

RECORD OF DECISION

Excess Federal Power Policy

INTRODUCTION

On March 29, 1996, the Bonneville Power Administration (BPA) initiated a public process to interpret, and to develop a policy to implement, the excess federal power marketing provisions of the Energy and Water Development Act of 1996, Pub. L. No. 104-46, §508(a) and (b), 109 Stat. 402, 419-420 (1995) (codified at 16 U.S.C.A. § 832m (West Cum. Ann. Pock. Pt. 1996)) (hereinafter "P.L. 104-46"). BPA published a proposed policy in the Federal Register for public review and received comment during a 60 day public comment period. BPA has considered all comments received and has finalized its policy to implement this new power marketing authority.

This Record of Decision (ROD) explains the public process; the distinction between BPA's surplus power marketing under prior legislation and excess federal power marketing activities under P.L. 104-46; provides an overview of BPA's final policy on excess federal power; responds to public comment; explains this action's compliance with the National Environmental Policy Act; and adopts a final policy on excess federal power.

The execution of this ROD is a final action of the BPA Administrator under section 9(e) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. § 839(e).

POLICY DEVELOPMENT PROCESS

On March 29, 1996, BPA published a Federal Register notice announcing the beginning of the public process to develop the methodologies and policies for implementing BPA's new authority to market excess federal power pursuant to P.L. 104-46. 61 F.R. 14089. In a letter to interested parties, BPA acknowledged that its policy could impact the interests of regional and out-of-region customers and other utilities. To encourage development of a fair and workable policy and to ensure the success of the new legislation, BPA conducted an informal rulemaking. BPA encouraged interested parties to provide comments and suggestions regarding the proposed implementation policy during a 60 day public comment period that ended May 28, 1996. BPA received 14 comment letters. BPA also held two public comment meetings: April 10, 1996, in Portland, Oregon, and April 12, 1996, in San Francisco, California. The final excess federal power policy will be published in the Federal Register and is attached to this ROD as Attachment A. These documents will be made available through BPA's Public Information Office located in Portland, Oregon at:

P.O. Box 3621 Portland, OR 97208 or by calling BPA's Public Information Officer at 503-230-7334.

BACKGROUND

BPA's Statutory Authority to Market Electric Power

BPA markets federal power generated at 30 federally operated dams and other resources in the Pacific Northwest. BPA may sell power that is generated by the Federal Columbia River Power System (FCRPS), and power that it has purchased under either section 6(a)(2) of the Northwest Power Act, 16 U.S.C. § 839d(a)(2), or section 11(b)(6)(i) of the Federal Columbia River Transmission System Act of 1974, 16 U.S.C. § 838i(b)(6)(i), (Transmission System Act). BPA's power marketing is authorized and directed under several federal statutes including the Bonneville Project Act of 1937, 16 U.S.C. §§ 832-832i; the Act of August 31, 1964, 16 U.S.C. §§ 837 et seq. (Northwest Preference Act); the Transmission System Act; and the Northwest Power Act. Section 508(a) and (b) of P.L. 104-46 provides BPA with additional authority to market a portion of the federal power available for sale to its customers.

Sections 5(b) and 5(d) of the Northwest Power Act obligate BPA to serve, under contract, the net firm power requirements of utilities in the Pacific Northwest, including public bodies, cooperatives and investor-owned utilities, and authorize BPA to serve a limited portion of the firm power requirements of its existing direct-service industries. 16 U.S.C. §§ 839c(b) and (d). BPA refers to these power sales as its "firm requirements power sales." Any federal power not needed to meet these contractual obligations is considered "surplus power." Section 5(f) of the Northwest Power Act authorizes BPA to sell or otherwise dispose of power that is surplus to the obligations of the Administrator under sections 5(b), (c) and (d). 16 U.S.C. § 839c(f). The Northwest Power Act and the Northwest Preference Act provide that BPA may only sell power outside the Pacific Northwest region that is surplus power or surplus capacity as defined by those Acts. The provisions of those Acts regarding the sale of power outside the region place limitations on the sale of surplus power outside the Pacific Northwest thereby establishing a priority for regional customers to purchase any surplus power before such power is sold outside the region.

Surplus Firm Power Marketing Authority

Several Acts of Congress limit the manner in which BPA can sell surplus power. For example, section 4 of the Bonneville Project Act requires BPA to give "preference and priority to public bodies and cooperatives" when marketing power. 16 U.S.C. §§ 832c(a). Accordingly, all sales of federal power, including surplus power, are made consistent with public preference: the requirement to give public bodies and cooperatives a first right of refusal to purchase available amounts of power.

Another limitation is placed upon BPA's sales of federal power to private persons or businesses under section 5(a) of the Bonneville Project Act. 16 U.S.C. § 832d(a). That section provides that BPA's

[c]ontracts for the sale of electric energy to any private person or agency other than a privately owned public utility engaged in selling electric energy to the general public, shall contain a provision forbidding such private purchaser to resell any of such electric energy so purchased to any private utility or agency engaged in the sale of electric energy to the general public and requiring the immediate canceling of such contract of sale in the event of violation of such provision.

Id. This provision limits the ability of private entities that are not authorized to sell power to the general public (in other words, private entities that are not investor-owned utilities) to resell federal power. These private purchasers are prohibited under their power sale contracts with BPA from reselling power purchased from BPA to investor-owned utilities or their agents.

Additionally, the Northwest Preference Act establishes a preference for Pacific Northwest customers in all sales of surplus power. That Act places limitations on the sale of surplus power for use outside the Pacific Northwest which affect the usefulness and marketability of the power purchased while at the same time protecting the region's customers' right to purchase federal power prior to its sale outside the region.

First, the Northwest Preference Act requires that at least 30 days prior to the execution of any contract for the sale, delivery, or exchange of surplus energy or surplus peaking capacity for use outside the Pacific Northwest, BPA must give its current Pacific Northwest customers written notice that negotiations for such a contract are pending. 16 U.S.C. § 837a. In addition, BPA must make the current draft of the proposed contract available upon a customer's request. Id. Second, the Act requires that all contracts for such sales must include the right for BPA to terminate the delivery of surplus energy on up to 60-days' notice and surplus capacity on up to 60-months' notice when the power is needed to meet the firm requirements power needs of BPA's Pacific Northwest customers. 16 U.S.C. §§ 837b(a) and (c). Third, the Act requires that BPA include in contracts for the sale or exchange of power provisions giving regional purchasers priority to purchase electric power generated at federal hydroelectric plants in the Pacific Northwest. 16 U.S.C. § 837f.

Section 9(c) of the Northwest Power Act reaffirms the application of the foregoing limitations and requirements in the marketing of surplus power outside the Pacific Northwest. 16 U.S.C. § 839f(c). The provision specifically provides definitions of "surplus energy" and "surplus capacity" for the purpose of marketing this power, and refines the considerations used in the Administrator's determination of the electric power requirements of its Pacific Northwest customer.

Section 508 of Public Law 104-46

Facing a rapidly changing and increasingly competitive market for wholesale electric power, Congress, in P.L. 104-46, addressed BPA's power marketing authority. In the accompanying conference report, Congress states that BPA's "authorizing legislation severely limits the agency's flexibility to market federal power, placing it at a marketing disadvantage and restricting potential revenues." H.R. 1905, House Report, No. 293, 104th Cong., 1st Sess. 94 (1995). In order to increase BPA's revenues and its competitiveness, Congress enacted P.L. 104-46, providing BPA with increased flexibility to market power abandoned by regional customers and power generated by operations of the hydrosystem for fish and wildlife purposes on a more competitive basis. Id. In short, P.L. 104-46 redefines a portion of surplus power into a new category termed "excess federal power." BPA, at its discretion, may sell such power without certain otherwise applicable statutory restrictions if BPA first makes this power available to Pacific Northwest customers.

The term "excess federal power" is defined as "such electric power that has become surplus to the firm contractual obligations of the Administrator under section 5(f) of the Northwest Power Act due to either of two causes:

- (1) A reduction in the quantity of electric power BPA is contractually required to supply to its utility customers under section 5(b) and to its direct service industrial customers under section 5(d) of the Northwest Power Act due to the election of these customers to purchase power from other suppliers, as compared to the quantity of power BPA was contractually required to supply as of as of January 1, 1995; and
- (2) Operations of the Federal Columbia River Power System that are primarily for the benefit of fish and wildlife which have been affected by the development, operation, or management of the system.

16 U.S.C.A § 832m(a)(3).

Notwithstanding sections 2, 3(a), 3(b), 3(c), and 7 of the Northwest Preference Act, and section 9(c) of the Northwest Power Act, BPA may sell or otherwise dispose of excess federal power outside the Pacific Northwest region on a firm basis for a contract term not to exceed 7 years. 16 U.S.C. A § 832m(b)(1). Before selling the excess federal power for use outside the Pacific Northwest region, BPA must first offer the power, for a reasonable period of time and under the same essential rate, terms and conditions, to BPA's regional public body, cooperative and investor-owned utility customers identified in section 5(b) and to the direct service industrial customers identified in section 5(d)(1)(A) of the Northwest Power Act. Id.

The Northwest Preference Act requirement that BPA provide notice to existing regional customers of pending out-of-region transactions is made inapplicable to sales or other disposition of excess federal power. *Id.* Congress, in the accompanying conference report explains that

Bonneville is allowed greater flexibility to provide Pacific Northwest preference notice to regional customers for out-of-region sales. This flexibility may include shorter notice periods and less detailed information on in-program negotiations. Notice periods may be very short for short-term sales (for example, notice to accommodate hourly sales) and for transactions that must be negotiated quickly. BPA may also provide seasonal notices with price ranges requesting interested parties to contact BPA to purchase power.

H.R. 1905, House Report, No. 293, 104th Cong., 1st Sess. 94 (1995). After making excess federal power available for purchase by its Pacific Northwest customers, BPA may market this power to purchasers outside the region without a right to terminate deliveries of energy on 60 days' notice and of capacity on 60 months' notice when such power is needed to meet BPA's firm contractual obligations to its Pacific Northwest customers. 16 U.S.C. § 832m(b) and House Report 293, *supra*, at 94.

Finally, BPA may also market this power to other purchasers in or outside the Pacific Northwest without the restriction on resale to investor-owned utilities. 16 U.S.C.A § 832m(b)(2).

OVERVIEW OF BPA'S POLICY ON EXCESS FEDERAL POWER

General Approach

BPA intends the scope of the final policy to be limited to its interpretation of the statute and development of methodologies necessary to implement the relevant provisions of P.L. 104-46. The final policy contains the methods by which BPA will determine the amount of excess federal power available for marketing and the procedures BPA will follow to market such power.

Analysis of the Major Provisions of the Final Policy

Determination of the Amount of Excess Federal Power Available for Sale

As BPA interprets section 508(a) of P.L. 104-46, in order to determine the amount of power BPA may market under section 508(b) of that Act, BPA must:

- (1) determine the amount of reductions in BPA's firm contractual obligations under sections 5(b) and 5(d) of the Northwest Power Act (5(b) and 5(d) obligations) under its existing contracts relative to those 5(b) and 5(d) obligations as of January 1, 1995, which can be further broken into two findings: (a) the actual amount of BPA's 5(b) and 5(d) obligations as of January 1, 1995, or the excess federal power baseline; and (b) a yearly forecast of BPA's then-current 5(b) and 5(d) obligations to serve Pacific Northwest firm requirements power loads;
- (2) determine the amount of excess power resulting from operating the hydrosystem primarily for fish and wildlife; and
- (3) develop a process for measuring the amount of excess federal power resulting from power abandoned by Pacific Northwest customers and the amount of excess federal power resulting from operating the hydrosystem primarily for the benefit of fish and wildlife.

Excess Federal Power Resulting From Reductions in the Administrator's Firm Contractual Obligations Under 5(b) and 5(d) of the Northwest Power Act

BPA's 5(b) and 5(d) obligations are BPA's sales of firm requirements power for the regional consumer loads of its public body, cooperative, federal agency, and investor-owned utility customers, and the sale of firm requirements power for direct consumption by its existing direct-service industrial customers in the Pacific Northwest. These are sales under BPA's 1981 power sales contracts offered pursuant of 5(g) of the Northwest Power Act, 16 U.S.C. § 839c(g)(1), and replacement or successor contracts.¹ All other remaining contractual obligations are not sales of power for the general requirements of utility customers or direct-service industrial customers and are not executed under or governed by sections 5(b) and 5(d) of the Northwest Power Act.

BPA's will calculate its firm contractual obligations as of January 1, 1995, using an annual amount of load which is based on the calendar year ending December 31, 1994, and is the sum of BPA's 5(b) and 5(d) obligations. Such sales are calculated as follows:

Actual and Planned Computed Requirements Customers: Obligations for the Actual and Planned Computed Requirements customers are the annual average of the customers' monthly energy requirements in average megawatts for calendar year 1994 submitted to BPA for the Pacific Northwest Coordination Agreement (PNCA) for operating years 1993-94 and 1994-95. As of January 1, 1995, these customers are Grant County PUD No. 2, Chelan County PUD No. 1, Cowlitz County PUD, Douglas County PUD No. 1, Eugene Water

¹ Section 5(g)(1) required BPA to offer long-term power sales contract to existing public body and cooperative customers, privately owned utility customers and the direct-service industrial customers within nine months of the effective date of the Northwest Power Act.

and Electric Board, Pend Oreille PUD No. 1, Seattle City Light, Snohomish County PUD No. 1, and Tacoma Public Utilities.

Metered Requirements Customers: Obligations for the Metered Requirements customers are the calendar year 1994 annual average firm energy sales in average megawatts to this customer class as reported in BPA's Generation and Power Sales Report. Metered Requirements customers are small and non-generating public utilities, including federal agencies.

Direct-Service Industrial Customers: Obligations for the direct-service industrial customers are the annual average of the customers' monthly operating demands for calendar year 1994 submitted to and approved by BPA for contract years 1993-94 and 1994-95.

Investor-Owned Utilities: Obligations for the investor-owned utilities are the calendar year 1994 annual average sales under the New Resource Firm Power rate in average megawatts to this customer class as reported in BPA's Generation and Power Sales Report. All of the investor-owned utilities in the region have signed long-term firm power sales contracts that obligate BPA, upon compliance with certain notice requirements, to deliver power in amounts requested by the investor-owned utilities to meet a portion of their loads in the region. Collectively, these utilities place a relatively small amount of electric power load on BPA.

