



Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

PUBLIC AFFAIRS

November 4, 2008

In reply refer to: DK-7

Mr. Dan Seligman
Attorney at Law
Columbia Research Corp.
P.O. Box 99249
Seattle, WA 98139

RE: FOIA #08-036

Dear Mr. Seligman:

This letter is a final response to your request for information that you made to the Bonneville Power Administration (BPA), under the Freedom of Information Act (FOIA), 5 U.S.C. 552.

In your initial letter you asked for the following:

A copy of all offers and/or proposals submitted to BPA by Alcoa or Columbia Falls Aluminum Corp. (CFAC) since January 1, 2007, that address future BPA service to the Direct Service Industries (including power sales and/or cash payments).

Response: BPA has provided a copy of the release determination letter dated October 28, 2008, that went to Alcoa and CFAC along with Documents 10 and 11 provided in their entirety. Documents 1 thru 4, 12 thru 14, 19 thru 26, 31 and 32 have some information redacted as either non-responsive and/or withheld under Exemption 4 of the FOIA. In addition, Documents 5 thru 9, 15 thru 18 and 27 thru 29 have been redacted in their entirety under Exemption 4 of the FOIA. Document 30 has some information withheld under Exemption 6 of the FOIA.

If you are dissatisfied with this determination, you may make an appeal within thirty (30) days of receipt of this letter to the Director of Office of Hearings and Appeals, Department of Energy, 1000 Independence Avenue SW, Washington, DC 20585. Both the envelope and the letter must be clearly marked "Freedom of Information Act Appeal." There is no charge for your request.

I appreciate the opportunity to assist you with this matter. If you have any questions about this letter, please contact Laura M. Atterbury, FOIA/Privacy Act Specialist, at 503-230-7305.

Sincerely,

/s/ Christina J. Brannon

Christina J. Brannon
Freedom of Information Act/Privacy Act Officer

Enclosure: 1. Letter to Alcoa and CFAC dated October 28, 2008 without Exhibits
 2. Responsive Documents



Department of Energy

Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208-3621

PUBLIC AFFAIRS

October 28, 2008

In reply refer to: DK-7

Mr. Michael C. Dotten
Attorney-Mediator-Arbitrator
13643 Melrose Place
Lake Oswego, OR 97035

Mr. Zach Mayer
Glencore Ltd.
3 Stamford Plaza
301 Tresser Blvd.
Stamford, CT 06901

RE: FOIA Request #08-036

Gentlemen:

This letter is in response to Alcoa, Inc.'s and Columbia Falls Aluminum Corporation's (CFAC) objections to the release of information that is responsive to this FOIA request.

A. FOIA Request

BPA received a March 31, 2008, FOIA request from Dan Seligman (Columbia Research Corporation) requesting a copy of:

“all offers and/or proposals submitted to BPA by Alcoa or Columbia Falls Aluminum Corp. since January 1, 2007 that address future BPA service to the Direct Service Industries (including power sales and/or cash payments.”
[Exhibit 1]

After locating several responsive documents, and pursuant to Executive Order 12,600, Bonneville Power Administration (BPA) sent a notification letter on May 23, 2008, to Alcoa and CFAC stating that the responsive documents would be released unless Alcoa and CFAC explained why they should not be disclosed under Exemption 4 of the FOIA. By a subsequent letter dated August 14, 2008, BPA asked both Alcoa and CFAC for additional information and clarification concerning their original objections to the release of the documents. [Exhibits 2-4]

CFAC responded by a letter dated August 29, 2008, and Alcoa did so by a letter dated August 25, 2008 (received September 2, 2008). [Exhibits 6-7]¹

This determination letter focuses on the issue of whether Alcoa and CFAC voluntarily submitted the responsive information to BPA under Exemption 4.² Since the nature of the information and the circumstances under which it was provided to BPA are identical, the analysis covers Alcoa and CFAC together.

B. BPA's Findings

The FOIA's statutory policy favors the disclosure of information. Alcoa and CFAC have the burden of persuasion to show that the responsive documents are exempt from disclosure.³

Information may be exempt from disclosure under Exemption 4 if it is "commercial" in nature, is "obtained [by BPA] from a person [Alcoa/CFAC]," and is "privileged or confidential." Here, there is no question that the responsive information is commercial in nature and that BPA obtained it from Alcoa and CFAC.

