during a rate period of five years and over the term of the contract. Only by having a degree of certainty as to what resources will be applied by customers is BPA able to know its contract obligations with a sufficient degree of reliability for its rates and resource planning. An unlimited amount of resource additions for renewables lends to uncertainty and unpredictable costs.

BPA included the renewable resource exception as an incentive to customers to develop new renewable resources. BPA has included the 200 MW cap to ensure that any cost consequences on other customers are limited in scope. Klickitat's proposal to include low impact hydro from existing resource could expose BPA customers to potentially large cost impacts from existing resources being removed from service to load which BPA would then have to replace with market purchases. BPA's proposed policy is intended to get customers to make investments in new resources. It does not preclude marketing their resources in emerging green resource markets. BPA is granting its consent to the permanent removal of a renewable resource that was new and added under this provision. The customer's BPA contract will specify the term and removal date of the renewable resource from service to the customer's load. When removed, the customer may replace it with Federal power.

Issue: Whether the term "new renewable resource" is adequately defined in the policy.

PPC and PNGC commented that the term "new renewable resource" is not adequately defined in the policy. PPC recommends that BPA define a new renewable resource as a renewable resource project or a new addition to an existing renewable resource project, or the electricity produced by the project, that is not in operation as of May 1, 1999. PPC

claims this definition is consistent with the definition developed for the BPA conservation and renewables discount. *PPC, 5(b)9(c)-012*. PNGC requests that BPA define “new renewable resource” before it sets the eligibility standards for conservation and renewables discount. Renewables that find a buyer should qualify as well as those of higher cost. *PNGC, 5(b)9(c)-018*. EPUD believes that the definition of which renewables qualify should be precisely consistent with the definition used in the conservation and renewables discount. *EPUD, 5(b)9(c)-019*.

Evaluation and Decision

BPA will use the definition and standards developed for the conservation and renewable resource discount. If there are no renewable resources included in the discount, this provision would not apply. PPC’s comment does not clearly explain the issue they seek to address. The Regional Technical Forum is the appropriate forum for identifying resources eligible for the conservation and renewable resources discount.

Issue: Whether new renewable resources added after reaching the 200 MW limit should be considered under the 5(b)9(c) policy.

PPC comments that, while they support some limit on the megawatts covered by the exclusion, they believe BPA should consider additional resources on a case-by-case basis. We recommend BPA consider the qualification of renewable resources over the 200 MW limitation on a case-by-case basis. *PPC, 5(b)9(c)-012*. Emerald PUD questioned why BPA needed to limit the renewables exception to 200 aMW and felt BPA should be open to having more than 200 aMW. *EPUD, 5(b)9(c)-019*.

Evaluation and Decision

BPA will allow use of this exception to permit customers to add new renewable resources beyond the 200 aMW limit on a case-by-case basis. The policy now provides that once the 200 aMW limit is met, a customer that wants to use a new renewable resource can do so as long as BPA agrees in writing.

Issue: Whether conservation should have the same status as renewable resources under the 5(b)9(c) policy.

Tacoma comments that conservation should be given the same status as renewable resources regarding relief from take-or-pay. *Tacoma, 5(b)9(c)-025*.

Evaluation and Decision

BPA included a limited exception for new renewable resources to encourage their development. BPA does not believe this exception could be managed to create changes in a customer’s right to purchase Federal power for conservation programs without unacceptable levels of administrative costs.

Issue: Whether this provision of the 5(b)9(c) policy should refer to “firm power load” rather than “retail firm power load.”

The PGP renews its comment that the policy refers to “retail firm power loads” whereas the statutory language is “firm power load.” PGP states that use of retail firm load may reduce some customers’ net requirements if their regional firm power load is greater than their retail load. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA has previously responded to the PGP’s comment. BPA will use the terms “retail firm power loads” when referring to a customer’s firm consumer loads in the region which it has an obligation to serve. Utilities that BPA makes sales to for requirements are those that are in the public business of selling and distributing to retail consumers. 16 U.S.C. 832c(c). Moreover, BPA’s organic statutes refer to the retail service of BPA’s utility customers. For example, when purchasing Federal power to serve their retail firm load, BPA’s utility customers are required to provide BPA their retail rates charged to their retail firm load to show that such rates are reasonable and nondiscriminatory. 16 U.S.C. 832d(a). These statutory provisions evince BPA’s obligation to provide Federal power to meet the customer’s net requirements based upon its regional retail firm load.

D. Changes in the Amount of Federal Power Purchased During the Term of a Contract

1. Annual changes in loads and resources used to determine net requirements

Issue: Whether it is reasonable for BPA to establish net requirements on an annual basis through annual reporting of a utility customer’s loads and resources.

Grant argues that BPA has no legal obligation to limit its sales to a customer’s net requirement on an instantaneous basis. Grant argues that BPA’s obligation under section 5(b)(1) establishes a minimum, not a maximum, sale. Grant would not object to an annual basis to determine net requirements using reasonable forecasts. Annual determination of net requirements is reasonable, but not instantaneous determinations of net requirements. *Grant, 5(b)9(c)-011.*

Evaluation and Decision

BPA disagrees with Grant’s interpretation of section 5(b)(1). If Grant’s comment means that BPA is not limited to selling only section 5(b)(1) requirements power to its customers and may sell other classes of power such as surplus power, then BPA does not disagree. However, BPA believes the statute sets a minimum and a maximum obligation for power sold to public and private utilities for service to their retail firm power loads in the region. The maximum amount of power which may be sold as section 5(b)(1) requirements is delineated by the regional retail consumer load of the customer on any

hour for which a customer has no resources. This type of obligation is exemplified by BPA's full service product. Further, BPA must balance its total load service obligations to all customers so as to meet those loads. BPA may use a different basis for calculating the planned retail load of a customer which is net of its resources if the customer is not taking a load following product from BPA. A requirements product of this type is BPA's firm block product which is based on an annual amount of retail load, net of the customer's planned firm nonfederal resources. BPA's load obligation to this customer does not exceed the fixed amount of the block in an hour or for a year because the customer provides the remainder of the resources necessary on a planned basis to meet load and provides its own load following service. There are other variations between these two bookend products. In no instance, however, does BPA sell requirements power above an amount of net firm load for the year to the customer.

If BPA has power in addition to the amount of power needed to meet its firm load obligations, then BPA may market that power which is in excess of its load obligations. BPA believes that any sales under section 5(b)(1) for any purpose must be reasonably based upon a customer's actual hourly or planned net loads and related to serving those loads. BPA does agree with Grant that such net requirement does not need to be established on an instantaneous basis, although for BPA's full service customers such service is on an instantaneous basis. BPA believes establishing the net requirement on an annual basis using reasonable forecasts of planned loads net of a customer's planned resources meets the intent of the statute. BPA offered products in its initial power sales contracts based on both types of service, planned and actual loads.

Issue: Whether a BPA annual determination of a customer's net requirement is consistent with Northwest Power Act section 5(b)(1).

PGP argues that BPA has no legal right to make an annual determination of a customer's net requirement. PGP claims this requirement is inconsistent with section 5(b)(1). BPA should revise the policy to comport with section 5(b)(1) and make a single determination of a customer's net requirement only at the time when the customer requests and BPA offers a contract for the sale of Federal power, not annually. Delete the whole section. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA disagrees with the PGP's interpretation of BPA's statutes. Even prior to the Northwest Power Act, BPA did not sell unlimited amounts of power to public utilities to serve load which was not related to their retail consumer loads. The purposes of the Bonneville Project Act against monopolization of power, widespread use and providing power for the benefit of domestic and rural consumers suggest that BPA must balance the requests for power service for the loads of its customers. *See* 16 U.S.C. 832a(b) and 832c(a). Section 5(b)(1) states that BPA is to offer a contract for the sale of power for the regional firm loads of a customer to the extent they exceed the customer's resources. Thus, a calculation of the customer's regional consumer loads, and customer resources used to serve those loads, must be made, and BPA's service under contract is limited to

those amounts. Although BPA might do a single calculation at the start of the contract and not look back, BPA and its customers realize that loads change over time and particularly for contracts of five, ten, or twenty years, the load in the first year of the contract would not likely be the same in the last year.

Further, BPA's initial power sale contracts in 1981 included provisions for measuring, and monthly billing review of, the power taken and annual changes in a customer's loads as well as its resources. The type of review varied somewhat depending upon the power products purchased by the customer under that contract. For Subscription contracts customers have requested a variety of power products, and BPA's review of the net requirements load of a customer will depend upon they type of products taken. However, at a minimum an annual review will occur and, if necessary, an adjustment to BPA's load obligation made. Only by so doing will BPA ensure that it is not overselling or underselling to a customer consistent with the terms of its contract and statute. This is also an assurance to BPA's other customers that one customer is not exceeding its load service and affecting the cost of BPA acquiring or purchasing additional supplies of power. Therefore, BPA will not change its policy of an annual, monthly or hourly review of net requirements load, as appropriate under the contract with the customer.

Under section 5(a) of the Bonneville Project Act, the Administrator may include in power sales contracts such terms and conditions and in such manner as he or she may deem necessary, desirable or appropriate. 16 U.S.C. 832d(a). If BPA were selling all of its Federal power based on the actual loads of its customers, BPA would not necessarily require an annual review. Since a number of BPA products are based on load forecasts and planned forecast of customer resources, the amount of load any one customer may serve from year to year is very uncertain in a deregulated industry environment. BPA finds it is necessary to review each customer's actual circumstances on a minimum of a yearly basis.

Issue: Whether BPA has required sufficient information from utility customers for the annual review.

The PPC is not opposed to annual reports from customers to BPA, as long as information requirements are kept minimal. *PPC, 5(b)9(c)-012*. Tacoma commented that the information provided for the annual review should be no more detailed than the information needed for the initial determination. For products purchased, annual information requested by BPA should be in no more detail than that required to determine initial net requirements so as not to expose market sensitive material to competitors (BPA). No determination is needed until 5(b) loads exceed firm capability of the FBS. *Tacoma, 5(b)9(c)-025*.

Evaluation and Decision

BPA has identified the information necessary in order to administer its contracts and implement its statutes. If a customer feels the information is market sensitive, the customer may request that the information be treated in a confidential manner, consistent

with the requirements of the Freedom of Information Act for marking and identifying proprietary or business sensitive information. Such additional agreements on confidentiality as may be mutually agreed upon between BPA and the individual customer are possible.

2. Customer removal of market resources and generating and contractual obligations to maintain net requirement

Issue: Whether the 5(b)9(c) policy should define the term “market purchase”.

PPC commented that the policy must define what is meant by a market purchase. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

BPA has addressed the meaning of market purchases above in subsection III.A.1(d). The market purchases that BPA refers to in this provision are those power purchases a customer contractually commits to make on a planned basis to meet a portion of its load instead of placing a requirements load on BPA. These market purchase commitments would be based on the difference between the customer’s planned BPA power purchase and the customer’s remaining planned loads reduced by the planned amount of specific nonfederal generation or contract resources. The remaining amount of load will be met by the customer’s market purchase commitments. If a customer purchases the full service net requirement product, it would have no market purchases in this category. Since market purchase commitments are an amount of power purchased on a planned basis, they are different from the load following or balancing power purchases a customer must make to ensure that it meets its load hourly. Such balancing purchases are necessary for any product which does not include BPA load following services, such as the Slice product which provides energy in a shape different than its load.

Issue: Whether the 5(b)9(c) policy should require that the removal of resources for reductions in load be made in the shape of the load reduced.

PGP argued that any policy requirement that a customer resource be removed from load service in the shape that caused a customer’s net requirement to differ from a customer’s contracted amount of Federal power was an unwarranted intrusion into their affairs. PGP asked BPA to delete the whole section for the same reason given in response to III.D.2. (annual reports). PGP asks that, if not deleted, at least delete reference to “shape” of power. It may not be possible to match the shape of prospective rights to purchase Federal power with original contract rights to purchase Federal power. Any reduction by the customer of a generating or contract resource must be at the customer’s discretion pursuant to nonfederal contract rights. This is especially critical to Slice purchasers. *PGP, 5(b)9(c)-021.*

Tacoma argues that the customer’s resource which is removed should be based on the product purchased. If the total section 5(b) load obligations of BPA exceeds BPA’s firm

capability, the amount and shape of power removed should be dictated by the product purchased. Contractual resource removals should be conducted under same terms and conditions as resource additions. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

Because section 5(b)(1) limits the amount of power BPA may sell to a customer to the net of its loads less its resources used to serve its load, BPA will review the loads and resources of a customer on a minimum of an annual basis. If there is a change in the net load amount that BPA would serve for the next year, BPA either has to reduce its sale of power to the customer equal to the load reduction, or it may permit the customer to remove a resource which the customer was using to serve its loads. Under the 1981 contract, a customer could choose to remove a resource if BPA was in a planned surplus condition for the upcoming contract operating year or years. This policy adopts the approach of having the customer remove its market purchase commitments, *i.e.*, its planned power purchases, in the event that the customer's retail load is reduced.

The policy specifies that were BPA to reduce its power service to the customer where BPA is not following the load of the customer on an hourly basis, then BPA would make the reduction by amounts which the shape of the power provided exceeded the customer's net requirement. The policy states: "Such removal shall be in an amount and shape equal to the difference between the amount of Federal power a customer can purchase for the next year and the amount and shape of Federal power a customer has contracted to purchase for the next contract year." 5(b)9(c) Policy, at 13 (65 Fed. Reg. 14262). The Federal power will continue to be provided in the same shape as originally purchased, and the customer makes any changes necessary in load shape to meet load. The customer's nonfederal resources are reduced in the same shape as the reduction in its load obligations so that BPA does not take on additional shaping obligations when it is not providing a product that meets the customer's loads hourly.

For a product like Slice that delivers power in the shape of the Federal system's generation, the customer must use it for load, but must also add it to nonfederal generation or reshape for load as the case may be. By taking nonfederal resources off in the shape of the Federal power that is planned to be available, BPA does not provide additional shaping. While BPA does not agree with the PGP characterization of this issue, BPA recognizes the Slice product presents unique circumstances in defining that portion of a customer's load served by the Slice product in any month and the portion served by the customer's nonfederal resources. The method for determining the amount and shape of Federal power a customer has contracted to purchase as compared against its net requirement can be addressed in the contract terms.

Issue: Whether the 5(b)9(c) policy properly requires a utility customer first to remove market purchases in the amount and shape of its reduced load when its contracted BPA purchase exceed its net requirement.

MAC commented on the requirement in section III.D.2 that requires a customer to remove market purchases in the amount and shape its net requirement differs from its contracted amount of Federal power. MAC believes the provision is unworkable and will force a customer to change its purchasing relationship with BPA. MAC commented that in an open access environment, a customer will not know in advance how much retail access load loss will occur. MAC wonders how will actual loads be reconciled to estimated loads. MAC is concerned that customer could be forced into Complex Partial category. MAC suggest that customers be given the option to replace dedicated resources with electric service provider purchases by end-use customers up to the limits of dedicated resources. *MAC, 5(b)9(c)-009.*

Evaluation and Decision

The market purchases that BPA refers to in this provision are those purchases a customer commits to make instead of placing a requirements load on BPA. These market purchase commitments would be based on the difference between a customer's loads and its dedicated nonfederal resources. If a customer purchases its full net requirement, it would have no market purchase commitments in this category. These market purchase commitments are planned monthly and annual amounts of power. They are different than the purchases a customer must make hourly to serve its consumer load under a block product or when the Slice product produces energy in a different shape than its load.

BPA proposes to adjust a customer's annual net requirement based on a forecast of the customer's load for the upcoming year. BPA will deem the customer's forecast to be the actual load for purposes of the determination. BPA would identify any periods during the year (monthly amounts of HLH energy and LLH energy) where the customer's net requirement was less than its contracted amount of Federal power. The customer must first remove any amounts of market purchase commitments to increase its net requirement during those HLH and LLH periods. If the customer has no specified market purchase commitments, the customer could elect to apply the mitigation provisions of its power sales contract and reduce the contracted amount of Federal power, or it could identify a nonfederal resource it would remove from service to load for that monthly HLH or LLH period. BPA would assume the energy during any period would be removed in equal hourly amounts.

Issue: Whether the customer removal of a market purchase in the shape of its reduction in load means a change in the power product purchased from BPA.

PPC commented that it does not understand why the shape of the market purchase must reflect the shape of the difference between a customer's contracted Federal purchase and its net requirements. If this requirement is maintained, they believe it should not force a change in the type of product a customer is purchasing. *PPC, 5(b)9(c)-012.* EPUD

commented that it is concerned that the requirement of matching the load shape of the market purchases will lead to a shift in the type of product a customer must purchase, such as from Partial Simple to Partial Complex. *EPUD, 5(b)9(c)-019.*

Evaluation and Decision

BPA agrees with the PPC and EPUD that any requirement to remove an amount of unspecified market purchase commitments should not change the original product relationship a customer established with BPA. BPA's concern is one of having the customer no longer provide a shaping service for the power it takes from BPA when it removes market purchase commitments. BPA's net requirements obligation could change for its block or Slice products which do not provide load shaping. Market purchase commitments for these products should be removed in the amount and shape equal to the difference in the amount of their planned Federal purchase for the next year and the customer's calculated revised net requirement for the next year to maintain the original purchase between BPA and the customer.

BPA sees this process as a set of sequential steps to identify the amount of load lost, the amount of change to net requirement, if any, and the appropriate removal of market purchase commitments of power which the customer will forego in the upcoming year. If the customer cannot reduce its planned purchases for the year, this policy will enable the customer to offer to the market an amount of market purchase commitments it would have had delivered for its load. Commodity blocks of power from nonfederal resources that the customer would remove from service to its retail loads must be marketed in the region or exported from the region consistent with regional preference.

Issue: Whether the 5(b)9(c) policy should permit the utility customer to remove generation from service to load at any time due to retail load loss.

PPC urges BPA to establish by contract the right to remove any generation from service to its load. PPC opposes language that requires BPA's customers to seek consent from BPA to remove any of their own generation. PPC recommended establishing by contract the customer's right to reduce an amount of generation or contract resource being used against load. *PPC, 5(b)9(c)-012.* PGE requests that BPA clarify whether the request to remove a resource due to retail load loss is automatic or if it involves discretionary decision-making by BPA, and if so, what standards will be applied to the decision. *PGE, 5(b)9(c)-014.*

Evaluation and Decision

BPA cannot agree that a customer may remove any generation from service to its load at any time. The ability of a customer to remove a generating resource based on consent can only occur when the amount of retail load loss exceeds the amount of the customer's market purchase commitments. BPA will agree by contract that a customer may remove nonfederal generation dedicated to serve its load for a period of one year based on forecasted annual loads. If the customer's loads grow in subsequent years, BPA would

require that the generation removed in a previous year be available to serve that increase in loads.

Issue: Whether the 5(b)9(c) policy should state that resources removed by a utility customer for retail load loss are not conservable nor subject to the Regional Preference Act.

PPC and WPAG argue that the right to remove a resource due to losses in retail loads must be accompanied by a waiver of regional preference or a declaration that the resource is non-conservable. Policy must state that any decision to reduce market purchases or generating/contractual resources will result in an automatic waiver of 9(c) test, or declare the resource non-conservable. *PPC, 5(b)9(c)-012*. PGE comments that the treatment of such resources under sections 9(c) and 3(d) needs to be clarified. PGE approves of permitting customers to remove market purchases from use for regional firm load in determining net requirements. The option of permitting customers to temporarily remove a resource from service to regional load is a good policy choice that will promote retail competition. *PGE, 5(b)9(c)-014*. PacifiCorp recommended that BPA determine in advance that any exports from resources dedicated to regional loads in amount equal to loss of retail load under Oregon's Senate Bill 1149 will not result in a reduction of a utility's net requirements. PacifiCorp believes that the Northwest Power Act's intent supports this. *PacifiCorp, 5(b)9(c)-016*.

By imposing the 9(c) policy on the disposition of the removed resources, BPA has materially reduced the ability of the utility to deal with the financial consequences of retail load loss. It appears that the 9(c) portion of the policy categorically requires a decrement of the customer's requirement deliveries if the removed resource is exported under any circumstances. This makes the resource removal provision of little use to the utility. WPAG stated that the policy must permit export if the removed resource is offered in the region and no purchaser has come forward within a reasonable period of time. Price should recover the utility's costs. *WPAG, 5(b)9(c)-024*.

The policy works for utilities only if BPA declares that the portion of the nonfederal resource removed from use could not have been conserved within the region. A better policy would require "good faith efforts" to market the power first within the region to other section 5(b) customers. *Tacoma, 5(b)9(c)-025*.

Evaluation and Decision

BPA does not agree that resources removed from service to a customer's load due to loss of retail load are exempt from regional preference. Customers must market these resources that are removed from retail load service in accordance with the rules of regional preference or face a reduction in the amount of Federal power they can purchase. BPA does agree that a resource that is removed for a one year period due to loss of retail load by a customer is not considered conservable under section 6(b) of the section 9(c) policy. BPA would still be required to determine whether the resource could otherwise be retained to serve regional load if the customer proposed to export it from the region.

Customers removing a resource from service to their retail loads under this provision would be required to notify BPA if they plan to export the resource in the next year. If they plan to sell it in a manner so it serves regional load, they face no further regional preference requirements. If they plan to export the resource, BPA would be required to make a factual finding whether the resource would result in an increase in firm energy requirements of BPA's customers and whether it could otherwise be retained to serve regional loads.

BPA would make such factual finding by comparing the fully allocated nominal cost of the resource that the customer had included in its retail rates against BPA's forecast of the regional marginal cost. If the cost of the resource exceeded the regional marginal cost, the customer could export the resource. If the cost were less than the regional marginal cost, BPA would reduce the customer's net requirement for the year if the customer elected to proceed with the export. If BPA made such a finding, or a customer did not want BPA to proceed with such finding, a customer could offer the resource for sale to BPA and all BPA's customers at its fully allocated cost plus a reasonable rate of return. BPA agrees with WPAG's comment that holding the offer open to BPA and all its customers for a minimum of five working days is adequate for any offers for a one year period. If neither BPA nor any of BPA's customers purchase the resource after five working days, the customer would be free to proceed with the export without a reduction in its net requirement. If a customer did not want to go through the offer process, they could inform BPA that they had changed its marketing plans and could market the resource in a manner so that the resource was used to serve retail loads in the region.

Issue: Whether the 5(b)9(c) policy should permit a reduction in BPA power deliveries if the utility experiences load loss so that loads and resources remain in balance on a planning basis.

WPAG proposed an additional option where BPA would agree to a reduction in a customer's contracted amount of Federal power if BPA had additional load obligations during the upcoming year. When a customer requests permission to remove a resource due to retail load loss, BPA may have a firm load that it could serve with the requirements power the utility cannot take. In an operating year when sum of the utility's BPA power supply and its section 5(b)(1) resources will exceed its firm retail load, and BPA has need for the power, the policy should allow BPA and the utility to agree on a reduction of BPA deliveries so loads and resources remain in balance on a planning basis, with no payment of liquidated damages. *WPAG, 5(b)9(c)-024.*

Evaluation and Decision

BPA believes it is difficult to make the factual determination proposed by WPAG on whether BPA has the need for the power and how that would be determined. If the utility were facing liquidated damages, it is unlikely that BPA would be facing increased demands for its power.

