

**RECORD OF DECISION
PNGC CAPACITY OWNERSHIP**

6/30/93

BRIEFING MEMO

The attached ROD is set forth with the understanding that the Non-Federal Participation Environmental Impact Statement (NFP EIS) process is not yet completed and the Bonneville Power Administration (BPA) has not yet decided whether to offer capacity ownership its share of the PNW AC Intertie. However, BPA agreed with the Pacific Northwest Generating Cooperative (PNGC) in a Memorandum of Understanding, dated October 11, 1991, to make a determination by close of public comment on BPA's Draft Non-Federal Participation Environmental Impact Statement (NFP EIS) on whether PNGC would be "an appropriate contracting entity" for purposes of the Capacity Ownership Agreement. The ROD and attached exhibits constitute the decision of BPA regarding that determination.

This decision is based on BPA's interpretation of the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"), Pub. L. 96-501, 16 U.S.C. §§ 839c(a),g(c) (1980), the Bonneville Project Act, Pub. L. 75-329, 16 U.S.C. 832c(a) (1937) ("Project Act"), and other relevant statutes, case authorities, and industry practices.

In this ROD BPA is deciding to exercise its discretion to enter into a Capacity Ownership Agreement with PNGC alone, if BPA's decision after completion of the NFP EIS is to offer Capacity Ownership and if PNGC otherwise qualifies for a contract, on the condition that certain provisions are included in PNGC's Capacity Ownership Agreement and certain additional actions are taken to alleviate BPA's primary concerns associated with section 9 of the Northwest Power Act and to mitigate BPA's financial and non-utility ownership risks.

In this ROD BPA is also deciding to execute a new long-term firm agreement with PNGC for Network transmission services, and to execute a new agreement with PNGC for certain other transmission services in support of the Capacity Ownership Agreement, if BPA decides not to amend the existing Services Agreement with PNGC.

PNGC CAPACITY OWNERSHIP DECISION

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SECTION I

SUMMARY

This document is set forth with the understanding that the Non-Federal Participation Environmental Impact Statement (NFP EIS) process is not yet completed and the Bonneville Power Administration (BPA) has not yet decided whether to offer capacity ownership its share of the PNW AC Intertie. However, BPA agreed with the Pacific Northwest Generating Cooperative (PNGC) in a Memorandum of Understanding, dated October 11, 1991, to make a determination by close of public comment on BPA's Draft Non-Federal Participation Environmental Impact Statement (NFP EIS) on whether PNGC would be "an appropriate contracting entity" for purposes of the Capacity Ownership Agreement. This document and attached exhibits constitute the decision of BPA regarding that determination.

This decision is based on BPA's interpretation of the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"), Pub. L. 96-501, 16 U.S.C. §§ 839c(a),g(c) (1980), the Bonneville Project Act, Pub. L. 75-329, 16 U.S.C. 832c(a) (1937) ("Project Act"), and other relevant statutes, case authorities, and industry practices.

BPA decides here to exercise its discretion to enter into a Capacity Ownership Agreement with PNGC alone, if BPA's decision after completion of the NFP EIS is to offer Capacity Ownership and if PNGC otherwise qualifies for a contract, on the condition that certain provisions are included in PNGC's Capacity Ownership Agreement and certain additional actions are taken to alleviate BPA's primary concerns associated with section 9 of the Northwest Power Act and to mitigate BPA's financial and non-utility ownership risks.

If BPA enters into a Capacity Ownership Agreement with PNGC given the foregoing, BPA decides also to execute a new long-term firm agreement with PNGC for Network transmission services, and to execute a new agreement with PNGC for certain other transmission services in support of the Capacity Ownership Agreement, if BPA decides not to amend the existing Services Agreement with PNGC.

SECTION II

INTRODUCTION

A. Statement of the Issue

Is PNGC an appropriate entity for contracting with BPA for purposes of the Capacity Ownership Agreement and other specific agreements in support of capacity ownership?

B. Background

1. Pacific Northwest Generating Cooperative (PNGC)

The PNGC is a generation and transmission company, incorporated in 1975 as a Non-Profit Corporation in the State of Oregon. PNGC is currently composed of 13 non-contiguous mutual utilities and cooperatives located in the Pacific Northwest (PNW). Each of PNGC's members has executed a Power Sales Agreement with the Bonneville Power Administration (BPA) for the member's long-term firm power requirements. PNGC does not serve consumers or retail load nor does it own distribution or transmission facilities interconnecting with its various members. PNGC's primary purpose is "to serve the needs of its membership by exploration, research and development of new electric power resources as needed; management of operating electric power resources; and power management services or any other services which may be deemed in the best interests of PNGC by the Board of Directors of PNGC." PNGC's Wholesale Power Sales Contract - Revised, Recital A, p. 8; included here as Appendix A.

