United States of America
Department of Energy
Bonneville Power Administration

Final Interpretation of Section 4(c)(10)(B) of the Northwest Power Act

Introduction

On June 15, 2006, the Bonneville Power Administration ("BPA") issued a proposed interpretation ("Proposed Interpretation") of section 4(c)(10)(B) of the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"). BPA issued this notice to clarify its methodology for calculating the statutory cap on funding for the Northwest Power and Conservation Council ("Council"). Although BPA was not required to solicit public comments regarding this Proposed Interpretation, BPA provided an opportunity for interested parties to submit comments for BPA's review in developing a final interpretation of section 4(c)(10)(B). At the close of the comment period on June 29, 2006, BPA received a total of nine comments from regional parties. After reviewing and considering the views expressed in these comments, BPA is now issuing this final interpretation of section 4(c)(10)(B).

I. Background

The Council is an interstate compact agency created by Congress through the Northwest Power Act. *See* 16 U.S.C. § 839b(a)(2)(A). The principal functions of the Council are the development of (1) a regional power plan to assure the Northwest an adequate, efficient, economical and reliable power supply; and (2) a fish and wildlife program to protect, mitigate and enhance fish and wildlife affected by hydroelectric development in the Columbia River Basin. *See generally* 16 U.S.C. §§ 839b(d) – 839b(k).

In section 4(c)(10) of the Northwest Power Act, Congress directed BPA to financially support and pay the expenses of the Council for its statutory purposes within certain limits. Specifically, section 4(c)(10)(A) provides that, upon request of the Council, the Administrator shall make funds available to the Council for the purposes stated above, but not in excess of 0.02 mill multiplied by BPA's firm kilowatt hours forecasted to be sold in the year to be funded. 16 U.S.C. § 839b(c)(10)(A). This limit may be increased by the Administrator to 0.10 mill upon an annual showing by the Council that the 0.02 mill limitation "will not permit the Council to carry out its functions and responsibilities" under the Northwest Power Act. 16 U.S.C. § 839b(c)(10)(B).

In BPA's WP-07 rate proceeding, some parties claimed that BPA's proposed funding of the Council exceeded the 0.10 mill limitation contained in section 4(c)(10)(B). *See id*. Because of procedural restrictions, BPA was unable to substantively respond to these concerns in the rate proceeding. Instead, BPA staff presented material at the March 6 and March 8, 2006, Power Function Review public workshops to explain the methodology BPA used to calculate the funding limit for the Council. *See* Bonneville Power Administration, Power Function Review, *available at* http://www.bpa.gov/power/pl/review/meetings.shtml. The presentation material stated that BPA's calculation of the statutory cap included an estimated amount of firm power sales associated with the Residential Exchange Program ("REP") over the rate period. Using this methodology, BPA's firm power forecast establishes a statutory cap of approximately $9.5

million, $9.6 million, and $9.66 million for the FY2007-2009 period, which is above the estimated funding levels for the Council in BPA's initial WP-07 rate proposal.

II. Interpretation of Section 4(c)(10)(B)

BPA's funding for the Council is prescribed in the Northwest Power Act. Section 4(c)(10)(A) of the Act provides:

> At the request of the Council, the Administrator shall pay from funds available to the Administrator the compensation and other expenses of the Council as are authorized by this chapter, including the reimbursement of those States with members on the Council for services and personnel to assist in preparing a plan pursuant to subsection (d) of this section and a program pursuant to subsection (h) of this section, as the Council determines are necessary or appropriate for the performance of its functions and responsibilities. Such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act [16 U.S.C. § 838 *et seq*.] and shall be subject to the requirements of that Act, including the audit requirements of section 11(d) of such Act [16 U.S.C. § 838i(d)]. The records, reports, and other documents of the Council shall be available to the Comptroller General for review in connection with such audit or other review and examination by the Comptroller General pursuant to other provisions of law applicable to the Comptroller General. Funds provided by the Administrator for such payments shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded. In order to assist the Council's initial organization, the Administrator after December 5, 1980, shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

Section 4(c)(10)(B) of the Northwest Power Act provides:

> Notwithstanding the limitation contained in the fourth sentence of subparagraph (A) of this paragraph, upon an annual showing by the Council that such limitation will not permit the Council to carry out its functions and responsibilities under this chapter[,] the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded.