Issue: Whether contract finalization will necessitate revision to the policy.

PPC notes that BPA's contracts are not finalized. Any reliance on language that addresses load loss may require the ability to revisit this portion of the policy. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

BPA understands the concern raised by PPC. However, BPA believes it will not be necessary to revisit this portion of the policy. BPA contract will take into consideration the policy and reflect BPA's decisions accordingly.

3. Annual review of proposed exports by customer

Issue: Whether it is appropriate for BPA to conduct an annual review of a utility customer's exports.

Grant comments that there is no need for BPA to make an annual review of a customer's potential exports. *Grant, 5(b)9(c)-011.*

Evaluation and Decision

BPA believes that it is appropriate for a customer to report the planned use of its resources that are subject to regional preference and which are not dedicated to serve the customer's load under its requirements contract on an annual basis. BPA has always administered section 9(c) of the statute by requiring customers to report the use of their resources. BPA believes an annual requirement to report the planned use of resources is appropriate under today's market conditions without being unduly burdensome administratively. BPA expects such reports to state the customer's expectations whether it plans to offer the resource to extraregional markets during the next year. Such plans would trigger a section 9(c) analysis regarding a proposed export.

Issue: Whether the 5(b)9(c) policy should exclude customer historical operations from the annual review of exports.

PGP comments that this section should refer to the prospective export of power for the next year and should explicitly exclude historical operations. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA agrees that its section 9(c) determinations must be made on a prospective basis. BPA does not agree, however, that such determinations should explicitly exclude consideration of historical operations. BPA must retain the right to review a customer's operations if a customer fails to report its planned exports. Such failure can be used as the basis for identifying a prospective export unless a customer demonstrates a change in

its marketing plans. BPA will clarify the policy to allow prospective changes in the customer's right to purchase Federal power for the remainder of a contract year.

4. Customer rights to request power to serve increases in net requirements

Issue: Whether the 5(b)9(c) policy should address BPA's obligation to serve the newly acquired loads of its utility customers.

Puget commented that BPA should not allow customers to request increased purchases of Federal power to serve new loads acquired by a customer due to purchase or condemnation of additional distribution for its system. Puget requests that we drop the provision. *Puget, 5(b)9(c)-005*. In contrast, the PPC supported BPA's proposal to increase requirements service as a result of new loads acquired after purchase or condemnation of additional distribution facilities. *PPC, 5(b)9(c)-012*. PGP commented that BPA should not interfere with timely service to new loads by requiring a six months notice to serve. PGP argues that BPA should allow customers to give notice of prospective service. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

BPA agrees with Puget that the additional provision on annexation is not required. Such a provision is not in the final policy. While BPA also does not disagree with the PPC regarding service to newly acquired loads, BPA's obligation to provide service to newly acquired load is not dependent upon this policy. Rather, BPA will determine its obligation to serve after considering the type of requirements product purchased by the customer. BPA agrees with PGP's comment that BPA should not interfere with timely service to new loads.

IV. SECTION 9(c) POLICY

Many parties expressed concerns over BPA's interpretation and application of section 9(c) and 9(d) of the Northwest Power Act, 16 U.S.C. 839f(c) and (d), and Section 3(d) of the Northwest Preference Act, 16 U.S.C. 837a(d). BPA's interpretation of these sections and their relation to section 5 contracts with its customers have previously been addressed by BPA in policy and letters responding to customer inquiries over their export of nonfederal resources. For over 20 years BPA has addressed these issues, first on a case-by-case basis and, more recently, in a policy and record of decision, adopted in 1994 as the nonfederal Participation Capacity Ownership Contracts and 9(c) Policy (NFP 9(c) Policy). Then, as now, the issues regarded whether, how, and to what extent BPA would not make Federal power available to a customer at BPA's lowest cost rates and, instead, only offer surplus Federal power as available to replace the resources or power exported. BPA recognizes that it has no statutory authority to prevent the export of any nonfederal resources or power from the Pacific Northwest by its customers. However, both of these statutes direct that BPA may only sell as replacement for power from nonfederal hydroelectric resources, thermal, and other resources exported, Federal power which would otherwise have been surplus power.

These statutes require BPA to make factual determinations that are based on present and future Federal loads and resources, nonfederal resources used in the region to serve regional load, and the resources which a customer uses to support export sales. If certain considerations are met then the export does not result in a reduction of BPA's obligation to supply firm power to its customer. If not, then BPA may only sell to such a customer power which would otherwise be surplus power to replace the customer's exported power. Surplus power may not always be available from BPA and may cost more than the firm requirements power BPA sells to customers.

In 1993, BPA proposed a policy regarding the export sales of potential new participants in the 3rd AC line to over 800 interested parties including customers, and customer applicants for participation in the line called New Owners. BPA's NFP 9(c) Policy was adopted in July of 1994 as a policy of general application which addressed the specific circumstance of the exports which may be made over BPA's 3rd AC line. A portion of the capacity of that line, 725 MWs, was leased for the life of the facilities to several Pacific Northwest BPA customers (the New Owners). These customers would be making new exports of power by sale or exchange with Pacific Southwest parties. The policy and legal interpretation issued addressed those potential new exports and stated its application to subsequent 9(c) determinations. NFP ROD at 8.

BPA's initial draft policy proposal on section 5(b) and 9(c) policy considered modifications to its NFP 9(c) policy, including the adoption of a presumption that nonfederal resources of BPA's customer were exported and the adoption of an auction mechanism for the offer of nonfederal customer resources to the region. After an initial round of comment, BPA dropped both of these modifications. Most parties objected to the presumption. They commented that they would prefer to show that specific transactions of an export should or should not result in a reduction of BPA's firm

obligation to the customer rather than rebutting a general presumption. Several parties raised concerns over the operation of an auction mechanism. Parties had very distinct and differing views on how the mechanism would work. BPA determined that it would be administratively difficult and legally problematic to ensure that an auction was conducted with an opportunity for Northwest customers to obtain the power service from the other selling Northwest customer. Leaving out these two major modifications, BPA then revised the draft policy to make minor modification to address Subscription issues but kept the current NFP 9(c) policy basically intact. As part of its revised draft policy, BPA provided the parties an interlined version of the NFP 9(c) policy showing the changes made in the 1994 NFP policy. BPA's intent is to have this revised NFP 9(c) policy applicable to determinations of how exports of nonfederal resources will affect BPA and customer obligations for the post-2001 period and the new Subscription contracts.

Issue: Whether this 9(c) policy adequately explains its relationship to the 1994 9(c) policy.

Grant suggested that BPA suspend any action on this policy pending further review and analysis of the relationship of this 9(c) policy and 1994 NFP 9(c) policy. BPA needs to define the standards and process for making 9(c) determinations. *Grant, 5(b)9(c)-011.*

Evaluation and Decision

BPA and its customers need certainty as to the obligations each will undertake in the next contract. BPA needs both load and resource certainty for the initial rate period. BPA's policy addresses the effect a customer's export of nonfederal resources and power from the region may have on the obligations of BPA to supply power under its section 5 contracts. Customers and BPA are interested in execution of new power sales agreements prior to the last operating year under their current contracts. BPA does not see a need to delay or further consider this policy.

BPA has provided a revision of the standards in the 1994 NFP policy to customers for comment and review. BPA does not find that additional analysis and review is needed beyond this record of decision and the 1994 NFP policy ROD. BPA's legal interpretation of the issues raised here are based upon the legal interpretation issued in 1994 as part of that ROD and are unchanged. BPA's responses below address specific comments raised as regards the changes and interrelationship of the 1994 policy and this policy. Specific modifications of the 1994 policy are addressed. BPA affirms the prior determinations made under the 1994 NFP policy and they remain in effect as do the prior determinations made by letter and as addressed in the 1994 NFP ROD. This policy is a revision of the 1994 NFP policy and is incorporated therein. This 9(c) policy as modified will apply to future determinations under sections 9(c) and (d) of the Northwest Power Act and section 3(d) of the Regional Preference Act.

A. Modifications to BPA’s Nonfederal Participation Section 9(c) Policy

Issue: Whether it is appropriate to eliminate the rebuttable presumptions contained in the initial policy proposal.

PGE noted that BPA had proposed in its initial policy proposal to change the definition of “market resource” under the section 9(c) policy. The change was from the definition of a resource which was specifically developed for export to a more general one of any resource not dedicated to load service under the customer’s 1998-99 FRE. The policy then proposed a presumption that all new resources developed after December 21, 1998, were exempt from section 9(c) unless they were dedicated by a customer to serve regional loads under a section 5(b) contract. PGE encourages BPA to adopt that proposal. PGE encourages BPA to adopt the initial policy proposal and presume that all new generating resources are developed for sale in the deregulated market, and not for service to customer’s retail load. *PGE, 5(b)9(c)-014*. During the second round of comments, PGE changed its position. PGE approved of BPA’s return to its prior policy on export of a resource by making a factual finding on a case-by-case basis of whether an export occurred and the determination of whether BPA’s obligations would be reduced as a result. PGE agreed with the elimination of presumption of export. *PGE, 5(b)9(c)-014*. Tacoma supports removal of the rebuttable presumption on exports. It commented that the statute adequately addresses the requirements and procedure for factually determining the export status of resources. *Tacoma, 5(b)9(c)-025*. Idaho Falls also agreed with BPA’s decision to remove the “rebuttable presumption” requirement for exports from the draft policy. *Idaho Falls, 5(b)9(c)-008*. EWEB found the elimination of presumptions, rebuttable or otherwise, for 9(c) export determinations to be particularly appropriate. Similarly, BPA’s reaffirmation of its 1994 9(c) policy and legal interpretations is warranted and will provide consistency with past and future 9(c) determinations. *EWEB, 5(b)9(c)-028*.

Evaluation and Decision

In general, parties commented that the rebuttable presumption in the initial draft was confusing and potentially unworkable. BPA proposed the use of a presumption because the type and amount of information which may be available to BPA to track resource(s) exports by a customer was uncertain. In the past BPA has relied on schedules of transmission service to inform it of the export done particularly over the PNW-PSW Interties. Given FERC orders on functional separation between transmission and power functions, BPA was uncertain as to what source of information may be available to monitor export activity for purposes of section 9(c) compliance. Hence, a presumption which permitted the customer to voluntarily report on its transactions by way of rebutting the “export” presumption was thought to assure a flow of information. During public meetings and through written comment, it became clear to BPA and the customers that information on export transactions would be available as so-called NERC “tags” from transmission services. The information source may not be complete for 12 to 24 months, but it would eventually be able to provide the same type of information which BPA previously had available to it. Further, such information would also be available to

BPA's customers to track any exports over which they had a concern. Therefore, BPA concluded that the need for the presumption has disappeared as long as BPA and its customers are able to obtain sufficient information in adequate detail to understand what export activity is on going.

The "market resource" test will remain unchanged as part of the 9(c) policy. It identifies resources or portions of resources that were never intended to be used to serve regional loads. BPA believes section 9(c) requires any resource that was actually used to serve regional loads to meet the tests of the statute. BPA's section 9(c) policy will apply to new resources developed after December 21, 1998, that are used to serve regional loads or planned by the owners to be so used at some future date. BPA also recognizes that a "market resource" may include contract resources purchased for trading purposes. In reporting the export of its regional resources that have been used to serve regional firm retail loads, customers only need to report the export of contractual resources with terms exceeding twelve months. For contractual purchases for periods less than twelve months BPA will not require reporting, unless the customer has specifically agreed to use a specific short term contract purchase to serve its regional load.

Issue: Whether it is reasonable to eliminate from the 9(c) policy the auction of a customer's resource.

MPC commented that the revised policy, in contrast to the initial policy, did not address the changes occurring in the electric power industry. In particular, the new policy did not accommodate the sales of generating assets as vertically-integrated companies restructure in a deregulating industry environment. MPC commented that BPA should revise its draft policy to allow auctions as a means of determining whether a resource could otherwise be retained for load in the region. *MPC, 5(b)9(c)-015.*

Evaluation and Decision

BPA is cognizant that the structure of the electric wholesale industry and market has changed. BPA also recognizes that some states have also made changes to their retail electric utility industry. Parts of the policy are designed to address some of those changes, such as the concept of market purchase commitments used to serve regional retail firm load. However, the policy does not address all changes resulting from industry restructuring. The reason is simple. This policy is of general application. Many of restructuring changes are still ongoing or have not even yet begun. The ability of one utility to restructure itself in one state may not be the same in other states. For example, although the state of Montana has addressed restructuring, the state of Washington has not. This policy addresses company restructuring to the extent that the company has either resold its resources on the market, *i.e.*, divestiture, or has sold power on the market which had been used to serve regional loads by applying the current standards for review of a customer's exports. Based on the lack of agreement in comments BPA received over the appropriate mechanics for an auction, BPA decided that customer auctions of resources would not be able to meet the intent of the statute to retain resources to serve regional loads.

Issue: Whether it is reasonable in this 9(c) policy to reaffirm BPA's 1994 9(c) policy and legal interpretation.

PGP notes that the provision reaffirming the application of the 1994 section 9(c) policy and legal interpretation and section 5 of the policy reaffirming its prior section 9(c) determinations implies that portions of the section 9(c) policy are not open to comment or legal review. PGP believes such a position is legally flawed. BPA's incorporating the 1994 policy by reference forecloses a whole class of customers from providing comment on the new policy. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

Copies of BPA's 1994 NFP 9(c) Policy have been, and are, available without cost to the public at BPA's headquarters in Portland, Oregon, or upon request by telephone or electronic mail. BPA received numerous requests for copies of the policy throughout public comment and review of BPA 5(b)9(c) policy proposals. In the revised draft of the 5(b)9(c) policy BPA provided an interlined version of the 1994 NFP 9(c) policy showing the changes made. The public review of this policy has not been conducted in a way which forecloses any interested party from commenting upon the proposal. Moreover, prior to adoption of its 1994 NFP 9(c) Policy, BPA mailed out over 800 copies of the policy to its customers and other interest groups in the region. The accompanying ROD was also distributed to interested parties. PGP had an opportunity in 1994 to comment on BPA's legal interpretation or even to challenge it in the United States Court of Appeals for the Ninth Circuit if it disagreed with BPA's interpretation. A Federal agency is fully within its legal authorities and rights to rely upon its prior public policy and legal interpretations when it reviews its policy. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). PGP is simply wrong on the law. There has been no foreclosing of any class of customer from commenting. As evidenced by its comments, PGP is not constrained to accept BPA's interpretation of the law, even though this policy incorporates and does not change that interpretation, since that law has not changed. The references in the current policy revision include the 1994 provisions incorporating prior BPA factual determinations. BPA does not intend for its revision of the policy to change or affect its prior section 9(c) determinations. Those determinations are good for the duration of the export contracts which the customer entered into based upon the BPA determination.

B. Section 9(c) Policy

1. Section 1: Northwest Power Act Section 9(c) Determinations

Issue: Whether the 9(c) policy should consider only long-term exports and not seasonal exports.

Seattle comments that the exports considered under section 9(c) should be limited to long term exports of power and should not include annual sales of seasonal surplus power. *Seattle, 5(b)9(c)-030.*

Evaluation and Decision

BPA has identified seasonal exchanges of power as an exception to review if they return an equal amount of power at a different time and the region does not see a net loss of resource out of the region. A sale of power is different from an exchange in that there is no obligation to return power in a like for like transaction. In a sale the title or ownership of the power passes to the purchaser without any obligation to replace. Sales of power have been made for years with seasonal deliveries specified and may occur when the Northwest faces its highest load months. BPA does not find a basis to exempt a sale simply because it may not deliver power to the buyer out of region for the full 365 day year. BPA has said that it would look at annual sales, long term sales, but not at hourly market sales. Sales which are for firm deliveries of power on a multi year basis even if seasonal are subject to this policy. BPA agrees the policy does not cover sales of capacity without energy, nonfirm energy, or ancillary services. While Seattle's exports of the firm output of its resources may be surplus to Seattle's needs on a seasonal basis, the region may be in deficit during that season and be forced to acquire more expensive resources as a result of the export. Applying the regional preference statutes to Seattle's seasonal exports ensures that Seattle is not purchasing cost-based Federal power while simultaneously exporting firm power from the region.

Issue: Whether 9(c) determinations are made prospectively or after the fact.

PGP commented that the policy was unclear whether section 9(c) determinations were made on a prospective basis or after the fact. PGP urged that BPA make the determinations on a prospective basis and not based on real time operations. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

It is not clear what PGP means by prospective or after the fact. BPA's determinations will not reach backward and require the customer to deliver back Federal power that they bought from BPA even if they violated section 3(d) or 9(c) by a transaction. However, BPA will look back at transactions that become known to BPA and make a determination of their effect upon BPA's current and future obligations to serve the load of its customers in the region. If BPA determines that a customer's disposition of power out of the region is ongoing even though it may have commenced earlier, then that transaction will be subject to review. If a decrement or reduction in BPA's obligation to serve is required, it will apply prospectively from the time BPA makes its determination.

BPA intends to rely on all of its customers to accurately report their planned use of resources on an annual basis. Determinations made on a prospective basis worked well when customers had to request the use of BPA transmission to make an export prior to deregulation of wholesale transmission. Today's unbundled transmission environment raises an issue as to what remedy should be used if a customer does not report any plan to export a resource and then exports power or a resource. Under the statute, if the power could be conserved or otherwise retained for use and its export would result in an

increase in load of BPA or any other customer, then BPA believes it must retain the right to decrement or reduce prospective sales of Federal power. This obligation exists when an unreported export is identified. BPA must presume the customer will continue to export the power or resource which was not reported.

Issue: Whether it is reasonable for the 9(c) policy to require utility customers only to report the planned use of their resources, including exports.

Kaiser, Reynolds, Northwest Aluminum, and Goldendale commented that they liked the rebuttable presumption proposed in the initial policy that any resource previously used to serve firm loads in the region and sold at market has been exported in a manner increasing the firm energy requirements of BPA's customers. They do not object to the revised policy as long as a customer selling a resource is required to demonstrate that the resource was not exported if any customer challenges a replacement power sale by BPA. *Kaiser et al., 5(b)9(c)-023.*

Evaluation and Decision

BPA changed the proposal for the rebuttable presumption for the reasons stated above. BPA intends to rely on all of our customers reporting of the planned use of their resources. BPA will retain the right to request information from the exporting customer regarding the use of a specific resource if information is made available to BPA that a customer failed to report an export for a section 9(c) determination.

Issue: Whether the 9(c) policy adequately defines "export".

EWEB comments that BPA explicitly defined the transactions that constituted an export under the 1994 Policy. Since BPA has reaffirmed the 1994 Policy, EWEB wants BPA to still only consider exports limited to "any contracts which include terms for delivery of power at the points of interconnection of BPA's Intertie with California (COB), Nevada (NOB), British Columbia (Blaine), and eastern Montana" EWEB asks BPA to make such reaffirmation explicit. *EWEB, 5(b)9(c)-028.*

Evaluation and Decision

When BPA adopted its 9(c) policy in 1994, there was an aggregation of transmission service from power services in the wholesale market and no market hubs for buy/sell transactions in power. Today it would be overly simplistic to define an export of power by the marketing arm of a utility based upon the delivery point. However, BPA agrees with EWEB that the transactions that constitute an export should be made explicit. Therefore, BPA will clarify that it does not reaffirm the 1994 NFP 9(c) Policy definition of an export. BPA will define an export as any sale of the firm power output of a resource which is monthly, seasonal, annual or multiyear, and not planned to be delivered for use solely to serve firm consumer load in the Pacific Northwest.

The advent of wholesale deregulation has allowed purchasers, as well as sellers, to obtain the transmission necessary to export power from Northwest resources. BPA will rely in the future on the contract between the buyer and seller to determine its intended use. BPA expects customers to self-report their exports and monitor the use of their resources sold to another party for use to serve regional load. Additionally, others may make information available to BPA that suggests that power or a resource has been exported by a customer. BPA will request that customers report the specific planned uses of their resources. As discussed above, customer concerns over confidentiality may be met by a request to BPA that it maintain that information under a confidentiality agreement allowing access only by BPA employees to make the section 9(c) determination.

As noted previously, annually, or more frequently if necessary, BPA will review the customer's determination of its planned resources to be used to serve its regional firm load for the next contract year. BPA expects the following resources will be included in the customer's planned resources: seasonal sales on a multi-year basis, annual sale/purchase amounts, generation, and contracts which are less than one year if the customer is obligated under such contract to use it to serve its regional load. Resources that need not be included in the customer's planned resources include: hourly to less than twelve month purchases, resources to meet load variation whether due to increases or available due to reductions, and nonfirm/surplus power from generation.

2. Section 2: Finding Required

Issue: Whether the 9(c) policy adequately defines the time frame of the export.

Idaho Falls and the PGP argue that BPA cannot base its finding on whether an export increases the firm energy requirements of any of its customers in the region "on BPA's and its customers' ability to meet Pacific Northwest load presently and in the future". Idaho Falls argues this language could be read to disqualify an export that has no impact on BPA and its customers during the term of the export. Idaho Falls also argues such determination must rely on existing customers, not anticipated customers. Idaho Falls argues the language should clearly limit application of the policy to the time frame of the disposition and the then existing customers with whom BPA has a contractual commitment to serve. *Idaho Falls, 5(b)9(c)-008.*

The PGP comments that this standard violates section 9(d) of the statute which, PGP claims, allows a customer to export a resource as long as that export does not increase the load on BPA. PGP asserts that BPA's analyzing whether exports would increase requirements of any of its customers is inconsistent with section 9(c) and violates 9(d). *PGP, 5(b)9(c)-021.*

Evaluation and Decision

In prior determinations BPA has made its finding based upon the term of the sale out of region by the customer. BPA's evaluation of the second prong of the test in section 9(c) of whether it is likely that the load of BPA or any other customer will increase as a result

of the export has been limited to the time frame of the export sale. BPA agrees with Idaho Falls that the factual finding regarding an export is limited to the duration of the export. This limitation is made explicit in section 2 of the policy. However, BPA does not agree that BPA's analysis of its firm power requirements in the region needs to be limited to the current load obligations at the time of export. Depending on the type of product purchased under contract, some of BPA's existing customers may increase their load obligation on BPA either by normal load growth, annexation, or additions to load. Further, from time to time BPA has taken on obligations of new customers that are formed in the region. BPA is obligated to offer a contract to any qualified new public utility or IOU which serves retail consumer loads in the region. Depending on the duration of BPA's contracts, BPA faces potential obligations to serve additional regional loads under section 5(b) of the statute. BPA may also be obligated to serve the increased loads of customers who have lost, retired, or obsolete resources, or to whom BPA has granted consent.

Each time BPA reestablishes its rates of general application, the potential exists under Subscription for additional loads to be placed on BPA. Therefore, BPA must look at potential obligations for exports that extend beyond the current proposed Subscription period. During the current Subscription period, BPA expects to see substantial increases in its firm power load requirement obligations. These increases would not likely have occurred if some or all of the customers' exported nonfederal resources were used to serve retail firm load in the region. As just described, prior determinations of exports (and exports that continue) do affect BPA's potential obligations to serve load; therefore, BPA will revise them.