One of the principal activities PNGC has been involved with is the construction and operation of the 530 megawatt (MW) Number One Boardman Station (Boardman) coal plant located on the Carty Reservoir just west of the McNary Dam and south of the Columbia River. PNGC owns a 10 percent share of the output of the plant and has, from time to time on a short-term basis, sold its share of the output to BPA or to utilities located outside of the region, primarily in California. PNGC executed power sales agreements with its members that provided for the purchase of Boardman power by the members. (See Appendix A.) Pursuant to those agreements, PNGC's members received allocations of Boardman power totaling 100 percent of PNGC's share of the output. PNGC's member utilities listed their allocations of Boardman power in their Firm Resource Exhibits to their BPA Power Sales Contracts from July 1, 1983, until July 1, 1990, when the resource was deleted from their Firm Resource Exhibits and at a time when BPA was in surplus.

BPA has provided certain services to PNGC and its members under a Services Agreement, BPA Contract No. DE-MS79-85BP92300, for scheduling and management of PNGC's share of the Boardman plant

output, as well as startup and station service, in order for PNGC to meet its sale agreement obligations with other parties.

2. Memorandum of Understanding (MOU)

PNGC has expressed an interest in acquiring a share of transmission capacity in BPA's share of the PNW AC Intertie through the Non-Federal Participation (NFP) proposal. BPA is analyzing this proposal in its NFP EIS. In general terms, BPA's proposal is to sell PNW AC Intertie transmission capacity rights to interested Northwest utilities through "Capacity Ownership contracts." Utilities would acquire a share of PNW AC Intertie transmission capacity, as distinguished from facilities, for the life of the PNW AC Intertie.

BPA required all utilities that are interested in NFP to execute a MOU with BPA. On October 28, 1991, a MOU, Contract No. DE-MS79-92BP93488, was executed between PNGC and BPA. (PNGC's MOU is attached as Appendix B.) The MOU provides for PNGC's agreement to enter into a life-of-facilities Capacity Ownership Agreement with BPA for up to 52 MW contingent upon, among other things, BPA's determination by close of public comment on BPA's Draft NFP EIS that PNGC is "an appropriate contracting entity" for purposes of the Capacity Ownership Agreement. Although BPA agreed to enter into the MOU without requiring PNGC's members to execute as parties, the MOU states that BPA may require PNGC's "participating member cooperatives" to sign the Capacity Ownership Agreement in some capacity.

A second contingency in the MOU stipulated that PNGC enters into subscription agreements, prior to close of public comment on BPA's NFP Draft EIS, "with those Pacific Northwest distribution cooperatives who are its members as of September 30, 1991, in compliance with the Bylaws of the Pacific Northwest Generating Cooperative (March 7, 1990) and the terms of its Wholesale Power Sales Contract--Revised (executed as of February 22, 1983, as amended as of April 24, 1984) . . .". PNGC satisfied this contingency on March 5, 1992, by entering into a Subscription Agreement (See Appendix C) with each of the following utilities:

1. Benton Rural Electric Association
2. Blachly-Lane County Cooperative Electric Association
3. Central Electric Cooperative
4. Clearwater Power Company
5. Consumers Power, Inc.
6. Coos-Curry Electric Cooperative
7. Douglas Electric Cooperative
8. Fall River Electric Cooperative
9. Lincoln Electric Cooperative
10. Lost River Electric Cooperative
11. Lower Valley Power and Light, Inc.
12. Raft River Rural Electric Cooperative
13. Umatilla Electric Cooperative Association

The subscription agreements authorize PNGC to undertake the obligations of the Capacity Ownership Agreement on behalf of the subscribers and provide for PNGC to recover its costs from the subscribers, who agree to be "jointly and severally liable for the full indemnification of PNGC for Intertie costs. . ." (emphasis added). Pacific Northwest Generating Cooperative PNW AC Intertie Subscription Agreement.

A third contingency in the MOU is PNGC entering into a power sale, seasonal exchange, or other similar arrangement with a Pacific Southwest utility prior to close of public comment on BPA's NFP Draft EIS. PNGC satisfied this contingency by entering into a 25-year Power Purchase Agreement with the Turlock Irrigation District (Turlock) on November 10, 1992. The Power Purchase Agreement provides for payment by Turlock to PNGC of all costs "attributable to PNGC's ownership in the PNW AC Intertie." PNGC and Turlock have agreed to certain alternative methods of achieving the level of generation desired, including Turlock's purchase of replacement power or purchasing emissions allowances, in the event that 1990 Amendments to the Clean Air Act limit the output of Boardman.