Consequently, BPA must determine whether the information is confidential. To do so, the initial question is whether the information was submitted to BPA voluntarily or involuntarily.⁴ If voluntarily submitted, the information is withheld under Exemption 4 without further analysis if it is not customarily made available to the public. Information submitted involuntarily, on the other hand, is confidential only if its release would likely cause the submitter substantial competitive harm.⁵

1. Voluntary v. Involuntary—legal standard

In deciding whether Alcoa and CFAC provided the commercial information voluntarily, BPA must consider the full circumstances surrounding the submissions. This inquiry focuses on whether BPA has the authority to require the submissions, and if so, whether it in fact exercised that authority. Unlike many other federal agencies, BPA has no regulatory authority (except in rate making). However, commercial information still will be considered to have been required,

¹ Before forwarding the responsive documents to Alcoa and CFAC for comment, BPA redacted the parts of the documents that were outside the scope of the FOIA request. Alcoa's and CFAC's subsequent objections covered most of the unredacted parts of the documents. Therefore, for ease of reference, "responsive documents" here means those parts of the documents for which BPA received an objection from either Alcoa or CFAC. Those parts of the responsive documents for which BPA received no objection will be released.

² See Exhibit 7, Alcoa 9/02/08 letter at pg. 8. Exhibit 6, CFAC's 8/29/08 letter, concentrated on the likely commercial harm it would suffer if the information were to be released.

³ Occident al Petroleum Corp. v. SEC, 873 F2d 325, 342 (DC Cir 1989).

⁴ Critical Mass Energy Project v NRC, 975 F2d 871, 879 (DC Cir 1992).

⁵ See National Parks & Conservation Ass'n v. Morton, 498 F2d 765, 770 (DC Cir 1974). Because BPA finds that the Critical Mass test applies here, the competitive harm and government impairment tests under National Parks are not relevant.

and therefore involuntarily provided, if BPA made the submission of the information a condition of participating in an administrative process or of doing business with it.⁶

Generally, in federal government procurement (contract solicitations such as invitations for bids and requests for proposals), most information submitted to the government falls into the “required” category of information under Exemption 4 because the government requires that the information be provided. For example, a Request For Proposal mandating contractors to submit cost breakdowns is required information, and therefore submitted involuntarily.⁷ It does not matter that the underlying activity (e.g., seeking a government contract or grant) is one in which participation is voluntary. Instead, the key question is whether those who choose to participate, like Alcoa or CFAC, have information submission requirements as a condition of participation. If so, any information submitted is done so involuntarily for Exemption 4 purposes.

2. Information provided by Alcoa and CFAC to BPA

The circumstances surrounding Alcoa’s and CFAC’s submission of the responsive information to BPA is considerably different than what normally occurs in federal procurement. To understand why, some background is necessary.

Both Alcoa and CFAC are aluminum companies that are referred to as Direct Service Industries (DSI) because BPA sells power to them directly (most industries receive power from their utility company, which may in turn buy power from BPA). BPA may offer a power sales contract to a DSI because of BPA’s desire to retain aluminum smelter jobs that contribute to the local and regional economy. In this context, the BPA Administrator’s decision to offer a power sales contract (or not) is not influenced by the volume or quality of information provided by the DSI. Commercial information that is given to BPA by a DSI is based on what the DSI thinks is necessary to support its request for a power sales contract. BPA does not require a DSI to provide it with any particular information (or any information at all) before offering it a power sales contract. Thus, although BPA could require a DSI to supply it with certain information, it does not.⁸

Further, contract negotiations with a DSI are also different because BPA is not buying based on a specified price, quality, or specification. Instead, BPA is selling power to a DSI that BPA has the right, but not the obligation, to sell power to.⁹ BPA does so in an effort to balance its

⁶ National Parks, *supra*, 498 F.2d at 770.