BPA's direction under section 9(c) to examine its obligations includes not only its obligation to the exporting customer, but also all other customers. Section 9(c)(2) also contains the language "or other customers of the Administrator." If a resource had been used by a customer to serve regional load other than its own, and the resource is withdrawn and resold, the potential for BPA to serve the regional load previously served by the resource goes up. If a power contract between two one of BPA's customers in the region is withdrawn by one and resold on the market for export, then the load the contract previously supplied becomes load BPA may be obligated to supply. Thus, BPA must look at its current obligation to the exporting customer and to BPA's obligations to other customers that may be affected by the export.

BPA does not agree with the PGP's comment that this standard violates section 9(d) and is inconsistent with 9(c). BPA believes that the standard under both provisions is essentially the same. Section 9(d) does not render meaningless the express tests set out in section 9(c). It does not prohibit BPA from making a determination based on changes to a customer's load for the simple reason that BPA may bear that obligation. Rather, BPA reads the language in section 9(d) to also mean that the export cannot increase the firm power requirements of any of BPA's customers as a result. BPA reads this language to require the same factual finding as required under section 9(c). The exported resource or power will not be available for the duration of the export so that BPA is the alternative supplier for service to the loads. BPA does not believe there needs to be a direct causal

connection between the export and any specific increase in BPA's load obligation, rather the loads and resource balance may also be considered under the statute.

Issue: Whether section 5(b) limits the application of section 9(c).

Tacoma comments that the customer loads considered under section 5(b) should be limited to public agency loads based on the provisions of section 5(b)(6). Tacoma takes issue with broadening 9(c) language to include impacts on the customers' ability to meet load and increase in firm energy requirements of BPA's customers. A determination of the impact of export on BPA should extend to only BPA's ability to serve the 5(b) loads. *Tacoma, 5(b)9(c)-025.*

Evaluation and Decision

Tacoma renews its argument under section 5(b) that BPA has no additional load obligations until it has used all of its Federal Base system for service to public loads. BPA does not agree with Tacoma. Tacoma this time points to section 5(b)(5) of the Northwest Power Act. That subsection, as well as subsection 5(b)(6), address a condition of "insufficiency" which occurs when BPA is unable to obtain by acquisition or purchase sufficient firm resources on a planning basis to meet its load obligations. However, the determinations under section 9(c) and (d) of the Northwest Power Act, and subsection 3(d) of the Regional Preference Act, are not limited to an instance of insufficiency. BPA believes the operation of these determinations are to ensure the opposite result. These provisions of law protect BPA from becoming insufficient simply because utilities have chosen to export their resources rather than to serve their loads with them.

Issue: Whether the 9(c) policy should enable the Administrator to make determinations of exports by customers not placing load on BPA.

The PGP and Grant County PUD argue that BPA should not examine the least cost plans and load/resource information of utilities that do not place load on BPA. The PGP argues that this examination exceeds BPA's statutory right and would somehow cause a repricing of Federal power. *PGP, 5(b)9(c)-021.* Grant argues that BPA has no need to look at the least-cost plans of utilities not placing load on BPA. There is no justification for customers supplying BPA with load/resource balances or least cost plans, especially those placing no load on BPA. *Grant PUD, 5(b)9(c)-011.*

Evaluation and Decision

Section 9(c) expressly provides that BPA is to determine whether the power or resource exported was "included in the resources of such customer for service to firm loads in the region," and if disposed outside the region, BPA is to determine whether, "as a result of such disposition, the firm energy requirements of such customer or any other customer of the Administrator are increased." BPA has based its determination under this section upon factual information provided by the customer and other customers as to their loads and planned resources or contract power purchases. BPA conducts loads and resource

planning for its obligations in the region and works with the Northwest Power Planning Council to provide planning of loads and resources for the region. Other utilities conduct such planning as directed by regulatory bodies having jurisdiction over them or simply by following prudent utility practices. Typical of these planning documents are those which are termed least cost plans and avoided cost plans. Without the factual basis provided by this information, BPA would have to rely upon its own information alone in determining what effect, if any, the export of power or sale of a resource would have on that customer's obligation or on BPA's other customer's load. Congress recognized that some regional resources owned by BPA customers are sold to other regional customers for service to their firm consumer loads. An example is the purchase of output from the Mid-Columbia hydroelectric projects by several regional utilities. So it follows that factual information on both the customer's loads and resource balance and BPA's other customers loads is needed and directed by the statute.

BPA does not agree that the analysis of firm energy requirements needs to be limited to those customers placing load on BPA. Such a limitation would directly contradict the requirement in the statute that BPA assess the affect of the export on its other customers' loads. BPA has potential firm power requirement obligations that can increase due to several causes which could result in service to any customer's regional loads under section 5(b) of the statute. At this time, BPA does not know of any public utility that does not buy Federal power from BPA. The Northwest Power Act section 3(7) gives a statutory definition of customer as, "anyone who contracts for the purchase of power from the Administrator pursuant to this chapter." 16 U.S.C. 839a(7). Based on this provision the PGP's proposition would only be applicable if a current customer terminated all power sales agreements with BPA and entered into an agreement with BPA that it would make no request to buy any Federal power at any time in the future. We do not believe that any utility board would take such action or that it would be legally binding upon the utility even if they did.

BPA believes it must look at potential obligations that may be placed on BPA in the future due to a customer's export of a resource. BPA does not believe that it must demonstrate an actual increase in its obligations to its customers directly occurring following an export. If BPA's factual findings demonstrate that it is more likely than not regional load could have been served with the exported resource, either currently or later in the term of the export sale, then the export will result in an increase in BPA obligations. Currently there is an increased demand in BPA firm load obligations across its public utility and investor-owned utility customer classes, BPA expects that any resource whose cost is below the region's marginal cost and which was serving regional load if exported will cause an increase in BPA's obligation to that customer or other customers' loads during the next five year period. Given the current upward market trend in pricing, it is more likely than not that BPA will serve more load after 2006 than could have been served with a current resource whose cost is below the projected regional marginal cost.

Finally, each time BPA establishes new rates of general application, the potential exists under the proposed Subscription contracts for customers to place additional loads on

BPA. Therefore, BPA must look at potential obligations for exports that extend beyond the current proposed Subscription period. During the current Subscription period, BPA expects to see substantial increases in its firm energy requirements. These increases would not likely have occurred if the exported resources had been used to serve firm load in the region.

Issue: Whether the determinations under the 9(c) policy should be based on an annual review or the duration of export.

WPAG argues that the language in policy section 2(a) stating that BPA will look at its ability to meet its loads presently and “in the future” is too vague and ambiguous. WPAG argues that such forward look at its obligations should be limited to the duration of the export. The loads BPA would analyze to determine any increase in energy requirements would be performed on speculative loads, and 9(c) limits inquiry to loads of exporting customers and other customers of BPA. *WPAG, 5(b)9(c)-024.*

Evaluation and Decision

As BPA stated above, the factual determinations BPA makes under sections 9(c) and (d) and 3(d) are based upon the proposed or known duration of a customer’s disposition (sale) of power or resource out of the region. BPA agrees with WPAG that BPA’s examinations of future load obligations should be no longer than the duration of the export. BPA has modified the 1994 NFP 9(c) policy to include in section 2(b) the ability of a customers to request a determination done annually or for the duration of a sale.

Issue: Whether annual power exchanges should be excluded from the 9(c) policy.

Grant argues that annual power exchanges should be excluded from the application of section 9(c). Power exchanges that do not result in any net power export on a 12 months basis should be exempted from the policy. *Grant, 5(b)9(c)-011.*

Evaluation and Decision

BPA’s policy exempts exchanges of power seasonally, or on another basis, from review as long as the exchange returns an equal amount of power as was disposed outside the region and does not result in a net power loss to the region because of the exchange. They are covered under section 8 of the policy.

Issue: Whether the 9(c) policy should be limited to exports of “energy” only and not include “power” exports.

Grant, the PPC, WPAG, Seattle commented that all references in the policy should be changed from power to energy. Grant believes the policy should not encompass sales of capacity, nonfirm energy, and non-energy power produces. Grant claims BPA’s policy violates the law because the policy refers to “power” while the statute refers to “energy” exports. *Grant, 5(b)9(c)-011.* BPA should revise the policy to deal with only electric

energy requirement of customers, not power. *WPAG, 5(b)9(c)-024*. BPA's references to "power" in the policy should be changed to "energy." *Grant, 5(b)9(c)-011; PPC, 5(b)9(c)-012; Seattle, 5(b)9(c)-031*. PGP notes the statute's reference to "energy exports" and claims that the 1994 NFP policy used the term "energy" instead of "power." PGP claims that BPA's attempt to delete the references to energy and replace them with power clearly shows that BPA's current attempts to restrict the exports of power is not consistent with statute or past BPA interpretation. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

BPA sells both firm energy and firm peaking energy or capacity to its customers under its section 5 contracts. BPA also sells surplus energy and capacity as it becomes available on BPA's system under section 5 contracts. In its 1994 NFP 9(c) ROD, BPA stated its legal interpretation in regard to the statute's use of the term "energy":

In making its factual determinations [on exports] BPA applies the following meaning regarding the conditions expressed in subsection 9(c). . . .

. . . .

BPA reads 'amount of energy' to mean the amount of power exported and potentially excluded from [BPA's] firm load obligation. . . .

. . . .

BPA believes that both peaking energy and electric energy are included in the terms 'any amount of energy' and 'such energy' [when used in the subsection.] The Northwest Power Act defines electric power as 'electric peaking capacity, or electric energy or both.' 16 U.S.C. 839a(9). BPA's contractual obligations under section 5 include supplying both electric peaking energy (capacity) and electric energy for its customers' firm load requirements. Further, a customer may designate peaking and energy resources under subsection 5(b)(1) in differing amounts for service to its firm loads. For these reasons the above phrases apply to firm power and not just firm energy in BPA's determinations under subsection 9(c). Additionally, this interpretation coordinates these terms with subsection 5(b)(1) that uses the term 'electric power' to meet firm power loads of customer in defining the Administrator's obligation under its contracts. Both electric peaking capacity and electric energy are needed in order to provide continuous service to a customer's firm power loads.

1994 NFP 9(c) ROD at B-10-B-12. BPA continues to read section 9(c) and (d) as not just covering energy, but as meaning electric power produced or purchased on a firm basis. By harmonizing these provisions BPA looks at what the impact will be on meeting firm loads by the customer's export or disposition of firm power from nonfederal resources or purchases. Firm peaking energy is a valuable commodity that BPA may have to purchase to meet its regional customer's firm loads if firm peaking energy, *i.e.*, capacity, or firm power is exported.

BPA will examine the export of firm power under section 9(c) and section 3(d) of the Regional Preference Act. Exports of non-firm energy or capacity products which do not

include firm energy will not be considered. If BPA determines that firm power has been exported in a manner that requires a reduction of Federal power sales, BPA will make such reductions in the amount of power and the shape of the export. BPA believes the capacity component of firm energy exported by a customer must be considered as stated above. Notwithstanding the PGP assertions, BPA's interpretation of the statute today is unchanged from its past interpretation. Otherwise, BPA will find itself in the position of acquiring resources to replace the firm power a customer exports.

BPA agrees with Grant that the policy does not encompass sales of capacity and nonfirm energy. BPA does not agree that it should refer only to energy. BPA believes it should look to the timing of any energy sales when determining how it would decrement or reduce a customer's right to purchase power under section 5(b)(1) due to an export. BPA believes the timing and duration of the export establish the basis for any reduction in sales of requirements power. BPA's reasoning is further elaborated in its legal analysis of the 1994 NFP Section 9(c) Policy.

Issue: Whether the term "reasonable means" to retain resources to serve regional loads is adequately defined in the 9(c) policy.

Grant comments that inclusion of "reasonable means" is ambiguous; BPA should identify standards to be used and how they will be applied. *Grant, 5(b)9(c)-011.*

Evaluation and Decision

BPA's legal interpretation which accompanied its 1994 NFP 9(c) Policy discussed the meaning of the phrase "reasonable measures" at page B-17. The measures included use of the power for service to load that had no other available supply, so called orphaned loads, use of the power for economic displacement of the customer's other resources, storage of the power, exchange of the power, or sale to another regional customer for use in load or displacement of higher cost resources. These are illustrations of reasonable measures.

BPA has included a standard for determining whether a resource that cannot be conserved could otherwise be retained in the region by reasonable means. Section 9 of the policy provides a standard for a utility to determine whether a resource could have been retained in the region by reasonable means, providing that a customer offer the resource at its cost plus a reasonable rate of return. Section 2 states BPA's finding for otherwise retaining a resource for regional use. That standard provides that a resource can be retained if its fully allocated nominal cost is less than the fully allocated nominal cost of the region's marginal resource to be built during the term of the export.

Issue: Whether BPA should provide opinions regarding the treatment of proposed customer transactions under the 9(c) policy.

Grant argues that customer's should have the option to have BPA opine on any proposed transaction. This should be an option but not a requirement to have BPA judge proposed transactions which may be subject to 9(c). *Grant, 5(b)9(c)-011.*

Evaluation and Decision

Since customers are required to report proposed exports, BPA could make a factual finding for a proposed export sale or disposition of power or a resource. The ability to make such a determination would depend upon the amount of information the customer was willing and able to provide BPA, including perhaps consideration of other factors such as loads and resource studies which may need to be performed. The test for a prospective sale or disposition would be the same as for any other export and subject to the terms of the policy and this ROD. BPA would determine whether the proposed export would result in an increase in the firm energy requirements of such customer or other customers of the Administrator. If BPA determined it would then BPA would determine whether the resource could have been retained for service to regional loads by reasonable means. These are factual findings. BPA has previously made evaluations of prospective exports when they are sufficiently defined in their terms so as to provide a basis for analysis. If BPA makes a finding that the proposed export would meet those tests, the customer can elect not to proceed with the export. However, BPA expects all customers to report any seasonal, annual, or multiyear export sales of power or resources at least by the time they are made.

Issue: Whether the 9(c) policy should state that the replacement of an exported resource with a market purchase does not increase the firm energy requirements of a BPA customer in the region.

PGE asked how BPA would determine whether the export of a resource increased the firm energy requirements of the exporting utility. PGE assumes that if the utility replaced the resource with market purchases, BPA would determine that the export did not increase the firm energy requirements of the exporting utility. *PGE, 5(b)9(c)-014.*

Evaluation and Decision

Under section 9(c) the determination must be made of whether the export of power or resources will increase the requirements of any BPA customer. Thus, BPA must examine more than just the exporting utility's firm energy requirements on BPA. It must also look at the firm energy requirements of other BPA customers. Based on the increase in BPA obligations across its public utility and investor-owned utility customer classes, BPA assumes that any resource whose cost is below the regional marginal cost serves regional load, and that BPA's obligation to the customer to serve load or to other customers' loads which the resource served are likely to increase during the next five year period. If, for example, the exported resource is identified in a customer's firm resource exhibit, and

assuming that the utility replaced the resource and not BPA, then BPA would agree with PGE that there would be no increase in that customer's firm energy requirements due to the export. The customer in that event already has the obligation to replace the resource with another. However, that alone is not the determination required by section 9(c), BPA must assess whether the firm power requirements of other customers would increase.

BPA does not believe that it must demonstrate an actual increase in its obligations to its customers directly occurring following an export. BPA's factual finding demonstrates that it is more likely than not that the regional load that could have been served with the exported resource has resulted in an increase in BPA obligations. Based on the increase in BPA obligations across its public utility and investor-owned utility customer classes, BPA expects that any resource whose cost is below the regional marginal cost was serving regional load and that the customer's load it was serving has increased during the next five year period. BPA believes it is more likely than not under section 5(b)(1) that it will end up serving load after 2006 that could have been served with any resources whose cost is below the projected regional marginal cost.

Issue: Whether BPA must consider all customer obligations in determining an export, not just the individual customer's obligation.

PacifiCorp commented that it and PGE should be allowed to export an amount of resources equal to any commercial and industrial load loss in Oregon under SB 1149. PacifiCorp notes that BPA's legal analysis of the 1994 NFP 9(c) Policy required a two part analysis of whether "as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased." This first part of the analysis is whether the exporting customer's net requirements are increased. The second part of the analysis is whether BPA's firm power obligations to other customers are increased. PacifiCorp argues that any loss of retail load will lower their net requirements and, therefore, the first requirement is met. PacifiCorp then argues that the second prong is met because any service by a departing commercial and industrial customer due to their receiving service through another utility is caused by the actions of the other utility and not by the export. *PacifiCorp, 5(b)9(c)-016.*

Evaluation and Decision

BPA's policy requires a factual determination as just previously stated in the above response. The conclusion that PacifiCorp would have BPA adopt does not meet the test of whether BPA's obligations to other customers could increase and which load could be served by the retention of the PacifiCorp resource within the region. Rather, PacifiCorp would only have BPA look to whether its requirements loads were increasing and argues that since a load loss just occurred no increase is likely. The error of this assumption is that it is only specific to the individual load that left and assumes no other changes in PacifiCorp's load. PacifiCorp then reasons that since the cause of the loss of the individual load was another BPA customer picking up the load, no other examination of regional loads is needed. Again, this proposition is focused on a single load. That is not

what the statute asks regarding whether the energy requirements of other customers would increase.

BPA's 5(b) policy, adopted together with this 9(c) policy, allows a customer to remove a market resource or other resource from service to its load in order to maintain its net requirement purchase from BPA in the face of any load loss, including commercial and industrial load loss. Export of this resource removed from load service does increase the net requirement of the utility over what it would have been if the resource had continued to be used to serve the loads remaining on PacifiCorp's system. BPA does not agree with PacifiCorp's conclusion that the statute requires a direct, and individual customer, causal connection between an export and an increase in BPA's obligations.

Issue: Whether the 9(c) policy should enable BPA to make a factual determination of whether an export will increase BPA's obligations to serve load in the region.

PNGC argues that BPA's factual finding under section 2 has changed an objective test under the statute of whether an export increased the Administrator's firm energy requirements to the exporting customer or any other customer into a subjective test on the probability of whether an export will result in an increase in BPA's requirements obligations. BPA's proposed analysis sets up an administrative process that could easily get bogged down in time consuming and contentious debates over the results of less than transparent analyses. A better approach would be for BPA to require that a utility demonstrate that it is dedicating sufficient resources to its load to result in the net requirement it is placing on BPA. Let the market determine where resources go. *PNGC, 5(b)9(c)-018.*

Evaluation and Decision

BPA's interpretation has been that a factual determination is required to assess whether the export sale or disposition of power or a resource out of the region will result in an increase in the requirements of the exporting customer or any other customer. A factual determination must also be made on whether the power sold or a resource sold could have been conserved, or otherwise retained by reasonable measures to serve regional load. As to the first determination, BPA is proposing to look at the information it has available for regional loads and for nonfederal resources used by BPA's customers to meet loads in the region. BPA will consider the least cost planning information and other information made available to it. As to the second determination, BPA has in the past based the determination on usual utility practice and technical knowledge of Northwest systems, current and expected future conditions, and the market. Since the determinations are factual, if BPA fails to state a factual basis for its conclusion, the determination may not be supported. To the extent that the basis for a determination is made upon estimation of loads either by the exporter or another party, some amount of reasonable judgment may be a part of creating that estimate. No party, including PNGC, can foretell the future performance of resources, loads or the impact of market or sales with surgical precision.

BPA disagrees with PNGC that BPA's proposal will necessarily result in an endless administrative process. BPA has stated what the considerations for making the determinations will be and those determinations are BPA's alone to make. If the customer disagrees with the determination made, it may challenge BPA's decision. PNGC's argument that all that is needed is a demonstration that it is dedicating sufficient resources to serve its load, is not unlike PacifiCorp or PGE's arguments above. BPA rejects these positions because they look only to the single customer load, which is the exporter of the power, and not to all customers' requirements or to whether the power could be retained to meet regional load as opposed to the exporter's load.

PNGC also commented that the market will determine where resources go. BPA is planning to use a comparison of the fully allocated nominal cost of a resource compared to BPA's forecast of the regional marginal cost. BPA will expressly state the methodology it intends to use in its study.

Issue: Whether the 9(c) policy adequately provides for instances of utility retail load loss or generation asset sales.

ICNU comments that BPA's revised policy fails to address the issues surrounding retail load loss or generation asset sales related to retail restructuring. ICNU urges BPA to allow resources to be removed from a firm resource exhibit due to retail load loss or if the resource is sold at a public auction. ICNU acknowledges that it may be possible to provide benefits to residential customers through cash payments for investor-owned utilities who lose the right to buy power from BPA due to retail access. *ICNU, 5(b)9(c)-019.*

Evaluation and Decision

BPA has agreed in its revised policy that it will allow utilities to remove a market purchase commitments or other resource from their firm resource exhibit and preserve their net requirements if a utility loses load due to retail access. While BPA had initially proposed that it would determine whether a resource could otherwise be retained to serve regional load by having it offered at auction and not purchased by a regional customer, there was considerable disagreement in the timing, mechanisms, and conduct of an "auction" reflected in the comments BPA received. With no consensus, BPA determined that the use of such a mechanism to establish a determination was unlikely to meet the intent of BPA's statutes.

BPA's section 9(c) policy results in a reduction of a utility's right to purchase Federal power only if a utility exports a resource that could not be conserved or otherwise have been retained to serve regional load. For example, if a utility stopped serving commercial and industrial customers due to retail access and the utility then sold its surplus resources to the departing retail customers, there would be no export and no reduction in Federal power sales to the utility. If, on the other hand, the utility decided to export the resource it had been using to serve its retail loads that is now surplus, BPA's policy states that it must be offered to BPA and to all BPA's customers at cost plus a reasonable rate of

return. BPA interprets that standard as the amount that the utility was charging its departing customers under its retail rates. If no regional customer will pay the costs that the utility had been charging its retail customers, then BPA has determined that the resource can not otherwise be retained to serve regional load. BPA does not believe these policy requirements will create a significant impediment to retail restructuring. Even if the actions taken by the utility do result in reductions in the amount of Federal power the utility can purchase to serve its residential loads, BPA has provided for a financial credit. Provisions in its proposed settlement agreement for the residential exchange require cash payments reflecting the difference between the market value for the power and the rate the utility had paid BPA for such power.

Issue: Whether the 9(c) policy should define the term “energy requirements”.

Kaiser, Reynolds, Northwest Aluminum, and Goldendale (Kaiser *et al.*) comment that BPA should define the firm energy requirements of its customers to mean the same as the term “Energy requirements of any Pacific Northwest customer” under the Regional Preference Act, whether or not BPA is currently required by contract to serve such customer. In effect, Kaiser *et al.* argue that firm energy requirements of BPA customers has the same meaning as the “energy requirements” of any Pacific Northwest customer as defined in section 1(f) of the Regional Preference Act, 16 USC 837(f). Kaiser *et al.*, 5(b)9(c)-023.