3. Chronology of Correspondence

BPA began its analysis to determine whether PNGC is an appropriate contracting entity by formulating questions, regarding PNGC's membership and financial characteristics, which were directed to PNGC in a letter dated March 6, 1992.

In a letter to BPA dated March 30, 1992, PNGC indicated that the Rural Electrification Administration (REA) would not be the lender for PNGC's PNW AC Intertie costs but the REA will have to approve PNGC's participation and grant a lien accommodation for non-REA funding, i.e., through the National Rural Utilities Cooperative Finance Corporation (CFC) (upon demonstration of adequate security for loan repayments). PNGC promised to prepare a complete response to BPA's questions accordingly.

On May 15, 1992, BPA received a partial response to its questions from CFC. On June 1, 1992, BPA sent a second letter to PNGC requesting additional information and included a followup request for a complete response to its questions and document requests listed in BPA's letter of March 6, 1992.

On November 16, 1992, BPA received a letter from PNGC responding to BPA's questions with a note that CFC and REA were asked to respond to the questions relating specifically to those entities. BPA received a letter from CFC to PNGC, dated December 21, 1992, addressing BPA's questions on CFC.

In response to BPA's request for information on what CFC's position would be in the event of a default by PNGC, CFC indicated that "Although CFC has never stepped in and taken over a Borrower's interest in a contract . . . , CFC's loan documents do allow for CFC to

sell, assign or transfer such interest to a third party. It is understood that such third party would have to agree to be bound by the terms and conditions of the contract and be agreeable to BPA." CFC expects "that the contract between PNGC and BPA would clearly include the ability of CFC to assign or transfer the contract to a third party in the event of a default of PNGC."

BPA requested similar information from REA. In REA's response, forwarded to BPA on March 15, 1993, REA states that "In the case of an event of default by PNGC under the REA mortgage, REA reserves the right to exercise any and all remedies against PNGC and its system as provided for in Section 5.01 of the REA mortgage. At the time of the happening of such default REA would evaluate the situation and determine its course of action. In the event REA exercises any of the rights, powers or privileges available to it under the REA mortgage with respect to PNGC's contract for PNW AC Intertie ownership rights, then and only then shall REA assume the obligations to be performed by PNGC under such contract." REA requires certain contractual provisions in contracts executed by their borrowers to protect REA's rights as mortgagor. The contracts must also be freely assignable to REA.

According to Joe Nadal's letter of November 16, 1992, to Sally Long, CFC will require PNGC to obtain a "lien accommodation" from REA. However, before REA will grant a lien accommodation, PNGC must comply with certain REA procedures and obtain REA's approval of all documents related to PNGC's capacity ownership. This requirement was identified in PNGC's MOU.

After reviewing the information provided by PNGC, REA, and CFC, BPA proceeded with an analysis of the issue based on the information received through PNGC, and other applicable documents and statutes. BPA then drafted several preliminary recommendations to address BPA's concerns and risks associated with entering into a Capacity Ownership Agreement with PNGC. The recommendations, which are contained in this ROD, were discussed informally with PNGC and the recommended provisions or actions were generally acceptable to PNGC.

SECTION III

ANALYSIS OF THE ISSUE AND RISKS TO BPA

This section analyzes the legal issues and risks posed by contracting with the entity PNGC rather than with PNGC's members or with PNGC together with its members. The first issue considered is whether BPA is required to contract with PNGC. The analysis concludes that BPA is not required to enter into a contract with PNGC to the exclusion of its members and, thus, considers the risks to BPA of entering into a contract with PNGC alone.

A. BPA Does Not Have a Legal or Statutory Obligation to Contract With PNGC

BPA's existing contractual and statutory obligations do not include or support an obligation on the part of BPA to contract with PNGC alone. BPA executed an MOU with PNGC that states that BPA will make a determination of the propriety of contracting with PNGC, to the exclusion of its membership, in the event that BPA decides to offer Capacity Ownership contracts and PNGC otherwise qualifies for a contract. See Appendix B. The MOU, however, is not a contract, and in any event does not obligate BPA to contract with PNGC.