The critical statutory language for BPA's interpretation is "the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by *the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded*." 16 U.S.C. § 839b(c)(10)(B) (emphasis added). The Administrator therefore must determine the amount of firm power forecast to be sold. In determining this amount, the Administrator has always used a firm power forecast developed by BPA staff. This forecast includes all firm power sales recognized under the Northwest Power Act.

Section 5(b)(1) of the Act provides that the Administrator shall sell power, upon request, to "public bodies and cooperative[s] entitled to preference and priority under the Bonneville Project Act" and to investor-owned utilities to meet their net requirements. 16 U.S.C. § 839c(b)(1). Section 5(b)(3) of the Act permits the Administrator to sell power to Federal agencies in the region. 16 U.S.C. § 839c(b)(3).

Section 5(c) of the Northwest Power Act established the REP. Section 5(c)(1) of the Northwest Power Act provides that:

> Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region.

16 U.S.C. § 839c(c)(1). Under the REP, the amount of the power purchased and sold equals a utility's residential and small farm load. *Id.* In BPA's ratemaking, BPA has always treated the REP as a purchase and sale of firm power. In implementing the REP, however, no actual power deliveries have taken place. For ease of administration, BPA has provided equivalent monetary benefits to the utility based on the difference between the utility's ASC and the applicable PF Exchange rate multiplied by the utility's residential load. Even under this approach, however, the Residential Purchase and Sale Agreements ("RPSA") implementing the REP have provided for actual power sales for "in lieu" transactions. 16 U.S.C. § 839c(c)(5). Section 5(c)(5) of the Northwest Power Act provides that, in lieu of purchasing any amount of electric power offered by a utility, the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to a utility as part of an exchange sale if the cost of the acquisition is less than the cost of purchasing the electric power offered by the utility. *Id.* In summary, section 5(c)(1) authorizes the Administrator to make firm power sales to exchanging utilities.

Section 5(d)(1)(A) of the Northwest Power Act authorizes, but does not require, BPA to sell power to "direct service industrial customers." 16 U.S.C. § 839c(d)(1)(A).

Section 5(f) of the Northwest Power Act authorizes the Administrator to "sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this subsection . . ."

As noted previously, section 4(c)(10)(B) of the Northwest Power Act describes the ceiling for Council funding as "any amount not in excess of 0.10 mill multiplied by *the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded*." 16 U.S.C. § 839b(c)(10)(B) (emphasis added). All of the foregoing statutory firm power sales are included by BPA in its "firm power forecast" to establish the ceiling and have been included since the inception of the Act. This includes BPA's firm power sales under the REP, which, as noted above, have always been reflected as purchases and sales of firm power in BPA's rate development under the Act. Similarly, since the inception of the Northwest Power Act, BPA has included all of its firm power sales obligations, including forecasted sales associated with the REP, when calculating the section 4(c)(10) budget ceilings. *See* 16 U.S.C. § 839c(c).

Beginning in 2000 and again in 2004, BPA began resolving disputes involving the REP through settlements with exchanging utilities. *See* Residential Exchange Program Settlement Agreements With Pacific Northwest Investor-Owned Utilities, Administrator's Record of Decision (ROD), October 4, 2000. For FY 2007–2011, BPA has resolved REP disputes with its investor-owned utility customers through REP Settlement Agreements, which provide monetary payments. *See* Proposed Contracts or Amendments To Existing Contracts With the Regional Investor-Owned Utility Regarding the Payment of Residential and Small-Farm Consumer Benefits Under the Residential Exchange Program Settlement Agreements FY 2007-2011, Administrator's ROD, May 25, 2004. These settlements, which have far-reaching regional benefits, provide a monetary settlement amount to the exchanging utilities' residential consumers but, because the settlement makes the purchase and sale of power moot, the settlements do not include firm power sales.

Congress intended section 4(c)(10)(B) to align BPA's financial commitment to the Council with BPA's total firm power obligations. To maintain this connection in the face of the REP settlements, BPA must include an estimate of the REP firm load when developing the "firm power forecast" in section 4(c)(10)(B). BPA believes this approach is necessary because it preserves the congressionally designed tie between BPA's total firm power commitments, which includes the REP, and the Council funding provision. It also avoids financially penalizing the Council for decisions BPA makes in relation to its REP litigation. Absent this adjustment, the Council funding calculation in section 4(c)(10)(B) would potentially fall by millions of dollars each time BPA decided to settle its REP obligation through a monetary payment rather than a firm power sale. In BPA's opinion, such a result is neither reasonable nor required by the Act. BPA will therefore interpret the words "kilowatt hours of firm power forecast" in section 4(c)(10)(B) of the Northwest Power Act as including a forecast of the REP as a firm power sale in the narrow circumstance when BPA has settled disputes regarding implementation of the REP through REP settlement agreements.