BPA will use the calendar year 1994 annual average for three reasons. First, the calendar year 1994 average meets the criterion contained in section 508(a)(3)(A) of P.L. 104-46 for establishing the Administrator's obligations "as of January 1, 1995." 16 U.S.C.A. § 832m(3)(A). Second, the use of an annual average, as opposed to a monthly or seasonal average, takes into account the seasonal variation in the Administrator's 5(b) and 5(d) obligations. Third, the particular form of the annual average (calendar vs. operating year) makes no significant difference in the result. The use of an operating year average based on the period ending August 1994 would yield a number that deviates from the calendar year average by less than one percent.

Based on the above calculations, BPA's firm contractual obligations as of January 1, 1995, were 8298 average megawatts. This amount is 11 average annual megawatts less than BPA's proposed amount published in the March 29, 1996, Federal Register notice. 61 F.R. 14089. This number was revised to exclude power sales made to public utilities in 1994 under Bonneville's Surplus Firm Power rate schedule. Surplus firm power sales are entered into under section 5(f) of the Northwest Power Act. As stated above, the calculation of BPA's firm contractual obligations as of January 1, 1995, only includes contracts entered into under and governed by sections 5(b) and 5(d) of the Northwest Power Act.

Consistent with P.L. 104-46, 8298 average megawatts will be the baseline for all future annual calculations of excess federal power. This is a fixed number which BPA will use to determine the amount of excess federal power available for sale. This number will not change in each annual calculation of excess federal power. See Attachment B, "The Administrator's 5(b) and 5(d) Obligations as of January 1, 1995 by Customer Class."

Each year BPA will determine its current operating year's 5(b) and 5(d) obligations based upon its then-effective firm requirements power sale contracts. Each year BPA will project its current 5(b) and 5(d) obligations for an upcoming 10-year planning period. BPA will produce a 10-year annual average energy (average megawatts) forecast of its current 5(b) and 5(d) obligations in order to allow for sales or dispositions of excess federal power to purchasers outside the region for up to 7 years' duration. A 10-year forecast will accommodate this contracting practice of delaying the actual delivery of power beyond the date the contract is executed. For example, BPA may execute a sale of power on January 1, 1996 that requires deliveries to commence on January 1, 1998. BPA interprets the statute's limitation on the contract term of excess federal power sales or other dispositions as a limitation on the delivery term of such transactions rather than on the contract term. Revisions in this 10-year forecast will be made annually.

Reductions or increases in BPA's 5(b) and 5(d) obligations will be calculated in each annual determination of excess federal power. For each year of the 10-year forecast period, the reductions or increases in BPA's 5(b) and 5(d) obligations will be the difference between the forecasted obligation in that year and 8298 average megawatts. Additionally, in order to calculate an amount of excess peaking capacity associated with reductions or increases in its regional firm power load obligations and available for marketing, BPA will calculate an average annual load factor based on all of its remaining loads served under its 5(b) and 5(d) obligations. This load factor will be applied to the difference between the forecasted current obligations and 8298 average megawatts to determine the amount of excess capacity, in megawatts, that BPA may market as excess federal power.

Excess Federal Power Resulting from Operation of the Federal Columbia River Hydrosystem Primarily for the Benefit of Fish and Wildlife

Excess generation from operations of the federal hydrosystem and other BPA resources is a result of operational characteristics of the hydrosystem; such as thermal plant operations, contract resource deliveries, and various non-power operating constraints; and changes in those characteristics. The calculation of excess federal power due to operations of the hydrosystem relies upon studies of operations under expected conditions. Since hydrosystem operations are heavily reliant on water conditions, that include regional precipitation, snow pack, and streamflows, studies of hydrosystem operations need to account for the wide variation in water conditions.

BPA has run two 50-year continuous water year studies to determine the amount of excess generation in average megawatts caused by hydrosystem operations primarily for fish and wildlife. The first study removes all fish and wildlife requirements. This study shows the firm energy production capability of the federal system in each month. The second study includes all fish and wildlife restrictions and also provides monthly firm energy production. Each study was run with the rule curves and resource operations that simulate the most efficient operation for their specific conditions and limitations. The difference in monthly energy production between the two studies was averaged over the 50-year period for each month. The positive monthly averages, representing the increased generation due to fish and wildlife operations, were summed to determine the annual average energy amount in average megawatts of excess federal power due to fish and wildlife operations. A 100 percent load factor was assumed for determining the capacity amount of excess federal power due to fish and wildlife operations.

BPA relied on two studies that were developed to support implementation of the BPA fish spending limitation. The results from those two studies established an amount of excess federal power due to hydrosystem operations primarily for the benefit of fish and wildlife of 129 average megawatts annually and 129 megawatts of capacity. Unless further changes are required in the scope and magnitude of hydrosystem operations for the benefit of fish and wildlife in the future, this amount of excess federal power due to such operations will not be revisited in each annual determination of excess federal power. If future changes affect federal hydrosystem operations, BPA may revise the amount of excess federal power by reopening this policy.

Process

Each year BPA will determine the total amount of excess federal power available for marketing. Each annual determination will be based on a revised 10-year forecast of BPA's then-current 5(b) and 5(d) obligations under the Northwest Power Act. BPA will compare each year of the forecast to 8298 average megawatts to determine the amount of excess federal power available in that year due to forecasted reductions in those contractual obligations. The sum of this amount and 129 average megawatts will be reduced by the amount of any current contracts for sales of excess federal power to determine the total amount available to BPA for marketing.

The results of the preceding determinations will be included in an annual notification to BPA's then-existing regional customers. BPA may also send this notification to non-regional customers. The annual notice may contain the amount of surplus power available for disposition as determined by BPA.

Sales Or Other Disposition Of Excess Federal Power

Sales or Other Disposition of Excess Federal Power in Any Region

Relationship to Surplus Power

P.L. 104-46 provides a specific definition of the amount of surplus power that can be sold or otherwise disposed of as excess federal power. That definition requires BPA to compare reductions in its firm requirements power sale obligations to the amount of such obligations as of January 1, 1995, and to determine the amount of surplus power generated or purchased as a result of operating the hydrosystem primarily for fish and wildlife. 16 U.S.C.A. § 832m(a)(3). This calculation of excess federal power is not tied in anyway to actual resources of BPA. It merely represents the amount of firm requirements power that BPA's regional customers no longer purchase or that results from operating the hydrosystem consistent with fish and wildlife mitigation measures. In other words, this amount represents the extent of BPA's authority to sell surplus power without otherwise applicable marketing restrictions.

The actual amount of power that BPA has available for sale or other disposition as excess federal power is the amount of available surplus power. Consequently, BPA will, at its discretion, sell or otherwise dispose of only that amount of excess federal power which is less than or equal to the total amount of surplus power under section 5(f) of the Northwest Power Act that BPA projects to be available consistent with its most current load/resource planning.

Annual Notification and First Offer of Available Excess Federal Power

BPA will provide customers notice of the availability of excess federal power and the range of rates, terms and conditions within which BPA will market available power. This notice will be an invitation to request a contract for the sale or other disposition of excess federal power consistent with the range of rates, terms and conditions included in the notice. Regional customers will have 30 days from the date of the notification to request a purchase consistent with the notice in order to have preference and priority to purchase the available power. Upon such a request, BPA will enter into good faith negotiations for the sale or other disposition of power with the regional customers consistent with the range of rates, terms and conditions in the notice. Based upon the negotiations, BPA will offer the power to regional customers for a reasonable period. In all cases, if BPA receives competing requests, BPA will proceed to negotiate sales consistent with public and then preference under this Act. Within each customer classification, BPA will negotiate and first offer to sell, based upon the time of receipt of the request.

General Provisions

Section 508(b)(2) of P.L. 104-46, 16 U.S.C.A. § 832m(b)(2), authorizes the sale of excess federal power in any region without the restriction on resale of section 5(a) of the Bonneville Project Act. Accordingly, contracts for the sale of excess federal power will not contain a provision prohibiting the resale of such power to investor-owned utilities or their agents.

BPA will attempt to meet all applications or requests to purchase excess federal power received from any customer consistent with the requirements of BPA's power marketing authorities, including section 508 of P.L. 104-46. BPA may allocate available amounts of excess federal power sold to customers within a single class of purchasers, e.g., Pacific Northwest preference customers. BPA, however, will not hold or reserve any excess federal power for or from sale to any particular class of purchaser.

On a case by case basis, BPA will average the net amount of available excess federal power in each year of a proposed sale or other disposition to determine whether the amount of excess federal power is sufficient for a multi-year transaction. Additionally, consistent with the provisions of section 5(a) of the Bonneville Project Act, any contracts for the sale or other disposition of excess federal power, whether to regional or out-of-region purchasers, are binding in accordance with their terms for the duration of the contracts and will be firm obligations of BPA upon execution.

Sales or Other Disposition of Excess To Purchasers Outside the Pacific Northwest

Limitation on Term of Delivery

Section 508(b)(1) of P.L. 104-46 provides BPA with the authority to sell or otherwise dispose of excess federal power outside the region for a contract term not to exceed 7 years. 16 U.S.C.A. § 832m(b)(1). In all sales or other dispositions of excess federal power to purchasers outside the region, BPA will limit the actual delivery term, rather than the contract term, of excess federal power to 7 years. Such contracts may contain a provision for renewal and be renewed, subject to the availability of excess federal power as determined by BPA using the methodology delineated above. BPA will provide 5-days notice to regional customers of the renewal of existing sales of excess federal power for periods of one or more years.

Termination Provisions

Section 508(b)(1) of P.L. 104-46 authorizes BPA to sell or otherwise dispose of excess federal power to purchasers outside the Pacific Northwest without the requirement that deliveries of energy or capacity be subject to termination upon 60-days' notice for energy and 60-months' notice for capacity. 16 U.S.C.A. § 832m(b)(1). Such termination provisions were required by the Northwest Preference Act for sales of

surplus power outside the region in order to allow BPA to recall the power when needed to meet the firm power requirements of BPA's regional customers. Contracts for the sale or other disposition of excess federal power to purchasers outside the region will not contain such termination provisions.

Notice and First Offer to Regional Customers

Section 508(b)(1) P.L. 104-46 also conditions the sale or other disposition of excess federal power to purchasers outside the region only upon the requirement that BPA first offer the power to Pacific Northwest public body, cooperative, and investor-owned utilities and direct-service industrial customers for a reasonable period of time and under the same essential rate, terms and conditions as the proposed out-of-region transaction. 16 U.S.C.A. § 832m(b)(1). . Additionally, the notice for proposed out-of-region transactions of surplus power required by section 2 of the Northwest Preference Act is made inapplicable to sales or other dispositions of excess federal power. BPA is not required by P.L. 104-46 to provide notice to regional customers of a pending out-of-region sale of excess federal power at least 30 days prior to execution of the sale. BPA is also not required by P.L. 104-46 to provide copies of the proposed contract upon the request of a regional customer.

P.L. 104-46 does not explicitly require BPA to provide notice, written or otherwise, to regional customers of proposed out-of-region transactions. BPA interprets the requirement to first offer the power to regional customers under the same essential rate, terms and conditions and for a reasonable period of time as inherently requiring BPA to notify regional customer of proposed transactions to allow regional customers the opportunity to request a purchase of available power. This interpretation is consistent with the accompanying conference report which explains that BPA is allowed "greater flexibility" to provide notice to regional customers. House Report 293, supra, at 94.

In addition to the annual notice, BPA will provide then-existing regional customers with notice of proposed individual transactions with out-of-region purchasers with terms of one year or more. This notice will contain the essential rate, terms and conditions of proposed transaction as determined by BPA. Regional customers will have between five and 30 days, as determined by BPA, to make a request to purchase the power. This period within which a regional customer must make a request to purchase the power may vary due to the circumstances of each individual transaction. If a regional customer has made a request to purchase the excess federal power proposed to be sold or disposed of to an out-of-region purchaser, BPA will offer the power to the regional customer under the identical rate, terms and conditions of the proposed out-of-region transaction. The regional customer may enter into such a transaction, by agreeing to the identical rate, terms and conditions in the transaction, except those which clearly do not apply to the particular utility (such as points of delivery). BPA's offer will remain open for 5 days.

For sales of excess federal power outside the Pacific Northwest of less than 1 year, the annual notification of the availability of excess federal power will be the primary notification provided to customers to allow them to request a purchase of excess federal power. Any regional customers interested in purchasing such short-term excess federal power must make a request to purchase the power consistent with the procedures specified above. In addition to the annual notice, BPA will provide regional customers with notice of any additional excess federal power which BPA determines is available in daily, weekly, or monthly amounts, as warranted by system and market conditions. Regional customers interested in purchasing excess federal power under such notices will have 5 days or less, depending upon the effective delivery date and the duration of the short-term sale, within which to request a purchase by contacting BPA.

BPA believes that in addition to the annual notification of excess federal power, these notice and offer procedures provide regional customers with priority and preference to available excess federal power consistent with the provisions of section 508 of P.L. 104-46. These procedures assure regional customers of three opportunities to purchase federal power. First, regional customers may purchase federal power under their firm requirements power contracts. Second, regional customer will receive annual notices of the amount of excess federal power determined to be available under the methodology set out above. Third, regional customers will receive notification of individual long-term transactions prior to execution of those transactions.

CONSISTENCY WITH OTHER STATUTORY PROVISIONS

BPA is required to interpret the purposes and provisions of its authorizing statutes in a consistent manner. Accordingly, BPA interprets section 508 of P.L. 104-46 in a manner consistent with the purposes and provision of its other statutes, including the Northwest Power Act, the Bonneville Project Act, and the Northwest Preference Act. Section 508 of P.L. 104-46 provides that BPA may sell or otherwise dispose of excess federal power as permitted by otherwise applicable law. It further states that BPA may make sales of such power outside the Pacific Northwest notwithstanding section 2, subsections (a), (b) and (c) of section 3, and section 7 of the Northwest Preference Act.