Nor do the statutes require BPA to execute a contract with PNGC alone. Section 6 of the 1974 Transmission Act, 16 USC §838d, states that "[t]he Administrator shall make available to all utilities on a fair and non-discriminatory basis, any capacity in the Federal transmission system which he determines to be in excess of the capacity required to transmit electric power generated or acquired by the United States." 16 USC § 838d. This provision, however, does not require BPA to sell that capacity as it proposes to do so here. (See S. Report 93-1030, 93d Cong., 2d Sess., p. 10 (July 24, 1974) (the section-by-section analysis states "[s]ection 6 provides that the Administrator of the Bonneville Power Administration shall not discriminate among classes of customers in making agreements to transmit electric power over Federal transmission lines.") Even if this provision applied in this case, PNGC arguably is not a utility entitled to take advantage of the obligations it places on BPA. See infra p. 13-14.

Similarly, section 9(i)(1)(B) of the Northwest Power Act requires BPA to assist its existing customers' power marketing efforts. Section 9(i)(1)(B) states that BPA

shall, to the extent practicable, dispose of, or assist in the disposal of, any electric power that a customer or group of customers proposes to sell within or without the region at rates and upon terms specified by such customer or group of customers, if such disposition is not in conflict with the Administrator's other marketing obligations and the policies of this Act and other applicable laws.

16 USC § 839(i)(1)(B). The provision is fairly non-specific, but it does not obligate BPA to undertake projects such as NFP. The House Interior and Insular Affairs Committee Report's section-by-section analysis of the bill notes that the section was not intended to create new services, only to ratify existing ones.

Section 9(i) sets forth additional services BPA is to provide its customers, at their request and expense, with respect to power sales and purchases of their own. This subsection essentially ratifies BPA's existing policies on services, except that paragraph (3) creates a limited and contingent priority on BPA's available services for the marketing of power from projects currently under construction in the region, should BPA decline to acquire these resources.

H.R. Rep. No. 96-976, 96th Cong., 2d Sess., pt. II, at 56 (1980). At the time this section was enacted, BPA had no policy or plans to sell excess PNW AC Intertie capacity, and section 9(i) cannot be read to impact it.

Even if section 9(i) governed BPA's sale of PNW AC Intertie capacity, however, the requirement that BPA make these services available to its existing customers would not obligate it to deal with PNGC. While section 9(i) of that Act obligates BPA to take certain actions on behalf of customers and "groups of customers," PNGC is neither a customer nor a "group of customers."

"Customer" is a defined term of the Northwest Power Act. Section 3(7) defines "customer" as "anyone who contracts for the purchase of power from the Administrator pursuant to this Act." 16 USC § 839a(7). Such purchases would be made pursuant to section 5(b) of the Act. PNGC does not have a section 5(b) power sales contract, nor has BPA determined that PNGC is entitled to one. Section 5(b) of the Northwest Power Act requires BPA to offer a power sales contract to any requesting "public body or cooperative entitled to preference and priority under the Bonneville Project Act of 1937 . . ." 16 USC § 839c(b)(1).

PNGC is not, however, a "public body" or a "cooperative entitled to preference and priority" as those terms are defined by the Bonneville Project Act. 16 USC § 823b. PNGC is not a state, public power district, county, or municipality, and does not meet the definition of "public body" Id 16 USC § 832b. The definition of "cooperative" contemplates a collective of citizens or consumers, not of utilities. Section 4(d) of the Project Act indicates that entities such as PNGC, although constituted as cooperatives, do not fall within the definition. Section 4(d) contains an admonition that public bodies and cooperatives be given time to arrange financing

to construct or acquire necessary and desirable electric distribution facilities, and in all other respects legally to become qualified purchasers and distributors of electric energy available under this Act.

16 USC § 832c(d). This language with section 3 suggests that to qualify as a preference customer or entity would need "electric distribution facilities" and consumer members. This conclusion is consistent with BPA's past interpretation of statutes, its policy, and its course of conduct. See eg. Opinion of BPA's Acting General Counsel, March 30, 1948, regarding City of Seattle; Opinion of BPA's General Counsel, March 11, 1954, regarding the Washington State Power Commission; City of Portland v. Munro, No. CIV-77-928 (D. Or.) (Order granting partial summary judgment). Consistent with judicial and other agencies' interpretations of the application of public preference generally. See eg. Fort Mohave Indian Tribe v. United States, CV 77-4790ALS (C.D. Cal. July 7, 1978); Department of Energy, General Counsel's Opinion, "Request of City of Needles for Reinstatement of Federal Power for Benefit of its Citizens," November 17, 1988.