III. Public Comments

BPA received a total of nine comments from regional parties on the Proposed Interpretation of Section 4(c)(10)(B). Six of these comments generally agreed that BPA should include a forecast of the REP when calculating the Council funding ceiling. A number of these comments note that this interpretation is consistent with the language of the Northwest Power Act and with Congressional intent. *See* Lazar, INT-001; NRDC, INT-002; Coalition, INT-003; Council, INT-004; WUTC, INT-009. In addition, several of the parties concurred that Congressional intent would be frustrated if BPA's commitment to the Council were reduced because of the REP Settlements. *Id.* Three of the comments opposed the Proposed Interpretation, and recommended that it not be adopted. *See* WPAG, INT-005; PPC, INT-006; NRU, INT-007. These parties argued that the Proposed Interpretation was inconsistent with the language of the statute and Congressional intent to limit BPA's financial commitment to the Council. *Id.* The particular issues raised by the parties, and BPA's final decision, are described below.

Issue 1

Whether the Proposed Interpretation is consistent with the language of section 4(c)(10)(B) of the Northwest Power Act.

Parties' Positions

Western Public Agencies Group (WPAG), Public Power Council (PPC) and Northwest Requirements Utilities (NRU) all express concern that BPA's Proposed Interpretation is inconsistent with the language of section 4(c)(10)(B) of the statute because the interpretation uses a hypothetical REP load when calculating the Council funding cap. *See* WPAG, INT-005 at 1-2; PPC, INT-006 at 2; and NRU, INT-007 at 1. These parties argue that the statutory phrase "firm power forecast to be sold in the year to be funded," read literally, requires BPA to use only actual forecasted firm power sales when calculating the spending limit. *Id.* Because BPA is not forecasting any firm power sales associated with the REP load in its Loads and Resource Study, BPA should not include any such loads in the Council funding calculation. *Id.* As such, WPAG, PPC and NRU state that the use of a hypothetical REP load, as suggested in the Proposed Interpretation, is inconsistent with the language of the statute.

WPAG, PPC and NRU also argue that the fact that BPA is not serving the REP loads because of the REP settlement does not require a deviation from the language of the statute. All three parties note that the statutory reference to "firm power" should not be construed to include monetary equivalents. WPAG asserts that Congress purposefully chose to use the phrase "firm power" in its description of BPA's funding obligation to the Council. WPAG, INT-005 at 1-2. WPAG points out that Congress refers to both "firm power" and "non-firm power" in other parts of the statute, which demonstrates that Congress understood the nature of the limitation imposed on Council funding. *Id*. WPAG concludes that the Proposed Interpretation, if adopted, would give BPA unfettered discretion in funding the Council, which is contrary to the Congressional direction set out in section 4(c)(10)(B). *Id.* at 3.

PPC and NRU further argue that the Proposed Interpretation is not reasonable because it uses a REP load forecast which conflicts with the description of the REP obligation in other contexts. PPC, INT-006 at 3; NRU, INT-007 at 2. PPC and NRU note that BPA used 2200MW to describe the benefits the IOU received in the REP Settlement Record of Decision. *Id*. Later, BPA chose to forecast zero kilowatt hours of REP load for rate setting purposes for FY 2007-2009. *Id*. Then, to calculate the current Council cap, BPA calculated a hypothetical REP load, which ranged between 3400 aMW and 3700 aMW. *Id*. PPC and NRU conclude that these inconsistent characterizations of the REP loads by BPA make the Proposed Interpretation unreasonable. *Id*.

Finally, WPAG and NRU argue that no statutory scheme is frustrated if BPA does not adopt the Proposed Interpretation. WPAG, INT-005 at 3; NRU, INT-007 at 2. WPAG and NRU argue that Congressional intent to limit BPA funding is clear, and that BPA has failed to identify what statutory scheme BPA is seeking to protect through its Proposed Interpretation. *Id*. Moreover, even if this scheme were identified, WPAG asserts that the rules of statutory construction require BPA to reconcile the conflicts rather than create conflicts through the adoption of a policy that would frustrate Congressional directives. *Id*.

