

IOU RESPONSE TO WPAG/PPC AND NRU JULY 2023 POST-2028 REP COMMENTS

Submitted to REP2028@bpa.gov

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These comments are submitted by Avista Corporation, Idaho Power Company, NorthWestern Energy, PacifiCorp, Portland General Electric Company, and Puget Sound Energy, Inc. (together, “IOUs”), in response to comments on the Post-2028 REP June 27, 2023 workshop and discussions submitted by (i) the Western Public Agencies Group and the Public Power Counsel (together, WPAG/PPC”) on July 27, 2023,¹ and (ii) the Northwest Requirements Utilities (“NRU”) on July 21, 2023.²

A. WPAG/PPC Assertion: *The REP does not allow for a physical exchange of power (page 2).*

- The statutory language in NWPA §5(c)(1) provides for a physical exchange of power between a utility and BPA:

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.

(Emphasis added.)

The statutory language says nothing about the transaction being an accounting exercise.³ Indeed, by its terms, the statutory language contemplates an exchange through purchase and sale of power.

- Historically, the REP was implemented by agreements between BPA and exchanging utilities (through settlement or not) that included financial payments to utilities, but did not require a physical exchange of power. By not requiring a physical exchange, these agreements, in effect, waived, for the term of the agreements, the statutory provision in NWPA §5(c)(1) for a physical exchange. This waiver was consistent with the fact that the

¹ Available at <https://www.bpa.gov/-/media/Aep/power/residential-exchange-program/post-2028-rep/WPAG-and-PPC-comments-to-June-Workshop.pdf> .

² Available at <https://www.bpa.gov/-/media/Aep/power/residential-exchange-program/post-2028-rep/NRU-comments-to-June-Workshop.pdf> .

³ That NWPA §5(c)(1) provides for a physical exchange of power is further demonstrated by the following:

(i) The “in lieu” provision under NWPA §5(c)(5) allows BPA to acquire equivalent power elsewhere if cheaper than from the utility. In such cases, the delivery of power is by BPA alone, which is clearly not an accounting exercise.

(ii) As discussed below, NWPA §5(c)(6) limits the application of preference with respect to BPA deliveries under an REP exchange. Such limit only makes sense in the case of physical deliveries of BPA power and makes no sense if the REP were only an accounting exercise.

power to be exchanged under the REP was fungible prior to the advent of environmental attribute requirements.

- Some of the language in the cases referenced by WPAG/PPC at page 2 of their comments describe how the exchange has historically been implemented in practice. *See Pub. Util. Com'r of Oregon v. Bonneville Power Admin.*, 583 F. Supp. 752, 754 (D. Or. 1984), *aff'd*, 767 F.2d 622 (9th Cir. 1985) (“*In practice*, only dollars are exchanged, not electric power.”) (emphasis added). However, the issues in the cases referenced by WPAG/PPC had nothing to do with whether NWPA §5(c)(1) provides for a physical exchange. More fundamentally, none of the cases referenced by WPAG/PPC is a legal holding as to what NWPA §5(c)(1) provides with respect to a physical exchange because the question of whether §5(c)(1) provides for a physical exchange was not before those courts. In short, descriptions of the REP in such cases (such as descriptions of the REP as a “paper transaction”⁴) are not holdings and are at best dicta. To the IOUs’ knowledge, no court has ever held that NWPA §5(c)(1) does not provide for a physical exchange.
- The legislative history cited generally by WPAG/PPC at page 2 of their comments does not support their position that §5(c) provides only for a rate subsidy and does not provide for a physical exchange of power. That legislative history includes the following, which describes a *purchase and sale*:

Under [§5(c)], any utility in the region would be entitled to sell to BPA an amount of power equal to the utility’s residential and small farm load at the ‘average system cost’ of such power and BPA would be required to sell back to each such utility an equivalent amount of power at a rate identical to what preference customers pay BPA for power to meet their ‘general requirements’ (subject to a ‘rate ceiling’).⁵

- BPA states that its sales of power are system sales.⁶ The power produced by BPA’s system includes the environmental attributes of such power. Environmental attributes, such as carbon intensity, are inherent in BPA’s power sales, including those under NWPA §5(b)(1) and §5(c)(1). Just as the COUs enjoy the environmental attributes of the federal power they purchase under NWPA §5(b)(1), so should the IOUs when BPA sells power to the IOUs in an exchange under NWPA §5(c)(1).⁷

⁴ *Pacificorp v. F.E.R.C.*, 795 F.2d 816, 818 (1986).