⁷ See e.g. Canadian Commercial Corp. v. Dept. of Air Force, No. 04-1189 (DDC 8/3/06) (in procurement contracts, price is usually required in a solicitation and therefore involuntarily submitted); Research Focus, ___ DOE ___ (TFA-0247 3/26/2008) at pg. 2 (contractor was required to submit an agreement in contract negotiations thereby making it “involuntary”); BP Exploration, Inc., 27 DOE 80,216 (1999) (Exxon was required to submit a proposed rental fee in negotiating a lease agreement, making it involuntarily); William D. Logan, Jr., 27 DOE 80,198 (1999) (payment equations for pipeline rental were involuntarily submitted because they were necessary to complete the lease).

⁸ For example, BPA’s procurement regulations (which do not apply to power sales contracts) require certain information from a contractor when it submits a proposal in response to a RFP. See generally Bonneville Purchasing Instructions (BPI).

⁹ Policy for Power Supply Role for Fiscal Years 2007-2011, February 2005, p. 40.

“primary consideration” – “the importance to local economies of the jobs [DSIs] provide” – with the recognition that “there are rate impacts on other utilities and therefore jobs in other industries associated with continuing to provide service benefits to the DSIs.”¹⁰

This general description of the BPA-DSI negotiation framework happened here. In 2006, BPA set out three possibilities for dealing with a DSI in the 2012-2028 timeframe: no service, a power sales contract, or other financial benefits.¹¹ In addition to receiving comments from interested parties, BPA had discussions with Alcoa and CFAC. In those discussions, Alcoa and CFAC provided commercial information to assist BPA in making a decision. BPA never required any specific information be provided by Alcoa and CFAC as a condition of those discussions, or as a condition of a power sales contract. Thus, for purposes of Exemption 4, BPA obtained the information voluntarily.

The case law supports this conclusion. One example that parallels this situation is Parker v. Bureau of Land Management.¹² In Parker, the BLM received documents from two pipeline companies in response to proposed pipeline projects. Of importance to the analysis here, the BLM right-of-way application regulations did not require this information. Instead, the documents and information were submitted to assist the BLM in considering and processing the proposals. Since the agency did not require this specific information, the court concluded that the documents that were submitted were done so voluntarily (and therefore that Critical Mass test applied).¹³

As noted above, in federal contracting, information submitted to the government is more likely to have been required, and therefore submitted involuntarily. But the government must still have required the information. If not, the information is still voluntarily provided despite the contracting context. Such was the case in Mallinckrodt Inc. v. West.¹⁴ Although pricing information was required of all potential contractors, information relating to rebates and incentives was not required in response to the solicitation. Thus, although the submitted rebate and incentive information may have made “the bid more appealing or valuable to the government,” that was not enough to make it required and involuntarily provided under Exemption 4.¹⁵

¹⁰ Id. at 40.

¹¹ Long-Term Regional Dialogue Policy Record of Decision, 7/13/06 at 55.

¹² 141 F Supp 2d 71 (DDC 2001).

¹³ Id., 141 F Supp 2d at 77-78.

¹⁴ 140 F Supp 2d 1 (DDC 2000).

¹⁵ Id., 140 F Supp 2d at 6. See also Judicial Watch v. Department of the Army, 466 F Supp 2d 112, 125-126 (DDC 2006) (information provided by a contractor after it had been awarded the contract, relating to the administration of the contract, was voluntarily submitted); Scripps Institute, 27 DOE 80, 160 (1998) (correspondence from a contractor to DOE regarding Scripps’ performance was voluntarily provided because there was no contractual requirement for them to be produced).

The BPA-DSI process is unique, and is clearly different than what occurs in “normal” federal contracting. In any event, as the above description of the process and supporting case law should make clear, Alcoa and CFAC voluntarily provided the commercial information to BPA.

4. Is the voluntarily submitted information customarily released to the public?

Since Alcoa and CFAC voluntarily provided the information, it will be “confidential” and protected from disclosure if it is “of a kind that would customarily not be released to the public by the person from whom it was obtained.”¹⁶ It is the actual customary treatment of the information by the submitters that is important, not industry custom. A submitter may have made some disclosures of the information, but as long as they were not public, the information is protected.¹⁷

Alcoa and CFAC have shown that the information has not been disclosed to the public—in fact, it is generally not released even within their industry.