Jim Lazar (Lazar), Natural Resource Defense Council (NRDC), NW Energy Coalition (Coalition), Northwest Power and Conservation Council (Council), and Washington Utilities and Transportation Commission (WUTC) all supported the Proposed Interpretation. *See* Lazar, INT-001; NRDC, INT-002; Coalition, INT-003; Council, INT-004; WUTC, INT-009. These parties agree that Congress envisioned that BPA would always include the REP loads as part of the firm power forecast when calculating the Council's funding cap. *Id*. In setting up the spending parameters of section 4(c)(10)(B), they note that Congress envisioned that the REP would be handled through an actual firm power sale and exchange. *Id*. These parties agree that BPA's recent decision to settle its REP obligation through a monetary transaction should not result in a reduction in the funding to the Council. *Id*. According to these parties, if the REP Settlement did not exist, BPA would be serving the REP load through a firm power sale and exchange transaction, which would be included in the firm power forecast used to calculate the Council's funding. *Id*. These parties conclude that for purposes of calculating BPA's support for the Council, including the REP as a firm load is to hold true to Congress' intent for section 4(c)(10)(B). *Id*.

The Pacific Northwest Investor-Owned Utilities (IOUs)[1] submitted comments which did not oppose the Proposed Interpretation, but proffered additional advice on ways BPA could interpret its statutory authorities. *See* IOUs, INT-008. The IOUs first state that section 4(c)(10)(B) does not set an absolute statutory cap, but establishes the mandatory amount that the Council may require the Administrator to fund. *Id* at 1-2. BPA's executive authority to set budgets and spending levels determines the maximum amount of Council funding, not section 4(c)(10)(B). *Id*. In support of this position, the IOUs cite the Administrator's broad statutory authority in the Federal Columbia River Transmission Systems Act to make expenditures from the BPA fund to carry out the purposes and provisions of the Northwest Power Act. *Id*., *citing* 16 U.S.C. 838i(b)(12). The IOUs contend that the Administrator has the authority through this general grant to make expenditures to the Council that exceed the .10 mill limitation mentioned in section 4(c)(10)(B) if such additional payments are necessary for the performance of the Council's functions. *Id* .

The IOUs also recommend that if BPA decides to forecast a load associated with the REP to calculate Council spending, then it should do so in a manner that considers the REP load and resource assumptions used in the WP-07 rate case. *Id* at 2-3. The IOUs do not dispute the position BPA took in the WP-07 rate case that spending decisions, such as the level of Council funding, are subject to review only by the President and Congress. *Id*. They suggest, however, that BPA should take note of how it dealt with REP loads in other contexts, such as in the 7(b)(2) Rate Study, when making such a determination. *Id*. The IOUs note that BPA included a forecast of the loads and resource of the REP in this study for ratemaking purposes only to ensure that the Program Case would function properly. *Id*. The IOUs advise that a similar approach should be adopted for purposes of calculating Council funding. *Id*.

BPA's Position

[1] These comments were jointly filed on behalf of Avista Corporation, Idaho Power Company, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc.

BPA generally agrees with the comments of Lazar, NRDC, Coalition, Council, and WUTC. BPA believes the Proposed Interpretation is consistent with BPA's interpretation since the inception of the Northwest Power Act and is consistent with the methodology Congress developed for funding the Council.

The Northwest Power Act refers to the REP as a firm power sale, which would necessarily always be included in BPA's firm power obligations. The settlement of the REP litigation should not alter this construct or result in the unintended consequence of diminishing the Council's funding. Although Congress vested BPA with broad contracting and settlement authority, Congress never envisioned the myriad of specific applications of that authority or how, as in the instant case, the settlement of REP litigation might impact the Council's funding under section 4(c)(10)(B). As a result, it is important to interpret this provision in a manner that promotes rather than frustrates Congressional intent.

BPA believes the purpose of section 4(c)(10)(B) is to assure that BPA's funding of the Council is bounded by use of a relatively objective proxy – BPA's firm power obligations. BPA believes that its decision to include the firm power obligation it would otherwise have had under the REP in the absence of the litigation settlement promotes this Congressional purpose. In BPA's opinion, it would be unreasonable and unwise to penalize the Council, and in many respects, the region in this manner.

BPA believes Congress gave BPA some latitude to interpret section 4(c)(10)(B) by leaving to BPA's discretion the development of the firm power forecast. Indeed, a forecast, by its very nature is not an exact science but rather calls for the exercise of judgment. BPA believes it has reasonably exercised that judgment by including REP firm power sales that would have occurred in the absence of a settlement, in that forecast.