Evaluation and Decision

Kaiser *et al.* raises a statutory interpretation issue concerning what obligations BPA has to provide electric power to its Northwest customers under two different statutes, the Regional Preference Act of 1964 and the Northwest Power Act. Both statutes address an electric power service obligation which BPA must consider for the following specific purposes: (1) in making a determination of the effect of an export of nonfederal hydro resources; (2) in making a determination of whether BPA must terminate deliveries of a Federal power sale out of the region; (3) in determining whether an export of nonfederal power under section 9(c) of the Northwest Power Act would result in an increase in BPA obligations to any customer to serve their load; and (4) in determining whether BPA must sell only surplus power as replacement for an export of nonfederal power or a sale of a resource by a customer.

Kaiser *et al.* comment that “requirements” should be equated to a customer’s consumer loads in the region regardless of whether or not BPA has a contract to supply power to an entity. Kaiser *et al.* would like BPA to interpret the obligation under the Regional Preference Act section 1(f) to provide for the “energy requirements” of any Pacific Northwest customer to have the same meaning as the terms “electric power requirement of any Pacific Northwest customer” used in section 9(c) of the Northwest Power Act.

Although the phrases are similar, BPA’s interpretation of these phrases, as used in the two statutes, distinguishes each from the other based on the contextual use of each within

the two different provisions. Energy requirements in section 1(f) of the Regional Preference Act includes,

the full requirements for electric energy of (1) any purchaser from the United States for direct consumption in the Pacific Northwest and (2) any non-Federal utility in that region in excess of (i) the hydroelectric energy available for its own use from its generating plants in the Pacific Northwest and (ii) any additional energy available for use in the Pacific Northwest which under a then existing contract, the utility (A) can obtain at no higher incremental cost than the rate charged by the United States, or (B) is required to accept.

16 U.S.C. §837(f). Section 1(f) of the Regional Preference Act is a definitional section which applies to the Administrator's determination of "energy requirement" and whether to exercise a termination of delivery provision under section 3(a) and 3(b) of the Act.

Sections 3(a) and (b) of the Act require the Administrator to include in surplus power sale contracts a provision allowing BPA to terminate the delivery of power to a purchaser out of region or to an in region purchaser with a replacement sale for an exported hydro resource. Section 3(a) requires BPA to give a 60 day notice of termination of deliveries when the Administrator determines "it can reasonably be foreseen that such delivery would impair his ability to meet . . . the energy requirements of any Pacific Northwest customer." 16 U.S.C. §837b(a). Section 3(b) contains similar language requiring a determination of a present or future inability to meet the energy requirements of any Pacific Northwest customer for power sold on a "provisional basis." The difference between subsections 3(a) and (b) is that subsection 3(a) is preceded by a determination that the power sold is unlikely to be needed and if later needed, the power delivery is terminated. Under subsection 3(b) the power is sold based on a determination that the power may be needed in the future and if needed, the deliveries are terminated and the amount of power previously delivered is returned. There is no other mention of the phrase "energy requirements" outside of the context of the determination of whether to exercise BPA's right to terminate deliveries of power already made.

Conversely, section 9(c) of the Northwest Power Act states in pertinent part,

[t]he Administrator shall, in making any determination, under any contract executed pursuant to section 839c of this title, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude . . . any amount of energy included in the resources of such customer for service to firm loads in the region . . . [if the specified circumstances are met].

16 U.S.C. 839f(c). The electric power requirement of a Northwest utility customer is limited by being net of the resources a customer must or has applied to its regional consumer load. These resources can be generation or contract resources, and thermal or renewable resources, not just the hydroelectric resources and contracts addressed in the Regional Preference Act. The context of the Administrator's determination under section

9(c) is the Administrator's obligations to BPA customers under their Northwest Power Act section 5 contracts with BPA. These contract obligations are specifically defined in subsection 5 (b), (c), (d) and (f).

There are several differences between the intent, context, and impact of the determination BPA makes under section 9(c) of the Northwest Power Act, as opposed to section 1(f) of the Regional Preference Act. First of all, in contrast to section 1(f) of the Regional Preference Act, the amount of BPA's electric power requirement for a customer under Northwest Power Act section 5 contracts is not a fixed one, but instead changes with a change in the customer's resource(s) due to obsolescence, retirement, loss of resource, and loss of contract right. The Administrator may also grant consent to the removal of customer resources. For contracts that customers use and apply as resources, the Administrator's consent is not dependent upon whether the price is a higher incremental cost than the rate BPA would charge. Secondly, BPA's obligations are specifically defined under section 5. Moreover, the factual determinations BPA is directed to make under section 9(c) to establish its net requirements obligation under section 5 are different from that of section 3 of the Northwest Preference Act. Therefore, BPA has read the definition of energy requirement under section 1(f) of the Regional Preference Act to be broader than the definition of "electric power requirement" under section 9(c) of the Northwest Power Act.

BPA's interpretation that the two provisions are different but interrelated was stated in BPA's legal interpretation accompanying its 1994 Nonfederal Participation 9(c) Policy. BPA stated that under section 3(d) of the Regional Preference Act, a customer's export of nonfederal hydroelectric resources reduces its section 1(f) energy requirement. 1994 NFP 9(c) Policy ROD at B-18. BPA stated that "a utility's energy requirements included BPA's requirement obligation to provide firm power to the utility under its subsection 5(b)(1) contract with BPA." *Id.* To the extent that BPA provides electric power to meet the utility customer's firm power requirements load, those "electric power requirements" under the Northwest Power Act section 9(c) are included in the definition of "energy requirement" under subsection 3(d) of the Regional Preference Act. *Id.*

3. Section 3: Scope of Section 9(c) Policy

Issue: Whether this 9(c) policy should change the prior policy regarding third party wheeling.

PGP commented that the revised policy deleted an important provision that BPA included in the 1994 Policy. The 1994 policy included these two sentences: "This policy does not automatically decrement New Owners for any resource when they wheel for others and in which the New Owner has no ownership or contractual interest. BPA shall analyze such third party wheeling over a New Owner's share of Intertie on a case by case basis." PGP is concerned that BPA will automatically reduce its firm power load obligations under its section 5 contracts to customers when they wheel power for export for others. The removal of this provision is contrary to 9(d) and in breach of the contracts for Intertie users. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

BPA's deletion of this provision does not imply an automatic decrement for customers when they wheel for others. BPA has removed this provision since it is no longer necessary. Now that the policy is applicable to all BPA customers, it is no longer necessary to identify specific factual instances which will be examined on a case-by-case basis.

4. Section 4: Data on Specific Resources

Issue: Whether the 9(c) policy adequately provides for the treatment of commercially sensitive utility information requested by BPA.

Grant PUD commented that the information in section 4 is commercially sensitive information that must be shielded from BPA's merchant function. *Grant, 5(b)9(c)-011*. PGP commented that most of the information required is unnecessary for determination. Particularly, "data on specific resource" are not reasonable and exceed BPA's statutory authority. There is no protection from BPA using such information for commercial advantage. All references to specific resources should be deleted. "Prior history" is irrelevant and should be deleted. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

BPA must make a determination of the impact of a customer's export upon its present and future electric power requirement obligations and do so upon a reasonable basis. In order to make such a determination BPA needs basic information which can only be supplied by the customer making the export. It is not beyond BPA's authority to require basic information in order to make its determination. Without such information BPA would determine that the export occurred because no showing would be made that the resource could be conserved, or otherwise retained or that BPA's loads. Without the information BPA may not even know the amount of power exported which would frustrate completely BPA's administration of this provision of statute. Therefore, BPA rejects PGP's comment and will require that information be provided by the customer making the export.

BPA believes the information required under section IV of the policy is the minimum necessary to administer the statute. BPA does not see what commercially sensitive information is included in the data request. BPA's request is limited to the resource intended for export. Nonetheless, BPA is willing to treat such information from the customer as commercially sensitive, clearly designate it as such, and receive it under a confidentiality agreement that limits access to the information to those BPA staff who will review the information for the purpose of making any section 9(c) or 3(d) determination. Treatment of information in this manner will be consistent with BPA's responsibilities and obligations under the Freedom of Information Act.

5. Section 5: Prior Case-by-Case Section 9(c) Interpretations

Issue: Whether the determinations made under the 1994 9(c) Policy are incorporated into this 9(c) policy.

PGP commented that BPA should not incorporate by reference prior interpretations of section 9(c) and section 3(d) into the new policy. PGP argues that those interpretations are entirely different than the ones contained in the new policy. PGP assumes that the old policy will continue to apply to exports commenced prior to the new policy. PGP urges that the new policy will apply to sales after the policy becomes effective. PGP stated that BPA's references here are confusing, such as, "BPA incorporates by reference in this policy these prior interpretations of section 9(c) and 3(d) and determinations made thereunder for the duration of the export sale." PGP suggests that BPA delete these statements. If determinations and interpretations made under 1994 policy are to be applied to the new policy, the policy should expressly state that position. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

One of BPA's purposes in returning to its 1994 NFP 9(c) Policy and ROD is to revise it to accommodate the changes that have developed in the wholesale power market since its adoption. Revisions to the policy are to address those aspects of the policy that BPA felt needed to be better coordinated with the new markets. This ROD addresses the changes made in the policy, the reasons for it, and BPA's response to customer's comments on the policy. This revised policy and this ROD are built upon the foundation of both the legal interpretation and policy as adopted in 1994 and incorporation of those by reference here is entirely appropriate. The wisdom of BPA's 1994 NFP 9(c) Policy need not be reviewed.

In addition, a number of customers who had been making exports of power under the 1994 policy have not been decremented by BPA. These customers were concerned about the status of their transactions under a new policy, and expressed concern over whether they would have to reestablish the basis for their exports under the new proposed section 9(c) policy. BPA has clearly said that those exports which have been approved without decrement, and those which were decremented, under the 1994 policy will not be changed. Determinations previously made regarding customer exports do not have to be reconsidered due to clarifications resulting from publication of a new policy and are binding on the agency for the duration of the export. BPA retains the 1994 policy and ROD and reaffirms its prior determinations.

6. Section 6: Categories of Resources

Issue: Whether the 9(c) policy reasonably categorizes the resources for export that do not result in an increase in net requirements.

Idaho Falls questions how section 6 of the policy, listing resources which will and will not result in a reduction of BPA's obligation to supply the electric power requirements of a customer, operates in accordance with the statute. Idaho Falls also questions how these provisions operate with sections 7 - 10 of the policy. Idaho Falls notes that section 6(b) states that certain resources are by definition conservable, *i.e.*, all hydroelectric resources and current section 5(b)(1)(A) and (B) resources. Idaho Falls is concerned this provision nullifies an earlier provision allowing a resource to be removed from service to firm loads due to retail load loss. Idaho Falls commented that section 6(a)'s use of the words "certain resources" is undefined. The focus on the impact of the customer's export ignores the conservability of the resource as described in 9(c). There appears to be no circumstance where a utility can export hydroelectric power or the resource, and not have its net requirements reduced. A utility should be allowed to demonstrate that the export of hydroelectric power will not increase energy requirements of BPA's customers or that the resource was not conservable. *Idaho Falls, 5(b)9(c)-008.*

WPAG expresses similar concerns that the operation of this section is unclear. WPAG recommended that BPA change "electric power requirements" to "electric energy requirements" to conform with statute. WPAG commented that BPA should add language to make clear that a utility's transaction that qualifies under section 7 - 10 will not be treated as an export, and will not result in decrement to utility's requirement power. BPA should also revise the policy to recognize that when nonfederal resources are removed from retail load service due to retail load loss, their export is permissible when it can be shown that doing so will not increase the firm energy requirements of BPA customers, or the resources cannot be otherwise conserved, or it otherwise qualifies for export without decrement under section 8, 9, or 10. *WPAG, 5(b)9(c)-024.*

Evaluation and Decision

Responding first to WPAG's comment that BPA should change the provision to read "electric energy requirements" instead of "electric power requirements," BPA has previously addressed this issue. *See supra* Section IV.B.2. As to Idaho Fall's comments, section 6(a) was included in the 1994 NFP policy to identify those resources which had met the tests of the statute such that BPA would not reduce its electric power requirements to the customer as a result of the export. Section 6(a) identifies those resources which have met the tests set out in section 2 of the policy. Those tests are taken from the provisions of section 9(c) of the Northwest Power Act. The only clarification that needs to be made is that when section 2(b) uses the terms "firm energy requirements," it includes firm peaking energy. BPA use of the terms "certain resources" is undefined because the determination regarding any specific resource, other than hydroelectric resources, will depend upon specific loads and resource conditions at the time of the export and the actions taken by the customer both under its BPA contract and

in the market. Certain resources simply means there will be some resources which meet the tests set out in the policy and do not result in a decrement to BPA's obligations.

Idaho Falls also commented that stating some resources are always conservable under section 6(b) is inconsistent with the statute. BPA disagrees. In 1994 BPA determined that those thermal or hydroelectric generating resources a customer had applied for use against its own loads were conservable since using the power in load would not result in waste of the power. BPA reaffirmed the determination that any firm hydroelectric power or generation was conservable because it had a lower variable cost than other thermal resources and customer could use it to displace their higher operating cost resources. Footnote 5 of BPA's legal interpretation in the 1994 NFP 9(c) Policy ROD at B-19 explained the reasoning. Because the utility could conserve the hydroelectric resource by applying the power generated to its load, if the utility exported the resource, BPA would reduce its electric power requirements obligation to the utility and sell it only surplus power as replacement for the exported power. This category of resource, if exported by the customer would cause a reduction in BPA's electric power requirement to the customer.

As to the question of the operation of this section 6 with sections 7, 8, 9, and 10, section 6(a) would identify those resources which based on a section 2 finding, a customer could use to support a section 7 "system sale" without a reduction in its BPA obligations, or which could be exported after making a resource offer to BPA and its other customers under section 9. Section 10 simply states that if a customer buys generating capability or power from an IPP, the customer's portion of the resource purchase it made is subject to the policy even though the resource may be owned and operated by a non-BPA customer. Section 8 addresses seasonal exchanges which do not result in any net regional energy deficit. Resources covered by section 6 may be used for seasonal exchanges covered by section 8 with no reduction in BPA obligations, if there is no net energy deficit to the region during the operating year from the exchange.

Idaho Fall's also commented that a resource removed with BPA's consent for load loss may still have to be applied to load if it is a hydroelectric resource. BPA is aware that Idaho Falls uses the Gem State or Bulb turbine resource, which is a hydroelectric resource. BPA's 5(b) policy would require the hydroelectric resources of the customer to continue to be applied unless they are discontinued due to retirement, obsolescence, or loss of resource. BPA's 5(b) policy states that if there is a reduction in the amount of net requirements load due to retail load loss, BPA will implement the mitigation for retail load loss provision in the customer's 5(b)(1) contract. In this instance, the customer would continue to apply its generation to load and BPA then would reduce the amount of power it sells to the customer equal to the reduction in the customer's retail load. BPA's 5(b) policy includes an alternative which is that BPA may consent to the removal of a generating resource for one year. Consent to remove a resource for one year permits the customer to dispose of the resource in accordance with section 10 of the 9(c) policy which would require that the customer offer the resource to BPA and its Pacific Northwest customers. If neither BPA nor any of its customers purchase the power

offered, the customer may then sell the power out of the region without a reduction in its BPA electric power requirements obligations.

If a hydroelectric resource is requested to be removed due to retail load loss, then a further consideration must be made. Because the resource is a hydroelectric resource which could be conserved, BPA will consider the hydroelectric resource not conservable if the total annual cost of firm power generated from the resource in mills per kilowatt-hour is higher than the then applicable PF rate, with any adjustments, for an equal amount of power. If the mills per kWh cost of the hydro resource is less than the PF rate applicable to the customer's BPA power purchases for that year, then the lower cost hydro resource should be applied to load and the portion of load served by the resource would not be part of BPA's power requirements under section 1(f) of the Regional Preference Act.

Issue: Whether sections 6(a) and 6(b) of the 9(c) policy should be clarified.

Grant PUD expresses concern that it is not clear how sections 6(a) and (b) will operate. Grant believes BPA needs to make it clear that a customer will not face a decrement of its BPA section 5(b)(1) requirements power purchase if it exports a resource identified under section 6(b). Grant commented that the interrelationship between section 6(a) and (b) is not clear. At a minimum, the policy should be revised to reflect that energy exported from resources identified in (b) will not reduce a customer's BPA purchase entitlement as long as export does not increase firm energy requirements of any BPA customers. *Grant PUD, 5(b)9(c)-011.*

Evaluation and Decision

The relationship of these provisions is set out in the preceding response. The resources identified in section 6(b) are the ones that BPA finds are conservable under the statute. BPA will reduce a customer's net requirement for the export of these resources. If the resources are already dedicated to serve the customer's load and BPA gives consent to remove the resource for a year due to load loss, then the customer must offer the resource to BPA and to BPA's Northwest customers under section 9 of the policy. If the resource is not purchased by a customer or BPA for regional load, then it may be exported without decrement. The offer of the resource to BPA and BPA's other customers will establish that the export of the resource would not be used by them for regional load and will not increase their BPA electric power requirements. BPA will not revise the policy to reflect "energy" or energy requirements" for the reasons BPA states in the preceding response to the comments of WPAG.

Issue: Whether the 9(c) policy appropriately addresses the responsibility of customer owner/operators with respect to resource use by other customers.

PPC commented that they are opposed to customer owner/operators having any responsibility for how project participants or output purchasers use generating output. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

BPA's legal interpretation of section 9(c) published as part of its 1994 NFP 9(c) ROD discussed this concern. BPA recognized the effect upon its own obligations to a customer which had a nonfederal resource withdrawn by another customer, and stated the following.

When a customer withdraws a firm resource it previously sold to another customer, and *the resource was dedicated to that other customer's firm load*, the customer's export of its resource *could result in an increase in BPA's firm load obligation to that other customer*. The loss of a resource, or of contract rights, gives rise under subsection 5(b)(1) to an increase in BPA's obligation to 'pick-up' that portion of firm load served by the lost resource. Only if the customer losing the firm resource had another firm resource that was otherwise uncommitted and available to serve the same firm load would the withdrawal of the resource not automatically result in an increase in BPA's firm obligation to the losing customer under subsection 5(b)(1).

1994 NFP 9(c) Policy ROD at B-14. (emphasis added). The actions of an owner operator who is a customer of BPA are not exempt from review. However, the actions of a customer who has purchased a share of an owner operator's resource output or power from the resource is also responsible for its actions in using the resource and those actions may be subject to review under 9(c) if the power is exported. The actions of one customer will not be attributed to another unless both take similar actions together, such as a joint export sale. The determination of the effect of an export which would result in a reduction in BPA's electric power requirements obligations will be determined for each customer and affect BPA's obligation to serve that customer's load based on that customer's sale or other disposition. Thus, the result of any determination to reduce or decrement BPA's obligation to a customer will not exceed its portion of the sale or disposition.

BPA does not agree that customer owner/operators are free to export their resources through sales in the wholesale market without BPA determining the effect of such exports upon BPA's electric power requirements obligations. BPA also recognizes that the wholesale market has changed significantly since participant agreements were signed for many of the region's generating projects. BPA will evaluate any potential export by a customer by considering the facts involved when an export sale or contract was executed.

Many of the region's previous output sales from existing resources by one customer to another in the region occurred during a period when the region's utilities engaged in fewer wholesale transactions. Such sales by customer owner/operators disposed of output which was excess to what that customer needed to serve its loads at the time. The output was purchased by other customers to be used to serve their regional loads. Many of these purchase contracts were used to serve the buyer's regional load and have been dedicated under section 5(b)(1)(A) of the Northwest Power Act. BPA's 1994 NFP 9(c) Policy looks to the utility purchasing this output to determine how they used the resource

in determining whether an export occurred. If a customer owner/operators had a right to take back the power, then BPA would look at the owner/operator's use of the resource in determining its electric power requirement to purchase Federal power.

These same resources may be returned to the control of the customer owner/operator upon notice under the contract or expiration of those original contracts. If the output of the resource which was taken back by a customer owner/operator was in turn resold to a regional utility for service to its regional loads, there would not be an issue under section 9(c). The need to determine whether the power was exported would arise if the customer owner/operator sold the power in the wholesale market. As an example, if the customer owner/operator arranges through a broker to sell to a marketer and the marketer then used the power to bid into the California PX, BPA believes that such power has been exported from the region. The fact that the transaction transferring title took place in the region does not relieve BPA from its responsibilities under the statute.

Issue: Whether BPA has the legal authority to make determinations under the 9(c) policy which reduce utility customers' net requirements.

PGP commented that BPA has "no authority under 9(c) or 3(c) [sic] to reduce customers' net requirement entitlement" if the customers export a product other than energy. BPA fails to consider that under 9(c), an export must have previously served a customer's firm load in the Northwest. PGP claims that BPA must determine whether the energy is exported outside the region; then whether the export cannot be conserved; and then whether the export will increase firm energy requirements of the exporting customer or other customers of BPA. Under statute BPA may not make an indefinite determination that any category of resource is conservable. Subsection 9(c) addresses BPA determinations under its section 5 contract, not under a policy. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

PGP's argument that BPA lacks authority to make determinations under section 9(c) based upon categorizing nonfederal resources and the possible export or disposition of them outside the Region by a customer is simply wrong. As discussed above, BPA is charged with the responsibility of interpreting the statute and ensuring that its purpose is obtained. Congress did not direct any specific methodology by which BPA would make its determinations. Instead, Congress left it to BPA to decide the means. Congress did provide a set of tests which BPA must consider on a factual basis to support its determinations. The categories of resources created by section 6(a) and (b) are not indeterminate. They are based upon those tests and facts which obtain by virtue of the customer's prior use of the resource to serve its load. For example, if a customer is obligated to use a nonfederal resource to serve its regional load on a planning basis, then the customer would not be able to show that the power from the resource could not be conserved. Since the resource could be used for regional load, making it conservable, an export of the power from the resource by the customer would cause BPA's load to that customer or other customers to increase.

BPA's current policy does not modify the basic tenet of its 1994 9(c) NFP Policy on the factual determinations BPA must make regarding a customer's export of resources. BPA has not failed to consider whether the customer's nonfederal resource has previously been used to serve regional load since such resources are identified under the section 5(b) policy. BPA does not disagree with the PGP's statement about the tests required under section 9(c); however, BPA does disagree that the only means is to make a case-by-case determination for each resource. Power from customer resources which is to be used for regional load should not be exported. There is nothing indefinite about a customer having the obligation to so apply its resource.

Further, BPA disagrees that the issue is solely one for contract negotiation between BPA and a customer. BPA can adopt policies regarding the implementation of its statutes which will guide the agency in administering its contractual obligations with its customers. Where interpretations have region-wide significance for all customers, the development of such policies allow all customers to participate. This would not be possible in bilateral negotiations. Finally, for the reasons stated above in response to Idaho Falls' comments and others, BPA declines to view the statute as addressing energy only, instead of the electric power requirements of its customers, when considering any determinations made under this policy.

Issue: Whether the 9(c) policy should provide customers the right to review BPA's 9(c) resource determinations.