Sections 2 and 3 of the Northwest Preference Act govern BPA's sales of surplus power for which there is no market (or demand) for energy or capacity at the rate established for the disposition of such energy or capacity. These products are defined under subsections (c), (d) and (f) of section 1 of the Northwest Preference Act and section 9(c) of the Northwest Power Act. P.L. 104-46 does not apply those definitions of surplus power to sales under the Act. Instead, as explained in detail above, P.L. 104-46 creates a new class of surplus power called "excess federal power."

BPA reads subsection P.L. 104-46 as not requiring BPA to apply the requirements of section 2 or section 3(a) (b), or (c) of the Northwest Preference Act nor section 9(c) of the Northwest Power Act to any sales of "excess federal power" as defined in section 508(a)(3) of P.L. 104-46.. Instead, BPA must apply the requirements of P.L. 104-46 to such sales. BPA intends to fully comply with the directions of the Northwest Preference Act for any sales or dispositions of "surplus power" made under that Act. This policy is consistent with both statutes and with the intent of Congress as expressed in the conference report on this Act. That report states

"Surplus power which is surplus for reasons other than the reasons stated above will continue to be governed by existing marketing restrictions , . . This legislation poses no significant risk or cost to Bonneville's regional customers because the only power sold outside the region without the restrictions is power abandoned by regional customers . . . No other amount of power can be sold outside the region without such restrictions. Regional customer will continue to receive first right to purchase excess federal power before it is sold outside the region."

BPA does not read the introductory phrase of section 508(b) of P.L. 104-46, which states "notwithstanding . . . section 7 of the [Northwest Preference Act]," as modifying that section except as not requiring BPA to make or offer any further amendments of its existing contracts to account for sales of excess federal power. As Congress and the accompanying conference report affirm, Pacific Northwest customers will continue to have priority to purchase excess federal power before it is sold out of region, as required by section 7. All other sales of surplus power which are not sales of excess federal power will continue to be governed by the Northwest Preference Act and by section 9(c) of the Northwest Power Act. Section 508 of P.L. 104-46 does not modify the rights of Pacific Northwest customers under their existing contracts to a priority in purchasing either excess federal power or surplus power. This policy is consistent with providing those customers with that priority.

RESPONSE TO PUBLIC COMMENT REGARDING MARCH 1996 PROPOSED POLICY ON EXCESS FEDERAL POWER

Issue #1

Whether BPA should make direct sales of excess federal power to retail loads.

BPA's 3/96 Proposal

In the March 29, 1996 Federal Register Notice BPA stated that, "It is Bonneville's preliminary view as a matter of policy that Bonneville should make retail sales outside the Pacific Northwest region to purchasers, other than preference customers and federal agencies, only where sales are consistent with the State

law that would apply if Bonneville were not a federal agency." 61 Fed. Reg. 14,089, 14,090 (1996).

Comments

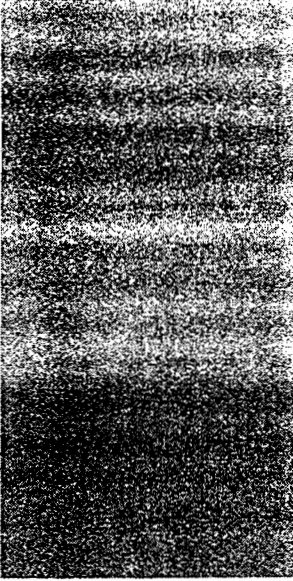
The Association of Public Agency Customers' (APAC) comments do not dispute BPA's authority nor preliminary policy statement with regard to sales to extraregional retail preference and federal loads. APAC asserts that if BPA were to pursue such sales, then retail consumers in the Pacific Northwest should have the right to make matching offers, or have a right to step in front of those proposed transactions consistent with the regional preference right of current Pacific Northwest utility customers under the Northwest Preference Act. APAC asserts that failure to allow Pacific Northwest retail consumers this right would place them at a financial disadvantage relative to out-of-region retail consumers.

Puget Power submitted comments stating that P.L. 104-46 provided no additional authority for BPA to market to retail loads. Puget asserts that any discussion or decision with regard to BPA's role in marketing to retail loads has no place in this rulemaking. Puget also states that BPA, as a matter of both law and policy, should not make sales at retail, except to existing Pacific Northwest direct-service industrial (DSI) loads. Puget states that regulation of retail sales is a State right, and that BPA as a federal agency would in essence be able to act as an unregulated retail seller, "...cloaked in the privileges and immunities of the federal government." Both PacifiCorp and Washington Water Power supports Puget's comments.

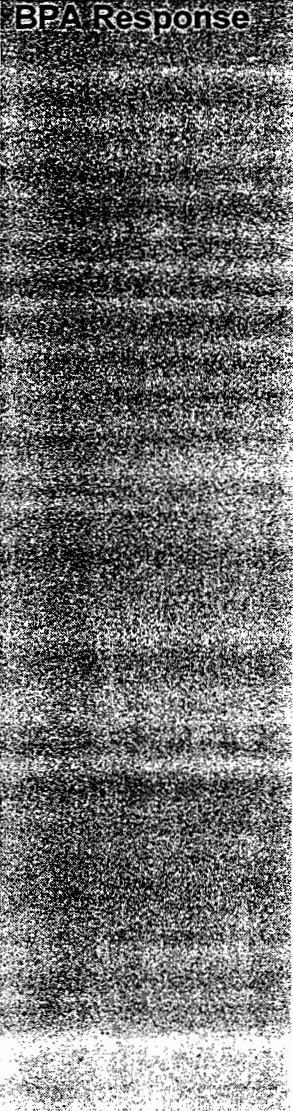
The Department of the Navy strongly urges BPA to "structure its policy in a manner which will give federal agencies such as ours access to the excess federal power."

The Public Generating Pool (PGP) supports this retail sales policy proposal with two exceptions. First, PGP opposes direct sales by BPA to end users in the Pacific Northwest. Second, the PGP questions whether it is clear to whom BPA can sell in California given their current restructuring proposals.

The Springfield Utility Board (SUB) questions BPA's authority to sell on a retail basis, in or outside of the region, other than to existing Pacific Northwest DSIs. SUB also questions BPA's efforts to compete with its preference customers for retail loads.



Pacific Gas and Electric (PG&E) strongly supports the aspect of BPA's retail sales policy proposal in which BPA proposes to make retail sales consistent with State law that would apply if BPA were not a federal agency. PG&E requests that BPA add a phrase stating that BPA will not only comply with State law but also State "regulations and regulatory orders and policies." PG&E states that the policy statement is not clear and that it would strongly object to the proposal if it meant that BPA did not intend to follow State law in selling to retail federal and preference customers outside the Pacific Northwest. PG&E asserts that such a policy approach would create cost shifting and other inequities that would seriously compromise California's electric market restructuring efforts. Finally, PG&E asks BPA to clarify how it intends to make retail sales within the Pacific Northwest as a matter of equity.



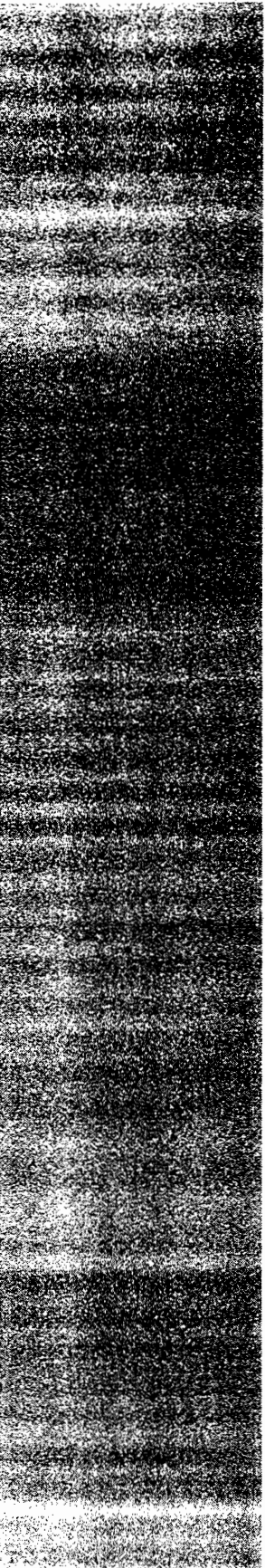
BPA Response

BPA stated explicitly in its public forum presentations that P.L. 104-46 does not provide Bonneville any additional authority to make sales to parties to whom Bonneville would not otherwise be authorized to sell power under existing federal law.

BPA has authority to sell excess federal power to public bodies and cooperatives and to privately owned public utilities, agencies, or to private persons and to federal agencies for the sale at wholesale of electric power either for resale or direct consumption. Section 5(a) of the Bonneville Project Act , , reads, in part, in the first sentence:

the administrator shall negotiate and enter into contracts for the sale at wholesale of electric energy, either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons and for the disposition of electric energy to federal agencies.

16 U.S.C. 832d(a). This provision authorizes BPA to sell federal power to public agencies at wholesale for their direct consumption. In addition, subsection 5(b)(3) of the Northwest Power Act reaffirms BPA's authority to make sales to federal agencies without limitation, other than the requirement that they meet BPA's standards of service under subsection 5(b)(4). 16 U.S.C. § 839c(b)(3) and (b)(4). BPA's interpretation of its authorities has not changed for the past 59 and 16 years, respectively.



As a matter of policy, however, BPA has not made sales to retail or end-use customers when they have been adequately served by a BPA wholesale utility customer. Given the additional marketing flexibility permitted by P.L. 104-46 and the emergence of plans to allow direct access to retail customers in California and other States within the near future, BPA considered it appropriate to solicit comments on potential sales of excess federal power to retail or end-use customers outside the Pacific Northwest.

Although BPA has the authority to sell to retail customers in wholesale quantities for direct consumption under section 5(a) of the Bonneville Project Act, the issue of whether the retail purchaser could obtain transmission and delivery services for that sale is not clear. Anticipated changes in State laws regarding transmission and distribution access and other issues will help to clarify the ability of such retail purchasers to obtain transmission access to otherwise inaccessible power supplies. BPA has recently made a policy statement to the Comprehensive Regional Review regarding BPA sales of federal power to regional retail purchasers. This policy regarding sales of excess federal power outside the Pacific Northwest is not intended to alter or change that policy statement. See, Alternatives for Restructuring the Northwest Electric Utility Industry, July 12, 1996 (Draft Paper Presented to the Comprehensive Regional Review by the Bonneville Power Administration).

Therefore, as a matter of policy, BPA will continue to apply its present policy regarding sales to retail load in the Pacific Northwest and may refrain from making sales to retail customers at this time.

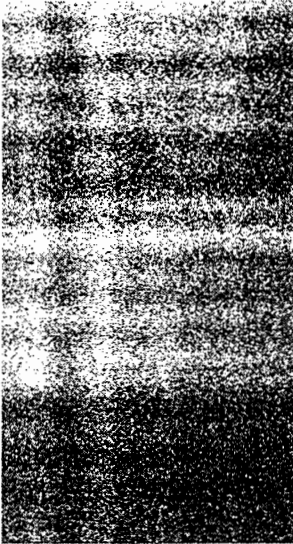
In marketing excess Federal power outside the Pacific Northwest, Bonneville does not intend to use its status as a Federal agency as a basis for seeking to shield retail sales to non-Federal entities from restrictions, terms and conditions of State law concerning access to retail markets. Moreover, Bonneville intends to defer to State policies concerning access to retail markets with respect to any dispositions of excess Federal power to Federal end users unless an exception is made by the Secretary of Energy in a specific circumstance. Consequently, Bonneville adopts the following policy:

- A. Retail Sales to non-Federal Customers: Bonneville will not make direct retail sales of excess Federal power outside the Pacific Northwest to non-Federal customers unless the purchaser obtains any third-party transmission or distribution services needed to effect delivery of such power to the purchaser. ~~As a matter of law, the purchaser's acquisition of such transmission or distribution services would be subject to any terms and conditions of service established under applicable State and Federal law (including rules and orders thereunder).~~
- B. Dispositions to Federal End Users: The policy under subsection (a) will guide dispositions of excess Federal power to Federal end users outside the Pacific Northwest unless the Secretary of Energy determines on a case-by-case basis that the interests of the United States otherwise require.

BPA will, however, enter into future sales of excess federal power which are contingent upon the purchaser obtaining a right to access for transmission and distribution of such power and the purchaser's compliance with applicable State law allowing access by retail customers to transmission and distribution for delivery of power.

APAC's suggests that once a Pacific Northwest State allows access to retail level transmission and distribution services, retail consumers in the Pacific Northwest should have preference and priority to federal power generated in the region prior to such power being sold outside the region. Current law provides a preference right to qualified BPA customers and not to the public generally. This issue is beyond the scope of this policy and is not authorized or addressed by P.L. 104-46. Therefore, the issue is not appropriate for inclusion in this policy.

BPA does not concur with Puget's argument that the only retail customers BPA may sell to in the region are BPA's existing direct service industrial customers because such an argument ignores BPA's power marketing authority discussed above and is overbroad. BPA acknowledges, however, that section 5(d)(2) of the Northwest Power Act limits BPA's ability to sell to new direct service industrial customers in the region. BPA also does not agree that the only law applicable to retail consumer sales is that of the several, federal law governs the sale of federal power by



BPA. BPA does acknowledge that for those entities over which the State or its regulatory bodies have jurisdiction, State law regulates retail sales by entities subject to their jurisdiction. Nothing in this policy is intended to affect that jurisdiction nor to be contrary to or diminish Congress', the federal courts', or the federal executive's jurisdiction over sales of federal power by BPA.

BPA concurs with Puget Power, Washington Water Power, PacifiCorp, and the Public Generating Pool that P.L. 104-46 does not provide any additional authority, beyond the existing federal law, to sell power to retail customers. BPA also agrees that the Regional Review is the appropriate forum to examine BPA's future overall marketing role.



Issue #2

Whether BPA should use a base period other than calendar year ending December 31, 1994.

BPA's 3/96 Proposal

In the Federal Register notice, BPA uses the calendar year ending December 31, 1994 to determine the Administrator's contractual obligations under sections 5(b) and 5(d) of the Northwest Power Act as of January 1, 1995.