Nor is PNGC a "group of customers." While PNGC's members have banded together in a group and PNGC represents that group, PNGC is not a "group," only an agent that the members have created. Were BPA required to contract with the members as a group, it would do so, but it would be BPA's decision whether it would deal with the agent or the principals. Moreover, PNGC's membership is not restricted to customers of BPA ^{1/}; and PNGC has notified BPA in writing that it will not restrict its membership to utilities. (See PNGC's Bylaws, attached as Appendix D, and Letter from Nadal to Long, Nov. 16, 1992, attached as Appendix E.)

The Northwest Power Act's legislative history supports the interpretation that BPA's obligations under section 9(i) run to its existing customers and not to other entities. The House Interior Committee Report states that "[s]ection 9(i) sets forth additional services BPA is to provide its customers, at their request and expense, with respect to power sales and purchases of their own." H. Rep. 96-976, 96th Cong., 2d Sess., Part II (1980), p. 56 (emphasis supplied). The House Commerce Committee Report confirms this intent stating that "[s]ection 9(h) [sic.] describes the additional services that the Administrator is to provide his customers within the region." H. Rep. 96-967, 96th Cong., 2d Sess., Part II (1980), p. 73 (emphasis supplied).

Conclusion

BPA is not obligated to contract with PNGC for the sale of PNW AC Intertie transmission capacity. BPA has the discretion to determine the best manner for discharging its obligations, including the discretion to determine how to manage its financial and legal risks.

Although BPA is not required to execute a contract with PNGC, the Administrator may exercise discretion to do so. In the past, BPA has

^{1/} PNGC's Bylaws require that members be electric cooperatives or mutual utilities located within BPA's service territory. It does not require that they be BPA customers. Bylaws of the Pacific Northwest Generating Cooperative, March 7, 1990, p.1, attached as Appendix D.

executed contracts with PNGC and its members jointly to assist them in selling power from Boardman to parties outside the region. Contracts Nos. DE-MS79-85BP92154; DE-MS79-91BP92300. BPA has also recently executed a short-term wheeling contract with PNGC without requiring that PNGC's members be parties to that agreement. Contract No. DE-MS79-91BP92687.

Decision

Solely for the purpose of Non-Federal Participation, BPA will exercise its discretion to enter into a Capacity Ownership Agreement with PNGC alone, if BPA can obtain PNGC's written acknowledgment that execution of a Capacity Ownership Agreement does not create any right or evidence of any right, i.e., establish any precedent, for PNGC to receive a power sales contract or any section 9(i) services from BPA. By executing a Capacity Ownership Agreement with PNGC, it is not BPA's intent to make any decision on, or establish any basis for, PNGC to become a power sales customer of BPA, a status for which it does not presently qualify.

B. PNGC Members Must Reduce BPA Load Obligation If Section 9(c) Resources Are Exported

If BPA contracts with PNGC alone, BPA must still be able to reduce, if necessary, its firm load obligations to its utility customers, PNGC's members, under their section 5(b) contracts pursuant to any section 9(c) determination under the Northwest Power Act.

Section 9(c) of the Northwest Power Act states, in part, that:

[t]he Administrator shall, in making any determination, under any contract executed pursuant to section 5 [of the Northwest Power Act], 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 USC § 839f(c). This provision requires BPA to reduce its firm load obligation to a customer that exports, from a Pacific Northwest resource that is conservable or otherwise retainable through reasonable measures, if that export could result in an increase in the firm energy requirements

of that customer or any other BPA customer. It prevents customers from placing additional load on BPA to the extent of such export, or causing other customers to place additional load on BPA, when they have exported power that they could reasonably have retained for use against those loads. If additional loads on BPA result from exports, they represent increase costs to BPA for having to supply that additional power.

PNGC has no requirements power sales contract with BPA, however, and BPA does not owe PNGC a firm load obligation that can be reduced. Only PNGC's members have section 5(b) power sales contracts with BPA. BPA will have no means of complying with the requirements of section 9(c) unless PNGC's members are bound by contract to accept a reduction in BPA's firm load obligation under section 9(c).

Providing PNGC with transmission capacity, which could be used for section 9(c) exports, without binding its members to accept a reduction in BPA's obligation as may be required by a section 9(c) determination, exposes BPA to significant legal risk. In the case of PNGC, the power PNGC will export, initially, is generated at Boardman. PNGC owns its share of Boardman for the benefit of its members. See p. 2, *supra*. To the extent that PNGC's members use PNGC to purchase resources to serve member firm loads, as they did with Boardman, such members cannot be entitled to use PNGC to evade the application of section 9(c). If BPA were to permit PNGC to export power under these circumstances without providing a mechanism for reaching the members, BPA's other customers or Northwest interest groups might challenge the arrangement as a circumvention of BPA's and other Northwest utilities' obligations under section 9(c).