WPAG objects to the findings under section 6(b) that certain resources are always conservable. WPAG believes factual circumstances could change so that these resources are no longer conservable. WPAG also argues they should have an opportunity to show that export of one of these resources does not increase the firm energy requirements of BPA's customers. WPAG claims it would be a denial of due process if the customer is not given this opportunity. *WPAG, 5(b)9(c)-024.*

Evaluation and Decision

WPAG raised similar issues in its comment in IV.B section 6 issue 1. BPA has stated its interpretation regarding whether a resource, hydro or thermal is conservable, including how BPA will consider the resource if a load loss has occurred. In circumstances of load loss and possible export of hydroelectric resources, this ROD sets out what BPA will look for in order to determine that the hydroelectric resource may be exported without reduction in BPA obligations. BPA does not agree that the policy or the statute addresses only energy. Nor does this policy preclude any customer request that BPA review the policy's application to any specific action of a customer in exporting a resource. BPA has not denied any right of due process.

Issue: Whether the 9(c) policy should include a treatment of section 5(b)(1)(A) and (B) resources.

Tacoma commented that the reference to sections 5(b)(1)(A) resources and section 5(b)(1)(B) resources should not have been removed from section 6(b) of the section 9(c) policy. Such resources are important in the context and scope of the 9(c) policy and in making appropriate 9(c) determinations. *Tacoma, 5(b)9(c)-025*. PPC expects implementation of the policy to allow for modifications to the inclusion of 5(b)(1)(A) and (B) resources to the extent appropriate. *PPC, 5(b)9(c)-012*

Evaluation and Decision

The references in the 1994 NFP Section 9(c) Policy to subsection 5(b)(1)(A) and (B) resources are intended to encompass any resources which are thermal that have been used to serve regional load by a customer and which were not determined to be retired, obsolete, or lost. BPA has found that Pacific Northwest hydroelectric resources can be conserved to serve the customer's Northwest loads, unless the conditions of load loss stated above in IV.B section 6 issue 1 are met. Section 3(d) of the Regional Preference Act was enacted prior to the Northwest Power Act and applies to the export of hydroelectric resources or power in addition to any determinations made under section 9(c).

Issue: Whether this 9(c) policy section 6(a) changes the intent of the 1994 NFP 9(c) Policy.

EWEB commented that the 1994 NFP 9(c) Policy included a determination that the export of non-hydroelectric resources that have not been dedicated to load in any customer's firm resource exhibit would not result in a reduction of BPA's firm load obligation under the exporting customer's section 5(b) contract. EWEB noted this language had been omitted without explanation and replaced with a section 9(c) study. *EWEB, 5(b)9(c)-028*.

Evaluation and Decision

While BPA has changed the wording of section 6(a) regarding non-hydroelectric resources not included in a firm resource exhibit, the actual intent of the language has not changed. Section 6(a) requires a factual finding whether any non-hydroelectric resource that has been exported would result in an increase in the firm energy requirements of the exporting customer or other customer's of BPA, and if so, whether the resource could have been retained to serve regional load. BPA makes this factual finding under section 2. BPA will look at the use of the resource and the cost of the resource being exported and compare its cost to the regional marginal cost (*i.e.*, the region's marginal resource to be built). If the resource costs less than the regional marginal cost, BPA may find that export of the resource may result in an increase in BPA's firm energy requirements and that the resource could otherwise have been retained to serve regional loads. A customer

may offer the resource to BPA and BPA's other customers. If the resource is not purchased for use in the region, then it may be exported without decrement.

BPA conducted a 9(c) Study in support of its determinations under this section. In 1994 BPA performed a section 9(c) Study for a specific amount of power to be exported. *See* 1994 NFP 9(c) Policy Appendix A. BPA knew the type of resources that each customer was proposing to sell out of region. Based on information provided for the study, BPA was able to determine that both the amount of power exported and the resources proposed for export by the NFP Owners met the test of either not being conservable or retainable. They were also not likely to increase BPA's firm power requirements to any customer. BPA's factual finding in the study supported that the resources could be exported. BPA expects a section 9(c) Study for the period from 2002-2006 to identify categories of resources BPA finds can be exported.

Issue: Whether Section 6 of this 9(c) policy is intended to apply to a customer's use of nonfirm energy.

Grant PUD recommended that BPA reword the policy to refer to "firm energy" exported rather than nonfirm and other power products. BPA's right to decrement should be couched as optional rather than mandatory. *Grant PUD, 5(b)9(c)-011.*

Evaluation and Decision

BPA does not intend for this policy to cover a customer's use of nonfirm energy, available to a customer from its hydroelectric resources in planning conditions above critical water. BPA does intend this policy to cover, however, the firm power available to a customer from its hydroelectric resources on a critical water planning basis and from its thermal plants on a firm basis. Firm peaking capability is also covered, but other power products or ancillary services are not subject to this policy.

BPA does not see any basis in the statute for suggesting that BPA may forego the limitation placed on BPA power sales to a customer exporting resources or power. Particularly, if BPA finds the customer exported power or resources which could be conserved or retained for use in regional loads and, as a result of the export, BPA is likely to face increased load service from that customer or from its other customers. The statute directs BPA in that instance to only sell power which would otherwise be surplus power to the customer. This direction is not optional.

7. Section 7: System Sales

Issue: Whether the 9(c) policy should apply to system sales.

Grant PUD and the PGP argue that section 7 of the policy is unnecessary and violates section 9(c). Grant claims the concept of "system sales" has no applicability or usefulness for purposes of implementing the statute. *Grant PUD, 5(b)9(c)-011.* PGP commented that the statute refers to "energy exports" not "system sales." PGP notes the

1994 policy refers to energy, not power and recommends the deletion of this section as inconsistent with statute. *PGP, 5(b)9(c)-021.*

Evaluation and Decision

In its 1994 NFP 9(c) Policy BPA noted that some export sales by its customers were not of a specific resource but were simply power sales from the customer's system out of the region. The principles adopted in the 1994 policy will continue to apply. Section 7 of the policy creates a method for determining what resources a customer has exported. BPA believes it is necessary to administer the statute. BPA has already responded to comments made by parties regarding the terms "energy" versus "power".

Issue: Whether the 9(c) policy should apply to system sales involving hydroelectric resources.

The PPC comments that section 7 creates problems regarding the treatment of undeclared hydroelectric resources. The PPC suggested that decrementing 5(b) requirements is not necessary in cases where a system sale is supported by hydro generation that cannot be conserved or otherwise retained in the region. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

BPA has made the finding that the firm capability of all regional hydroelectric resources can be conserved to serve regional loads. BPA statutes do not allow it to sell Federal requirements power to replace the firm capability of nonfederal hydroelectric energy exported from the region whether the resource has been dedicated to serve a customer's own retail loads or not. Customers owning such resources should dedicate them to serve their own retail loads or sell them to someone else in the region for that purpose.

Issue: Whether a decrement under section 9(c) should be in proportion to the amount of hydro exported and not the entire system sale.

PGE commented that section 7 appears to require a decrement of a customer's net requirement by the entire amount of a system sale if a portion of the sale is supported by a nonfederal resource that could have been conserved or otherwise retained to serve regional load. PGE argues that it would be more equitable to decrement the customer's net requirement in proportion to the amount of such hydroelectric resource supporting the system sale. PGE contends that it is unfair to decrement a customer's 5(b) purchase by entire amount of exported system sale because a portion was hydro power or power from a thermal resource identified in a firm resource exhibit. Instead, BPA should decrement a sale in proportion to the amount of hydro used to support the sale. *PGE, 5(b)9(c)-014.*

Evaluation and Decision

BPA defined system sales in order to cover the circumstance of a customer not specifying the generation which was supporting an export of firm power from the region. BPA

provided that a customer could identify those resources which supported a system sale in which case BPA would consider the information provided and analyze the sale based on the resource used to support it. If hydro resources were used for only a portion of the generation supporting the sale, then BPA would not attribute the hydro to other portions of the sale. However, absent information from the customer as to which of its resources would be used for the export sale, BPA would assume that the generation supporting the export was hydroelectric power. BPA will modify the policy to clarify that if adequate information on the resources used to support an export sale are provided to BPA by the customer, then any decrement or reduction of firm power obligations will be limited to only the portion of the export sale supported by hydroelectric resources, and other resources that could have otherwise been retained by reasonable measures to serve regional load.

Issue: Whether the 9(c) policy should require BPA to monitor system sales.

Alcoa *et al.* commented with the following question. The policy requires a customer to identify the specific resources supporting the system sale to avoid a decrement, but how does BPA intend to assure that only the named resources actually support the system sale? *Alcoa et al., 5(b)9(c)-004.*

Evaluation and Decision

BPA does not intend to monitor a customer's resources hour-by-hour to ensure that on any one hour only a specific resource is supporting an export sale. BPA's intends to review the export transactions on a planning basis, including seasonal sales, seasonal sales which are multiyear transactions, and sales of less than an operating year. BPA will evaluate whether the amount of power on a planning basis from the specific resources identified for a system sale are sufficient to support the sale. If so, then those resources will be deemed to be the ones which supply the power for export per the representations of the customer. For system sales without identified resources, BPA will assume that the resources used to support the sale are hydroelectric resources absent other information.

8. Section 8: Seasonal Exchanges

Issue: Whether this 9(c) policy should change from BPA's 1994 NFP 9(c) Policy with respect to seasonal exchanges.

Grant PUD argues that section 8 of the policy is overly restrictive. If on an annual basis an exchange does not result in a net export of energy, then the transaction should not be subject to 9(c). *Grant PUD, 5(b)9(c)-011.*

Evaluation and Decision

BPA has not modified this provision from the 1994 NFP 9(c) Policy. The 1994 NFP 9(c) Policy addresses the issue of seasonal exchanges, or power for power exchanges, as part of the dispositions of power outside the region which would not result in a reduction of

BPA's obligation to a customer under its section 5 contract. Although an exchange of power sends power out of the region the basis for the exchange transaction is the return of an equal or greater amount of power to the utility at a different time. Because an amount of power was returned to the region at least equal to what was exported, BPA adopted an exception for exchanges of power as long as there was an equal amount of power returned and no net export of power during the year. These remain the conditions for the exception created for seasonal exchanges, or power for power exchanges, by customers. If there is a net export of power from the region, BPA will consider the transaction to be a sale and not an exchange and make a determination of whether there would be a reduction in its obligations to the customer.

Issue: Whether section 8 of the 9(c) policy exceeds the Administrator's authority.

The PGP and WPAG argue that section 8 violates section 9(d) because it uses the terms "regional energy deficit" and that section 9 (c) and (d) require an increase in BPA's firm load obligations. PGP claims that section 8 of the policy exceeds BPA's statutory obligations and authority by referring to a regional energy deficit. The provision should address only increases in BPA's obligations to serve that result from the exchange. The provision should be revised to comply with 9(d). *PGP, 5(b)9(c)-021*. WPAG claims that section 9(c) does not exempt only seasonal exchanges but exempts all exchanges regardless of duration. WPAG notes that the statute does not refer to "net regional deficits" in determining the exchange exemption. The exemption is extended to all exchanges so long as they do not increase the amount of firm power BPA obligated to provide any customer. *WPAG, 5(b)9(c)-024*.

Evaluation and Decision

As stated above, the revised policy for 9(c) did not propose any change in the 1994 policy. It has been in effect for six years. The purpose of this provision was to remove a category of transactions which were "dispositions" of power out of the region and covered by section 9(c) from BPA review if there were a net zero export of energy from the region. BPA could have included such transactions as part of its review and made individual determinations. The types of exchanges which were discussed in the legal interpretation are similar to those of section 5 of the Northwest Preference Act. *See* 1994 NFP 9(c) Policy ROD at B-10 and 11. Congress exempted BPA's exchange transactions under this section if they were of this type because they would not result in a net reduction of power in the region. Given that BPA could use exchanges of the types enumerated it is reasonable that a customer could use the same mechanism without a reduction in regional firm power. BPA does not view this provision as inconsistent with section 9(d) or 9(c) since, in effect, no net disposition of power is made.

Issue: Whether seasonal exchanges under the 9(c) policy should include buy/sell transactions.

Tacoma argues that the provision regarding seasonal exchanges should be broadened to reflect buy/sell market exchanges that occur under current market conditions. Tacoma

suggested that BPA include extra regional sales that are balanced during the operating year by extra regional purchases. Include market exchanges, not just exchanges with one single entity. *Tacoma*, 5(b)9(c)-025.

Evaluation and Decision

BPA's 1993 Definitions notes that exchanges are agreements for the transfer of power or energy between BPA and customers and are not a sale of power. BPA Definitions, DOE/BP-2279 (April 1994). The United States court of Appeals for the Ninth Circuit addressed the distinctions between a sale of power and an exchange in *Utility Reform Project v. BPA*, 869 F.2d 437, 454-55 (9th Cir. 1989). The court found that settlement agreement involving the transfer of power from BPA to regional IOUs and a return obligation from the IOUs to BPA was an exchange. The court noted the structure of the exchange: "Bonneville and the IOUs are to make available to each other an equivalent amount of energy in each contract year. Their obligations differ with respect to the times of delivery and rates of delivery of the electric energy. These different obligations make the exchange economical and mutually beneficial to the parties and take advantage of the different characteristics of their systems." *Id.* at 444. BPA has viewed exchanges as basically a trade in kind of electricity for electricity with the time periods of delivery and return being based on the different seasonal or operational characteristics of the parties systems, loads and resources. They are not a transfer of title or ownership of power to another party for money.

Tacoma argues that the distinction between a seasonal exchange and an export sale which is balanced by an equal purchase from an extra-regional sources is an unnecessary distinction. While Tacoma's comment has superficial validity, it ignores the differences in the basics of each transaction, the relative value per season of the energy or power, and the relationship that is maintained by keeping a single transaction. For example, a sale of power is complete when the power is delivered and the parties to the sale owe no other obligation to each other. Conversely, the nature of an exchange of power is that when power is taken by another party it owes the other an obligation to return an amount of power which is not satisfied until a return is made. Parties in the market have no express obligation to sell power to each other or any one party in particular, and may simply refuse to offer power or make power available. Further, Tacoma's proposal could allow power which would otherwise be used in the region, to be bought back at times when the power purchased cannot be used to serve regional firm loads. BPA may then be required to buy new resources to serve those loads that could have been served by the export. For these reasons, a buy-sell arrangement will not be considered the same as an exchange.

Issue: Whether hourly and nonfirm energy amounts should be included in the 9(c) policy.

Alcoa et al. noted that as secondary energy becomes traded hourly as firm, the policy could allow substantial portions of Northwest resources to be exported at market prices when there is unmet need in the region. Seasonal energy should be handled though the resource offer section. *Alcoa et al.*, 5(b)9(c)-004.

Evaluation and Decision

BPA understands that a hourly market for firm secondary energy has developed. However, BPA's 1994 NFP 9(c) Policy stated that the power and energy BPA was considering for application of 9(c) is that which is planned to be used for firm loads in the region and not the occasional nonfirm or hourly amounts that may occur on any hydrosystem due to high water conditions. BPA has proposed using the load and resource planning basis of critical water for purposes of showing what portion of a hydroelectric resource may be kept available for service to firm power loads of customers in the region. Other planning bases may be considered if the utility has used them for its own planning. However, BPA is not intending to account for every kilowatt-hour which may occasionally be produced by a customer's resources, given variable water conditions, in this policy.

9. Section 9: Resource Offer

In its 1994 NFP section 9(c) Policy, BPA proposed and adopted a provision which stated:

Section 9. Recall.

Any New Owner that does not want its Northwest Power Act, section 5(b) power sales contract decremented by BPA may agree to include terms for the recall of its export sale upon notice from BPA that the energy from such New Owner's resource is needed to meet requirements load in the Pacific Northwest.

1994 NFP 9(c) Policy ROD at C-10. The explanation for this provision was stated in the policy principles and was based on a statutory provision of section 3(a) of the Regional Preference Act regarding contracts for the sale of Federal surplus power to an out of region purchaser. The explanation stated that BPA would consider whether the export obligation of the customer included a right of the customer to terminate deliveries of energy and power in favor of Pacific Northwest loads. BPA said that if the customer had contract terms that include a discontinuation of the sale upon notice from BPA that the resource would be needed by a date certain for service to loads, then on a case-by-case basis, depending on the exact terms in the contract, BPA would consider not reducing the customer's firm power requirements load obligation. Thus, some export sales which would have received a decrement, e.g., system sales, could be made without a reduction if appropriate terms for recall as defined in the policy were included in the export contract.

Since the adoption of the 1994 policy and the implementation of the Third AC Participation Agreements, BPA has not had any New Owner or other customer seek to use this provision regarding its exports. BPA's experience has shown that such a provision is of little interest to the buyers and sellers, and that Northwest customers were not interested in using this type of policy option. Therefore, BPA in modifying its 1994 9(c) policy had decided to delete the provision. The deletion of this provision does not affect or change BPA's own obligation under section 3(a) of the Regional Preference Act

regarding the recall of any surplus sales. Dropping this recall policy provision merely means that customers cannot avail themselves of a contract provision to avoid reductions in their load obligations from BPA, assuming such reduction would have applied under the statute and this policy as modified.

BPA's present clarifications of the application of section 9(c) to exports under this modified policy makes this provision unnecessary. Under the modified policy, BPA will examine a customer's export of a resource on a year by year (annual) basis unless the customer requests BPA to make a longer period determination for its export. Inclusion of any "recall" provision in the customer's contract would be totally voluntary and at the selling customer's discretion.

Issue: Whether the 9(c) policy should require that BPA exercise its recall rights under the Regional Preference Act before requiring a recall of nonfederal resources under section 9(c).

Avista commented that section 9 of the modified Section 9(c) policy required customers to include a recall provision in their exports to avoid a decrement. Avista urged that BPA exercise all recall rights to Federal power before requiring a recall of nonfederal resources under section 9(c). BPA should exercise its callback rights under 3(a) of Regional Preference Act before decrementing a customer's net requirements for export. *Avista, 5(b)9(c)-003; PSE, 5(b)9(c)-005*. BPA should not impose more onerous conditions on its customers than it would impose on own exports. There is no statutory provision that customers must include recall provisions, only BPA. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

Subsection 3(a) of the Regional Preference Act requires BPA to include in its contracts for the sale of Federal surplus power a provision which allows BPA to terminate deliveries of Federal surplus power to an extra-regional purchaser on up to 60 days notice. Such notice is to be given when BPA determines that there will be a need for the power to meet the energy requirements of its Pacific Northwest customers. 16 U.S.C. 837b(a). BPA's contract sales made under this provision include such a term in the contract. However, the "recall" provision of the NFP 9(c) Policy affecting a customer's export is merely contractual and not required by statute. In its 1994 NFP 9(c) Policy, BPA Inclusion of a recall provision is at the customer's discretion. BPA has provided this option to allow customers to make long term exports that potentially could be retained to serve load in the region. This provision was originally included under BPA's Intertie Access Policy to allow long term exports of thermal resources that would be recalled when BPA issued a notice that the resource was needed in the Pacific Northwest. Since BPA has determined that it will drop this provision in its modified section 9(c) policy, no issue of whether BPA exercises its termination of deliveries ahead of, or behind, the recall of a customer's extraregional sale will arise in the future.

BPA believes the duties imposed on BPA under section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act regard a customer's use of its own

nonfederal resources and are distinct and separate from BPA's obligations regarding recall of its sales of surplus power. The issue under section 9(c) and 3(d) addressed by this policy is whether BPA is required to decrement a customer's purchase under its requirements contracts if it has exported energy that results in an increase in the firm energy requirements of such customer or BPA's other customers, and whether the resource or power sold by the customer could be conserved or otherwise have been retained to serve regional load. That is a separate legal issue from BPA's obligation to exercise recall of any Federal surplus power that has been sold out of region and is needed to meet an unmet energy requirement in the Northwest.

If BPA has, or is, acquiring sufficient power to meet its contractual firm power obligations in the Northwest on a planning basis, it does not need to exercise recall of its sales. Further, none of the provisions of statute establish a sequence regarding recall of Federal or nonfederal exports that must be followed since export of nonfederal resources are not made subject to recall. Thus BPA declines to adopt any policy on the sequencing of its exercise of a recall of Federal surplus power sales.

Issue: Whether the 9(c) policy should enable BPA to exercise a first right of refusal to purchase power prior to its export.

Grant PUD and the PGP argue that section 9 should be reworked to allow the export of any energy from the region subject to BPA having a limited right of first refusal to purchase the energy. Grant believes that if BPA has the right to purchase the energy at the price the customer proposes to export the energy, then section 9(c) has been satisfied. Grant proposed that BPA reword the policy to exclude any contract for sale of energy that is subject to a limited right of refusal given by the customer to BPA. *Grant PUD, 5(b)9(c)-011*. Similarly, PGP proposed that BPA revise the policy to exclude any contract for sale of energy subject to limited right of refusal by the customer. BPA would have an option to purchase the energy that would have been sold at the price being offered. If not purchased, the export would satisfy 9(c) requirements. *PGP, 5(b)9(c)-021*.

Evaluation and Decision

Section 9(c) sets out specific considerations regarding the disposition of power or resources by a customer out of the region. One aspect of the "tests" in the statute is whether through reasonable measures the resource or power could have been conserved. BPA has interpreted this test to ask whether the customer could save the power and not face waste of the power by storage or other reasonable measures. This question would not be answered by a right of first refusal to purchase given to BPA by the selling customer. Another test is whether the disposition of power out of the region could be "retained for service to regional loads" by reasonable measures. The test is broader than simply asking whether BPA could use the power. BPA simply does not serve all of the consumer load in the region through its customers. If another customer of BPA would purchase the power to serve its current loads or load growth, even though BPA might not buy the power, then BPA would have to conclude that such a purchase would retain the

power for service to regional loads, and was a reasonable measure for retaining the power in the region. Thus, the right of first refusal for BPA alone to purchase the power could not support a conclusion that the power would not be bought by another customer for the loads it must serve.

BPA does not believe a first right of refusal at market prices will meet the intent of the statute. BPA looked hard at whether resources could be sold at market prices through a transfer of ownership and concluded such a mechanism would not meet the intent of the statute to preserve low cost resources in the region. BPA believes the resource must be offered to BPA and to all regional customers at cost plus a reasonable rate of return to meet the intent of the statute. BPA defines cost plus a reasonable rate of return to be the costs a customer collects or would collect from its retail ratepayers for a resource.

Issue: Whether the 9(c) policy should be changed to read that the customer resource offer be made to BPA “and” BPA’s other customers.

Alcoa *et al.*, commented that BPA should require that a resource be offered to BPA “and” (not “or”) all of BPA’s customers, as an alternative to BPA making a factual finding whether the cost of the resource exceeded the regional marginal cost. *Alcoa et al.*, 5(b)9(c)-004.

Evaluation and Decision

BPA agrees that the word “or” in this section should be the word “and”. The final 5(b)9(c) policy, as published in the Federal Register on March 16, 2000, is corrected to reflect this change. The corrected policy is incorporated by reference here and attached to this ROD. BPA believes that a customer’s offer of power or a resource to BPA and its other Pacific Northwest customers is an alternative means of BPA making a factual finding that the resource may not be retained in the region for service to regional load. In considering the offer made BPA will review whether a resource’s costs plus a reasonable rate of return are less than the regional marginal cost of a new resource. BPA’s factual finding attempts to determine if BPA, or any of its customers, would have bought the resource for serving existing or new load, and thus reduced the amount of firm power requirements load BPA may otherwise have had to serve. The finding may be an individual determination or a factual finding based upon a recent study BPA has performed. BPA believes it is necessary to make an offer to both BPA and all its Pacific Northwest customers in order to establish that no additional load would have been served by retention of this resource in the region.