Comments

PGP states that BPA looks at the priority firm load that it is obligated to serve by using as a base period a time when PRIORITY FIRM loads were significantly higher than they are currently; i.e. a period ending December 31, 1994 (based in part upon energy requirements submitted by utilities in context of the PNCA for operating years 1993-94/94-95). In a footnote, PGP stated that "the Pacific NW Coordination Agreement reporting requirements are resource based, not load based, and must be interpreted if resource information is to act as a proxy for loads, or to be used to calculate net loads."

BPA Response

Excess federal power is defined, in part, as that power which is made surplus to the Administrator's firm contractual obligations under section 5(f) of the Northwest Power Act due to "any reduction in the quantity of electric power that the Administrator is contractually required to supply under subsections (b) and (d) of section 5 of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839c), due to the election by customers of the Bonneville Power Administration to purchase electric power from other suppliers as compared to the quantity

of electric power that the Administrator was contractually required to supply as of January 1, 1995." 16 U.S.C.A. § 832m(a)(3)(A).

BPA rejects PGP's argument that BPA's use of a calendar year as a base period is erroneous. BPA's use of a calendar year is consistent with Congress' direction. The use of current 1996 load as suggested by PGP would be directly inconsistent with Congress' direction. Congress determined the time frame upon which BPA's loads were to be calculated. BPA's final policy does not change the proposed determination of the Administrator's obligations as of January 1, 1995.

In determining the Administrator's obligations under sections 5(b) and 5(d) of the Northwest Power Act as of January 1, 1995, BPA will use calendar year 1994 annual average amounts. Alternative methods would have been to use the actual loads as of January 1, 1995, or an "operating year" annual average (e.g. August 1994 through July 1995). BPA's contractual obligations to meet requirements loads in the Northwest are on an annual basis.

BPA chose to use the calendar year 1994 annual average power obligations for three reasons. First, the calendar year 1994 average better meets the year long criterion contained in section 508(a)(3)(A) of P.L. 104-46 for establishing the Administrator's obligations "as of January 1, 1995" by viewing those obligations for the preceding calendar year. Second, the use of an annual average based on calendar year takes into account the seasonal variation in the Administrator's 5(b) and 5(d) obligations under the Northwest Power Act in a manner similar to the Operating Year under the contract but without running beyond the January 1 date. Third, the use of an operating year average based on the period August 1994 to July 1995 would yield a number that deviates from the calendar year average by less than one percent. So the particular form of the annual average (calendar vs. operating year) makes no significant difference in the calculation.

The annual average of BPA's section 5(b) and 5(d) obligations under the Northwest Power Act are the sum of the calculations summarized below:

Actual and Planned Computed Requirements Customers:

Obligations for the Actual and Planned Computed Requirements customers are the annual average of the customers' monthly

energy requirements in average megawatts for calendar year 1994 submitted to BPA for the PNCA for operating years 1993-94 and 1994-95. The annual amount of 1933 aMW is based upon actual load amounts submitted to BPA for use in its operational planning, contrary to PGP's inference that resource information was used as a proxy for loads, or to be "used to calculate net loads." Regardless of whether PNCA reporting requirements are resource-based as PGP states, BPA plans its operations to meet the loads of all of its customers including the loads BPA submits for its metered customers and those submitted by each Actual and Planned Computed Requirements customer operating under the PNCA. On a monthly basis in 1994, BPA served the Actual and Planned Computed Requirements amounts, which may have been less than, equal to, or greater than the amounts submitted to BPA. Any differences would be due in part to the customers' election to displace purchases from BPA with other supply sources. In any case, BPA's annual operations reflected its obligation to serve the total energy load requirements presented in these submittals.

Metered Requirements Customers: Obligations for the Metered Requirements customers are the calendar year 1994 annual average firm energy sales in average megawatts to this customer class as reported in BPA's Generation and Power Sales Report. In 1994, BPA was obligated to serve the actual load requirement of these full to nearly-full requirements customers; therefore, actual historical load requirements best reflect the Administrator's 5(b) and 5(d) obligations. The calendar year 1994 annual average amount was 3455 aMW, including sales to federal agencies.

Direct-Service Industrial Customers: Obligations for DSIs are the annual average of the customers' monthly Operating Demands for calendar year 1994 submitted to and approved by BPA for contract years 1993-94 and 1994-95. In 1994 BPA was contractually obligated to serve amounts up to the Operating Demand levels submitted by the DSIs. By definition, in contracts with the DSIs effective in 1994, 100 percent of the total Operating Demand was considered a firm obligation for the purposes of resource operation. The total Operating Demand for calendar year 1994 was 2907 aMW.

Regional Investor-Owned Utilities: Obligations for the investor-owned utilities (IOUs) are the calendar year 1994 annual average sales under the New Resource Firm Power rate in average

megawatts to this customer class as reported in BPA's Generation and Power Sales Report. The calendar year 1994 annual average amount was 3 aMW.

Issue #3

Whether the determination of excess federal power should consider firm non-requirements sales used to meet a utility's general requirements.

BPA's 3/96 Proposal

In the March 29, 1996, Federal Register notice, BPA stated that "each year Bonneville will determine the Administrator's current 5(b) and 5(d) contractual obligations based upon executed contracts. In order to accommodate power deliveries of up to 7 years, Bonneville will produce a 10-year annual energy forecast of its current 5(b) and 5(d) obligations."

Comments

PGP suggests that "any policy to implement the sale of excess federal power must consider BPA's firm contractual obligations to serve in addition to its obligations to serve under 5(b) and (d) of the Northwest Power Act." [Emphasis in original.] PGP states that "BPA has specifically rejected analysis of these firm contractual obligations by its overly strict reading of the relevant legislation." In addition, PGP states that "BPA's analysis ignores the fact that nothing in the legislation mandates that BPA only consider its priority firm obligations" and "by distinguishing between priority firm obligations and firm obligations under surplus power contracts or other federal power services and sales, BPA puts itself in the position of selling the power twice or increasing its long-term obligations--first as a surplus or under other (*sic*) contractual arrangement and, secondly as excess federal power."

The Public Power Council (PPC) submitted comments stating that "BPA defines excess federal power as reductions in requirements service. Simply because a BPA customer reduces its requirements service on BPA does not necessarily mean that the customer is taking any less power from BPA." The PPC further commented that "BPA may create a considerable amount of excess federal power simply by switching some of its current requirements load to nonrequirements load. This seems to fly in the face on (*sic*) Congress' injunction that excess federal power should be created as a result of *the election by customers of BPA to purchase electric power from other suppliers*. Switching from one form of BPA service to another form of BPA service should

not contribute to 'excess federal power' under this definition." [Emphasis in original.]

APAC commented that "BPA defines excess power as the difference between its resources and sales under sections 5(b) and (d). There is no mention of sales already consummated under authorities in section 5(f). Strictly construed, BPA could continue to determine that excess power is available even after selling all its existing excess, since those sales do not count in computing the amount of excess power. APAC presumes this is an oversight in BPA's proposed policy." In footnote APAC suggests that "the list of such resources and sales should include sales committed under section 5(c) under circumstances in which BPA has sold power to an exchanging utility pursuant to the in lieu provisions of the Regional Act and the power-sales contracts."

BPA Response

Congress was explicit in stating that BPA was to measure reductions in its 5(b) and 5(d) firm requirements obligations under section 508(b) and did not direct BPA to consider all sales of federal power. BPA rejects PGP, PPC and APAC's suggestion that any non-requirements sale to a Pacific Northwest public body, cooperative, investor-owned utility or direct-service industrial customer, that is, a sale of power entered into under authority other than sections 5(b) or 5(d) of the Northwest Power Act, should be considered as a "firm requirements contractual obligation" sale.

The issue of whether BPA should include firm contractual obligations which are other than those made under section 5(b) and section 5(d) was addressed by the statute. Congress specifically referred to those firm obligations executed under and governed by sections 5(b) and 5(d) of the Northwest Power Act, or as referred to by BPA, its firm requirements power contracts. Excess federal power is partially composed of power made surplus due to reductions in those contractual obligations resulting from a customers' decision to purchase power from another supplier. While PPC correctly points out that some customers are reducing purchases of firm requirements power and then purchasing surplus firm power from BPA, BPA considers that power to be a separate supply than requirements power and does not agree that Congress intended those sale to be included as part of requirements service from BPA when calculating excess federal power.

The inclusion of sales executed under authority other than section 5(b) and 5(d) of the Northwest Power Act are not sales of firm requirements power. Their inclusion would be contrary to the intent of Congress and introduce into the calculation an amount of BPA sales made on a wholly different basis, i.e., secondary power sold on an "as available" basis. For example, BPA has an obligation under section 6(a)(2) of the Northwest power Act to acquire sufficient resources to meet its section 5(b) and (d) obligations but not obligations under section 5(f). Because BPA's statutory obligations to supply firm requirements power under section 5(b) and 5(d) are different than its obligation to supply surplus power, it would be inconsistent with the intent of the Act to equate such sales with requirements obligations reduced as a result of customer's actions.

Further, those secondary sales are not always used or dedicated by a purchaser to "meet a utility's general requirements" but may be used for economic dispatch of its own generation [for which BPA has no firm obligation to provide electric power under section 5(b) contracts], or may be used for resale on the wholesale market. BPA will not count such sales of surplus federal power in its annual forecast of the Administrator's current 5(b) and 5(d) obligations.

BPA's interpretation of P.L. 104-46 is not overly strict because Congress was trying to address the economic impact on BPA and Treasury of reductions in BPA's revenues caused by reduced obligations under its basic contract service with its Northwest customers under section 5(b) and 5(d) of the Northwest Power Act. The adverse impacts of BPA's regional customers termination or reduction of this basic service on BPA's fiscal and other obligations lead directly to this legislation. Congress did not and has not considered sales of secondary power under 5(f) as the same service as firm service to requirements loads under section 5(b) or 5(d). On the contrary, Congress fully recognized that: (1) sales of surplus power, even to Northwest customers, is of a different character and is a different contractual obligation than firm requirements service; and (2) such service generates lower revenues due to that character of service; and (3) BPA is not required, as it is with sales of firm requirements power, to sell surplus power for service to the general requirements of regional loads.

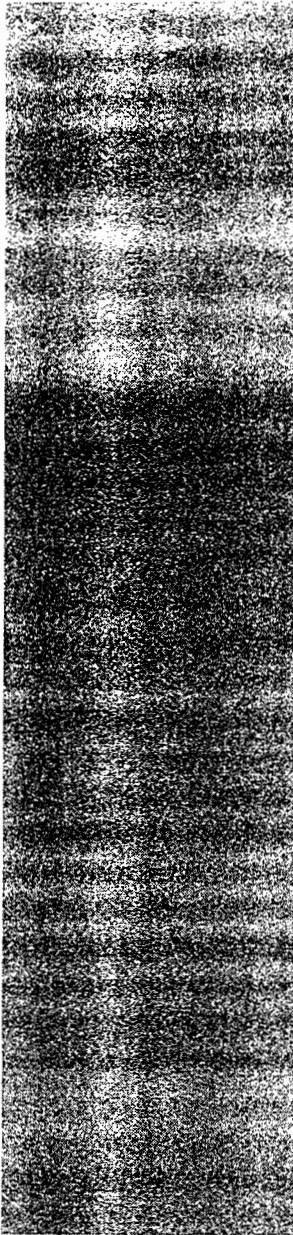
Bonneville's policy is that any non-requirements sales even when made to a Northwest purchaser which result in a reduction in the

Administrator's 5(b) and 5(d) Northwest Power Act obligations will result in an increase in the amount of excess federal power authority. Any reduction in the Administrator's 5(b) and 5(d) Northwest Power Act obligations after January 1, 1995, constitutes excess federal power as defined in Section 508(a)(3) of P.L. 104-46.

It is important to note that BPA's methodology for determining the amount of excess federal power available for sale will not result in BPA "selling power twice." Even though sales of surplus power will reduce BPA's firm obligations under sections 5(b) and 5(d), resulting in an increase in BPA's authority to sell excess federal power, the amount of such power available for sale is limited to the projected amount of surplus power. Before BPA markets excess federal power, it will determine the amount of surplus power actually available for sale. BPA will determine the amount of surplus power it has available based on its most current load/resource planning. All sales of excess federal power will be made consistent with prudent business practices given projected market conditions and the likelihood of surplus availability. This methodology does not preclude BPA from selling firm non-requirements service to public utilities as excess federal power.

Regarding APAC's comment that BPA has defined excess federal power as the difference between its resources and its sales, APAC has misconstrued BPA's interpretation and calculation. BPA has defined excess federal power consistent with P.L. 104-46. This calculation is more complicated than subtracting the total amount of federal system generation (resources) on a planning basis from BPA's currently planned firm power requirements load obligations under its section 5(b) and 5(d) contracts. APAC's proposal and BPA's calculation are two significantly different calculations since APAC's would not account for increased generation due to fish and wildlife, as opposed to increased system efficiency or the like. APAC's proposal does not comply with Congress' intent to make a comparison between BPA's annual regional firm load requirements power obligations as of January 1995 and its current regional firm load requirements power obligations.

APAC also commented that BPA should include its exchange obligations under section 5(c) of the Northwest Power Act where BPA uses its own surplus power "in lieu" of purchasing power from an investor owned utility or a preference utility for its.



residential exchange. APAC suggests that BPA should include any amounts of such "in lieu" purchases as firm obligations in its calculation of reductions in its section 5(b) and 5(d) obligations. First, if Congress had intended BPA to include the obligations as suggested by APAC then it would have expressly provided for the inclusion by referencing section 5(c) in the definition of excess federal power.

Congress did not do so, and for good reasons. Section 5(c) provides for an exchange of power between BPA and a utility even though it is phrased in the terms of a sale and purchase.

This exchange results in no net transfer of kilowatt hours between the utilities but rather is an economic subsidy to the utility based on the difference between the average system cost of the utility's resources for certain loads compared to BPA's cost of service. The result is a net dollar exchange, a check and not power. If the cost of purchasing power is less, the "in lieu" provision permits BPA to use an amount of power from another source as "replacement" for the power "purchased" from utility's resources in the exchange.