The concern here, however, is not simply that PNGC will export Boardman and that this could increase BPA's or its customers' loads and, therefore, their costs.^{2/} BPA's major concern is that this type of arrangement could create a large loophole for customers, including those which are existing or future members of PNGC, to make an end run around the Northwest Power Act by transferring resources they wish to export to similar umbrella organizations or holding companies. Allowing BPA utility customers who are PNGC's members to circumvent section 9(c) in this manner could create an unwarranted precedent.

To the extent that BPA allowed circumvention, BPA could compromise its ability to implement the statute or to argue that customers exporting through a holding company must accept reductions in BPA's firm load obligations. Therefore, BPA needs a mechanism to bind PNGC's existing and future members which are also customers of BPA to reduce BPA's firm service obligations to them if required to do so by section 9(c). BPA believes that avoiding an adverse precedent is very important.

^{2/} Under section 9(c), BPA will make a determination, separate from this decision, whether PNGC's export of Boardman on behalf of its members would result in any increase in BPA's firm load obligations of those members or BPA's other customers.

In any case, BPA must be able to reduce its firm load obligations to PNGC members in proportion to each member's contractual interest in the resource or power, if a reduction is required by section 9(c).

Decision

BPA requires a provision in a separate contract with PNGC's members; each will accept a reduction in BPA's firm load obligation to it if: (1) PNGC exports that member's resource, or a member's share of a resource, or a resource held for the member's benefit; and (2) determination of BPA under section 9(c) requires a reduction in BPA's firm load obligations due to the proposed export of the resource. PNGC must agree to have the provision cover changes in membership in order to apply to new PNGC members which are also BPA customers.

C. BPA Requires Risk Mitigation for Non-recovery of Costs

If BPA contracts solely with PNGC, BPA runs an increased financial risk of not recovering PNGC's share of adjusted upfront costs, if applicable, and the annual costs related to operation and maintenance of the PNW AC Intertie. BPA recognizes that it could be subject to the risk of non-payment of these costs by any of the NFP participants; however, because of the difference in PNGC's structure, the risk of PNGC non-payment warrants additional analysis.

BPA's NFP proposal anticipates payment for PNW AC Intertie capacity rights in two parts. First, an upfront payment of \$215 per kilowatt of capacity (adjusted at a later date to match actual costs) for capital and related costs following interim approval of the rate from the Federal Energy Regulatory Commission (FERC). Second, an ongoing annual payment for operation, maintenance, replacement, and other costs, based on a pro rata share of PNW AC Intertie capacity, for the life of the facilities.

PNGC does not present a non-payment risk for the upfront payment. Once the contract is in place, however, BPA risks PNGC's inability to make an additional upfront payment for adjustments, and the ongoing payments for annual costs associated with the PNW AC Intertie. Unlike other utility applicants which have various sources of revenues and assets, PNGC's primary asset is Boardman (accounting for approximately 75 percent of total PNGC assets). Financial Statements and Report of Independent Certified Public Accountants, Pacific Northwest Generating Cooperative, December 31, 1991 and 1990. PNGC plans to pay for its share of annual costs and for repayment of its loan through sales of its Boardman power. PNGC's inability to market its share of Boardman could seriously jeopardize its ability to make payments to BPA.

In contrast, if BPA executes the Capacity Ownership Agreement with PNGC's members, in addition to or in lieu of PNGC, the members would have a contractual obligation to pay the annual charges. Two benefits would accrue to BPA from this arrangement: (1) BPA would have the protection of and access to a broader base of assets; and (2) BPA would be extending an already substantial relationship with existing customers.

The subscription agreements between PNGC and its current members provide for the subscribers to indemnify PNGC for all costs related to the purchase of PNW AC Intertie capacity and the obligations under the Capacity Ownership Agreement (See Exhibit C). This provision, however, affords no legal protection to BPA. BPA cannot force PNGC to act on the subscribers' indemnification of PNGC because BPA is not a party to the subscription agreements and has no rights to assert under such agreements. Nor can BPA use the provisions of the subscription agreements to reach the assets of the subscribers. BPA would have to be a third-party beneficiary of the Capacity Ownership Agreement in order to obtain a claim against either PNGC or the subscribers. Cf. e.g. Restatement (2d) of Contracts, § 302. At this time, BPA is not named as a third-party beneficiary.