Alcoa *et al.* are correct that the policy allows the export of high cost resources which are offered to regional customers and BPA at their cost plus a reasonable rate of return, and if not purchased they may be exported without a decrement in a customer’s right to purchase Federal power. BPA finds those customer resources that cost more than the regional marginal cost of replacement power are resources that cannot otherwise be retained to serve regional loads. Since there are lower cost alternatives, the lower cost resources should be used to serve regional loads. Whether a customer can purchase

power to serve its loads under its section 5 contract with BPA by adding a resource will depend upon the terms of that contract and the products purchased. Some products will require that the customer, and not BPA, meet any additional service to loads unless the customer provides a six month notice to BPA. Other contracts will have BPA bear the risk of meeting additional service to the customer's loads.

Issue: Whether the 9(c) policy should contain a “cost plus a reasonable rate of return” standard.

PPC commented that BPA should not set a policy that dictates the price of an export. *PPC, 5(b)9(c)-012*. Grant PUD commented that a requirement to offer the power or resource in the region first should be sufficient. BPA should delete the phrase “offered at the customer's cost including a reasonable rate of return.” *Grant PUD, 5(b)9(c)-011*. BPA should not dictate offer price as “cost including reasonable rate of return.” The fair market value of resource may be higher. *Tacoma, 5(b)9(c)-025*. BPA should eliminate the requirement that the offer be made at “cost plus a reasonable rate of return.” This standard is inconsistent with the developing competitive wholesale market. Simply require a common sense finding that regional utilities were aware that a resource was for sale, had an adequate opportunity to purchase the resource, and failed to purchase it. *PGE, 5(b)9(c)-014*. At most, BPA should require that a resource be offered in the region prior to being exported. The “cost plus” standard should be abandoned. *PNGC, 5(b)9(c)-018*.

Evaluation and Decision

In the legal interpretation to its 1994 NFP 9(c) Policy, BPA defined the term “conserve” used in subsection 9(c) and in 3(d) to mean “not to waste, to preserve from loss, or keep.” 1994 NFP 9(c) Policy ROD at B-17; B-19. BPA distinguished this term from those reasonable measures which might be taken by a utility regarding its resources to “otherwise retain for service to regional loads.” BPA also distinguished the term from reasonable measures which could be taken by a utility regarding its hydroelectric resources under section 3(d) of the Regional Preference Act to “otherwise keep available” the power from those resources. Because Congress used the disjunctive term “or” and not the conjunctive term “and” in these statutory provisions, to conserve a resource is a separate and distinguishable action from retaining a resource for use in regional load or keeping power from a hydroelectric resource available for use. BPA has not read section 9(c) or 3(d) to have the intent or meaning that to conserve a resource is the same as to retain for regional load or to keep it available for use. Even prior to BPA's 1994 NFP 9(c) Policy ROD, BPA's determinations in letters sent in response to a customer's export of its nonfederal resource made the distinction between these two different types of actions required by the statute.

BPA does not agree that the test of “conserving” a resource may be met by simply offering the resource to other regional buyers, as PGE suggests. Rather, the test of conserve is whether the utility can continue to use the resource against its loads. If the answer is yes, then the resource is conservable. If no, then the question of whether it may

be retained or kept available for service to regional loads by reasonable means arises. In response to this latter question, BPA has considered whether the offer to regional customers of a resource which could not be used by the customer to meet its loads should be a “reasonable means” for retaining the resource in the region. Although there are other reasonable measures which should be considered, BPA’s 1994 NFP 9(c) Policy adopted the principle that if a nonfederal resource could not be conserved, then one test of retaining it for service to regional load was to offer the resource to other BPA customers. However, the offer must still be a “reasonable measure” so not all types of offers are reasonable or “fair” as PGE states.

The 1994 NFP 9(c) Policy and legal interpretation treated hydroelectric resources under an initial standard of conserve or otherwise kept available for use in the customer’s load by reasonable measures under section 3(d), and then further considered whether the hydroelectric resource could also be retained for service to regional loads. 1994 NFP 9(c) Policy ROD at B-18-20. BPA stated that hydroelectric resources, although a subset of resource under section 9(c) were not excluded from the ambit of section 9(c)’s tests. Generally, hydroelectric resources can be conserved because they can be used to displace higher cost thermal resources. However, with the advent of the open wholesale market customers are wanting to sell low cost resources into the higher market to obtain a greater return than that which would occur with high cost thermal resources. Further, with the advent of possible open retail marketing of electricity to retail consumers, some customers may experience retail load loss. Much of the comment of PGE, PPC, PNGC, PGP, Tacoma, and Grant concern BPA tests affecting their actions in the wholesale and retail markets for their nonfederal resources.

In response to these comments, BPA is not by this policy dictating either the price at which a customer may sell a resource on the market or whether a customer may sell a resource or power from its resource on the market. These are decisions and choices which the boards of the utility customer must make. The purpose of BPA’s policy is to administer the Northwest Power Act and the Regional Preference Act provisions regarding whether low cost Federal power will continue to be made available to the customer for service to loads served by its now exported resource, or whether BPA must by these provisions sell, as replacement for the customer’s resource, only power which “would otherwise be surplus” to BPA. This is not an exercise in attempting to influence or gain competitive advantage as some of the parties owning generation resources have asserted. Rather, the decisions and determinations to be made by BPA under this policy are aimed at whether BPA will take on the additional costs of acquiring ever higher cost resources to make up for the power which one customer disposed of on the market and potentially to the detriment of other BPA customers who would bear a part of the costs of the Federal power replacing the nonfederal power. On the other hand, if BPA is to only sell surplus power it has available, then BPA does not have to acquire additional power. The cost impact to other BPA customer is minimal and the exporting customer faces both the higher cost of the Federal surplus power and the risk of its unavailability.

The economic standard BPA has incorporated into the test of the customer offering its resource to other regional customers and to BPA is a measurement of the reasonableness

of the offer. Certainly, offers above market price would not be reasonable nor are offers based solely upon the variable costs of operating the resource. The standard posits a middle ground which considers the differential between power costs in the Pacific Northwest and in the out of region market. Given that BPA would potentially have to acquire or purchase power as replacement for the resource sold, the standard also appropriately recognizes the cost difference between existing and newly constructed resources. Although a utility may wish to sell its resource at fair market value, and parties do argue for BPA to let the market operate, such standards do not present BPA with any concrete measurement tool. The statute recognizes that BPA may bear additional costs of resources to replace what a customer has sold off in the market and asks what a reasonable measure would be to avoid that consequence. The standard stated in the policy addresses whether the offer was a reasonable measure or just a sham. BPA will not delete the standard or substitute an illusory standard of “fair market value” for it. BPA does not view that having its other customers merely aware that the resource was for sale with an opportunity to buy is sufficient to establish that the offer was a “reasonable measure” taken by the utility to retain the resource for service to regional load.

BPA does not believe the cost plus a reasonable rate of return standard will be that difficult to determine. BPA believes the cost plus a reasonable rate of return standard reflects what a utility is charging its retail customers for a resource. BPA will look at the fully allocated nominal costs a customer has historically included in its retail rates prior to the export, plus the rate of return for that investment it collects from its retail customers. Effectively, this standard will be enforced by the regulatory body, including local boards, that establish retail rates in the region.

Issue: Whether the “cost plus” standard should apply to environmentally preferred resources.

PPC raised the issue of whether the cost plus a reasonable rate of return standard would affect the value in the region of “environmentally preferred resource” since this type of resource may have value in excess of the “cost plus” standard. *PPC, 5(b)9(c)-012.*

Evaluation and Decision

BPA expects most environmentally preferred non-hydroelectric resources to have a cost that exceeds the regional marginal cost for the near term. Although such resources may be developed and are encouraged, BPA does not expect that its test will result in the export of large amounts of such resources since utilities derive other benefits from their inclusion of such resources in their service than just an economic one. Environmentally-friendly hydroelectric resources should generally be used to serve regional retail load. If the regional market values those resources in excess of the cost-plus standard, then they can be marketed to serve those regional loads without a decrement in net requirements purchases. If the regional markets do not place that value on the resources, they can either be dedicated to serve a customer’s regional load or exported by the customer. Even if dedicated to serve a customer’s regional load, the economic effect on the

customer is the same if the resource is then exported. Environmentally-preferred hydroelectric resources that are exported must be replaced by the exporting customer with purchases from the market and not by purchases of Federal requirements power. If initially dedicated, there is no need to do the annual analysis. If not dedicated, then BPA will review the planned use of the resource on an annual basis.

Issue: Whether the 9(c) policy should include elements to deal with retail load loss, such as resource acquisition, duration of offer, and inclusion of stranded cost as part of the reasonable rate of return.

WPAG comments that three things are needed in this section to provide a utility with the means of dealing with financial risk of retail load loss. First, BPA should remove the sentence that discusses the process BPA follows for acquisition of a major resource since this process is established by statute and its mention here this is repetitive. WPAG finds the language in section 10 that requires major resources offered under this provision to be subject to section 6(c) of the Northwest Power Act as unnecessary. Second, the policy should require the offer to be open for five business days. Third, cost should include not only costs of resource and reasonable rate of return, but also other utility costs that would have been retrieved from departing retail load. *WPAG, 5(b)9(c)-024.*

Evaluation and Decision

The language in section 10 of the 9(c) policy referring to BPA's acquisition of a customer's resource if offered to BPA merely states the requirement of the statute. BPA agrees that the provision would not be applicable to offers of a customer's resource if the offer was for a period of less than 5 years. BPA believes it is applicable to any offers exceeding five years and believes it best that this requirement is identified to customers contemplating long term exports.

WPAG comments that the duration of the offer needs to be addressed in section 10. Regarding the duration of an offer under section 10, WPAG proposed that an offer be made for the duration of 5 business days. This period of time may be adequate provided that a utility uses all means available to it to make the offer known to other BPA Pacific Northwest customers, including posting information concerning the offer at regional sales market hubs. In the case that a resource will be offered longer than a one year period, 5 days may be too short to conclude a sale if a regional customer responds and if the power sale offered is for longer than a one year. Therefore, a duration of 10 days for sales of 1 year or longer is reasonable to require. BPA agrees that an offer open for 5 business days is reasonable for any proposed export that is not longer than 1 year.

WPAG comments that cost plus a reasonable rate of return should be expanded to include other utility costs that would have been retrieved from the departing load. WPAG does not specify what those costs would be. This suggestion is not well enough defined to identify specific costs and the costs included in retail rates are very specific. BPA cannot agree that the offer should include any costs other than the costs of the resource that the utility had included in its retail rates.

10. Section 10: Consumer-Owned and Independent Power Producer-Owned Resources

Issue: Whether the 9(c) policy should treat resources owned by IPPs and consumers the same as any other utility resource.

WPAG comments that this section reaches a conclusion that appears not to consider several steps of the section 9(c) policy. WPAG suggests that BPA revise the policy to state that a consumer owned or independent power producer sponsored generating project acquired by a utility will be treated in the same manner under 9(c) as any other utility resource. WPAG, 5(b)9(c)-024. Grant PUD claims that there is no statutory justification for this section and is in violation of law. BPA's authority extends only to energy exports from a customer's own resources. A purchase should not be decremented because other purchasers of the same resource have chosen to remarket their portion outside the region. Grant PUD, 5(b)9(c)-011.

Evaluation and Decision

This provision is intended to address a customer's purchase or acquisition of all or a portion of a resource which is owned and operated by an independent power producer (IPP) or a consumer. Power from such resources may be sold on the market to entities which are not BPA customers having contracts under section 5 of the Northwest power Act. Such sales are not subject to review. However, to the extent that a BPA customer buys power or generation capability from an IPP or a consumer, this section is stating that BPA will review the customer's disposition of that power or generating capability even though it may not own or operate the resource. BPA agrees with WPAG's comments and will modify the policy accordingly.

BPA does not agree with Grant's assertions that this section is inconsistent with the statute. Grant appears to suggest that the ambit of section 9(c) is only applicable when a customer actually has title to the generation resource. It argues that if the resource is owned by another party, even though the customer may have right to its output, the customer's use of that output, including disposition out of region, is exempt from review by BPA when it determines the customer electric power requirement.

Such an interpretation would create an artifice under the statute whereby all nonfederal power or generation in the region could be exported simply by setting up a third party IPP shell. BPA has interpreted sections 9(c) and (d) and section 5(b) of the Northwest Power Act as treating a contract right to buy power or output of a resource as "having generation." Since section 5(b)(1) recognizes that a loss of nonfederal contract right to power is a reason for discontinued application of that resource to the customer's load, and since such loss is part of the determination of the electric power requirement of the customer, direct ownership of the generation is not required. A contract right to buy the power from the resource is sufficient to attribute that portion of the power from the resource purchased to the customer for purposes of section 9(c). The portion of a generating resource for which the customer will be subject to review is only that portion

which it purchased, not what the IPP or consumer retained and sold to entities which are not BPA customers. BPA will only attribute the power or share of an IPP or consumer resource sold to the customer if there is more than a single purchaser. BPA does agree that it will not decrement, or reduce its electric power obligations to a customer, if the portion of the IPP or consumer resource that is being exported is a portion over which the customer has no contract right to obtain, purchase, or direct its use.

11. Section 11: BPA Notification

None of the parties commented on this section of the 9(c) policy proposal.

C. Scope of the Section 9(c) Policy

Issue: Whether all Northwest Power Act section 5 contracts are within the scope of the 9(c) policy.

PGE commented that section IV.C of the revised policy proposal states that it will address on a case-by-case basis the effects of exports of resources by IOUs who purchase power under residential exchange contracts pursuant to section 5(c). DSIs who purchase under contracts pursuant to section 5(d), and customers purchasing under surplus power contracts pursuant to section 5(f) will also be addressed on a case-by-case basis. PGE argues that there is no basis under BPA's statutes to review any of these sales based on customer exports. Neither the Northwest Power Act nor the Regional Preference Act give BPA the authority to decrement a power sales contract entered into under any provision other than section 5(b) of the Northwest Power Act. Accordingly, BPA should eliminate the final sentence in IV.C. of the revised policy. *PGE, 5(b)9(c)-014.*

Evaluation and Decision

BPA disagrees with PGE's reading of the statute which would exclude BPA review of exports out of the region by a customer holding contracts other than a subsection 5(b) contract with BPA. The application of Northwest Power Act section 9(c) and 3(d) of the Regional Preference Act regarding exports of hydroelectric resources by utilities is also broader than just application to the utility's section 5(b)(1) contract. BPA will not remove the provision from the policy and will proceed to review the impact of exports by its utility customers on contracts other than those under section 5(b), *i.e.*, sections 5(c), (d) and (f), on a case-by-case basis. On May 8, 2000, BPA sent out for public comment and review a proposed agreement to implement the residential exchange agreements or provide for settlement of those agreements. Consistent with the decision to address matters under section 5(c) on a case-by-case basis, BPA is including a specific issue for review regarding the effect of section 9(c) on section 5(c)(6) "in lieu" sales. The public comment period does not close until June 9, 2000. Only after BPA considers all comments received will it make its decision regarding the application of section 9(c) to section 5(c)(6) contracts.

D. Subscription 9(c) Study

Issue: Whether BPA should provide for public comment on a draft of its 9(c) study.

Grant PUD, PGP, and EWEB commented that BPA should put its section 9(c) Study out for a thirty day comment period. *Grant PUD, 5(b)9(c)-011; PGP, 5(b)9(c)-021; EWEB, 5(b)9(c)-028.*

Evaluation and Decision

BPA has nearly completed the study. The study includes some BPA factual determinations. When completed, BPA will make it available upon request and will notify parties of its availability. BPA is not legally required to make it available for public review and comment and chooses not to do so. BPA believes that public review and comment would not serve a useful purpose. The study will comprise only a portion of the information BPA will use in the future in making case-by-case factual determinations under section 9(c).

V. ENVIRONMENTAL COMPLIANCE

The evaluations and decisions contained in this document are consistent with the environmental analysis conducted for the 1998 Power Subscription Strategy, as documented in the National Environmental Policy Act, Administrator's Record of Decision, Power Subscription Strategy, December 21, 1998 (NEPA ROD). The NEPA ROD is a direct application of BPA's earlier decision to adopt a Market-Driven approach for participation in the increasingly competitive electric power market and is consistent with BPA's Business Plan, the Business Plan Environmental Impact Statement (DOE/EIS-0183, June 1995) and the Business Plan ROD (August 15, 1995).

CONCLUSION

I have considered fully the comments made by parties in response to BPA's revised draft proposal of the 5(b)9(c) policy. This record of decision incorporates by reference and is in support of my approval of the attached 5(b)9(c) policy. This policy and ROD will provide guidance not only to BPA, but also to BPA's customers, in negotiating and executing contracts during Subscription and in the future.

Issued in Portland, Oregon, on May 23, 2000.

/s/ J. A. Johansen _____
Administrator and Chief Executive Officer

Appendix

Commenter Abbreviations and Acronyms

Avista	Avista Corporation
Alcoa et al.	Alcoa Inc., Columbia Falls Aluminum Company, Kaiser Aluminum & Chemical Corporation, and Vanalco, Inc.
Canby	Canby Utility Board
Cowlitz	Cowlitz County Public Utility District No. 1
CPU	Clark Public Utilities
EPUD	Emerald PUD
EWEB	Eugene Water & Electric Board
Forest Grove	Forest Grove Light and Power
Grant	Grant County PUD No. 2
Grays Harbor	Grays Harbor PUD
ICNU	Industrial Customers of Northwest Utilities
Idaho Falls	City of Idaho Falls
IPC	Idaho Power Company
KEC	Kootenai Electric Cooperative
Klickitat	Klickitat PUD
MAC (PRM)	Market Access Coalition (the Public Utility Districts of Benton, Franklin, Klickitat and Grays Harbor Counties and the City of Richland, Energy Service Department)
Milton-Freewater	City of Milton-Freewater
MPC	Montana Power Company
NWEC	Northwest Energy Coalition
Northern Wasco	Northern Wasco County PUD
OPUC	Oregon Public Utilities Commission
PacifiCorp	PacifiCorp
PGE	Portland General Electric
PGP	Public Generating Pool
PNGC	Pacific Northwest Generating Cooperative
PPC	Public Power Council
PRM	Power Resources Management
Puget or PSE	Puget Sound Energy, Inc.
Seattle	Seattle City Light
SUB	Springfield Utility Board
The Companies	Kaiser Aluminum & Chemical Corporation, Reynolds Metals Company, Northwest Aluminum Company, and Goldendale Aluminum Company
Tacoma	Tacoma Power
WPAG	Western Public Agencies Group

Policy on Determining Net Requirements of Pacific Northwest Utility
Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act

INTRODUCTION

On December 21, 1998, BPA published its Power Subscription Strategy and accompanying Record of Decision for selling Federal power under new contracts with its publicly and cooperatively owned utility, investor-owned utility and direct service industrial customers. The Power Subscription Strategy stated overall policies for determining the amount of Federal power to be offered to Pacific Northwest public utility and investor-owned utility customers under section 5(b)(1) of the Northwest Power Act.

On May 6, 1999, BPA published a Federal Register Notice (64 FR 24376) with a draft proposed policy for determining the net requirements of publicly and cooperatively owned utility and investor-owned utility customers. BPA sought public comment on its proposed policies for determining utility customer net requirements under section 5(b)(1) of the Northwest Power Act. Adoption of a final policy is important to a successful implementation of BPA's post-2001 power sales contracts under BPA's Power Subscription Strategy.

On October 28, 1999, BPA published a Federal Register Notice (64 FR 58099) with a revised draft policy proposal based upon comments received on the earlier proposal and requested additional comment on this revised draft policy. After having reviewed and considered the additional comment, the Administrator has decided to adopt this final policy. Review and analysis of public comment will be published in the Administrator's Record of Decision (ROD) that is related to this final policy.

This final policy provides guidance on implementation of the Power Subscription Strategy under applicable statutes and describes how certain factual determinations will be made regarding the amount of Federal power publicly and cooperatively owned utilities, or investor-owned utilities may purchase from BPA under section 5(b)(1) of the Northwest Power Act. BPA's determination of this amount, as described in this policy, is affected by a customer's export of hydroelectric resources and non-hydroelectric resources out of the Pacific Northwest in accordance with section 9(c) of the Northwest Power and section 3(d) of the Northwest Preference Act. BPA will review a customer's export of power or output from resources under BPA's Section 9(c) Policy as set forth in Section IV.B.

Environmental Compliance: This final policy is consistent with BPA's Business Plan Final Environmental Impact Statement (DOE/EIS-0183, June 1995), the Business Plan Record of Decision (ROD), signed August 15, 1995, and the subsequent tiered Power Subscription Strategy ROD, signed December 21, 1998.

I. Relevant Statutory Provisions

The Northwest Power Act provisions are:

5(b)(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 [16 U.S.C. 832 et

seq.] and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the region to the extent that such firm power load exceeds –

(A). The capability of such entity's firm peaking and energy resources used in the year prior to December 5, 1980, to serve its firm load in the region, and

(B). Such other resources as such entity determines, pursuant to contracts under this chapter, will be used to serve its firm load in the region.

5(b)(1) In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights. 16 U.S.C. 839c(b)(1)

9(c) Any contract of the Administrator for the sale or exchange of electric power for use outside the Pacific Northwest shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 23, 1964 (16 U.S.C 837a and 837b) for any contract for the sale, delivery, or exchange of hydroelectric energy or peaking capacity generated within the Pacific Northwest for use outside the Pacific Northwest. In applying such sections for the purposes of this subsection, the term "surplus energy" shall mean electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy, and the term "surplus peaking capacity" shall mean electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for the disposition of such capacity. The authority granted, and duties imposed upon, the Secretary by sections 5 and 7 of such Act (16 U.S.C. 837d and 837f) [16 U.S.C. 837d and 837f] shall also apply to the Administrator in connection with resources acquired by the Administrator pursuant to this chapter. The Administrator shall, in making any determination, under any contract executed pursuant to section 839c of this title, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus. 16 U.S.C. 839f(c) (emphasis supplied).

The Northwest Preference Act provision is:

3(d) The Secretary, in making any determination of the energy requirements of any Pacific Northwest customer which is a non-Federal utility having hydroelectric generating facilities, shall exclude any amounts of hydroelectric energy generated in the Pacific Northwest and disposed of outside the Pacific Northwest by the utility which, through reasonable measures, could have been conserved or otherwise kept available for the utility's own needs in the Pacific Northwest. The Secretary may sell the utility as a replacement therefor only what would otherwise be surplus energy. 16 U.S.C. 837b(d).