Evaluation of Positions

By the express terms of the statute, Congress designed the Council funding mechanism to follow in relative alignment with BPA's forecasted firm power obligations. *See* 16 U.S.C. § 839b(c)(10)(B). Such a forecast includes all of BPA's statutorily required loads, including loads associated with the REP. *Id.* By law, BPA is required to serve the eligible REP load of the investor-owned and public agency utilities. *See* 16 U.S.C. § 839c(c)(1). As such, the "firm power forecast" referenced by Congress in section 4(c)(10)(B) of the Act would always have included a significant firm power requirement associated with the REP. With the advent of the REP settlement, though, the interplay between BPA's firm power forecasts and Council funding is potentially frustrated. The functionality of section 4(c)(10)(B) is dependent upon BPA using a forecast of its firm power obligations that includes *all* of its statutorily required commitments. Anything less would be inconsistent with the Congressionally intended design of section 4(c)(10)(B), and lead to dramatic shifts in the Council's funding. To maintain the functionality of the funding provision, BPA must account for the REP in situations where the REP obligation has been temporarily alleviated because of events like the REP settlement. The Proposed Interpretation does this by using an estimated REP load. It thus preserves the interplay between BPA's firm power obligations and section 4(c)(10)(B) in the narrow circumstance where the REP has been settled through a monetary payment rather than a firm power sale.

WPAG, NRU and PPC argue that this interpretation is contrary to the language of the statute. They contend that the phrase "firm power forecast to be sold in the year to be funded," read literally, requires BPA to use only actual forecasted firm power sales when calculating the spending limit. *See* WPAG, INT-005 at 1-2; PPC, INT-006 at 2; and NRU, INT-007 at 1. Nothing in the Act or legislative history, however, requires such a narrow reading of this section. Congress provided little guidance in describing the basis for the "firm power forecast." *See* 16 U.S.C. §839b(c)(10)(B). Congress did not define what BPA must use or how BPA was to develop the firm power forecast used in the Council funding calculation. The legislative history of this section provides little additional clarification. The report of the Senate Committee on Energy and Natural Resources, based on an early draft of the Northwest Power Act, states:

> It is intended that funding under this section will be applied to meet the expenses directly connected with each state's and its representative's participation in and support of the Council activities. Such funding must be approved by the Council, although the Administrator's vote is not required for approval, and shall be included in the Administrator's annual budget submitted pursuant to Public Law 93-454. The limit on the total of such funding for all States is established at 0.02 mills per kilowatt-hour of estimated power sales of the Administrator; it is intended that such sales figures will be based on the Administrator's estimate of his total firm loads.

S. Rep. No. 96-272, 96th Cong., 1st Sess. 23 (1979). The report of the House Committee on Interior and Insular Affairs states:

> Section 4(a)(12) directs the Administrator at the request of the Council to provide financial support for the performance of the Council's functions and to the States that have appointed members to the Council for their participation in, and activities related to, the Council.

H.R. Rep. No. 96-976, Part II, 96th Cong., 2d Sess. 42 (1980). The report of the House Committee on Interstate and Foreign Commerce states:

> As for the Council's budget, the Administrator must include in the BPA budget the funds necessary for the Council to carry out its responsibilities. The total amount shall be no greater than .02 mills times the kilowatt hours sold by the Administrator the previous calendar year. Anticipating that this ceiling may be too limited, the Committee provided a procedure whereby the Administrator may raise the amount to .10 mills. The Committee expects the BPA and the Council to be judicious in utilizing this authority. To insure this, the procedure requires an annual showing to BPA by the Council of the basis of any request for added funds which must be public. The raise for one year will not automatically be applied in the next.

H.R. Rep. No. 96-976, Part I, 96th Cong., 2d Sess. 54 (1980).

Where, as here, Congress has failed to define its terms specifically, and the legislative history sheds no light on the question presented, the best approach is to construe the statutory language in accordance with its purpose. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979). That purpose, as noted above, is to set BPA's financial commitment to the Council in line with its overall forecasted firm power obligation. Exactly how BPA was supposed to develop that firm power forecast was not specified. As such, Congress gave BPA some discretion to determine the best way to calculate what BPA believes are its firm power obligations. For the immediate future, BPA has chosen to enter into financial litigation settlements with the exchanging utilities that have eligible REP load. There is nothing unusual or unreasonable, then, with including the REP settlement as part of BPA's total firm power obligations for purposes of section 4(c)(10)(B) to avoid aberrations in Council funding. This interpretation is not prohibited by the language of the statute, and is consistent with the Congressional purpose of tying BPA's financial commitment to the Council with its total firm power obligations.