For the reasons given above, it is BPA’s determination that Alcoa and CFAC voluntarily provided to BPA the commercial information in the responsive documents. That information has not been released to the public. Therefore, Alcoa’s and CFAC’s objections to disclosure are well-taken. There is no need for further analysis under the National Parks competitive harm test.

Pursuant to Executive Order 12,600 and 10 CFR 1004, BPA only will release those portions of the responsive documents to which neither Alcoa nor CFAC made an Exemption 4 objection. (A copy of the separate responsive documents that show the redactions, and the parts that will be released, are included with this letter.) The release will occur after 10 business days from receipt of this letter.

Sincerely,


Christina J. Brannon
FOIA/Privacy Act Officer

Enclosures

¹⁶ Critical Mass, *supra* 975 F.2d at 879.

¹⁷ Critical Mass, *supra* 975 F.2d at 879-880.

DOCUMENT 1

Clark, Harry W - PTL-5

From: Fisher, Leigh Ann [LeighAnn.Fisher@alcoa.com]
Sent: Friday, February 08, 2008 10:29 AM
To: Clark, Harry W - PTL-5; Miller, Mark E - PTL-5
Cc: Pereira, Marc A.; Jack Speer; Symonds, Mark C - PTL-5
Subject: RE:
Attachments:

I've prepared a high-level recap on the - would like to review this on the call to make sure I've got it correct; as well as explain in more detail

And again the conf number is

[Non-responsive]

Leigh Ann
US Primary - Energy Development

From: Clark, Harry W - PTL-5 [mailto:hwclark@bpa.gov]
Sent: Friday, February 08, 2008 11:47 AM
To: Fisher, Leigh Ann; Miller, Mark E - PTL-5
Cc: Pereira, Marc A.; Jack Speer; Symonds, Mark C - PTL-5
Subject:

Leigh Ann
You have the correct questions.

] Just let us know if you have any other

Harry Clark - PTL-5
Bonneville Power Administration
905 NE 11th Ave.
Portland, OR 97232
503-230-3662
hwclark@bpa.gov

From: Fisher, Leigh Ann [mailto:LeighAnn.Fisher@alcoa.com]
Sent: Friday, February 08, 2008 7:38 AM
To: Miller, Mark E - PTL-5
Cc: Pereira, Marc A.; Jack Speer; Symonds, Mark C - PTL-5; Clark, Harry W - PTL-5
Subject:

Mark - *[Non - Responsive]*

2/8/2008

DOCUMENT 2

[

EX 4 (per ltr)

]

Leigh Ann
US Primary - Energy Development
ACT 8-324-4725
Mobile 865-919-2203

From: Miller, Mark E - PTL-5 [mailto:memiller@bpa.gov]
Sent: Thursday, February 07, 2008 1:20 PM
To: Fisher, Leigh Ann
Cc: Pereira, Marc A.; Jack Speer; Symonds, Mark C - PTL-5; Clark, Harry W - PTL-5
Subject: BPA's January 17 proposal

Leigh Ann,

As promised, we have attached the document are the changes . Added to the end of the
made to the framework during the meeting, which represented

Also [

EX 4

]

would help

]. We thought this

<<

>>

<<

>>

We would be happy to get on the phone with you at any point to provide : you may need.
In any event, we will need to talk tomorrow in order to compare our EX 4

Mark Miller
503-230-4003

DOCUMENT 3

Clark, Harry W - PTL-5

From: Burns, Allen L - PT-5
Sent: Friday, October 12, 2007 2:57 PM
To: Miller, Mark E - PTL-5; Symonds, Mark C - PTL-5; Clark, Harry W - PTL-5
Subject:
Importance: High
Attachments:

Here it is.

From: Jack Speer [mailto:speerja@verizon.net]
Sent: Friday, October 12, 2007 2:22 PM
To: Burns, Allen L - PT-5
Cc: Marc.Pereira@alcoa.com; Mike F. Rousseau; Teffeteller, Michael D.
Subject:

Allen,

Thanks for the good meeting earlier this week.