In fact, Congress addressed the exchange issue in section 508(e) of the legislation. 16 U.S.C.A. 832m(e). That provision and the accompanying conference report suggest that both the BPA's use of "in lieu" resources will be gradually phased out of the exchange by the year 2001. Id. Given that Congress directly discussed and considered the exchange in the same Act but not in the excess federal power marketing provisions, BPA can find no support for the proposition that Congress indirectly intended obligations under section 5(c) of the Northwest Power Act to be included in BPA's calculation of excess federal power.



Issue #4

Whether BPA should use monthly or annual results of excess federal power due to hydro operations primarily for fish and wildlife.

BPA's 3/96 Proposal

The results of 2 hydrosystem operations studies were compared to develop an annual average amount of excess generation due to fish and wildlife operations of 129 aMW.

Comments

PGP is concerned that BPA may market surplus power as excess federal power on annual basis up to the 129 aMW

identified, while comparison of the 2 studies only shows excess generation in the months of April, July and August. They assert that because BPA averaged the excess generation over a 12 month period to arrive at the 129 aMW amount, BPA will need to purchase to meet 129 aMW of sales during those months when excess generation is not available. PGP recommended that this calculation be done on a monthly basis rather than an annual basis.

PPC, APAC, and SUB also suggested that the marketing of excess federal power resulting from operations of the hydro-system for the benefit of fish and wildlife be limited to only those months or seasons where excess generation actually occurs.

BPA Response

The hydrosystem operation studies indicate that excess generation is expected to occur, on average across 50 streamflow conditions, in the months of April, July, and August. All other months show, again on average, a decrease in generation due to the fish and wildlife operations. This results in the overall annual average generation being lower due to the fish and wildlife operations. However, this general pattern of system impacts was well known prior to the enactment of P.L. 104-46, which in the accompanying conference report specifically refers to "excess power generated . . . for the benefit of fish and wildlife due to hydrosystem operations. House Report, supra, at 94. That fact, coupled with the intent of P.L. 104-46 to increase the marketability of BPA's excess generation, argues for excluding periods from the calculation of excess federal power where generation is expected to be reduced.

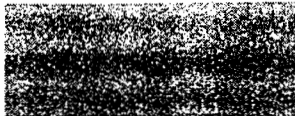
P.L. 104-46 is also intended to provide BPA with the ability to increase the value of excess generation by allowing it to be marketed on a longer term basis without the contractual restrictions otherwise applicable to these types of transactions. Available and commonly used commercial arrangements between utilities; such as access to increased amounts of off system or other storage on an as available basis and seasonal exchanges (e.g. the environmental exchange with Southern California Edison); permit shaping this excess generation into more highly valued products. BPA has the ability to use the excess generation in particular months to create more marketable blocks. Both seasonal exchanges, power for power exchanges, and storage allow generation in one seasonal period to be effectively moved to another.

Finally, the results of the hydro-system operations studies cited by PGP, PPC, APAC, and SUB are the expected values of monthly generation over 50 streamflow conditions. When the individual water year results are examined for each month, excess generation can occur in many months other than just April, July, and August. In fact, under some streamflow conditions, generation is reduced in April, July, and August. The parties' proposal would allow BPA to market over 700 MW-months of energy in both April and July and virtually none in other months rather than the 129 MW-months of energy in all months as BPA has proposed.

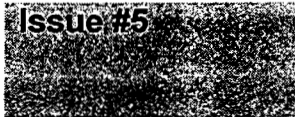
BPA must take a practical approach to marketing this power just as any other utility would. The suggestion that BPA only market as the generation occurs without first trying to make the power more usable is not a practical marketing or operational approach. BPA attempts to balance its system operations to enhance both operations and revenues rather than selling at dump prices. There is no indication that Congress intended for BPA to make "fire sales" of this excess generation rather than use techniques or arrangements generally available to operating utilities to market power.

In either case, the actual excess generation may be greater than or less than the average amount. Given the commercial measures that are often available to shape energy from one month to another, particularly the small amount (129 aMW) relative to the total energy or capacity of the BPA system being discussed here, it is reasonable to compute the excess generation due to fish and wildlife operations on an average annual basis.

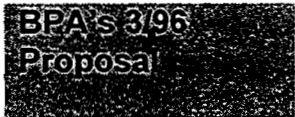
BPA could calculate the amount of excess federal power due to fish and wildlife operations each year to account for the actual annual streamflow conditions. The 129 aMW, however, is a fixed number which will be revisited only if warranted by changes in fish and wildlife management plans or for other reasons. BPA expects fish and wildlife requirements to stabilize as BPA operates under the new fish spending limitation agreement and as operational requirements under the Endangered Species Act have become less volatile. In addition, the estimated amount of excess federal power due to operations for fish and wildlife is relatively small. These facts make BPA's decision to not recalculate the amount of excess federal power due to fish and wildlife each year reasonable and minimizes the administrative



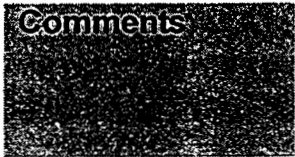
burden of the annual determination process. This general approach will permit the most efficient, simple, straightforward, and administratively least-burdensome implementation.



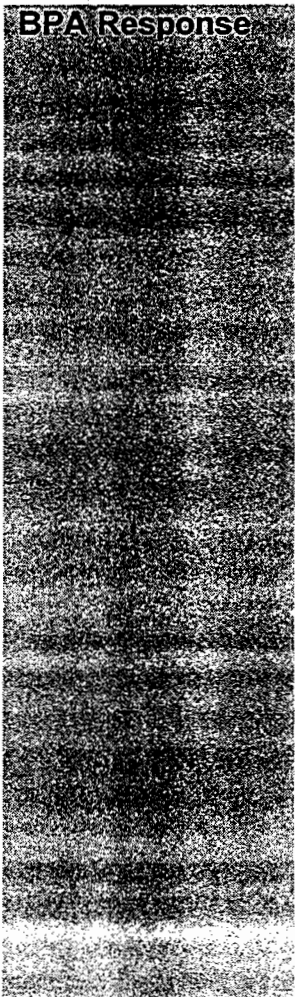
Whether BPA should determine the capability of the system for calculation of excess federal power due to hydro operations primarily for fish and wildlife on a firm or nonfirm basis.



The two hydro system operations studies to determine excess generation from fish and wildlife operations examined changes in total generation, including both firm and nonfirm generation.

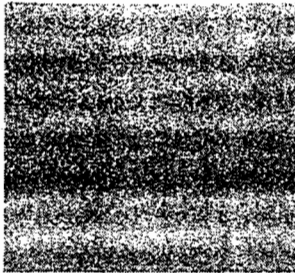


SUB asserted that BPA may market only firm products under P.L. 104-46, particularly on a long-term basis. SUB believes the amount of excess federal power due to fish and wildlife operations would probably be less if computed on a firm basis.



Neither P.L. 104-46 nor the accompanying conference committee report limit the sale of excess federal power to only firm power. Although the larger quantity of electric power may derive from both reductions in firm load obligations and increased firm power generation on the BPA system which may be marketed as firm, part of the excess generation will have a nonfirm component depending upon varying system conditions during an operating year. Therefore it is reasonable to accommodate and anticipate an amount of nonfirm sales as excess federal power. The language of the Act does not change the broad definition of excess federal power as being electric power which may have both a firm and a nonfirm component dependent upon availability of the power. It is reasonable to interpret P.L. 104-46 to include within the definition of excess federal power both firm and nonfirm energy.

BPA has estimated excess firm generation due to fish and wildlife operations using the same methodology as for the estimation of excess total generation by using critical water streamflow instead of the average of 50 streamflow conditions. Contrary to SUB's presumption, the amount of excess firm generation is greater than total excess generation due to the occurrence of spill resulting from differing conditions in the studies. The amount of firm excess generation is 385 aMW. The increase is due largely to the system reaching spill conditions during higher streamflow years for both hydro system operations studies when analyzing



total generation. Thus, the impact of fish and wildlife operations on total generation is reduced relative to firm generation (which is estimated under low streamflow conditions). Because BPA concludes that it is appropriate to market both firm and nonfirm energy as excess federal power. BPA also concludes that it is appropriate to estimate the amount of excess generation due to fish and wildlife operations on a total generation basis.



Issue #6

Whether BPA should average the amount of excess federal power annually and over a multiyear planning period.

BPA's 3/96 Proposal

Averaging the amount of excess federal power was not addressed in BPA's March 29, 1996, Federal Register notice. In the public meetings held in Portland and San Francisco in April 1996, BPA proposed to average the amount of available excess federal power over the term of the transaction to determine if sufficient excess federal power is available for transaction as calculated over the 7-year forecast period.

Comments

APAC submitted comments stating that "the averaging of periods of surplus and deficit over a 10-year horizon to create an overall average surplus allows BPA to purchase power in the future to serve a sale of excess power. This misconstrues the intent of P.L. 104-46."

Montana Power submitted comments stating that given BPA's increasing load growth obligations, averaging excess federal power over a multiyear period will result in less than average amounts of excess federal power in the latter years. "This will ensure that BPA will not have sufficient firm resource to serve its total loads, due to overselling to extra-regional entities" requiring BPA to purchase resources to meet its loads. Montana does not believe this is the intent of Congress. It suggests that BPA should match its excess federal power availability and contract terms to ensure that this does not occur.

PPC also objected to BPA averaging over a multiyear period because it would require BPA to purchase to meet its obligations.

PPC suggest that sales should be tied to the actual pattern of power production.

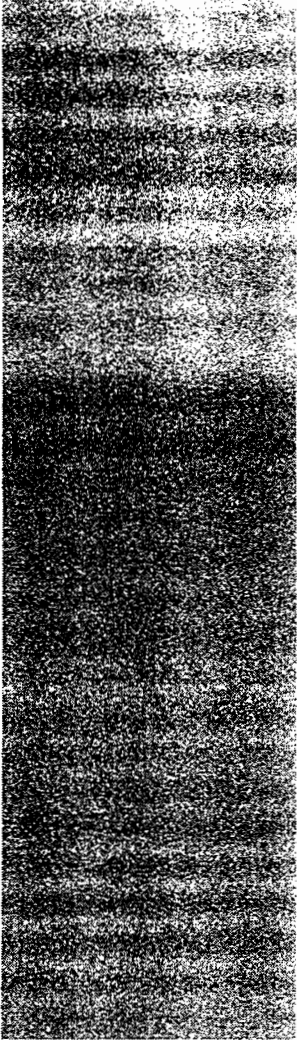
BPA Response

BPA's proposal is to sell power which is excess up to its multiyear planning numbers and to use an average of each year's surplus as a cap for the amount which may be sold over the period of a contract. BPA has already stated that it would sell only up to the amount of section 5(f) surplus it anticipates in its planning and all of it or only part of it may be sold as excess federal power depending upon whether the total amount of surplus power excess or is less than the amount of excess federal power BPA determines it may sell. BPA cannot sell more excess federal power than it has surplus power but may sell more surplus power than it has excess federal power. Excess federal power is a subset of BPA's section 5(f) available surplus power.

Regarding Montana Power's asserting that BPA's load growth obligations will reduce the amount of excess federal power over the out years of a study, BPA believes that it is equally possible that BPA will not face load growth obligations due to the customers reduction of their 5(b) obligations on BPA. Customers as the electric market opens up may be more likely to have such service provided by other suppliers, just as customers have argued that current load should be so supplied. Montana's speculation that the load growth will become an obligation of BPA and would lead to deficits in firm power to meet obligations is not supported by current market trend or customer behavior. BPA does intend to correlate the availability of 5(f) surplus power with the sales it may make of excess federal power.

APAC's comment suggests that by averaging the amount of excess federal power over a multiyear period BPA will have to purchase power to support its sales. This will occur because BPA may have no actual surplus to support excess federal power in some years but will sell in those years based on the multiyear average. APAC's suggestion is incorrect. By averaging its planned amounts of estimated surplus power and by limiting its sales to not more than the average for a period, BPA would not oversell power which it does not anticipate occurring over the period on a reasonable basis. Use of an average number as a sales target is reasonable because the estimate for any year may be higher or lower than actuals and the probability that it may be higher or lower is equally distributed.

It is not BPA's proposal to first enter into contracts and then show that it has sufficient surplus power to sell. Rather BPA has stated that it will provide annual projections of both the amount of



excess federal power which it could sell based on the above calculations and that sales of surplus power will be limited to the available surplus. BPA will enter into and execute contracts when BPA can show that it has surplus power to support the transaction. BPA has stated that it will reduce the amount of available excess federal power in its annual calculation by the amount of then-current excess federal power sales. BPA's projections of available excess federal power and surplus power will change year-to-year. P.L. 46-104 does not expand BPA authority to buy or acquire power on a temporary or long term basis and BPA will use its existing authorities to support its firm obligations.

BPA rejects the APAC, PPC and Montana Power's suggestions to not average over a period. BPA will average the amount of excess federal power forecasted over the term of any proposed long-term contract. Averaging the amount of excess federal power over a multiyear period is a reasonable methodology for the following reasons: (1) it is unlikely that any single year would show a deficit while at the same time years preceding and following that year would show "surpluses"; (2) it is likely that if a "deficit" year were to occur it would occur in the last few years of the forecast which would probably disappear upon the next annual determination and forecast of excess federal power; and (3) historically, BPA has for many years used its expertise in hydro-system operations and in probability analyses in calculating future surpluses or deficits.



Issue #7

Whether P.L. 104-46 requires BPA to provide notice to Pacific Northwest customers of each proposed long-term out-of-region sale.