Even assuming *arguendo* that the language in section 4(c)(10)(B) is unambiguous, BPA declines to adopt the hyper-technical reading of the statute proffered by WPAG, NRU and PPC. BPA believes its interpretation is a reasonable one and is consistent with accepted statutory interpretation. In determining a statutory provision's meaning, the court "may consider the purpose of the statute in its entirety, and whether the proposed interpretation would frustrate or advance that purpose." *U.S. v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999)(citation omitted). Statutory interpretations "which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d. 973 (1982). Even where the express language of a statute appears unambiguous, a court must look beyond that plain language where a literal interpretation of this language would thwart the purpose of the overall statutory scheme. *Royal Foods Co., Inc. v. RJR Holdings, Inc.*, 252 F.3d 1102, 1108 (9th Cir. 2001); *Hurston v. Dir., OWCP*, 989 F.2d 1547, 1554 (9th Cir.1993) ("We are required by traditional canons of statutory construction to avoid a literal interpretation of a statute that leads to an absurd result or that is contrary to Congress' constitutional power.")

Usually when a statutory provision is clear on its face the court stops there, in order to preserve language as an effective medium of communication from legislatures to courts. But, "if the clear language, when read in the context of the statute as a whole or of the commercial or other real-world (as opposed to law-world or word-world) activity that the statute is regulating, points to an unreasonable result, courts do not consider themselves bound by 'plain meaning,' but have recourse to other interpretive tools in an effort to make sense of the statute." *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002), citing *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 453-55 (1989); *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring).

In this instance, WPAG, PPC and NRU are advocating an interpretation of section 4(c)(10)(B) that would inseparably intertwine an REP litigation settlement with the level of Council funding. Whether BPA should or should not settle its REP litigation with the exchanging utilities should have no bearing on the level of funding for the Council. Yet, under the interpretation proffered by WPAG, PPC, and NRU, these two very different matters are drawn into complete opposition

to each other. Potentially millions of Council funding dollars could disappear based on a BPA decision to settle (or not) its REP litigation with the exchanging utilities. Such a dramatic impact on Council support simply because the Administrator decided to settle a litigation matter was never intended by Congress, and frustrates the very purpose of tying the funding level to the relative stability of BPA's total firm power obligations. In BPA's opinion, to preserve the Congressional design of section 4(c)(10)(B), these two matters must be treated separately. The Administrator's decision to settle or not settle the REP should be made independent of and have no adverse effect on the Council's funding. Because the interpretation of 4(c)(10)(B) supported by WPAG, PPC and NRU draws these two unrelated issues into direct conflict, BPA considers it unreasonable and therefore rejects it.

Contrary to WPAG, PPC and NRU's assertion, the Proposed Interpretation of section 4(c)(10)(B) does not give BPA unfettered discretion to fund the Council. First, when forecasting REP firm power sales for purposes of the Council funding calculation, BPA is constrained by the amount of the forecasted REP sales. In other words, BPA cannot assume that there will be, for example, 20,000 aMW of REP firm power sales. This is because the total amount of REP sales if all eligible utilities participated in the REP would not reach 20,000 aMW. This limits the Administrator's discretion. Second, the Council still must make an annual showing that it is in need of funds exceeding the .02 mills base level contained in section 4(c)(10)(A). *See* 16 U.S.C. § 839b(c)(10)(A). If the Council does not make this showing or if the Administrator determines that the funds are not needed to implement the Council's functions and responsibilities, then BPA has no obligation to provide additional funding to the Council under section 4(c)(10)(B). The Proposed Interpretation leaves undisturbed this Congressional check, which requires the Council to annually demonstrate its need for additional funding.

PPC's and NRU's concern that BPA is making conflicting representations related to the REP load is also in error. First, in the context of the REP Settlement ROD itself, the 2200 aMW figure is a negotiated figure developed through comments in a public notice and comment proceeding to develop the benefits provided under the REP Settlement Agreements. *See* Residential Exchange Program Settlement Agreements With Pacific Northwest Investor-Owned Utilities, Administrator's Record of Decision (ROD), October 4, 2000, at 10-11. This number is multiplied by the difference between BPA's market price forecast and the RL rate to determine a monetary sum that is appropriate to settle the investor-owned utilities' claims regarding the implementation of the REP. The 2200 aMW figure is not and has never been a representation of what the REP would be in any given year. Second, for rate case purposes only, BPA used two forecasts of REP loads in the WP-07 rate proceeding. One forecast was for load associated with the REP because such a forecast was necessary for the proper development of BPA's rates. *See* 2007 Wholesale Power Rate Adjustment Proceeding, Administrator's ROD, July 17, 2006, at 10-19 to 10-30. Another forecast showed no REP load because, due to the REP settlements, implementation of the REP was no longer necessary. *Id.* at 3-1 to 3-3. This characterization was reasonable because BPA is not expecting to implement the REP with physical power deliveries during the rate period. It still remains, however, that absent the REP settlements BPA would be implementing the REP.