In the event of non-payment by PNGC, BPA must rely on PNGC's good intentions to maintain and enforce the indemnification provisions under the subscription agreements, but BPA could not reasonably force PNGC to do so. There is a risk that PNGC and the subscribers may decide at any time to change or eliminate the indemnification provisions of the subscription agreements. Business interests and the needs of PNGC's members may militate in favor of maintaining the provisions. If the market for PNGC's resource were to collapse, however, PNGC's subscribers could attempt to abandon PNGC and its future debts. BPA would be unable to prevent the subscribers from doing so.

Decision

BPA requires a provision in the PNGC Capacity Ownership Agreement which would both meet PNGC's needs and protect BPA's financial interest by mitigating BPA's risk of non-payment of the adjusted upfront costs, if applicable, and the ongoing annual charges in the event of PNGC's failure to comply with the Capacity Ownership Agreement payment provisions. Because this risk is not unique to PNGC, although it is heightened, this concern will be addressed in the contracts of all New Owners.

D. BPA Requires Risk Mitigation of Non-utility Ownership

If BPA contracts with PNGC to the exclusion of its members, BPA risks non-utility ownership of PNW AC Intertie capacity. This is another issue that could arise in regard to any of the NFP participants. Again, because of the special nature of PNGC, the risk of non-utility ownership arising from PNGC's participation warrants additional analysis.

Participation in BPA's NFP proposal was originally restricted to Northwest scheduling utilities or utilities with contracts with scheduling utilities. The scope of possible participants was later expanded to include joint power agencies, comprised of BPA PNW utility customers, that have either a PNW Scheduling Utility or a contract with a PNW Scheduling utility for scheduling services. The proposal was not designed to accommodate non-utility owners, or at least noncustomer-related owners, and such owners are not considered desirable or appropriate.

PNGC raises the specter of non-utility ownership in two ways. First, PNGC would finance its Capacity Ownership payments through a loan from CFC, a

private corporation that lends to cooperative corporations. CFC would acquire ownership of PNGC's interest through terms of the loan agreement upon default on PNGC's loan. CFC will retain for itself the right to assign its interests, making it possible that a third party could acquire PNGC's ownership interest. This risk is not necessarily unique to PNGC's situation, of course, because other utilities could have similar security arrangements with their lenders. PNGC presents a somewhat greater risk, in that it has no apparent income for discharge of its obligations other than its sale of Boardman and the voluntary support of its members.

Second, PNGC presents a greater risk because it may not be a "utility" with a duty to continue service. Oregon statute defines "public utility" as

[a]ny corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of . . . power, directly or indirectly, to or for the public"

ORS 757.005(1)(a)(A). Although PNGC appears to meet the requirements of this definition, it also meets the terms of the definition's exemption. The statute's definition of public utility excludes "[a]ny corporation, company, individual or association of individuals providing . . . power: (i) From any energy resource to fewer than 20 customers, if it began providing service to a customer prior to July 14, 1985[.]"

ORS 757.005(1)(b)(C). Because the provision specifies "customers" rather than the public, it is appropriate only to count PNGC's members. PNGC has fewer than 20 members and should qualify for this exemption.

The definition of "public utility" aside, PNGC does not conduct itself as a typical utility. PNGC does not have distribution or transmission facilities interconnecting with its utility members. It does not operate a generating resource although it is a minority owner of Boardman. It makes no filings with the Oregon Public Utilities Commission. Nor is PNGC regulated by FERC under the Federal Power Act. As a cooperative, PNGC is not subject to FERC jurisdiction.

PNGC is more closely analogous to a non-utility generator, for example, than to a utility. Like a non-utility generator, PNGC sells power at wholesale to utilities. PNGC can also appropriately be viewed as an agent for its members concerning their non-Federal power purchases and sales. The conclusion that PNGC is not a utility is consistent with prior BPA analyses of PNGC. See Draft ROD, p. 3.

If PNGC is not a utility within the meaning of Oregon's statute, it may be possible for PNGC to simply cease operations. Oregon requires public utilities, and their successors and assigns, to "furnish adequate and safe service, equipment and facilities . . .". ORS 757.020. It further restricts a utility's ability to encumber or dispose of property "necessary or useful in the performance of its duties to the public or any part thereof . . ." ORS 757.480(1)(a); see also ORS 757.480(3). A

utility may not sell any necessary or useful property without the approval of the Oregon PUC. Id. Also, nothing in PNGC's bylaws restricts its ability to dissolve, and given the ambiguity of PNGC's status, it would not be prudent to discount this risk completely. If PNGC can go out of business without the requirement of continued service during a period of reorganization or hand over to a utility, PNGC presents BPA with the risk of a very long-term agreement partner who could simply disappear.