As promised, please find our attached calculation of our effective delivered power rate to Intalco under the Alcoa proposal for a Post-2011 monetary benefit, *[non-responsive]*

The summary table for the *[non-responsive]* Alcoa proposal is colored to indicate our best estimate of how Intalco would operate using current operating costs of the plant. This is confidential material, so please do not disclose it to anyone outside BPA and use it for your evaluation of future contracts only.

Also attached is an example of how you might estimate the cost of our proposal taking into consideration the value of the low-streamflow reserve we are offering and the natural volatility of aluminum markets.

I look forward to your response to our proposal.

Regards,

Jack

DOCUMENT 4

Non - Responsive

DOCUMENT 5

Redacted - EX4

DOCUMENT 6

[

Redacted - EX 4

DOCUMENT 7

[

Redacted I- EX 4

DOCUMENT 8

Confidentiality

- This document proposes a compromise designed to settle pending and potential appeals in which BPA has challenged BPA's failure to provide Alcoa with power for its smelters. Furthermore, it contains sensitive business information pertaining to Alcoa's operating costs and the costs to Alcoa of temporary shutdowns of its smelters. It would be detrimental to Alcoa's competitive position for such information to be supplied to its competitors. Therefore, Alcoa submits this information with a request that it be kept confidential pursuant to 16 U.S.C. Section 552(b)(4) as trade secret, confidential and commercial information.

DOCUMENT 12

1

Non - Responsive

3

1

DOCUMENT 13

1

EX 4

Non - Responsive

1

1

4

DOCUMENT 14

1

1

EX 4

Non - Responsive

1

1

5

DOCUMENT 15

1

EX 4

9

1

l

Redacted - EX 4

DOCUMENT 9

[

/redacted - EX 4

DOCUMENT 10

Confidential

**Framework for Long-Term
Aluminum Contracts with BPA**

Alcoa Proposal

October 9, 2007

DOCUMENT 11

DOCUMENT 16

EX 4

7

7

DOCUMENT 17

ET 4

DOCUMENT 18

[

EX 4

DOCUMENT 19

CONFIDENTIAL SETTLEMENT OFFER
A ROADMAP FOR ALCOA/BPA AGREEMENT ON POST-2011 SERVICE

February 12, 2007

Process [

Principles

EX 4

DOCUMENT 20

SHEET 2

]

EX 4

]

DOCUMENT 21

Clark, Harry W - PTL-5

From: Jim Stromberg [stromberg_cfac@worldnet.att.net]
Sent: Wednesday, February 13, 2008 9:17 AM
To: Burns, Allen L - PT-5; Miller, Mark E - PTL-5; Clark, Harry W. - PTL-5; Symonds, Mark C - PTL-5
Cc: Matt Lucke; Zach Mayer
Subject:
Attachments:

Alan -

[yesterday we developed the attached paper on our discussions thus far.
including proposed solutions to outstanding issues and clarifications.]

Jim

=====
Jim Stromberg

DOCUMENT 22

Post-2011 DSI Discussion
 February 13, 2008

CONCESSIONS

1) [

Years 1-5			
	40	60	80
3300	EX 4		
2800		EX 4	EX 4
2300			

Years 6-10			
	40	60	80
3300		EX 4	
2800	EX 4		EX 4
2300			

Years 11-15			
	40	60	80
3300			
2800	EX 4	EX 4	EX 4
2300			

Years 16-17			
	40	60	80
3300			
2800	EX 4	EX 4	EX 4
2300			

2) CFAC makes major concession on payments during shutdown:

[EX 4 CFAC, while not overlooking the importance of this issue, has conceded the point in the interest of securing an overall agreement. [EX 4] there should be no forfeiture of future benefits related to operational performance. [EX 4]

COMPROMISES

In the spirit of reaching an agreement, CFAC believes it is appropriate to meet in the middle on the following outstanding issues:

DOCUMENT 23

A. Program Maximum Payment Cap

Total BPA payments over the life of the contract will be capped at ~~EX 4~~ of the summation of the yearly maximum amounts.

	Program Maximum
CFAC	
Non-responsive EX 4	
Compromise	

Due to the high-cost nature of the smelters, hedging flexibility is a necessity. However, all hedging will fall within the confines of the total program maximum cap.