There is a firm load associated with the REP, and thus firm power sales, which for the current rate period is satisfied through a monetary settlement. That firm load is depicted in the final

number noted by PPC and NRU. The 3400 aMW to 3700aMW represents the forecasted load associated with the REP if it were being implemented as a firm power purchase and sale. *See* Bonneville Power Administration, Power Function Review, *available at* http://www.bpa.gov/power/pl/review/meetings.shtml. This number was developed by BPA staff using a comparison of the ASC of each investor-owned utility (and eligible public agencies) and the PF Exchange rate to determine which investor-owned utilities (and public agencies) would most likely be operating under an REP purchase and sale arrangement. This final number, therefore, provides the most accurate representation of what the REP would be if the REP Settlement Agreements had not been executed.

The IOUs offer some thought-provoking comments on Council funding. *See* IOUs, INT-008. The IOUs state that section 4(c)(10) only establishes minimum, mandatory levels of Council funding. *Id*. They claim that there is no absolute statutory cap on the amount that BPA, in its discretion, can pay the Council for its funding. *Id*. Accordingly, they claim the determination of a power forecast is irrelevant to the payment of Council expenses if BPA determines that certain payments should be made. *Id*. Although this is an interesting interpretation, BPA does not express an opinion on such interpretation at this time. BPA may, however, revisit this interpretation in the future.

Decision

BPA will use the Proposed Interpretation when calculating the Council funding cap of section 4(c)(10)(B).

Issue 2

Whether BPA should include conservation savings as part of its interpretation of the "firm power forecast to be sold."

Parties' Positions

NRDC and NW Energy Coalition recommend that BPA amend the Proposed Interpretation to include conservation in the interpretation of "firm power forecast to be sold." NRDC states that BPA is currently serving 890 aMW of load through conservation, which BPA acquired between 1985 and 2005. NRDC and NW Energy Coalition both suggest that BPA consider these conservation savings when calculating the Council's funding.

BPA's Position

Although conservation is defined in the Northwest Power Act as a resource, it is not the same as a firm power sale. Conservation amounts should not be included in the calculation of the firm power forecast to be sold by the Administrator.

Evaluation

The Northwest Power Act provides that funds provided by the Administrator for the Council's functions and responsibilities under the Act "shall not exceed annually an amount equal to 0.02 mill multiplied by the *kilowatt hours of firm power* forecast to be sold by the Administrator during the year to be funded" and that "the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by the *kilowatt hours of firm power* forecast to be sold by the Administrator during the year to be funded." 16 U.S.C. § 839b(c)(10) (emphasis added). The Northwest Power Act defines "electric power" as "electric peaking capacity, or electric energy, or both." 16 U.S.C. § 839a(9). This definition does not include conservation. "Conservation" is defined as "any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution." 16 U.S.C. § 839a(9). The distinction between conservation and firm power is also supported by the Act's definition of "resource." Conservation, unlike firm power, is not sold by the Administrator; rather, conservation is a resource that is used to reduce demand in the consumption of electricity. Section 3(19) defines "resource" as "(A) electric power, including the actual or planned electric power capability of generating resources, or (B) actual or planned load reduction resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure." 16 U.S.C. § 839a(19). The foregoing definition shows that the Act differentiates between actual power production, which results in firm power sales, and conservation, which results in load reduction. Therefore, conservation should not be treated as firm power sales for purposes of calculating the Council funding ceiling.

Decision

Conservation will not be treated as a firm power sale for purposes of calculating the Council's funding ceiling.

Issue 3

Whether BPA's 14-day comment period provided participants sufficient time to submit comments on the Proposed Interpretation.

Parties' Positions

WPAG and PPC argue that BPA did not provide enough time to comment on the Proposed Interpretation. Other commenters, such as Lazar, NRDC, Coalition, Council and WUTC do not voice this concern. WPAG claims it only had 10 days from receipt of the Proposed Interpretation to prepare and submit comments. WPAG remarks that the brevity of the comment period appears to be a *post facto* policy justification for funding the Council in excess of what WPAG believes are the statutory limits. PPC expressed concern that the 14-day comment period did not provide sufficient time to evaluate and discuss the proposed view on how to properly fund the Council.