BPA's 3/96 Proposal

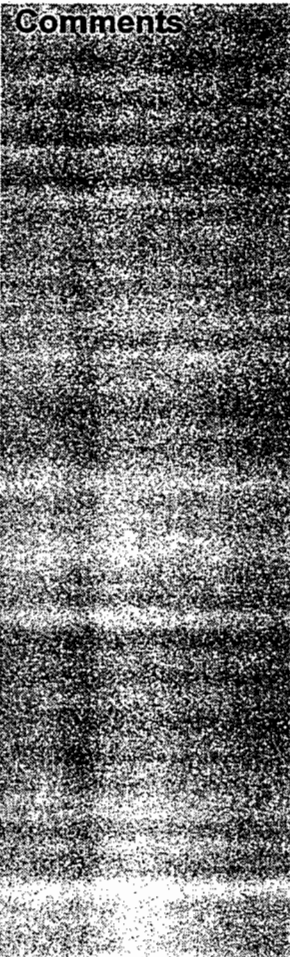
In its proposal BPA would annually notify then-existing regional customers of any available excess federal power. The annual notice would specify a range of rates and terms and conditions at which BPA expected to negotiate sales of excess federal power on the market. Pacific Northwest customers would be allowed a 30-days to request a purchase of excess federal power. BPA and the interested regional customer would then enter into negotiations for the purchase of that amount of excess-federal power under the terms stated in the annual notice.



If during the year, a proposed sales of excess federal power to an out-of-region customer for a term of 1 or more years included terms inconsistent with those specified in the annual notice, BPA would notify regional customers of the new terms of the proposal sale. Regional consumers would have 5 days to contact BPA to enter into negotiations for the purchase of excess federal power under the newly defined terms.

For contracts of less than 1 year, the annual notification would serve as the only notification to regional customers of such proposed sales. BPA would first offer regional customers the right to purchase excess federal power offered for less than 1-year terms. BPA also promised to provide a new notification to customers of up to 5 days if any proposed short-term excess federal power sales deviated from the annual notice.

Contracts for the sale of excess federal power sales could allow for the possibility of renewal of the sale. BPA would not notify regional customers of its intent to renew the sale.



Comments

PacifiCorp comments assert that BPA's proposal does not comply with the Act because it "fails to first offer the excess power to in-region customers at the same essential rate, terms and conditions" as the proposed excess federal power sale. PacifiCorp's position is that BPA's proposal to notice a "broad range of generic prices, terms and conditions plainly does not constitute the same essential rate, terms and conditions." [Emphasis in original.] PacifiCorp argued that BPA must provide notice of all transactions on a "sale-by-sale basis, not an annual basis." PacifiCorp asserts that BPA must notify regional customers of every sale, even hourly sales, even if the notice is for very short periods.

Washington Water Power concurs with PacifiCorp.

Puget Power states that BPA's proposal to offer a price range for excess federal power in an annual notice fails to comply with the "letter and the intent" of the Act. Puget states that the price range "simply is not an offer at a price and thus fails to comply with the offer requirements of" the Act.

PGP stated that the proposed policy provides Pacific Northwest customers limited notice of BPA's intent to sell, particularly of actual terms and conditions. PGP stated that generic annual notices and specific minimum 5-day notices are not reasonable.

PGP does not agree that BPA should not provide notices even when excess federal power contracts provide for extension or renewal. PGP proposed that BPA provide: (a) a general quarterly notice of forecasted prices and availability of excess federal power; (b) an annual notice 60 days before any 'reporting requirements' under Pacific Northwest customers' preference power contracts with BPA; and (c) at least 30 days' notice on every excess federal power deal over 90 days in duration.

SUB asserts that "Bonneville's declaration of EFP [excess federal power] availability must identify specific products and cannot be an umbrella declaration to bypass the notification requirement to Preference Customers." SUB also asserts that an annual notice on short-term sales is not adequate and that contracts that have the ability to be extended beyond one year should not be considered as short-term sales.

Montana Power Company supports PacifiCorp's comments on notice provisions.

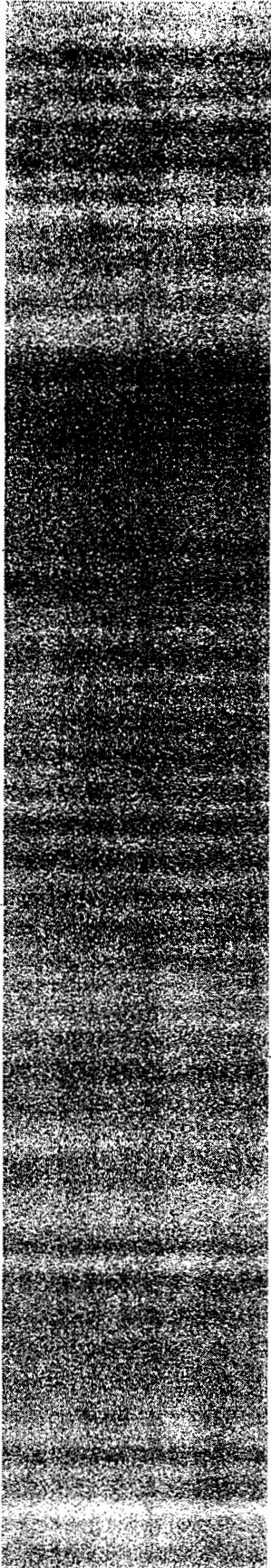
PPC states that BPA should not make excess federal power sales for terms that exceed 7-years duration. In addition, PPC stated that the annual generic notice is not sufficient, and that it would not be unduly burdensome for BPA to "offer power in the Northwest along the lines mandated by H.R. 1905 before offering it to extraregional utilities."

BPA Response

BPA may make excess federal power sales outside the Pacific Northwest if the excess federal power "is first offered for a reasonable period of time and under the same essential rate, terms and conditions" to current Pacific Northwest customers. BPA is provided with increased flexibility in notifying regional customers of proposed out-of-region sales.

In the accompanying conference report, Congress states that "this flexibility may include shorter notice periods and less detailed information on in-program negotiations. Notice periods may be very short for short-term sales (for example, notice to accommodate hourly sales) and for transactions that must be negotiated quickly. BPA may also provide seasonal notice with price ranges requesting interested parties to contact Bonneville to purchase power."

H.R. 1905, Conf. Rep. House Report No. 293, 104th Congress, 1st Session 94 (1995).



BPA is required by law to provide a first right of refusal or a first opportunity to purchase power which is surplus to its requirements' customers' needs to Pacific Northwest regional customers of BPA prior to selling the power outside the Pacific Northwest. 16 U.S.C. § 837a. BPA has implemented this right of first refusal of its regional customers by providing notice of the availability of power and the basic terms and conditions for such sales. BPA then negotiates a sale of power with those customers requesting purchases consistent with public and then regional preference. If regional customers do not request a purchase of surplus power then BPA will negotiate a sale of power with out-of-region customers requesting a purchase consistent with public preference. In all cases, customers must first request a purchase of available power under the terms and conditions specified in the annual notification before BPA can proceed to negotiate and offer a sale of federal power. This has been BPA's marketing practice for surplus power for many years.

P.L. 104-46 does not require a change in this practice. In fact by permitting BPA to sell or otherwise dispose of excess federal power to out-of-region customers if the power is first offered to regional customers for a reasonable period of time, the Act anticipates the continuation of this practice. The accompanying conference report to P.L. 104-46 states that BPA is afforded "greater flexibility to provide *Pacific Northwest preference notice to regional customers* for out of region sales." House Report No. 293, supra, at 94. Contrary to PacifiCorp and others comments, Congress did not direct BPA to use a different approach to implementing the first right of refusal but the same one as it has in the past.

Additionally, contrary to PacifiCorp, Montana Power, Puget, and Washington Water Power's assertion that notice and then offer does not comply with the intent of Congress, Congress recognized that notice to customers was the initial step required to be taken and that a request from a customer to purchase an amount of power the necessary next step in reaching an "offer" for a sale. The approach suggested by the above investor-owned utilities of making an offer and holding it "open" for acceptance does not further the Act's purpose of providing BPA greater marketing flexibility to increase its revenues and its competitiveness. Such an action would not allow BPA the flexibility to market the power abandoned by BPA's customers to receive the highest price allowed by the market.

First, regional customers have the ability to purchase federal power as firm load requirements power. If they decline to purchase it as requirements power, they have another opportunity to purchase the power when BPA releases its annual notification of available excess and surplus power. However, BPA will not offer the power to the regional customers unless they request a purchase consistent with the terms contained in the annual notice. Upon a request, BPA will proceed on a timely basis to negotiate a sale for the purchase of the power requested. Absent any requests from regional customers, BPA intends to proceed to sell this abandoned power out of the region to recoup a portion of BPA's revenues lost due to customers not purchasing the power as requirements service.

Customers have argued that the market for electric power is rapidly changing and that their suggested notice procedure is not only efficient but necessary in the increasingly competitive market. BPA rejects their contentions. Under BPA's notice provisions, regional customers will have ample opportunity to purchase any abandoned excess federal power based on the annual notices, individual contract notices and shorter term notices. BPA will not adopt a rigid marketing approach of an immutable "offer" held open for a considerable period of time in which regional customers may at their leisure decide to purchase or not purchase. BPA's notice procedure is fully consistent with the requirement that BPA first offer excess federal power for a reasonable period of time to regional customers.

Because excess federal power is power that was abandoned or displaced by requirements customers, any notice of available excess federal power provides regional customers with a second chance to purchase this federal power. This second chance, coupled with the fundamental purpose of P.L. 104-46, which was to provide BPA enhanced ability to dispose of surplus federal power and recoup revenues lost, supports the implementation of notice provisions with a competing request to purchase and is less stringent and not more stringent as that approach suggested by the customers.

Regarding SUB's suggestion that BPA must provide specific product information in its notifications, and that the notice cannot be "umbrella declarations to bypass the notification requirement," BPA will provide information on the amount of excess federal power available for sale and the essential terms

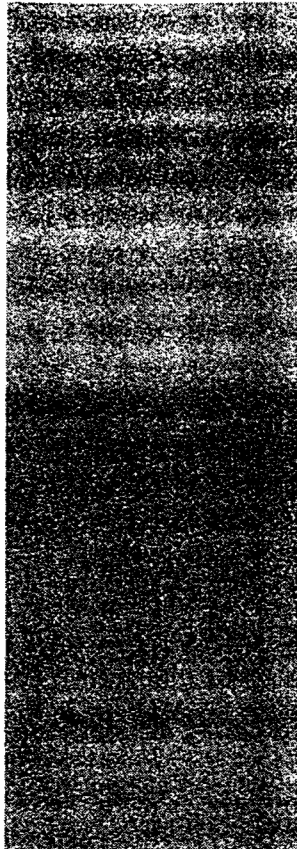
and conditions for sale such as a range of pricing. Therefore, the notifications will provide sufficient information for the customer to request a purchase and for good faith negotiation for a sale of power. SUB will have sufficient information to determine whether to repurchase the power it has abandoned but BPA will retain the right to negotiate individual prices for its sales in order to recoup as much lost revenues as the market permits.

Regarding PGP's comment that a notice is needed 60 days before any reporting obligation under their existing power sales contract, at this point, BPA cannot determine the timing of annual notices. The reporting obligation is a 48 month firm resource and assured capability of resources planning obligation. If a regional public utility intends to include purchases of excess federal power as Firm Resources to serve its load, it will need to execute a contract for the sale of excess federal power. BPA intends to issue its first notice of availability of excess soon after the publication of the final policy in the Federal Register. This should provide a utility sufficient time before the next reporting date of February, 1997, to permit it to execute a contract.

Regarding PGP and SUB's comments on renewals and extensions of contracts, any contract may be renewed upon the mutual agreement of both parties even if the contract does not specifically provide for such an action. BPA considers a contract with a term of less than one year or less as a short term transaction. BPA will provide notice for those contracts which it intends to renew in advance of the effective date of such renewals. This will permit regional customers an opportunity to request a purchase of excess federal power on the same terms and conditions as the proposed renewal.

Regarding PacifiCorps comments on hourly sales of excess federal power, BPA intends to provide notice for such hourly or nonfirm sales in the same manner it presently notifies its regional customers of such sales.

BPA believes its notice procedures in its proposal are fully consistent with P.L. 104-46. Due to the number of comments on the procedures for sales of one or more years, however, BPA will modify its proposal to provide specific notice, in addition to the annual notice, of such sales. This notice will contain the essential rate, terms and conditions of the proposed out-of-region sale as determined by BPA. Due to the intensely competitive nature of the market, regional customers will have 5 days to



request a purchase of the power under the same rate, terms and conditions in the notice. This notice will be for up to 30 days' and not less than 5 days' duration, depending on the nature of the negotiations. This additional notice of individual transactions provides a reasonable amount of time for a regional customer to request a purchase. Upon receipt of a request to purchase, BPA will proceed to negotiate a sale to the Pacific Northwest customer consistent with the terms in the notice and make an offer. In the case of competing requests, BPA will proceed to negotiate a sale based on public preference and the time of receipt of the request from a regional customers.

BPA will not modify its proposed annual notice approach with regard to transactions of less than one year. These transactions typically would occur through BPA's trading floor and may be culminated in a matter of minutes. It is important to recognize the expeditious nature of these transactions as BPA takes actions to rapidly meet non-power constraints such as flood control and fisheries operational requirements.

Finally, BPA will notify regional customers of any renewal of existing contracts for terms of one or more years.



Issue #8

Whether BPA should determine excess federal power based on BPA's projection of loads and resources and whether seasonality should be considered.

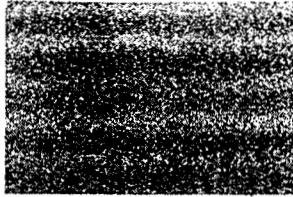
BPA's 3/96 Proposal

Issue not addressed in original proposal.

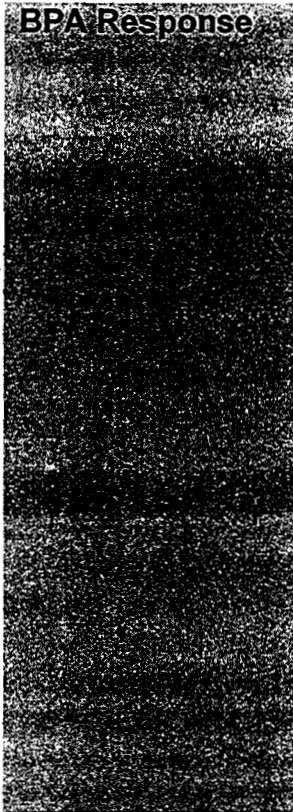
Comments

PPC submitted comments stating that "[a]lthough there is considerable seasonality in the pattern of BPA's load resource balance (for example, BPA is massively surplus in the spring and deficit in the winter), BPA proposes to ignore the seasonality of its surplus and defines as excess federal power an average amount of power year round, even if power would have to be purchased during most of the year to firm the excess federal power."

