

**United States of America
Department of Energy
Bonneville Power Administration**

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

Introduction

The purpose of this notice is to inform the public of an opportunity to review and comment on BPA's proposed interpretation of section 4(c)(10)(B) of the Pacific Northwest Electric Power Planning and Conservation Act ("Northwest Power Act"). BPA is making this notice in order to clarify the calculation of the statutory cap on funding for the Northwest Power and Conservation Council ("Council"). Although BPA is not required to solicit public comments regarding this proposed interpretation, BPA is providing this opportunity given regional interest in this matter so that BPA can review the comments of all interested persons in developing a final interpretation of section 4(c)(10)(B). Comments on the proposed interpretation may be submitted in the manner described at the end of this notice.

I. Background

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

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

In BPA's WP-07 rate proceeding, some parties have claimed that BPA's proposed funding of the Council exceeds the 0.10 mill limitation contained in section 4(c)(10)(B). *See* 16 U.S.C. § 839b(c)(10)(B). Because of procedural restrictions, BPA was unable to substantively respond to these concerns in the rate proceeding. Instead, BPA staff presented material at the March 6 and March 8, 2006, Power Function Review public workshops to explain the methodology BPA used to calculate the funding limit for the Council. The presentation material stated that BPA's calculation of the statutory cap included an estimated amount of firm power sales associated with the Residential Exchange Program ("REP") over the rate period. BPA's firm power forecast establishes a statutory cap of approximately \$9.5 million, \$9.6 million, and \$9.66 million for the FY2007-2009 period, which is above the estimated spending levels for the Council in BPA's initial WP-07 rate proposal.

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

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

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

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

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

The critical statutory language for BPA's interpretation is "the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by *the kilowatthours of firm power forecast to be sold by the Administrator during the year to be funded.*" 16 U.S.C. § 839b(c)(10)(B) (emphasis added). The Administrator therefore must determine the amount of firm power forecast to be sold. In determining this amount, the Administrator has always used a firm power forecast developed by BPA staff. This forecast includes all firm power sales recognized under the Northwest Power Act, including firm power sales associated with the REP purchase-and-sale agreements. *Id.* § 839c(c)(1).

Beginning in 2000 and again in 2004, BPA began resolving disputes involving the REP through settlements with previously exchanging investor-owned utilities. *See Residential Exchange Program Settlement Agreements With Pacific Northwest Investor-Owned Utilities – Record of Decision*, October 4, 2000. For FY 2007–2011, BPA has resolved REP disputes with its

investor-owned utility customers through REP Settlement Agreements, which provide monetary payments without attendant firm power purchase-and-sale agreements. *See Proposed Contracts or Amendments to Existing Contracts With the Regional Investor-Owned Utility Regarding the Payment of Residential and Small-Farm Consumer Benefits Under the Residential Exchange Program Settlement Agreements FY 2007-2011 – Record of Decision, May 25, 2004.*

The issue that has arisen is how BPA should calculate its forecast of firm power sales for purposes of establishing the Council's spending ceiling in light of the REP settlements. BPA proposes to interpret the words "kilowatthours of firm power forecast" in section 4(c)(10)(B) of the Northwest Power Act as including BPA's forecast of REP firm power sales when BPA has settled disputes regarding implementation of the REP through REP Settlement Agreements. The Northwest Power Act describes the REP as a purchase and sale of firm power. *See* 16 U.S.C. § 839c(c)(1). Therefore, the language of the Act presumes that the Council's budget would be based on BPA's total "firm power forecast," which would necessarily always include the REP load. 16 U.S.C. § 839b(c)(10)(B). Consistent with this intent, it has been BPA's practice to treat settlement of the REP as a firm power sale when calculating the Council's spending ceiling even when the actual implementation of the settlements includes a combination of both power deliveries and monetary benefits that are the equivalent of a purchase-and-sale arrangement. BPA believes it would frustrate the statutory scheme envisioned by Congress if forecast REP firm power sales were eliminated from the ceiling calculation simply because parties have entered into settlement agreements that established monetary payments without the purchase-and-sale arrangements to settle REP disputes instead of implementing and litigating such disputes in the context of a power exchange.

III. How to comment

Comments on BPA's proposed interpretation must be received by 5:00 p.m., Pacific Standard Time, on June 29, 2006. Comments can be submitted on-line at: <http://www.bpa.gov/comment>; via e-mail to comment@bpa.gov; via mail to: Bonneville Power Administration, Public Affairs Office - DKC-7, P.O. Box 14428, Portland, OR, 97293-4428; or faxed to 503-230-3285. You can also call us with your comment, toll free at 1-800-622-4519. Please reference "Section 4(c)(10)(B) Interpretation" with your comments.

Following the close of comment, BPA will issue a final interpretation on section 4(c)(10)(B).

If you have any questions, please contact Kurt Casad at 503-230-4024. You can also call us toll free at 1-800-622-4519.

Sincerely,

/s/ Steven G. Hickok

Steven G. Hickok
Deputy Administrator