II. Scope of the Policy

The Policy on Determining Net Requirements as described in section III addresses the amount of Federal power that BPA is obligated to offer to customers requesting contracts to serve firm power loads under section 5(b)(1) of the Northwest Power Act. Purchasers eligible to request a contract under section 5(b)(1) include public body, cooperative, or investor-owned utilities in the

region.¹ BPA has a corresponding statutory duty when determining the net requirements of a requesting purchaser to apply the provisions of section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act. BPA's modification to its 1994 Non-Federal Participation Section 9(c) Policy (1994 NFP Policy) is contained in section IV. Such provisions direct the Administrator to determine whether an export or proposed export of a requesting purchaser's non-hydroelectric or hydroelectric resource(s) would result in an increase in the firm energy requirements of any of BPA's customers. Findings by BPA that the export of such resources are likely to increase BPA's firm obligations, and that the resource could have been conserved, or otherwise retained to serve regional loads, will result in a reduction (decrement)² of the amount of Federal power and energy available for purchase under section 5(b)(1) equal to the amount of power and energy, and for the duration, of the export. Determinations under the policy will be made by BPA based on demonstrations made by the customer and other available information.

III. Policy on Determining Net Requirements

A. Determination of the Amount of Federal Power For Sale Under Section 5(b)(1)

1. BPA will determine the amount of Federal power for sale under section 5(b)(1) in the manner described below. In making this determination BPA will reduce the amount of Federal power a customer may purchase in accordance with section 9(c) of the Northwest Power Act and section 3(d) of the Northwest Preference Act.
 - (a) BPA will offer an amount of Federal power for sale to a customer under section 5(b)(1) based upon such customer's actual retail firm power loads in the region. To establish the customer's actual retail firm power loads in the region, BPA shall use either the actual measured load of the customer, or the customer's own actual load forecast. However, if BPA finds the customer's forecast unreasonable, or the customer has not produced such a forecast, BPA will substitute its own forecast. (Any actual or forecast loads of the customer shall exclude any wholesale loads served by the customer. Wholesale loads means power sales made by the customer using its own resources to serve its own wholesale customers who are purchasing to resell the power at wholesale or retail.)
 - (b) For purposes of determining the amount of Federal power BPA will offer to existing customers in the post-2001 period, BPA will require an existing customer to continue to use all generating and contractual resources included in the Firm Resource Exhibit (FRE) of such customer's current 1981 or 1996 power sales

¹ The policy also addresses any sales of Federal power BPA makes under section 5(b) in settlement of a customer's right to service under the residential exchange program created under section 5(c) of the Northwest Power Act. While recognizing that this is a settlement, it does not affect the application of, or change, the policy regarding the net requirements of any customer.

² The 1994 Section 9(c) Policy BPA published uses the term "decrement" to mean a decrease or reduction in BPA's obligations to sell power to a customer under its section 5 power sales contract with BPA. When used in this Policy and modification of that Policy the terms "decrement," "decrease," "reduce" or "reduction" have the same meaning.

contracts for the 1998-1999 operating year.³ BPA will not, however, require customers to continue the use of resources identified in their 1998-99 FREs under any one of the following conditions: (1) the customer's contractual resource(s) expires prior to October 1, 2001; (2) the customer's generating resource(s) is determined by BPA to be lost due to obsolescence, retirement, or loss of resource in accordance with section III.B.1 (loss of generating resources); or (3) the customer's contractual resource(s) is determined to be lost in accordance with section III.B.2 (loss of contractual resources). In addition, customers who were given express written consent by the Administrator to permanently remove a resource from use in serving regional firm power loads are not required to return such resources to use.

- (c) BPA will require that all Federal surplus firm power contracts or excess Federal power contracts with terms which specify that such power be used to serve the customer's retail firm power load in the region be so applied.
- (d) Under a section 5(b)(1) contract customers may elect to dedicate other generating resources or contractual resources, in addition to generating resources or contractual resources customers must use to serve load under section III.A.1.(b), to serve their consumer load. Customers can also agree to contractually commit power purchases from the market (market purchases) to serve any remaining amounts of their retail firm power load in the region which is not served by (1) generating resources or contractual resources that a customer must use to serve load under section III.A.1.(b); and (2) additional generating resources or contractual resources that a customer elects to use under this section. Application of additional generating resources, contractual resources, or market purchases by a customer under a section 5(b)(1) contract shall be as follows:
 - (i) All additional generating resources or contractual resources shall be used for their remaining useful life except for (1) the customer's generating or contractual resources added pursuant to section III.C (renewable resources), (2) the customer's generating resources determined by BPA to be lost during the term of the contract due to obsolescence, retirement, or loss of resource in accordance with section III.B.1 (loss of generating resources), (3) the customer's contractual resources determined by BPA to be lost during the term of the contract in accordance with section III.B.2 (loss of contractual resources), or (4) the customer's generating or contractual resources where BPA has provided express written consent to permanently remove the resource. The remaining useful life of new contractual resources shall not be less than the term of the customer's section 5(b)(1) contract.

³ BPA's requirement that the customer continue using the customer's resources listed in its FRE for the 1998-1999 operating year is based upon a decision made in BPA's Power Subscription Strategy. The decision was to establish a baseline for determining the customer's resources expected to continue serving regional firm power loads in the post-2001 period.

- (ii) Market purchases used to serve retail firm power load in the region shall be used for the entire 5 year rate period for which BPA establishes rates of general application, except as provided in section III.D.2.
 - (iii) Consistent with the customer's section 5(b)(1) contract and the customer's product selection, a customer who elects to use market purchases to serve load that does not match the customer's existing resources and delivery of Federal power from time to time shall make such market purchases to serve that portion of load that does not match such customer's existing resources and delivery of Federal power under all such circumstances.
 - (e) BPA will apply the Declaration Parameters included in the Power Products Catalog to establish the amount of power available from the customer's generating and contractual resources under the Subscription contract. Because the Declaration Parameters are subject to revision, BPA will use the Declaration Parameters in effect at the time of BPA's contract offer to determine the amount of Federal power offered. The customer may declare a reduction in the amount of power that would otherwise be available from its own generating and contractual resources by the amount of power the customer uses from such resources to serve its wholesale loads, defined above, which were served prior to December 5, 1980, and which continue to be served by such resources.
2. In addition to subsections III.A.1.(a) through (e), BPA shall reduce the amount of Federal power offered to a customer under section 5(b)(1) when such reductions are consistent with the application of BPA's Section 9(c) Policy as modified, and resultant findings made under section 9(c) of the Northwest Power Act and section 3(d) of the Northwest Preference Act.

B. Statutory Discontinuance For A Customer's Generating and Contractual Resource

1. A customer's non-Federal generating resource is considered no longer used to serve regional retail firm power load under a section 5(b)(1) contract if the resource's use is permanently discontinued due to obsolescence, retirement, or loss.
- (a) Obsolescence is a permanent discontinuance of a generating resource resulting from the inability to continue to operate such resource at the end of its useful life due to lack of available replacement parts, deterioration of the physical facility, or lack of sources of fuel supply.
 - (b) Retirement is a permanent discontinuance of a generating resource for which the customer can demonstrate that the cost of replacements, improvements, or additions necessary to continue to operate the resource, combined with the resource's variable operating costs, exceed the reasonable economic return over the remaining life of the resource. The customer will demonstrate the reasonable economic return of the resource by comparing the costs to the customer of replacing the resource with market purchases plus the cost to permanently shut down the resource to the cost of continuing to operate the resource.

(c) Loss of a resource is a permanent discontinuance caused by factors beyond the reasonable control of the customer and which the best efforts of the customer are unable to remedy. Such factors include, but are not limited to, complete destruction of the resource, complete loss of the Federal or State license to own or operate the resource, or complete and/or partial reduction of the capability of a resource to the extent of the loss resulting from requested operations or orders of a cognizant State or Federal agency directly or indirectly affecting the operation of the resource and changing its planned capability.

2. A customer's contractual resource is considered no longer used to serve regional firm power load if the customer experiences a permanent loss of contract rights. Loss of contract rights must result from expiration of the term of the contract, after any extensions of the contract unilaterally available to the customer, or from factors beyond the reasonable control of the customer and which the best effort of the customer are unable to remedy. The Administrator may grant consent to a customer's permanent discontinuance of a contract resource upon expiration of such contract notwithstanding a customer's right to renew or extend such contract if the customer demonstrates that substantial and material changes in the terms of a successor contract, such as price, will deny the basic benefit of the bargain to the customer which effectively results in the loss of existing contract rights.

C. Use of New Renewable Resources to Serve Retail Firm Power Loads

1. A customer may elect to use a new renewable resource to serve its regional retail firm power load for a specified period which is less than the term of its section 5(b)(1) contract; provided, however, that such new renewable resource is part of the first 200 aMW of all new renewable resources requested by all BPA customers under this section to serve regional retail firm power load each year or, once that 200 aMW limit has been reached, a new renewable resource that BPA has agreed in writing can be so used without regard to the 200 aMW limit. A customer may choose to elect to use a new renewable resource at the time of contract execution and during an annual review of such customer's net load requirements under its section 5(b)(1) contract.
2. Only new renewable resources that meet the standards established to qualify for BPA's conservation and renewable resource discount may be used under this section.
3. Application of a new renewable resource under section III.C.1 shall reduce the customer's net requirements load.

D. Changes in the Amount of Federal Power Purchased During the Term of a Contract

1. Under a section 5(b)(1) contract BPA will require a customer to submit annual reports that track and forecast the customer's retail firm power loads in the region, except for customers who purchase the full service product and for whom BPA meters their total retail load. The purpose for the annual report is to provide information that shows any increase or reduction in the amount of the customer's retail firm power loads in the region from the amount served when the contract was executed. Based on such load information, or BPA's forecast of the customer's load if BPA finds the customer's load forecast is

unreasonable, BPA shall make an annual determination of the net firm requirement load of the customer under a section 5(b)(1) contract as follows.⁴ First, BPA will account for:

- a) the generating and contractual resources a customer is required to use to serve firm power load in the region under section III.A.1.(b) (1998-99 FRE firm resources);
- b) additional resources a customer has elected to use under section III.A.1.(d) (additional generating and contractual dedicated resources); and
- c) power purchases from the market that a customer has contractually committed to purchase in their 5(b)(1) contract, consistent with section III.A.1.(d) (market purchases).

Second, BPA will make adjustments for:

- d) changes in a customer's new renewable resources used to serve retail firm power load in the region, as provided for in section III.C.1 (renewable resources);
- e) changes in the customer resources serving its load pursuant to III.A.1.(b) and III.A.1.(d) based on BPA's determination of a statutory discontinuance under section III.B.
- f) any reductions in the amount of power a customer may purchase under a section 5(b)(1) contract due to the annual export review under section III.D.3; and,
- g) changes in the customer's hydroelectric resource capability declarations due to changes in coordinated planning allowed under section III.A.1(e).

2. If BPA's annual determination of a customer's net firm requirement load results in a finding that the amount of Federal power a customer can purchase is less than the contracted amount of power to be purchased for the next contract year, then the customer shall first remove from use for its regional firm load, for a period of one year, any market purchases the customer has agreed to use under its BPA contract. Such removal shall be in an amount and shape equal to the difference between the amount of Federal power a customer can purchase for the next year and the amount and shape of Federal power a customer has contracted to purchase for the next contract year.

If the amount of Federal power a customer can purchase after the removal of the market purchases is still less than the amount of power the customer has contracted to purchase for the next contract year, then BPA will implement the mitigation measure for load loss specified in the customer's section 5(b)(1) contract and reduce the amount of Federal power a customer is obligated to purchase. Alternatively, BPA will consent to the customer's

⁴ Such reports may be in addition to other load or resource information the customer is required to provide BPA on its loads or resources for contract administration and planning purposes. Such determinations may be in addition to other determinations of net firm power requirements loads made more frequently under the terms of the customer's contract.

removal of a generating resource or contractual resource from use for its regional firm load, for a period of one year. The portion of a customer's generating resource or contractual resource removed shall be equal to the difference between the amount and shape of Federal power a customer can purchase and the amount and shape of Federal power the customer has contracted to purchase for the next contract year. Any customer resources, other than market purchases, which are removed from use in serving the customer's regional firm load service under this section, are subject to BPA's determinations made under sections 9(c) of the Northwest Power Act and 3(d) of the Northwest Preference Act. If the customer's use of that resource results in a reduction or decrease in BPA's obligation to provide power under section III.D.3, then BPA will recalculate the amount of power a customer may purchase for the upcoming year as provided under this section (III.D.2).

3. On an annual basis as provided under a section 5(b)(1) contract BPA will review the export of power from a customer's regional non-Federal generating and contractual resources and, if required, will reduce the amount of Federal power a customer may purchase in accordance with section IV of this policy. BPA shall reduce the amount of power a customer may purchase for the longer of the remainder of the year or the duration of the export during the period between annual reviews based on a determination by BPA in accordance with section IV.
4. BPA shall make available additional amounts of power to a customer under a section 5(b)(1) contract to serve the customer's regional loads which were formerly available by a customer's generating resources or contractual resources but are no longer required to be used to serve the customer's retail firm power loads in the region, in accordance with section III.B (statutory discontinuance). Such service shall be on 6 months notice that such an event has occurred or as mutually agreed.

IV. Scope of the Section 9(c) Policy

A. Modification to BPA's Non-Federal Participation Section 9(c) Policy

BPA's modification to its 1994 Non-Federal Participation Section 9(c) Policy (1994 NFP Policy) is set forth in section B. BPA's 1994 NFP, as modified, is retitled: BPA's Section 9(c) Policy.

BPA reaffirms the application of its 1994 section 9(c) policy and legal interpretation published in July of 1994. The context for some of the determinations made in the 1994 NFP policy was, in part, prior exports and new exports of firm power from customer resources out of the region by participation in the new, Third AC Intertie. The interpretation has been of general application since 1994 to customer exports. BPA is now modifying the policy to address certain issues which were not previously addressed. Prior determinations made under the 1994 NFP Policy remain in effect for the duration of the export sale.

In the 1994 NFP Policy, BPA did not address the export of firm power from Investor-Owned Utility (IOU) resources because the IOUs were not placing any firm power loads on BPA under their section 5(b)(1) power sales contracts with BPA. See footnote 3, page B-10, BPA's 1994 NFP Policy. Since the IOUs were not taking any power service from BPA, reductions

pursuant to a section 9(c) determination in their service under those section 5(b)(1) contracts would not have affected their BPA service. Presently, BPA is preparing new section 5(b)(1) power sales contracts for the post-2001 period to be offered to customers eligible to purchase Federal power. BPA anticipates that IOUs will take firm power service from BPA under new 5(b)(1) contracts. BPA will require that the export of firm power from resources of IOUs be accounted for, in setting BPA's net firm load obligations under those contracts. Additionally, the 1994 NFP Policy is modified to update the technical provisions as discussed in section B.

B. Section 9(c) Policy

Section 1. Northwest Power Act Section 9(c) Determinations

As required by the Northwest Power Act, BPA shall make its Section 9(c) determinations for the exports of its customers. Export for purposes of this policy means the sale of the firm power output of a generating or contractual resource in a manner that such output is not planned to be used solely to serve firm consumer load in the Region as the term "Region" is defined in section 3(14) of the Northwest Power Act.

Section 2. Finding Required

In examining the export of Pacific Northwest resources, BPA shall make its finding based on the following requirements of Section 9(c):

- a) BPA shall analyze whether the customer's exports would result in an increase in the electric power requirements of any of its customers in the region. BPA shall do this by examining its load/resource forecasting and planning documents to determine the impact the exports will have on BPA's and its customers' ability to meet Pacific Northwest load presently and in the future. BPA shall also analyze the information available from other sources including least-cost plans and load/resource information of Pacific Northwest utilities which do not currently place any load on BPA.
- b) BPA shall review the specific resources being exported on an annual basis unless the customer requests review for a longer period to determine if the resources being exported are hydroelectric resources and if not, whether they are conservable. BPA shall review categories of resources eligible for export for a period selected by BPA. If the resources are not hydroelectric resources and BPA determines the resource is not conservable (see section 6.(b) for a description of those resources BPA has determined are conservable), BPA shall determine if such exports will result in an increase in the firm energy requirements of its customers and if so, determine whether the resource could be otherwise retained for service to regional loads by using reasonable means. If BPA finds in its analysis that the fully allocated nominal cost of the resource a customer is proposing to export exceeds the fully allocated nominal cost of the region's marginal resource, BPA will conclude that such resource can be exported without having to decrement the customer's section 5(b) utility power sales contract.

Section 3. Scope of Section 9(c) Policy

This Section 9(c) Policy addresses a customer's exports of power from Pacific Northwest resources out of the region. BPA shall make its Section 9(c) determinations based on a factual determination using information about the specific resource the customer intends to export.

Section 4. Data on Specific Resources

BPA shall base its Section 9(c) determination on specific information BPA has obtained from the customer on the resources it intends to export. The customer shall provide this information when it notifies BPA that it intends to export a resource or when BPA requests information regarding a possible export. This includes, but is not limited to, the following information:

- a) name of the resource to be exported;
- b) location of the resource;
- c) type of resource;
- d) whether the resource is currently in any Pacific Northwest utility's firm resource exhibit;
- e) whether the resource is planned or existing;
- f) type of transaction or sale, and if it is a seasonal exchange, the terms of the exchange, and
- g) the cost of the resource (including reasonable rate of return) included in the customer's retail rates and a forecast of such costs for each year of the proposed export.

BPA will also consider any prior history of the resource including prior efforts to market it to BPA or other Pacific Northwest utilities.

Section 5. Prior Case-by-Case Section 9(c) Interpretations

BPA will not modify its existing determinations on Pacific Northwest utility exports including its 1994 NFP Policy determinations and will apply its prior case-by-case interpretations of Section 9(c), and Section 3(d) of the Regional Preference Act to such decisions without modification. Therefore, BPA incorporates by reference in this Policy these prior interpretations of Sections 9(c) and 3(d) and the determinations made thereunder for the duration of the export sale.

Section 6. Categories of Resources

- a) **Exports That Will Not be Decrement by BPA:** Under this Section 9(c) Policy determination, BPA will determine based on the finding in section 2 of this policy whether the export of certain resources will not result in an increase in the electric power requirements of any of its customers. If the export of a resource does not increase the firm energy requirements of BPA's customers or could not otherwise be retained for service to regional loads, the resource may be exported without a reduction in BPA's firm load obligation under the customer's Section 5(b) utility power sales contract.
- b) **Exports That Will be Decrement by BPA:** BPA has determined based on its prior policy interpretations of Northwest Power Act Section 9(c) that the following categories of resources are conservable and if they are exported BPA shall decrement the customer's Section 5(b) power sales contract:
- 1) all Pacific Northwest hydroelectric resources owned or purchased by a Pacific Northwest utility, whether or not dedicated in any Pacific Northwest utility's firm resource exhibit; and
 - 2) all Section 5(b)(1)(A) and 5(b)(1)(B) thermal resources that are currently dedicated by a utility in any customer's firm resource exhibit.

Section 7. System Sales

BPA shall utilize a case-by-case approach to system sales. BPA shall require the exporting utility to submit an operating plan for the duration of the export, identifying these specific resources or categories of resources supporting the system sale. If the export is a system sale made up solely of a customer's resources that individually would not result in a decrement if each resource were exported standing alone, then BPA would not decrement a customer's firm power purchase under section 5(b) for such a system sale. BPA shall decrement the customer's section 5(b) utility power sales contract in the amount and to the extent the system sale involves the export of the planned capability of hydroelectric resources to support a power sale (whether or not in a firm resource exhibit); the planned capability of a non-hydroelectric resource that is in a firm resource exhibit, or if not, that could otherwise be retained to serve regional load; or any portion of the sale that is a prohibited resale of Federal power.

Any customer that was previously a Contracted Requirements customer of BPA, and which is currently purchasing power and energy from BPA under its power sales contract, shall have BPA's firm power obligation under its section 5(b)(1) contract reduced in the amount and to the extent a system sale involves the resources described above for the duration of the export sale. If the customer was not placing load on BPA under its section 5(b) utility power sales contract at the time of the export sale, then at such time as the customer requests to place a firm load obligation on BPA, BPA shall make an appropriate determination and may reduce its energy sales to such customer in the amount and to the extent the export sale involves the resources described above and for any remaining duration of the export sale.

If the exporting utility does not provide an operating plan identifying the resources supporting the system sale, BPA will treat the system sale as made up of resources that would result in a decrement of the customer's section 5(b) utility power sales contract.

Section 8. Seasonal Exchange

Any seasonal exchange between a customer and an out of region entity which results in no net regional energy deficit during any Operating Year shall not result in a decrement by BPA of the customer's Section 5(b) utility power sales contract.

Section 9. Resource Offer

A customer may offer a resource to BPA ~~or~~ and to all other Pacific Northwest customers. If neither BPA, nor any Pacific Northwest customer, purchases the offered resource (offered at the customer's cost including a reasonable rate of return), the resource may then be exported without a decrement of the customer's Northwest Power Act section 5(b) power sales contract. If offered for sale to BPA, the resource shall be treated as an unsolicited proposal. If BPA proposes to acquire the resource, and if it is greater than 50 aMW or offered for longer than 5 years, it will be subject to the Northwest Power Act Section 6(c) process, which can take more than 12 months.

Section 10. Consumer-Owned and Independent Power Producer-Owned Resources

If a customer contracts to purchase and then export any consumer-owned resource or any resource developed by an independent power producer, such resource shall be subject to this Policy as a generating or contract resource of the purchasing customer as appropriate.

Section 11. BPA Notification

BPA shall notify in writing any customer which has exported a resource or proposes to export a resource of the outcome of BPA's Section 9(c) determination. The BPA notification shall be made within 30 working days from the date BPA receives the information specified in Section 4 about a specific resource.

C. Scope of the Section 9(c) Policy

BPA's Section 9(c) Policy addresses the effect of exports of resources by any public body, cooperative, or investor-owned utility purchasing power under a section 5(b) contract for service after October 1, 2001. The findings and interpretations of this Section 9(c) Policy shall be applied to all exports occurring after publication of this Section 9(c) Policy. Customers that have exported resources prior to publication of the Section 9(c) Policy may face a reduction in the amount of Federal power that BPA will offer at the time they request a contract under section 5(b)(1) for service after September 30, 2001. A reduction in BPA's obligation to provide firm power requirements to a customer under its section 5(b)(1) contract will be based on a case-by-case factual determination regarding the export of a resource by a BPA customer, and may be based on the regional load resource balance at the time of the export and other factors. BPA shall address the effect of exports of resources by a customer purchasing power under a contract pursuant to section 5(c), section 5(d)(1), or section 5(f) of the Northwest Power Act on a case-by-case basis.

D. Subscription 9(c) Study

BPA will perform a Subscription 9(c) Study. The study will provide part of the factual basis for determining whether an export of a resource during the period from October 1, 2001, through September 30, 2006, is likely to result in an increase in the firm energy requirements of BPA customers, and if so, whether the resource could be otherwise retained to serve regional loads.

Clarifications Issued on BPA's Policy for Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act, dated May 23, 2000

The Bonneville Power Administration (BPA) issued a "Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Section 5(b)(1) and 9(c) of the Northwest Power Act" and Administrator's Record of Decision (the 5(b) 9(c) Policy) in May of 2000. The 5(b) 9(c) Policy addresses numerous issues regarding the amount of Federal power a customer would be eligible to purchase under section 5(b)(1) of the Northwest Electric Power Planning and Conservation Act, P.L. 96-501, (Northwest Power Act) as firm requirements power for the customer's firm power loads in the Pacific Northwest.