⁵ WPAG/PPC cite H.R. Rep. No. 96-976, Pt. II, 96th Cong., 2d Sess., at 34–35 (1980).

⁶ *See* BPA Whitepaper (available at <https://www.bpa.gov/-/media/Aep/power/provider-of-choice/bpa-whitepaper-on-system-sales.pdf>) at 1–6.

⁷ Indeed, the rates for sales to preference customers under NWPA §5(b)(1) and sales under NWPA §5(c)(1) are based on the same resources. *See* NWPA §7(b)(1); BPA Whitepaper at 5–6. The only difference between the two rates is that which may result from the NWPA §7(b)(2) rate cap.

B. WPAG/PPC Assertion: *If the IOUs desire to purchase and receive physical power from BPA to serve their loads, §5(b) rather than §5(c) is the provision under the NWPA that authorizes them to request, and obligates BPA to sell, physical power (page 2).*

- NWPA §5(b) applies to sales of power by BPA to meet the net requirements of regional utilities. This is not what the IOUs are proposing. The IOUs’ proposal is a physical exchange of power under NWPA §5(c)(1), which is expressly allowed under the NWPA, not a purchase of power under NWPA §5(b).⁸ As such, WPAG/PPC’s reliance on NWPA §5(b) is misplaced.
- WPAG/PPC fail to recognize that NWPA §5(b) and §5(c) serve different purposes. A utility may purchase power under NWPA §5(b) to meet its net requirements.⁹ In contrast, a utility may exchange power with BPA under NWPA §5(c)(1) to provide benefits for its residential and small farm consumers.

C. WPAG/PPC Assertion: *The benefits of power acquired from BPA under an exchange “are in exclusion to any other benefits,” such as environmental attributes, which WPAG/PPC assert “would be impermissibly additive to the rate subsidy allowed under the statute” (page 3).*

- WPAG/PPC erroneously assert that (i) the price differential between power purchased and sold under the REP is the only benefit that can accrue to IOUs under NWPA §5(c)(1), (ii) environmental attributes would be an impermissible “additive” benefit, and (iii) a change in law would be required for any environmental “benefits” to accrue to IOUs under an exchange. The only authority they cite — *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1036–37 (9th Cir. 2007) — does not support their argument. *Portland General* held that BPA cannot avoid the requirements of the NWPA through settlement but said nothing about the environmental attributes of power sold under the NWPA §5(c)(1). Further, *Portland General* did not hold that a change in law would be required to permit provision of environmental attributes under a NWPA §5(c)(1) exchange.
- WPAG/PPC’s argument also fails to recognize that the NWPA was intended to spread the economic benefits of the federal system to residential and small farm consumers of IOUs.¹⁰ At page 4 of their comments, WPAG/PPC recognize that BPA’s low-carbon power is of “tremendous financial benefit to those of BPA’s preference customers.” Providing the environmental attributes associated with power sold to exchanging utilities

⁸ Of course, NWPA §5(b) and §5(c)(1) are not mutually exclusive. A utility, including a COU or IOU, is entitled to both purchase power under §5(b) to meet its net requirement and exchange power under §5(c)(1).

⁹ Indeed, a utility may well not have a net requirement to purchase power under NWPA 5(b) but still should receive benefits for its residential and small farm consumers.

¹⁰ The NWPA legislative history includes the following with respect to the REP: “This exchange will allow the residential and small farm consumers of the region’s IOUs to share in the economic benefits of the lower-cost Federal resources marketed by BPA. . . .” 96th Congress 2d Session House of Representatives Rept. 96-976, Part II at page 35.

(similar to the environmental attributes provided with power sold to COUs) is not “additive” and is consistent with the intent of the NWPA.

- In any event, there is no “additive” benefit. As noted above, BPA power exchanged under NWPA §5(c)(1) carries with it any environmental attributes inherent in that power.

D. WPAG/PPC Assertion: *The IOUs’ proposal violates preference as to supply (page 3).*
NRU Assertion: *Preference rights include the environmental attributes of the federal base system output (page 2).*

- WPAG/PPC assert, in effect, that they have a statutory preference right to purchase FBS power, separate and apart from other BPA power. NRU asserts a statutory preference right to environmental attributes of BPA power provided in an REP exchange. WPAG/PPC and NRU provide no authority supporting these assertions. WPAG/PPC only cite NWPA §5(a) and §10(c), neither of which provides preference specifically to FBS power, separate and apart from other BPA power. (Indeed, it is likely WPAG/PPC and NRU would argue that statutory public preference would apply to all BPA power, not just FBS power.)
- Preference customers have a statutory preference right to BPA power where there are competing applications for power (NWPA §5(a)), but they do not have a statutory preference right to FBS power, separate and apart from other BPA power. Indeed, BPA states that (i) it is required to sell power as “system sales” and (ii) a system sale is a sale to a customer, usually wholesale, from the seller’s system as a whole using “pooled” resources, without identifying a specific resource as being the creator of the power being sold (BPA Whitepaper at 1–6).
- Under NWPA §5(c)(6), BPA deliveries of power under REP exchanges cannot be restricted below the amounts of power acquired by BPA from, or on behalf of, the exchanging utility:

Exchange sales to a utility pursuant to this subsection [5(c)] shall not be restricted below the amounts of electric power acquired by the Administrator from, or on behalf of, such utility pursuant to this subsection.

Northwest Power Act §5(c)(6). The NWPA legislative history expressly recognizes that this limitation on restrictions applies during periods of insufficiency:

Section 5(c) permits power exchanges between BPA and Pacific Northwest utilities for the benefit of residential and small farm consumers. . . . Exchange agreements may be terminated by the utility under specified circumstances, and upon reasonable terms and conditions agreed in advance, but *during any period of insufficiency a utility's entitlement under this section shall not be less than the amount of power BPA acquires from or on behalf of such utility under this section.*

H.R. Rep. No. 96-976, Pt. II, 96th Cong., 2d Sess., at 47 (italics added).

- The Comments of WPAG/PPC and NRU asserting preference rights to power or environmental attributes in connection with REP exchanges fail to recognize or address the limitation on preference rights in NWPA §5(c)(6)..
- In any event, an exchange of power under the REP results in no net diminution to BPA’s power. As explained in *Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437 (9th Cir. 1989), BPA’s ability to exchange power “means that there will be no net diminution to the federal system. BPA will therefore continue to have the ability to meet its preference customers’ needs.” *Id.* at 444; *see also Assoc. of Public Agency Customers v. Bonneville Power Admin.*, 733 F.3d 939, 966 (2013).

**E. WPAG/PPC Assertion: *The IOUs’ proposal violates preference as to price (page 3-4).*
NRU Assertion: *Preference customers may not bear the cost of the REP (page 2).***

- Preference customers purchasing power to meet their general requirements pay the price specified in NWPA §7(b)(1), as such price may be capped by the NWPA §7(b)(2) rate cap. *See Golden Nw. Aluminum, Inc. v. Bonneville Power Admin.*, 501 F.3d 1037, 1046 (9th Cir. 2007) (“section 7(b) provides price benefits to preference customers in the form of a ‘rate ceiling’”). WPAG/PPC suggest that NWPA §5(a) and §10(c) entitle preference customers to protection from increased carbon compliance costs; *Golden Northwest* rejected an argument that statutory preference provisions provided price protections in addition to NWPA §7(b)(2). 501 F.3d at 1046.¹¹
- In short, treatment of the cost of the REP is addressed in the NWPA §7(b)(2) rate cap, and there is no separate exclusion of REP costs due to statutory preference provisions.

F. WPAG/PPC Assertion: *It is unlikely that power received by an IOU under the REP would meet the delivery requirements under CETA’s implementing regulations (page 2).*

- The likelihood that power received by an IOU under the REP would meet the delivery requirements under CETA’s implementing regulations is beyond the scope of and not relevant to whether BPA can enter into an exchange of physical power under NWPA §5(c).
- In any event, BPA power deliveries under NWPA §5(b) and §5(c) should be structured insofar as practicable to support efforts of its customers, including IOUs, to meet their CETA and other state or federal environmental compliance requirements. This is

¹¹ WPAG/PPC’s complaint that “increased carbon compliance costs” would harm its customers and violate the “manifest intent” of the NWPA to preserve “financial benefits for preference customers” also ignores that one purpose of the NWPA is to share the economic benefits of federal power with IOU residential and small farm consumers. Without a physical exchange under §5(c)(1), the inequality of rates between COU and IOU consumers would likely be exacerbated as IOU consumer rates rise due to CETA and other state or federal environmental compliance costs.

consistent with the approach taken by BPA in the Provider of Choice Forum. *See, e.g.*, the following goal in the July 2023 Draft Provider of Choice Policy at page 3:

5. Contracts support customers meeting national and regional objectives.

Bonneville supports customers in meeting their applicable compliance requirements. Current and emerging issues to be considered include clean energy policies, distribution of environmental attributes, emerging markets and electrification.¹²

¹² Available at <https://www.bpa.gov/-/media/Aep/power/provider-of-choice/draft-provider-of-choice-policy.pdf>.