APAC submitted comments stating that "BPA also must recognize the seasonality of power in determining excess power. It cannot average excesses in the spring months with deficits in the fall and winter months to create an annual amount of excess



power. A 4800 aMW surplus in May cannot be used to declare a 400 aMW excess in every month of the year (unless storage rights permits [sic] that power to be so shaped). BPA's rights to sell power should be limited to the amounts available in the months when it is available."



BPA Response

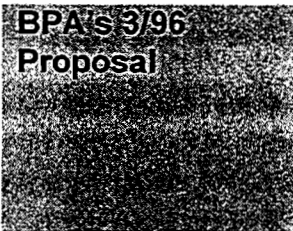
BPA can find no intention in the Act that it not utilize its market, contracting or operational flexibilities to maximize the value of the electric power abandoned by its requirements customers. These are the same capabilities available to other Northwest operating utility which is interconnected with other regional and international utilities. APAC uses a very limited view of system operations and contracting flexibilities and BPA declines to adopt such a limited approach to the marketing of this abandoned power.

Indeed were BPA to do so it would not be fulfilling the intent of the Act to recover revenues lost due to abandonment of firm power by requirements customers, nor other purposes in other Acts. No utility would only sell power "in those months in which it were available" without using all of its contracting, system, and other flexibility's. Such an approach is equal to saying a utility should sell electric power on a nonfirm basis on the hour only. (See Issue #3 on whether BPA should determine excess federal power based on BPA's projection of loads and resources, and Issue #4 regarding BPA's ability to spread excess generation from one period to another.)



Issue #9

Whether BPA should sell or otherwise dispose of excess federal power for terms longer than 7 years.



BPA's 3/96 Proposal

BPA's Federal Register notice stated that in instances where contracts for sales of excess federal power contained renewal notices extending the term (length) of the sale, BPA would not provide notice to Pacific Northwest customers of such contract extensions if the terms and conditions remain unchanged from the original contract.



Comments

See Issue #7: Notice Provisions.

BPA Response

Section 508(b) of P.L. 104-46 provides the Administrator with the authority to sell excess federal power outside the region for a period of up to 7 years. 16 U.S.C. § 832m(b)(1). The Act is silent on whether BPA may renew contracts which are expiring. By offering the option of renewing a contract, BPA may be able to obtain greater value from the market. Any such renewal would be conditioned on BPA making a determination that sufficient excess federal power and surplus power is anticipated to be available for the term of the renewal. In all sales of excess federal power, whether inside or outside the region, BPA will limit the actual delivery of electric power to 7 years. Such sales may be renewed if the power is available and after regional customers are provided an opportunity to purchase the power. BPA revised its position on this issue to state that BPA will provide notice to Pacific Northwest customers of term extensions of contracts involving the sale of excess federal power. (See Issue #7: Notice Provisions.)

Issue #10

Whether transmission services should be sold with excess federal power.

BPA's 3/96 Proposal

BPA has not made any specific proposal on the "bundling" or "unbundling" of transmission services as part of this policy. In BPA's rate case and in response to FERC's Open-Access rulemaking, it has positioned its self to separate transmission services from power services. Excess federal power would be a power service offered by BPA to customer and not a transmission service. BPA has not determined whether to offer transmission services or let the purchaser make arrangements for such services. That decision will not be made in this policy.

Comments

PacifiCorp submitted comments stating that BPA must offer excess federal power to in-region consumers separately from transmission services in order to comply with FERC Rule 888.

BPA Response

BPA has made no proposal regarding the offering of transmission services whether bundled or unbundled with other products in this policy. Decisions on the extent to which BPA is required to do so will be made in other forums and will not be decided here. BPA may or may not offer to provide transmission services as part of a sale of excess federal power under this policy.

Issue #11

The relationship between excess federal power and surplus power.

BPA's 3/96 Proposal

BPA's proposal did not address this specific issue.

Comments

PPC expressed concern that the amount of excess federal power, as determined under the proposed policy, could be much greater than the amount of federal surplus and that BPA would operate like a power broker by purchasing power to make sales of excess federal power. PGP and Montana Power are also concerned with the potential risks of BPA purchasing power to support sales of excess federal power. APAC presumes that the potential for excess federal power to be available, under the policy, when all surplus has been sold is an oversight by BPA. PGP is concerned about the implementation policy dramatically increasing BPA's participation in spot, short-term, and possibly long-term markets.

BPA Response

BPA has previously addressed this issue in responses to issue no. 6 and incorporates that response. In addition, it is important to note that the commenters appear to believe that section 508(a)(3) of P.L. 104-46 gives BPA the authority to market more power than it otherwise could have without this new law. That is not the case. That section of P.L. 104-46 merely removes certain marketing restrictions established by other statutes for an amount of surplus power that is determined through a methodology delineated in the law. P.L. 104-46 does not give BPA additional authority to purchase power, acquire generating resources, or otherwise create additional amounts of surplus power beyond that which existed prior to the enactment of P.L. 104-46.

Section 508(a)(3) of P.L. 104-46 specifically defines excess federal power as

"such electric power that has become surplus to the firm contractual obligations of the Administrator under section 5(f) of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839c(f)) due to either-

- (A) any reduction in the quantity of electric power that the Administrator is contractually required to supply under subsections (b)

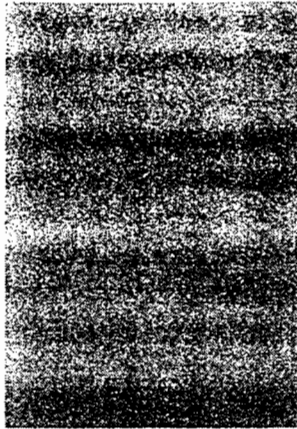
and (d) of section 5 of the Pacific Northwest Electric Power Planning and Conservation Act (16 U.S.C. 839c(f)), due to the election by customers of the Bonneville Power Administration to purchase electric power from other suppliers, as compared to the quantity of electric power that the Administrator was contractually required to supply as of January 1, 1995; or

- (B) those operations of the FCRPS that are primarily for the benefit of fish and wildlife affected by the development, operation, or management of the System.”

16 U.S.C. § 832m(a)(3). This language defines excess federal power as a subset of federal surplus under section 5(f) of the Northwest Power Act, and the amount determined by the two criteria listed. BPA has taken the plain meaning of the language and developed an implementation methodology that is consistent with that language.

Under the policy, an amount of excess federal power is determined according to the methodology in P.L. 104-46. This methodology defines the amount of excess federal power in terms of BPA load reductions (due to existing customers reducing their requirements contract loads on BPA) and excess generation (due to fish and wildlife operations). The methodology is not the industry standard methodology for determining surplus power available from a power system, nor was it intended to be. P.L. 104-46 provides a methodology for determining what amount of available surplus power under section 5(f) of the Northwest Power Act that may be sold without some of the otherwise applicable statutory marketing restrictions; i.e. recall provisions, certain regional notice timelines, and resale restrictions. Because the determination of the amount of excess federal power is methodologically independent from the determination of the amount of section 5(f) surplus power that BPA may have at any time, the amount of excess federal power may be greater than or less than the amount of section 5(f) surplus power.

However, since the excess federal power methodology defines an amount of section 5(f) surplus power that may be sold without the otherwise applicable statutory marketing restrictions, P.L.



104-46 does not provide BPA any new or expanded authority to market more than the available section 5(f) surplus power. If the excess federal power amount exceeds the amount of available section 5(f) surplus power, BPA may market the full amount of section 5(f) surplus without the otherwise applicable statutory marketing restrictions. If the excess federal power amount is less than the available 5(f) surplus power, BPA still may market up to the full amount of available surplus power, but any amount marketed above the excess federal power amount must still be in compliance with the otherwise applicable statutory marketing restrictions.



Issue #12

Whether the policy should address BPA's contractual obligation under the 1981 contracts.

BPA's 3/96 Proposal

BPA made no proposal regarding its contract obligations under the 1981 contracts in this policy.

Comments

Both PGP and SUB suggest that the policy is inconsistent with contractual obligations under the 1981 public agency contracts.

BPA Response

This final policy on excess federal power is limited to those statutory interpretations and implementation decisions necessary to carry out the provisions of P.L. 104-46. BPA is unaware of any part of this policy which would be inconsistent with its obligations under its 1981 power sales contract. BPA has stated as part of this policy that it will make a determination of both the amount of excess federal power available and the amount of 5(f) surplus that it may sell both on a short term and long term basis. BPA will most likely use its long term planning studies in order to make such determinations and those studies are the ones typically used for purposes of meeting any obligation BPA may have under the 1981 contract referred to by PGP and SUB. It is possible that the specific studies used for such purposes may change in the future but BPA intends to comply with its 1981 contract obligations. How BPA may do so or what studies it may use to do so is not within the scope of this policy.



Issue #13

Whether BPA should limit the resale of excess federal power by purchasers to out-of-region customers.

BPA's 3/96 Proposal

BPA's proposed policy did not include any proposal to limit the resale of excess federal power by any customer.

Comments

SUB submitted comments suggesting that BPA should prohibit the resale of excess federal power to Pacific Northwest customers thereby limiting the purchasers remarketing rights to out-of-region customers

BPA Response

BPA, at this time, sees no need to create such a limitation. In addition, such a limitation may impair BPA's ability to resell power which has been abandoned by current BPA requirements customers. SUB and other customers have the opportunity to purchase this federal power ahead of any other purchaser who may be reselling the power within the region.

First, they may do so under their 1981 or a new firm requirements power sales contract. If they choose not to, then that power becomes part of BPA's surplus power under section 5(f) of the Northwest Power Act and is included in the calculation of BPA's excess federal power under this Act. Based on the above notice provisions and by making a request to purchase the power, regional customers may repurchase the same power as excess federal power. If they choose not to make such a request leading to a BPA offer to sell, they may make a request based upon the notice BPA will give for any long term contract with an out of region purchaser. Thus, regional customers have three opportunities to purchase the power they abandoned. Those opportunities are ample protection to any Northwest party to buy back what electric power did not take as firm load requirements service. BPA will not place any limitation on the resale of excess federal power in the region under this policy because it is unnecessary and there is no basis to apply such a limit on any use of the power by any customer in region or out of region at this time.

Issue #14

Whether extraregional customers must purchase excess federal power on a take or pay basis.

**BPA's 3/96
Proposal**

BPA's proposal did not include any requirement that a customer purchase excess federal power on a take or pay basis.

Comments

SUB submitted comments suggesting that an offer of excess federal power should be take-or-pay.

BPA Response

BPA may decide on a contract by contract basis to sell amounts of excess federal power on a take or pay basis or not to do so. Whether the terms of any particular contract specify that the sale is take or pay will depend upon the terms of the bargain as a whole, and the benefits and risks thereof.

Issue #15

Whether a percentage of excess federal power should be reserved for purchase by regional customers.

**BPA's 3/96
Proposal**

BPA's proposal did not contain any reservation of excess federal power for any customer or group of customers.

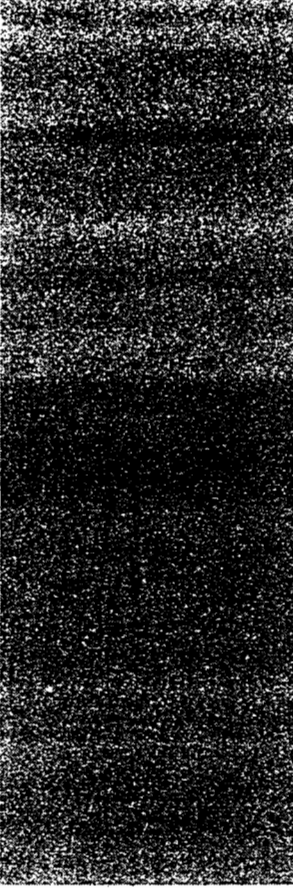
Comments

SUB suggests that BPA should reserve 50 percent of available short-term excess federal power for purchase by Pacific Northwest customers

BPA Response

As discussed above, SUB proposal that BPA reserve an amount of excess federal power for sale only in the Pacific Northwest neither makes economic sense nor is it consistent with the purposes of this Act or BPA's other statutes. Why should BPA reserve such power from sale to willing buyers after it has notified and afforded its Pacific Northwest customers a first opportunity to purchase the power? Presumably BPA would have to decline to sell fully half of the electric power its Northwest customers had already abandoned, in the potentially vain hope that some day the same parties may repurchase it. Congress did not intend such a "banking" of excess federal power and to incorporate a reservation like the one SUB proposed would be more restrictive than BPA's current ability to sell surplus federal power under P.L. 88-552.

BPA declines SUB's invitation to undercut Congress' direction that it sell excess federal power with greater flexibility in notice and after first making such power available for Northwest customer to purchase. Although the Bonneville Project Act required BPA to reserve an amount of power for preference customers in order to encourage their formation, the conditions



prevailing in the market at that time have substantially changed and Congress did not require such a reservation in this Act. Section 508(a) and (b) of P.L. 104-46 do not require BPA to reserve any percentage of excess federal power available for sale or purchase by regional customers.

Instead, Congress gave BPA discretion to make such sales under this authority for the express purpose of providing BPA with increased revenues and a better competitive position to ensure repayment of the U.S. Treasury. Placing a restriction on the amount of excess federal power for sale on the market would be inconsistent with Congressional intent. In addition, such a restriction is unnecessary. P.L. 104-46 requires BPA to first offer excess federal power to regional customers prior to marketing the power outside the region. In order to comply with this requirement BPA will notify regional customers of a pending out-of-region sale. After receipt of a request to purchase available excess federal power under the same essential rate, terms and conditions of the pending out-of-region sale and the completion of good faith negotiations to enter into such a purchase, BPA will offer the power first to interested regional customers. In light of this first right to purchase the power, a reservation for regional customers is unnecessary.