The 5(b) 9(c) Policy also addresses issues regarding BPA's 1994 policy and statutory interpretation of section 9(c) and 3(d), retaining the policy in part and modifying it in part. The 5(b) 9(c) Policy covers circumstances when reductions (decrements) in the amounts of Federal power that a customer could buy would, or would not, occur due to the customer's disposition or sale outside of the Pacific Northwest region of nonfederal power from its resources.

After publication of the 5(b) 9(c) Policy, several preference utility customers, direct service industries, and investor owned utility customers filed challenges to the 5(b) 9(c) Policy in the United States Court of Appeals for the Ninth Circuit, in *Goldendale Aluminum Co., et al v. United States Department of Energy, et al*, nos. 00-70717; 00-70719; 00-70743; 00-70778. The petitioners, interveners and BPA jointly moved for a stay and referral of the case to the Circuit Mediator granted on December 29, 2000. Settlement discussions focused on specific "clarifications" of the 5(b) 9(c) Policy. Preference customer petitioners and petitioner-interveners identified specific issues and submitted them to BPA.

BPA then conducted discussions first with the preference customer petitioners and interveners over several months that produced a proposal for settlement. BPA then discussed specific issues identified by the investor-owned utility petitioners in several meetings. BPA then held discussions with the direct service industry attorneys. Finally, BPA met with the mediator and the parties on the proposed settlement. The parties have executed a settlement agreement and made a joint motion for dismissal of the consolidated actions in cases nos. 00-70717; 00-70719; 00-70743; 00-70778 filed in the United States Court of Appeals for the Ninth Circuit, or do not oppose the dismissal of the litigation. The following are the clarifications to BPA's 5(b) 9(c) Policy and Record of Decision resulting from this litigation settlement process.

Clarifications Regarding Section 5(b) 9(c) Policy.

1. For purposes of section 5(b)(1), a resource is only declared as dedicated to serving the customer's load under section 5(b) of the Northwest Power Act when it is named as so used in section 2(a) of Exhibit C of the BPA Power Sales Agreement.

A customer only declares a resource, whether it is a generating resource or a firm power purchase, as serving load when it is shown as dedicated to serve the customer's load in Exhibit C, section 2(a) of the customer's BPA Power Sales Agreement. Any specific resources that the

customer does not include in this Exhibit are not "declared or dedicated" to serve the customer's regional load under section 5(b) of the Northwest Power Act.

2. A customer can use all or a portion of a resource as an unspecified resource (no identification beyond amount) to serve the customer's load under section 2(b) of Exhibit C of the customer's BPA Power Sales Agreement, and such use does not constitute a declaration of a specific resource under section 2(a) of Exhibit C of such BPA Power Sales Agreement or under 5(b) of the Northwest Power Act.

A customer may use all or a portion of a resource as an unspecified resource, stated in a whole megawatt and megawatt-hour numbers. However, the portion of the resource used as an unspecified resource cannot be otherwise dedicated or declared under section 2(a) of the customer's BPA Power Sales Agreement to serve a portion of its consumer load.

3. A customer can use an undeclared resource to serve its load with no long-term consequences to its 5(b) entitlements. Only resources specifically named as committed to load in section 2(a) of Exhibit C of the customer's BPA Power Sales Agreement will be expected to be committed to load in subscription and follow-on contracts.

The use of undeclared resources to serve the customer's firm load is not a declaration under section 5(b)(1) of the Northwest Power Act. A customer may or may not apply such resource to its load under the next contract.

4. A customer can sell the unplanned output, which cannot be output included in section 2(a) of Exhibit C of its resources declared under section 2(a) of Exhibit C, anywhere for any price without a 9(c) decrement.

From time to time, generating resources are able to produce power in excess of planned amounts that the customer has declared under section 2(a) due to water conditions that exceed the planning criteria, increased heat rate due to temperature, or other conditions. Such temporary over-generation is not part of the firm power that a customer declares under its section 2(a) resource dedication as being applied to load. Such temporarily available power is not conservable by the fact that the customer has dedicated firm power from the resource to meet consumer load. Such over-generation available on a temporary basis is not subject to section 9(c) determinations and may be sold in or out of the region without consideration of a reduction in BPA's obligations.

5. A customer can sell the planned firm output of a regional resource to any regional utility, joint operating agency (JOE), or direct service industry (DSI) for use in the region for any price for any term without a 9(c) decrement. Such sales must be made to a utility, JOE, or DSI with a planned or actual load deficit in the region for the period of the sale. An unspecified resource amount listed in section 2(b) of Exhibit C constitutes a planned deficit.

Any firm power from a resource, other than a declared resource under section 2(a) of Exhibit C, sold by one BPA regional utility customer to another BPA regional customer for use in a

regional load may be sold at any price – the cost plus a reasonable rate of return does not apply – and without a decrement.

6. Customers are responsible for the use of resources or portions [parts] of resources [output] or contract resources that they own as follows:

6(a). If a customer sells a resource or its output to a third party that does not have a 5(b) power purchase from BPA, the selling customer remains responsible for the in-region use of that power in order to avoid a 9(c) decrement to its BPA entitlement. A customer may include a contract provision requiring in-region use of the power in the sales contract with the third party that does not have a 5(b) power purchase from BPA. However, the selling customer remains responsible for the in-region use of the power.

6(b). If a customer sells a resource or its output to a third party that does have a 5(b) power purchase from BPA, the 5(b) 9(c) Policy obligations transfer to the third party, and in such case the selling customer is no longer responsible for the use of the power by the purchaser under the 5(b) 9(c) Policy.

Because the third party purchaser has a section 5(b)(1) power sales contract with BPA including obligations to report its exports, BPA and the seller will rely upon the BPA customer to use the resource purchased for its regional load.

7. A customer may declare as dedicated to its load service under section 5(b)(1) of the Northwest Power Act, a part of a resource by naming that part in section 2(a) of Exhibit C, without causing the remainder of the resource to be dedicated to serving load under section 5(b) of the Northwest Power Act.

8. Customers may resell purchases of less than 12 months running from the date of commencement of delivery of power to termination of delivery, without 5(b) or 9(c) decrements, provided that the customer has not accepted any section 5(b) or 9(c) obligations as part of its purchase.

9. The customer may sell a resource that has been used as an unspecified resource under section 2(b) of Exhibit C, consistent with the 5(b) 9(c) Policy. The fact that the unspecified resource has been used to serve load is not pertinent to the 5(b) 9(c) Policy application.

BPA will not treat a resource that is used to meet an unspecified resource obligation under its 5(b) 9(c) Policy as if it were a declared resource under section 2 of Exhibit C to the power sales contract, or under section IV. B. 6(b) of the 5(b) 9(c) Policy. Resources used to meet a portion of, or all of a customer's obligations for "unspecified resource" or its market purchase commitment, may be sold consistent with the terms of these clarifications, and BPA's 5(b) 9(c) Policy.

10. New Resources, as defined in 10(d) below may be sold in the following manner and remain consistent with the 5(b) 9(c) Policy:

10(a). Sales for the balance of the month and the prompt month may be made without restrictions regarding price, purchaser or location where power sold is used.

Power from New Resources sold on a short-term basis for the month and the prompt month will not be considered as subject to reductions in BPA's obligations if they are sold for export out of the region.

10(b). Sales of power from New Resources made for beyond the prompt month up to 1 year (generally, 61 – 365 days) may be made without section 9(c) restrictions provided that 50% of such sales are for in-region use in each month. The customer will provide BPA with a tally of sales to check for the 50% limit and such check will be performed no more frequently than monthly. The selling customer will maintain records of these sales and upon a BPA request, will provide copies with the price and other proprietary information redacted. Such requests will be made no more frequently than once each month, and the selling utility will provide BPA with information necessary to reasonably determine compliance with this section 10(b).

10(c). Sales made for delivery periods of 366 days or longer and sales of portions of a year with the delivery period in future years may be made via a 'must take auction' that will be open to BPA customers with regional retail loads. Power sold will be for in-region use, with the minimum bid limited to cost plus a reasonable rate of return, or alternatively power sales may be made bilaterally with one or more parties, all of whom will make in-region use of the power.

10(d). "New Resources" are those generating resources, or the contractual right to the output of such resources, that were not in commercial operation as of the date of the 5(b) 9(c) Policy, May 23, 2000, that is the subject of this settlement. New Resources do not include those resources customers have developed solely for export and that are not for use in anticipation of service to the customer's present or future firm loads. Such resources that are developed solely for export, may qualify as a "market resource," in accordance with the meaning of such term under BPA's section 9(c) policy and ROD. If so qualified, the market resource is not subject to subsection 10 (a)-(c) above, and may be exported without a reduction in the customer's BPA firm power requirements obligation.

10(e). If the limitations in 10(b) and 10(c) above result in no sales for in-region use of the New Resources, the power may be sold for use outside the Pacific Northwest. If the outside purchaser was making the purchase at a price less than that offered by or to in-region users, then the New Resource must be offered in the region to BPA and BPA customers at such lower price before the out of region sale is made.

10(f). The customer has the responsibility for demonstrating that the resource is a New Resource by providing to BPA the pertinent information and data such as date of commercial operation, size, location, etc.

11. A customer has demonstrated that a power sale is for use in the region under the following circumstances:

11(a). The sale is to a Northwest Power Act section 5(b) customer of BPA with unspecified resource amounts declared in section 2(b) of Exhibit C.

11(b). The sale is to a Northwest Power Act section 5(b) customer of BPA as displacement of a resource or contract resource declared in either section 2(a) or section 2(b) of Exhibit C. The use of the displaced resource is subject to the 5(b) 9(c) Policy. The displacement of a resource that is declared in section 2(a) of Exhibit C does not represent a removal or replacement of that resource from service to load.

11(c). The sale is to a Northwest Power Act section 5(b) customer of BPA with a slice/block contract when the delivery of Critical Slice Amounts is forecast to be or is actually less than the Initial Critical Slice Amount.

11(d). The power sale is to a Northwest Power Act section 5(b) customer of BPA when it replaces a resource or contract resource declared in section 2(a) of Exhibit C that to have been lost in accordance with the 5(b) 9(c) Policy.

11(e). The sale is to a Northwest Power Act section 5(b) customer of BPA to supplement a resource or contract resource up to the amounts declared in section 2(a) of Exhibit C when such resource or contract resource does not produce, or is forecast not to produce, power in accordance with its declared amounts.

A sale of power by a Northwest utility from a resource that is not otherwise committed to its load, to supplement or make up power stated in 2(a) of Exhibit C of a purchaser and used for the purchaser's load, is a use of the power in the region.

11(f). The sale is to a DSI with a facility operating in the Pacific Northwest for service to that operating facility.

The portion of DSI loads not directly served by BPA are regional loads for the purpose of section 9(c) and 3(d) in determining use in the region when a power sale is made by a Pacific Northwest utility to a DSI.

11(g). The sale is to a Northwest Power Act section 5(b) customer of BPA for service to an operating NLSL. If the purchasing entity has a resource or contract resource declared for service to that NLSL then the sales of that resource or contract resource is subject to the 5(b) 9(c) Policy.

A Pacific Northwest utility may sell power to another Pacific Northwest utility for an operating NLSL. BPA will consider the sale an in-region use for purposes of section 9(c) and 3(d), provided that the load is operating and the power sold exceeds the other resource(s) identified for the NLSL by the purchaser, if any, but does not exceed the load; and provided that the purchase is not displacing any resources specifically identified for service to the NLSL.

11(h). The sale is to a Northwest Power Act section 5(b) customer of BPA for other transactions that are described prior to their deliveries and can be demonstrated to serve loads in the region.

11(i). The sale is to a Northwest Power Act section 5(b) customer of BPA as a substitute for a 5(b) resource declared under that customer's 5(b) contract, which the purchaser no longer owns, and is to provide the declared amount for such resource for the purchaser's load service obligation.

11(j). The sale is to a Northwest Power Act section 5(b) customer of BPA to serve the retail load of such customer in excess of planned levels.

11(k). The sale is to a BPA customer utility that has entered into an agreement with BPA to reduce its load requirements on BPA.

An alternate purchase of nonfederal power from another regional utility by a BPA customer to reduce its load under a specific load reduction agreement with BPA, that meets such load reductions, is power used in regional load.

12. BPA will not impose a 9(c) decrement on the selling customer if the selling customer retains the contractual right to terminate immediately the sale to a regional utility, DSI or JOE without a Northwest Power Act section 5(b) contract with BPA, if the selling customer discovers, or when BPA determines that the purchaser is not making in-region use of the power to serve load, and such right of termination is promptly exercised upon such discovery or determination.

13. Does the 5(b) 9(c) Policy apply to the export of any secondary firm energy? If so, under what circumstances would a utility's net requirement be decremented for exporting secondary firm energy?

Response: The 5(b) 9(c) Policy does not apply to sales of secondary energy. Secondary energy is unplanned over-generation from hydroelectric resources due to water conditions above critical water planning, thermal plant over-generation running at higher capacity due to ambient air conditions for limited time durations, or generation held until the month of delivery or prompt month to meet unanticipated loads. It is not firm purchased power. These conditions occur temporarily on a utility system, are variable as to the time of occurrence, and are dependent upon factors beyond those normally planned for continuous operation of the resource. A reduction in BPA's firm obligations to a customer would not result from sales of such temporary over-generation as opposed to planned generation available on a continuous firm basis during a year.

The 5(b) 9(c) Policy applies to all exports of firm power by a BPA customer. A customer must identify its planned resources to be used to serve its regional firm load annually under the contract. These planned resources (except for resources that are held to meet unanticipated load) include seasonal purchases on a multi-year basis; power purchase contracts with delivery periods greater than one year; customer-owned generation; and purchase power contracts with delivery periods less than one year, and obligate the customer to serve regional load with the power. Sales of any planned firm power from these resources in excess of the customer's forecasted regional firm load would be subject to the 5(b) 9(c) Policy. If a customer exported such planned firm power without a BPA determination that such power could not otherwise be retained to serve regional loads, a customer faces a decrement of its net requirements purchase. BPA could request information regarding any exports not reported by a customer. If BPA determines the

power has been exported and could have been retained to serve the customer's or another BPA customer's regional loads, then BPA would reduce the exporting customer's net requirement by adding an amount of power equal to the resource exported into the customer's Net requirements Exhibit and modify the customer's federal power purchase from BPA.

14. Does the 5(b) 9(c) Policy apply to any exports of non-firm energy?

Response: As discussed above, the 5(b) 9(c) Policy does not apply to the class of energy which is available only temporarily from over-generation of a customer's non-Federal resources and which is sometimes called non-firm or secondary energy.

15. Does the requirement of an offer at cost plus a reasonable rate of return apply only to exports of firm energy and not to exports of non-firm energy?

Response: Yes. The cost plus a reasonable rate of return standard for offers applies to planned firm power sold by a customer to other BPA customers in the region for their regional loads or to BPA and only applies to offers of firm power, and not to offers of non-firm energy by a customer.

16. Clarify the language in the 5(b) 9(c) Policy which appears to be inconsistent with the decision BPA made regarding the Residential Purchase and Sale Agreements ROD.

Response: The 5(b) 9(c) Policy and ROD was issued on May 23, 2000. On page 12 of the Attachment that includes the section 9(c) Policy, BPA stated that BPA would address the effect of exports of resources on section 5(c) contracts on a case-by-case basis. BPA's Record of Decision on Residential Purchase and Sale Agreements (RPSA) issued in October 4, 2000, addressed the application of the section 9(c) policy to deliveries of power under a section 5(c) contract. On page 74, BPA determined that section 5(c)(6) of the Northwest Power Act precluded any reductions in exchange sales due to the operation of section 9(c). BPA's policy decision under the RPSA ROD eliminates the need to address section 9(c) under section 5(c) contracts on a case-by-case basis.

17. Confirm the treatment of specific resources identified to support an export sale (a system sale).

Response: Section 7 of the 5(b) 9(c) Policy requires customers to provide an operating plan identifying the firm resources that support a firm power system sale. BPA will review those firm power resources identified by the seller as planned to support the export sale and determine whether they are sufficient to support the sale. If they are sufficient, they will be deemed to be the resources supplying the power for the sale. BPA will then assume for purposes of review that the export sale is of those planned resources, and will apply the provisions of the policy and section 9(c) and 3(d) to those specific resource(s) the customer has stated is supplying power on a planned basis for the export in the amount of the system sale. The actual resources of the customer operating in any hour may differ from those resources identified by the customer as supporting the export sale on a planning basis. Such hourly operations shall not invalidate the initial designation as reviewed by BPA.

18. Clarify that purchases under the Northwest Power Act's section 5(c) residential exchange settlement are not subject to decrement under section 9(c).

Response: BPA offered two types of power purchase contracts to utilities as an offer to settle BPA's residential exchange program obligations, a purchase under section 5(b) and a purchase under section 5(c). Sales made pursuant to contracts offered under section 5(b) based on a customer's net requirements are subject to decrement under section 9(c). See, pages 131-132 of the Residential Exchange Program Settlement Agreement ROD (Settlement ROD), and pages 18-19 of the 5(b) 9(c) Policy ROD. Sales made as a negotiated "in lieu" purchase under section 5(c) are not subject to decrement under section 9(c). See, pages 18-19 of the 5(b) 9(c) Policy ROD; page 74 of the RPSA Settlement ROD; and pages 140-150 of the Settlement ROD.

19. BPA should clarify that if there were past mistakes in the utility's Firm Resource Exhibit (FRE), which are continued in the FRE under new contracts, the 5(b) 9(c) Policy will not preclude making corrections.

Response: The 5(b) 9(c) Policy does not make any factual determinations, and the 5(b) 9(c) Policy allows making corrections in contractual determinations when warranted.

20. BPA should clarify that the 5(b) 9(c) Policy will permit the "automatic" removal of Qualifying Facility contracts, *i.e.*, purchases of PURPA resources, which were not independently made by the utility when such contracts are terminated.

Response: Pages 51-74 of the 5(b) 9(c) Policy describe when a statutory discontinuance of a resource has occurred. These factual events can include loss of a contract right.

21. Clarify that a customer's resources that are sited outside the region, and used to serve consumer's loads outside the region, are not subject to the Policy. Resources so located outside the region and used outside the region do not require any section 9(c) analysis of "exports" under the Policy and cannot cause a reduction in a utility's net requirement for its regional loads.

Response: A customer's resources, generation or power purchase contracts, or any portion thereof, which have not been dedicated to serve any portion of a customer's regional firm power load under section 5(b)(1), and which are used solely for service to loads outside the Pacific Northwest Region as defined by section 3(14) of the Northwest Power Act, will not result in a reduction or decrement to a customer's net requirement due to such use.

22. BPA should clarify that any power exported by a customer in an amount equal to any retail load under direct retail access will not result in a reduction to the utility's net requirement because the application of section 9(c) to power exported due to a reduction in load by direct retail access load loss will reduce power benefits for residential and small farm consumers under the residential and small farm exchange settlement.

Response: BPA included provisions in the 5(b) 9(c) Policy addressing the concerns over the loss of loads due to retail access. Section D.2 of the 5(b) 9(c) Policy allows a customer to remove a

generating or contractual resource from use to serve its regional load if load loss would otherwise result in a reduction of the utility's net requirements. Any export from the resource that has been removed is subject to the 5(b) 9(c) Policy. If the power is exported and could have been retained to serve a customer's regional consumer loads, BPA would reduce its 5(b)(1) obligation.

23. Would BPA "double count" exports under section 9(c) of the Northwest Power Act if for example, a utility sold its share of an existing generating project to a marketer and that sale were considered an export? Would the sale result in a reduction of both the utility's Net Requirement and its power allocation under its 5(b)(1) contract? Currently the utility's net requirement calculation without decrements for export is 1564 average megawatts. The utility's share of the existing resources it sold was 264 average megawatts. A reduction in net requirement equal to the existing resource sold would leave 1300 average megawatts. Would the power allocation for the utility's residential settlement of 258 average megawatts also be reduced by the 264 average megawatts or not?

Response: BPA would reduce its obligation to serve the utility by the amount of the megawatts of the export sale, but this would not result in a double counting of the 264 average megawatts exported. If the existing resource were included in the utility's Exhibit C as a dedicated resource in the amount of 264 average megawatts, then upon the sale BPA would notify the utility that it had the obligation to supply the same amount of megawatts as that sold outside the region and apply those megawatts to its load. Thus BPA's obligation to supply would not increase as a result of the sale since the utility would have to supply the 264 average megawatts.

If the existing resource is not a dedicated resource under Exhibit C and the 264 average megawatts are sold out of region, then section 9(c) applies, and BPA would have to determine if the resource could be conserved or otherwise retained by reasonable means for service to the utility's regional load, or BPA load, or other BPA customers' load that BPA was not serving. Assuming the determination concluded that the power could be retained for use in regional loads, then BPA would "decrement" its obligations to serve the utility for the duration of the export and in the amount of the export, 264 average megawatts. BPA would show the decrement by adding a nonfederal resource obligation to the utility's contract in section 2(b)(3) of Exhibit C in the amount of 264 average megawatts for the duration of the export. This would have the effect of reducing BPA's net requirement obligation to the utility by the amount of the export. It would not necessarily affect the 258 megawatts of Federal power purchased for load because the net requirement still exceeds the amount of the sale.

Only if the amount of load to be served was less than the total of the utility's dedicated resources, would the amount of both the nonfederal resource obligation included in section 2(b)(3) as a result of the 9(c) decrement and the 258 average megawatts of Federal power, result in an actual reduction of Federal power sold to the utility under its contract. The utility's current contracts also permit the removal, due to reductions in retail consumer loads, of the utility's nonfederal resources. Such removal of resources is for utility's resources other than specific section 2(b)(3) resource obligations added due to section 9(c) decrements. If the utility elects to use such removal rights for all its dedicated resources, such removal rights provide that only when the section 2(b)(3) resource obligations plus the Federal purchase exceed the total of the

utility's consumer loads would a reduction in BPA's power "allocation" sale result from a decrement for an export by the utility.

24. BPA anticipates this 5(b) 9(c) Policy will be effective for the duration of its 2001 subscription requirements contracts. However, BPA will review *de novo* its section 5(b) 9(c) Policy, including these clarifications, if there is a major change in BPA's or other statutes affecting its authority for marketing Federal power and this Policy, or if in the judgment of the Administrator, significant changes in the wholesale market require reconsideration of this Policy.

25. Please clarify that section B.6. (b) "Exports that will be decremented by BPA" does not constitute an exclusive, limited list of those regional resources that if exported, may result in a decrement to the customer firm federal power purchase.

The list in section B. 6. (b) is not an exclusive listing of customers' nonfederal resources that could result in a reduction in BPA's firm power obligations. Under the Policy other customer resources would be reviewed by BPA on a case-by- case basis for a determination of whether the resource is conservable, and if exported, whether the export requires or does not require BPA to reduce its firm power obligations to the customer.

These clarifications are adopted and will be applied under BPA's 5(b) 9(c) Policy following the filing of a settlement agreement and motions to dismiss the above referenced litigation. The 5(b) 9(c) Policy and these clarifications will be effective until BPA undertakes a review of this Policy by publishing a future notice.

Issued in Portland, Oregon, this 7th day of March 2003.



Stephen J. Wright
Administrator and CEO