B. PF Rate True-Up Period

Power cost may not average below the PF rate over any ~~EX 4~~ year period during the contract term.

	PF Rate True-Up Period
CFAC	
Non-responsive EX 4	
Compromise	

C. Contract Default Mechanism

In the event of a ruling by the 9th Circuit Court (or other court of competent jurisdiction) restricting BPA's ability to provide financial benefits to the smelters, BPA shall supply physical power to CFAC for 1 ½ potlines.

	Physical Power
CFAC	
Non-responsive	
Compromise	EX 4

[EX 4]

CLARIFICATIONS

The allocation of benefits shall be based on the current distribution of the 560 MW total, with CFAC receiving 170 MW.

In the event that BPA strikes a deal with Alcoa on more favorable terms, CFAC shall have the right to take the Alcoa deal instead.

DOCUMENT 24

Clark, Harry W - PTL-5

From: Jim Stromberg [stromberg_cfac@worldnet.att.net]
Sent: Monday, February 11, 2008 4:50 PM
To: Burns, Allen L - PT-5; Miller, Mark E - PTL-5; Clark, Harry W - PTL-5
Cc: Matt Lucke; Zach Mayer
Subject:
Attachments:

Mark -

Attached is [*non responsive*] and some solutions to them. It is our intent to work together to address the concerns of both parties. We have [] and proposed a cap on total program payments. [] solutions lead directly to a lower expected value for the entire program - [] The notion of a curtailment payment is excluded and instead we propose adding value during a restart, which would mean the program goal of enhancing smelter operations is being furthered. Also, we believe the several solutions offered work to limit the maximum amount of payments per hedge.

Jim

PS - I did not have Mark's email.

=====
Jim Stromberg

2/12/2008

DOCUMENT 25

BPA Concerns/CFAC Solutions
 February 11, 2008

[Non-responsive]

CFAC Solution: CFAC will give value back in low LME and high power environments over the 1st 5 years of the contract, taking back value in higher LME markets.

1st 5 years:

1) 1st 5 years

	40	60	80	
3300				
2800				
2300	[EX 4]

[Non-responsive]

Years 6-10:

2) next 5 years

	40	60	80	
3300				
2800				
2300	[EX 4]

Years 11-15:

3) next 5 years

	40	60	80	
3300				
2800				
2300	[EX 4]

Last 2 Years:

4) last 2 years

	40	60	80	
3300				
2800				
2300	[EX 4]

[Non-responsive]

CFAC Solution: Willing to cap total program payments to [EX 4] of the sum of the yearly maximums.

DOCUMENT 26

[Non-responsive]

CFAC Solution: Increased payments over following years.

- *EX 4* million per every 12 months of no operation
- *EX 4* million is paid out at *EX 4* per year over the following two years (PF rate golden rule still applies)
- BPA benefits if a smelter is down for two or more years in a row

[Non-responsive]

CFAC Solution:

EX 4

- How we see the future:

EX 4

[Non-responsive]

CFAC Solution:

EX 4

DOCUMENT 27

f

Redacted - EX 4

DOCUMENT 28

Redacted - EX4

DOCUMENT 29

Redacted - EX 4

DOCUMENT 30

Clark, Harry W - PTL-5

From: Jim Stromberg [Ex 6]
Sent: Friday, May 04, 2007 5:38 PM
To: Burns, Allen L - PT-5; Forman, Charles W - PSW-6; Clark, Harry W - PTL-5; Aho, Rodney A - PSS-6
Cc: mathew.lucke@glencore-us.com; Zach Mayer; stromberg_cfac@att.net
Subject: BPA/DSI Post 2001 Agreement framework
Attachments: BPA Framework Agreement.doc

Alan -

Attached is the framework we promised for the FY2012-2027 agreement.

[
Jim

Ex 6

]

DOCUMENT 31

Confidential

FOR DISCUSSION PURPOSES ONLY

Framework Agreement for DSI Service
FY2012 - FY2027

/

EX 4

]

DOCUMENT 32

EX 4

7

Forward Aluminum Price Index (/t)	Annual Monetary Benefit (million)	Forward Aluminum Price Index (/t)	Annual Monetary Benefit (million)
EX 4	EX 4	EX 4	EX 4