ENVIRONMENTAL COMPLIANCE

The policy on excess federal power is consistent with the Business Plan Final Environmental Impact Statement (EIS) (DOE/EIS-0183) and the subsequent Business Plan Record of Decision (BP ROD), signed August 15, 1995. As documented in the BP ROD, BPA decided to respond to the rapidly changing electric utility market by becoming market-driven. BPA is a more active participant in the West Coast electric power, transmission, and energy services markets and uses its success in these markets to ensure the financial strength to provide public benefits. Being market-driven includes taking a strategic approach to and expanding extraregional marketing. This expansion adds marketing flexibility and enhances BPA's competitiveness.

CONCLUSION

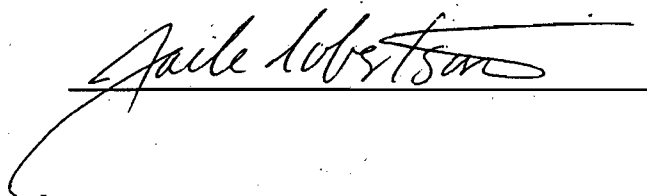
Congress enacted P.L. 104-46 in order to provide BPA with the marketing flexibility necessary to increase its revenues and its competitive position while at the same time preserving to a lesser degree the preference and priority of regional customers to purchase available federal power. Congress decided that if regional customers decided to reduce their firm requirements purchases or if fish and wildlife mitigation measures resulted in excess power, BPA should have the flexibility to market that "abandoned" or excess power to obtain the highest price allowed by the market. Current marketing restrictions inhibited BPA's ability to do so.

The final excess federal power policy attached to this ROD takes into account the comments submitted by regional and out-of-region utilities, interest groups and federal agencies. BPA believes that the final policy prescribes a methodology for calculating the amount of excess federal power BPA is authorized to market and the amount of excess federal power BPA has available for marketing in a manner that presents minimal risk for regional customers. In addition, the notice procedures contained in the policy provide regional customers with a first right to purchase any available excess federal power for a reasonable period prior to the sale of such power outside the region and under the same essential, rate, terms and conditions as a proposed out-of-region sale. The final policy is also consistent with the purposes of BPA's existing statutory authority including P.L. 104-46. Implementation of the final policy will aid BPA in obtaining the highest market price for the power regional customers do not purchase, thereby increasing its revenues. For these reasons, BPA adopts the Excess Federal Power Policy.

PUBLIC AVAILABILITY

This Record of Decision will be distributed to all interested and affected persons and agencies. Copies can be obtained through BPA's Public Involvement Office, P.O. Box 12999, Portland, Oregon 97212, or by using BPA's nationwide toll-free document request line, 1-800-622-4520.

Issued in Portland, Oregon on September 18, 1996.



Paule Robertson

6450-01-P

DEPARTMENT OF ENERGY
Bonneville Power Administration
Policy on Excess Federal Power

AGENCY: Bonneville Power Administration (Bonneville), Department of Energy (DOE).

ACTION: Notice.

SUMMARY: On March 29, 1996, BPA initiated a public process to develop a policy to implement the excess federal power marketing provisions of the Energy and Water Development Act of 1996, Pub. L. No. 104-46, § 508(a) and (b), 109 Stat. 402, (1995) (codified at 16 U.S.C. § 832m) (hereinafter "P.L. 104-46"). BPA published a proposed policy in the Federal Register for public review and received comment during a 60-day public comment period. BPA has considered all comments received and has finalized its policy to implement this new power marketing authority. The policy is published below.

A Record of Decision (ROD) regarding this policy has been prepared and explains the public process; the distinction between BPA's surplus power marketing under prior legislation and excess federal power marketing activities under P.L. 104-46; provides an overview and delineates BPA's final policy on excess federal power; responds to public comment; explains this action's compliance with the National Environmental Policy Act; and adopts a final policy on excess federal power.

The publication of this policy and execution of the ROD is a final action of the BPA Administrator under section 9(e) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. § 839(e).

ADDRESS: Copies of the ROD may be obtained by calling BPA's toll-free document request line: 1-800-622-4520.

FOR FURTHER INFORMATION, CONTACT: David J. Armstrong - MPF, Bonneville Power Administration, P.O. Box 3621, Portland, Oregon, 97208-3621, phone number (503) 230-3658, fax number (503) 230-7568.

POLICY ON EXCESS FEDERAL POWER:

I. DEFINITIONS

- A. Firm Contractual Obligations: are those Bonneville sales or other dispositions of power entered into under and governed by sections 5(b) and 5(d) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), 16 U.S.C. 839c(b) and 839c(d). Such sales include the firm requirements power sales in the Pacific Northwest region to Bonneville's actual and planned computed requirements customers, metered requirements customers, direct-service industrial customers and investor-owned utility customers.
- B. Delayed-Delivery Contracts: are contracts by Bonneville for the sale or disposition of power which provide for actual delivery of power to begin at some time after the effective date of the contract.
- C. Surplus Power: shall have the same meaning as electric power which is surplus under section 5(f) of the Northwest Power Act. 16 U.S.C. 839c(f).

II. DETERMINATION OF EXCESS FEDERAL POWER

- A. Reductions in Contractual Obligations under Sections 5(b) and 5(d) of the Northwest Power Act:
 - 1. As of January 1, 1995, BPA's Firm Contractual Obligations equaled 8298 average megawatts (aMW). This number will be the baseline for comparing reductions in such obligations to determine annual amounts of excess federal power. This is a fixed number that will not change.
 - 2. To determine the energy component of excess federal power, each year Bonneville will prepare a current forecast, in average megawatts, of Firm Contractual Obligations based upon its then-current contracts. In order to

allow for sales or dispositions of excess federal power under Delayed-Delivery Contracts with delivery terms of up to 7 years, Bonneville will produce a 10-year annual average energy (average megawatts) forecast of its then-current Firm Contractual Obligations. For each year of the forecast period, the excess federal power in firm energy from reductions in Firm Contractual Obligations will equal the difference between the forecasted Firm Contractual Obligations and 8298 aMW.

3. Bonneville will calculate an amount of excess peaking capacity (megawatts) associated with reductions and increases in its then-current Firm Contractual Obligations by calculating an average annual load factor based on all of its forecasted Firm Contractual Obligations. This load factor will be applied to the result of the calculation in section (2) above to determine an amount of excess capacity.

- B. Operations of the Federal Columbia River Power System Primarily for the Benefit of Fish and Wildlife: The amount of excess federal power resulting from operations of the Federal Columbia River Power System primarily for the benefit of fish and wildlife is 129 average megawatts annually. The amount of excess peaking capacity associated with these operations is 129 megawatts. This is a fixed number that will not change unless there is a need to modify the number as determined by Bonneville.
- C. Net Excess Federal Power: The sum of the results of the calculation in (2) above (the Reductions in Bonneville's sections 5(b) and 5(d) contractual obligations) and, unless modified, 129 aMW will be reduced by the amount of then-current sales or other dispositions of excess federal power to determine the net amount available for marketing in each year of the forecast period. Bonneville will determine this amount annually.
- D. Process: The results of the preceding determinations will be included in an annual notification to Bonneville's then-existing regional customers, and at Bonneville's discretion, non-regional customers, of Bonneville's intent to market excess federal

power. Bonneville may also include in this annual notification the amount of Surplus Power available for disposition.

III. SALES OF EXCESS FEDERAL POWER IN ANY REGION

- A. Bonneville will, at its discretion, sell or otherwise dispose of excess Federal power in any region consistent with its authority to market federal power under its authorizing legislation, including section 508 of the 1996 Energy and Water Development Appropriations Act (P.L. 104-46). The actual amount of power sold or otherwise disposed of as excess federal power will not exceed and may be less than the amount of Surplus Power projected to be available based upon Bonneville's then-current load/resource planning and the amount of excess federal power Bonneville determines to be available consistent with section II above.
- B. Sales or other dispositions of excess federal power shall not be subject to the second sentence of section 5(a) of the Bonneville Project Act. 16 U.S.C 832d(a).
- C. Bonneville will annually notify then-existing regional customers, and at its discretion, non-regional customers, of the amount of excess federal power resulting from the determinations in section II above. This notification will also contain the range of rates, terms and conditions within which Bonneville will market available power and may contain the amount of Surplus Power determined by Bonneville to be available for marketing. This notice will be an invitation to contract for the sale or other disposition of power consistent with the range of terms and conditions contained in the notice. Regional customers will have 30 days from the date of this notification to contact Bonneville with a request to purchase power consistent with the notice in order to have preference and priority to purchase the power. Upon such a request, Bonneville will enter into good faith negotiations for the sale or other disposition of power with the regional customer consistent with the general rate, terms and conditions contained in the notice. Upon conclusion of the negotiations, Bonneville will offer the power to the regional customer. If Bonneville receives competing requests to purchase excess federal power, Bonneville will proceed to negotiate sales consistent with public

preference and then preference under section 508 of P.L. 104-46. Within each class of customer, Bonneville will negotiate and offer to sell, based upon the time of receipt of the request.

- D. On a case by case basis, Bonneville will average the net amount of available excess federal power in each year of a proposed sale or other disposition to determine whether the amount of excess federal power is sufficient for a multi-year transaction.
- E. All contracts for the sale or other disposition of excess federal power will be binding in accordance with their terms for the duration of the contract and will be firm obligations of the Administrator.

IV. SALES OR OTHER DISPOSITIONS OF EXCESS FEDERAL POWER TO PURCHASERS OUTSIDE THE PACIFIC NORTHWEST REGION

- A. Bonneville will, at its discretion, sell or otherwise dispose of excess federal power, to purchasers outside the region for delivery terms of up to 7 years as permitted by section 508(b) of P.L. 104-46. Such transactions may be renewed subject to the availability of excess federal power. Prior to executing a renewal of one or more years, Bonneville will notify regional customers of the proposed renewal, consistent with the notice procedures for long-term transactions in subsection IV(C) below.
- B. Sales or other dispositions of excess federal power to purchasers outside the region will not be subject to section 2, subsections (a), (b), and (c) of section 3, and section 7 of the Act of August 31, 1964, 16 U.S.C. 837a, 837b(a), (b) and (c), and 837f (the Northwest Preference Act), and section 9(c) of the Northwest Power Act, 16 U.S.C. 839f(c).
- C. Long-term Sales or Other Dispositions of Excess Federal Power To Purchasers Outside the Pacific Northwest: For proposed sales or other dispositions of excess federal power to purchasers outside the region for a period of one or more years, Bonneville will notify then-existing regional customers of the proposed

transactions. This notice will contain information on the essential rate, terms and conditions of the proposed out-of-region transaction as determined by Bonneville. Regional customers interested in purchasing the power under the rate, terms and conditions contained in the notice will have up to 30 days and no less than five days, as determined by Bonneville, to request a purchase. Upon a request to purchase, Bonneville will offer the power to the regional customer under the identical rate, terms and conditions in the notice, except those terms and conditions that clearly do not apply to the particular purchaser (such as points of delivery). This offer will remain open for five days.

D. Short-term Sales or Other Dispositions of Excess Federal Power To Purchasers Outside the Pacific Northwest:

1. Primary Notice: For proposed sales or other dispositions of excess federal power to purchasers outside the region for a period less of than one year, the annual notification in section III(C) above will be the primary notification.
2. Additional Notice: As determined by Bonneville and as warranted in Bonneville's opinion by system or market conditions, Bonneville will issue additional notices of available excess federal power which will contain the same type of information as in the annual notice. Regional customers interested in purchasing this power will have 5 days or less, depending upon the effective delivery date and the duration of the short-term sale or other disposition, within which to contact Bonneville. may provide such notices in its daily prescheduling conferences with customers.

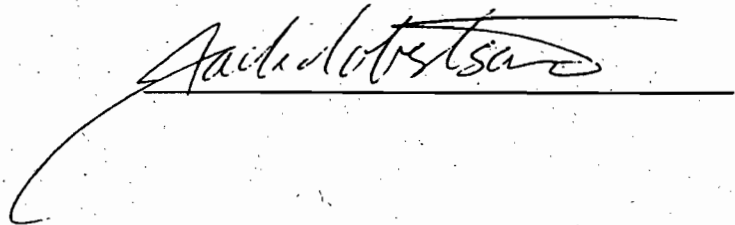
POLICY ON SALES OF EXCESS FEDERAL POWER OUTSIDE THE PACIFIC

NORTHWEST REGION TO RETAIL CUSTOMERS: In marketing excess Federal power outside the Pacific Northwest, Bonneville does not intend to use its status as a Federal agency as a basis for seeking to shield retail sales to non-Federal entities from restrictions, terms and

conditions of State law concerning access to retail markets. Moreover, Bonneville intends to defer to State policies concerning access to retail markets with respect to any dispositions of excess Federal power to Federal end users unless an exception is made by the Secretary of Energy in a specific circumstance. Consequently, Bonneville adopts the following policy:

- A. Retail Sales to non-Federal Customers: Bonneville will not make direct retail sales of excess Federal power outside the Pacific Northwest to non-Federal customers unless the purchaser obtains any third-party transmission or distribution services needed to effect delivery of such power to the purchaser. As a matter of law, the purchaser's acquisition of such transmission or distribution services would be subject to any terms and conditions of service established under applicable State and Federal law (including rules and orders thereunder).
- B. Dispositions to Federal End Users: The policy under subsection (a) will guide dispositions of excess Federal power to Federal end users outside the Pacific Northwest unless the Secretary of Energy determines on a case-by-case basis that the interests of the United States otherwise require.

Issued in Portland, OR on September 18, 1996.



A handwritten signature in black ink, appearing to read "Jack Dotson", is written over a horizontal line. The signature is cursive and extends slightly above and below the line.

Attachment B

5 (b) & (d) Obligations as of January 1, 1995

By Customer Class

| Customer Class | CY94 Annual aMW | Source |
|---------------------------------|-----------------------|---|
| Small and Nongenerating Publics | 3334 | BPA generation and sales report |
| Federal Agencies | 121 | BPA generation and sales report Submittals to BPA for OY93-94 & OY94 |
| Generating Public Agencies | 1933 | 95 PNCA Operating demand submitted to BPA |
| Direct Service Industries | 2907 | for OY93-94 and OY 94-95 |
| Investor-Owned Utilities | 3 | BPA generation and sales report |
| Total | 8298 | |

1/ Excludes CSPE

2/ Excludes USBR

3/ Energy deliveries under the New Resource Firm Power rate