Decision

BPA wishes to avoid having non-utility ownership of PNW AC Intertie capacity, therefore, there must be a provision in the Capacity Ownership Agreement that requires a New Owner, or its successors or assigns, to reconvey capacity ownership interest to BPA, at BPA's sole option, in the event of dissolution or default on financial obligations. Again, this concern is more acute for PNGC, but not unique. The concern will be addressed generically in all the Capacity Ownership Agreements.

SECTION IV
OTHER ISSUES

A. Scheduling and Other Transmission Support Services

In the NFP MOU, PNGC agrees to enter into a scheduling agreement with either BPA or another PNW scheduling utility for scheduling services with respect to its interest in the PNW AC Intertie. Typically, BPA requires the purchaser of power or a NW scheduling utility to be a party to a BPA transmission agreement, because such utilities usually have the system control and scheduling capability to meet load-following and system-stability requirements, and it is assumed that the purchaser has the greatest interest in load-following requirements.

BPA entered into a Services Agreement, Contract No. DE-MS79-86BP92300 dated February 27, 1987, with PNGC and its members. The Services Agreement provides for, among other things, scheduling, dispatch, and management services from BPA for PNGC's share of output from Boardman. Although the agreement does not provide for wheeling, it provides for certain support or ancillary services associated with a wheeling transaction.

Neither PNGC nor its members have the capability of providing ancillary services, and the new purchaser of PNGC's share of Boardman, Turlock, is not a NW scheduling utility. Therefore, either BPA or a NW scheduling utility would be required to provide such services to PNGC for its transactions under the Capacity Ownership Agreement. PNGC has requested BPA to provide the services necessary to support the Capacity Ownership Agreement. BPA is in the process of determining which services would be required and whether to amend the existing Services Agreement with PNGC or to execute a new agreement for such services.

Decision

If BPA amends the Services Agreement with PNGC and its members, all parties to the Services Agreement will execute any amendments. If a new agreement is entered into for services to support the Capacity Ownership Agreement, BPA may enter into the new agreement with PNGC alone; however, services under the agreement must be suspended upon PNGC's failure to meet its payment obligations to BPA.

B. Network Transmission

Section 11, Wheeling To and From AC Intertie for Initial RTC, of Exhibit A (life-of-facilities capacity ownership alternative of the EIS Implementation Plan) to the NFP MOU states that:

To the extent that BPA has sufficient capacity in excess of its needs and obligations at the time capacity ownership agreements are executed, BPA would make available, through

existing or new contracts to each New Owner, Network wheeling between AC PNW AC Intertie and the New Owner's system in an amount equal to each new Owner's share of RTC exclusive of upgrades. Such Network wheeling would be for 20 years and be of the same quality as, and on terms and conditions consistent with that being offered to other customers similarly situated. At the end of the 20 years, BPA will offer to extend wheeling of the same quality as, and on terms and conditions consistent with, that being offered at that time to other customers similarly situated.

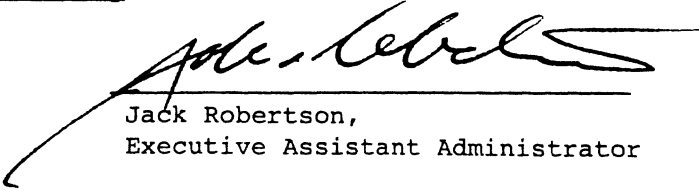
PNGC has recently requested Network service from BPA. PNGC currently has a short-term agreement, Contract No. DE-MS79-91BP92687, with BPA dated May 21, 1991, whereby BPA provides, among other things, Network transmission service to PNGC. As mentioned above, PNGC's members are not parties to the short-term agreement.

Decision

BPA may enter into a long-term Network agreement with PNGC alone for transmission services, provided that such transmission services would be suspended upon PNGC's failure to meet its payment obligations to BPA under the agreement. If PNGC decides in the future to request an agreement for new points of delivery in order for its members to receive deliveries of power from the south, it would be necessary for such members to become parties to such agreement if BPA interconnects with their facilities.

I have reviewed and hereby approve this Record of Decision as supporting my decision of June __, 1993, that PNGC is an appropriate contracting entity for purposes of a Capacity Ownership Agreement upon meeting the above BPA requirements.

Issued at Portland, Oregon, 14th July, 1993.



Jack Robertson,
Executive Assistant Administrator