BPA's Position

The issues raised in the Proposed Interpretation were narrow enough to require only a 2-week comment period. The purpose for the Proposed Interpretation and the brevity of the comment

period was not intended to create a *post facto* justification for the Council funding levels in the WP-07 rate case. BPA has been using a forecast of the REP loads in calculating the funding of the Council since the inception of the Northwest Power Act. The purpose of the Proposed Interpretation is to elicit comments from the region on BPA's approach to addressing the interplay between the REP settlements and the Council funding formula, and to determine whether there are any other reasonable alternatives.

Evaluation of Positions

BPA is not required to give parties a prescribed amount of time to comment on interpretive actions such as the Proposed Interpretation. Indeed, BPA is not legally required to give parties any opportunity to comment at all on this statutory interpretation. *See* 5 U.S.C. § 553(b)(3)(A). In this case, however, BPA sought to exceed the statutory procedural requirements in order to allow parties an opportunity to express their views on the Proposed Interpretation and provide BPA with different perspectives on Council funding in the context of the REP settlements. Because of the narrowness of the issues involved in the Proposed Interpretation, BPA determined that a 14-day comment period would be sufficient time for participants to evaluate the proposal and prepare comments. The fact that BPA received nine comments on the issue of Council funding, and no parties claimed they were unable to file comments because of the length of the comment period, is evidence that an adequate amount of time was allotted to receive such comments. BPA does not believe further time would have resulted in additional comments, and is unaware of any interested party that was unable to submit comments because of the 14-day limitation.

WPAG claims that it received only 10-days notice of the Proposed Interpretation. Nevertheless, BPA believes an adequate amount of time was provided to WPAG and others to respond to the Proposed Interpretation. BPA posted the Proposed Interpretation on its website on June 15, 2006, thus giving interested parties notice that it was accepting comments on the interpretation for a 2-week period. Although this was the first posting of the Proposed Interpretation, it was not the first public disclosure of BPA's interpretation or of BPA's intent to issue a formal interpretation of section 4(c)(10)(B). BPA's interpretation of section 4(c)(10)(B) was known as early as March 2006 when BPA staff publicly noted that they had included a forecast of the firm power load associated with the REP when calculating the Council's budget. Later, in response to the concerns raised by WPAG to this interpretation in the WP-07 rate proceeding, BPA stated in its Draft Record of Decision, which was published on June 2, 2006, that BPA would issue a proposed interpretation of section 4(c)(10)(B). *See* Administrator's Draft Record of Decision, WP-07-A-01, at 17-21 (2006). Thus, interested parties such as WPAG, were on notice as early as June 2, 2006, that BPA would be issuing a formal interpretation on the Council funding provision, and parties had ample time to prepare their comments.

WPAG's final argument is that the brevity of the comment process appears to be designed to provide a "*post facto*" justification for the Council funding level contained in the WP-07 initial rate proposal. This argument makes little sense. The length of the comment period did not determine the date when BPA would issue a final interpretation of section 4(c)(10)(B). Indeed, BPA's final interpretation is being issued well after the completion of the WP-07 proceeding. Therefore, the length of the comment period is irrelevant to any justification of BPA's funding

level in the WP-07 proceeding. Furthermore, as explained in the WP-07 record, BPA does not make program level determinations in BPA's rate proceedings, including program levels for Council funding. BPA's program levels are first determined in separate proceedings and are subject to review and approval by Congress.

Decision

The parties received sufficient time to submit comments on the Proposed Interpretation.

IV. Conclusion

The language in section 4(c)(10)(B) was built around a paradigm where Congress assumed that the investor-owned utilities (and eligible public agencies) would be receiving their REP benefits through a purchase and sale arrangement. These agreements would necessarily have been reflected in BPA's load forecasts as firm power obligations. Since the inception of the program, BPA has included these loads in its forecasts when calculating the Council's spending ceiling. The settlement of the REP obligation should not change this construct. The obligation to serve the applicable REP loads continues even though it has been temporarily alleviated through the REP Settlements. To preserve Congressional intent and not distort the implementation of the funding formula, BPA will include an estimate of the REP as a firm load when developing the "firm power forecast" in section 4(c)(10)(B).

/s/ Steven G. Hickok

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